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Promotion and protection of all human rights, civil, political, economic,  
social and cultural rights, including the right to development

### **Report of the open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure\***

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\* Late submission.

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## **I. Introduction**

1. The Human Rights Council decided, in its resolution 11/1 of 17 June 2009, to establish an open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention. It also decided that the working group should hold its first session for five working days before the end of 2009.

2. In adopting that resolution, the Council took into consideration, *inter alia*, the almost universal ratification of the Convention on the Rights of the Child, the celebration of the twentieth anniversary of the Convention in 2009 and the fact that procedures allowing for individual communications have been established for other core international human rights treaties.

3. Pursuant to this resolution, it was decided that the working group would meet from 14 to 18 December 2009. However, in view of the fact that the United Nations Secretariat was not in a position to provide interpretation services into the six official languages on 14 and 15 December, the working group could meet only from 16 to 18 December 2009.

4. The session was opened by Jane Connors, Director of the Special Procedures Division and officer-in-charge of the Office of the High Commissioner for Human Rights on 16 December 2009. Ms. Connors welcomed the interest of the Human Rights Council in the question of a communications procedure under the Convention on the Rights of the Child and its decision to set up the working group. She recalled that, since the adoption of the Convention in 1989, the treaty body system had evolved significantly, particularly in terms of drafting new instruments and adapting the working methods of the treaty bodies to the numerous challenges they currently faced. Important landmarks in that respect were, among others, the adoption of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 1999 and to the International Covenant on Economic, Social and Cultural Rights in 2008, both establishing communications procedures. The Convention on the Rights of Persons with Disabilities and its Optional Protocol, which also provide for a communications procedure, had entered into force as well in 2008. Further, she noted that only two more ratifications were needed for the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance which also includes a procedure for individual communications. Accordingly, in the current situation, all core international human rights treaties, except the Convention on the Rights of the Child, provide individuals with a mechanism by which they can file complaints before the respective treaty monitoring body. Ms. Connors encouraged delegates to carefully reflect upon the results of recent negotiations of similar communications procedure instruments and to keep in mind the need to ensure consistency and coherence within the existing body of international human rights law.

## **II. Organization of the session**

### **A. Election of the Chairperson-Rapporteur**

5. At its first meeting, on 16 December 2009, the working group elected Drahoslav Štefánek (Slovakia) as its Chairperson-Rapporteur, by acclamation. Mr. Štefánek was nominated by the core group of States (Chile, Egypt, Finland, France, Kenya, Maldives, Slovakia, Slovenia, Thailand and Uruguay) supporting the initiative for a new optional protocol on a communications procedure under the Convention on the Rights of the Child. The representative of Uruguay, speaking on behalf of the core group, indicated that the

nomination was based on the agreement reached by the core group and contained in the note verbale of 16 November 2009, addressed by the Permanent Representative of Chile to the President of the Human Rights Council, circulated to all States through their regional coordinators and presented to the representatives of more than 60 States at an information meeting on the working group held on 18 November 2009.

## **B. Attendance**

6. Representatives of the following States members of the Human Rights Council attended the working group's meetings: Argentina, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Burkina Faso, Chile, China, Djibouti, Egypt, France, Ghana, Hungary, India, Indonesia, Italy, Japan, Mauritius, Mexico, Netherlands, Nigeria, Norway, Pakistan, Philippines, Qatar, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, Slovakia, Slovenia, South Africa, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The following non-member States of the Human Rights Council also participated in the working group's meetings: Algeria, Armenia, Azerbaijan, Australia, Austria, Belarus, Bulgaria, Canada, Colombia, Costa Rica, Democratic Republic of the Congo, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Guatemala, Haiti, Iceland, Israel, Iran (Islamic Republic of), Kazakhstan, Kuwait, Lao People's Democratic Republic, Libyan Arab Jamahiriya, Lithuania, Malaysia, Maldives, Morocco, New Zealand, Oman, Panama, Paraguay, Peru, Poland, Portugal, Republic of Moldova, Romania, Serbia, Singapore, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, Uganda, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

8. The Holy See and the Occupied Palestinian Territory were also represented by observers.

9. The following intergovernmental organizations were represented at the meetings of the working group: African Union, European Union and the International Organization of la Francophonie.

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

11. The following non-governmental organizations (NGOs) in consultative status with the Economic and Social Council were represented by observers: Good Neighbors International, International Commission of Jurists, International Federation Terre des Hommes, International Save the Children Alliance, Save the Children-Japan, International Service for Human Rights, Kindernothilfe, Norwegian Centre for Human Rights, Plan International, Inc., SOS Children's Villages International, World Organization against Torture, World Vision International.

12. Pursuant to paragraph 3 of resolution 11/1, the Chairperson of the Committee on the Rights of the Child, Yanghee Lee, and Vice-Chairperson Jean Zermatten also attended the session of the working group as resource persons. The following experts addressed and engaged in an interactive dialogue with the working group: Najaat M'jid Maalla, Special Rapporteur on the sale of children, child prostitution and child pornography; Peter Newell, Vice-President of the NGO Group for the Convention on the Rights of the Child and Chairman of the Council of the Child Rights Information Network; and Marta Santos Pais, Special Representative of the Secretary-General on violence against children.

## **C. Documentation**

13. The working group had before it the following documents:

- A/HRC/WG.7/1/1 Provisional agenda
- A/HRC/WG.7/1/CRP.1 Submission made by expert Nevena Vuckovic Sahovic
- A/HRC/WG.7/1/CRP.2 Submission made by expert Peter Newell
- A/HRC/WG.7/1/CRP.3 Submission made by expert Najat Maalla M'jid
- A/HRC/WG.7/1/CRP.4 Submission made by expert Paulo Sérgio Pinheiro
- A/HRC/WG.7/1/CRP.5 Joint submission presented by International Save the Children Alliance, Kindernothilfe, Organisation Mondiale contre la Torture (OMCT), SOS Children's Villages International, World Vision International, the Child Rights Information Network (CRIN), the Global Initiative to End Corporal Punishment and the NGO Group for the CRC
- A/HRC/WG.7/1/CRP.6 Submission made by expert Yanghee Lee
- A/HRC/WG.7/1/CRP.7 Submission made by expert Marta Santos Pais
- A/HRC/WG.7/1/CRP.8 Submission made by expert Jean Zermatten
- A/HRC/WG.7/1/CRP.9 Submission made by the European Network of Ombudspersons for Children
- CRC/C/GC/10 General comment No. 10 (2007). Children's rights in juvenile justice
- CRC/C/GC/12 General comment No. 12 (2009). The right of the child to be heard

#### D. Organization of the debate

14. In his opening statement, the Chairperson-Rapporteur recalled that 2009 marked the twentieth anniversary of the Convention and many events had taken place in that connection. Resolution 11/1 was the result of cross-regional efforts within the Human Rights Council. In that respect, a core group of States representing all regions had been formed in order to facilitate the preparation of the working group's session. He underlined the basic principles for conducting the session of the working group, i.e. transparency, constructiveness and open and frank discussions on all relevant issues with a view to achieve a consensual outcome.

15. At its first meeting, on 16 December 2009, the working group adopted its agenda, as it appears in document A/HRC/WG.7/1/1, and programme of work without comments.

16. Upon the proposal of the Chairperson, the working group agreed to hold a general debate, to be followed by expert presentations and discussions around the following topics: (a) reasons and timing to elaborate a communications procedure under the Convention; (b) existing international mechanisms, their efficiency and accessibility by children; (c) efficiency in the protection of the rights of the child under mechanisms existing at the national and regional levels; (d) unique nature of the rights of the child and specific rights enshrined in the Convention, including the right of the child to be heard; and (e) implications of a communications procedure under the Convention and feasibility of the procedure.

### III. General debate

17. At its first meeting, on 16 December 2009, the working group held a general debate in which State delegations and representatives of intergovernmental and non-governmental organizations made opening statements and expressed their preliminary views on options regarding the elaboration of an optional protocol to the Convention on the Rights of the Child to provide a communications procedure and on the key issues to be addressed by the working group. Some 37 delegations took the floor, some of which spoke on behalf of regional and subregional groups. Two NGOs, one of which represented a coalition of 11 organizations, and UNICEF also made statements. In general, the speakers welcomed the convening of the working group as an important step to strengthen the implementation of children's rights.

18. Many speakers referred to the almost universal ratification of the Convention and the substantial impact it had made in asserting the status of children as rights holders. Several delegations provided examples of positive developments which had taken place at the national level regarding the protection and promotion of children's rights. However, a number of speakers highlighted that those efforts were still insufficient in all respects and there were children in all parts of the world who continued to be abused and exploited. In many countries, children did not have access to effective remedies for the violations of their rights and domestic remedies were often inadequate or non-existent.

19. Most delegations considered that a communications procedure would constitute an additional tool to make further progress and referred to the fact that the Convention was the only major human rights treaty which did not have such a procedure. It was highlighted that it would be part of a continuum of accountability mechanisms, starting at the community level and comprising national justice systems, ombudspersons offices and regional mechanisms. The procedure should be available and accessible for all children, including the excluded and marginalized. In that respect, reference was made to article 4 of the Convention, which requires States to undertake all appropriate legislative, administrative and other measures for the implementation of rights. Furthermore, in general comment No. 5 the Committee on the Rights of the Child expressed that for rights to have meaning, effective remedies must be available to redress violations (para. 24).

20. Numerous delegations expressed their openness to explore the issue and look at the added value that such procedure would represent. A few delegations stated that an optional protocol should not be elaborated simply in order to replicate the procedures established under other treaties, but only after a careful examination of its added value. Existing communications procedures should be carefully considered. However, given the specific characteristics of the Convention, they could not be simply reproduced. New and differentiated approaches should therefore be examined through comprehensive discussions. In this regard, a number of delegations emphasized their willingness to consider different options and engage in a constructive debate.

21. A few delegations, also representing regional groups, stressed that, in examining the question of a communications procedure it would be important to bear in mind issues related to cultural and religious elements, the role of the family and traditions, the setting in which children live, the national judicial systems and the situation of developing countries. Some emphasized that effective protection of children rights should start at the domestic level. One delegation, speaking on behalf of a regional group, recalled that the African Union had adopted in 1999 the African Charter on Rights and Welfare of the Child and that the African Committee of Experts on the Rights and Welfare of the Child had been empowered to hear individual communications alleging violations of the Charter. This was an indication of the priority African States have placed on the protection of the rights of the child.

22. The majority of speakers welcomed the presence of experts at the working group and their written contributions. Many expressed their interest in hearing the views of experts and other participants regarding key issues, such as: the question of the legal capacity of children; representation of children under the communications procedure and the need to obtain their consent; how to avoid politically motivated complaints; the need to take into consideration cultural particularities; how to ensure that communications were filed in the best interest of the children concerned; the exercise of the child's right to be heard under the procedure; the exhaustion of domestic remedies; the need to strengthen national mechanisms vis-à-vis an international one; overlapping with existing communications procedures under other human rights treaties; duration of proceedings, given the special status of children; scope of the optional protocol; implications of the procedure for the workload of the Committee; possibility of submitting collective complaints; the inclusion in the optional protocol of an inquiry procedure; and the resource constraints affecting the treaty body system.

23. Several delegations and participants expressed the wish that the working group would be able to recommend that the Council provide it with a mandate to begin the elaboration of an optional protocol and that the current mandate of the working group could thus be reinforced. A few delegations indicated that they had an open view in that respect and that they would listen to the discussion with a view to forming a position. In general, all speakers expressed their willingness to work in an open and constructive manner.

24. One delegation referred to the Declaration adopted on 24 November 2009 at a Conference held in Cairo to commemorate the twentieth anniversary of the Convention and at which most member States of the Organization of the Islamic Conference (OIC) as well as international organizations, national human rights institutions, NGOs and children from OIC countries participated. The Declaration welcomed the expressions of support from numerous OIC member States to strengthen the mandate of the working group to proceed with the drafting of a new optional protocol to the Convention on the Rights of the Child to provide a communications procedure.

25. At the end of the general debate the Chairperson noted the high number of delegations and participants that had taken the floor, which showed the great interest that the working group had raised. He stated that a communications procedure in the framework of the Convention was long overdue and there was a need to explore the reasons for it.

#### **IV. Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child**

26. The topic on reasons and timing to elaborate a communications procedure was introduced by Yanghee Lee, Chairperson of the Committee. A written submission on the subject was also provided by Paulo Sérgio Pinheiro, Commissioner and Rapporteur on the rights of the child of the Inter-American Commission on Human Rights and former Independent Expert appointed to lead the United Nations Secretary-General's Study on Violence against Children. Ms. Lee recalled that the idea of a communications procedure was debated in the late 1980s, during the negotiation process of the Convention, and brought back at the commemorative celebration of the tenth anniversary of the Convention in 1999. However, the proposal did not make progress because at that time the international community was more focused on the definition of children's rights than on procedural matters.

27. Ms. Lee indicated that in the past year and a half the Committee had considered the pros and cons of a communications procedure and come to the conclusion that such procedure was not only feasible and possible but also necessary, as it would contribute

significantly to the overall protection of children's rights. The procedure would take the dependent nature of children and the principle of their evolving capacities into consideration. Furthermore, the right to be heard at the international level would further enhance the promotion and protection of the rights enshrined in the Convention.

28. As for the timing, Ms. Lee recalled that children and their rights had been the subject of attention by the international community since the League of Nations. Moreover, after the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the question of justiciability of these rights was no longer an issue. She therefore believed that the time was ripe and that a communications procedure was long overdue.

29. Ms. Lee's statement was followed by a debate in which many delegations indicated the reasons which, in their view, justified the establishment of a communications procedure, such as: the fact that many rights guaranteed by the Convention are not included in other human rights treaties, and others are dealt with under the specific principles enshrined in the Convention; claims regarding violations of the Convention should be dealt with by the body with the appropriate expertise, i.e. the Committee on the Rights of the Child; the procedure would be able to provide a remedy when national systems fail, as many countries lacked appropriate redress mechanisms; the Committee would be in a unique position to provide expert clarifications on complex issues regarding the implementation of the Convention; the jurisprudence that would develop would greatly contribute to the interpretation of the Convention; national mechanisms and bodies could benefit greatly from that jurisprudence; the procedure would strengthen the status of children as rights holders; there would be no interference with the national jurisdictions, as the exhaustion of remedies would be required; the procedure would constitute an additional tool to reinforce the monitoring of the Convention; it would also contribute to reinforce the State obligations under the Convention and to strengthen national standards and policies.

30. As for the timing, several delegations which took the floor agreed with the arguments presented by Ms. Lee. Some underlined the fact that there was currently a strong support for an optional protocol and that such momentum should not be missed. Others found it difficult to identify the right time for it.

31. When summing up the discussion the Chairperson-Rapporteur underlined some of the reasons referred to by the speakers in favour of an optional protocol, including the fact that the child is a holder of rights and that the Convention is the only treaty without a communications procedure. Furthermore, the optional protocol would give content to the right to be heard, provide an effective remedy and be a child sensitive mechanism. The Committee's jurisprudence would greatly contribute to the interpretation of the provisions of the Convention and inspire regional and national bodies.

32. On the timing, he noted the different views expressed. However, he recalled that it was the responsibility of States parties to comply with the obligations and commitments they had accepted when they ratified the Convention.

## **V. Existing international mechanisms, their efficiency and accessibility for children: perspective of a special procedure**

33. The topic on existing international mechanisms was introduced by Najat Maalla M'jid, Special Rapporteur on the sale of children, child prostitution, and child pornography.

34. The Special Rapporteur explained the functioning of her mandate in dealing with individual complaints, urgent appeals and country visits. She pointed out its limits, in

particular regarding individual complaints, where she was unable to act on many instances because the issues involved, although related to children, were not covered by her mandate.

35. The Special Rapporteur welcomed the idea of an optional protocol setting up a communications procedure. In her view, the procedure would complement both her and the Committee's mandates, would result in a better protection of children's rights and would strengthen the international human rights protection system. She stressed that cooperation between the special procedures and treaty bodies in general was essential. As far as the Committee on the Rights of the Child and her mandate were concerned, cooperation existed mainly in the form of exchange of information.

36. From the perspective of her mandate, the Special Rapporteur provided the following reasons as to why the new procedure was necessary: (a) the main flow of information she received came from NGOs, and thus there was a problem of full visibility and accessibility for children; (b) the scope of her mandate was limited; and (c) there was no effective follow-up procedure under her mandate. In order for the new procedure to be effective, its accessibility by children or those working with children should be guaranteed. Confidentiality and respect of the children's private life should also be taken into account.

37. A number of delegations posed questions about the possible examination of identical complaints by different mechanisms. Some observed that if an optional protocol was adopted it would attract most of the children-related complaints.

38. It was also stressed that the existing special procedures are already open to children. However, given the specificity of their respective mandates, the special procedures can only ensure a fragmented protection of children's rights. Thus, the establishment of the optional protocol would provide an added value to the existing system.

39. Representatives of non-governmental organizations stressed the current lack of a body with full competence to deal with children's rights. Even if some treaty bodies received complaints from children, their respective mandates remained limited.

40. When summing up the debate on the topic the Chairperson-Rapporteur noted that the effectiveness of the procedure would depend to a large extent on its accessibility by children. Accordingly, children, their representatives, those working on children's issues and other stakeholders should be aware of its existence. Information in that regard should be made available in schools and other appropriate institutions. The Chairperson further noted that the issues of complementarity and overlapping were often referred to. However, it was clear that the existing treaty bodies and special procedures systems offered only a fragmented protection regarding children's rights and they could not ensure the same level of protection as the one provided under the Convention on the Rights of the Child.

## **VI. Efficiency in protection of the rights of the child under mechanisms existing at the national and regional levels: best practices and deficiencies**

41. The topic on efficiency in protection of the rights of the child under mechanisms existing at the national and regional levels was introduced by Peter Newell, who referred to the existing gap between the obligations taken on by States in ratifying the Convention and the extent to which children's rights are realized and enjoyed in reality. He stressed that many States were still far from providing effective remedies and focused on the need to take measures in order to ensure: (a) the availability of child friendly information, advice and advocacy, including support for self-advocacy; (b) easy access by children to independent complaints procedures in all settings of their lives; (c) access by children and their representatives, like all other rights holders, to courts when other remedies failed to

address, or address adequately, violations of their rights; (d) adequate reparation for children whose rights had been violated.

42. According to the expert, many States still failed to provide effective remedies, as they considered children as objects rather than subjects of rights. Attention was drawn in this respect to the particular vulnerability of children with disabilities. He emphasized that often children could act only through their parents. However, in many cases (civil, penal or administrative) there were risks of a conflict of interest between the parents and the child.

43. The lack of adequate remedies at the national level had been highlighted in the 2006 Secretary-General's Study on Violence against Children. Furthermore, although in its general comment No. 2, the Committee on the Rights of the Child had requested States parties to empower their respective national human rights institutions to consider individual complaints on behalf of or by children, that goal had not been generally achieved.

44. Ideally, according to the expert, remedies should be available at the national level. Unfortunately, that was rarely the case in practice. The process of elaboration, adoption and coming into force of an optional protocol could intensify access to and better functioning of national mechanisms.

45. The expert pointed out that States had not denied access to international remedies to adults when national mechanisms failed to provide an adequate response. Accordingly, a different approach should not exist in relation to children. Furthermore, it should be kept in mind that children have a special status.

46. As to the requirement of exhaustion of domestic remedies, the expert stressed that that requirement should refer only to remedies which are accessible to the child or his/her representative, and which are not unduly delayed. Furthermore, special measures to protect the child from threats in connection with the submission of a communication must be envisaged.

47. According to the expert, the optional protocol should also allow the Committee to carry out inquiries for mass violations under the Convention. A collective complaint mechanism, without identification of the specific victims, could also be envisaged. All procedures envisaged should be child-sensitive and child-friendly. In conclusion, the expert stressed the need to ensure consistency and coherence among the envisaged procedure(s) and those already existing. A new optional protocol could only be an additional tool to ensure better enjoyment by children of their rights.

48. Regarding the proposal to have a collective complaint mechanism, several States parties indicated that that issue needed to be further explored. A distinction should be made between collective complaints filed by identifiable individuals, and complaints where no individualization was possible.

49. A number of delegations pointed out that the Inter-American Commission/Court of Human Rights and the European Court of Human Rights had already referred in their respective jurisprudence to provisions of the Convention on the Rights of the Child, and that had facilitated the application of the Convention's provisions by domestic courts. Some delegations insisted on the complementary nature of the regional and international mechanisms of human rights protection. An optional protocol could only further develop this complementarity.

50. One delegation suggested that the new optional protocol include guidelines on the main features of national human rights institutions dealing with children's issues.

51. Several delegations provided information on their respective children protection mechanisms and practices, including on the issue of representation, and provided examples of good practices. Many insisted that the protection of children at the national level should

be strengthened. One delegation suggested that the needs of vulnerable groups of children be considered as well. Another delegation proposed to create a database containing information on good practices.

52. One delegation emphasized the need to clarify issues regarding delays and length of proceedings, for example, how to address the situation where a case is submitted by a minor who, at the time the Committee takes its final decision, has reached the age of majority. Several delegations addressed the issue of children's accessibility to the communications procedure, and one wondered about options for a disabled child to lodge a complaint at the international level.

53. Representatives of NGOs expressed the view that the new mechanism would guide national courts in dealing with children's issues. Several countries do not have a child-specific mechanism of complaints, and children, in general, have limited access to the existing ones. Existing regional mechanisms may only ensure limited protection to children, as they cannot deal with all rights protected under the Convention. In any case, there is no conflict between the existing mechanisms and the one envisaged. When they fail to obtain redress at the national or regional levels, children must have the opportunity to seek remedy at the international level.

54. In reaction to the different interventions, Mr. Newell acknowledged that both the Inter-American system and the European Court of Human Rights had made a positive use of the Convention on the Rights of the Child in interpreting the American and European Conventions on Human Rights. Both systems had also taken into consideration the Committee's general comments. In spite of that, a number of judgements of the European Court of Human Rights had been criticized for not being fully consistent with the Convention on the Rights of the Child. In his view, regional mechanisms could only welcome the establishment of a new communications procedure.

55. The expert further pointed out that a standard limitation so that the same matter could only be considered by one mechanism at a time would solve the issue of overlapping. The choice of forum would depend mainly on the rights and allegations invoked by the victims. He did not believe that the future optional protocol should include provisions on the role of national human rights institutions regarding complaints, as this issue had already been dealt with in the Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles) and in the Committee's general comment No. 2.

56. On the length of proceedings, Mr. Newell explained that existing treaty bodies that examine communications had established their own rules regarding deadlines for the parties to provide observations. The new procedure should find a balance between the rights and interests of complainants and States parties in this regard.

57. The expert further indicated that, in his opinion, empowering the Committee with the possibility to issue requests for interim measures of protection would be of crucial importance for its work on individual communications.

58. On the issue of representation, and with reference to the "best interest of the child" principle, the expert suggested that it could be a differentiated treatment depending on the age of the children and their capacity to give consent in order to have their case examined by the Committee.

59. The Chairperson-Rapporteur in his summary of that debate emphasized: the need for the procedure to be child-friendly and for the communications to be dealt with expeditiously; the need to ensure that children have access to courts; the importance of taking into account best practices at the national level; the fact that regional and international mechanisms do not overlap but rather complement each other; the idea that

international protection mechanisms can contribute to strengthen mechanisms at the national level; the positive expectations at the national and regional levels should not be ignored; exhaustion of domestic remedies is necessary but only when they are effective and available and the proceedings are not unduly prolonged; national institutions should be empowered to bring children-related cases to court; and the need to further discuss the issue of collective complaints in connection with the future communications procedure.

## **VII. The unique nature of the rights of the child and specific rights from the Convention on the Rights of the Child, including the right of the child to be heard**

60. The topic on the unique nature of the rights of the child and specific rights from the Convention was introduced by Marta Santos Pais, Special Representative of the Secretary-General on Violence against Children, and Jean Zermatten, Vice-Chairman of the Committee on the Rights of the Child. Ms. Santos Pais stated that the wealth of experience developed over 20 years, including a change towards the perception of children as rights-holders, relevant institutional and legal reforms and a comprehensive evaluation of the work of regional and national mechanisms, could provide useful guidance to the discussion.

61. Ms. Santos Pais explained how a communications procedure would be relevant for her mandate. As the Secretary-General's Study on Violence against Children showed, violence against children persisted, often as a hidden phenomenon largely accepted by society. As a result, children feared reporting, particularly in the absence of effective remedies at the national level. It was therefore essential that appropriate mechanisms be established at the national level, to be further complemented by a communications procedure under the Convention, as recommended in the Study. While building on existing international norms and standards, that procedure would: contribute to the preservation of the holistic nature of the Convention; take into account the general principles of the Convention in the consideration of allegations; propose measures to prevent the child from being subjected to reprisals for having submitted complaints; apply a gender-sensitive approach; guarantee the right of the child to be heard in proceedings affecting him or her; and complement the reporting function of the Committee, which would thus be in a position to call on relevant bodies to support countries in any follow-up to its recommendations, including by addressing root causes of violence against children.

62. More specific reasons in favour of an optional protocol establishing a communications procedure include providing detailed guidance to States on specific legislative measures, as well as giving the right of the child to information a more specific content. National mechanisms should be set up to assist individuals in the use of the procedure, for instance through ombudsman offices. It is essential to ensure that all relevant actors become knowledgeable and skilful in the use of the procedure.

63. For a communications procedure to be effective and genuinely accessible to children, it needed to be understood and made easily available. For this reason, the new optional protocol could include valuable guidance to States on the need: to provide children with relevant information on existing complaint mechanisms and procedures; to raise awareness of what these instruments mean and how they could be used; and to employ child-sensitive language, materials and tools in the performance of these tasks.

64. The optional protocol should also recognize important legal safeguards, including the child's entitlement to initiate a communications procedure and to be supported effectively throughout the process; the right of the child to benefit from legal counsel and representation; the right to free legal aid; and the right to expeditious decisions. Moreover, the admissibility of a communication should be considered in the light of the best interest of

the child, waiving the requirement for the exhaustion of all available domestic remedies when the application of such remedies would be unreasonably prolonged or unlikely to bring effective relief. Further discussions in the elaboration of the optional protocol would provide an opportunity to address these and further issues in detail, while taking into account the need to build on a firm and sound normative framework, the progressive spirit of the Convention and the experience developed at the national and regional levels.

65. In his intervention, Mr. Zermatten noted that the Convention was a holistic instrument, covering children's civil, political and economic, social and cultural rights. While some articles mirrored guarantees established for everyone in other human rights treaties, most of its provisions provided unique rights for children. Furthermore, all provisions of the Convention had to be interpreted in the light of its main principles, i.e. non-discrimination (art. 2), best interest of the child as a primary consideration in all actions concerning children (art. 3), obligation to ensure maximum survival and development of the child (art. 6) and the obligation to give due weight to children's expressed views in all matters affecting the child (art. 12).

66. In connection with the right of the child to be heard, Mr. Zermatten referred to resolution 64/146 on the rights of the child, in which the General Assembly recognized, *inter alia*, that the full enjoyment of the right of the child to be heard and to participate requires adults to adopt an appropriate child-centred attitude, listening to children and respecting their rights and individual points of view (para. 32). That resolution, together with the Committee's general comment No. 5 (General measures of implementation of the Convention on the Rights of the Child) clearly recognized the special status of children, which meant that children had become rights holders and not simply individuals who needed care and protection. Consequently, it was necessary to provide children with the legal means to file complaints when their rights have been violated and obtain reparation. In Mr. Zermatten's view, the special status together with the fact that other human rights treaties did not respond adequately to the specific needs of children justified the establishment of a specific communications procedure. That procedure would complete the Committee's monitoring mandate, and the ensuing jurisprudence would provide guidance at the national level, including by mainstreaming the general principles enshrined in the Convention.

67. Mr. Zermatten considered that the Committee's general comment No. 12 on the right of the child to be heard (article 12 of the Convention) should inspire the working group's discussions. Paragraph 47 of that comment indicates that "if the right to be heard is breached with regard to judicial and administrative proceedings, the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment". In Mr. Zermatten's view, the reference to the access to appeals and complaints procedures could be interpreted so as to include the possibility for a child to file an individual communication before the Committee claiming the violation of his or her rights. Finally, Mr. Zermatten recalled that almost half of the world population was under 18 and that it would thus be paradoxical if half of the world population were excluded from access to an appropriate communications procedure.

68. Ms. Santos Pais's and Mr. Zermatten's statements were followed by a debate in which many delegations explored the links between the unique nature of the rights of the child and a communications procedure. The following issues were raised in that regard:

(a) While the child has been recognized as a rights holder with specific, unique rights and the Committee is the treaty body with the most relevant expertise to deal with them, the Convention is the only core human rights treaty that lacks a communications procedure;

(b) The establishment of a communications procedure under the Convention would contribute to strengthening child protection by providing a specific forum in which all rights and principles enshrined in the Convention would be considered by a Committee with a unique, multidisciplinary expertise based on the innovative and creative manner in which the Convention was designed;

(c) Questions regarding the ability of the child to submit a complaint and the most appropriate body to assess the maturity of a child should be considered in light of lessons learned from the Convention on the Rights of Persons with Disabilities as well as experiences developed at the national level;

(d) While the Convention does not specify a minimum age for the child's views to be heard, it does state that consideration of the child's views has to be assessed against criteria that are both objective (age) and subjective (level of maturity);

(e) In view of the vulnerable status of children, there is an objective risk that children may be manipulated when submitting a complaint. An optional protocol should devote particular attention to this aspect and put in place specific guarantees to avoid or limit this risk to the maximum extent possible;

(f) The overarching principle of the evolving capacities of the child contained in article 5 of the Convention and further detailed in general comment No. 7 should guide the interpretation of the role of the family or other person(s) legally responsible for the child. There is no contradiction between the child's right to be protected and the child as a rights bearer;

(g) Lessons learned and best practices relating to children's participation in drafting legislation on their fundamental rights should guide the consideration of participation of children in the work of the open-ended working group.

69. The Chairperson-Rapporteur in his summary of this debate highlighted that the recommendations on redress mechanisms made in the context of the Secretary-General's Study on Violence against Children should be taken into consideration when deciding on the elaboration of an optional protocol. While some speakers seemed to be of the view that the need for a communications procedure was implicitly recognized in the Convention others expressed doubts in that regard and indicated that the issue needed further discussion. The Chairperson also noted the importance of a child-friendly procedure which took into consideration the evolving capacity of the child and the uniqueness of the rights and principles set up in the Convention.

## **VIII. Implications and feasibility of a communications procedure under the Convention on the Rights of the Child**

70. The Chairperson of the Committee on the Rights of the Child, Ms. Lee, made a presentation on the feasibility of a communications procedure under the Convention on the Rights of the Child. A paper on the same topic was submitted by Nevena Vuckovic Sahovic, former member of the Committee on the Rights of the Child.

71. Ms. Lee referred to the workload of the Committee. On two occasions, when confronted with an extensive backlog of State reports, the Committee had decided to work in two parallel chambers. To avoid the backlog problem in the future, the Committee was asking States parties to combine periodic reports. Currently, the Committee was reviewing its methods of work with a view to providing a more durable long-term solution to that problem.

72. Ms. Lee mentioned that the methods of work to examine communications could be dealt with in the context of the Rules of Procedure to be adopted once the mechanism was set up. In that regard, the Committee would look at how other communications mechanisms operated. At the Secretariat level, it was estimated that, to begin with, one additional Professional and one General Service staff would be required after the entry into force.

73. Regarding expertise, Ms. Lee indicated that, of the current members of the Committee, seven experts had a legal background. However, in order to address violations to the rights of the child in a holistic and comprehensive manner, a multidisciplinary approach was necessary. As to how to deal with communications, the Committee would certainly look at experiences in other treaty bodies. Possible options might include setting up a working group or designating case rapporteurs.

74. Finally, with respect to international assistance for training programmes in the context of the optional protocol, as raised by some delegations, Ms. Lee 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.

75. Ms. Lee's statement was followed by a discussion in which some delegations raised a number of questions pertaining to procedural and resource issues about the possible future work of the Committee on individual complaints. The issues raised included:

(a) The question of delay in the submission of a communication to the Committee, and the fact that the complainant might no longer be a "minor" within the meaning of the Convention before the completion of the procedure;

(b) Procedural attribution of the examination of complaints to the Committee to either one of its two chambers, or to a working group created for that purpose;

(c) Human and financial resources, including the question of whether resources should be allocated progressively to the Committee's communications activities, as the number of complaints grows;

(d) Concerning the working group, the need to make fast progress in the current process, so as to avoid unnecessary spending of resources;

(e) The need to ensure adequate legal expertise within the Committee.

76. In connection with the topic above, a presentation was made by the Secretariat of the Office of the High Commissioner for Human Rights (OHCHR) in order to address a number of questions raised by delegations in connection with the current functioning of the treaty bodies system regarding the examination of communications.

77. Concerning the Human Rights Committee, the Secretariat indicated that approximately 430 cases were currently pending. Around 100 cases were registered per year and an equal number of final decisions were adopted per year. The Committee against Torture had currently 85 cases pending before it, and a total of approximately 400 cases had been registered under that Committee's procedure since the early 1990s. The Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of All Forms of Discrimination against Women had very few cases registered. The newly created Committee on the Rights of Persons with Disabilities did not have any registered individual communication yet.

78. The Secretariat indicated that only 2 to 2.5 per cent of the complaints considered by the treaty bodies related to situations involving children. Regarding the concern expressed by a number of delegations fearful of possible "forum shopping" by complainants, the Secretariat referred to the existing practice of treaty bodies examining individual communications, such as the Human Rights Committee, noting that most States parties to

the European Convention on Human Rights made a reservation to article 5, paragraph 2 (a), of the Optional Protocol to the International Covenant on Civil and Political Rights, which limits the Human Rights Committee's competence to examine complaints which have already been examined by the European Court of Human Rights. Other treaty bodies are barred from examining communications which have already been decided by relevant international organs.

79. With regard to the question of the standing of children and the question of collective complaints, which were also raised by delegations in their discussions, these should be dealt with at the drafting stage. It was obvious that plausible and pragmatic rules should be elaborated concerning representation of children.

80. On exhaustion of domestic remedies, which had been raised by delegations on a number of occasions, the Secretariat noted that, as far as existing treaty-bodies practice examining individual communications is concerned, the prolonged nature of domestic remedies must be examined on a case-by-case basis. Addressing the concern expressed by a number of delegations that the Committee might become another instance in proceedings initiated at the domestic level, the OHCHR representative noted that treaty bodies did not act as a "fourth instance" and did not normally examine facts and evidence dealt with by national courts.

81. Concerning the additional workload of the Committee if it were to examine individual communications, and relying on the practice of existing treaty bodies, the Secretariat observed that, because of, *inter alia*, the requirement for exhaustion of domestic remedies, it was improbable that the Committees would receive many communications immediately after the entry into force of the optional protocol.

82. As for Secretariat resources, it was noted that a programme budget implications (PBI) statement should be tabled in due course, in order to ensure additional resources which would allow the Committee to carry out its activities under the optional protocol.

83. In her replies to the questions raised by delegations, Ms. Lee reiterated that the Committee would build on best practices of other treaty bodies. On the legal expertise of Committee members, she recalled that the composition of the Committee was the responsibility of States parties. Both Ms. Lee and Mr. Zermatten reiterated the importance of a multidisciplinary approach in dealing with issues regarding children, as it was already the case at the national level. In this regard, the OHCHR representative noted the useful contributions made by members with no legal expertise in the Committees which currently examined individual communications.

84. Following the presentation by the Secretariat, delegations asked additional questions concerning: statistics and reasons for inadmissibility of communications before and after being registered; reasons for the low percentage of communications involving children; time for dealing with communications since their registration; and estimation of the percentage of additional communications with which the OHCHR Secretariat could deal with in its current status.

85. The Secretariat replied that a high percentage of the communications received are rejected prior to registration. After the case is registered, an additional 40 to 50 per cent of communications are declared inadmissible. The main reasons for the inadmissibility of a communication include non-exhaustion of domestic remedies, incompatibility with the provisions of the relevant treaty, insufficient substantiation or lack of standing as a victim of the alleged violation. In the case of the Human Rights Committee, the average time for a communication to be processed, from its registration, was three and a half to four years.

86. Mr. Newell concluded the discussion on the topic by providing a few examples of child representation in the European Court of Human Rights. He suggested that the rules of

procedure to be elaborated by the Committee under the optional protocol could be inspired by the European Court practice.

87. In his final summing-up of the debate on the topic the Chairperson-Rapporteur referred to the measures adopted by the Committee to deal with its current backlog and the fact that the number of reports was getting progressively smaller. On resources, he noted that the Committee had currently seven members with legal background and that it was the responsibility of States parties to decide the composition of the Committee. The issue of international assistance and cooperation to States had been dealt with in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. An appeal for resources in that respect could be made in the future in connection with the optional protocol to the Convention on the Rights of the Child if adopted.

## **IX. Adoption of the report**

88. The working group adopted its report ad referendum at its final meeting, on 18 December 2009.

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