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

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This paper outlines the reasons and timing to adopt a communications procedure under the Convention on the Rights of the Child (hereafter referred to as CRC). Overall, the paper is built on lessons learnt within the IAHR system regarding the protection of the rights of the child based on locus standing status of all individuals to access international human rights supervisory organs¹.

We are all aware that the process of drafting new instruments can be prolonged - for example the very lengthy recent process of elaborating the Optional Protocol to provide a communications procedure for the International Covenant on Economic, Social and Cultural Rights. But equally, when there is a will to do so, States can act decisively and quickly: I understand that the drafting of the similar Optional Protocol to the Convention on the Rights of Persons with Disabilities was accomplished in the final stages of the negotiation of the Convention itself in New York with astonishing speed – possibly less than 48 hours.

States know that these Working Group sessions cost the UN system substantial funds – the support of the secretariat in the Office of the High Commissioner, the interpretation, papers, experts and so on. We all have a responsibility to use the UN's limited funds – and particularly the funds available for the promotion of human rights – in a responsible manner. The current mandate of the Open-Ended Working Group – to “consider the possibility of elaborating...” - hardly needs more time. It is indeed “possible” to proceed. I cannot think that any State or expert will claim it to be “impossible”.

I respectfully urge States in the Human Rights Council to move quickly to strengthen the mandate of the Open-Ended Working Group to proceed with the elaboration of the necessary Third Optional Protocol. I will elaborate my reasons below.

I was not directly involved in the drafting process for the CRC, but I understand that initial consideration was given then to the question of providing a communications procedure for the Convention. I believe that the hesitations in the 1980s, or some of them, were about the justiciability of the economic, social and cultural rights in the Convention. But surely the adoption of the OP to the International Covenant on Economic, Social and Cultural Rights can be seen as an emphatic answer to that hesitation. Nor was I involved in the 10th anniversary celebrations of adoption of the CRC, when I understand the Committee on the Rights of the Child raised the proposal again.

I have been asked to comment on the timeliness of the proposal: the twenty anniversary of the CRC is the most suitable scenario to enhance international human rights mechanisms to protect children around the world. I believe that the elaboration of this Optional Protocol is overdue, and in particular, my experience in leading the UNSG's Study on violence against children convinced me of its importance. I hope that an economical, effective and speedy process of elaboration will commence as soon as possible after the next session of the Human Rights Council. While the responsibility for negotiation and adoption lies with States, much of the preparation can and should be done by the secretariat, with the support of appropriate experts, between and outside sessions of the Working Group. Much has been done already, in the very thorough preparations for the elaboration of the Optional Protocols for CEDAW and for the ICESCR (see, for

¹ For additional reference about “international human rights supervisory organs” see CANCELED TRINDADE, Antônio, *Direito das Organizações internacionais*, 4 edição, Editora Del Rey, Belo Horizonte, 2009.

example, the comparative summary submitted to the Open-Ended working group on an Optional Protocol to the ICESCR, E/CN.4/2005/WG.23/2). The preparations will involve:

1. an updated comparative review of the various elements of the provisions which have created communications procedures for eight other core human rights Conventions (four through provisions within the Conventions and four through Optional Protocols);
2. an updated comparative review of the provisions regarding communications procedures within regional human rights systems
3. consideration of how to ensure that the new procedure is appropriate for use by children and their representatives;
4. providing drafted recommendations, with further expert help as necessary, so that elaboration, on the basis of negotiations on an advanced draft, can be achieved quickly.

In elaborating quickly, as I hope States will, the necessary Optional Protocol to provide a communications procedure for the CRC, the special status of children does of course need to be recognised. Children are described by the Committee on the Rights of the Child in the introduction to its most recent General Comment on "The right of the child to be heard", as people who "on the one hand lack the autonomy of adults but, on the other, are subjects of rights". The Committee goes on: "The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention".

But in seeking to take account of the special needs of children, States should also be clear that these are not completely new problems. As others have noted, young children are not the only vulnerable subjects of rights who lack capacity to pursue communications for themselves, or who are deprived of the opportunity to submit a communication on their own behalf (for example adults held in detention incommunicado or subject to enforced disappearance). Existing communications procedures already, for example, allow for communications "on behalf of" individuals or groups. (For example, CEDAW's Optional Protocol Article 2: "...where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without their consent"; the newer Optional Protocol to the ICESCR has an identical provision). Similarly, the OPs to CEDAW and ICESCR each require States Parties to take steps to ensure that petitioners are not subjected "to any form of ill-treatment or intimidation" as a consequence of communicating with the Committee (CEDAW Article 11; ICESCR Article 13). Thus I would emphasise that in elaborating the existing communications procedures, in developing detailed Rules of Procedure for their operation and in the examination of communications, States and then the relevant Treaty Bodies have had to take account of the needs of similarly vulnerable and dependent petitioners.

If States are to maintain the credibility of a communications procedure as a semi-judicial process, there are limits on how far the Optional Protocol can be adapted. For example, it may be possible for the OP to the CRC to impose shorter time limits on the various stages of examination of a communication made by or on behalf of a child. But it has to be recognised that justice does take time: the proper examination of allegations of violation of rights and adjudicating on them can often be complex. States too have a right to due process.

It will be important to review the common requirement that petitioners must exhaust all available and effective domestic remedies before a communication can be considered by the Committee. It should be made clear in the new Optional Protocol to the CRC that this requirement

refers only to domestic remedies that are genuinely and realistically available to children. And again, this will put reasonable pressure on States to ensure that such child-sensitive remedies do exist. Some of the provisions for existing procedures already exclude the need to exhaust remedies “which are unreasonably prolonged or unlikely to bring effective relief” (for example see OP to CEDAW Article 4 and OP to CRPD Article 2).

During the UNSG’s Study process, I worked closely with the Council of Europe and its human rights mechanisms and became aware of the collective complaints procedure under the European Social Charter and Revised Social Charter (which has been used with good effect, among other issues concerning children, to challenge the persisting legality of corporal punishment in some member states). In the case of children, I believe there are strong arguments for allowing collective communications from reputable, approved bodies and organisations, without the need to identify individual child victims of violations. I am aware that there were attempts to include provisions for collective communications during the elaboration of the Optional Protocols to CEDAW and to the ICESCR. I was not involved and do not know why they were not included in the end. But I hope there will be further consideration of this during the elaboration of the third Optional Protocol to the CRC, in the light of the special status of children.

Why proceed with the elaboration?

I am aware that some States are dissatisfied by the obvious argument that the CRC must have a communications procedure because it is the only core Convention without one; that this is a matter of discrimination against children. But this is a very strong argument which it appears to me can really only be challenged by challenging the very concept of children as rights-holders, and surely we have got beyond that?

To me, filling this very obvious gap in the armoury of human rights instruments is in itself a necessary confirmation of full acceptance by States of the child as a rights holder, with the essential ability to seek remedies, including through external, international procedures, for violations of their rights. Indeed; it is a necessary confirmation of the universality of human rights. A communications procedure has been accepted as a necessary complement to the reporting procedure for all the other core instruments, and also as a necessary tool within the regional human rights mechanisms, including in the Inter-American system which I am most familiar with, and also, with special reference to children, in the work of the African Committee of Experts for the Rights and Welfare of the Child.

I believe that the existence of the procedure will very importantly provide a new pressure on States Parties to the Convention on the Rights of the Child – and we hope that they will very soon be *all* Member States – to provide children and their representatives, at local and national level, with access to effective remedies for any violations of their rights. Indeed, I believe that the widespread debate already raging on this proposal, among States and among civil society organisations in all regions, is in itself having a positive impact. It is drawing attention, in this twentieth anniversary year, to gaps in implementation of the CRC and to the need to provide effective remedies for breaches of children’s rights.

I note the strong commitments made in the Human Rights Council Resolution 10/14, in March 2009 on “Implementation of the Convention on the Rights of the Child and the Optional Protocols thereto”. This requests the States parties “to take effective measures to ensure that their

obligations arising from the Convention are given effect and comprehensively implemented through policy and legislation within their domestic systems and to review their national legislation with this aim..." (para. 3); calls on States "to take all appropriate measures, including legal reforms and special support measures, to ensure the enjoyment by children of all their human rights and fundamental freedoms without discrimination of any kind" (para. 8)

The resolution also emphasizes the need for effective remedies: "... to ensure that child-sensitive procedures are made available to children and their representatives so that children have access to means of facilitating effective remedies for any breaches of any of their rights arising from the Convention through independent advice, advocacy and complaint procedures, including justice mechanisms, and that their views are heard when they are involved or their interests concerned in justice procedures..." (para. 11). It also calls for education and training for all those involved in implementation of the Convention, "with the aim of emphasizing the status of the child as a holder of human rights, increasing knowledge and understanding of the Convention and encouraging active respect for its provisions." (para. 13).

Also, if the elaboration does take account of children's needs, it can provide a model to encourage existing and developing regional human rights mechanisms to be child-sensitive - or even "child-friendly" - too.

I am unable to reassure States that if they elaborate, adopt and ratify an Optional Protocol creating a communications procedure for the CRC, it will seldom be used. I hope States would not wish me to do so. The necessity to use the procedure will indeed depend on States' efforts, individually and in the context of international cooperation, to fulfil the obligations they have taken on by ratifying the Convention and its two existing Optional Protocols and to provide effective measures for the pursuit of violations of children's rights locally and nationally. Proceeding with the elaboration of the necessary Optional Protocol will be a further signal of States Parties' commitment to children, and to children as rights holders. In my personal view there are no more worthy causes in the spectrum of human rights.

As I have discovered in my own region, and globally during the process of the UN Secretary-General's Study on Violence against Children which I led from 2003 - 6, there is a strong and dynamic civil society movement for children's rights: international and national non-governmental organisations and children's rights coalitions and also growing numbers of children's ombudspersons and similar human rights institutions with a specific focus on children's rights (I believe at least 70 globally). I am also aware of the increasing development of child-led organisations, developing self-advocacy of their rights.

I believe that civil society organisations have made in general responsible use of the CRC reporting procedure, and I understand that in this process, children and child-led organisations are increasingly involved in briefing the Committee in detail on their experiences during pre-sessional hearings, before the examination of States Parties' reports.

I am equally confident that the movement for children's rights will also make responsible use of a communications procedure. States may be reassured by the fact that none of the international communications procedures to date has been swamped with petitions.

Indeed, international law shows that complaints mechanisms have played integral roles in other areas of international human rights law, and I believe that it is imperative for the future development of specific international standards on the rights of the child to create a complaint mechanism.

The experience and evidence of the UNSG's Study on Violence against Children

The UN Secretary-General's Study on violence against children, which I had the privilege to lead, revealed for the first time the extent of all forms of violence, confirming "that such violence exists in every country of the world, cutting across culture, class, education, income and ethnic origin. In every region, in contradiction to human rights obligations and children's developmental needs, violence against children is socially approved, and is frequently legal and State-authorized" (A/61/299, introduction, para.1)

The report characterized this as a "grave and urgent" problem (para. 24). I believe the Study, its report to the General Assembly and the accompanying *World Report on Violence against Children* provides strong evidence, additional to that revealed by the reporting process under the CRC and its Optional Protocols, of the extent to which children's rights to full protection from all forms of violence and exploitation are not being fulfilled, the degree of impunity which perpetrators of violence against children have through the lack of accountability mechanisms.

I believe this strongly reinforces the case for creating an international communications procedure enabling children and their representatives to petition the appropriate specialist Treaty Body – the Committee on the Rights of the Child – on violations of the whole spectrum of rights in the CRC and its Optional Protocols. As noted above, the existence of such a procedure will encourage consideration by States of the need to develop, or develop further, appropriate local and national systems to provide genuine remedies. So I will briefly summarise here the lessons of the Study.

During this human-rights based Study, which arose from a proposal from the Committee on the Rights of the Child, endorsed by the General Assembly, I was guided by a number of principles: the first is that "No violence against children is justifiable. Children should never receive less protection than adults". Another is that "States have the obligation to ensure accountability in every case of violence" (A/61/299, para. 93). The Study urged States, as required by international instruments, to prohibit all forms of violence against children, in all settings, including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation and so-called honour crimes, sexual violence and torture and other cruel, inhuman or degrading treatment or punishment (para. 98). It emphasized the need to ensure accountability and end impunity (para. 105).

The Study revealed the extent of violence and the extent of adult impunity for perpetrating it, in all settings of children's lives, reviewing violence in the five settings of the home and family, schools, care and justice systems, the workplace and the community.

For example, on care and justice systems, the report referred to the lack of effective complaints, monitoring and inspection mechanisms, noting that adequate government regulation and oversight are frequently absent: "Not all perpetrators are held accountable, creating a culture of impunity and tolerance of violence against children. The impact of institutionalization goes

beyond the experience by children of violence. Long-term effects can include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism.” (para. 54).

Despite the obligation to ensure that the detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time, it was estimated that one million children are deprived of their liberty. Most of these are charged with minor or petty crimes, and are first-time offenders. Many are detained because of truancy, vagrancy or homelessness. In some countries, the majority of children in detention have not been convicted of a crime, but are awaiting trial (para. 61). The Study recommended – as the Committee on the Rights of the Child has recommended consistently – that States should establish effective and independent complaints, investigation and enforcement mechanisms to deal with cases of violence in care and justice systems.

In the workplace, across all regions, violence - physical, sexual and psychological - affects many millions of children who are working, both legally and illegally. It may be used to coerce children to work, or punish or control them within the workplace. Some categories of illegal work have been identified as the “worst forms of child labour” and therefore constitute violence against children (para. 64). The exploitation of children under 18 in prostitution, child pornography and similar activities constitutes violence. It is estimated that one million children enter these sectors every year. Many are coerced, kidnapped, sold and deceived into these activities, or are victims of trafficking (para. 67). In parentheses, I would emphasise here that the scope of the new Optional Protocol providing a communications procedure needs to extend to cover the two existing Optional Protocols, on sale of children, child prostitution and child pornography and on children and armed conflict, enabling States to recognize the competence of the Committee to consider communications under these Protocols.

The Study confirmed that violence against children persists as a permanent threat where authoritarian relationships between adults and children remain. Violence against children is a violation of the rights of the child which thrives in the absence of democracy and respect for human rights.

The Study report concluded: “Member States have already made commitments to protect children from all forms of violence. However, we must accept — from children’s testimony during the Study process, as well as reflected in research, that these commitments are far from being fulfilled. The core message of the Study is that no violence against children is justifiable; all violence against children is preventable. There should be no more excuses. Member States must act now with urgency to fulfil their human rights obligations and other commitments to ensure protection from all forms of violence. While legal obligations lie with States, all sectors of society, all individuals, share the responsibility of condemning and preventing violence against children and responding to child victims. None of us can look children in the eye, if we continue to approve or condone any form of violence against them.” (para. 91)

The experience of the Inter-American system of human rights

In my current role as a Commissioner and Rapporteur on the Rights of the Child to the Inter-American Commission on Human Rights, I also strongly support the proposal for a communications procedure for the CRC.

The following comments are based on lessons learnt within the IAHR system regarding the protection of the rights of the child based on locus standing status of all individuals to access international human rights supervisory organs². In overall, I highlight some strong arguments to create a communication procedure for children.

The Inter-American system has no specific provisions allowing petitions from children, but there is nothing to prevent the submission of petitions by children and their representatives. There have been a number of celebrated petitions submitted by parents and by NGOs concerning children's right to life, to protection from torture, denial of nationality, various forms of discrimination and so on: these are well-documented and the details available from the Commission and Court and their websites.

Some key arguments based on the Inter-American experience

a. Real meaning to the rights enshrined in the CRC

International Human Rights Law has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespectively of his link of nationality, of his political statute, of his gender, of his ethnic origin, of his age or any other situation or circumstance. Hence, in this new law of protection, the legal personality of the individual, as a right holder of both domestic and international law, the responsibility of the State for all its acts and all its omissions, brings to the fore the legal personality of the individuals and their direct access to international human rights mechanisms to vindicate their rights. Indeed, the direct access of children, to complain mechanisms regarding the violation of their rights in an international arena could bring real meaning to their rights contained in the CRC³. This statement is absolute relevant because the CRC is the only UN human rights treaty that has not a complaint mechanism. This has limited the protection of the rights of children in certain circumstances. For example, the Human Rights Committee rejected a case though it would have been clear for the Committee on the Rights of the Child that there was a violation of the treaty because the author who brought it was not considered as a representative of the child⁴.

b. Universality of the CRC

² For additional reference about "international human rights supervisory organs" see CANCELEDO TRINDADE, Antônio, *Direito das Organizações internacionais*, 4 edição, Editora Del Rey, Belo Horizonte, 2009.

³ Committee on the Rights of the Child, General Comment 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, paragraph 24.

⁴ UN Human Rights Committee, Communication No. 1355/2005 : Serbia, CCPR/C/89/D/1355/2005. (Jurisprudence), , 3 May 2007

The universality of the CRC is based on its almost universal ratification and the ratification by 127 for OP on children in armed conflict and 131 for OP on the sale of children. Whilst the Convention is the world's most ratified treaty, it is the only UN international human rights treaty which doesn't have a complaint mechanism. This is a core argument taking in consideration that procedural and substantive law are in a special relationship. Legal procedures help to the merits of bringing an action. Procedures make law real. This means that where there is right there should be a way to give effect to it.

In addition, a communication procedure would permit the Committee to develop new international standards to protect the rights of the child. Through case analysis international human rights supervisory organs have contributed to the recognition of other human rights that were not explicitly recognized in the past. For instance, the right of children to a life free of all forms of violence could benefit from the Committee's analysis. Both the Inter-American Commission and Court apply International Law principles to ensure full protection of the rights of the child. This practice would be useful for the analysis that could be held by the Committee in individual communications. For instance, in the first judgment regarding children in the Americas, the Inter-American Court concluded that "that the interpretation of an international instrument of protection ought to "accompany the evolution of times and the present-day conditions of life", and that such evolutive interpretation, in accordance with the general rules of interpretation of treaties, has contributed decisively to the advances of the International Law of Human Rights"⁵.

c. Unique rights enshrined on the CRC

The Inter-American Human Rights System has two main norms that contain specific provisions to the rights of children which are: the American Declaration on the Rights and Duties of Man and the American Convention and the American Convention on Human Rights. The American Declaration states that

Article VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Article XXX. It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it. (...)

The American Convention enshrines that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state". Under these provisions, specific rights of children are not cover explicitly. Nevertheless, there is no need for a specific regional treaty on the rights of the child.

Indeed, the CRC is the most comprehensive treaty, covering children's rights in all areas of their lives (civil, political and economic, social and cultural rights). The Committee on the Rights of

⁵ Inter-American Court of Human Rights, case Villagran Morales and others v Guatemala, Joint Concurring opinion of judges Antônio cançado Trindade and Abreu;Burelli paragraph 5; see also Advisory Opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999) Advisory Opinion OC-16/99, of 01.10.1999, Series A, n. 16, par. 114.

the Child provides expertise specifically on children's rights which no other Committee is in a position to do. A communications procedure would help to define the rights of the child under the CRC, specifically and exactly as they are asked for. Although most rights could be dealt with under other treaty bodies, there are quite a few that would be difficult to subsume (eg, Art. 11, 12, 18, 20, 33, 38). The complaints mechanism would allow children and young people to appeal to the UN Committee on the Rights of the Child when the state fails to fulfill its obligations under the Convention.

d. Evolving capacities of children

This special framework for the protection of the rights of the child is grounded on the special conditions of children as right holders, i.e. the vulnerability to which the child is exposed and its dependence on adults for the exercise of certain rights, the level of maturity, its progressive development, and the lack of knowledge of their rights and the mechanisms for enforcing them, which do not place children on an equal footing with adults, and consequently justify the adoption of special measures. In this regard, the Committee on the Rights of the Child has emphasized that ""children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights"⁶.

The Inter-American system has also addressed this issue of evolving capacities of children in relation with the special protection of the child. In the case of the girls Dilcia Yean and Violeta Bosico versus the Dominican Republic, the Court states that "at the time that the State accepted the contentious jurisdiction of the Court, Dilcia Yean and Violeta Bosico were children, who by virtue of that condition had special rights entailing special duties on the part of their family, society, and the state, and required special protection from the State, which should be understood as an additional, complementary right"⁷. Hence, special protection and recognition of the special conditions of children as rights holders do not mean by any reason denial of their right to enjoy locus standi at the international arena.

It is quite clear today that there is nothing intrinsic to International Human Rights Law that impedes or renders it impossible for children to enjoy international legal personality. Article 44 of the American Convention on Human Rights does not impose any requirement concerning the legal capacity of individuals. A child may consequently file an individual petition with the Commission even if he or she is not entitled to bring an action before the national courts. Unfortunately, children have not filed petitions on their own.

But this fact compels States to set up public and/or private information agencies for children, aimed at promoting the exercise of their rights and at providing information and advice

⁶ Committee on the Rights of the Child, General Comment 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, paragraph 24.

⁷ Inter-American Court of Human Rights Case of of the girls Dilcia Yean and Violeta Bosico versus the Dominican Republic judgment on the preliminary exceptions, merits and reparations, September 8, 2005, paragraph 133. See also Inter-American Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, note 84, paras. 53, 54 and 60, and *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004, Series C No. 110, para. 164; Inter-American Commission on Human Rights, *The Rights of the Child in the Inter-American Human Rights System*, Second Edition, paragraph 35.

on how to file individual petitions/communications. Partnership and cooperation with other actors would be key. For instance, local bar associations, child welfare services, NGOs, child led organizations would be essential to enable children not only to speak out about their rights but also to claim for their rights. All human rights bodies should take advantage of their web-sites to inform children on their rights. Certainly, the practice in dealing with individual petitions within the regional system allows us to state that a communication procedure would put extra pressure on States parties to fulfill their obligations on a national level.

What procedural recommendations could benefit from further analysis in the OP CRC?

Any kind of initiatives regarding international mechanisms to protect the rights of the child should provide child-sensitive procedures and child-friendly information.

Briefly, I would like to outline some procedural recommendations that could contribute to a more effective protection of the rights of the child within an OP CRC are: 1) an urgent or immediate response mechanism: the Inter-American system shows effective protection of the rights of the children throughout precautionary measures and provisional measures⁸. 2) Considering adding friendly settlements. 3) On site visits to investigate individual communications. 4) Exceptions to the exhaustion of domestic remedies would be needed under the OP CRC. 5) Working meetings with other UN and regional human rights bodies.

Concluding remarks

Children are holders of rights. Both the Commission and the Court have consistently developed a child-oriented approach in ruling on cases regarding children. Nevertheless, the fact is that the inter-American human rights bodies rarely deal with cases brought on behalf of children and never, at least up to now, with cases brought by them. To the best of my knowledge, the situation is similar in all other international human rights supervisory organs. But this is not because the rights of children are not violated – regrettably, we know that they are frequently violated across the globe – it is because their access to international human rights supervisory organs is not adequate. Indeed, the third OP CRC can make a real difference for the protection of the rights of the child around the world. I am convinced that the debates that will follow will be extremely interesting and useful. I hope this meeting will conclude with the decision to proceed with the elaboration of the necessary Third Optional Protocol.

⁸ Information about precautionary measures granted to protect children in the Americas is available on <http://cidh.org/Ninez/medidaseng.htm>