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HUMAN RIGHTS COUNCIL  
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Open-ended Working Group on an Optional Protocol  
to the International Covenant on Economic, Social  
and Cultural Rights  
Fourth session  
Geneva, 16-27 July 2007

**DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT  
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**Prepared by the Chairperson-Rapporteur,  
Catarina de Albuquerque**

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**Letter from the Chairperson-Rapporteur to the members of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights**

1. As you will recall, the Human Rights Council in its resolution 1/3 decided to extend the mandate of the Working Group for a period of two years in order to elaborate an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). To facilitate this task, the Council requested the Chairperson of the Working Group to prepare a first draft optional protocol to be used as a basis for the negotiations. The Council specified, in this regard, that the draft should include draft provisions corresponding to the various main approaches outlined in the Chairperson's analytical paper (E/CN.4/2006/WG.23/2) and take into account all views expressed during the sessions of the Working Group.
2. In response to this request, I have prepared the text enclosed in annex I to the present letter for your consideration at the fourth session of the Open-ended Working Group.
3. When preparing the text, I have carefully studied the views expressed and proposals made in the course of the first three sessions of the Working Group. In some cases, where it was not possible to account for all main views in one provision, I have proposed different options in bracketed text. My primary aim has been to present faithfully those views and proposals, so as to provide the Working Group with as useful a basis as possible for its forthcoming negotiations.
4. In this endeavour I have, to the extent possible, used agreed language from existing United Nations human rights treaties, bearing in mind the need to ensure coherence and consistency with the existing body of international human rights law (in accordance with the guidelines set out in General Assembly resolution 41/120, and as requested by delegations). Thus, the proposed text draws from existing communications procedures under optional protocols to the International Covenant on Civil and Political Rights (ICCPR-OP1); to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW); and to the Convention on the Rights of Persons with Disabilities (OP-CRPD); as well as under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). I was also constantly guided by the Vienna Convention on the Law of Treaties.
5. I sought the advice of a number of human rights experts - from all regions and with experience of United Nations treaty bodies and special procedures, as well as of regional mechanisms and national level litigation - on technical aspects of a preliminary draft at a meeting held in Lisbon from 29 September to 1 October 2006. The suggestions and comments provided at that meeting were very valuable for my efforts to prepare a legally sound and coherent first draft optional protocol. I am also very grateful for the constant support that was given to me by the Office of the United Nations High Commissioner for Human Rights (OHCHR).
6. The explanatory memorandum enclosed in annex II to the present letter sets out the rationale behind the proposed text and explains how I have sought to account for the various main proposals made in the course of our discussions. For ease of reference, I have indicated the session at which particular proposals and suggestions were made, as reflected in the reports of

three sessions of the Working Group (WG II and III). Obviously, proposals and suggestions made by delegates at previous sessions do not represent fixed positions. In many cases, suggestions were presented as ideas for further consideration, and positions on particular issues have evolved over time. Still, I hope my attempt to reflect in the present draft those main ideas and suggestions will provide a useful basis and reference for the next stage of our work, when we start the negotiations for the new human rights instrument.

7. I look forward to meeting with colleagues during the fourth session of the Working Group, from 16 to 27 July 2007, and during possible informal consultations with all interested delegations and regional groups before those dates. It is my hope that these occasions will allow us to make considerable progress.

*(Signed):* Catarina de Albuquerque  
Chairperson-Rapporteur of the Open-ended  
Working Group on an optional protocol to the  
International Covenant on Economic, Social  
and Cultural Rights

## ANNEXES

### Annex 1

#### **DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

*The States Parties to the present Protocol,*

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights and in the dignity and worth of the human person,

*Also noting* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

*Recalling* that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

*Also recalling* that the World Conference on Human Rights, in the Vienna Declaration and Programme of Action adopted in 1993, reaffirmed that all human rights are universal, indivisible and interdependent and interrelated,

*Considering* that in order further to achieve the purposes of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications concerning violations of any of the rights set forth in the Covenant.

*Have agreed* as follows:

#### **Article 1**

##### **The competence of the Committee**

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications and to conduct inquiries as provided for by the provisions of the present Protocol.

#### **Article 2**

##### **Individual communications**

[1.] Communications may be submitted by or on behalf of individuals or groups of individuals, subject to the jurisdiction of a State Party, claiming to be victims of a violation of any of the

rights set forth in [Parts II and III of] the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent.

[2. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee to consider individual communications under certain provisions of articles 2 (1) and 6 to 15 of the Covenant.]

### **Article 3**

#### **Collective communications**

1. The States Parties to the present Protocol recognize the right of international non-governmental organizations with consultative status before the United Nations Economic and Social Council to submit communications alleging unsatisfactory application of any of the rights set forth in the Covenant by a State Party.

2. Any State Party may also, at the time of ratification or accession to the present Protocol, or at any moment thereafter, declare that it recognizes the right of any representative national non-governmental organization within its jurisdiction, which has particular competence in the matters covered by the Covenant, to submit collective communications against it.

### **Article 4**

#### **Admissibility**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The Committee shall declare a communication inadmissible where:

(a) It is not submitted within six months after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;

(b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless the facts can be shown to amount to a violation of the Covenant after that date;

(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(d) It is incompatible with the provisions of the Covenant;

(e) It is manifestly ill-founded or not sufficiently substantiated;

- (f) It is an abuse of the right to submit a communication;
- (g) It is anonymous or not in writing.

## **Article 5**

### **Interim measures**

At any time after the receipt of a communication, the Committee may request the State party concerned to take such measures of interim protection as may be necessary to avoid possible irreparable damage to the victim of the alleged violation, when the risk of such damage is sufficiently substantiated.

## **Article 6**

### **Transmission of the communication**

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

## **Article 7**

### **Friendly settlement**

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. Any agreement on a friendly settlement shall be deemed to close consideration of the communication under the present Protocol.

## **Article 8**

### **Consideration of the merits**

1. The Committee shall consider communications received under articles 2 and 3 of the present Protocol in the light of all information made available to it by the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining communications under the present Protocol, the Committee shall give due consideration to relevant decisions and recommendations of other United Nations mechanisms as well as of bodies belonging to regional human rights systems.

4. When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.
5. After examining a communication, the Committee shall transmit its views on the merits together with its recommendations on the remedies, if any, to the parties concerned.
6. The State Party shall give due consideration to the Views of the Committee, together with its recommendations on the remedies, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the Views and recommendations of the Committee.
7. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its Views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

## **Article 9**

### **Inter-State communications**

1. A State Party to the present Protocol may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
  - (a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
  - (b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

(d) Subject to the provisions of subparagraph (c) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

- (i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
- (ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## **Article 10**

### **Inquiry procedure**

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of the rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
3. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
4. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
5. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
6. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report.

## **Article 11**

### **Follow-up to the inquiry procedure**

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 10 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 10, paragraph 5, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

## **Article 12**

### **Protection measures**

A State Party shall take all appropriate steps to ensure that individuals subject to its jurisdiction are not subjected to ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

### **Article 13**

#### **International assistance and cooperation**

The Committee shall transmit, as it may consider appropriate, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State party's observations and suggestions, if any, on these views or recommendations. The Committee may also bring to the attention of such bodies any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.

### **Article 14**

#### **Special fund**

1. To support the implementation of recommendations on remedies of the Committee under any of the procedures set forth in the present Protocol, and for the benefit of victims of violations of the Covenant, a special fund shall be set up by decision of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to provide economic assistance, when requested, to States parties that lack the financial means to implement effective remedies.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

### **Article 15**

#### **Annual report**

The Committee shall include in its annual report a summary of its activities under the present Protocol.

### **Article 16**

#### **Dissemination and information**

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the Views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats.

## **Article 17**

### **Rules of procedure**

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

## **Article 18**

### **Signature, ratification and accession**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Covenant.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## **Article 19**

### **Entry into force**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

## **Article 20**

### **The Committee's competence regarding the inquiry procedure**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 10 and 11.
2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

## **Article 21**

### **Reservations**

[No reservations to the present Protocol shall be permitted.]

## **Article 22**

### **Amendments**

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

## **Article 23**

### **Transfer of competences**

A Conference of States Parties to the present Protocol may decide, by two-thirds majority, whether it is appropriate to transfer to another body, without excluding any possibility, the competences attributed to the Committee by the present Protocol.

## **Article 24**

### **Denunciation**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 2, 3 and 9 before the effective date of denunciation.

## **Article 25**

### **Notification by the Secretary-General**

The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 22;
- (c) Any denunciation under article 24.

## **Article 26**

### **Official languages**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.

## **Annex II**

### **EXPLANATORY MEMORANDUM**

#### **Preamble**

1. The text of the draft preamble remains to be discussed by the Working Group. As a basis for our discussions, I have proposed wording which draws inspiration from the preambles of the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1) and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), listing the different instruments referred to in chronological order. The first two paragraphs refers to the Charter of the United Nations and the Universal Declaration of Human Rights, reflecting the first paragraphs of OP-CEDAW, leaving out the specific reference to the equal rights of men and women. The third and fourth paragraphs stress the indivisibility, interdependence and interrelatedness of all human rights, recalling the preambles of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and ICCPR<sup>a</sup> and the Vienna Declaration and Programme of Action. The fifth paragraph closely reflects the preamble of ICCPR-OP1, thus further underlining the complementarity of the two Covenants. I replaced the reference to “communications from individuals” with a more generic formula to take into account the possibility that the optional protocol includes a collective communications procedure.

#### **Article 1 (Competence to receive communications)**

2. The text of draft article 1 uses agreed language from ICCPR-OP1 and OP-CEDAW. Compared to existing language of ICCPR-OP1 and OP-CEDAW, draft article 1 adds a reference to the competence “to conduct inquiries” and qualifies the Committee’s competence by the clause “as provided for by the provisions of the present Protocol”.

#### **Article 2 (Individual communications)**

3. In order to reflect the various views and proposals as to which rights should be subject to a communications procedure, I have proposed alternative texts. The proposed text represents respectively:

(a) A “comprehensive” approach (allowing for communications under any of the rights of the Covenant);

(b) A “limited” approach (limiting the procedure to Parts II and III of the Covenant); and

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<sup>a</sup> The preambles of the two Covenants are almost identical, in line with the request of the General Assembly in its resolution 543 (VI), that the two Covenants be drafted so that they would contain as many similar provisions as possible in order to “emphasize the unity of the aim in view”.

(c) A “reservation” or “opt-out” approach (allowing a State party to exclude the application of the communications procedure from one or several provisions contained in articles 2, paragraph 1, and 6 to 15).

4. Article 2, paragraph 1 seeks to represent the position of a majority of delegates in the Working Group favouring a comprehensive approach, similar to that of all existing communications procedures under United Nations human rights treaties.<sup>b</sup> In line with proposals made by delegates, the text uses agreed language from article 2 of OP-CEDAW, stating that “[c]ommunications may be submitted by or on behalf of individuals or groups of individuals” (see also the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art. 14 (1) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) art. 2), changing “under the jurisdiction” (OP-CEDAW) to “subject to the jurisdiction” (ICCPR-OP1).<sup>c</sup> As in OP-CEDAW and OP-CRPD the second sentence of paragraph 1 indicates that “[w]here a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent”, leaving out the last part of the sentence in OP-CEDAW article 2 (“unless the author can justify acting on their behalf without such consent”), equally left out in OP-CRPD article 2.

5. To reflect another proposal made in the Working Group, article 2, paragraph 1, includes bracketed text which would limit the scope of the procedure to rights set forth in Parts II and III of the Covenant, thus excluding communications under article 1.<sup>d</sup> The main concern of States in relation to article 1 would seem to be the prospect of communications relating to claims about the right to self-determination. Some delegates have noted in this regard that the identical article of ICCPR is already subject to an individual communications procedure and that the established jurisprudence of the Human Rights Committee in relation to article 1 has been “that no claim for self-determination may be brought under the Optional Protocol” (see e.g. inadmissibility decision No. 413/1990, *A.B. et al. v. Italy*, adopted on 2 November 1991). It should, however, be noted that the Human Rights Committee, in recent decisions, has clarified that the provisions of article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27 (see Views on communication No. 760/1997, *Diergaardt et al. v. Namibia*, adopted 20 July 2000, para. 10.3).

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<sup>b</sup> States and regional groups which have expressed support for a “comprehensive” approach include the African Group, Angola, Argentina, Azerbaijan, Belgium, Brazil, Congo, Costa Rica, Croatia, Cuba, Ecuador, Egypt, Ethiopia, Finland, Italy, Iran, Madagascar, Mexico, Morocco, Portugal, Senegal, Spain, South Africa, Switzerland, and Venezuela (Bolivarian Republic of) (WG II and III).

<sup>c</sup> The delegates of Argentina, Azerbaijan, Brazil, Finland, Italy, Mexico, Norway, Portugal, Spain, and South Africa have supported the option of allowing individuals and groups of individuals to submit communications (WG III).

<sup>d</sup> The proposal to exclude article 1 was made by the Russian Federation (WG II).

6. Article 2, paragraph 2, seeks to address the different and sometimes complex proposals to limit the scope of a communications procedure to: (a) “core rights” or “minimum contents” of rights;<sup>e</sup> (b) non discrimination;<sup>f</sup> (c) serious violations of Covenant rights;<sup>g</sup> and (d) “respect” and “protect” aspects of the rights, with an opt-out procedure allowing States to exclude “fulfil” aspects.<sup>h</sup> Paragraph 2, as currently drafted, aims to cover most variations of a limited approach, by allowing States to exclude communications concerning certain provisions contained in articles 2, paragraph 1, and 6 to 15. For example, excluding communications under article 2, paragraph 1 would limit the scope of the procedure to the non-discrimination provisions of article 2, paragraph 2 and 3.

### **Article 3 (Collective communications)**

7. The option of a collective communications procedure has not received much attention in the discussions of the Working Group. A number of delegates have expressed a preference for including such a procedure, as an addition to the individual communications’ procedure.<sup>i</sup> Some have noted that a collective communications procedure could be given further consideration under the condition that it would not replace, but complement the individual communications procedure.<sup>j</sup> One delegate has argued against including collective communications.<sup>k</sup>

8. While no specific suggestions were made as to how a collective communications procedure could be included in an optional protocol, I have reflected this proposal in article 3. As noted in my analytical paper communications procedures of the International Labour Organization (ILO) as well as the European system give standing to specific organizations rather than to individuals or groups of individuals. In drafting article 3, I have drawn inspiration from articles 1 and 2 of the 1995 Optional Protocol to the European Social Charter, modifying the text to reflect the specific nature of the Covenant, which, contrary to the European Social Charter and the ILO Conventions, does not refer to a tripartite process involving trade unions, employers’ organizations and Governments. The proposed article gives standing to NGOs with consultative status before ECOSOC to present communications and also opens the possibility, which already exists under the 1995 Optional Protocol to the European Social Charter, for States to recognize the right of national NGOs to submit communications.

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<sup>e</sup> Proposal made by Germany, Norway (WG II), Sweden, and the United Kingdom (WG III).

<sup>f</sup> Proposal made by the United Kingdom (WG III).

<sup>g</sup> Proposal made by France, Greece (WG II), and the Republic of Korea (WG III).

<sup>h</sup> Switzerland (WG II and III).

<sup>i</sup> Ethiopia (on behalf of the African Group) and the Netherlands (WG III).

<sup>j</sup> Canada, Finland, Mexico, and Portugal (WG III).

<sup>k</sup> Greece (WG III).

#### Article 4 (Admissibility)

9. In our discussions so far, there was general agreement about the need for clear admissibility criteria. In this regard, several delegates recommended the inclusion of similar admissibility criteria as those of OP-CEDAW and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>1</sup>

10. The inclusion of a provision on the exhaustion of domestic remedies in relation to individual communications has received general support in the Working Group's discussions. Equally, a number of delegates have argued that such provision should allow for exceptions in cases where remedies are unlikely to be effective,<sup>m</sup> or in cases where remedies are unreasonably prolonged or the domestic legislation does not afford due process of law,<sup>n</sup> as reflected in the inter-American system and in the practice of the United Nations mechanisms.<sup>o</sup> In the case that draft article 3 on collective communications is retained, it should be specified that the criteria of exhaustion of domestic remedies would not apply to such communications for which there would be no victim requirement.

11. Article 4, paragraph 1, uses language from ICCPR-OP1 (art. 5, para. 2 *b*) and OP-CEDAW (art. 4, para. 1). Guided by the need to ensure coherence within the United Nation human rights treaties, I have chosen not to add an additional exception clause referring to cases in which "domestic legislation of the state concerned does not afford due process of law ..." (see article 46, paragraph 2 *a*, of the American Convention on Human Rights), as the wording of the existing United Nations human rights treaties adequately covers this aspect. Under those procedures, and the jurisprudence developed by the respective treaty bodies, the exhaustion of domestic remedies is only required when available remedies are effective and offer reasonable prospects of success.

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<sup>1</sup> Canada, Brazil, Finland, France, Mexico, Portugal, Switzerland, and the United Kingdom (WG III).

<sup>m</sup> Mexico and Brazil (WG II).

<sup>n</sup> Argentina, Azerbaijan, Finland, Mexico, and Portugal (WG III).

<sup>o</sup> Article 46 (2) of the American Convention on Human Rights (Pact of San Jose, Costa Rica) provides that "The provisions of paragraphs 1.a [that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law]; and 1.b [that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment]; ..." shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. (See <http://www.oas.org/juridico/english/Treaties/b-32.htm>).

12. The text of article 4, paragraph 2, apart from subparagraphs (a), (b) and (g), identical provisions are found in articles 4, paragraphs 2 of CEDAW and OP-CRPD (see also CAT art. 22, para. 5 a and ICCPR-OP1 art. 5, para. 2 a).

13. Subparagraph (a) introduces new language, to reflect a suggestion made by a number of delegates that communications should be submitted within a reasonable time limit after exhaustion of domestic remedies.<sup>p</sup> While none of the other United Nations human rights treaties contains such provision, CERD sets a similar six months limitation in its rules of procedures.

14. Subparagraph (b), like OP-CEDAW (art. 4, para. 2 e) and OP-CRPD (art. 4, para. 2 f), includes a provision on competence *ratione temporis*, excluding communications concerning alleged violations which occurred before the entry into force of the procedure. Subparagraph (b) replaces “unless those facts continued after that date” (OP-CEDAW, OP-CRPD) with “unless the facts can be shown to amount to a violation of the Covenant after that date”. It has been pointed out during our discussions that such explicit provision might not be necessary, as it is covered in the Vienna Convention on the Law of Treaties.

15. Subparagraph (g) excludes communications which are anonymous and not in writing, a criterion on which there was general agreement in the Working Group. Subparagraph (g) uses similar language to CERD article 14, ICCPR-OP1 article 2 and OP-CEDAW article 3. A suggestion was made by two delegates that the Committee in certain cases could withhold the name of a complainant.<sup>q</sup> However, given the preference expressed by most delegates for a provision excluding anonymous communications and also in light of the precedent of other human rights communications mechanisms, I have chosen not to include such exception clause in the draft.

#### **Article 5 (Interim measures)**

16. Several delegates have argued that the Committee supervising a communications procedure should have the power to request interim measures to prevent possible irreparable harm to an alleged victim.<sup>r</sup> Interim measures are foreseen in all communications procedures; either in the rules of procedures of the respective committees (ICCPR-OP1, ICERD, CAT) or in a treaty provision (articles 5 of OP-CEDAW and OP-CRPD). Interim measures have been applied under these procedures to respond to exceptional or life-threatening situations.

17. I have included a provision on interim measures in the draft text. Another option would be to leave such procedure for the Committee’s rules of procedure.

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<sup>p</sup> Canada, South Africa, and Sweden (WG III).

<sup>q</sup> China and France (WG III).

<sup>r</sup> Angola, Argentina, Belgium, Brazil, Canada, Finland, Mexico, Morocco (on behalf of the African Group), Portugal, Russian Federation, Spain, and Switzerland (WG III).

18. A suggestion was made by the African Group that a linkage should be established between the use of interim measures and the capacity or resources available to States. I was unable to find appropriate language for such criterion, which is not found in any of the existing communications procedures. In considering the added value of such new criterion, it would be important to bear in mind the voluntary nature of compliance with requests for interim measures and the purpose of interim measures to respond to exceptional or life-threatening situations. Equally, the Committee, consistent with its practice in considering reports, would be expected to take into account the issue of resource constraints not only in its consideration of interim measures, but also more generally in its consideration of communications under an optional protocol.

#### **Article 6 (Transmission of the communication)**

19. This issue has not been discussed at any length in the Working Group. Partly, it would seem, because of the uncontroversial nature of this provision. The other existing communications procedures establish similar rules for the transmission of communications and information provided by the parties in their rules of procedure, setting fixed time limits for comments and submissions. In the course of the Working Group's discussions, a number of delegations have equally underlined the importance of deadlines for parties' submissions to avoid unduly prolonged proceedings.

20. I have chosen to include a specific provision on the transmission of communications, rather than leaving it to the Committee's rule of procedure, using agreed language from OP-CEDAW. Article 6 in the present draft is identical with OP-CEDAW article 6, except from the deletion of the second sentence of the first paragraph reading "and provided that the individual or individuals consent to the disclosure of their identity to that State Party", which underlines that a communication received from a known person who wishes to protect his/her identity cannot be acted upon by the Committee, as communications cannot be anonymous (as stipulated in article 4 of the present draft and OP-CEDAW article 3).

21. While inclusion of the deleted sentence of OP-CEDAW article 6 would provide an opportunity for those who wish to protect their identity to change their mind once it becomes clear that the threshold requirements for admissibility are fulfilled, I have left out this sentence, so as to make it clear that the Committee cannot receive a communication whose author does not wish to have his or her identity disclosed to the State party.

#### **Article 7 (Friendly settlement)**

22. Friendly settlement is a general principle of international law and is only included explicitly in the inter-state procedure under ICCPR (art. 41, para. 1 *e*), CAT (art. 21, para. 1 *c*) and ICRMW (art. 76, para. *d*). The possibility of friendly settlement is also explicitly recognized in the Inter-American and European systems. In the Working Group, several delegations have expressed their support for a provision on friendly settlement in the optional protocol.<sup>s</sup>

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<sup>s</sup> Argentina, Azerbaijan, Brazil, Canada, Finland, Iran, Mexico, Morocco (on behalf of the African Group), Russia, Switzerland, and Venezuela (Bolivarian Republic of) (WG III).

23. Article 7 is based on ICCPR (art. 41, para. 1 *e*) and ICRMW (art. 76, para. 1 *d*), the meaning of which, once modified from an inter-State procedure to a procedure of individual communications, is similar to that of article 48, paragraph 1, subparagraph (*f*), of the American Convention on Human Rights. The proposed text, adds new wording in the last sentence, specifying that “Agreement on friendly settlement shall be deemed to close consideration of the communication ...”

### **Article 8 (Consideration of the merits)**

24. A number of suggestions concerning the proceedings on the merits have been made by delegates during the sessions of the Working Group. In particular, different suggestions were made as to whether the merits of a communication should be examined separately from or simultaneously with the examination of its admissibility. A majority of delegates which expressed a view on this issue were of the opinion that the merits of a communication should be considered separately from the examination of the admissibility.<sup>t</sup> In this regard, one delegate noted that the joint consideration of merits and admissibility would lead to a rapid consideration of the communication, but that States should be able to request that admissibility be examined separately from the merits, as provided for in the rules of procedure of the Human Rights Committee (rule 97).

25. The issue of whether such option should be included in a provision in the optional protocol or left for the rules of procedures has not been discussed in the Working Group. In this regard, it should be noted that all existing United Nations human rights communications procedures specify the option of separating the consideration of the admissibility and the merits, as well as the time limits of submissions, in the rules of procedure of their respective committees.

26. Another issue, raised by two delegates, was the usefulness of oral hearings as provided for in the rules of procedures of CAT (rule 111, subpara. 4) and CERD (rule 95, subpara. 5).<sup>u</sup> However, no specific suggestion was made for inclusion of such option in the text of the optional protocol.

27. In order not to overcharge the draft text, and in light of the formula used in other communications procedures, I have chosen not to include a specific provision on the possibility of separating the consideration of admissibility and merits or on oral hearings, and used agreed language from OP-CEDAW, which also provides that the meetings at which the Committee examines communications shall be closed (similar to ICCPR art. 7, para. 2 and ICRMW art. 76, para. 1 *e*). With the exception of paragraphs 3 and 4, the present article 8 mirrors article 7 of OP-CEDAW, with minor amendments to paragraphs 5 and 6.

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<sup>t</sup> States which have supported this option include: Argentina, Azerbaijan, Mexico, Morocco (on behalf of the African Group), and Spain (WG III).

<sup>u</sup> Finland and Mexico (WG III).

28. Paragraph 3 introduces new language to reflect the suggestion that an optional protocol should take due account of, and benefit from, the experience of the existing regional human rights mechanisms. At the last session of the Working Group, it was suggested that such regional mechanisms should be exhausted before a communication could be submitted at the global level. Another suggestion was that a victim should be free to decide which international mechanism he/she would prefer to use: the regional or the universal. However, in the discussions there seemed to be general agreement as to the importance of ensuring cooperation and avoid duplication between regional and United Nations human rights mechanisms. I have formulated paragraph 3 in a way that would cover these suggestions and hopefully be acceptable to all.

29. In paragraph 4, I have reflected a suggestion made by a number of delegates that an optional protocol should underline the need for the Committee to apply a standard of reasonableness in assessing questions concerning national policymaking and resource allocations.<sup>v</sup> Other delegates argued that such standard was already implicit in the Covenant, and that there was no need to include such criteria in the optional protocol. Equally, the point was made that it would be difficult to define more specific criteria to assess the reasonableness of policies and resource allocations. Present article 8, paragraph 4, includes a reference to a standard of “reasonableness” and, to underline its consistency with the nature of States parties’ obligations, the provision closely reflects the wording of article 2, paragraph 1, of the Covenant.

#### **Article 9 (Inter-State procedure)**

30. The possible inclusion of an inter-State procedure remains to be discussed by the Working Group. Part of the reason why this issue has not received much attention in our discussions so far is probably related to the fact that existing inter-State procedures under other human rights mechanisms have never been used.

31. As the option of an inter-State procedure has been mentioned in the course of the Working Group’s discussions, article 9 of the present draft includes such procedure using wording from ICCPR article 41 and ICRMW article 76 (see also CAT art. 21).

#### **Articles 10-11 (Inquiry procedure)**

32. Delegates have expressed views for or against including an inquiry procedure in an optional protocol, and this is clearly an issue which requires further discussion in the Working Group. A number of delegates have argued for the inclusion of an inquiry procedure in the optional protocol.<sup>w</sup> Others have stated that they had no defined position on this issue,<sup>x</sup> while yet others have expressed concerns about and argued against such procedure.<sup>y</sup>

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<sup>v</sup> A proposal made by Canada, Norway, the United Kingdom (WG III).

<sup>w</sup> Azerbaijan, Finland, Mexico, Portugal (WG III).

<sup>x</sup> Argentina, Brazil, Belgium, Chile, France, Italy, Spain, the United Kingdom (WG III).

<sup>y</sup> Egypt, Nigeria, Angola (WG III).

33. In order to reflect this option in the draft text, and given the lack of suggestions as to the specific features of such procedure, I have used agreed language from the identical provisions of OP-CEDAW (arts. 8 and 9) and OP-CRPD (arts. 6 and 7) (present draft arts. 10, paras. 1-5 and 11) and from CAT (art. 20, para. 5) (present draft art. 10, para. 6).

#### **Article 12 (Protection measures)**

34. While not discussed in the Working Group, I have included an article on protection measures, identical to article 11 of OP-CEDAW, for further consideration by the Working Group.

#### **Article 13 (International assistance and cooperation)**

35. In the Working Group several delegates have underlined the importance of international assistance and cooperation as a tool to ensure a better implementation of economic, social and cultural rights in general, and of the Committee's views and recommendations in particular. One main proposal made in this regard was to give effect to the procedure already established in the Covenant under article 22, enabling the Committee to transmit its Views and requests for technical cooperation - in light of concrete and individualized cases under an optional protocol - aimed at achieving progressive implementation of particular provisions of the Covenant, so that the agencies and programmes in question could identify tangible international measures to assist a State in need. I made this suggestion in my analytical paper (E/CN.4/2006/WG.23/2, paras. 54 and 55) and several delegates expressed support for such provision at the last session of the Working Group.<sup>z</sup> In article 13, I have aimed to reflect this proposal, drawing inspiration and wording from article 22 of the Covenant and article 45, paragraph 3 of the Convention on the Rights of the Child.

#### **Article 14 (Special fund)**

36. Another proposal made as to how the optional protocol could encourage and facilitate international assistance and cooperation was the establishment of a special fund to assist States facing serious resource constraints in implementing the Committee's Views and recommendations. Similar funds are also included in OP-CAT and the Rome Statute of the International Criminal Court. Article 17 aims to reflect this proposal, based on the model of OP-CAT article 26.

#### **Articles 15-26**

37. The last part of the present draft optional protocol, articles 15-26, deals with a number of technical aspects, most of which remain to be discussed by the Working Group: the annual report

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<sup>z</sup> Brazil, Finland, Mexico, Portugal, Spain (WG III).

(art. 15), duty of States to disseminate information on the optional protocol (art. 16), rules of procedure (art. 17), signature, ratification and accession (art. 18), entry into force (art. 19), the Committee's competence regarding the inquiry procedure (art. 20), reservations (art. 21), amendments (art. 22), transfer of competences (art. 23), denunciation (art. 24), notification by the Secretary-General (art. 25), and official languages (art. 26).

38. In drafting these provisions I have primarily used agree language from OP-CEDAW articles 12-21. The main innovations are the following.

39. Article 15 uses the wording "disseminate" rather than "give publicity to" (CEDAW-OP art. 13), and adds that States should make information on the Covenant and the optional protocol available "in accessible formats".

40. Article 20 refers to the Committee's competence regarding the inquiry procedure. The text is identical to that of OP-CEDAW article 10, but rather than placing this article together with articles 10 and 11 of the present draft (defining the inquiry procedure), I thought it would be more logical to place this article, allowing for reservations to articles 10 and 11, just before article 21 on reservations.

41. Article 21 on reservations is the only of the provisions 15 to 26 which has been discussed at any length in the Working Group. A number of delegates have argued that reservations should not be permissible.<sup>aa</sup> Others have argued that reservations should be permissible, as long as they were not incompatible with the object and purpose of the treaty,<sup>bb</sup> while yet others have suggested that a provision on permissible reservations could be considered.<sup>cc</sup> Importantly, a number of delegates pointed out that the approach taken to the issue of reservations would need to be considered in the light of the approach taken with regard to the scope of the optional protocol (see article 2 of the present draft).

42. In order to reflect all main approaches, the present draft includes between brackets a provision excluding reservations, as a basis for further discussions on this issue. As I pointed out in my analytical paper, the Working Group might wish to consider:

- (a) The effect of permitting reservations in an instrument which is of an optional nature;
- (b) The similarities between a communications procedure allowing reservations and selective, "opt-out", approach, and whether the choice of one would preclude the use of the other;
- (c) The applicability of the Vienna Convention on the Law of Treaties.

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<sup>aa</sup> Czech Republic, Ethiopia, Ghana, Belgium (WG II) and Azerbaijan (WG III).

<sup>bb</sup> Russian Federation, Angola, China, Japan (WG III).

<sup>cc</sup> African Group (WG III).

43. Article 23 introduces new language to ensure sufficient flexibility with regard to the competent treaty monitoring body in the context of the on-going treaty body reform process. Although such a provision has never been proposed in the Working Group, I think the suggested text might address some questions which have been raised by delegations in the course of the Working Group's meetings.

44. Article 24 on denunciations includes a reference to one year (as in OP-CRPD and article 56, paragraph 2 of the Vienna Convention on the Law of Treaties).

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