Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure

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Introduction

The International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (NGO Coalition) brings together individuals and organizations from around the world who supported the creation of the Optional Protocol and actively contributed to the drafting process leading to its adoption. Our members include international NGOs, regional and international networks, grassroots activists, community-based organizations, and individuals, all of whom share the common goal to promote economic, social and cultural rights through the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP ICESCR). The NGO Coalition is committed to ensuring that the Optional Protocol enters into force as soon as possible and is utilized in the most effective manner for the protection of rights under the International Covenant on Economic, Social and Cultural Rights (Covenant).

This paper presents the NGO Coalition's views regarding key provisions of the OP ICESCR that it considers should be reflected in the Committee on Economic, Social and Cultural Rights (Committee) Rules of Procedure related to individual communications. We recognize that many questions regarding interpretation and application of the OP ICESCR will best be addressed by the Committee through the development of its jurisprudence. However, we consider the issues addressed in this paper to be appropriate for clarification in this preliminary stage of the Committee's work in light of their centrality to the effectiveness of the procedure and the existence of well-established jurisprudence and practice from other human rights bodies.

The paper does not aim to provide detailed language for inclusion in the Rules of Procedure (Rules), nor does it aim to be complete in addressing all of the issues that the Committee will want to include in its Rules. Rather, it presents the Coalition's priority concerns regarding the application of several provisions of the OP ICESCR, reviews the drafting history regarding those provisions in order to clarify the meaning of the text that was adopted, and considers the implications of the wording of the provisions for the content and scope of the Rules of Procedure. The paper addresses matters related to: (a) procedures for receiving and registering communications; (b) consideration of communications; (c) requests for and monitoring of interim measures; and (d) follow-up measures.

The OP ICESCR that emerged from many years of debate is one which provides the Committee with the mandate and duty to adjudicate claims addressing *all* components of the Covenant and *all* aspects of state obligations. In order to fulfill this mandate, the Committee will need to develop Rules of Procedure that do not indirectly preclude the adjudication of the types of claims that the drafters adamantly insisted on including in the OP ICESCR.

Comparative experiences in the adjudication of economic, social and cultural rights, particularly in cases which involve the collective dimensions of these rights, demonstrate the importance of adapting the procedure to the specific nature of the issues at stake. This paper is intended to highlight those procedural aspects which require particular attention, in order to provide information that may assist the Committee in approaching cases concerning complex issues and assessing the appropriateness of the measures adopted by the State to realize the rights enshrined in the Covenant. In these types of cases, it is especially important for the outcome of the Committee's deliberations to reflect adequately the full picture of the situation raised by the communication concerned. A flexible approach to questions such as standing and information provided by third parties may thus be necessary.

In addition, the procedure should be sensitive to the barriers and obstacles suffered by disadvantaged and marginalized groups, which are the most frequent victims of violations of economic, social and cultural rights. The paper offers several recommendations intended to lessen the effects of those barriers and to promote equality of arms between the parties.

Finally, this contribution includes some suggestions and recommendations concerning innovative features of the OP ICESCR – that is, features which do not have precedents in the individual communications procedures in the universal human rights system. Such features include the discretionary criteria of "clear disadvantage" to decline consideration of a case, the friendly settlement mechanism, and the "reasonableness" standard of review.

The NGO Coalition welcomes the opportunity to provide any assistance we can to ensure that the OP ICESCR fulfills the hopes and expectations of those who have struggled so long for this historic advance.

Article 2: Standing for Third Parties Acting without the Victim's Consent

Article 2
Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in 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 unless the author can justify acting on their behalf without such consent.

Although Article 2 addresses several broad issues concerning the Committee's competence with regard to individual communications, the NGO Coalition wishes to focus its remarks on concerns relating to an aspect of this provision closely linked to the efficacy of the communications procedure as a means of redress for many of the individuals and communities most frequently affected by violations of rights under the Covenant: standing for third parties acting on behalf of victims without their consent in circumstances where the author can justify the absence of consent. This basis for standing, like the whole of Article 2, is modeled on Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP CEDAW).

The recognition of standing for third parties acting on behalf of victims without their consent offers a means for addressing many of the most common and larger scale violations of the Covenant. Breaches of rights protected by the Covenant frequently have collective dimensions and affect groups and communities as such, in contrast to violations of purely individual scope. Claims regarding widespread practices that create systemic or structural violations require collective remedies. In such situations of widespread or collective violations, it will be impractical to obtain consent from large numbers of victims, and a communication submitted on behalf of a small number of individual victims who have given consent may not adequately represent the systemic or collective nature of the violations. The recognition in Article 2 of an exception to the general requirement of consent thus allows the Committee to consider claims that more accurately represent the collective or systemic nature of many violations. In addition, the exception takes into account circumstances in which the consent of individual victims may be difficult or impossible to obtain. This includes claims regarding victims who face a danger of reprisal if they consent to the presentation of a claim on their behalf, victims who are deceased, imprisoned, or detained, or victims whose whereabouts cannot be determined following displacement.

In light of these considerations, the NGO Coalition urges the Committee to adopt an approach that assesses the "justification" for acting without the victims' consent *in the specific circumstances of the case*, rather than defining the factual bases accepted as establishing "justification" in the abstract. In making such determinations, the Committee should consider the facts of each case, in light of such factors as: the nature of the alleged

violation; the circumstances that make obtaining the consent of the alleged victims unworkable or impossible; the capacity of the third party to represent the interests of the victims effectively, including attentiveness to the needs of victims; and the absence of any conflict between the interests of the victims and possible interests that third parties may themselves have in relation to the claim. The Committee should require a third party seeking to act without the consent of the victim(s) to submit a written explanation of the justification for such action, in order to obtain information on which to base its evaluation.[1]

Main considerations regarding Article 2

The NGO Coalition recommends that with regard to the standing of third parties acting on behalf of victims without their consent, the Rules of Procedure should stipulate that:

> **i) Where an author seeks to submit a communication in accordance with paragraph 2 of the present rule, the author shall provide written reasons justifying such action.**
> **ii) The Committee shall determine whether the submission of a communication without the victim's consent is justified in light of the particular circumstances of the case."**

Article 3(1): Exhaustion of Domestic Remedies as a Condition of Admissibility

Article 3(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.

Article 3(1) sets out the long established rule requiring the exhaustion of domestic remedies before a claim can be presented at the international level. The NGO Coalition considers that this provision should be interpreted and applied in light of *both* existing human rights jurisprudence *and* factors particular to violations of economic, social and cultural rights. The exhaustion rule is the subject of extensive jurisprudence under the UN and regional human right treaties and its main parameters are well settled. Exceptions to the rule have been recognized in a wide range of circumstances. Factors particular to violations of rights under the Covenant that will necessarily influence the application of the exhaustion requirement under the OP ICESCR include: the systemic or collective nature of many violations; the absence of judicial remedies in numerous domestic systems; and the need to clarify standards regarding the adequacy and effectiveness of non-judicial remedies for violations.

The underlying aim of the exhaustion rule is to provide the State with an opportunity to redress a violation by means of its domestic legal system before a claim is brought to an

international body.[2] The rule is premised on the assumption that there *is* an effective remedy in the domestic system available for the alleged violation. The exhaustion requirement in Article 3(1) is therefore inextricably linked to the duty of the State to provide domestic remedies as a means of giving full effect to the rights recognized in the Covenant. As the Committee observed in its General Comment 9, on the domestic application of the Covenant: "[a] State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of Article 2, paragraph 1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."[3] Many domestic systems lack adequate and effective remedies for violations of the rights protected by the Covenant, including judicial remedies or enforceable administrative remedies that guarantee due process of law. In the absence of effective domestic remedies, the exhaustion requirement in Article 3(1) does not apply.

The phrase "all available domestic remedies" in Article 3(1) must be interpreted in a manner consistent with well established jurisprudence and generally recognized principles of international law concerning the exhaustion rule.[4] Human rights jurisprudence makes clear that in order to fall within the scope of the exhaustion rule, a domestic remedy must satisfy three criteria: it must be *available* in practice, *adequate* (or "sufficient") to provide relief for the harm suffered, and *effective* in the particular circumstances of the case. The availability, adequacy and effectiveness of a remedy must be sufficiently certain not merely in theory but also in practice. The formal existence of remedies in the domestic system does not impose a requirement to make use of them in a given case.[5]

- The *availability* of a remedy depends on its *de jure* and *de facto* accessibility to the victim in the specific circumstances of the case. As noted above, the *de jure* availability of remedies for violations of the rights protected by the Covenant remains limited in many domestic systems. For disadvantaged sectors of society and particularly vulnerable groups, the *de facto* availability of the remedies that do exist in the law is restricted by social and economic obstacles of a structural or systemic character. Domestic remedies may prove illusory due to economic barriers, such as lack of free legal aid, the location of courts or administrative tribunals, and procedural costs, or due to the broad-based effects of structural inequalities on women, migrants, indigenous communities, marginalized racial and ethnic groups, and other sectors of society that face systemic discrimination. [6]

- The *adequacy* of a remedy depends on the nature of the violation, the type of relief that may be obtained in the event of a successful outcome, and the objective sought by the victims in the particular circumstances of the case. Violations of the rights under the Covenant involving social policy measures that affect large groups of victims or breaches of collective rights generally cannot be adequately addressed through remedies designed for the settlement of individual claims. In

applying the exhaustion rule, it will therefore be necessary for the Committee to evaluate the adequacy of domestic remedies as a means of addressing the collective dimensions of these rights, including whether standing requirements and participation and monitoring mechanisms are adequate to protect the interests of affected groups and communities,[7] as well as considering the adequacy of remedies for redressing individual claims.

- The *effectiveness* of a remedy depends on the nature of the violation, the nature of the remedy, and the relationship between the remedy and the facts of the case. To be effective, a remedy must be capable of producing the result for which it was designed and it must offer a reasonable prospect of success or a reasonable possibility that it will prove effective. Core elements of an effective remedy include enforceability, the independence of the decision-making body and its reliance on legal standards, the adequacy of due process protections afforded the victim, and promptness. The express reference in Article 3(1) to the exception for remedies that are unreasonably prolonged points to the particular importance of promptness or timeliness as an aspect of effectiveness.

Human rights bodies have emphasized that the exhaustion rule must be applied with a degree of flexibility and without excessive formalism, bearing in mind that it is being applied in the context of a machinery for the protection of human rights and that the application of the rule requires an assessment of the particular circumstances of each individual case.[8] Exceptions to the exhaustion requirement have been recognized on the basis of the facts of the individual case and the facts concerning the general legal, political and socioeconomic context within which the remedy operates. [9]

With regard to the types of remedies to which the rule applies, existing jurisprudence considers it to apply primarily to judicial remedies but also to administrative remedies if they are *de facto* available, adequate and effective in the particular circumstances of the case. To satisfy these criteria and fall within the scope of the rule, administrative remedies must be provided by a decision-making body that is impartial and independent, has the competence to issue enforceable decisions, and applies clearly defined legal standards. The proceedings must ensure due process of law, including the possibility of judicial review, and the remedies must be prompt. However, jurisprudence consistently holds that the rule does not apply to discretionary remedies whose purpose is to obtain a favor and not to vindicate a right.

Burden of proof regarding the exhaustion of domestic remedies and waiver of the requirement

Established human rights jurisprudence requires a State contesting admissibility on grounds of non-exhaustion to demonstrate that an unexhausted remedy would be available in practice, adequate and effective in the particular circumstances of the case. The regional human rights bodies and the Human Rights Committee apply the equivalent of a shifting burden of proof with regard to the exhaustion of domestic remedies. Once a complainant presents a credible claim that domestic remedies have been exhausted or an

exception to the requirement applies, if the State wishes to contest exhaustion it bears the burden of proving that "the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success."[10]

Evidence of the formal existence of remedies is not sufficient to discharge the State's burden of proof. The State should provide "details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective."[11] The information provided by the State as to effectiveness must be detailed and relate to the specific circumstances of the case.[12] If the State advances such proof, the burden shifts back to the complainant to show that the remedies identified by the State were exhausted or an exception to the rule applies. This allocation of the burden of proof reflects an awareness that the State enjoys significant advantages over the complainant in connection with access to evidence relevant to the exhaustion requirement.

In its Rules of Procedure, the Inter-American Commission on Human Rights has recognized that the State should bear the burden of proving non-exhaustion in circumstances where the complainant lacks access to the evidence necessary to demonstrate exhaustion. The Rules stipulate that when the complainant alleges that he or she is unable to prove exhaustion, the State must demonstrate that "the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record." [13]

Based on the same considerations regarding inequality of arms, the Committee should follow existing practice regarding burden of proof on the exhaustion of domestic remedies. Clarity about the distribution of the burden of proof under Article 3(1) would contribute to the effective functioning of the communications procedure, bearing in mind that the exhaustion of domestic remedies is among the most common grounds advanced by States as a basis for contesting admissibility under other human rights complaints procedures.

In addition, the Committee should recognize that the exhaustion rule can be waived by the State and if it fails to raise non-exhaustion in the first available opportunity, it will be estopped from doing so at a later stage. The European Court of Human Rights, the Inter-American Commission and the Inter-American Court of Human Rights have held that the State may tacitly or expressly waive the exhaustion requirement, since the rule is designed for the benefit of the State and operates for it as a defense. If the State fails to assert non-exhaustion during the first stages of the proceedings, tacit waiver of the requirement by the State will be presumed. Once effected, waiver is irrevocable.[14] This approach is supported by principles of fairness and judicial economy, bearing in mind that exhaustion is an admissibility requirement of procedural character that is for the State's benefit.

Main considerations regarding Article 3(1)

Article 3(1) of the Optional Protocol should be interpreted in a manner consistent with the overarching aim of providing justice to victims and with authoritative jurisprudence on the exhaustion rule in the field of human rights. In order to clarify the basic meaning of Article 3(1), as understood in light of well established jurisprudence, the Rules of Procedure should incorporate explicit references to the criteria of *de facto* availability, adequacy and effectiveness, as well as references to promptness, enforceability and accessibility as aspects of the effectiveness of remedies. The Rules should also incorporate provisions regarding the allocation of the burden of proof when the State contests exhaustion and waiver of the exhaustion requirement by the State. By providing this guidance in the Rules as to the scope of application of Article 3(1), the Committee would encourage the parties to address the exhaustion requirement with greater specificity in their submissions and support the principle of equality of arms between the author of a communication and the State.

The NGO Coalition recommends that the Rules of Procedure stipulate that:

i) In accordance with generally recognized principles of international law, Article 3(1) applies to those remedies under domestic law that are *de facto* available, adequate and effective in the particular circumstances of the case. The effectiveness of a remedy shall be considered with reference to, *inter alia*, its promptness, enforceability and accessibility in practice at the relevant time.

ii) If the State party concerned disputes the contention of the author(s) that all available domestic remedies have been exhausted or that an exception applies, the State party shall give details of the adequate and effective remedies available to the victim or victims in the particular circumstances of the case.[15]

iii) If the written explanations or statements submitted by the State concerned pursuant to Article 6(1) do not present an objection to the admissibility of a communication based on the failure to exhaust domestic remedies, the State shall be presumed to have waived that objection.

Article 3(2): Continuing Violations

Article 3(2)
The Committee shall declare a communication inadmissible when (b) The facts that are subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3(2) expresses the principle of the non-retroactivity of treaty obligations and recognizes the well-established exception to the application of this principle for violations that are of a continuing nature. The exception for continuing violations has been defined by the Human Rights Committee and other human rights bodies as encompassing situations in which the acts or facts that form the basis of the claim continue or have effects that are continuing and in themselves constitute a violation of

protected rights. [16] In its General Comment 33 on the Obligations of States Parties under the First Optional Protocol to the ICCPR, the Human Rights Committee states that: "in responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule), the State party should invoke that circumstance explicitly, including any comment on the possible 'continuing effect' of a past violation." [17]

The NGO Coalition notes that many violations of economic, social and cultural rights have effects that are of a continuing nature and in themselves constitute violations of the Covenant, as in the case of forced evictions which may result in ongoing denials of the right to housing, health, education, food, and water. Although it will be for the Committee to apply Article 3(2) in light of the specific factual circumstances of each communication, the Rules of Procedure should clarify that, in accordance with established human rights jurisprudence, the exception extends to the continuing effects of a past violation.

Main considerations regarding Article 3(2)

The NGO Coalition recommends that the Rules of Procedure clarify that the exception under Article 3(2) applies:

i) where the facts continue after the entry into force of the OP ICESCR for the State concerned and;

ii) where the alleged violations have continuing effects which in themselves constitute a violation of the Covenant.

Article 4: Communications Not Revealing a Clear Disadvantage or Raising a Serious Issue of General Importance

Article 4
The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

Article 4 gives the Committee the discretionary authority to decline to consider a communication on an exceptional basis where the communication "does not reveal that the author has suffered a clear disadvantage." The scope of application of Article 4 is further restricted by the stipulation that even where these conditions are met, the Committee should consider the communication if it "raises a serious issue of general importance." The text of Article 4 and its drafting history make clear that it is intended to be invoked on a discretionary basis by the Committee itself and only in exceptional circumstances. The exceptional circumstances envisaged by the drafters were serious constraints on the Committee's capacity to carry out its work under the communications procedure due to the submission of an unmanageably large number of communications. Although the reference to "disadvantage" is drawn from Article 12 of Protocol 14 to the European Convention on Human Rights, Article 4 of the OP ICESCR is entirely different in its scope and field of application. In particular, while Article 12 of Protocol 14 is an admissibility requirement

to be applied by the European Court of Human Rights in all cases, Article 4 of the OP ICESCR is a discretionary mechanism that "may" be applied by the Committee "if necessary."

The exceptional nature of an Article 4 review

The plain language of the text makes clear that Article 4 is intended to govern exceptional circumstances. The phrase "if necessary" sets a high bar for the invocation of this provision. In the drafting process, broader and more equivocal qualifying language, such as "if appropriate" or "if reasonable," was rejected in favor of the stricter standard of "necessity." It is clear from concerns expressed by the States supporting this provision or its earlier formulations that Article 4 was intended to create a mechanism that would allow the Committee to manage its caseload if faced, in the future, with large numbers of cases that do not raise substantive issues. The text indicates that Article 4 is to be applied at the discretion of the Committee: it is not for States parties to invoke Article 4 as grounds for the Committee to decline to consider a communication.

The Committee should clarify in its Rules of Procedure that in the normal functioning of the communications procedure, Article 4 does not constitute an additional requirement to be satisfied by the authors of communications. If it were to be applied routinely in this manner or States were to be permitted to invoke it as an additional defense, Article 4 would have the opposite effect to its intended purpose, by expanding rather than reducing the Committee's workload. The Committee's procedural approach should ensure that Article 4 comes into play only when the Committee has determined that it may be necessary to decline to consider a communication.

It should then assess whether there is a *prima facie* indication that the communication raises a serious issue of general importance, since if the Committee finds that an issue of general importance has been presented, it will not need to consider the question of "clear disadvantage" to the victim. The "general importance" clause of Article 4 allows the Committee to address situations where a law, policy or practice has an impact on the rights of others in addition to the author of the communication and it concludes that adjudication is appropriate in order to clarify the legal obligations of the State regarding the wider situation.

If the Committee, in the exercise of its supervisory role under the Covenant, concludes that the information contained in the author's initial submission appears to raise such an issue of general importance, it would be in the interests of judicial economy to proceed at that point with consideration of the communication. However, if the Committee is of the view that such an issue has not been raised in the initial submission, it should invite an additional submission from the author on whether he or she has suffered a clear disadvantage and whether the communication raises a serious issue of general importance. Since Article 4 does not constitute a requirement to be met in the normal functioning of the procedure, the author should be given the opportunity to make a submission specifically addressed to these questions. The State party concerned would then be invited to respond to the author's submission.

Main considerations regarding Article 4

Detailed interpretation of Article 4 should be developed by the Committee through its jurisprudence rather than expressed in its Rules of Procedure. This conclusion is reinforced by the fact that there is limited precedent from other human rights bodies or guidance from the *travaux preparatoires* of the Working Group as to how this provision is to be applied. However, the NGO Coalition recommends that the following key points with respect to the Article 4 be clarified in the Rules of Procedure:

> **i) It is an exceptional provision that will be applied only when "necessary" and not in the normal functioning of the communications procedure;**
> **ii) The term "necessary" refers to the Committee's assessment of restrictions on its capacity to consider communications and the best allocation of its resources in light of its existing caseload.**
> **iii) Article 4 cannot be invoked or pleaded by the State Party as grounds for dismissal of a communication;**
> **iv) It is a discretionary consideration which the Committee is under no obligation to apply.**

With regard to its procedures in connection with Article 4, the Committee should consider the following sequence of deliberation, to be reflected as appropriate in its Rules of Procedure:

> **i) Communications *presumptively* should not be subject to a review under Article 4. An Article 4 review would be undertaken by the Committee only in circumstances where the Committee has first made a determination that it is "necessary" to consider the non-adjudication of a communication.**
> **ii) After the Committee has made a determination that it is necessary to consider the non-adjudication of a communication, it would then assess whether the communication raises a serious issue of general importance, based on the information presented in the communication. If the Committee concludes that the communication presents a serious issue of general importance, it would proceed with its consideration of a communication.**
> **iii) If the Committee considers that the initial submission does not provide a *prima facie* indication that a serious issue of general importance has been raised or that the author has suffered a "clear disadvantage," the Committee should invite the parties to make submissions on those questions.**

Article 5: Interim Measures

Article 5
1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations. 2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5 is essential to the effectiveness of the OP ICESCR as a means of redressing violations of rights protected by the Covenant, since the objectives of the communications procedure would be defeated if irreparable damage to the victims of an alleged violation were to occur while a communication is pending. The Committee's Rules of Procedure and working methods in connection with Article 5 should allow the Committee to: identify the need for interim measures and issue a request on a urgent basis; promote compliance by the State with its request for interim measures; monitor the steps taken by the State on an ongoing basis; determine when to lift interim measures; and respond to any refusal by the State to comply with its request in a manner consonant with the gravity of such a refusal.

Interim measures of protection are incorporated in other human rights instruments and the practice of UN treaty bodies and the regional human rights mechanisms. Human rights bodies have considered compliance with an order of, or request for, interim measures to be an aspect of compliance with specific obligations related to the complaints procedure and the broad aims of the human rights treaty itself. They have accordingly treated the refusal to implement interim measures as a breach of the State's obligations.[18] The Human Rights Committee has characterized a refusal to abide by interim measures as follows: "[a]part from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile." Compliance with a request for interim measures under Article 5 should be considered as an aspect of compliance with the objectives of the OP ICESCR, and the Committee should characterize a refusal to implement interim measures as a breach of the State party's obligations under the OP ICESCR.[19]

The purpose of interim measures under Article 5 is to prevent irreparable harm to victims, an objective that extends beyond the traditional aims of interim measures in domestic systems that are designed to preserve the interests of the parties in the matter under consideration. The scope of Article 5 should be understood in light of this objective and the authority given to the Committee by the text. In particular, the NGO Coalition notes that there are no restrictions on the scope of Article 5 beyond those specified in the provision itself: a) there is no requirement for the exhaustion of domestic remedies as a pre-requisite for interim measures; b) Article 5 applies to all rights set forth in the

Covenant, since the text does not circumscribe its field of application and the OP ICESCR itself covers all rights protected by the Covenant; c) the phrase "exceptional circumstances" in Article 5(1) should be understood as underscoring the character of interim measures themselves, which are by their nature invoked exceptionally with regard to irreversible harm, not as imposing an additional limitation on the Committee's discretion under Article 5; and d) the types of irreparable damage to be avoided are not limited to the categories of irreparable damage that have been the focus of interim measures in the adjudication of civil and political rights but must be identified by the Committee in the particular circumstances of each case. The necessity for interim measures should be assessed in light of the rights at issue in a particular case, the urgency of the risk of harm, and nature of the irreparable damage that is threatened.

The Committee's procedures in relation to Article 5

It will be necessary for the Committee to adopt procedural arrangements that facilitate its role in all stages of the process related to interim measures, including: assessing the need for interim measures; deciding to issue a request to the State; monitoring and follow-up; lifting of measures; and, where necessary, responding to a refusal by the State to comply with the Committee's request. With the exception of the Committee's response to a refusal by a State to comply with a request under Article 5, principal responsibility for all these stages of the process should be assigned to a Working Group on Communications, which would inform the full Committee of its decisions and the action or inaction of the State in response to its request. The allocation of these responsibilities to the Working Group would balance the necessity for an urgent action in situations where irreparable damage is threatened or may be in fact occurring and the importance of consultation among several members of the Committee in light of the complexity of the issues that may be raised by Article 7 requests. During its regular sessions, the full Committee would review any inter-sessional action taken by the Working Group and, as necessary, make decisions regarding follow-up to, and lifting of, interim measures on the basis of the recommendations of the Working Group.

The Working Group on Communications should develop rapid response procedures for assessing the necessity for interim measures and issuing a request to the State party when the Committee is not in session. For these purposes, it could establish through the Secretariat modalities for urgent communication with the Secretariat and among its members. The Chairperson of the Committee should be authorized to take any necessary action in cases of urgency where consultation among the members of the Working Group is not feasible within a reasonable period of time under the circumstances.[20] In such cases the Chairperson would inform the Working Group and the Committee of the action he or she has taken.

The Working Group on Communications should consider the necessity for interim measures based on a request by the victim, the authors of the communication, or any other concerned party, or on its own initiative when the information before it indicates the necessity for such measures. The possibility of a third party request ("any other concerned party") follows the practice of the European Court of Human Rights and the

Inter-American Court of Human Rights. It is intended to take account of circumstances in which a victim facing the threat of irreparable harm is prevented from making a request.[21] The Working Group should be authorised to request information from the interested parties on matters related to the issuance of a request to a State party and the State's action in response to the request, if it considers that additional information is necessary to support its assessment of the situation.[22]

When it determines that the information before it warrants a request for interim measures, the Working Group should set out an explanation of the basis for its decision, including the factual allegations on which the request is founded. Requests transmitted to the State party should include: the explanation of the basis for the Working Group's decision to request interim measures; references to any specific measures the Working Group considers indispensible for the effective protection of victims; timelines for implementation of the request by the State party; and arrangements for periodic reporting by the State party to the Working Group on measures taken pursuant to the request. With the assistance of the Secretariat, the Working Group (or designated members of the Working Group) should periodically seek information from the victims who are the subject of interim measures of protection as to: the actions taken by the State or its failure to act; the effectiveness of the protection afforded by the States' actions; specific additional measures that might be necessary to prevent irreparable damage; and the appropriateness of lifting interim measures. Finally, the Working Group should determine the circumstances in which interim measures should be lifted, in consultation with the full Committee as necessary.

In the event of a refusal by the State to comply with a request under Article 5, the Committee as a whole should take a decision to include in its Views on the communication a statement similar to the one by the Human Rights Committee cited above.

Main considerations regarding Article 5

The NGO Coalition notes that the Committee's exercise of its discretion under Article 5 to request interim measures will necessarily be determined by the facts of the case. However, the Coalition considers that that the Rules of Procedure should address the following points with regard to the scope of application of Article 5 and the Committee's procedures:

> **i) The exhaustion of domestic remedies is not a condition or requirement for the exercise of the Committee's discretion under Article 5;**
>
> **ii) The Committee may request a State party to take interim measures to avoid possible irreparable damage in relation to all rights set forth in the Covenant;**
> **iii) The Committee may authorize the Working Group on Communications to carry out designated activities under Article 5, including the adoption of a decision to request a State party to take interim measures and review of the**

measures taken by the State party in response to its request. The Working Group shall inform the Committee of the decisions and actions it has taken. The Committee may, as necessary, take decisions regarding follow-up to, and lifting of interim measures on the basis of the recommendations of the Working Group. In the event of non-cooperation by a State party, the full Committee shall decide the action to be taken by the Committee, including any comments on the matter to be included in its Views on the communication.

iv) A request for interim measures can be issued at any time after the receipt of a communication and before a determination on the merits, on the basis of a request by the victim, the authors of the communication, or any other concerned party, or at the initiative of the Working Group itself when the facts before it indicate the necessity for such measures.

v) The Working Group may request information from interested parties on any matter related to a decision requesting interim measures or the action taken by a State party in response to its request.

vi) In urgent cases where consultation among the members of the Working Group is not possible within a reasonable period of time under the circumstances, the Chairperson of the Committee shall take a decision regarding the transmission of a request and shall inform the Working Group and the Committee of the decision.

vii) The Working Group may request the State to take interim measures on the basis of information indicating a necessity for such measures to avoid possible irreparable damage to the victim or victims. A request by the Committee or the Working Group for interim measures does not imply a determination on admissibility or on the merits of the communication.

viii) A request for interim measures transmitted to a State party shall include: a) an explanation of the basis for the Working Group's decision to request interim measures; b) requests concerning any specific measures the Working Group considers indispensible for the effective protection of victims; c) timelines for implementation of the request by the State party; and d) arrangements for periodic reporting by the State party to the Working Group on measures taken pursuant to the request.

ix) The Working Group shall periodically request information from the victim or victims who are the subject of interim measures of protection with a view to ascertaining whether the actions taken by the State party have afforded effective protection against irreparable damage and whether there is a continuing need for those measures or for alternative measures.

x) When the Working Group has issued a request for interim measures, it

will review the steps taken by the State party to implement the request, with a view to ensuring that the State party gives effect to such measures. The Working Group shall inform the Committee of the measures taken by the State party and make recommendations as necessary regarding action by the Committee. A refusal by a State party to comply with a request for interim measures constitutes a breach of its obligations under the OP ICESCR.

Article 6: Transmission of the Communication

Article 6
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 6 addresses the receipt, registration and transmission of communications to the State party concerned and establishes the duty of the State party to submit a response to the communication within six months. The NGO Coalition notes that practice with regard to these matters is largely uniform among the other UN treaty bodies and the Committee will no doubt look to the relevant rules of procedure of the Human Rights Committee, the Committee against Torture and the CEDAW Committee in elaborating its own procedures. The Coalition wishes to highlight concerns regarding: aspects of those procedures related to the accessibility of the communications procedure itself for victims with limited access to information and low levels of legal literacy; the failure of a State party to cooperate; and confidentiality of the identity of the victim.

i) The role of the Secretariat:

The rules of procedure should address the activities of the Secretariat in relation to receipt and registration of communications and requests for additional information from the authors of communications. When processing a submission, the Secretariat should not only assess its compliance with requirements for submission of a communication, but should also consider whether the submission should be directed to a different treaty body and whether additional information should be requested from the author, following the model of the rules of procedure of the Human Rights Committee and the CEDAW Committee in this regard.

It is particularly important for the Committee's rules to authorize the Secretariat to request further information from the authors of communications where necessary for clarification. Victims of violations of Covenant rights will frequently have no access to legal assistance and will be unaware of the types of information needed to present their claims clearly. More complete information from the authors of communications will assist in the Committee's consideration of the communication. The Rules of Procedure should

therefore authorize and encourage a constructive and helpful interaction between the Secretariat and the author of the communication, in the manner of Rule 58 of the CEDAW's Rules of Procedure.

A second important measure to enhance the accessibility of the communications procedure to victims and contribute to the more effective functioning of the procedure itself is the development of a *questionnaire* outlining information to be provided by the authors of communications, along the lines authorized by the other treaty bodies.[23] The questionnaire should be drafted so as to provide clear and detailed directions, in accessible language for non-specialist audiences, and give examples of the factual information to be provided.

The NGO Coalition recommends that the Rules of Procedure:

a) authorize the Secretariat to: request additional information from the author in order to clarify such matters as the objective of the communication, relevant facts, the precise nature of the allegations, and the steps taken with respect to exhaustion of domestic remedies; and to explain to the author the procedure that will be followed and;

b) authorize the development by the Secretariat of a detailed questionnaire outlining information to be provided by the authors of communications, intended to be accessible to non-specialist audiences.

ii) Failure of the State party to meet the six months deadline

In order to promote compliance by States with the general duty to cooperate in the communications procedure and the specific obligation to provide a response to a communication within six months, the Committee's rules of procedure should stipulate that:

a) the Committee will proceed with consideration of the communication in the event that the State party fails to submit a response; and

b) if the State party has failed to furnish the Committee, in good faith and within the specified deadlines, with all the information at its disposal in relation to a communication, due weight will be given to the authors' allegations, to the extent that these have been adequately substantiated.[24]

iii) Confidentiality of identity of the victim to the public

The rules of procedure should authorize the Committee to maintain the confidentiality of the identity of the victim and/or author in all public documents related to a communication. A request by the author or the Committee's own assessment of the vulnerability of the victim or the privacy interests related to the violations at issue could provide the basis for maintaining confidentiality. This is the established practice of other UN human rights treaty bodies dealing with individual communications, including the Human Rights Committee, the Committee against Torture and the CEDAW Committee. Initials or pseudonyms are substituted for the names of victims and/or authors.

Article 7: Friendly settlement

Article 7
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. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

Article 7 establishes the duty of the Committee to offer its good offices to facilitate a friendly settlement between the author(s) of a communication and the State party concerned. The guiding principle of Article 7 is that a friendly settlement can be reached *only* on the basis of respect for the obligations set forth in the Convention. The NGO Coalition emphasizes the need for the Committee to develop procedures in relation to Article 7 that strengthen its role in ensuring that the friendly settlement process and the content of the agreements reached do not become a means by which States can avoid accountability for violations. At the same time, the Coalition considers that settlement agreements under Article 7 can provide an opportunity to address the root causes and systemic aspects of the violations, in addition to providing reparations tailored to the situation of individual victims. In light of these broad considerations regarding the potential advantages and disadvantages of the procedure for victims, as well as the lack of precedent for friendly settlement of individual communications under other UN human rights treaties, the NGO Coalition wishes to present its concerns and recommendations in detail.

Given the lack of precedent in UN human rights treaties, it is appropriate for the Committee to look to the experience of the regional human rights systems for guidance in developing its Rules of Procedure and working methods in relation to Article 7. Among the regional human rights systems, the friendly settlement procedure is used most extensively in the Inter-American system, where a high percentage of the cases submitted to the Inter-American Commission on Human Rights is resolved by friendly settlement. The Inter-American Commission's friendly settlement procedure offers a working model of a settlement procedure with outcomes that in many cases have benefited both the victims who obtained individual redress and broader sectors of society whose rights have been positively affected by settlement provisions related to systemic or structural changes. A number of the proposals outlined below are based on the practice in the Inter-American system.

The need for safeguards

The friendly settlement procedure must not be used by States to delay consideration of a communication or induce victims' consent to settlement through coercion or financial or other incentives. Even when the State participates in good faith, negotiations between individual victims and the State are characterized by an inequality of arms. The State enjoys significant advantages over victims with regard to human and financial resources, negotiating experience, access to information, and urgency of the need to resolve the

matter. This imbalance can undermine the consensual nature of agreements and shift their content in favor of the State's interests.

Therefore, in addition to encouraging a dialogue between the parties, the Committee should direct its activities under Article 7 toward ensuring: a balance of power between the parties throughout the negotiation process; the mutuality of agreement between the parties in relation to the settlement; the compatibility of the settlement with the obligations set forth in the Covenant; and timely fulfillment of the commitments undertaken. Because the terms of settlement agreements may well have consequences that extend beyond the interests of the victim(s) and the State party, the Committee also has the responsibility to consider the possible effects of a settlement on the rights of others in the State concerned whose interests were not represented by the parties to the proceedings.

The scope and content of settlement agreements

The terms of friendly settlements under Article 7 will necessarily vary according to the facts of the case, the redress sought by victims, the nature of the alleged violations, causal factors linked to the alleged violations, the status of the State party's efforts to implement its obligations under the Covenant more generally, and a range of other factors. However, settlement agreements should in general include measures to: ensure cessation of the violations; repair the harm suffered through measures of compensation, restitution, rehabilitation and satisfaction; prevent future violations; and address the root causes and systemic aspects of the violations.

The NGO Coalition emphasizes the need for settlements to deal with the underlying causes and systemic aspects of the violations, since many claims presented under the OP ICESCR are likely to implicate the rights of broad sectors of society in the State concerned, in addition to the rights of the individual victims who have submitted the communication. The inclusion of collective measures for redress of past abuses and prevention of future violations offers the possibility to expand the utility of the settlement agreements as a means of enhancing realization of rights under the Covenant for vulnerable and disadvantaged groups.

Promoting compliance with settlement agreements

In order to encourage compliance by the State with its commitments and avoid the failure of a settlement agreement after it has been concluded, during negotiations, the parties could adopt a framework for friendly settlement that provides for specific measures to be taken in stages leading toward a formal settlement agreement. The formal settlement agreement would be concluded only when the measures identified in the framework agreement have been implemented. The framework agreement would identify specific commitments agreed in the course of negotiations and establish time periods for compliance with each of the commitments undertaken. This model is based on practice in the Inter-American system.

If this approach is not adopted and implementation is expected to take place after the adoption by the parties of a formal settlement, the settlement agreement should set out timelines for compliance with each of the commitments undertaken and incorporate a provision addressing the consequences of non-compliance. This provision would state that if any of the commitments undertaken are not fulfilled during the time periods established, the friendly settlement process will terminate and the Committee will thereby be authorized to continue its consideration of the communication. This approach, which is also based on practice in the Inter-American system,[25] would create a mechanism for promoting compliance within the terms of the settlement agreement itself, based on the mutual agreement of the parties. It would allow the Committee to resume consideration of the communication without requiring the victim to submit another communication in the case of non-compliance.

The Committee's role with regard to settlement agreements

Article 7(2) states that: "[a]n agreement on a friendly settlement closes consideration of the communication under the present Protocol." Paragraph 2 should be understood to refer to a friendly settlement that has been verified by the Committee as being based on "the respect for the obligations set forth in the Covenant," not merely an agreement concluded by the parties. This understanding is compelled by the fact that an agreement reached in relation to a communication is subject to the overarching purpose of the OP ICESCR – to further implementation of the Covenant – and the Committee's supervisory functions under the OP ICESCR. The necessity for the Committee to verify settlements is also derived from its authority to monitor compliance with the obligations established in the Covenant itself. Verification is essential to ensure that the State does not evade its obligations through the use of friendly settlements.

In addition, because the terms of agreements may have significant effects beyond the immediate interests of the parties, verification by the Committee is necessary to guard against the possibility that measures pursuant to an agreement will erode the rights of groups and individuals not party to the proceedings. A requirement for verification would follow the practice of the Inter-American and European human rights systems, in which the decision to terminate consideration of a petition is taken only after verification that the settlement agreement is based on respect for the rights in the relevant human rights treaties.[26] Because it is for the Committee to determine whether a settlement agreement reached in the context of the communications procedure is based on the respect for the obligations set forth in the Covenant, the Rules of Procedure should incorporate a requirement for verification by the Committee as a precondition to closing the Committee's consideration of a communication.

If the parties follow the practice of adopting a framework agreement that culminates in a formal settlement agreement at the point when the terms of the framework agreement have been satisfied, then the Committee would review the terms of the agreement and its implementation. The Committee would then take a decision verifying that: the terms are based on respect for the obligations set forth in the Covenant, including a determination that the measures taken by the State are not incompatible with its general obligations to

realize the rights in the Covenant; the terms are consistent with the interests of the victims; and the commitments undertaken in the agreement have been implemented. This decision verifying the settlement agreement would end its consideration of a communication, as provided by Article 7(2).

If this approach, which conditions the formal adoption by the parties of a settlement agreement on implementation of the commitments undertaken, is not followed and the parties adopt settlement agreements that are expected to be implemented in the future, then it would be necessary for the Committee to establish follow-up procedures in relation to the settlement agreement. Under this model, the Committee's decision verifying the terms of a settlement agreement would end its consideration of a communication, as provided by Article 7(2), but follow-up procedures would be established in relation to the agreement itself. Without follow-up procedures, there is an obvious risk that States will fail to carry out their commitments under settlement agreements and the victims would have to seek recourse by re-submitting their communications.

The Committee's procedures and working methods

The Committee should adopt procedures and working methods in relation to Article 7 that will permit it to: monitor the progress of negotiations in order to discourage the use of the settlement procedure by a State party as a means of delaying consideration of a communication and to ensure that the inequality of arms does not prevent effective representation of the interests of the victims; carry out substantive reviews of the terms of settlements in order to verify that they are based on respect for the obligations set forth in the Covenant and consistent with the interests of victims; and determine compliance with the terms of settlement agreements. For these purposes, the Committee should establish an Article 7 Working Group, which could designate individual members to carry out activities in connection with a single communication or multiple communications involving the same State party.

Main considerations regarding Article 7

The Committee's Rules of Procedures should set out the key components of its activities in relation to the settlement procedure, while recognizing the need for flexibility in its working methods. The Rules of Procedure should:

> **i) Permit the Committee to exercise its good offices at any stage of the proceedings following registration of a communication and its transmission to the State, up until the point that a final decision is taken on the merits by the Committee. Since Article 7 does not specify any limitation regarding the stage of the communications procedure at which the Committee may offer its good offices, the NGO Coalition recommends that the Rules of Procedure give the Committee flexibility with regard to the stage at which settlement proceedings may be initiated. This approach follows the model of the Inter-American Commission on Human Rights and the practice that will be**

followed by the European Court of Human Rights when Protocol 14 to the European Convention on Human Rights comes into force.[27] Such flexibility would permit expedited resolution of a case at its earliest stages, thereby maximizing the reduction of the Committee's caseload, or in its later stages, thereby accommodating the possibility of changed circumstances that may motivate the parties to establish a dialogue aimed at friendly settlement, such as a change in the State's political leadership.

ii) Establish protections to compensate for the inequality of arms between victims and States parties in the negotiating process and deter abuse of the procedure by a State seeking to evade accountability. The Rules of Procedure should:

> **a) condition the initiation of the friendly settlement procedure and its continuation on the consent of the parties;**
>
> **b) stipulate that the Committee will terminate its intervention in the friendly settlement process if any of the parties decides not to continue the process or if the State does not display the willingness to reach a friendly settlement based on respect for the rights in the Covenant;**
>
> **c) authorize the members of the Committee who have been designated to carry out activities under Article 7 to develop working methods that will permit them to monitor progress in the negotiation of friendly settlements and respond to any requests by the parties that a member of the Committee facilitate negotiations; and**
>
> **d) establish formal procedures for the periodic submission of information by both parties on the status of negotiations within designated timelines.**

iii) Specify that, in the event that settlement negotiations are terminated prior to an agreement and the Committee proceeds to consider the communication, the parties cannot rely on information communicated in the course of negotiations to support their positions on the admissibility or merits of the communication, or otherwise convey this information to the Committee.

iv) Establish a Working Group to carry out the Committee's work under Article 7.

v) Stipulate that framework agreements or formal settlement agreements under Article 7 shall include provisions regarding the implementation of the commitments undertaken by the parties, including specified timelines for compliance.

vi) Condition the Committee's decision to end its consideration of a communication, as provided by Article 7(2), on a formal decision verifying that the terms of the settlement agreement are based on "respect for the

obligations set forth in the Covenant" and consistent with the interests of the victims.

vi) Recognize the Committee's authority to:

a) request the author(s) and the State party to provide within specified time periods information on the status of implementation of framework agreements or a formal settlement agreement;

b) request the State to include in its subsequent reports under Article 16 of the Covenant information relating to all settlements agreements to which it is party.

vii) Stipulate that a State cannot withdraw from a friendly settlement once adopted. The withdrawal from the agreement will constitute grounds for reopening the case.

viii) Provide for the publication, in the Committee's annual reports, of reports on all settlement agreements verified by the Committee. Reports on settlement agreements should include: a description of the processing of the agreement by the Committee; a statement of the facts covered by the settlement; and the full text of the terms of the settlement agreement. This information is essential to facilitate efforts by civil society at the domestic level to monitor and promote compliance with settlement agreements.

Article 8: Examination of Communications

8-1 Information to be Considered

The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.

8-2 Closed Meetings

The Committee shall hold closed meetings when examining communications under the present Protocol.

8-3 Documentation Emanating Other Sources

When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

8-4 Reasonableness Review

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Article 8 is unique to the UN system both in mandating, in 8(4), a standard of review for considering whether reasonable steps have been taken "to the maximum of available resources", in line with article 2(1) of the Covenant, and in providing, in 8(1) and 8(3), a mandate to receive information from a broad range of third party sources, in written or alternative formats.

The precise nature and scope of the review of reasonableness prescribed by article 8(4) will be a matter for the Committee to determine in its jurisprudence as it evolves in the context of individual communications, and ought not to be prescribed in advance in the Rules of Procedure. For the purposes of the Rules of Procedure, however, it is important to bear in mind the nature of information and expertise that will be required to conduct the broad review mandated by 8(4). Proposals from states wanting to narrow the scope of the Committee's review of social and economic policy or resource allocation by requiring a standard of "unreasonableness" or including reference to a margin of appreciation or margin of discretion to be accorded social policy or resource allocation were not accepted by the Open Ended Working Group. The mandate accorded the Committee in 8(4) thus makes it of particular importance to ensure that the Committee has access to a full factual record and relevant sources of expertise and analysis of issues that may often extend beyond the facts related to individual communications, engaging broader issues related to available resources and the needs of groups that are not direct parties to the communication.

The Open Ended Working Group received useful guidance about the kinds of information that would need to be considered in an assessment of reasonableness in the CESCR's Statement by the Committee: An evaluation of the obligation to take steps to the "Maximum of available resources" under an optional protocol to the Covenant." The Committee outlined a number of the considerations which would go into an assessment of reasonableness, including whether resource allocation was in accordance with international standards, whether "the precarious situation of disadvantaged and marginalized individuals or groups" was addressed and whether the programs prioritized "grave situations or situations of risk".[28] The wording of articles 8(1) and 8(3) in relation to both the sources of and the types of information that may be considered by the Committee are consistent with the Committee's understanding of the broad nature of an assessment of whether policies and programs are in compliance with the ICESCR, considered in light of available resources, the needs of disadvantaged groups and other relevant factors.

Information Submitted by Third Parties

The wording of article 8(1) is unique in comparison to all other UN communications procedures in allowing for the consideration of information submitted by third parties. All other communication procedures restrict information to that which is made available by the individual petitioner or the State Party concerned. Concerns that a similar restriction would be inappropriate in an OP ICESCR were first raised by the CESCR, in its 1997 submission to the Commission on Human Rights. The Committee noted that the

traditional formulation of other communication procedures "seems unduly restrictive and counterproductive" and recommended that the OP authorize the Committee to consider information from additional sources "on condition that any such information would also be provided to the parties concerned for comment."[29]

The Committee's recommendations on information submitted by third parties were subsequently accepted by the Open Ended Working Group. An initial draft produced by the Chairperson followed the more restrictive model of other communication procedures, but a number of states raised concerns about this restriction. The reference to information made available "by the parties" was thus deleted in the next draft. Last minute proposals to reverse this decision and to re-insert text that would foreclose the consideration of third party or amicus submissions did not gain support.[30]

Submissions from third parties to provide technical or legal assistance in relation to the matters raised in a communication are currently considered by UN treaty bodies as additional documentation submitted by claimants or state parties. The unique wording of Article 8(1) of the OP ICESCR, however, allows the CESCR to develop procedures for the receipt of third party submissions independently of the petitioner and the State Party, as long as these are provided to the parties for comment. Third party submissions may take the form of affidavits, expert opinions, amicus briefs from human rights institutions or non-governmental organizations, opinions from UN agents, such as special procedures mandate holders, submissions from UN bodies, or submission from any other sources deemed to be reliable and to be providing relevant expertise or information. In the Coalition's view, explicit provisions for the receipt of submissions from such third parties would increase the transparency of Committee procedures and enhance the capacity of the Committee to meet the anticipated challenges of the OP ICESCR.

The issue of third party amicus submissions from NGOs and human rights institutions was specifically considered by the OEWG, initially in relation to standing for non-governmental organizations and institutions in article 2.[31] While there was considerable support for the concept of amicus submissions, there was little support for granting NGO's independent standing to submit collective communications in the model of the European Social Charter. As a result, references to standing for non-governmental organizations and institutions were removed from article 2 and the question of whether or how procedures might be developed for amicus submissions was left to the Committee to consider in its Rules.

Information submitted by third parties such as non-governmental organizations or human rights institutions will help the Committee to assess the full picture of the situation at issue. Such organizations are in a position to advance legal arguments with an eye to future cases and to the coherence of jurisprudence rather than simply focusing on success in an individual case. Their experience in domestic and regional systems may be of considerable assistance to the Committee in understanding the issues in specific cultural, legal or political contexts and in developing appropriate recommendations.

Establishing procedures for third party submissions would also be in line with developments and lessons learned in other areas. In the adjudication of issues of public policy in trade and investment disputes and arbitration, the importance of amicus submissions has become increasingly recognized.[32] All regional systems now provide for third party submissions at the discretion of the adjudicating body. The Inter-American Court has a procedure for and has made extensive use of amicus submissions".[33] The Protocol on the Statute of the African Court of Justice and Human Rights provides for third parties to be invited "to present written observations or take part in hearings."[34] The European Court of Human Rights has similar authority and had made increasing use of the power to consider third party submissions where it deems these relevant.[35] In domestic law, it is widely accepted that courts and tribunals may benefit from interventions by non-governmental organizations, human rights institutions and other actors in the consideration of human rights cases, particularly those with broader systemic impact or raising new areas of law.[36]

Information Obtained from Other Sources

Article 8(3) is similarly unique in comparison to other UN human rights bodies' communication procedures. This article was modeled on provisions in the rules of procedure of the CERD, CAT and CEDAW Committees, providing for those Committees to obtain, through the Secretary-General, additional information from UN bodies or specialized agencies. Article 8(3) of the OP ICESCR, however, goes beyond the rules of the other Committees to identify a range of possible sources beyond those within the UN system, including "international organizations" and "regional human rights systems".

In light of the wide range of possible sources and types of documentation available to the Committee, it will be important for the Committee to develop procedures based on individualized case management, to ensure that relevant documentation and information sources are identified for each communication and appropriate measures taken to obtain all relevant information.

It may be worth including in the Rules a procedure through which the Committee would make regular requests for information pertaining to communications from relevant UN and other bodies. Particularly in cases of alleged structural/systemic violations, such requests and consultation should be a matter of course.

Information in a range of formats in addition to written documentation

Another important issue under discussion during the drafting process was whether information to be considered must be in written form, or whether alternative formats such as oral submissions in person or through video links, video recordings, audio recordings, photographs, film or information in electronic form, ought to be left open for the consideration by the Committee in its Rules of Procedure. In her originating analytical paper, the Chairperson noted that while most international human rights communications procedures require proceedings on the basis of written submissions, the Rules of Procedure of the CERD and CAT Committees allow for oral submissions. Proposals put

forward in the last session to restrict information to that which is "submitted in writing" in line with the OP ICCPR were not supported.[37] The Committee has thus been accorded flexibility to determine, either in the Rules of Procedure or on a case by case basis, the nature of submissions and documentation to be considered.

The NGO Coalition believes that it will prove extremely useful to the Committee to receive information in alternative formats including video links, video recordings, audio recordings, photographs, film or information in oral or electronic form. Written formats may present significant obstacles for marginalized communities facing language, literacy or disability related barriers. While states parties may generally have written material available to document their position, this will not always be the case for victims. Forced evictions may be captured on video or the state of housing or health facilities may be better illustrated by photographs or videos than in written briefs. In some cases, there will be very little written documentation of the realities faced by victims. Providing alternative means of transmitting relevant information to the Committee may be the only way to ensure a full factual record. It may also assist in giving voice to the most marginalized communities.

Oral hearings either by video link or in person may also prove useful to improving the efficiency of the Committee's consideration of communications. The CAT rule relating to consideration on the merits provides a useful model for the Committee's consideration, at paragraph 111 (c) of its Rules of Procedure:

> "The Committee may invite the complainant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case."

Other useful models exist at the regional level. The African Commission on Human and Peoples' Rights and the Inter-American Commission and Court provide for oral hearings at the discretion of the Commission or Court.[38]

Oral hearings need not be associated with a move toward legal formalism or court-like procedure. In the case of the OP-ICESCR, oral hearings may be seen as a means to increase accessibility for victims who may find written presentation to be a significant barrier and as a way to clarifying a point at issue through direct interaction with the parties rather than through the independent assessment of complex documentation. In cases of visual impairment, oral hearings may be an economical means to accommodate disability in order to ensure fairness and accessibility. In cases dealing with relatively complex issues of social policy, the Committee may find it helpful and efficient to be able to interact directly with representatives of the parties in order to clarify points or better understand complex issues of policy or legislation.

Separation of Admissibility and Merits in Appropriate Cases

In cases where either admissibility issues or the determination on the merits is predicted to be particularly complex, either because of complex facts or novel issues of law, the Coalition recommends that the rules provide for consideration of admissibility separately from the consideration of the merits. In other cases, however, where the Committee does not feel it necessary to separate them, admissibility questions may be joined with consideration of the merits, for reasons of efficiency and effectiveness.

Separation of admissibility from merits may also be an appropriate way to ensure that relevant information from third parties, UN agencies or international organizations is obtained in appropriate cases. During the Working Group discussions, delegates raised the question of how qualified organizations and institutions might be notified of the issues raised in a communication in order to submit relevant information or make available to the Committee their expertise. Since the procedure remains confidential until the publication of the views of the Committee, these organizations may have no way of knowing, prior to the publication of the Committee's views on the merits, that communications raising important public policy or systemic issues in which they have relevant expertise or views, were to be considered by the Committee.

One solution that has been suggested is a procedure for the Committee to identify cases where it would benefit from submissions from third parties and ensure that in those cases, the admissibility decision is rendered separately and reported along with a summary of the issues raised in the communication, on the Committee's website. In this way, organizations or institutions with relevant expertise would have the opportunity to make submissions or to provide relevant information or documentation.

Main considerations regarding Article 8

In light of the unique provisions in 8(1) and 8(3), to ensure access to a broad range of information, including submissions from third parties and including submission in non-written form, the NGO Coalition recommends that the Rules of Procedure include provisions for:

> **i) Active case management under the supervision of the Working Group and Case Rapporteur to assess the need for additional information, identify relevant and reliable sources, develop appropriate means of obtaining information and providing any such documentation to be considered to the parties for response. Provisions may also be made for joinder of communications raising similar issues, or severance of communications involving multiple complainants, where appropriate.**
>
> **ii) A rule similar to CEDAW: Rule 66 establishing that "The Committee may decide to consider the question of admissibility of a communication and the merits of a communication separately"[39] and a procedure for publishing a summary of the issues to be addressed in the consideration of the merits, when reporting on admissibility decisions, in cases where the Committee may benefit from third party submissions.**

iii) Flexible rules for the receipt of information or expertise from third parties in both written and non-written formats. The Rules should provide for the possibility of oral hearings either in person or by video conferencing in cases similar to the Rules of the CERD and CAT Committees, where the Committee may deem this to be a more appropriate or efficient means of obtaining relevant information or expertise.

iv) Opportunities for the parties to respond to information obtained from third parties. The obligation to transmit to the parties documentation received from other sources, affirmed in 8(1), would equally apply to documentation listed under 8(3). The Rules should clarify that reference in 8(3) to the consideration of observations or comments by the State Party concerned will not be interpreted to suggest that the Committee would not give equal consideration to comments or observations from the author of the communication as from the state party.

Article 9: Follow-up to the views of the Committee

Article 9
1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned. 2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, 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. 3. 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 establishes the Committee's competence to issue its views and recommendations on a communication and creates the basic framework for its follow-up procedures with the State. It will be necessary for Committee to elaborate this basic framework so as to encourage implementation by the State party and make public information regarding the status of implementation. The NGO Coalition emphasizes the need for follow-up procedures that will ensure that the Committee's assessments of implementation draw on information from the victims and civil society organizations, not only the State's representations regarding its action or inaction.

The State's duty to cooperate and the need for active follow-up by the Committee

The Committee's views and recommendations should be viewed as authoritative determinations of the matters at issue in a communication, in light of its role under the OP ICESCR and its responsibilities under the Covenant itself. Moreover, implementation of the Committee's views is an aspect of the State party's duty of good faith with regard

to its obligations under the OP ICESCR and the Covenant itself. This principle was recently affirmed by the Human Rights Committee in its General Comment on the character of its views under the First Optional Protocol to the International Covenant on Civil and Political Rights and the nature of State parties' related duties: "[t]he character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the OP ICESCR and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations."[40] The Committee's follow-up procedures should treat a failure by a State party to implement the views of the Committee as a serious breach of the State's duty to cooperate with the Committee.

Main considerations regarding Article 9

The working methods of other UN human rights treaty bodies offer useful guidance for follow-up procedures under Article 9. Those working methods have evolved over time, principally along lines that permit more extensive engagement of the treaty bodies with States parties. The NGO Coalition emphasizes the importance of *an active role by the Committee* toward three key aims: a) enhancing implementation through constructive dialogue; b) strengthening accountability for any failures to implement its views and recommendations; and c) integrating into its follow-up activities and the public record relevant information from the authors of communications and from civil society organizations that are engaged in monitoring the State's action and inaction related to the subject of the communication. In developing its Rules of Procedure, the Committee should consider how best to build on the experience of other treaty bodies in order to achieve these aims.

The NGO Coalition considers the following to be particularly important elements that should be incorporated in the Rules of Procedure:

i) The appointment of a Rapporteur for the Follow-up of Views

The activities of the Rapporteur should be modeled on those of the Human Rights Committee's Rapporteur for the Follow-up of Views, who "through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation."[41] In addition to initiating contacts with representatives of the State party, the Rapporteur should seek relevant information from the victims, the authors of communications, and NGOs and other groups in civil society. The Rules of Procedure should recognize the possibility for the Rapporteur to make on-site visit to the State party concerned and call for her or him to make recommendations as necessary for further action by the Committee.

ii) Public reporting on the State's action or inaction regarding the Committee's views and recommendations

Substantive information on, and the Committee's assessments of, implementation should be made public through the Committee's annual report, in a chapter related to its activities under the OP ICESCR and in its concluding observations on the State's subsequent reports under Article 16 of the Covenant. In reporting on its activities under the OP ICESCR, the Committee should present information related to implementation, in addition to the full texts of its decisions and summaries of decisions taken with regard its working methods. Information on implementation provided in annual reports should include, *inter alia*: a) a summary of information supplied by the State and the author(s) for every communication which is the subject of follow-up activities by the Committee; b) an assessment by the Committee of patterns with regard to satisfactory implementation and the failure to implement; c) the identification by the Committee of any responses by States that it considers to be unsatisfactory; and d) any suggestions by the Committee regarding general approaches to implementation that might be taken by States parties. In reporting on its review of periodic reports under Article 16, the Committee should include information regarding the implementation of its views. In the case of a failure to implement its views, the Committee should mention this failure in its concluding observations on the State party's report.[42]

iii) Integration of information from the authors of communications and civil society organizations into the Committee's follow-up activities

The Committee should develop formal procedures through which the authors of communications can submit information on the implementation of its views and recommendations. The rules should also provide for the State's response pursuant to Article 9(2) to be transmitted to the author(s). As noted above, the Special Rapporteur for the Follow-up of Views should seek information from NGOs and other civil society organizations regarding the status of implementation and recommendations for enhancing implementation.

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[1] This is the practice of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) under the OP CEDAW. See CEDAW Committee Rules of Procedure, Rule 68(3).

[2] See, e.g., Human Rights Committee, Celal, v. Greece, Communication No. 1235/2003 (2004), para. 6.3; Committee on the Elimination of Discrimination Against Women, Fatma Yildirim (deceased) v. Austria, Communication No. 6/2005 (2007) para. 7.2; African Commission on Human and Peoples' Rights, Rencontre Africaine pour la Defence des Droits de l'Homme v. Zambia, Communication No. 71/92, 10th Annual Activity Report (1996), para. 10; Inter-American Court of Human Rights, Velásquez Rodríguez Case, Merits, Judgment of 29 July 1988, Series C, No. 4, para. 61; European Court of Human Rights, Akdivar and Others v. Turkey, Judgment of 16 Sept. 1996, Reports, 1996-IV, para. 65.

[3] Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant (1998), para. 3. See also para. 9: "whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary."

[4] See International Law Commission, Draft Articles on Responsibility of States for Internally Wrongful Acts, report with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, as corrected, Article 44(b), p. 121 (regarding effectiveness of domestic remedies).

[5] See, e.g, Human Rights Committee, Gilberg v. Germany, Communication No. 1403/2005, 25 July 2006, para. 6.5; Committee on the Elimination of Racial Discrimination, Zentralrat Deutscher Sinti und Roma et al. v. Germany, Communication No 038/2006, 22 Feb. 2008, para. 7.3; Committee Against Torture, Adel Tebourski v. France, 300/2006, 1 May 2007, paras. 7.3-7.4; European Court of Human Rights, Akdivar v. Turkey, *supra*, para. 66; Inter-American Court of Human Rights**,** Velásquez Rodríguez, Merits, *supra*, paras. 63-64, and Fairén Garbi and Solís Corrales Case, Judgment of 15 Mar. 1989, Series C, No. 6, paras. 87-88; African Commission on Human and Peoples' Rights, Rencontre Africaine por la Defense des Droits de l'Homme v. Zambia, Communication 71/92, 9th Annual Activity Report (1995 -1996), para. 11.

[6] See, e.g., Inter-American Commission on Human Rights, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II, Doc. 68, 20 Jan. 2007, Chapter II A.4-6; Inter-American Commission on Human Rights, Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, Chapter II.

[7] For discussion of the substance of the right to effective judicial protection against violations of social rights and the limitations of remedies designed for settlement of individual disputes, see Inter-American Commission on Human Rights, Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, pp. 66-67, 75-79.

[8] See European Court of Human Rights, Selmouni v. France, Judgment of 28 July 1999, Reports 1999-V, para. 77; Inter-American Court of Human Rights, Cayara v. Peru, Preliminary Objections**,** Judgment of 3 Feb. 3, 1993. Series C, No. 14, para. 42; African Commission on Human and Peoples' Rights, Free Legal Assistance Group and Others v. Zaire, Communication No. 25/89, 47/90, 56/91, 100/9, 9th Annual Activity Report 1995-96, para. 37.

[9] See, e.g., European Court of Human Rights, Aksoy v. Turkey, Judgment of 18 Dec. 1996, Reports 1996-VI, para. 53; Inter-American Court of Human Rights, Ivcher Bronstein v. Peru, Judgment of 6 Feb. 2001, Ser. C No. 74, paras. 136-137.

[10] European Court of Human Rights, Selmouni v. France, Judgment of 28 July 1999, Reports 1999-V, para. 76. See, e.g., European Court of Human Rights, Akdivar v. Turkey, *supra*, para. 68; African Commission on Human and Peoples' Rights, Article 19 v. Eritrea, Communication No. 275/2003, 22nd Annual Activity Report (2006-2007), para. 51; Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 1, para. 88; Human Rights Committee, C.F. v. Canada, Communication No. 118/81, 4 Dec. 1985, para. 6.2.

[11] Human Rights Committee, Annual Report, UN Doc. A/54/40 (1999), para. 417 (emphasis added) (citation omitted).

[12] See Human Rights Committee, Sankara v. Burkina Faso, Communication No. 1159/2003, 28 Mar. 2006, para. 6.5.

[13] Inter-American Commission on Human Rights, Rules of Procedure, Article 31(3).

[14] See, e.g., European Court of Human Rights, De Wilde, Ooms and Versyp v. Belgium, Judgment of 18 Nov. 1971, Series A No. 12, para. 55; European Court of Human Rights Artico v. Italy, Judgment of 13 May 1980, Series A, No. 37, para. 27; Inter-American Court of Human Rights, Case of Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 July 2004, Series C, No. 107, para. 81; Velásquez Rodríguez Case, Preliminary Objections, *supra*, para. 88; Inter-American Commission on Human Rights, Abu-Ali Rahman v. United States, Report No. 39/03, Petition 136/2002, 6 June 2003, para. 27. The Human Rights Committee has also recognized that in certain circumstances a State may waive the exhaustion requirement. Annual Report of the Human Rights Committee, UN Doc. A/54/40 (1999), para. 417.

[15] See CEDAW Committee, Rules of Procedure, Rule 69(6).

[16] See, e.g., Human Rights Committee, Nallaratnam Singarasa v. Sri Lanka, Communication No. 1033/2001 (2004), para. 6.3; Human Rights Committee, Mónaco de Gallicchio v. Argentina, Communication No. 400/1990, para. 10.4; CEDAW Committee, Kayhan v. Turkey, Communication No. 8/2005, para. 7.4; African Commission on Human and Peoples' Rights, John K. Modise v. Botswana, Communication No. 97/93, 10th Annual Activity Report (1997), para. 23; European Court of Human

Rights, Papamichalopoulos and Others v. Greece, Judment of 24 June 1933, Ser. A, No. 260-B, para. 40); European Court of Human Rights Loizidou v. Turkey, Judgment of 18 Dec. 1996, Reports 1996-IV, paras. 46-47; Inter-American Court of Human Rights, Blake v. Guatemala, Preliminary Objections, Judgment of 2 July 1996, Series C, No. 27, paras. 29-40.

[17] Human Rights Committee, General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 Nov. 2008, para. 9.

[18] See, e.g., European Court of Human Rights, Mamatkulov and Abdurasulovic v. Turkey, Judgment of 6 Feb. 2003, para. 110; Inter-American Court of Human Rights, Constitutional Court Case, (Peru), Provisional Measures, para. 14; Inter-American Court of Human Rights, Loayza Tamayo v. Peru, Judgment of 27 Nov. 27, 1998, Series C, No. 42 (1998); Inter-American Court of Human Rights Cesti, Hurtado (Peru), Provisional Measures, Order of 14 August 2000, Ser. E. 315 (2000); Cf., LaGrand (Germany v. United States), ICJ, Judgment of 27 June 2001.

[19] Human Rights Committee, Communication No. 1461/2006, Maksudov v. Kyrgyzstan; Communication No. 1462/2006, Rakhimov v. Kyrgyzstan, Communication No. 1476/2006, Tashbaev v. Kyrgyzstan, Communication No. 1477/2006, Pirmatov v. Kyrgyzstan, 16 July 2008, paras. 10.2 -10.3. See also Human Rights Committee, General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 Nov. 2008, para. 19: "[f]ailure to implement ... interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."

[20] See African Commission on Human and Peoples' Rights, Rules of Procedure, Rule 111(3); Inter-American Commission on Human Rights, Rules of Procedure, Article 25(2).

[21] Rules of Court, European Court of Human Rights, Nov. 2003, Rule 39(1); Rules of Procedure of the Inter-American Court of Human Rights, Nov. 24, 2000, partially reformed during its LXI Ordinary Period of Nov. 20-Dec. 4, 2003, Art. 25(3).

[22] See Inter-American Commission on Human Rights, Rules of Procedure, Article 25(3).

[23] See Rules of Procedure of the CEDAW Committee (Rule 58), the Human Rights Committee (Rule 86), the Committee on the Elimination of Racial Discrimination (Rule 84), and the Committee Against Torture (Rule 99.)

[24] This language is based on the formula regularly employed by the Human Rights Committee in its Views in the event of non-cooperation by a State party. See, e.g., Aduayom, Diasso and Dobou v. Togo, Communications Nos. 422/1990, 423/1990 & 424/1990, para. 7.1; Human Rights Committee, K.L. v. Peru, Communication No. 1153/2003, 22 Nov. 2005, para. 4. See also African Commission on Human and Peoples' Rights, International Pen and Others v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, 12th Annual Activity Report (1998-1999), para. 81; Inter-American Court of Human Rights, Velásquez Rodríguez Case, Merits, *supra*, para. 138. Article 39 of the Rules of Procedure of the Inter-American Commission on Human Rights provides that: "[t]he facts alleged in the petition … shall be presumed to be true if the State has not provided responsive information … as long as other evidence does not lead to a different conclusion."

[25] See, e.g., Inter American Commission on Human Rights, Report No 70/07, Petition 788-06, Victor Hugo Arce Chávez, Friendly Settlement, Bolivia, July 27, 2007: Five. Failure to Comply with the Agreed Upon Agreements: "[t]he commitments in this compromise agreement must be effectively complied with within the specified time periods for each one of them. Failure to comply with one, several, or all commitments shall end the friendly settlement procedure before the Inter-American Commission on Human Rights, and both the State and Víctor Hugo Arce Chavez, represented by the Ombudsman, must immediately inform the Inter-American Commission that they waive any friendly settlement. This will authorize the IACHR to continue with the contentious processing of the case."

26 Article 41(5) of the Rules of Procedure of the Inter-American Commission provides for the adoption by the Commission of a report with a brief statement of the facts and of the solution reached, which is transmitted it to the parties and subsequently published. Before adopting the report, the Commission must verify that the victim of the alleged violation or, as the case may be, his or her successors, have consented to the friendly settlement agreement and that the friendly settlement is based on respect for the human rights recognized in the American Convention, the American Declaration and other applicable instruments. See also Rule 62(3) of the Rules of Court of the European Court of Human Rights, regarding verification of the settlement as a condition of striking the case. The Court's decision striking the case is issued in the form of a judgment and the Committee of Ministers supervises the execution of the terms of the friendly

settlement as set out in the judgment. Article 15(2) and (3) of Protocol No. 14 to the European Convention provides that if a friendly settlement is achieved, the Court will strike the case and the Committee of Ministers will assume responsibility for supervising the execution of the settlement.

[27] The Rules of Procedure of the Inter-American Commission on Human Rights and Article 15 of Protocol 14 to the European Convention on Human Rights, which will amend the European Convention procedure, allow the supervisory bodies to facilitate friendly settlements at any stage during the proceedings. The Inter-American Commission has the authority to facilitate negotiations and to close considerations of petitions through friendly settlement prior to admissibility, during consideration of the merits, or even at the stage when a case is already under consideration by the Inter-American Court of Human Rights. Rules of Procedure of the Inter-American Commission on Human Rights, Article 41(1). In the European system, friendly settlements have been adopted after judgments have been rendered. See, e.g., European Court of Human Rights, Broniowski v. Poland (friendly settlement), [GC], Application No. 31443/06, ECHR 2005-IX.

[28] U.N. Doc. E/C.12/2007/1 (2007)

[29] United Nations Economic and Social Council Commission on Human Rights, "Note by the Secretary General" Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1997/105 ,18 December 1996, para. 42.

[30] UN Doc. A/HRC/8/7, 6 May 2008, para. 165.

[31] UN Doc. A/HRC/8/WG.4/2 (24 December 2007).

[32] See Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001. See also G. Marceau and M. Stilwell: Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies, Journal of International Economic Law, Volume 4, Issue 1 (JIEL 4(1) 2001), pp. 155-187; Arndt Kaubisch, "Letters from Friends: The Admissibility of Amicus Curiae Briefs in WTO Dispute Settlement," ELSA SPEL 2004, p. 36.

[33] The Inter-American Court of Human Rights provides for amicus submissions in its Rules of Procedure: "[t]he President may invite or authorize any interested party to submit a written opinion on the issues covered by the request." Article 62(3) of the Rules of Procedure of the Inter-American Court of Human Rights. See Jo M. Pasqualucci. The Practice and Procedure of the Inter-American Court of Human Rights. (Cambridge University Press, 2004), p. 74.

[34] Article 49(3) of the Protocol on the Statute of the African Court of Justice and Human Rights states: "[i]n the interest of the effective administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings."

[35] Article 36(1) of Protocol 11 states that the President of the Court may invite "any person concerned other than the applicant to submit written comments or take part in hearings." Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaties, ETS No. 155, Strasbourg, 11.V.1994, Article 36(2). See generally Tullio Treves, Civil society, International Courts and Compliance Bodies (T.M. C. Acer Press: The Hague, 2005). In addition, Rule 44 in the Rules of the Court states that the President of the Chamber may "in the interests of the proper administration of justice … invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing."

[36] In the famous Grootboom decision by the Constitutional Court of South Africa, the importance of amicus submissions provided by the South African Human Rights Commission and the Community Law Centre (University of the Western Cape), represented by the Legal Resources Centre was summed up as follows by Justice Sachs of the South African Constitutional Court:

> This amicus intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights but [the amici] forced us to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the amici, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.

A. Sachs, "Commenting on the panel discussion," (2007) 8(1), ESR Review 17, 18(1)9.

[37] UN Doc. A/HRC/8/7, 6 May 2008 para 165.

[38] The legal basis for oral presentations is found in Article 46 of the African Charter on Human and Peoples' Rights, which allows African Commission to resort to any appropriate method of investigation and hear from any other person capable of enlightening it. See R. Murray "Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights,", 46 The International and Comparative Law Quarterly 412 (1997), p. 427. African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea, 20th Annual Activity Report (2004), paras 46 -47. Inter-American Commission on Human Rights, Rules of Procedure, Articles 62-63.

[39] CEDAW Rules of Procedure, Rule 66 .

[40] Human Rights Committee, General Comment 33, supra, para. 15.

[41] Human Rights Committee, General Comment 33, supra, para. 16. The Committee notes that "[i]n a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response." Id.

[42] See Human Rights Committee, General Comment 33, supra, para. 17: [i]t is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions inter alia in its annual reports to the General Assembly of the United Nations." The annual reports of the Human Rights Committee offer a useful template for the format and content of reporting on the implementation of views and recommendations under a communications procedure.