

5

COMPLAINT PROCEDURE

BACKGROUND TO THE COMMISSION'S COMPLAINT PROCEDURE

What was the Commission's complaint procedure?

The Commission on Human Rights' (the Commission) main complaint procedure was the 1503 procedure¹, under which it could receive communications (complaints) from victims or others acting on behalf of the victims regarding situations which “reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”² in any country in the world. The Commission would not address violations of an individual's human rights under this procedure. The procedure was intended, instead, to bring situations of massive human rights violations to its attention³. The procedure applied to all countries, irrespective of whether they voted for the 1503 resolution⁴ or their ratifications of human rights treaties⁵. The 1503 procedure was confidential and the Commission considered ‘situations’ in countries that come up under the procedure in a closed meeting. Complainants were informed if their cases had been taken up for processing under the 1503 procedure but were not given any further information on the proceedings themselves or the outcomes. As described in the special procedures chapter, special procedure mandate holders appointed by the Commission can

1 Named after the resolution by which it was created: Economic and Social Council (ECOSOC) *Resolution 1503 (XLVIII)* of 27 May 1970.

2 Para 1.

3 A.F. Bayefsky, *How to Complain about Human Rights Treaty Violations: Choosing a Forum*, available at: www.bayefsky.com/complain/44_forum.php.

4 F.Z. Ksentini, *Les procédures onusiennes de protection des droits de l'homme*, (Publisud, 1994), p. 122.

5 G. Alfredsson and E. Ferrer, *Minority Rights: A Guide to United Nations Procedures and Institutions*, (Minority Rights Group International and Raoul Wallenberg Institute, 1998), p. 20.

also receive communications that they take up directly with the concerned governments.

How did the 1503 procedure work?

Individuals or groups who were victims of human rights violations, or any other person or group with direct and reliable knowledge of the violations, could submit a complaint to the Commission through the Office of the High Commissioner for Human Rights (OHCHR) ⁶. **Non-governmental organisations (NGOs) did not require ECOSOC accreditation to submit complaints but were required to be acting in good faith and in accordance with recognised principles of human rights** ⁷. The OHCHR secretariat would carry out an initial screening of all communications to exclude communications that were inadmissible because they did not meet the substantive or procedural requirements of the 1503 procedure. OHCHR processed between 5,000 and 220,000 communications every year ⁸.

Under the substantive requirements of the 1503 procedure, the complaint had to describe the facts that demonstrated the existence of a consistent pattern of gross human rights violations, accompanied by specific evidence ⁹. The complaint had to indicate the 'purpose of the petition', namely the kinds of action sought, and indicate the rights that were violated ¹⁰. A series of communications on violations in a country could, taken together, reveal a consistent pattern of violations ¹¹. The procedural requirements of the 1503 procedure included that 1) the complainant had exhausted all available remedies in his/her country and submitted the complaint within a reasonable time; 2) that the State against whom the complaint had been made was not being examined under any public procedure of the Commission; 3) the subject matter did not fall within the mandate of any of the Commission's special procedures; 4) it was not possible for the complainant to submit the complaint under an individual complaints mechanism set up by a treaty, which the State in question had ratified; 5) the complaint was not politically motivated or manifestly

⁶ Para 2, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Resolution 1 (XXIV)*. Now referred to as the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission).

⁷ *Ibid.*

⁸ World Federation of United Nations Associations (WFUNA), *Report of the Seminar on the Commission on Human Rights*, (July 2004), p. 19, available at: www.wfuna.org/docUploads/Final%20Report%202004%20Seminar%20%20Epdf.

⁹ OHCHR, *Fact Sheet No. 7: Complaints Procedure*, (OHCHR, Rev. 1), available at: www.ohchr.org/english/about/publications/docs/fs7.htm.

¹⁰ Para 3, Sub-Commission *Resolution 1 (XXIV)*.

¹¹ N. Rodley and D. Weissbrodt, 'United Nations Nontreaty Procedures for Dealing with Human Rights Violations', in H. Hannum, *Guide to International Human Rights Practice*, (Transnational Publishers, 4th edn., 2004), p. 72.

unfounded or contained insulting references to the State; and 6) the complaint was not anonymous and did not rely exclusively on mass media reports¹².

Complaints that satisfied these requirements were forwarded to the concerned States, requesting them to reply within 12 weeks to the allegations contained in the complaint. **The complaint had to then go through two stages of review, and only a small number of situations in countries that made it through both stages were referred to the entire Commission¹³.** At the first stage, the complaints were reviewed by the Sub-Commission on the Promotion and Protection of Human Rights' (the Sub-Commission) Working Group on Communications¹⁴. The Working Group would review the complaint to assess whether it reliably attested to a consistent pattern of gross human rights violations and would only refer the complaints that it considered had satisfied the procedural and substantive requirements to the next stage of review. It could also keep some complaints pending till the following year to get more information. The second stage of the review would be carried out by the Commission's Working Group on Situations¹⁵. **The Working Group on Situations would decide which situations in countries, rather than complaints, the Commission should take up and make recommendations to the Commission on what course of action to take on each situation.** The process could take 18 months or longer from the time the complaint was submitted till it reached the Commission¹⁶. The concerned State would be informed that the situation had been transmitted to the Commission and would be invited to submit any additional information and participate in the proceedings at the Commission. The complainant was not informed or given any opportunity to submit information¹⁷.

The Commission would finally consider the situation in the countries referred to it by the Working Group on Situations in closed meetings during its annual session. The Commission could enter into a discussion with the concerned States, which could participate in the meeting and be present during the adoption of the final decision. **The recommendations of the Working Group on Situations were considered as the 'first proposal' but these recommendations could be amended and any member of the Commission could table new proposals¹⁸.** The Commission could decide on one of the following four courses of action¹⁹: 1) to discontinue reviewing the matter; 2) to keep

12 Paras 3–4, Sub-Commission *Resolution 1 (XXIV)*. See also M.F. Ize-Charrin, '1503: A Serious Procedure', in G. Alfredsson, J. Grimheden et. al. (eds.), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001), p. 297.

13 See ECOSOC *Resolution 1503* and ECOSOC *Resolution 2000/3*.

14 Made up of five members of the Sub-Commission, one from each of the UN's five regional groups.

15 Made up of five members of the Commission nominated by each regional group.

16 E. Miles, *A Conscientious Objector's Guide to the UN system*, (Quaker United Nations Office and War Resisters' International, 2000), p. 61, available at: www.wri-irg.org/pdf/co-guide-un.pdf.

17 See P. Alston, 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights*, (Clarendon Press, 1995), p. 147 where he also comments on the inequality of the procedure.

18 M.F. Ize-Charrin, '1503: A Serious Procedure', (n. 12 above), p. 302.

19 Para 7 (d) ECOSOC *Resolution 2000/3*. Para 6 (b) of ECOSOC - footnote carries over to the next page -

the situation under review and wait for further information from the State or which may reach it through the 1503 procedure; 3) keep the situation under review and appoint a country special procedure mandate²⁰ to monitor the situation and report back to the Commission; and 4) refer the matter to the public 1235 procedure, under which it could discuss the situation in the country publicly and take a variety of actions, such as adoption of a resolution, appointment of special procedure mandates, etc. The Commission could also make recommendations to ECOSOC. **The Commission did not provide any direct remedies or order the payment of compensation for the complainant or other victims under this procedure.**

After the initial notification that the communication was being processed under the 1503 procedure, the complainant did not receive any information about the proceedings or outcomes. The entire process of the consideration of complaints was confidential²¹. Since 1978, the Chairperson of the Commission started announcing the names of countries that had been examined under the 1503 procedure as well as those which had been discontinued but did not provide any other details of the discussions or outcomes. The Commission examined 84 countries under the procedure up to 2005²². It has dealt with a range of human rights violations including cases of mass killings, disappearances, torture, political detention, forced labour, violations of the right to self-determination, and religious persecution²³. The limited information that is available on the outcomes on specific country situations indicates that between 1989 and 2005, the Commission examined 55 States, of which the Commission discontinued reviewing 43. Nine States were transferred to the advisory services program, which was followed by the adoption of country resolutions regarding seven of these States. Three States were transferred directly to the public procedure²⁴.

Resolution 1503 provided that the Commission could set up an ad hoc committee to investigate the situation but this provision has never been used.

- 20 M. F. Ize-Charrin, '1503: A Serious Procedure', (n. 12 above), see p. 304 where Maria Ize-Charrin points out that special procedure mandates set up under the 1503 procedure followed the same guidelines as those set up under public proceedings. The major difference was that the reports of these mandates were only made public after a decision of the Commission. Examples of mandates set up under the 1503 procedure include the country special procedure mandates on Chad, Liberia, and Uzbekistan.
- 21 The Commission could however, at the request of the concerned government, make the documents relating to its examination public.
- 22 For the list of countries see www.ohchr.org/english/bodies/chr/stat1.htm. See also annex 5.1 for outcomes.
- 23 See H. Tolley, 'The Concealed Crack in the Citadel: The UN Commission on Human Rights' Response to Confidential Communications', (1984) 6 *Human Rights Quarterly* 420, pp. 448-449.
- 24 See annex 5.1 available on the CD-Rom and on www.ishr.ch/handbook for further details on the States examined and the outcomes, as well as the methodology used to collect this information.

What were the advantages and disadvantages of the 1503 procedure?

The 1503 procedure was a limited mechanism. Unlike most complaint procedures, it did not offer any direct relief for victims. Its main advantages were that 1) it acted as a channel through which any victim, NGO, or other individual could directly submit information to the Commission to bring their concerns about human rights violations to its attention²⁵; 2) the submission of information on particular violations under the 1503 procedure often helped lead to the Commission setting up a public procedure to deal with the issue²⁶; 3) it was part of an incremental technique for “placing gradually increasing pressure on offending governments”²⁷; 4) it was one of the few forums available to submit complaints regarding governments that have not ratified many human rights treaties or agreed to treaty bodies receiving communications; and 5) the prospect of being named under the 1503 procedure could be embarrassing for the concerned government.

Its main disadvantages were that: 1) the lack of remedies or even information about outcomes to victims; 2) “the Commission has only responded to violations of only a limited range of civil and political rights, which in turn has ensured that while Third World countries are disproportionately represented on the 1503 blacklist, developed countries (both West and East) have only very rarely been called into account”²⁸; 3) violations of economic, social and cultural rights have never been examined seriously²⁹; 4) at the level of both the Sub-Commission and Commission, political considerations have led to a failure to act on serious country situations and against some governments³⁰; 5) selectivity and double standards in the choice of countries that were referred and in its decisions led to the Commission investigating “political detention in one case while disregarding more egregious mass killings in another”³¹; 6) it was time-consuming, slow, had complex procedures, and gave unequal opportunities of participation to States in comparison to complainants; and 7) the secrecy of the proceedings worked to the advantage of the concerned

25 *Report of the Inter-Sessional Open-Ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, E/CN.4/2000/112, (16 February 2000), p. 11.

26 A commonly referred example is the establishment of the Working Group on Enforced or Involuntary Disappearances that was preceded by the «submission of thousands of cases recorded under the 1503 procedure». See M.F. Ize-Charrin, ‘1503: A Serious Procedure’, (n. 12 above), p. 306.

27 T. van Boven, *People Matter: Views on International Human Rights Policy*, (Meulenhoff, 1982), p. 65.

28 See P. Alston, ‘The Commission on Human Rights’, (n. 17 above), p. 151

29 *Ibid.*

30 See *Ibid.*, pp. 148–149 where Philip Alston describes the failure of the Commission to take action on Uganda during Idi Amin’s regime and the Sub-Commission’s reluctance to act on Greece, Iran, and Portugal.

31 H. Tolley, ‘The Concealed Crack in the Citadel: The UN Commission on Human Rights’ Response to Confidential Communications’, (n. 23 above), p. 453.

State and also shielded the members of the Commission from scrutiny of their decisions.

REVIEW OF THE COMPLAINT PROCEDURE

Will the Council maintain the 1503 procedure or set up another complaint procedure?

General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council), provides that the Council shall “maintain a complaint procedure”³². As in the case of special procedures, the Council is required to “review, and where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission” including the 1503 procedure “within one year after the holding of its first session”³³. The Council will review the 1503 procedure and may have to consider whether it retains this procedure as it is, improves and rationalises it, or sets up a new complaint procedure. The 1503 procedure is the oldest complaint procedure within the UN human rights system and was quite innovative at its time. **Complaint procedures have however developed considerably since the 1970s and the Council could consider various options to develop an easier to use, more effective, and stronger complaint procedure.** As with any reform process, the concern will be to ensure that the review is used to strengthen the existing system and not to erode it further.

Key questions include:

- Why does the Council need to maintain a complaint procedure?
- What kind of a procedure should the Council maintain to address complaints that are received by OHCHR that cannot be dealt with elsewhere in the UN human rights system?
- What were the strengths and weaknesses of the 1503 procedure?
- What should the review of the 1503 procedure focus on?
- Should the Council retain the 1503 procedure, use it as a foundation and improve it, or set up a new complaint procedure?
- If the Council retains the 1503 procedure, how, if at all, should it be improved?
- How can those who submit complaints be kept informed and participate in the Council’s complaint procedure?

³² Para 6.

³³ *Ibid.*

What should be the scope of the complaint procedure?

The 1503 procedure was one of a few complaint procedures which is not set up by or linked to a particular human rights or labour rights treaty³⁴. In the case of a complaint procedure that is set up by or linked to a particular treaty, 1) the scope of the complaint procedure is clearly defined and delimited to violations of rights set out under the treaty, and 2) the State signs up to a treaty or supplementary instrument setting up the complaint procedure and agrees to its jurisdiction. **Possibly the biggest strength of the 1503 procedure was the ability of the Commission to consider complaints in relation to all countries and all human rights irrespective of the ratification of human rights treaties. This wide scope was however counterbalanced by the high minimum threshold for intervention, which limited the application of the procedure to gross violations of human rights and was accompanied by various other procedural limitations, such as confidentiality.** The Council will have to consider what the scope of its complaint procedure should be. Should it cover all human rights or be restricted to certain rights agreed to by the State or which are applicable to all States? If the procedure has a wide scope and covers all rights, will the threshold for intervention be restricted to cases of severe violations or could the Council intervene in all violations, if certain other admissibility criteria are met? Linked to this issue, the Council will have to identify the role the complaint procedure plays in the Council's functioning. Will the complaint procedure be a channel of information for victims and others who cannot access the Council directly to trigger its action on country situations, will it serve as an early warning function, or a process through which the Council addresses individual violations?

The Council will also have to decide on the admissibility criteria for complaints, which would also impact the scope of the procedure. The 1503 procedure had very restrictive admissibility criteria, particularly in terms of overlap with special procedures, and this excluded a number of complaints. The Council may wish to consider whether it should revise these criteria to allow for a wider range of complaints to reach it.

Key questions include:

- What should be the scope of the complaint procedure?
- What should be the role of the complaint procedure in relation to the Council's functions?
- What would be the advantages and objectives of having a complaint procedure maintained by the Council, a political body made up of governments?
- What human rights violations should the complaints procedure cover?

³⁴ See annex 5.2 for a table comparing various international and regional complaint procedures, available on the CD-Rom and on www.ishr.ch/handbook.

- Should there be a minimum threshold for the Council's intervention such as the severity of violations?
- What should be the criteria for admissibility of complaints?
- If the subject matter of the complaint falls within the mandate of any special procedure, should it be excluded?
- How can the Council's complaint procedure complement other complaint procedures, set up under human rights or labour rights treaties?

What should be the composition of the body examining complaints?

The body that examines complaints could be a political body (made up of Council members), an expert body (made up of independent human rights experts³⁵), or mixed (with a two-stage procedure where the complaint is first examined by an expert body and then by a political body). The Council may wish to draw a distinction between a judicial examination phase and a political decision-making phase. Delegating the consideration of the complaint to an expert body with diverse human rights expertise would ensure that the determination of violations is undertaken on the merits of every complaint and that there is a reasoned decision along with recommendations for action by the Council; it would also reduce the pressure on the Council's time. The Council could then discuss the findings and recommendations of the expert body and decide on the action that it wishes to undertake.

Key questions include:

- What should be the composition of the body examining complaints?
- Should the body be a political body, an expert body, or mixed?
- If the body is made up of independent experts, how should the experts be chosen?
- How should the Council be involved in the consideration of a complaint?

Who should be able to submit complaints and what should be the process to consider complaints?

The 1503 procedure allowed victims, individuals with direct knowledge of the violations and all NGOs, not just those with ECOSOC accreditation, to submit complaints. As this feature was one of the main strengths of the 1503

³⁵ Possible models for selection include choosing five experts from a roster prepared by OHCHR while ensuring geographical balance, or to rely on the expert body if the Council sets one up to fulfil this task.

procedure, it is important that it be retained in any new system. The Council may however wish to revise the process of consideration of complaints, in particular the requirement of confidentiality and the lack of provision for victims to participate in the proceedings or get any information about the discussions or outcomes. The Council may also wish to decide whether there should be a provision for investigations to be carried out in the concerned country.

Key questions include:

- Who should be able to submit complaints?
- What should be the process to consider complaints? How long should it take?
- Should the entire process of considering complaints be public? If not, what parts should be confidential?
- How should victims and other complainants participate in the process?
- Should there be a provision to carry out investigations in the concerned country? Who should carry out these investigations?

What should be the outcomes of a successful complaint?

The 1503 procedure did not offer any direct relief to victims. It allowed the Commission to monitor and study the situation in a country by appointing a special procedure mandate, and to transfer the situation to its public proceedings for discussion and to take action. The Council will need to decide whether it should provide remedies to affected individuals, such as recommendations for action by the State and payment of compensation, and take interim measures for the protection of victims, if needed. It will also need to decide on the broader range of action it could take on the country situation. This may be in line with the tools it develops for dealing with country situations more generally and could include clear recommendations for action; setting up a monitoring mechanism or presence in the country; and/or referring the matter to other UN bodies³⁶. The Council could also consider how the complaint procedure relates to the Universal Periodic Review mechanism and what should be the follow-up process if the State fails to comply with its recommendations.

Key questions include:

- What should be the outcomes of a successful complaint?
- What kinds of recommendations and actions could the Council suggest?

³⁶ See the chapter on Universal Periodic Review for a more detailed discussion on possible outcomes on country situations.

- Should the Council provide remedies to victims? If so, what kinds of remedies should it be able to provide?
- Should there be a follow-up process if the State fails to comply with the Council's recommendations?

Process of the review

The process through which the Council will review the complaints procedure, as with special procedures and the Universal Periodic Review, is still undefined. It seems likely that the Council will set up an open-ended working group or some other form of consultation by the president, but this and other issues may only be decided once the Council meets in June. Essential elements for this process may include that it be carried out in an open, transparent, and public manner and with the participation of all stakeholders, such as other States, special procedures, OHCHR, NGOs, and NHRIs. It may also be useful for treaty bodies to provide input into this process on the ways in which the complaint procedure could complement and strengthen their work.