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HUMAN RIGHTS COUNCIL WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES DISCUSSIONS ON COMPLAINT PROCEDURE, 3RD SESSION, 10-27 APRIL 2007.

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Overview

The Working Group's third round of discussions on the complaint procedure took place on 10 and 25 April 2007, for a total of three three-hour sessions. A fourth session was cancelled by the Facilitator on the grounds that the Working Group on expert advice needed the time more.

The discussions continued to be grounded in a general consensus that the structures of the 1503 procedure should be retained as far as possible. The key debates could be summarised as the following:

Appointment and composition of the 1st Working Group:¹

- A basic consensus was built around the idea that the President of the Council should play a role in selection. However, States are still divided as to whether he should play an active, decision-making role, or whether he should appoint strictly according to nominations from the regional groups.
- It was still unclear whether experts will be drawn from the Expert Advice Body to the Council. This discussion was confused by its interrelationship with the ongoing discussions of the Working Group on the Review of Expert Advice.

Decisions of the 2nd Working Group:²

¹ This Working Group corresponds to the 'Working Group on Communications' under the 1503 procedure. This was composed of experts and used to consider the admissibility of cases. More information on the 1503 procedure can be found in the section on 'Background'.

- Most States seemed to agree that the decision to drop a case should be taken by consensus, or failing that a simple majority. However, one or two States still favoured using a qualified majority when consensus could not be achieved.
- There was still a division between States who believe the 2nd Working Group should be able to decide the Council should address a case in public, or whether the decision to make a case public should be decided by the Council itself.³ A large bloc of States believed this power should stay with the Council. A small group supported a middle ground whereby the 2nd Working Group could recommend a situation be addressed in public.

Timeframe of the Procedure:

- Most States now agreed that the 1st Working Group should be allowed to meet twice a year. Opinion was still divided over whether the 2nd Working Group should also meet twice, or only once.
- Extensive debate continued as to whether an overall time limit could be imposed on the Complaint Procedure. Towards the end of the session, a compromise proposal emerged whereby a timeframe could act as a guideline. It was not clear whether this proposal would be supported.
- In a discussion over the frequency with which the Human Rights Council would assess cases, States disagreed over whether this should be strictly once a year, or at least once a year with the option to consider cases more often when required.

Measures to be taken by the Human Rights Council:

- There was still no consensus as to whether there should be an exhaustive or indicative list of measures to be taken by the Council. Some States opposed the creation of any list at all.

Admissibility:

- States still disagreed over whether a complaint should be inadmissible if it has not exhausted all domestic remedies, including those provided by National Human Rights Institutions.
- There was also no consensus on what, if any, standards these domestic remedies should have to meet, for example whether they should have to be accessible and not unreasonably prolonged.

Background

The Commission on Human Rights' main complaint procedure was the 1503 procedure, under which it could receive 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"⁴ 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 attention. The 1503 procedure was confidential and the Commission considered 'situations' in countries 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 or the outcomes.⁵

² This Working Group corresponds to the 'Working Group on Situations' under the 1503 procedure. This was composed of representatives of States and used to consider both admissibility and what measures should be taken to deal with a situation.

³ Under the 1503 procedure, the Commission could decide to discontinue assessing a case under the confidential 1503 procedure and begin assessing it under the public 1235 procedure. This decision was reserved for the Commission as a whole, and could not be taken by the Working Group on Situations, otherwise known as the '2nd Working Group'.

⁴ Resolution 1503(XLVIII) of the Economic and Social Council, paragraph 1.

⁵ For further information and a discussion of the key issues see M. Abraham, *A New Chapter for Human Rights*, (ISHR and FES, Geneva 2006), available at <http://www.ishr.ch/handbook>, pp. 33-50. For more information on the 1503 procedure visit the OHCHR website (<http://www.ohchr.org/english/bodies/chr/complaints.htm>). The list of States examined under the 1503 procedure is

In accordance with General Assembly *Resolution 60/251* the Council was mandated with “reviewing and, where necessary, improving and rationalising all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaints procedure”. At its first session, the Council established the Working Group on the review of mandates and mechanisms. This Working Group met for the first time from 13 to 24 November 2006.⁶ At this stage, the President divided the Working Group into three streams: one to deal with the review of mandates, one to deal with the review of expert advice, and one to deal with review of the complaints procedure. From then on, these streams functioned as separate working groups. During that session, consensus emerged that the 1503 procedure should be used as the model for the new complaints procedure. It was felt that as far as possible, it should be preserved as it existed under the Commission. Even the vocabulary remained connected to the 1503 procedure, with several delegations using “1503 procedure” interchangeably with “complaint procedure”. The strongest areas of consensus emerged when States could agree on retaining specific aspects of the 1503 procedure. For example, although a few delegations had supported Canada’s proposal for a single stage/working group, the vast majority of States had supported the continuation of the 1503 structure, composed of two Working Groups. In addition to this general consensus around preserving the status quo, by the end of the November session several proposals for alterations to the 1503 procedure had become a significant part of the debate, including: increasing the involvement of the complainant; linking up the complaint procedure with other mechanisms; and limiting which complaints would be admissible.

At the second session of the Working Group in February, other significant areas of convergence emerged on: the structure and composition of the working groups (experts for the 1st Working Group and States for the 2nd); the method of selection for the 2nd Working Group; the need to create a process to “find a home”⁷ for rejected complaints; the need to keep victims better informed of the progress of their complaint; and the need to reduce the time taken dealing with complaints. Several of these proposals, if they maintain their support, could make the new complaints procedure a more victim-oriented and effective process than the 1503 Procedure.

However, important questions were left unanswered. States remained divided over whether the requirement for a complaint to have exhausted domestic remedies should include National Human Rights Institutions. There was little consensus on how members of the 2nd Working Group should be selected, and whether they should maintain their power to judge the admissibility of complaints. There was no agreement on whether a single secretariat should be created to deal with all complaints. Numerous questions surrounding confidentiality remained. Moreover, several positive proposals received very little support at the February session. There was a strong opposition to the suggestion to introduce a preventative role to the complaint procedure. Attempts to broaden the scope of the procedure to include not only gross, but serious violations were barely supported at all. Perhaps most worryingly, a significant negative proposal appeared to gain ground when no delegations spoke out against suggestions that complaints should now be required to come directly from victims.

In order to make progress on these areas of disagreement, an informal meeting of the Working Group was held during the March 2007 session of the Human Rights Council. Much of this session was taken up with a debate over whether it was legitimate to hold an informal meeting and therefore very little substantive discussion took place.

These discussions set the stage for this third and final round of formal public negotiations. As at the previous sessions, discussions were guided by a non-paper, presented by the Facilitator, Ambassador Blaise Godet of

available at <http://www.ohchr.org/english/bodies/chr/stat1.html>. ISHR has prepared a table on the outcomes of the 1503 procedure, based on available information and one comparing the 1503 procedure to other regional and international complaint procedures, which are available at www.ishr.ch/handbook/Annexes.

⁶ The reports of this round of discussions can be found at <http://ishr.ch/hrm/council>.

⁷ This was the wording used by the UK delegation.

Switzerland.⁸ This non-paper was the product of all the previous discussions of the Working Group. Whereas in previous non-papers, the Facilitator had outlined “elements of convergence”, “elements requiring further discussion” and “proposals by the Facilitator” or highlighted controversial issues in grey, this time the paper appeared more as a cohesive working proposal. The text was presented as one coherent body with a cover note outlining four main points still to be discussed. They were:

1. Appointment and composition of the first Working Group
2. Decisions of the second Working Group
3. Timeframe of the Procedure
4. Measures to be taken by the Human Rights Council (HRC)

Discussion of these issues took up the majority of the time of the final session of the Working Group. However, at the end of the final part of the session, the Facilitator invited comments on the rest of his non-paper. This opened the door to reiterations of numerous comments made in previous sessions and some newer proposals, which were not discussed in depth due to time constraints.

Appointment and composition of the 1st Working Group

Under the 1503 procedure, the Sub-commission designated the membership of the 1st working group from its own members. A consensus had already been established that this first Working Group should continue to be composed of experts. However, major questions remained unanswered over who should select these experts and who should be consulted about their selection. Further, a complex debate remained regarding whether the experts should be drawn from the future Expert Advice Body of the Council or not.

Who should select the experts?

In the February session, one group spoke in favour a model whereby the regional groups of the Council appointed experts nominated from the Council’s expert body,⁹ and another group advocated for the experts to be selected by the President of the Human Rights Council¹⁰, in consultation with members of the bureau,¹¹ with a third proposal from Germany (on behalf of the EU) that the High Commissioner for Human Rights should be responsible for appointment.

This time, a basic consensus was built around the idea that the President of the Council should be responsible for appointments after some form of consultation. India added its voice to those advocating this model. Germany (on behalf of the EU) suggested that it would also now be willing to consider this option, but downplayed the need for consultation. The African Group, Tunisia, Morocco and Bangladesh also moved to this position, with Bangladesh placing its emphasis on a strong consultation process and Algeria (on behalf of Africa) going further to argue that the President should appoint strictly according to the recommendations communicated to him. Only Cuba continued to object for any role for the President in this process, stating that the regional groups should be solely responsible for appointment.

⁸ The revised non-paper is available at the OHCHR extranet, which can be accessed at www.ohchr.org/english/bodies/hrcouncil/form.htm (fill out the form on the page to receive the user name and password).

⁹ Algeria (on behalf of the African group), Bangladesh and Venezuela

¹⁰ China, Iran, Japan, the Republic of Korea, Malaysia, Morocco, Pakistan (on behalf of the OIC), the Russian Federation.

¹¹ Under the practice of the Commission, the Bureau was made of the President, three Vice-Presidents and a Rapporteur. The President was rotated amongst the regional groups and each of the Vice Presidents and Rapporteur were chosen from the remaining four regional groups. States holding these positions in the bureau could not simultaneously act as the coordinators for their region.

If the President of the Council is responsible for selection, who should he consult?

In light of this approximate consensus, a new discussion arose as to who the President should consult when making his decisions. Algeria (on behalf of the African group), Cuba, Russia, Pakistan (on behalf of the OIC), Bangladesh, Indonesia, Colombia, China and Iran also stressed that this consultation must be with the regional groups themselves and not the bureau, as this was outside the remit of the Bureau. India supported this position by suggesting the addition of the wording “in consultation with regional groups” to the non-paper. Germany (on behalf of the EU) and the International Service for Human Rights (ISHR) spoke in opposition to this position. Germany stated that it saw no added value in the involvement of the regional groups. ISHR and Germany (on behalf of the EU) stated that since the 2nd Working Group was composed of States, State involvement should be minimised in the 1st Working Group.

Should the experts be drawn from the expert advice body to the Council?

The Facilitator stated that the whole debate regarding the composition and appointment of the 1st Working Group was dependent on whether the expert advice system was recreated as a single standing body or a roster of experts selected by the Office of the High Commissioner (OHCHR). A majority of States agreed with this assessment and this agreement became the basis for a highly complex discussion about the circumstances under which it should be decided that the experts for the Complaint Procedure will be drawn from the Expert Advice Body to the Council.¹²

Some delegations answered this question by looking at the two groups of experts as either entirely separate or entirely linked. In this group, Mexico and ISHR argued that the experts in the first Working Group need not be drawn from the experts of the advice body and can be seen as entirely separate. Algeria (on behalf of the African Group) and India both expressed clear preference for the groups to be linked, with members of the first working group to be selected from the members of the expert body to the Council, as was the case under the 1503 procedure.¹³ Algeria (on behalf of the African group) argued that if the current system is working, there is no need to change it.

However, some answered this question based on whether they believed the experts should be drawn from a roster or standing body. Accordingly, they argued that *if* the Expert Advice Body to the Council is eventually established, whichever of these forms that they prefer, the experts for the 1st Working Group could be drawn from this Body. If it is in the form that they do not prefer, they would advocate a separate group of experts to be established for the Complaints Procedure. In this way, Germany (on behalf of the EU), Japan, Australia and the UK (who all favour a roster) argued that if a standing body of experts is established as the Expert Advice Body, it would not be a suitable source of experts, as the members of the 1st Working Group must have a strong judicial background, whereas the members of standing Expert Body tend to be more broadly focused academics, as was the case in the Sub-commission. Therefore, a separate body of experts would need to be established. Mexico broadly supported this logic. However, China argued that experts from an academic background would be entirely qualified to sit on the 1st Working Group.

Others answered this question based on who they thought should appoint the experts: the President of the Council, the High Commissioner for Human Rights or representatives of regional groups. Accordingly, they argued that *if* the Expert Advice Body to the Council is eventually selected in the way that they prefer, the experts for the 1st Working Group could be drawn from this Body. If it is selected in a way that they do not prefer, they argued for a separate group of experts to be established for the Complaints Procedure. In this group, Pakistan (on behalf of the OIC) (who supported appointments by the regional groups with the President of the Council) argued that if the Expert Advice Body was established as a roster appointed by

¹² Colombia, Cuba, Germany (on behalf of the EU), India, Pakistan (on behalf of the OIC), UK.

¹³ Supported by Bangladesh, Iran.

OHCHR, this could not be a source of experts for the 1st Working Group, as the regional groups would not be able to choose between experts they had not originally selected and therefore did not know and whose credentials were not clear to them. Therefore, a separate source of experts would need to be established

Still others felt this question was dependent on the modalities of the Expert Advice Body to the Council. Here, Chile argued that if the Expert Advice Body was established with a mandate restricted to addressing themes, rather than specific countries or situations, it would not be appropriate for these experts to sit on the 1st Working Group of the Complaint Procedure, which deals with specific situations. Therefore a different group of experts would need to be used.

Geographical and Gender Representation

Under 1503, the 1st Working Group was geographically representative. At previous sessions, China and Pakistan (on behalf of the OIC) had favoured maintaining this system, and Germany (on behalf of the EU) had favoured changing it, in order to ensure the appointment of experts was based on ability. At this session, China reiterated its position that equitable geographic representation was required for equitable discussions. Russia and India added their voices to those states calling for the Working Group to be geographically representative. ISHR suggested a compromise that the Group should be formed with attention paid to geographical and gender balance, but not firmly tied to them.¹⁴

The size of the Working Group

Under the 1503 procedure, the Working Group was composed of 5 members. Argentina reiterated their previous proposal to increase the number to 10, with 2 members from each regional group. Mexico supported this. China, Iran and Indonesia argued it should remain as 5 members.

Decisions of the 2nd Working Group

Shall decisions to drop a case by the 2nd Working Group be taken by consensus, a simple or a qualified majority?

Chile felt that a full consensus was required to discontinue a case, on the grounds that this has very serious implications. At the other end of the spectrum, Cuba, Algeria (on behalf of the African group), USA and Australia supported the use of a single majority vote. USA reasoned that since it currently took a majority to advance a case, but a consensus to drop it, a backlog of cases was forming. However, most States favoured a middle ground. A strong majority felt that decisions of this Working Group should be taken by consensus, but a simple majority would be acceptable if a decision could not be reached.¹⁵ Similarly, Egypt, Germany (on behalf of the EU) and Bangladesh stated that this decision should be taken “preferably” by consensus. India strongly opposed using a single majority vote without attempting to establish a consensus on the grounds that it conflicted with the concept of “innocent until proven guilty.” Germany (on behalf of the EU) and Canada supported a qualified majority if consensus could not be reached, but expressed concern that cases might be kept pending for an excessive amount of time if the bar was set too high for dropping a case.

Egypt added that it should be made clear that all other decisions taken by the 2nd Working Group should reach the Council for resolutions.

¹⁴ Supported by Tunisia

¹⁵ Algeria (on behalf of the African group), Azerbaijan, China, Guatemala, India, Indonesia, Iran, Japan, Pakistan (on behalf of the OIC), Russia and Senegal.

Shall the 2nd Working Group have the power to decide that the Council consider a situation in a public meeting, or shall this decision remain in the hands of the Council itself?

Under the 1503 procedure, the Commission could decide to discontinue assessing a case under the confidential 1503 procedure and begin assessing it under the public 1235 procedure. This decision was reserved for the Commission as a whole, and could not be taken by the ‘2nd Working Group’, known as the ‘Working Group on Situations’. Germany (on behalf of the EU), Canada, the UK and Belgium were in favour of giving the 2nd Working Group this the power to decide the Council should assess a situation in public to be used in cases of non-cooperation on the part of a State. The UK argued that in a domestic system, when defendants do not show up at court on the day of their trial, there are considered to be “in contempt of court”, and there are mechanisms for dealing with this. It argued that giving this power to the 2nd Working Group would be creating an analogous mechanism to deal appropriately with non-cooperation. It added that “unequivocal non-cooperation”, the term used in the Facilitator’s non-paper, was actually too high a threshold.

However, a large bloc of States were strongly against giving this power to the 2nd Working Group.¹⁶ Algeria (on behalf of the African group) stressed that the Council already had mechanisms for addressing a case publicly and therefore the Complaints Procedure itself should not have its confidentiality compromised. Further, it questioned how it could be established that a State is not cooperating. Cuba argued that the decision to end the confidentiality of the procedure is so serious that it should only be addressed by the Council, as this is the superior body. It also argued that it would be impossible to establish when a State was manifestly not cooperating. India claimed the proposal was “not in the spirit” of the 1503 Procedure. Several States argued that such a small number of States should not be able to force the rest of the Council to assess a case in public.¹⁷ Pakistan (on behalf of the OIC) felt that it was important to protect confidentiality here, and that the principle of confidentiality should in fact be re-emphasised by adding a reference to the confidentiality of the procedure in this part of the text.

Chile, Guatemala, Australia, Mexico, USA and Senegal were in favour of a middle ground whereby to the 2nd Working Group could *recommend* that the Council address a situation in public in cases where a State is not cooperating. However, the final decision would be reserved for the Council. Australia justified this by arguing that the decision to end confidentiality was political in nature and should therefore be taken by the Council as a whole. Argentina proposed strengthening this recommendation mechanism by creating a rule that any case recommended for examination in public should have to be considered at the next session of the Council, rather than at the next Council session where cases are already scheduled to be assessed the Council is already due to assess cases from the Complaint Procedure. The rationale behind this was that if the Council generally only assesses cases from the Complaint Procedure at one or two of its three annual sessions, a case might be left pending for months until one of these sessions occurred. Under Argentina’s proposal, cases recommended for public consideration could be dealt with more quickly.

Timeframe of the procedure

Throughout the rounds of talks, general support has been established that the timeframe for the process of the Complaint Procedure should be shorter. At this session, discussions continued on how this would be achieved.

¹⁶ Algeria (on behalf of the African group), Bangladesh, China, Cuba, Egypt, India, Indonesia, Iran, Japan, Morocco, Pakistan (on behalf of the OIC), Russia.

¹⁷ Algeria (on behalf of the African group), Morocco, Thailand.

Frequency of both working group meetings

Under the 1503 Procedure, both Working Groups met once a year. However, in the February round of talks on reviewing the Complaint Procedure, States were divided as to whether they should now meet twice a year. This debate continued at this session. On one side, Algeria (on behalf of the African group) initially felt both Working Groups should continue to meet only once a year. On the other side, Germany (on behalf of the EU), India, Canada, Italy, ISHR, Italy and Mexico argued for twice yearly sessions for both Working Groups to improve the overall timeframe of the Complaint Procedure. Italy underlined that this would make the procedure more victim oriented. A third proposal emerged from Bangladesh, Indonesia and Thailand, who advocated twice yearly sessions for the 1st Working Group to consider first new complaints and then pending ones, and once yearly sessions for the 2nd Working Group. Algeria (on behalf of the African group) eventually moved to this position.

There was additional discussion clarifying the status quo on the frequency of meetings. Pakistan (on behalf of the OIC) questioned whether the 1st Working Group already in fact held two sessions, as a second one was required for the Chair to meet with the secretariat to sift through cases that the secretariat proposed rejecting. The Secretariat informed them that they meet with the Chair of the 1st Working Group on a monthly basis, in addition to the meetings of the two Working Groups.

Maximum time duration for the procedure

The complete process of the 1503 Procedure could take up to 4 years, from receipt of the Complaint to decision-making by the Council. In previous rounds of talks, some States supported limiting this timeframe to 18 or 24 months. Others objected to the principle of a strictly limited timeframe on the grounds that it would artificially limit the work of the Complaint Procedure. This time, Germany (on behalf of the EU) advocated an 18 month limit to the Complaint Procedure on the grounds that a more timely process will be more victim-oriented. Argentina, who had been against an imposed timeframe, now spoke in favour of a 24 month “timeline”. Cuba, China, USA, India and Bangladesh continued their opposition to any form of timeframe on the grounds that it would be “artificial and unfeasible”¹⁸ as particular circumstances might make it impossible for a State to reply. Bangladesh outlined possible delays facing States, such as communications with and within the capital, communications with the ministry, and then communications with relevant organs of the State, such as the police force. The Facilitator countered these criticisms of imposing a timeframe by suggesting that the timeframe could act as a guideline to be taken in good faith. Australia proposed wording this compromise that the timeframe “in principle should not exceed...”

Pakistan (on behalf of the OIC) questioned when the timeframe should be seen as beginning, opening a debate on this issue. The Facilitator was of the view that the “clock should start ticking” from the moment of receipt of the complaint by the Secretariat. Pakistan (on behalf of the OIC) objected to this on the principle that States might bear the brunt of the Secretariat’s delays. To avoid this problem, India proposed that the clock should start when the communication is transmitted to the Government.¹⁹ Algeria (on behalf of the African group) proposed that it should start when the communication is received by the Government. The Secretariat assured the Working Group that once they have approval from the 1st Working Group, they send a communication to the relevant State within 12 weeks.

There was a third debate within this discussion concerning a specific time limit for State responses. The Facilitator, the UK and Germany (on behalf of the EU) suggested that 3 months should suffice for States to respond to communications. Germany (on behalf of the EU) argued this was one month more than was given to States to respond to urgent appeals, and the UK argued that 3 months was consistent with practice within the Special Procedures system. India and Algeria (on behalf of the African group) felt this was too short. Italy proposed a compromise whereby States would have three months to submit an initial answer and an

¹⁸ This was the wording used by the Chinese delegation

¹⁹ Supported by Iran

additional 3 months to send in a more precise reply. The UK also suggested a compromise whereby a State could request more time on the grounds of special circumstances. India outlined a complex model whereby a 24 month duration could be respected whilst still giving States 12 months to respond.

Frequency of considerations by the Human Rights Council

Under the 1503 Procedure, the Commission considered situations referred from the 1503 Procedure at its annual session. However, in the February round of talks, some States favoured the Council being able to address situations more frequently as it sees fit and others proposed that it should review situations at every session of the Council. This time, Germany (on behalf of the EU) and Argentina advocated a flexible approach whereby the Council would review cases at least once a year, but with the option of considering them at every session. Algeria (on behalf of the African group), India, Indonesia, Thailand, Bangladesh, China and Pakistan (on behalf of the OIC) argued that cases should only be taken up once a year to leave ample time for States to respond. Algeria (on behalf of the African group) also argued that if the door were left open to assess cases at every session, the Council would be overrun with cases.

Measures to be taken by the Human Rights Council (HRC)

The final main issue for further discussion highlighted by the Facilitator was measures to be taken by the Human Rights Council. Debate on this issue focused on whether there should be an exhaustive or indicative list of measures that the Council may take in response to a situation referred to it within the Complaints Procedure. The Facilitator's non-paper included a list of 5 proposed measures, headed with the chapeau "The Council may take any action as it deems appropriate. It may in particular decide to:"

An indicative list

Argentina, Russia, USA, Canada, and ISHR supported the Facilitator's wording and his proposal that the list should be indicative, so as not to tie the Council's hands in any way. ISHR argued that the Council should take advantage of the freedom being offered to it to be the "master of its own destiny" and not tie its own hands with unnecessary limitations. A number of these delegations felt that there were measures they would like to see used that were not on the list, but felt this was acceptable as long as the list was only indicative.²⁰ The Facilitator pointed to the fact that the original wording of ECOSOC resolution 2000/3, which dictated the practice of the 1503 Procedure, listed measures that the Council "should" take, rather than "shall" take. Therefore, the 1503 Procedure only worked off an indicative list. Egypt countered this argument by noting that in practice the list used in 1503 was treated as an exhaustive list.

An exhaustive list

On the other side of the debate, Bangladesh, India, Egypt, Cuba and Algeria (on behalf of the African group) were in favour of an exhaustive list. Algeria (on behalf of the African group) felt that since the Complaint Procedure is confidential, at the very least, the scope of the Council's possible decisions should be defined in advance in a transparent manner. In support of this, India argued that an exhaustive list would not restrict the Council's decision-making in general; only restrict the Council regarding which measures they what it could decide upon in confidence. Should the Council wish to carry out any other action, it should have to do so by transferring the case to a public forum, outside the confidential bounds of the complaint procedure. Both India and Bangladesh argued that this was an important restriction it was important to make sure

²⁰ Argentina, Canada, USA.

unforeseen measures were decided in public as serious measures might be considered and this should not be done under the cover of confidentiality.

No list at all

A third group of States felt that there should be no list at all, as any lists – whether indicative or exhaustive would tie the Council’s hands.²¹

Debate over specific measures on the list

In addition to this debate over the nature of the list of measures in general, several States also contested specific measures that were present on the current formulation of the list. Australia argued that the list of measures should not include the discontinuation of a case, as under the 1503 Procedure cases were dropped by the Council on a politicised basis. Russia discussed the proposed measure for the Council to “keep a situation under review and appoint an independent and highly-qualified expert to monitor the situation and report back to the Human Rights Council.” It wanted to remove the details part about appointing experts in order that the 2nd Working Group can make these decisions on decide whether an expert is required to monitor a situation on a case by case basis.²² Colombia objected on principle to the appointment of an expert to monitor a situation on the grounds that it would weaken the Council to put all the responsibility for one situation in the hands of one individual. China and Egypt wished to remove the fifth bullet point, which provided for capacity building.

Other issues

In this section, States raised issues that had not appeared on the Facilitator’s list of “main issues still to be discussed”, but which they felt still required discussion in order to establish a consensus.

Admissibility

This was the most significant substantive area in which States felt strongly that more discussion was required. Several States commented throughout the session that ‘admissibility’ should have been included as a section in the main areas for discussion.²³

The first question here related to ‘domestic remedies’. Under the 1503 procedure, a complaint was only admissible if it had already ‘exhausted all domestic remedies’. After the February session, all States believed this requirement should be maintained, but a clear divide remained between States on their **definitions of ‘all domestic remedies’**. Some believed that this should include National Human Rights Institutions (NHRIs) and some believed that it should not. At this session, India (who have been in favour of including NHRIs in the definition of domestic remedies) was the first to state that this question remained unresolved and requested that a reference to NHRIs be reinstated in the non-paper. The Facilitator acknowledged that this remained a sensitive issue. In addition, India proposed specific wording which could clarify the involvement of NHRIs and specify the involvement of those that were “working under the guidelines of the Paris Principles, with quasi-judicial powers.”

In addition to the question of NHRIs as domestic remedies, Algeria (on behalf of the African group) raised concerns about other **requirements placed on domestic remedies** in order for them to be accepted as legitimate remedies for the purposes of the admissibility criteria. The Facilitator’s non-paper stated that

²¹ Egypt, Iran.

²² Supported by Colombia and Iran.

²³ Pakistan (on behalf of the OIC), USA.

domestic remedies must have been exhausted “unless it appears that such remedies would be ineffective, inaccessible or unreasonably prolonged”. Algeria (on behalf of the African group) argued that it would be very difficult to judge if a remedy was ineffective and to define “unreasonably prolonged”. It added that these vague terms could be used to circumvent the admissibility requirements. Further, it was of the view that the term “inaccessible” could be seen as pejorative. It stated that only the domestic remedies of a State experiencing armed conflict could really be seen as “ineffective”. Colombia supported Algeria on deleting “ineffective”, arguing this would be too difficult to prove. Pakistan (on behalf of the OIC) led the opposite side of this debate, arguing that some NHRIs are clearly ineffective and should not be used as a barrier to complaints reaching the Complaints Procedure. The Facilitator eventually declared his intention to remove the word “inaccessible”, but to keep the other terms on the grounds that they are well established in jurisprudence. This said, Algeria (on behalf of the African group) proposed a compromise on the other terms, suggesting that domestic remedies must have been exhausted “unless *it is established* that such remedies are ineffective or unreasonably prolonged.”²⁴ This would place a burden of proof on those wishing to exclude the remedies provided by a particular NHRI from consideration.

A third question related to the **anonymity of the author**. Under the 1503 procedure, anonymous complaints were automatically deemed inadmissible. However, this wording was not included in the Facilitator’s non-paper. Pakistan (on behalf of the OIC) requested that this requirement be reinstated.

A fourth issue of admissibility concerned the use of **abusive language** in complaints. Under 1503, complaints containing abusive language were deemed inadmissible. The Facilitator’s most recent non-paper proposed that if a complaint met the requirements of the admissibility criteria after the deletion of any abusive language, it should be deemed admissible. Algeria (on behalf of the African group) contested this proposal on the grounds that the initial presence of the abusive language should automatically render the complaint inadmissible.

A fifth issue related to the requirement that a complaint should refer to ‘a **situation** that appears to reveal a consistent pattern... already being dealt with by...an...**other UN complaints procedure**’ contained in the non-paper. Belgium, the UK and Argentina argued that this wording was too vague and proposed altering the term “situation” to the term “case”, since individual complaints generally refer to a specific experience, rather than the situation as a whole. Using the same rationale, Mexico proposed using the term “question” or “communication”. The USA opposed this proposal, arguing that the Complaints Procedure is about “situations and not law suits”.²⁵ In addition, Belgium felt that the wording ‘any...other UN complaints procedure’ was too broad. For example, if a case was already being assessed by the ILO from the perspective of labour rights, it might still form part of a consistent pattern of human rights abuses, and be worthy of examination from this different perspective. On these grounds, Belgium proposed changing the wording to “other mechanisms dealing with human rights”.

Both Mexico and Spain proposed adding in a reference to “**regional complaints procedures**” in the list of bodies that may not already be assessing a complaint. This proposal was first raised by Mexico in the informal session in March.

A final issue was raised by Australia and concerned the **methods used for applying these admissibility requirements**. The most recent draft of the Facilitator’s non-paper required the 1st Working Group to “refer to” the admissibility criteria.²⁶ Australia proposed that the admissibility criteria should be rigorously applied by this group, rather than only “referred to”. To support this, Australia also proposed that the non-paper should state clearly that the 1st Working Group should carry out its responsibilities rigorously.

²⁴ Australia declared that it would be willing to consider this wording.

²⁵ Supported by Colombia

²⁶ Supported by Bangladesh

Cooperation by States

Amnesty International proposed the creation of a set of principles, similar to a code of conduct, designed to regulate the standards of both Working Groups and outline requirements for cooperation from States. Argentina also referred to this “code of conduct”.

Equitable geographic distribution of cases taken up

Algeria (on behalf of the African group) felt that the Complaint Procedure should take up cases on a geographical basis, so as to cover all regions fairly. This point was raised towards the end of the session and no delegations responded to it.

“Victim-oriented”

Throughout discussions, States have been emphasising the importance of creating a “victim-oriented” mechanism. This principle has guided much of the deliberations of this Working Group and features in every draft of the Facilitator’s non-paper. However, at the informal session in March, this term was challenged by several States.²⁷ In this round of talks, Pakistan (on behalf of the OIC) continued to question the use of the term “victim-oriented”, on the grounds that all human rights mechanisms are designed to help victims.²⁸ Bangladesh supported this challenge, arguing that the Complaints Procedure dealt with patterns of human rights violations, not individual victims. Therefore, it would be more appropriate to refer to victims in the plural if any such wording were to be used.²⁹ China proposed altering references to “victim-oriented” to “for the protection and promotion of human rights” in order to deal with this problem.³⁰

Non-renewable mandates for the 2nd Working Group

The Facilitator’s non-paper states that the mandates of the 2nd Working Group shall not be renewable. Algeria (on behalf of the African group) questioned whether there were sufficient legal grounds or precedent for this limitation. Russia also challenged the Facilitator’s proposal, arguing that within the Eastern European group, it is often difficult to find States who wish to take part. Germany (on behalf of the EU) responded that this limitation is consistent with appointments to the bureau of the Council. Cuba presented a compromise that the mandates should be not immediately renewable, in order that the Council could profit from their expertise again at a later stage.

This size and membership of the 2nd Working Group

Germany (on behalf of the EU) and Mexico suggested that they were in favour of increasing the size of the 2nd Working Group to 10 members, rather than 5, in order to widen the base of expertise.

Mexico continued to advocate their proposal, first raised at the March informal session, that the 2nd Working Group should be composed of experts. However, this did not receive any support.

Involvement of the complainant

According to the Facilitator’s non-paper, the complainant would be informed when their case was deemed inadmissible and when a final outcome was reached. Since the first round of negotiations, Germany (on behalf of the EU) and Belgium have argued for a greater role for the complainant. At this session, it

²⁷ Bangladesh, China, Pakistan

²⁸ Supported by China

²⁹ Supported by Algeria (on behalf of the African Group) and Colombia

³⁰ Supported by Algeria (on behalf of the African Group)

maintained this position, arguing that the complainant should be informed at each stage their case is still pending, in order that they do not wonder what has happened and start pursuing other avenues.

Australia proposed creating a standard form for complainants to use when submitting their complaint, requiring them to disclose how their complaint can be seen as forming part of a pattern. It argued that this would make admissibility criteria easier to apply.

Conclusions and next steps:

At the end of the session, the Facilitator presented a new non-paper to the President of the Council.³¹ In his accompanying statement, he reiterated the areas still requiring discussion and expressed his hope that these issues would be resolved in the coming weeks. The President of the Council announced that negotiations will now move into a two track process lasting until the 18th of June. The first track will be made up of informal, private, bilateral and multilateral negotiations. The second track will be made up of weekly public consultations. These informal sessions are due to take place on the 10th, 17th, 24th and 25th May.

³¹ The revised non-paper is available at the OHCHR extranet, which can be accessed at www.ohchr.org/english/bodies/hrcouncil/form.htm (fill out the form on the page to receive the user name and password).

COUNCIL MONITOR STAFF

Gareth Sweeney, Human Rights Officer, Information Program

Michael Ineichen, Fellow, Information Program

Tony Morris, Information Program

Eléonore Dziurzynski, Communications Officer, Information Program

Contributors

Hannah Klein, Intern

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