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HUMAN RIGHTS COUNCIL WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES REVIEW OF THE COMPLAINT PROCEDURE

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Background to the Working Group on the review of mandates and mechanisms

The Commission on Human Rights' (the Commission) main complaint procedure was the 1503 procedure, 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”¹ 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 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.²

At its first session the Human Rights Council (the Council) adopted *Decision 2006/104* which mandated the establishment of an inter-sessional open-ended Working Group to “formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaint procedure”.³ The Working Group on the review of mandates and mechanisms was scheduled to meet for the first time from 13 to 24 November 2006,⁴ and its work was divided into three issues to be separately considered: the review of special procedures, the complaint procedure (former 1503 procedure), and the expert advice body (former Sub-Commission on the promotion and protection of human rights). During this first week of the Working Groups (from 13 to 17 November 2006), States began to consider the issue of the review of mandates, and also considered the complaint mechanism.

This report focuses on the discussions that took place on the issue of the complaint procedure, and is an updated and extended version of the preliminary report issued by the International Service for Human Rights (ISHR) after the first week of the Working Group. Separate reports will also be published on the discussions on the review of mandates (special procedures), the expert body and the UPR.⁵ These Working Group meetings have been preceded by informal consultations as well as discussions of the Council, which ISHR has also reported on.⁶

Overview of discussions on the complaint procedure

The Working Group’s discussions on the complaint procedure began on Thursday morning (16 November 2006) and resumed again on Friday morning (17 November 2006). The final session of the Working Group’s discussions on the complaint procedure concluded on Thursday 23 November 2006.

As part of the preparation for the Working Group, the facilitator of the discussions on the complaint procedure, Ambassador Blaise Godet of Switzerland, circulated a framework paper that reflected the issues

¹ Para 1.

² 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 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 available at <http://www.ohchr.org/english/bodies/chr/stat1.htm>. 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.

³ Paragraph 1 of Human Rights Council *Decision 2006/104*.

⁴ The Working Group on the review of mandates and mechanisms was scheduled to be held in conjunction with the Working Group on the Universal Periodic Review (UPR), with some sessions during the two week period being devoted to review of mandates and mechanisms and other sessions being devoted to the UPR.

⁵ These reports will be available at <http://www.ishr.ch/hrm/council/index.htm>.

⁶ To see copies of these reports, background information on the complaint procedure, please visit <http://www.ishr.ch/hrm/council/1503/1503.htm>.

raised on previous occasions to guide the discussions at the Working Group.⁷ He identified 13 key issues to be addressed, and various options and questions that could be considered under each topic. The 13 issues were:

1. Objectives
2. Scope of application
3. Admissibility criteria
4. Number of stages
5. Confidentiality
6. Participation of the authors of communications
7. Composition and size of the Working Groups examining the communications/situations
8. The experts of the first Working Group
9. Appointment/election of Working Group members
10. Duration of mandates for Working Group members and rotation
11. Human Rights Council and the examination of situations
12. Duration of the process
13. Possible measures to be taken by the Human Rights Council upon proposals made by the second Working Group⁸

The Working Group discussions on the complaint procedure began by addressing each of these points in order. During the first week, the discussions covered points 1-6 and point 11 of the above list. The remaining points were discussed in the second week.

Main issues discussed

Objectives of the complaint procedure

States that took the floor⁹ expressed their general satisfaction with the 1503 procedure and explained how the new complaint procedure should continue in a relatively similar manner¹⁰ while improving upon some inefficient and undesirable aspects of the current system. Only one State, China, expressed a concern that the 1503 procedure duplicates the work of the special procedures and treaty bodies. Many delegations mentioned the importance of the 1503/complaint procedure as a forum for individuals to access the protective mechanisms of the United Nations (UN) human rights system.¹¹ Brazil pointed in particular to the fact that this mechanism protects victims of gross violations in countries that are not parties to human rights instruments. Most States expressed general support for the objectives set out in the facilitator's paper, which stated "Through the complaint procedure, the allegations of a consistent pattern of gross, systematic and reliably attested violations of human rights and fundamental freedoms shall be brought to the attention of and

⁷ The Facilitator's paper, as well as a discussion paper written by the OHCHR, are available on the OHCHR Council extranet (fill out the form on the page to receive the user name and password) at www.ohchr.org/english/bodies/hrcouncil/form.htm.

⁸ Under the 1503 procedure, in addition to a Working Group composed of experts, a second Working Group, the Working Group on Situations, made of State representatives would also review the complaints received under the procedure and decided what situations were referred to the Commission on Human Rights (now the Council).

⁹ Algeria (on behalf of the African Group), Bangladesh, Chile, Colombia, India, Japan, Thailand, Iran, Finland (on behalf of the EU), Argentina, United States of America (USA), Canada, Brazil, China, Russian Federation, Costa Rica, Ecuador, Azerbaijan, United Kingdom (UK) and South Africa.

¹⁰ Under the 1503 procedure, the Commission on Human Rights 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" 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 and was confidential. For further information see, see M. Abraham, *A New Chapter for Human Rights*, (ISHR and FES, Geneva 2006), available at www.ishr.ch/handbook, pp. 33-50.

¹¹ China.

addressed by the Human Rights Council”. In the statements made at the beginning of the session the key areas of discussion were: the inclusion of the word ‘systematic’ in the objectives; the possible preventative role of the complaint procedure;¹² the timing of the process;¹³ the interaction between the complaint procedure and the Universal Periodic Review (UPR);¹⁴ the screening of complaints;¹⁵ the exhaustion of domestic remedies;¹⁶ and the involvement of States¹⁷ and victims¹⁸ in the Working Groups. Some of these topics raised early in the discussion related more to other points on the facilitator’s list of issues, and thus were considered in more detail once the discussion moved on to later issues.

The key issue of concern in relation to the objectives of the complaint procedure was the inclusion of the word ‘systematic’, which was noted by numerous delegations as being a change from the previous wording of the 1503 procedure, which provided for complaints to be brought which show “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”. Canada explained that the inclusion of the word ‘systematic’ could restrict the application of this mechanism as there could be allegations of consistent patterns of gross and reliably attested violations which should fall within the scope of the complaint procedure but which would not necessarily amount to systematic violations. ISHR noted that by defining the violation as ‘systematic’ it implied State involvement in the violations and this could be used to restrict the admissibility of the complaints if the violations were perpetrated by a non-State actor or lack of action by the State. Inclusion of the word ‘systematic’ is also unnecessary in light of the existing requirement that the violations be demonstrated by a ‘consistent pattern’. This opinion was shared by several delegations,¹⁹ with Canada proposing that the word ‘systematic’ was actually only included because of errors in translation between the English and French versions. Other delegations stated their desire to retain the term ‘systematic’,²⁰ for example China claiming that it would be important in order to distinguish the 1503 procedure from other complaint procedures set up under international human rights treaties. The delegation of Spain stated that the term ‘systematic’ was important in order to maintain the overarching scope of the 1503 procedure.

Another issue raised was the possible way in which the complaint procedure could play a preventative role. Finland, speaking on behalf of the European Union (EU),²¹ stressed the importance of this. ISHR suggested that the complaint mechanism needs to look at existing and emerging patterns of violations of human rights and fundamental freedoms, pointing out how complaints may not yet reach the level of consistent pattern but that an increase in number may indicate an emerging consistent pattern of violations. It was explained how the purpose of the mechanism should be to draw the attention of the Council to what is about to happen not just what has happened retrospectively. For this reason, the objectives of the complaint procedure should be worded in such a way as to facilitate it acting as some type of ‘early warning mechanism’.²² Argentina supported the idea that the complaint mechanism should include a prevention aspect.

Many delegations expressed the view that the complaint procedure should be based on principles such as efficiency, objectivity and impartiality and that complaints received should be considered on the basis of merits not political considerations.²³ Algeria, on behalf of the African Group, explained that they see the

¹² Finland (on behalf of the EU), Argentina and International Service for Human Rights (ISHR).

¹³ UK.

¹⁴ Argentina, Chile, UK and Russian Federation.

¹⁵ Bangladesh and China.

¹⁶ USA.

¹⁷ Iran.

¹⁸ ISHR.

¹⁹ USA, Canada, Great Britain, Ecuador, Argentina and Norway.

²⁰ China, India, Japan, Ecuador, Egypt, Russian Federation, Iran, Algeria, Azerbaijan and Tunisia.

²¹ Also supported by Argentina.

²² A mechanism or procedure to bring the deteriorating human rights situation in a country to the attention of the Council or the international community.

²³ Bangladesh, China, Algeria and Finland (on behalf of the EU).

complaint mechanism as focusing on capacity-building and technical assistance for the State concerned. The United Kingdom (the UK) pointed out that if this was to be a priority in terms of outcome for the mechanism, the objective should remain broad and that the inclusion of wording such as ‘system’ would limit the possible instances when States could have situations addressed through this procedure and access outcomes based on capacity-building and technical assistance.

Scope of application

The facilitator set out two options for the scope of application of the complaint procedure in his background paper:

- (a) All human rights under the *Universal Declaration of Human Rights* (UDHR) with high threshold of violations (the high threshold set out in the objectives); or
- (b) Limited scope of human rights violations with lower threshold of violations.

All delegations that took the floor supported the first option: the idea that the complaint mechanism should deal with all human rights under the UDHR with a high minimum threshold of violations.²⁴ However, several delegations thought that the scope should not be limited to the UDHR.²⁵ For instance, ISHR pointed to the huge developments that have taken place in the field of human rights since the UDHR was drafted in 1948 and how it would be valuable to include more recently recognised rights, such as the right to development and women’s rights into the scope of the complaint mechanism. The suggestion was that this be done by leaving the scope of the procedure broad, rather than prescribing a list of instruments from which the rights are to be sourced. Norway also recommended removing the specific reference to UDHR and simply referring to human rights so as to leave the scope as broad as possible, claiming that the 1503 procedure relates to all human rights and fundamental freedoms and so therefore so should the scope of the revised procedure.²⁶ Overall, delegations expressed a desire to keep the same scope as the current 1503 complaint procedure, while striving to make it as broad as possible.

Admissibility criteria

A number of concerns were raised under the topic of admissibility criteria: screening of complaints; the need for exhaustion of domestic remedies (including whether there should be a requirement to approach national institutions first); the degree and form of information submitted to give substance to the complaints; the requirement that a complaint use ‘decent’ language’ and the need to avoid ‘abusive’ language; and the issue of complaints which are ‘politically motivated’. The facilitator’s paper sets out a list of admissibility criteria drawn from those currently required under the 1503 procedure, namely that a complaint must contain “a factual description of the alleged violations”:

- Using decent language;
- Fully observing the provisions of the UN Charter;
- Not exclusively based on mass media reports or information and communications technology;
- Not being manifestly politically motivated;
- Author not to be anonymous;
- Not already being dealt with by a special procedure or a treaty body.

The facilitator’s paper also lists two options for the criteria of exhaustion of domestic remedies:

- Exhaustion of domestic remedies, (including recourse to national institutions), unless it appears that such remedies would be ineffective or unreasonably prolonged; or

²⁴ India, Chile, Uruguay, Japan, Argentina, Mexico, Iran, Russian Federation, Azerbaijan, Algeria, Guatemala, USA, Philippines and Republic of Korea.

²⁵ Chile, Uruguay, Mexico, Iran, Azerbaijan, Guatemala, USA and Republic of Korea.

²⁶ Finland (on behalf of the EU) also agreed with this desire not to restrict the scope to the UDHR but rather make it as general as possible.

- No need to exhaust domestic remedies for the communication to be considered under the complaint mechanism.

All delegations that took the floor agreed that complaints should contain a factual description of the alleged violations. There was some confusion over the paper's criterion of "decent language". Several delegations found this restrictive.²⁷ There was a suggestion by ISHR to replace this criterion by banning "abusive language", as was the original wording in the 1503 criteria, as this wording was less subjective. This was supported by Ireland and the UK. The UK disagreed with the need to include the provision requiring compliance with the UN Charter provisions, given the lack of clarity regarding what this would mean in the context of a complaint. Delegations agreed that complaints could not be exclusively based on media reports. Costa Rica however stated that this would be acceptable if the victims took responsibility for the media announcements.

There was a general consensus that complaints should not be politically motivated. However, Algeria asked for a clear definition of what constitutes a "politically motivated complaint". The Philippines also made the point that a political complaint may have merit.²⁸ In response, the United Kingdom stated that one should distinguish between politicised and political complaints. All delegations agreed that the author of the complaint could not be anonymous, but most stressed the need to maintain their confidentiality for the sake of privacy or protection. Nigeria however suggested that the government concerned should be given the full contact details of all authors of complaints for the purposes of "further clarification".

Several delegations expressed concern that overlap could occur with issues already dealt with by special procedures or treaty bodies. Argentina stated that the complaint mechanism has a different objective and scope so there was no problem with overlap. Azerbaijan emphasised how the complaint procedure provides victims with direct access to the Council and how it deals with gross and systematic violations. The United States of America (the USA) suggested that potential overlap could easily be prevented through the use of databases by the Secretariat to ensure that complaints brought under one procedure were not also being considered under other procedures. The Secretariat took the floor to explain that even though it tried to prevent overlap, the confidentiality of the complaint mechanism meant that special procedures and treaty bodies could take on the same complaint without knowing there is overlap. Peru stated that it was not against overlap but that coordination and cooperation should still be a goal.

Several delegations agreed that domestic remedies must be exhausted.²⁹ However, there was no clear agreement on what that meant. First there was confusion about the inclusion of a possible requirement of recourse to (seeking remedies from) National Human Rights Institutions (NHRIs) as part of the exhaustion of domestic remedies. ISHR stated that different NHRIs worked in different ways and that, accordingly, there was no need to single them out. Algeria was unclear about the use of the 'unless' clause and wanted a clear definition of what it meant to exhaust domestic remedies. The USA proposed using the term 'denial of justice' to clearly identify cases where domestic remedies have been 'exhausted'. The Philippines asked if domestic remedies included regional remedies where they existed. A few delegations stated that they would prefer to allow complaints even if domestic remedies have not been exhausted.³⁰ Guatemala also said that States often started domestic procedures that never led anywhere and that defining the exhaustion of domestic remedies would be too difficult.

Finally, there was a suggestion that a criterion be added to establish who can submit complaints, ensuring that individuals, groups, non-governmental organisations (NGOs) and others be entitled to submit complaints, as is currently the case with the 1503 procedure.³¹

²⁷ Uruguay.

²⁸ Supported by Ireland.

²⁹ The Islamic Republic of Iran, China, Japan, The Russian Federation, Azerbaijan, Algeria, USA and South Korea.

³⁰ Uruguay and Argentina.

³¹ UK, Finland (on behalf of the EU), Japan and USA.

Number of stages

The main issue here was whether to have one or more stages or Working Groups dealing with the complaint. The facilitator's paper set out the following proposal:

“All communications are transmitted to the Secretariat, which acts as a coordinating mechanism in order to avoid duplication between different human rights protection mechanisms. No decisions on a case to be taken by the Secretariat without referring to the Chair of the first Working Group.³²”

- (a) First stage: merits of the alleged communications and proposed measures to be dealt with by one Working Group only;
- (b) Second stage: first a Working Group, mainly focused on the merits of the allegations of violations, with a mandate to resort to a second Working Group; and Second Working Group to propose measures to be taken by the Council with regard to situations of human rights violations.”

Several delegations called for a continuation of a two-stage system. Currently complaints are reviewed by the Working Group on Communications (made up of five members of the Sub-Commission for the Promotion and Protection of Human Rights) and the Working Group on Situations (made up of five members of the Council).³³ There were several calls for the first stage to be a screening stage. Mexico emphasised the need for the second Working Group to focus on the merits of alleged violations, rather than reassessing the admissibility of the complaint. One proposal was to keep two stages, with the first stage being a screening by independent human rights experts and the second stage being a body composed of members of the Council.³⁴ Another proposal was to have only one condensed stage. ISHR stated that it was important that such a stage be run by independent experts as this would provide a more objective review than review by the States themselves. Uruguay emphasised the need to focus on the needs of the victim and therefore to act as quickly as possible.

In general there was a lot of debate over screening of complaints, with emphasis being placed on the need for the Secretariat of the complaint mechanism, staffed by geographically representative people, to undertake this task in a professional manner, and in conjunction with the Chair and/or other members of the first Working Group. Some delegations thought that this screening task should be done mainly by the Working Group on Communications.³⁵ Others thought the Secretariat should retain a key role in screening the complaints, at least to check that they meet the admissibility criteria.³⁶ In this regard, Argentina emphasised that no decision should be taken without referring to the Chair of the Working Group on Communications. Other delegations expressed the opinion that the whole Working Group should be involved, not just the Chairman.³⁷ The USA proposed that all stages should have the possibility of screening a complaint in order to determine its admissibility since there was always something that could be missed.

Confidentiality

The facilitator pointed out that there are four options regarding the confidentiality of the complaint mechanism. First, the whole mechanism could be kept confidential unless the Council decides otherwise (as is currently the case with the 1503 procedure). Other options could be that the mechanism could become public once the admissibility criteria have been met, or once a consistent pattern of gross, systematic and reliably attested violations of human rights and fundamental freedoms has been revealed. The fourth suggestion was

³² Under the 1503 procedure, complaints are reviewed by the Working Group on Communications (made up of five members of the Sub-Commission for the Promotion and Protection of Human Rights) and the Working Group on Situations (made up of five members of the Council).

³³ Bangladesh, China, Bhutan, Costa Rica, Mexico, Iran, Russian Federation, Azerbaijan, Philippines and the UK.

³⁴ China.

³⁵ India and Costa Rica.

³⁶ Japan and USA.

³⁷ The Russian Federation, Azerbaijan and Algeria.

that “the second Working Group could, for reasons of non-cooperation, including insufficient and/or delayed information, on the part of the State, recommend the Council to consider the situation in the country concerned in public”.

All the delegations that took the floor during the discussion agreed on the importance of retaining the confidentiality of the procedure. However some noted a need for transparency in both the process and the outcome. In this regard, the majority of delegations agreed that confidentiality should be linked to the extent of cooperation by States. Some of them proposed creating an automatic mechanism whereby, in case of non-cooperation, the complaint would be made public.³⁸ Several other delegations stated that due to the political nature of this decision only the plenary of the Council should decide whether to make the procedure public.³⁹

There was general concern over how the confidentiality of the complaint procedure could co-exist with the UPR and what would happen with countries which had matters pending before the complaint procedure and were to be examined under the UPR. Chile proposed that the Working Group on Communications could address the UPR and provide specific information about victims in particular States.

Participation of the authors of communications

The facilitator’s paper set out a number of stages at which the author of the communication could or should be informed about the progress/outcome of their complaint: at receipt of the communication; when it is deemed inadmissible; when taken up by the first Working Group; and at the final outcome.

At present a major flaw in the 1503 procedure is the lack of transparency and communication with authors of complaints. The majority of delegations agreed that there was a need for increasing the participation of the author in the process to make the procedures more effective and more victim-centred. Only a few differences were expressed by the delegations regarding the frequency of the communications. Some of them stated that the author should be informed at any stage of the procedure, from the receipt of the complaints by the Secretariat, to the decision on admissibility, and the final outcome.⁴⁰ The delegation of the Islamic Republic of Iran (Iran) stressed the importance of involvement of the State at all stages of the process, rather than the victim. Other delegations stated that, regarding the author’s right to be informed, information regarding the complaint procedure should be reduced only to the confirmation of receipt by the Secretariat and the final outcome, due to the high number of complaints received.⁴¹ China expressed a concern about authors breaching the confidentiality of the complaint procedure by going to the media with any information that they are given by way of notification throughout the process.

A general consensus was expressed that there was a need to introduce the possibility for the author of the complaint to provide additional information. Some delegations stated that, in order to avoid an increase of the length of the procedure, additional information would be provided upon demand from the Working Group.⁴² A strict timing for replies could be set.

Examination of situations by the Council

The final issue that was considered in the session on Friday 17 November was the frequency with which the Council would deal with situations. While all delegations emphasised the importance of considering the cases

³⁸ Finland on behalf of the EU, UK, Canada and Belgium.

³⁹ USA, Algeria, Russia Federation, Colombia, Japan, Brazil, Chile, Azerbaijan, Bangladesh, the Popular Republic of China, India, the Islamic Republic of Iran, Thailand, Egypt and Philippines.

⁴⁰ Finland on the behalf of the EU, Belgium, India, Philippines, Egypt and Thailand.

⁴¹ Bangladesh, Brazil, USA, Japan and the Russia Federation.

⁴² Canada, Azerbaijan, Brazil and Republic of Korea.

as often as possible, there were several calls for the Council's work not to be cluttered with the complaint mechanism at each and every session. Argentina, responding to a call from Canada that the Council could consider situations at each of its meetings (as necessary), proposed a compromise whereby the Council would consider issues under the complaint procedure twice a year, and more when deemed necessary by the second Working Group. Some delegations preferred cutting it down to once a year.⁴³ Finland, on behalf of the EU, stated it had no preference. The USA and Bangladesh limited their comments to stating they did not want issues to be dealt with at each session of the Council. Chile stated it wanted the issues to be dealt with more than once a year. In conclusion, there were several calls for more statistics on how many cases existed under the complaint mechanism, which would make the decision on this issue easier. The facilitator and the Secretariat noted this request.

Composition and size of the Working Groups examining the communications / situations

The facilitator presented the following options as a ground for discussion regarding the composition and size of the Working Groups examining the communications/situations:

- a) Independent and qualified experts (with fair geographic representation?); or
- b) Both independent experts and State representatives (with fair geographic representation?); or
- c) States representatives; if so, in personal capacity (with fair geographic representation?).

The facilitator added as a discussion point the question of whether the Chair should be an independent and non-voting member of the Working Group who would supervise the process. This proposition met a consensus among States. Finland (on behalf of the EU) added that the Chair/President of the Working Group on Situations should be headed by an independent expert appointed by the Council.

Most delegations were in favour of two Working Groups resembling the current practice under the 1503, namely a first Working Group on Communications comprised of independent and qualified experts and a second Working Group on Situations comprised of States representatives.⁴⁴

The sentence 'fair geographical representation' was the subject of some discussion, with Iran proposing that this be altered to 'equitable geographical representation'. India agreed, explaining that fair representation could be understood as representation which takes into account the population of each country, which is not the usual practice at present. A number of States supported this proposed alteration.⁴⁵

The size of each Working Group was not discussed in great detail and some States indicated a willingness to be flexible on this issue. Some mentioned a preference for increasing the size of the Working Groups,⁴⁶ while Finland, on behalf of the EU, suggested keeping the same number of members as there are currently under the 1503 procedure.

Canada proposed a single Working Group consisting of five independent and qualified experts, one from each regional group, to provide recommendations to the Council. It further stressed the need to focus on victims and explained how in its view, a reduction of the number of stages a complaint had to pass through would be of benefit to the victims.

The experts of the first Working Group

⁴³ The Russian Federation, Japan and Columbia.

⁴⁴ Finland (on behalf of the EU), Bangladesh, Russian Federation, China, The Islamic Republic of Iran, India, Republic of Korea, Ecuador, Algeria (on behalf of the African Group), Cuba, Venezuela, Azerbaijan, Pakistan and Japan.

⁴⁵ Algeria (on behalf of the African Group), Cuba, China and Venezuela.

⁴⁶ Bangladesh and Argentina.

The facilitator set out the following options in his paper regarding the selection of the experts for the first Working Group on Communications:

Experts to be chosen from:

- a) The new expert advice system of the Council, or
- b) A roster of independent and qualified experts.

A number of States that took the floor during the discussions favoured the first option (that experts of the first Working Group be chosen from the new expert advice system of the Council).⁴⁷ These States explained that this could be a way to bring this new expert advice system into operation. Finland, on behalf of the EU, Japan and others supported the idea that experts should be chosen from a roster of independent and qualified experts, and proposed that such a roster may be used by other UN mechanisms.⁴⁸ Canada explained that such a roster could be maintained by the Office of the High Commissioner for Human Rights (OHCHR) and would include the names of experts proposed by States, NGOs and others.

Appointment / election of Working Group members

The facilitator in his background paper made the following proposals and comments regarding the options for the appointment/election of Working Group members:

- a) Appointment by the President of the Council; or
- b) Appointment by the President of the Council after consultation with the Bureau; or
- c) Appointment by the President of the Council, after consultation with the regional groups; or
- d) Appointment by the High Commissioner for Human Rights (the High Commissioner) (after consultation with?), or
- e) Election by the Council (should all members of the UN be able to participate, since the mechanism concerns all members of the UN, not only members of the HRC?)

Most States taking the floor appeared in favour of the option of appointment by the President of the Council after consultation with regional groups.⁴⁹ Finland, on behalf of the EU, was in favour of experts of the Working Group on Communications being appointed by the High Commissioner for Human Rights and State representative members of the Working Group on Situations being appointed by member States of the Council. The USA suggested a mix of the different options, whereby the experts would be selected by the President of the Council in consultation with the High Commissioner but appointed by the States. Argentina and the Republic of Korea (both of which stressed that they did not have a firm position on this issue) expressed some preference for the option of appointment by the President of the Council after consultation with the Bureau. Canada, when suggesting that experts be appointed from a roster, explained that experts from this roster could be appointed by the President of the Council, after consultation with the Bureau. Algeria, on behalf of the African Group, preferred the option of election by the Council, but did not elaborate further on the details of how to do this. Cuba pointed out that if no agreement could be reached within regional groups, the President of the Council could then decide. India explained their first preference was for all expert members of the Working Group to be elected by the Council.

Duration of mandates for Working Group members and rotation

The facilitator presented the following options regarding the duration of mandates for the Working Group members and the rotation of membership:

- a) Five-year term, non renewable; or
- b) Three-year term, renewable once; or

⁴⁷ Pakistan, Russian Federation, China, The Islamic Republic of Iran, India, Algeria (on behalf of the African Group), Cuba and Venezuela.

⁴⁸ Canada, Republic of Korea and Azerbaijan.

⁴⁹ Ecuador, China, the Islamic Republic of Iran, Japan, Cuba and Azerbaijan.

c) One-year term (renewable? If so, how many times?)

The facilitator also added the following considerations: “It is considered that more expertise is needed in the first Working Group, which would focus on the merits of the alleged violations: should its mandate therefore be longer (and renewable) in order to ensure continuity? Should the mandate of the second Working Group, dealing with measures to be taken against situations of human rights violations, be shorter?”

Most of the States taking the floor preferred a three-year term, renewable once for both Working Groups.⁵⁰ Some States preferred the idea of a one-year term that would be non-renewable for the members of the Working Group on Situations (composed of State representatives) and a three-year term mandate, renewable once, for the Working Group on Communications (consisting of independent experts).⁵¹ The Russian Federation did not express a preference between the last two options, but considered the first option of a five-year term as unacceptable. Japan expressed equal preference for the first two options, highlighting fairness as the most relevant factor. Canada supported a three-year term mandate, renewable once, for a single Working Group. Venezuela spoke in favour of a four-year term mandate, but out of the options on the table accepted option b (three-year term).

Duration of the process

This discussion centred on whether or not there was a need to introduce a time limit for the duration of the whole complaint procedure, and if so, what would be a suitable duration. On this issue, there was a general consensus between the delegations regarding the need to reduce the length of the procedure (due to the delays currently experienced under the 1503 procedure) in order to improve its effectiveness, taking into consideration the interests of the victim.

Finland, on behalf of the EU, stated the need to ensure the procedure was not unnecessarily prolonged, but explained that there was no need to introduce a strict time limit. The USA stated that a time limit did not fit within the main rationale of the procedure. Several delegations expressed their opposition to an ‘artificial’ and ‘arbitrary’ time limit to the procedure, emphasising the importance of taking into consideration the situation of the country concerned.⁵² Other delegations emphasised the importance of encouraging cooperation of the State throughout the procedure.⁵³ However, some stated that in order to avoid delays it would be useful to introduce a time limit for the State to respond to the Working Group after receipt of a communication.⁵⁴ The USA, Mexico and Senegal emphasised that it was important to give the State enough time to investigate and collect information to respond to the Working Group. Bangladesh stated that only the Council should judge and react on non-cooperation and unjustified delays of the country concerned. Several delegations stated that the time limit should be flexible and should take into consideration the substance of the case, allowing for extensions for those cases that required more information and clarifications.⁵⁵ Argentina specified that this time period should be from 12 to 24 months.

Some delegations emphasised that this was a technical issue that needed to be examined in correlation with the discussion on the frequency of meeting of Council and the role of the complaint procedure’s Working Groups. An increase in the considerations of the cases by the Council could allow for the reduction of the length of the procedure as a whole.⁵⁶ Several delegations stated that there was no need to introduce a time limit proposing that the Council examine each situation in each session.⁵⁷ The USA and Mexico suggested

⁵⁰ China, the Islamic Republic of Iran, Ecuador, Republic of Korea, Algeria (on behalf of the African Group) and Azerbaijan.

⁵¹ Finland (on behalf of the EU), Pakistan and India.

⁵² Bangladesh, China, Iran, Senegal and Ecuador.

⁵³ Bangladesh, Indonesia and Ecuador.

⁵⁴ Bangladesh, Finland (on behalf of the EU), USA, Netherlands and Japan.

⁵⁵ Mexico, United Kingdom, Netherlands and Argentina.

⁵⁶ Argentina, Finland (on behalf of the EU), United Kingdom and India.

⁵⁷ Azerbaijan and India

that a strict screening of the admissibility criteria could help to reduce the length of the procedure. China and Mexico both expressed the opinion that this issue would be better discussed once the procedure is better defined and the frequency of meeting of the Working Groups is established.

A few delegations emphasised the difficulty of setting time frames given the importance of respecting the exhaustion of domestic remedies and the differences between these from country to country.⁵⁸ However, the UK clarified that the exhaustion of domestic remedies could not be part of the discussion on duration, because it was a required criterion for the admissibility of the complaint on which all delegations had reached a general consensus. Accordingly, a complaint that had not exhausted domestic criteria would not even be considered, except in the case where domestic remedies were unnecessarily prolonged and ineffective.

Algeria and Iran requested that the options be redrafted in more detail, as they were not clear. Several delegations stated that the Working Groups should decide on the appropriate time limits for particular complaints to be processed in order to allow them to create a cooperative relationship with the States.⁵⁹ Some delegations emphasised the importance of reducing the length of time for which cases can be kept pending. In this respect, the UK proposed that cases be left pending only during the inter-sessional period. The facilitator replied that this was a new proposal that would be further discussed.

Canada proposed strict time limits for each phase of the process. Once the OHCHR received the complaint, it should examine its admissibility and send it directly to the appropriate body within three months, and then the State should submit a response within two months. Other delegations proposed similar ideas for time limits to be imposed for individual stages of the complaint procedure.

Towards the end of the discussion on this issue, the Secretariat responded to requests for statistics and gave information on the number of cases that had been dealt with each year under the 1503 procedure, including how many had been considered and closed and how many were left pending. It was noted that the number of pending cases had increased during the last few years, despite efforts not to leave the cases pending. The USA and Mexico requested that the Secretariat submit statistical information on the number of cases taken on by the 1503 procedure in writing to all delegates.

Possible measures to be taken by the Human Rights Council

The final point for discussion was the possible measures to be taken by the Council, after proposals were put forward by the second Working Group. Before opening the discussion the facilitator clarified the options described in his background paper. He explained that out of the seven options proposed, the first four were the options that already existed under the current 1503 procedure. The three remaining represented additional options that were proposed during informal consultations held in the lead-up to the Working Group's meetings. These seven options were:

1. To keep the situation under consideration and wait for further information from the State concerned;
2. To keep the situation under consideration and appoint an expert to monitor the situation and report back to the Council;
3. To discontinue considering the situation;
4. To refer the matter to the 1235 public procedure;⁶⁰
5. To recommend that the country be urgently reviewed through the UPR;

⁵⁸ Algeria and Bangladesh.

⁵⁹ Indonesia and the Russian Federation.

⁶⁰ The 1235 procedure is so named after ECOSOC *Resolution 1235* which allowed the Commission on Human Rights to consider the human rights situations in particular countries and make recommendations in relation to these. It was addressed under the former Agenda Item 9 of the Commission on Human Rights.

6. To give a follow-up to the process, if the State fails to comply with Council decisions or refuses to cooperate (e.g. by referring to a special procedure? By recommending to the General Assembly, suspension of the Council membership of the State);
7. To recommend that the OHCHR provide technical and capacity-building assistance to the country concerned.

The delegations that took the floor reached a general consensus on retaining the first four options even if some clarification was requested on their formulation. Algeria and Iran proposed adding “only if the State refuses to cooperate” to the fourth option which would allow for the referral of the matter to the 1235 public procedure. Finland, on behalf of the EU, stated that when a case under the complaint procedure showed a reliable pattern of gross and systematic violations, the Council should have the possibility to act, such as through the creation of new mandates or fact-finding missions. It proposed that if the State concerned was part of the Council, the Council itself should have the possibility of suspending its membership rights.

The fifth point on the above list (recommending that the country be urgently reviewed through the UPR) was the most controversial aspects of the discussions. Several delegations agreed that cases under the complaint mechanism should be used as information for the UPR.⁶¹ In addition to this, Finland, on behalf of the EU, stated that the complaint procedure should serve as an early warning mechanism and that its recommendations should be taken up by the UPR for an urgent examination of the State concerned. However, several other delegations expressed concern in this regard, stating that the UPR was a forum for cooperation and mutual strengthening, and that individual complaints should not be part of the more general review system of the UPR.⁶² Tunisia added that including this option would make the UPR selective and political. The UK clarified their position in response to the reluctance of many to include this option in the possible measures the Council could adopt. It explained that the complaint mechanism only had blunt tools for action, such as the creation of mandates or bringing the discussion in the public arena. By holding an early review of a State concerned through the UPR mechanism, the principle of cooperation and strengthening would be increased. Belgium also made the point that a country would have to go a long way to be considered as requiring urgent referral to the Council under the UPR. In other words, it would have to show a complete unwillingness to cooperate with either of the Working Groups and if this was the case then the UPR would be a logical way of reinitiating dialogue. Argentina supported referral to the UPR but reminded the Council of the need to guarantee the confidentiality of the complaint procedure. Bangladesh stressed the importance of confidentiality as a way of encouraging cooperation.

There was no consensus regarding the sixth point (regarding follow-up to the process if the State fails to comply with Council decisions or refuses to cooperate). Indeed, the Philippines and Indonesia explained that it was not clear what timeframe and criteria represented compliance or non-compliance, stating that any decision on this would be inherently political. They also stated that suspension of membership was possible if the country was involved in gross and systematic human rights violations, but emphasised that this suspension would be limited to the right to vote. India stated that there was already a procedure for suspension of membership in the General Assembly, and that there was no need for an automatic form of suspension. The UK replied to concerns about the definition of compliance, citing *Resolution 60/251* which gave a broad definition of compliance, which was nevertheless well understood by all members.

The final and seventh point on the list contained in the facilitator’s background paper, recommending that the OHCHR provide technical and capacity-building assistance to the country concerned, was supported by most States, although it did not appear that States found it particularly important to include it.⁶³ The Philippines added that that this option should not be linked to conditionality, and that assistance should be provided as much as possible in any case. China stated that this point was not necessary.

⁶¹ Finland (on behalf of the EU) and the UK.

⁶² Pakistan, Philippines, Tunisia, Indonesia, Algeria, Mexico and the Islamic Republic of Iran.

⁶³ Finland, on behalf of the EU, India and Indonesia.

Conclusions and next steps

The facilitator provided a short overview of the status of discussions on the final day of the Working Group (Friday 24 November 2006). On Wednesday, 29 November 2006 he will distribute a written paper describing the discussions to-date and the issues still to be considered. Ambassador Godet will also present the progress of the Working Group's discussions on this issue to the 3rd session of the Council.⁶⁴

While numerous points of consensus are emerging in the discussions, a number of key issues still need considerable further discussion. For example, the confidentiality of the procedure and its relationship with other mechanisms such as the UPR, and the exact size and composition of the various composite stages of this complaint procedure, are issues that are still the subject of disagreement and negotiation. In general, it appears that States are happy to adopt a complaint procedure for the Council which closely resembles the existing 1503 procedure of the Commission on Human Rights, for example with two stages of Working Groups comprised first of individual experts and second of State representatives. While this could mean that everyone is satisfied with the way in which this procedure functions and thus there is little need for improvement, it is somewhat disappointing that the opportunity to thoroughly review from scratch the nature, scope and operation of a possible future complaint procedure has not been taken.

One particular area of concern in the discussions on the complaint procedure has been the proposal to limit the admissibility of complaints to those that demonstrate a consistent pattern of gross *and systematic* violations of human rights and fundamental freedoms. The insertion of this requirement that the violations also be 'systematic' will, if adopted, have significant consequences and limit the utility of such a procedure for many victims of human rights abuses in instances where it is not possible to demonstrate this additional criteria, despite the complaint relating to situations of consistent violations of a gross scale and nature.

It is also important to ensure that the failings of the 1503 procedure, such as the lack of communication with authors of the complaints, are not perpetuated. A new system provides opportunities for new ideas and practices to be implemented, including possible innovations in the options for action to be taken by the new Council. The very minimum that must be ensured is that victims of gross human rights violations are provided with a forum where their concerns can be adequately and efficiently addressed, and that they will be informed and updated on the progress of their complaints.

There has been limited NGO participation in the discussions at the Working Group, with very few oral or written contributions being submitted. NGOs, particularly those that have experience of using the 1503 procedure or other complaint procedures, may wish to submit their views and proposals to the Working Group on the future complaint procedure. The dates of the next Working Group session are yet to be confirmed but the facilitator of the review of mandates suggested that some possible dates for future meetings could be in January, February and May 2007. It is likely that the future programme of work will be discussed during the 3rd session of the Council, when the Council discusses the progress report of the Working Group. The segment on complaint procedure is scheduled for discussion on 6 December 2006.⁶⁵

OHCHR has also requested views on a discussion paper on the 1503 procedure,⁶⁶ that was circulated at the request of the facilitator, and welcomes any comments, suggestions or feedback from NGOs, in particular from those who have used and/or are familiar with the 1503 procedure. NGOs who are interested in submitting their comments should e-mail Ms Maria-Andrea Echazu at ma-echazu@ohchr.org

⁶⁴ The consideration of this issue by the Council is currently scheduled to occur on Wednesday 6 December 2006.

⁶⁵ ISHR's Daily Update from 6 December reports on these discussions and is available at www.ishr.ch/hrm/council. A draft calendar was circulated, which indicates that discussions on the complaint procedure may be scheduled from 5 to 9 February 2007.

⁶⁶ Available at <http://www.ishr.ch/hrm/council/1503/1503ohchr.pdf>.

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