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Establishing a Complaint Procedure in the Human Rights Council – Moving beyond the '1503 procedure'

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1. The General Assembly Resolution and past procedures

In Resolution 60/251 of 15 March 2006, establishing the Human Rights Council, the UN General Assembly decided:

> "That the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to *maintain a system of […] a complaint procedure*"[1].

It is generally accepted that this refers to the "1503 procedure", a procedure established 36 years ago by the former Commission on Human Rights to enable complaints about very serious human rights situations. However, the former Commission on Human Rights also set up other "complaint procedures": first, the "1235 procedure",[2] which authorized the Commission on Human Rights and its Sub-Commission to examine information relating to gross human rights violations and, secondly, the individual complaint procedure of the Working Group on arbitrary detention.

2. Learning from the past

The "1503 procedure" was established by the Economic and Social Council (ECOSOC)[3] in 1970, and later amended by the Sub-Commission on the Promotion and Protection of Human Rights[4], the Commission on Human Rights[5] and the

[1] Paragraph 6 of Resolution 60/251, emphasis added.
[2] ECOSOC Resolution 1235 (XLII).
[3] ECOSOC Resolution 1503 (XLVIII) of 27 May 1970.
[4] Especially by Resolution 1 (XXIV) of the Sub-Commission, of 13 August 1971.
[5] Decision 2000/109 of the Commission on Human Rights, of 16 April 2000. The Decision, made in the framework of the "Selebi reform" (named after the then Chair of the Commission on Human Rights Ambassador Selebi of South Africa), amends the 1503 procedure by reducing the number of procedural steps from five to four. Under these changes the Sub-Commission's Working Group does not report to the Sub-Commission in plenary, but directly to a Working Group of the Commission on Human Rights.

ECOSOC.[6] Although the "1503 procedure" was known as a procedure for individual complaints, it was in fact established to enable the Commission and Sub-Commission to consider in a confidential manner, information from non-governmental sources about situations that showed "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". Although individuals can submit complaints, the procedure is not designed to protect the rights of individual victims, nor to be a mechanism to provide redress and reparation to victims. Rather, the procedure is a way to the establish mechanisms to monitor a situation and/or to provide technical assistance to a government. The complainant (the author of the communication) plays no role in the procedure after having submitted the original complaint.

The "1503 procedure" is non-accusatorial, confidential and non-adversarial in style.[7] The outcome of the procedure is not public *per se*, although as a matter of practice the former Commission on Human Rights made some limited information available about the countries that were considered in the procedure and those on whom action was discontinued. Somewhat paradoxically for a procedure that is meant to be non-contentious in character, the "1503 procedure" requires, among other elements of admissibility, that domestic remedies be exhausted before a situation can be considered.[8] In contrast, other complaint procedures are adversarial, contentious, non-confidential and do not require the exhaustion of domestic remedies.[9]

Even after the Commission on Human Rights decided in 2000 to reduce the number of procedural steps from five to four, the procedure remained complex and drawn out. There were also serious concerns that, with a few notable exceptions, the experts of the Sub-Commission did not withdraw from the deliberations when their own country was considered.[10] This was even more problematic when those same experts were also members of the governmental delegation that, as a member of the Commission, had to examine the case at the next stage.

In 2000, the former Commission on Human Rights said it was "convinced of the value of the 1503 procedure as a channel for individuals and groups to bring their concerns about alleged human rights violations to attention".[11] It is true that the "1503 procedure" retained some value because it allowed complaints to be made about situations in any member state of the United Nations, based only on alleged violations of the Universal Declaration of Human Rights. It was not necessary to show that the state had ratified any human rights treaty. This has enabled countries to be considered that avoid the scrutiny of the human rights treaty bodies, including states that may have ratified treaties but do not recognise the competence of the treaty bodies to consider individual complaints under a treaty. For some victims, the

[6] Resolution 2000/3 of ECOSOC, of 16 June 2000. In this Resolution, ECOSOC confirms what it is decided by the Commission on Human Rights in its Decision 2000/109.
[7] Para. 8 of ECOSOC Resolution 1503 (XLVIII).
[8] Para. 4(b) of Sub-Commission Resolution 1 (XXIV).
[9] Such as the "1235 procedure" and the individual complaint procedure of the Working Group on arbitrary detention.
[10] In contrast this is a rule of the complaint procedure of the Working Group on arbitrary detention as well as in the individual complaint system of the human rights treaty bodies.
[11] Document E/CN.4/2000/112, para.35

"1503 procedure" was therefore the only recourse open to them in the United Nations. The procedure was used most notably, and with relative success, in the 1970's and the 1980's.

However, the procedure has been discredited for a number of reasons, mainly due to its secrecy and confidentiality and the non-adversarial nature of the deliberations, all of which has allowed outcomes that are based more on political than human rights considerations. The treatment given to the communications relating to Argentina during the military regime in the 1980's, as well the decision to close the debate on the Peruvian communication in 1998 at the height of the authoritarian government of President Fujimori, reflected the political bias of the deliberations. In contrast, the public procedure for country scrutiny established under ECOSOC Resolution 1235, has been more productive, as attested by the way the former Commission dealt with the human rights situation in Chile during the rule of General Pinochet.

Between 1974 and 2000, communications concerning 78 countries were examined under the "1503 procedure", of which the Commission decided to take action on only a small number. [12] This was the case even though in relation to many more states there was sufficient reliable information on which the Commission could have taken action. The procedure has become a "black hole", with very few results compared to the thousands of individual complaints received. The ICJ considers that, taking into account the structural weaknesses of the procedure and its poor performance, the "1503 procedure" was one of the significant reasons why the former Commission on Human Rights was seen as discredited.

Today the "1503 procedure" looks like an antiquated relic of a bygone era. Nevertheless, the Human Rights Council does need a complaint mechanism, which could also act as an early-warning function for the Council. While learning lessons from the past, member states should build on the original rationale and purpose of the procedure, to establish a new procedure that is effective and efficient.

3. ICJ Recommendations

The new Human Rights Council undoubtedly should be equipped with a complaint procedure that enables an effective, timely and appropriate response to human rights challenges around the world. To be credible and to avoid politically biased results, any complaint procedure should reduce the level of political influence in the deliberations. The Human Rights Council is a political body and the decision on each case under a complaint mechanism necessarily takes into account political considerations. However, prior to such a decision at the political level, the legal and factual assessment of a situation should be carried out at a technical, expert, level, meeting the highest standards of human rights and legal expertise, independence and impartiality.

[12] Between 1974 and 2000, a number of countries were considered under this procedure, such as: Haiti, Paraguay, Myanmar, Philippines, Armenia, Azerbaijan, Chad…

The aim of the procedure should not be limited to providing the country concerned with technical assistance, as was the trend with the "1503 procedure" in the 1990's. Rather, the aim should be to provide adequate responses to the challenges identified on each country, with a view to increasing the promotion and protection of human rights and the implementation of international human rights obligations and standards by states around the world. When deciding on action the Human Rights Council should take into account, among other matters: the extent, gravity and persistence of the human rights violations; the political will of the concerned state, and the level of cooperation with the Human Rights Council and the experts tasked to prepare the dossier for the Council under the new procedure. The Human Rights Council would then decide from a range of possible actions, depending on the specific circumstances of each situation, including the possibility of creating a mechanism to help prevent any human rights violations or to monitor the situation, or to encourage the provision of humanitarian assistance and/or technical or advisory services.

However, in some situations any possible response by the Human Rights Council may be completely ineffective, especially in some situations where the human rights violations are widespread, massive or systematic (and which could amount to crimes against humanity, war crimes or other serious crimes under international law). In such grave cases, the Human Rights Council should be able to refer the case/situation to the General Assembly for action.

The rules of procedure of the Council's complaint procedure should reflect that it is a procedure of a political body and not a judicial or quasi-judicial procedure. The procedural rules should therefore not draw from the rules of judicial or quasi-judicial procedures. For example, it is not appropriate to use the rule under complaint procedures of the human rights treaty bodies that domestic remedies must be exhausted before the complaint will be heard at the international level. The rules of procedure will need to reflect basic fairness and transparency, including providing an opportunity for the author of the complaint to participate at an appropriate stage.

Any complaint procedure created by a political body such as the Human Rights Council will address the human rights situation in particular countries, rather than the rights and wrongs of an individual victim's case. In other words, such a complaint procedure is not equipped to decide whether an individual victim should receive a remedy, such as redress and reparation, on the facts of their particular case. Although individuals should be able to continue to submit complaints, when the Human Rights Council decides to act on such a complaint it will seek the cooperation of the state concerned to change its laws, policies and practices so they conform with that state's international human rights obligations and ensure the full respect of human rights.

Nevertheless, the Human Rights Council could still request the state to take measures to ensure individual victims in general do receive appropriate redress and reparation. It will also be necessary to ensure that in addition to any successor to the "1503 procedure", the Human Rights Council should maintain existing individual complaint procedures carried out by a few Special Procedures: the Working Group

on arbitrary detention is able to consider and make determinations on complaints of arbitrary detention and the Working Group on enforced and involuntary disappearances can intervene on cases, but purely for humanitarian purposes.

To meet these challenges, the ICJ makes the following recommendations:

a) ***Reduce the opportunity for political manipulation of the procedure and increase the technical input and expert assessment of the situations*:**

A clear distinction should be made between the assessment of a situation and the final decision on action. The assessment should be carried out by an expert technical body (ie not made up of government representatives), based only on human rights and legal expertise and considerations. Members of the Human Rights Council should not make interventions, except for the state concerned, which should be asked to give information and responses during this initial assessment phase. The Human Rights Council will continue, of course, to be responsible at the final stage for taking a decision on the situation, but this decision should be based upon and draw on the technical assessment provided by the expert body. To ensure the integrity, expertise and the non-political nature of the expert body in charge of the assessment, clear rules and procedures should be established for the nomination of experts and how to ensure their independence and impartiality, including ensuring that experts do not hold government positions (as such positions would be incompatible with the independence of such experts).

b) ***Ensure the expertise and independence of the experts/expert body***:

The expert body could consist of ten independent experts from all geographic groups, appointed for a three-year term, renewable for one further term of three years. At least one expert should retire every year to ensure continuous renewal of the body. The experts could be appointed by the President of the Human Rights Council from a list of candidates drawn up by the Office of the High Commissioner for Human Rights (OHCHR). In developing the list of candidates, the OHCHR should vet nominees so as to filter out manifestly unqualified candidates. The OHCHR should use clear criteria of competence and independence. First, would be whether the person has a substantial level of expertise in the field of human rights. Secondly, would be whether she or he holds a position as public servant or agent that is subject to the hierarchical authority of the executive or legislature, as this would impair, or give the appearance of impairing, independence. The process of assessing nominees should include interviews and even written tests of the person's legal and human rights knowledge. An expert should not participate in the examination of a country if she or he is a national or resident of that country.

c) ***Create a simplified, three-stage procedure*:**

The new complaint procedure should be divided into three procedural steps, as follows:

- Step 1: Deciding admissibility: In this first stage the expert body, or one member of this body acting as a Rapporteur, assesses whether the criteria of admissibility have been met. This initial step should be confidential, in the sense that it is not a public process. Nevertheless, the concerned state and the author of the complaint should be invited to participate in this phase through writing submissions and be able to submit their views on the question of admissibility. At the end of this step the expert body decides whether the case is closed or proceeds to step two.

- Step 2: Making a factual and legal assessment: Once a complaint is declared admissible, the expert body prepares a report for the Human Rights Council with an assessment of the facts and application of relevant international law and making recommendations for possible action by the Human Rights Council. In preparing the report the experts should engage in a dialogue with the concerned state and the author of the complaint. They should also seek information or views from other United Nations bodies, agencies or procedures (including funds, programmes and specialised agencies, human rights treaty bodies, Special Procedures of the Human Rights Council, United Nations field operations) as well as from regional human rights bodies, procedures or intergovernmental organizations. In situations where gross or persistent human rights violations are taking place and there is poor cooperation from the state concerned, the expert body could request the Human Rights Council to take interim measures. This stage of the procedure should generally be carried out with public transparency, though if the experts during this stage have a clear indication that the communication is manifestly ill-founded, they should be able to carry out their work confidentially, without public reporting. In all cases, however, the concerned state and the author of the communication should continue to participate in the proceedings and in all cases the report should eventually be made public.

- Step 3: Final decision on merits and on action: During this last stage the Human Rights Council considers the report from the expert body in public session, hears the views of the concerned state and the author of the complaint and makes a decision on any action it may wish to take.

d) ***Develop criteria for admissibility:***

Because such a complaint procedure is not judicial or quasi-judicial in character and does not make determinations on individual cases, it is not logical, nor does it make legal sense, to require the author of a complaint to ensure that all domestic remedies are exhausted before they approach the Human Rights Council. Certain clear and objective criteria should be defined in written rules, partly to prevent abuse of the mechanism. The criteria should include the following:

- A complaint should not violate principles of the United Nations Charter or be politically motivated.
- A complaint should include sufficient grounds to reasonably demonstrate a consistent pattern of gross and reliably attested violations of human rights.
- Complaints should be accepted from individuals or groups claiming to be victims of violations, individuals or groups representing victims of violations, or individuals or groups who do not represent the victims of violations but have a legitimate interest and have direct and reliable knowledge of the violations.
- Complaints should not be anonymous.
- Complaints should not contain abusive language or insulting remarks about the state concerned.

e) ***Ensure an efficient and timely procedure:***

The procedure should be essentially a written procedure (especially in the first two stages conducted by the expert body). However, the experts should be able to hold a hearing in the first two stages should they consider this useful to decide admissibility or to carry out the factual and legal assessment. The third stage, before the Human Rights Council, should in all cases be in the form of discussions in open sessions of the Council. The expert body should operate as an inter-sessional working group, between meetings of the Human Rights Council, operating in the following way:

- The expert body could meet for at least one week prior to every meeting of the Council.
- After each time it meets, the expert body should transmit its report to the Human Rights Council for consideration, no less than two weeks before the relevant meeting of the Human Rights Council.
- The examination of the expert body's reports should be a permanent agenda item at each meeting of the Human Rights Council.
- The Council should be required to take appropriate measures in a timely manner, based on the report transmitted by the expert body.