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**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Intersessional open-ended intergovernmental working group on the implementation of
paragraph 6 of General Assembly resolution 60/251 established pursuant to
Human Rights Council decision 1/104**

**Complaint mechanism: preliminary conclusions by the Facilitator,
Mr. Blaise Godet (Switzerland)**

Introduction

1. Following the meetings of the Open-ended Intergovernmental Working Group on the Review of Mandates established in accordance with decision 1/104 of the Human Rights Council and the presentation of oral preliminary conclusions on Friday 24 November 2006, the President of the Council requested each facilitator to present written preliminary conclusions on the respective mechanisms of the Council.

2. These written preliminary conclusions intend to reflect the views expressed with regard to the complaint mechanism during the discussions in the Working Group. They are in no way final or even exhaustive and are solely the view of the Facilitator. They have been drawn only in order to facilitate the start of a negotiation process on the complaint procedure, which shall be maintained by the Council, according to General Assembly resolution 60/251. Delegations are welcome to submit comments and suggestions in order to complete and refine these preliminary conclusions.

I. Objective

Introduction

3. A consensus emerged in favour of retaining Economic and Social Council resolution 1503 (XLVIII) as a basis of work and to improve it where necessary. Therefore, the language of the 1503 resolution was retained, though with some modifications, as suggested by States. The result is set out below.

Emerging consensus

4. **Through the complaint procedure, a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms shall be brought to the attention of and addressed by the Human Rights Council in an impartial, objective, efficient, victim-oriented and timely manner.**

Comments

5. These included the following:

- The term “systematic”, contained in the first draft of this working paper, as well as in the French version of Economic and Social Council resolution 1503 (XLVIII), was deleted. In fact, the word “consistent” already covers the idea of repeated human rights violations constituting a pattern;
- The term “allegations” was also deleted, since it was rightly pointed out that the Council only addresses human rights violations which have been reliably attested; and
- The preventive or early-warning role, which the complaint procedure could play in revealing existing and/or emerging patterns of human rights violations has been put forward by some delegations. However, no consensus was reached on this issue.

II. Scope

Introduction

6. With regard to the scope of the mechanism, there was a wide consensus on the necessity to follow the existing 1503 procedure. What differentiates the complaint mechanism from other human rights protection mechanisms is its ability to address violations of all human rights and fundamental freedoms, in all parts of the world. Moreover, for reasons of manageability and feasibility, the threshold must be high, i.e. gross human rights violations must reveal a consistent pattern.

Emerging consensus

7. **Violations of all human rights and fundamental freedoms must have a high threshold.**

Comments

8. These included the following:

- The reference to the Universal Declaration of Human Rights was removed, since it was considered too limitative. Indeed, several delegations emphasized the need to include human rights which are not mentioned in the Universal Declaration (such as migrants, disabilities, the right to development, etc.); and
- The traditional reference to “fundamental freedoms” was added, following recommendations made by many delegations.

III. Admissibility criteria

Introduction

9. There was a convergence of views on the cumulative criteria below, which are already applied in the existing procedure.

Emerging consensus

10. **Complaints must:**

- **Contain a factual description of the alleged violations;**
- **Not use essentially abusive language;**
- **Come from an author who is not anonymous;**
- **Originate from a person or group of persons who claim to be victims of the violations, or from any person or group of persons, including NGOs, acting in good faith, who claim to have direct and reliable knowledge of those violations;**

- **Not be exclusively based on mass-media reports or information and communication technology; and**
- **Have exhausted domestic remedies, unless it appears that such remedies would be ineffective or unreasonably prolonged.**

Comments

11. These included the following:

- The concept of exhaustion of domestic remedies is well defined and well accepted in international public law, including the qualification that domestic remedies must be effective and timely; and
- The question arises as to whether national institutions, when they work under the guidelines of the Paris Principles, can serve as effective local remedies. Furthermore, it is necessary to assess the efficiency and powers of these institutions on a case-by-case basis.

Areas requiring further discussion

12. There was no emerging consensus on other admissibility criteria, such as:

- Not being manifestly politicized;
- Fully observing the Charter of the United Nations provisions; and
- A situation (vs. an individual communication) not already being dealt with by a special procedure or a treaty body.

Comments

13. These included the following:

- The term “political” was replaced by “politicized”. Indeed, it was pointed out that any complaint is likely to be interpreted as being somehow politically motivated but it should not be politicized;
- Whereas some delegations stressed the need to refer to the Charter of the United Nations, others stated that the Charter only applies to States and not to individuals submitting the complaints;
- While many delegations acknowledge the risk of duplication (though significantly reduced over the last years, according to the Secretariat), one must also be beware of protection gaps. Moreover, one has to bear in mind that the objectives of the special procedures and treaty bodies are to deal with individual cases, whereas the complaint procedure is to reveal a consistent pattern of gross human rights violations. Therefore, the term “situation” was added in order to distinguish the situations dealt with by the

complaint procedure from the individual cases dealt with by other human rights protection mechanisms; and

- Finally, while some delegations seemed to favour strict application of these criteria at all levels, including at the second Working Group (dealing with measures to be taken) level, other delegations preferred the application of the admissibility criteria to be of the sole responsibility of the first Working Group, focused on the merits of the case.

IV. Number of stages

Introduction

14. On the number of stages in the process, the overwhelming majority of delegations favour a two-stage process, as it is the case in the current 1503 procedure.

Emerging consensus

15. **In the two stages:**

- **The first Working Group focuses on the admissibility criteria and the merits of the allegations of violations, with a mandate to report to a second Working Group; and**
- **On the basis of information provided by the first Working Group, the second Working Group proposes measures to be taken by the Council, with regard to situations of human rights violations.**

Comments

16. These included the following:

- As regards the role of the Secretariat, it currently has little leeway. At present, it can only dismiss manifestly ill-founded and/or anonymous communications and has to refer complaints to the Chair of the Working Group on Communications for all other decisions pertaining to the admissibility and merits of a case. In other words, the Secretariat only acts as a coordinating body, to avoid duplication between different human rights protection mechanisms, but does not decide on the admissibility of a case;
- Some delegations would like the Secretariat to refer complaints to the whole Working Group on Communications; however, this proposal is in fact even more restrictive than the current 1503 procedure and it risks extending the duration of the procedure significantly. Rather, the Chair should be made accountable to its Working Group and justify its decisions on the non-admissibility of a case;
- Few delegations contended that the role of the Secretariat could be enhanced with regard to the screening process. They took the view that the Secretariat should take

over the tasks of the present Working Group on Communications, so that a single Working Group would deal with the whole process; and

- Finally, as regards the composition of the Secretariat, many delegations stressed the need for permanent staff to undertake pre-screening of the communications, as is already the case.

V. Confidentiality

Introduction

17. On the issue of confidentiality, further discussions are necessary. The two options below were retained.

Areas requiring further discussion

18. These areas include the following:

- (a) All stages should remain confidential unless the Council decides otherwise; or
- (b) All stages should remain confidential unless the second Working Group decides otherwise, for reason of non-cooperation from the State concerned.

Comments

19. While some delegations deem it essential to keep all stages confidential, unless the Council decides otherwise, others would envisage using confidentiality as a tool to ensure cooperation from the State concerned. Hence, these delegations take the view that the second Working Group should be allowed to decide to examine the situation in a public session, without prior approval by the Council.

VI. Participation of the author of the communication

Introduction

20. Wide agreement was reached on the necessity to keep the author of a communication informed.

Emerging consensus

21. **The author should be notified at the following key stages:**

- **At receipt of the complaint by the complaint mechanism;**
- **When the complaint is deemed inadmissible or when it is taken up for substantive consideration (at this point, the authors should be informed that they are welcome to provide any additional information, in line with the admissibility criteria); and**
- **At the final outcome.**

Comments

22. These included the following:

- Some delegations expressed two concerns with regard to the additional information to be sent in due time to the author. First, an increase in the Secretariat workload is likely to occur and, second, the risk of information leak could also significantly increase;
- An important point here would be to ensure that, when the author expresses the desire that his identity not be transmitted to the State concerned, confidentiality of the sources of communication is maintained, in order not to endanger the security of the author; and
- Another concern relating to the role of the State concerned was raised: if the author of the complaint is to be informed of the procedure, some delegations stressed the need to act likewise vis-à-vis the State. The Secretariat shall therefore continue keeping the latter informed at the same key stages as the author of communications.

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

Introduction

23. Assuming that two Working Groups would be maintained, a vast majority of delegations prefer that the first Working Group be composed of qualified and independent experts and the second Working Group of State representatives. Further, delegations seem to agree on the necessity to respect the principle of equitable geographic representation in the second Working Group.

Emerging consensus

24. **The emerging consensus was that:**

- **The first Working Group should be composed of qualified and independent experts; and**
- **The second Working Group should be composed of State representatives, with equitable geographic representation.**

Areas requiring further discussion

25. These areas included the following:

- Views differed on the necessity to apply the principle of equitable geographic representation in the first Working Group. Indeed, some delegations argued that equitable geographic representation should not be a criterion of selection, since experts are to be chosen according to their competence and independence; and

- Delegations appeared flexible on the size of both Working Groups, but many expressed satisfaction with their present size. Nevertheless, some delegations would favour an enlargement of both Working Groups, so as the first could play a more direct role in the screening process and the second could better represent the Human Rights Council (10 members instead of 5, for instance).

Comment

26. The idea of an independent and non-voting Chair of the second Working Group, whose role would be limited to supervision, deserves further discussion.

VIII. Choice of experts of the first Working Group

Introduction

27. If experts are to constitute the first Working Group, views are split between the two following options (with a majority of delegations in favour of option (a)):

- Areas requiring further discussion:
 - (a) Experts to be chosen from the new expert advice system of the Council; or
 - (b) Experts to be chosen from a roster of independent and qualified experts to be maintained and regularly updated by OHCHR.

Comments

28. These included the following:

- One proposal put forward consists in an election of experts by the Council on the basis of a roster of qualified and independent experts; and
- This issue is clearly linked to the outcome of the discussions concerning the expert advice of the Council. Therefore, it is difficult to make any decision before knowing what the new expert advice will look like.

IX. Appointment / Election of Working Group members

Introduction

29. The appointment or election of both Working Group members also deserves further debate. Views seem to be divided between the following options (with a majority of delegations in favour of option (a)).

Areas requiring further discussion

30. These areas included:

- (a) Appointment by the President of the Human Rights Council, after consultation with the Bureau or with the regional groups; and

(b) Election by member States.

Comment

31. If members of the Working Groups are elected, the Council should also decide if all members of the United Nations should be entitled to participate, since the mechanism concerns all members of the United Nations, or if this election should be restricted to members of the Human Rights Council.

X. Duration of mandate for Working Group members and their rotation

Introduction

32. Delegations showed flexibility on this issue, but most of them prefer maintaining the same system as today.

Emerging consensus

33. **The emerging consensus is for:**

- **A three-year term, renewable once, for the first Working Group; and**
- **A one-year term for the second Working Group.**

Comment

34. More expertise is needed in the first Working Group, which would focus on the admissibility criteria and the merits of the complaint. The mandate of its members should therefore be longer and renewable, so as to ensure continuity. The mandate of the members of the second Working Group could be shorter, since it would deal with measures to be taken against situations of human rights violations.

XI. Human Rights Council consideration of situations

Introduction

35. On the frequency with which the Council shall consider the situations of human rights violations, no sound emerging consensus was reached. While some delegations favoured frequent consideration by the Council of human rights violations situations (at each session of the Council, for instance), others preferred an annual examination of these situations. Having heard all delegations, the following compromise as to frequency of consideration might be considered:

- **At least once a year, and more often, if recommended by the second Working Group.**

XII. Duration of the process

Introduction

36. With regard to process duration, all delegations agreed on the need to establish a victim-oriented mechanism and therefore on the necessity for a more efficient and hence shorter procedure. However, different views were expressed on how to improve its efficiency.

Areas requiring further discussion

37. While some delegations would be inclined to impose a deadline on States to provide their replies or to increase the frequency of both Working Groups' meetings in order to better match the numerous sessions of the Council, others prefer relying on the experts' and representatives' judgement and not to limit the process duration to an artificial time-limit.

Comment

38. The process duration depends on several factors, such as the meetings frequency of both Working Groups, consideration of situations by the Council, deadline for States replies, national resources for the provision of timely responses, postponement of case consideration by the Working Group for lack of information, etc. The process duration shall therefore be further discussed in view of all these various elements.

XIII. Possible measures to be taken by the Human Rights Council on proposals made by the second Working Group

Introduction

39. There was wide agreement that the four existing measures already mentioned in Economic and Social Council resolution 2000/3 should be maintained. Furthermore, consensus also emerged on the necessity to add a measure concerning the provision of technical and capacity-building. There was, however, divergence on a possible link to be established between the complaint procedure and the Universal Periodic Review. Likewise, no agreement could be reached with regard to the follow-up process.

Emerging consensus

40. **The emerging consensus is for the Council:**

- **To keep the situation under consideration and wait for further information from the State concerned;**
- **To keep the situation under consideration and appoint an expert to monitor the situation and report back to the Council;**
- **To discontinue considering the situation;**
- **To refer the matter to the public procedure established under Economic Social Council resolution 1235 (XLII); and**

- **To recommend that OHCHR to provide technical and capacity-building assistance to the country concerned**

Areas requiring further discussions

41. These areas include whether:

- To recommend that the country be urgently reviewed through the UPR; and
- 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 it to a special procedure, by establishing a fact-finding commission, by recommending to the General Assembly, or by suspension of the rights of membership in the Council).

Comments

42. Several proposals were put forward. First, the words “wait for” could be replaced with “request” further information, in the first part listed under paragraph 40 above. Moreover, a deadline should be added, so as not to leave the process completely open-ended. Second, an additional measure to be taken by the Human Rights Council could be: “to engage in dialogue with the State, including visits if necessary”. Finally, an amendment was proposed with regard to the fifth part listed under paragraph 40 above: “to provide technical and capacity-building assistance to the country concerned, *provided the violations do not derive from a deliberate and systematic policy*”. In the same sentence, a proposal was made to add “to provide technical and capacity-building assistance to the country concerned, *only if the latter so requests*”.

43. The complaint procedure could serve as an early-warning mechanism resulting in the recommendation that the situation of the State concerned be taken up urgently under the Universal Periodic Review. Further, the situation of serious human rights violations could be used as one part of the information gathered on the State reviewed by the UPR. As well, a serious situation of human rights violations could be referred to UPR in an attempt to re-establish the dialogue with the State concerned in the most appropriate form. However, many delegations took the view that no link should be established between the UPR and the complaint procedure. First, it would be difficult to reconcile the confidentiality of the complaint procedure with the public character of the UPR. Second, given the regular cycle of the UPR; it would be difficult for a State to be reviewed as a matter of urgency. Third, the UPR is a cooperative mechanism, not a tribunal. Finally, being subject to several mechanisms at the same time overburdens the State concerned.

44. The issue of follow-up measures requires deeper discussions, for instance, delegations need to look at how to measure compliance by a State.
