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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Report of the sessional working group on the administration of justice

Chairperson-Rapporteur: Ms. Antoanella-Iulia Motoc

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Summary

By its decision 2004/101, the Sub-Commission on the Promotion and Protection of Human Rights established the sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Ms. Françoise Jane Hampson (Western European and other States), Ms. Antoanella-Iulia Motoc (Eastern Europe), Mr. Janio Ivan Tuñón Veilles (Latin America and the Caribbean), Mr. Yozo Yokota (Asia) and Ms. Lalaina Rakotoarisoa (Africa). The working group elected, by acclamation, Ms. Antoanella-Iulia Motoc as Chairperson-Rapporteur for its 2004 session.

The sessional working group held discussion on the subjects of international criminal justice; witnesses and the rules of evidence; rape, sexual assault and other forms of sexual violence; women and children in prison; and immunity. Papers were presented on a number of these topics. The working group proposed that the subjects of international criminal justice, women and the criminal justice system, transitional justice and the right to an effective investigation and remedy, be included in the provisional agenda for its next session. The working group stressed the need to continue to work closely with academics and non-governmental organizations in the future.

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Introduction

1. By its decision 2004/101, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Ms. Françoise Jane Hampson (Western European and other States), Ms. Antoanella-Iulia Motoc (Eastern Europe), Mr. Janio Ivan Tuñón Veilles (Latin America and the Caribbean), Mr. Yozo Yokota (Asia) and Ms. Lalaina Rakotoarisoa (Africa).

2. The following members of the Sub-Commission also took part in the discussions of the working group: Mr. Gáspár Bíró, Mr. Mohamed Habib Cherif, Mr. Chinsung Chung, Mr. Emmanuel Decaux, Mr. Rui Baltazar Dos Santos Alves, Mr. El-Hadji Guissé, Mr. David Rivkin, Mr. Ibrahim Salama, Mr. Abdul Sattar, Mr. Soli Jehangir Sorabjee and Ms. Halima Embarek Warzazi.

3. The working group held two public meetings, on 26 and 28 July 2004. The present report was adopted by the working group on …. August 2004.

4. A representative of the Office of the United Nations High Commissioner for Human Rights opened the session of the working group. The working group elected, by acclamation, Ms. Antoanella-Iulia- Motoc as Chairperson-Rapporteur for its 2004 session.

5. Representatives of the following non-governmental organizations took the floor during the debate: Association for World Education, International Movement ATD Fourth World, Council of Nitassinan (Innu Nation), Friends World Committee for Consultation (Quaker Office Geneva), Minnesota Advocates for Human Rights, Pax Romana, Penal Reform International and Japan Fellowship of Reconciliation.

6. The working group had before it the following documents:

Report of the 2003 sessional working group on the administration of justice (E/CN.4/Sub.2/2003/6);

Working paper by Ms. Florizelle O'Connor on the issue of women in prison (E/CN.4/Sub.2/2004/9);

Expanded working paper by Lailaina Rakotoarisoa on the difficulties of establishing guilt and/or responsibilities with regard to crimes of sexual violence (E/CN.4/Sub.2/2004/11);

Working paper by Ms. Françoise Hampson on the criminalization, investigation and prosecution of acts of serious sexual violence (E/CN.4/Sub.2/2004/12).

7. Furthermore, Ms. Hampson introduced two documents to the working group that were submitted by academics of the Human Rights Centre of the University of Essex:

Paper on human rights issues in the enforcement of international criminal law by national courts (no document symbol); and
Paper on respect for human rights norms by international and mixed criminal tribunals (no document symbol).

8. The Chairperson-Rapporteur noted that the working paper by Ms. Rakotoarisoa would be presented to the Sub-Commission, but that she would be making a contribution to the discussions of the working group on this subject.

Adoption of the agenda

9. At its first meeting, on 26 July 2004 the working group considered the provisional agenda contained in document E/CN.4/Sub.2/2003/6. Following discussion among members of the working group, the agenda was adopted as follows:

1. Election of officers.

2. Adoption of the agenda.

3. International criminal justice:

   (a) Criminalization, investigation and prosecution of acts of serious sexual violence;

   (b) Guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies.

4. Witnesses and rules of evidence:

   (a) Medical secrecy;

   (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination.

5. The domestic implementation in practice of the obligation to provide domestic remedies.

6. Provisional agenda for the next session.

7. Adoption of the report of the working group to the Sub-Commission.

10. Ms. Motoc recommended involving non-governmental organizations (NGOs) more closely in the working group and inviting them to submit papers on specific topics. She suggested that members of the working group could consult with NGOs to evaluate which papers might be prepared for next year's meeting of the working group.

11. Mr. Yokota drew the attention of the working group to the report "Women and justice", issued by the Asian Women's Fund. He mentioned that several members of the Sub-Commission had contributed to the document. The report contained guidelines for women who had interacted with the justice system.

12. Ms. Hampson stressed the importance of having NGOs come forward and get more involved in the work of the working group. She also supported the recommendation of Ms. Motoc to invite NGOs to submit papers to the working group.

I. INTERNATIONAL CRIMINAL JUSTICE

13. Ms. Hampson introduced two papers by post-graduate students of the Human Rights Centre at the University of Essex whom she had invited to work on thematic reports regarding issues of international criminal justice. The first paper, written by Mr. Matt Pollard and Mr. Guillaume Pfeifflé, entitled, "Human rights issues in the enforcement of international criminal law by national courts", examined the relationship between international and national criminal tribunals dealing with international crimes. Under the Rome Statute of the International Criminal Court (ICC), the Court would normally have jurisdiction only where the national court was unwilling or unable to try the accused. For such a system to work, to the greatest extent possible the national court would need to apply the same definition of the crime, the same rules of evidence and, in general, be in conformity with other procedures of ICC that might affect the substantive outcome of the proceedings.

14. Ms. Hampson noted that the paper highlighted differences between national courts of different States and between national and international courts with regard to evidence, rules of procedure and plea bargaining. She explained that the paper addressed the issue of differences between national court systems in implementing international criminal law. She highlighted the paper's finding that inconsistent outcomes on identical or very similar facts were possible because of differences in national substantive law or rules of procedure. Ms. Hampson noted the paper's conclusion that such a situation would have serious implications for the rights of the accused, the rights of victims and the effectiveness of the international criminal law system. She indicated the paper's conclusion that inconsistent legal standards in different States needed to be identified and harmonized, at least to the extent they covered crimes that were covered by international criminal law. There was also a need to obtain information on sentencing procedures at the national level so that they could be compared to procedures used by international courts.

15. The main aim of the second paper, written by Mr. Alfredo Strippoli, entitled "Respect for human rights norms by international and mixed criminal tribunals", was to initiate a discussion on the need to create some form of institutional human rights monitoring of international criminal tribunals and to suggest different options for such monitoring. One option was for the Human Rights Committee to take on this responsibility. The paper suggested that a third optional protocol to the International Covenant on Civil and Political Rights (ICCPR) could be elaborated

that would allow the Committee to monitor the work of the international criminal courts at periodic intervals and to receive complaints from individuals who alleged that international tribunals had not respected their rights guaranteed by the Covenant. A second option would be for the Commission on Human Rights to appoint a special rapporteur on human rights protection in international criminal justice to monitor whether the international tribunals were complying with relevant international human rights instruments. Of the two options, Ms. Hampson favoured the creation of an additional protocol to ICCPR. It would be less intrusive than an annual review by a special rapporteur and would be responsive to the needs of individuals.

16. Ms. Hampson then presented her own working paper on the criminalization, investigation and prosecution of acts of serious sexual violence (E/CN.4/Sub.2/2004/12), which examined three different offences: rape, sexual assault and other forms of sexual violence. She described how a defendant who was alleged to have committed rape, sexual assault or another form of sexual violence might in certain circumstances not be charged with one of those offences, but with torture, a crime against humanity, a war crime, or even genocide. Rape was the most striking case, and a better definition of rape at the national level was necessary because many laws defining rape had been drafted long ago and were not in accordance with the definitions used by international criminal tribunals.

17. The position of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) was that lack of consent was sufficient to establish the offence of rape, but that a number of national laws had a different requirement, such as the use of force. Some national legal definitions of rape were not in conformity with the definition used by international tribunals, and that could result in a defendant receiving a lesser sentence at the national level. Ms. Hampson further explained that there were differences at the national level with regard to charging practices and procedures for sentencing, which also could have an effect on the outcome of a trial.

18. Mr. Salama noted the important role of the judiciary at the national level in interpreting international human rights law. He also raised the question of the relationship between international humanitarian law and international human rights law and added that, although rape was a pertinent topic to discuss in this regard, other areas might be identified as well.

19. Ms. Hampson explained that the issue was one of the tripartite relationship between international human rights law, international humanitarian law and international criminal law. There was a general area of international criminal law that was not necessarily related to armed conflict, but which might relate to violations of international human rights law. The content of crimes like rape was not necessarily defined with sufficient explicitness in international humanitarian law and international and regional jurisprudence stated that not only identifying perpetrators, but also investigating and charging them with the crime were necessary for a State to meet its obligations under international human rights law. International criminal law included certain violations of international human rights law, and violations of the latter could indicate in what areas criminal proceedings should be brought under international criminal law. She suggested that it would be useful to build up a series of reports exploring the legal definition of various international crimes. Unless clear definitions existed for international crimes, national legal systems would not know what to do. The challenge for a State was to have workable and complementary definitions of crimes that constituted serious violations of international human

rights law such as offences related to torture, arbitrary killings and disappearances. She stressed the need to define what specific acts and what specific intent were required for the crimes in question.

20. Mr. Sorabjee also addressed the definitions of crimes such as rape. One of the main difficulties was that many crimes in his country found their definition in the Indian Penal Code of 1879. He mentioned a recent Indian Supreme Court ruling that interpreted the law with respect to rape in a manner that would be in conformity with the international definition of rape. Very few countries would have the same definition of rape as the one under international criminal law.

21. Mr. Guissé raised the issue of a victim's consent given by a third person, and in this regard brought up the issue of forced marriages of very young girls arranged by their families. As an example of the dramatic consequences of that practice, he related the case of an 11-year-old girl who died one day after her marriage and just after it was consummated. Some girls were forced into marriage as young as 9 years old, and girls that young were not in a position to give their own consent. He raised the question of whether it would be possible to fit this category of practice into the definition of rape at the international level, and stressed the absolute need to protect minors in this regard.

22. Ms. Rakotoarisoa asked Ms. Hampson to elaborate on the issue of immunity, which was seen as an obstacle to the prosecution of perpetrators. Ms. Rakotoarisoa argued that some States hid behind diplomatic and other types of immunity in order not to prosecute perpetrators of serious crimes.

23. Ms. Hampson responded to the issues raised by making several points. First, she addressed the issue raised by Mr. Guissé - rape outside armed conflict - and said that the definitions of the ad hoc international tribunals could also be applied in situations where no conflict existed. Hence, below a certain age, a child could not be considered to be consenting to sexual relations and therefore the action would be defined as rape. Her second point was that the definition of rape in civil-law systems was often wider than that in common-law systems. Common-law definitions of rape often required penetration specifically by means of a penis. Only some jurisdictions accepted oral penetration by the penis as rape, whereas that was part of the definition of the crime at the international level. Her third point was in response to Mr. Sorabjee's statement about how the Indian Supreme Court had tried to modernize dated definitions of rape through innovative jurisprudence. She said that it was better to change the definition of the law by legislation rather than having an evolving definition by the courts, in the interest of fairness to potential defendants. Ms. Hampson's last point related to the issue of immunity. She said that immunity did not exist before an international tribunal, although she noted that this constituted a substantial problem at the national level.

24. Mr. Rivkin argued that there were some situations in which immunity effectively existed before an international tribunal. Ms. Hampson disputed that assertion, adding that one should distinguish between the concepts of immunity and waiver.

25. Returning to the issue of the rape of under-age girls, Mr. Guissé argued that certain crimes could be found to be a crime against humanity even if committed outside a situation of armed conflict.

26. Mr. Tuñón Veilles explained that El Salvador and Panama were cooperating with the International Committee of the Red Cross (ICRC) with a view to bringing national law regarding serious crimes such as rape into conformity with international law. The two States intended to prepare a paper on the issue of rape in armed conflicts. There should be similar concerted efforts to bring national law in conformity with international law, and outside assistance would be most helpful in such a process.

27. The observer for Pax Romana argued that it was important to address the issue of sexual violence in situations that did not constitute armed conflicts, but where there were serious internal disturbances, riots or a breakdown in order because the State had effectively ceased to exist.

28. Mr. Yokota asked how double jeopardy could be avoided when both national and international law provided a means of prosecuting the same crime. It was important for one jurisdiction to have responsibility for prosecuting an alleged perpetrator and the person should not be subject to prosecution a second time. Mr. Yokata also asked about the issue of retroactivity of the law, particularly in the context of anti-terrorism legislation.

29. Mr. Guissé stated that international and national courts were complementary and therefore double jeopardy could be avoided, and that the principle of the non-retroactivity of law was well established.

30. Mr. Salama raised the issue of universal jurisdiction and its relevance to possible prosecution for a serious crime. Mr. Guissé said that, according to the principle of universal jurisdiction, each State had an obligation under international law. His understanding of the principle was that when a person committed a crime under international law, a State could try the perpetrator within its own jurisdiction or transfer the accused to an international tribunal for trial.

31. Mr. Guissé asked how an individual victim could bring a case to an international tribunal after the exhaustion of the national procedures.

32. Mr. Rivkin referred to the relationship between international and national jurisdictions, and stated that, normally, an international tribunal would have jurisdiction if there was a failure or inability to prosecute at the national level. The failure of a national court to give a lesser sentence than the penalty an international tribunal might give was not enough to invoke international jurisdiction. He raised the question of how to characterize the threshold level at which a national justice system would be expected to perform before international jurisdiction would apply. He suggested that, unless there was a fundamental failure of the national justice system to function, international jurisdiction could not be invoked.

33. Mr. Sorabjee described a hypothetical situation to indicate how differences in definition of serious crimes under international and national law could pose a problem to a potential defendant. A situation could exist where the facts would justify the prosecution of a person for a

crime as defined by international law, but not under national law owing to differences in definition. He asked what States were supposed to do in such a situation. If the alleged perpetrator were charged at the national level, he might escape judicial sanction altogether or be convicted of a lesser offence, but if the international definition of the crime were used, that would constitute retroactive application of the law.

34. The observer for the Association for World Education asked what happened when a State did not respect its obligations under international law, and referred to Opinion 1999/10 of the Working Group on Arbitrary Detention, which determined that the detention of an Egyptian Copt was arbitrary. He noted that, in spite of this opinion, the person continued to be imprisoned in Egypt.

35. Mr. Guissé replied that that Working Group was not a court or a substitute for the domestic jurisdiction of a State, although United Nations human rights mechanisms did have a certain degree of influence on State action.

36. Mr. Guissé asked for more information on the concept of immunity and its potential limitations.

37. Ms. Hampson took the floor to respond to questions and make concluding remarks relating to the presentation of her working paper. Regarding the issue of the age of consent for marriage of young girls and its relationship to statutory rape, she noted that as some States had different age limits for consent for marriage and for statutory rape. She also expressed reservations about treating the issue as a crime against humanity, as proposed by Mr. Guissé. On the subject of double jeopardy, Ms. Hampson said that in practice it should not be an issue, as jurisdiction between national and international tribunals was complementary. She agreed that it would be inappropriate to try a person at the international level a second time simply because one was not satisfied with the outcome of the trial at the national level. Regarding the difference in definitions of rape at the national and international level, she noted that there were significant anomalies at the national level in some States. The requirement at the national level in some States for eyewitness evidence, or requirements that eyewitness evidence of males be considered as more valuable than eye witness evidence of a female. She argued that in such extreme cases, one could argue that the national system was fundamentally flawed, opening the way for an international trial. In order for an international tribunal to make such a determination, it was very important for national courts to keep complete records of the proceedings. Ms. Hampson explained that universal jurisdiction meant that a State could try an alleged perpetrator for a serious crime committed anywhere, as long as the person was within its jurisdiction. She noted, however, that there was no requirement under international law for a State to invoke universal jurisdiction and try persons who had committed crimes outside its jurisdiction, except in the case of "grave breaches" of the Geneva Conventions and Additional Protocol I. Ms. Hampson supported the idea that a State's failure to prosecute an alleged perpetrator could constitute a breach of international human rights law. She explained that there were several types of immunity, and mentioned as examples diplomatic legislative and functional immunity in certain legal proceedings.

38. Mr. Guissé asked Ms. Hampson to comment on situations where States had granted amnesties to significant numbers of people, thereby effectively granting immunity from

prosecution for serious crimes. She replied that there was effectively a direct link between such amnesties and impunity or immunity from prosecution for serious crimes. That was a difficult issue, and the idea of reducing immunity generally, be it personal or functional immunity, to the absolute minimum at the national level merited further consideration.

39. Mr. Rivkin said that the working group should be humble when looking at situations of amnesty, even though amnesties could whitewash crimes and result in immunity. He referred to the case of South Africa, where many people were not prosecuted, or not prosecuted as fully as they could have been, in the interest of national reconciliation and national transformation. The concept of prosecutorial discretion looked not only at the interest of the victim, but also at the impact of the act on society as a whole.

40. Mr. Decaux referred to the excellent work that Louis Joinet had done on the issue of impunity, and in particular the "Set of principles for the protection and promotion of human rights through action to combat impunity" that were contained in the annex to his report to the Sub-Commission (E/CN.4/Sub.2/1997/20/Rev.1). He encouraged Sub-Commission experts to take those principles into account when discussing impunity in the working group.

II. WITNESSES AND RULES OF EVIDENCE

41. The Chairperson-Rapporteur opened the discussion on item 4 (a) of the agenda, "Medical secrecy", which had been proposed by the former member of the Sub-Commission, Mr. David Weissbrodt.

42. Mr. Guissé mentioned a link between medical secrecy and the commission of human rights violations, and added that medical secrecy sometimes covered up human rights violations. Regarding pharmaceutical companies and their attitude regarding drugs for AIDS, he said that profit should not be traded for human life. Mr. Guissé asserted that this type of activity should be considered a crime against humanity.

43. The Chairperson-Rapporteur opened the discussion on item 4 (b) of the agenda, "Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination".

44. Mr. Guissé said that women had always been the victims of sexual aggression. During periods of armed conflict, they had frequently been victims of sexual slavery and rape and in addition had suffered from sexually transmitted diseases.

45. Ms. Rakotoarisoa indicated that, although she was going to present her paper to the Sub-Commission rather than the working group, she would make some remarks under this agenda item. She described how women were lured into prostitution under false pretences such as a promise of a good job; women were also sold into prostitution, including sometimes by their families living in extreme poverty sometimes. She noted that doctors were excellent witnesses in cases of sexual abuse or rape, but were sometimes reluctant to testify for a variety of reasons.

III. DOMESTIC IMPLEMENTATION IN PRACTICE OF THE OBLIGATION TO PROVIDE DOMESTIC REMEDIES

46. Mr. Yokota noted that, although this item was an important one, no specific papers or statements on this subject had been prepared. No other statements were made.

IV. PROVISIONAL AGENDA FOR THE NEXT SESSION

47. The Chairperson-Rapporteur proposed that any question not specifically in the agenda could be discussed under agenda item 6, including juvenile justice, the death penalty and the privatization of prisons.

48. The observer for Pax Romana mentioned the example of Haiti as a case that could not be characterized as a failed State, but where it was nevertheless difficult to determine where people should go for justice and what laws were applicable. No remedies for this situation appeared to exist at the regional or international level.

49. The observer for International Movement ATD Fourth World Geneva informed the working group about a patchwork quilt that had been made by poor people and was on display at the Palais des Nations.

50. Mr. Yokota made a statement about the situation in Japan, where judges were not formally trained to apply international human rights law. They were only taught about domestic law and therefore international human rights law had very little, if any, impact on judicial proceedings. Judges and prosecutors were beginning to receive training in international human rights law at the Legal Research and Training Institute. However, some law schools in Japan did not teach international human rights law at all.

51. Ms. Motoc said that it would be interesting to have a study on the introduction of international human rights law in the curricula for training of judges in order to see whether it improved the human rights situation in a specific country.

52. At the second meeting of the working group, on 28 July 2004, Ms. Rakotoarisoa made further remarks about the problems of gathering evidence in sexual crimes. She said that the lack of evidence favoured impunity. She mentioned the problems that victims faced after sexual assault and the victim's vulnerability. For women and children the investigation process caused stress and confusion. She noted that people who were fearful and confused tended to withdraw into themselves and be more open to suggestion. Questioning by the court or the investigating judge tended to undermine witnesses, which could lead to contradictory statements. Many cases had failed because of incoherence induced by the trauma that the victim had experienced. A victim's memory could become less clear with the passing of time and suggestive questioning by the prosecution could result in confused and sometimes contradictory testimony. Trials might drag on for several years, which could affect the victim and her ability to testify in a coherent manner. In the United States, experts were able to speak on behalf of children so that they did not have to relive the experience in court. Ms. Rakotoarisoa noted that sexual assaults against minors were not limited to relationships between adults and children, but had also occurred between adolescents.

53. Ms. Rakotoarisoa said that virginity was a prerequisite for prosecution for rape in some States. Virginity could be very difficult to prove, it was an excessive requirement of evidence and was discriminatory, as the victim was obliged to answer humiliating questions. She mentioned the use of genetic fingerprints and other scientific means to identify a perpetrator, and noted further that DNA evidence analysis required the evidence to be taken fairly quickly after the crime occurred.

54. Ms. Rakotoarisoa then spoke about the problems of sexual tourism and the fact that some States opposed extradition of their own nationals. One solution was for the home country of the sexual tourist to have extraterritorial jurisdiction over its citizens abroad. This was particularly appropriate because women and children might not enjoy sufficient protection in the country where the sexual acts were committed. Evidence of sexual assault affecting disabled persons posed even greater obstacles and sometimes, when a disabled person was living in an institution, the interests of the institution were given priority over the interests of the victim.

55. Sexual assault in prison raised issues of effective immunity because many victims were fearful and potentially the subject of reprisals. She raised the issue of distributing condoms in prison: some claimed that this was an invitation to engage in sexual relations and debauchery, or at least that the practice was morally ambiguous. She explained that, even though sexual activities were prohibited in many prisons, they still occurred. The prison population was not static, and this could affect the outside population, particularly given the health risks of AIDS. Therefore, the failure to address the issue could pose a threat to public health.

56. Ms. Rakotoarisoa stated that paedophilia and cybercrime were becoming an increasing source of concern. The Internet was used increasingly to facilitate and spread paedophilia and perpetrators could now seek material from all over the world. States were encountering difficulties in monitoring and prosecuting action taken over the Internet, and the means of combating this type of crime were limited. Ms. Rakotoarisoa addressed the issue of witness protection and the importance of providing witnesses with guarantees of protection. She described different ways to take evidence so that the victim did not come face to face with the accused - the use of videos, screens, having someone speak on behalf of child victims and hearing testimony in closed proceedings.

57. Mr. Guissé raised the question of what a perpetrator might be seeking to achieve through a forced sexual act. Such conduct had been used in armed conflicts to dishonour the victim, sometimes even in front of her own family. Rape might also be used as a form of punishment against a specific ethnic group in armed conflict. In either of these cases, most of the time the crimes were committed against innocent victims who had nothing to do with the conflict. A third possible explanation might be simply that forced sexual acts were for the sexual pleasure of the perpetrators who had few moral scruples.

58. Mr. Guissé observed that that, in some countries, the victim had to be a virgin for the crime of rape to exist, and that the hymen of the victim had to be broken as a proof of rape. In his country rape was defined as forced sexual intercourse, regardless of the status of the victim. He raised the question of whether a woman could be raped by her own husband, and argued that forced sex in a marital relationship could be considered rape.

59. Mr. Guissé addressed the issue of adoption and its implications for crimes of sexual violence. An adopted child was often completely cut off from his or her biological family, and in some cases the motives of persons adopting children were suspect. Children who were adopted might be sexually exploited, forced to appear in pornographic films or used for their organs. Adopted children might also be the victims of accidents organized so that adults could collect substantial insurance payments. He worried about the increase in trafficking of children and noted that in practice there was little or no possibility of monitoring the well-being of a child after the adoption.

60. Ms. Hampson stated that many of the issues raised by Mr. Guissé had already been dealt with by the Working Group on Contemporary Forms of Slavery. She said it would interesting to know if the United Nations Office on Drugs and Crime (UNODC) in Vienna, through its Centre for International Crime Prevention, had elaborated model rules of criminal procedure or suggested procedures for witness protection. She also asked if the Committee on the Rights of the Child or other human rights bodies had addressed these issues. The European Court of Human Rights had considered the issue of virginity in the context of rape, and had concluded that proof of virginity was inappropriate as a requirement to prove this offence. She also raised the question of whether a man could, as a matter of law, rape his own wife. In a number of States marriage had been an absolute defence against the charge of rape because it was assumed that a woman automatically consented to sexual intercourse when she married. In a case involving the allegedly retroactive penalization of marital rape, the European Court of Human Rights appeared to support the view that a husband could be found guilty of the rape of his wife.

61. Ms. Hampson said that NGOs had a great deal of experience regarding children giving evidence in cases of sexual assault and that the rules of procedure and the law of evidence in that regard had changed dramatically in the last 20 years in certain jurisdictions. A review of those changes would be helpful to formulate guidelines in this area. Guidelines would also be helpful to overcome some discriminatory or unfair practices that were still in place. In some jurisdictions independent corroborating evidence was required to prove a case of sexual assault, or unequal weight was given to men and women's testimony, or the victim might be asked to produce eyewitness testimony of the alleged incident. Better rules of evidence and rules of procedure needed to be developed to protect victims and witnesses in cases of sexual assault.

62. Mr. Cherif noted that the rules of criminal procedure and the rules of evidence in cases of sexual assault were very important. It was essential for the judge to be able to fully consider both incriminating evidence and exculpatory evidence.

63. The observer for the Japan Fellowship for Reconciliation mentioned that the history of international law on crimes of a sexual character might be an area for further study. It had been an issue after both the First and Second World Wars.

64. The observer for the Innu Council of Nitassinan spoke about the rights of indigenous peoples in Canada and referred to the recent report of Canada to the Committee on the Elimination of Racial Discrimination (CERD) (CERD/C/409/add.4) of 17 May 2004. He suggested that the concluding observations of CERD could be of interest to the working group.

65. The observer for the Friends World Committee for Consultation – Quaker Office Geneva proposed that the issue of women and children in prison be included in next year's provisional agenda. Ms. O'Connor's working paper (E/CN.4/Sub.2/2004/9) was a good start, but there was a range of additional issues to be considered. Her organization was planning its own research on the subject, with a view to focusing on human rights law and its applicability to this issue. It would also be proposing practical solutions. She urged that this subject be a regular item on the agenda of the working group.

66. The Chairperson-Rapporteur asked for views on the proposal of the observer of the Friends World Committee for Consultation – Quaker Office Geneva. She also expressed concern that too many working papers were being submitted to the Sub-Commission and suggested that unless the matter was the subject of a report of a special rapporteur, it would be better discussed in the working group.

67. The observer for the Japan Fellowship for Reconciliation invited the working group to consider its submission to the Sub-Commission (E/CN.4/Sub.2/2004/NGO/28).

68. The observer for Minnesota Advocates for Human Rights noted that the organization had followed the process of transitional justice in Sierra Leone and Peru and that it wanted to offer a working paper on this subject to the working group next year. She added that the progress report submitted by Barbara Frey to the Sub-Commission on the prevention of human rights violations committed with small arms and light weapons (E/CN.4/Sub.2/2004/37 and Add.1) might be of interest to the working group because of recommendations relating, inter alia, to the training of law enforcement and security officials on the basic principles of international human rights law and international humanitarian law. She proposed that the issue of transitional justice be included on the agenda of the working group next year.

69. Ms. Hampson identified two general themes for next year's session. The first should be the issue of women and the criminal justice system, with two specific sub-items: rules of procedure for women having been subject to sexual violence; and women in prisons. The other general theme for next year's session should be international criminal justice. NGOs could produce documents or NGOs and experts could possibly cooperate to produce working papers. She herself was available to prepare a paper on the domestic implementation in practice of the obligation to provide an effective remedy. Alternative NGO reports to human rights committees focused on the fact that violations had occurred, but not why they occurred or why there was no adequate domestic remedy. NGOs should consider changing their working methods and move away from simply recording human rights violations, and become more involved in monitoring attempts by victims to bring cases before the domestic authorities with a view to obtaining a remedy.

70. The Chairperson-Rapporteur stated that she was favourable to including women and the criminal justice system, and international criminal justice in next year's provisional agenda. Transitional justice could also be included in the provisional agenda, but as a separate agenda item, as it involved issues relating to national human rights commissions as well as other national institutions with responsibility for the administration of justice.

71. Mr. Sorabjee said that the NGO community could be very helpful in collecting information about whether States were carrying out their obligations relating to criminal justice. It would be very useful to get information about how many people had been prosecuted for having accused high government, law enforcement and military officials of illegal acts. It would also be useful to know how many such officials were actually charged with crimes and how many were convicted. He added that he had the impression that there were very few prosecutions and even fewer convictions.

72. Ms. Hampson, responding to Mr. Sorabjee's statement, mentioned practical problems that the European Court of Human Rights had encountered in connection with considering cases of disappearances and arbitrary killings. Frequently, investigations were not handled properly and key witnesses were not interrogated. The issue of investigation was directly linked to the right to a remedy. She said that the right to an effective remedy was a most important human right, as without it the protection of all other rights was problematic. Guidelines could be developed that would assist NGOs in presenting information to treaty bodies about why there was a failure to investigate or why there was no adequate remedy.

73. The observer for Penal Reform International inquired about the status of Leïla Zerrougui's progress report on discrimination in the criminal justice system. The Chairperson-Rapporteur explained that, as reflected in the note by the Secretariat (E/CN.4/Sub.2/2004/5), Ms. Zerrougui was unable to submit her progress report this year. She added that Ms. Zerrougui remained Special Rapporteur on the issue of discrimination in the criminal justice system and it was hoped that she would be able to present her report to the Sub-Commission next year.

74. The observer for the Japan Fellowship for Reconciliation pointed out that investigations were sometimes difficult because most information was held by the Government, the police or the courts, was not available to the public, and was even destroyed in some cases. Prosecuting rape cases was particularly difficult in Japan; even if a crime was investigated by the police and transmitted to the prosecutor's office, sometimes prosecutors would not bring the case if they concluded that they did not have enough evidence. Prosecutors were reluctant to bring cases against the State when there were complaints of illegal action, even when a violation was openly acknowledged. A lack of resources was frequently cited as a reason for not prosecuting cases.

75. Mr. Sorabjee underlined the importance of strengthening the domestic legal system and talked about the problems encountered when investigating and charging high government officials. In India a special procedure had been developed that allowed a person to petition the court to ask why charges had not been filed. This system worked reasonably well. In certain situations, particularly those of a politically sensitive nature, cases had to be transferred to another state in India in order to ensure that there would be an effective prosecution of a case.

76. The observer for Pax Romana said that the prosecution of crimes against women was practically negligible. In rural areas there was frequently a preliminary problem of having even basic access to justice, and that the extremely poor faced additional obstacles.

77. Mr. Rivkin said that national courts and remedies available at the national level were the principal source of justice because there would never be enough resources to have large numbers of trials at the international level. He had some reservations about the feasibility of harmonizing

evidentiary rules in different systems and said that efforts should be made to make national remedies and procedures work better.

78. Ms. Hampson replied that the European Court of Human Rights, which supervised both common law and civil law jurisdictions, did not attempt to harmonize different legal systems, but it did try to harmonize the results through, for example, insisting on a universal requirement of having adequate and effective investigations. It was not appropriate to seek to harmonize the processes of national legal systems as they were linked to national culture, history, and the political origins of each State.

79. Mr. Rivkin agreed that the goal should be to have substantial equivalence of results, recognizing that national systems for the administration of justice would differ. He mentioned that procedures for suppressing evidence tainted through police misconduct in the United States had been criticized by other jurisdictions.

80. Ms. Hampson said that civil-law jurisdictions might be moving in the direction of common-law jurisdictions in not considering tainted evidence, at least when such evidence had been obtained through torture or other forms of ill-treatment.

81. The Chairperson-Rapporteur suggested including international criminal justice, women and the criminal justice system, transitional justice, and the right to an effective investigation and remedy. NGOs and academics should work closely with the working group and submit papers to next year's session.

82. Ms. Hampson raised the issue of when the working group would be held next year and said that there was a problem with holding a first meeting on the afternoon of the first day, and that the first substantive meeting should not take place before the Tuesday afternoon of the first week of the Sub-Commission.

83. Mr. Decaux said that it would raise the profile of the working group to become a pre-sessional working group. Such a change would allow the Sub-Commission to have more time for discussions in plenary.

84. The Chairperson-Rapporteur said that, with the current financial limitations on the Sub-Commission, it was not likely that the working group could meet on a pre-sessional basis. She again expressed her view that some documents relating to the administration of justice should be referred back to the working group and not be considered in the Sub-Commission.

85. The working group agreed that the provisional agenda for the next session would be as follows:

1. Election of officers.

2. Adoption of the agenda.

3. International criminal justice.

4. Women and the criminal justice system.

5. Transitional justice.

6. The right to an effective investigation and remedy.

7. Provisional agenda for the next session.

8. Adoption of the report.

86. Ms. Hampson noted that, in the interest of providing a measure of guidance to participants at next year's session and without in any way limiting the scope of the discussions or the submission of papers under individual agenda items, it might be useful to give examples of the topics that could be the subject of papers or presentations under specific provisional agenda items. Under provisional agenda item 3, dealing with international criminal justice, it would be interesting, for example, for the working group to receive papers on the relationship between international human rights law and international humanitarian law, including information on their respective enforcement systems and the scope of the obligation of States to implement international humanitarian law domestically. One could invite the International Committee of the Red Cross to participate in the debate and submit a paper. Universal jurisdiction, as well as international crimes outside the jurisdiction of ICC, would also be interesting subjects for discussion under provisional agenda item 3. Regarding provisional agenda item 4, dealing with women and the criminal justice system, it would be interesting to have papers or presentations on rules of procedure for women who had been subject to sexual violence and on women and children in prison. Her suggestions were illustrative only, and were not intended to limit in any way the flexibility of the working group to consider other issues under these two provisional agenda items.

V. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

87. On .... August 2004, the working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request that the Sub-Commission allocate two full meetings of three hours each, plus an additional meeting of one hour for adoption of the report, during its 2005 session.
