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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fifty-sixth session

SUMMARY RECORD OF THE 20th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 10 August 2004, at 3 p.m.

Chairperson: Ms. MOTOC
(Vice-Chairperson)

later: Mr. SORABJEE
(Chairperson)

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The meeting was called to order at 3.05 p.m.

ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY (agenda item 3)
(continued) (E/CN.4/Sub.2/2004/5, 7-12; E/CN.4/Sub.2/2004/NGO/11-13, 24, 26, 28 and 29)

1. Ms. CARAYON (Agir Ensemble pour les Droits de l'Homme), speaking also on behalf of the World Organization against Torture, said that 10 years after the horrific events in Rwanda, President Kagamé was consolidating a totalitarian regime, governing the people by intimidation and terror. Parliament had accused the few remaining independent, democratic organizations active in the country of propagating genocidal ideology and recommended their dissolution and the exemplary punishment of their leaders. Consequently, the Executive Director of the Rwandan League for the Promotion and Defence of Human Rights and a dozen of his close associates, fearing for their lives, had decided to go into exile. However, the countries to which they had turned had not yet issued the necessary visas, which was surprising, given that paragraph 4 of Commission on Human Rights resolution 2002/70 called upon all States to take all necessary measures to ensure the protection of human rights defenders.

2. The regime was manipulating the issue of genocide to justify massive human rights violations at all levels. Many of its opponents were forced into exile, and individuals associated with the genocide were returning to power. As in the case of the preceding administration, the current criminal activities were encouraged by the silence of the international community, which was anxious to establish good relations with the Rwandan Government. Nevertheless, it should be recalled that the Rwandan Army had been accused of committing war crimes, crimes against humanity and ethnic crimes against Hutu refugees. The international community's passive support of the regime was profoundly disturbing to all those who believed in a world order based on respect for law and human rights.

3. She called upon the regional working group on Africa and the Special Rapporteurs on extrajudicial, summary or arbitrary executions, and on the question of torture, to give special attention to human rights defenders in Rwanda. She also requested the Special Representative of the Secretary-General on the situation of human rights defenders to visit Rwanda, and urged the countries that had been approached by the human rights defenders to issue them visas and grant them asylum.

4. Ms. ZANNELATO (International Federation for Human Rights (FIDH)) said that FIDH welcomed the fact that the International Criminal Court had launched its first investigation, relating to the situation in the Democratic Republic of the Congo. The investigation should be as complete as possible and take into account all acts of violence committed since 1 July 2002 in every area in which the Court had competence, including sexual offences. FIDH considered that the United States' withdrawal of its request that the Security Council resolution exempting its soldiers from the jurisdiction of the International Criminal Court should be renewed was an important victory for the international community against selective justice. Nevertheless, it recalled the numerous bilateral immunity agreements entered into by the United States, and the economic and social measures of reprisal against States who refused to sign them, and requested the Sub-Commission to adopt a statement denouncing the illegality of such agreements.

5. FIDH and its partners in the Republic of the Congo were very concerned about the efforts of that country's authorities to hamper the investigation into those who had disappeared in the Brazzaville Beach affair. Witnesses, victims, next of kin of victims, and members of the Congolese Observatory for Human Rights were increasingly being subjected to pressure and intimidation. It was also becoming more difficult for the victims of the massacres to obtain refugee status in France. To undermine measures being taken in France, the Congolese authorities were alleging that an investigation was under way and declaring that the massacre had never occurred. Moreover, just when the proceedings in France had been starting to threaten the climate of impunity in the Congo, the French judiciary had released Mr. Ndengue, Director of Police.

6. Ms. RAKOTOARISOA, introducing her expanded working paper on the difficulties of establishing guilt and/or responsibilities with regard to crimes of sexual violence (E/CN.4/Sub.4/2004/11), said that access to justice was a guarantee of human rights; but proceedings had to be fair and the parties treated on an equal footing by the law. Evidence played a vital role in legal proceedings, because justice depended on assessment of the proofs produced by the parties. In the case of crimes of sexual violence, claims were based essentially on the statements of the alleged victim and there were rarely any witnesses to the act. The lack of evidence led directly to the impunity of authors of sexual violence and the victims' consequent loss of the right to redress. In recent years, the number of victims of sexual violence had continued to increase in times of war and peace alike because, even in times of peace, it could be used as a weapon to humiliate specific groups.

7. Chapters I and II of the working paper examined the forms and causes of sexual violence and abuse, as well as types of evidence of such practices and their impact on victims' rights in legal proceedings. It noted that sexual violence could even occur within the framework of marriage. Evidence could include or refer to the testimony of victims, databases of genetic markers of convicted sex offenders, extraterritorial jurisdiction with regard to sex tourism, the use of credibility experts, the recovered memory syndrome, sexual abuse during detention or in prisons, sexual exploitation as a vector for the spread of AIDS, and paedophilia and cyber-crime.

8. Chapter III looked at witness protection, which was needed when the witness's safety was threatened, and emphasized that child victims or witnesses of sexual violence should receive special attention, while chapter IV examined the legal framework for combating sexual violence and abuse.

9. In conclusion, the working paper recommended that efforts should be made to harmonize the types of evidence in cases of sexual violence, since there were major discrepancies because of the disparities in the judicial systems and procedural aspects of investigations and prosecutions in different countries. It called for better coordination among all United Nations bodies working with sexual violence and abuse, and the establishment of a network of contacts comprising all actors involved in the effort to combat sexual violence and abuse.

10. Mr. GUISSÉ said that speaking about evidence of sexual violence led on to considering the prosecution, investigation and punishment of such crimes; but evidence of sexual violence should never involve minors or those who were mentally handicapped. In such circumstances, the onus was on the alleged perpetrator to prove that he had not committed the act in question.

11. Unfortunately, impunity existed in many countries, owing to corruption within the system of justice. Many acts of sexual violence went unpunished because perpetrators were able to buy the silence or complicity of law enforcement officials. The independence of judges was often corrupted by the public authorities responsible for their appointment, with promises of undeserved promotion and material rewards.

12. The working paper referred to married women and the fact that they could become victims of sexual violence or abuse by their husbands. The marriage vows did not oblige a woman to alienate her body and submit to her husband in every way, which would amount to slavery. Women were not objects, but partners, whose consent was required in all aspects of the marital union.

13. The classification of sexual violence in criminal law varied from one country to another. In some countries, rape was treated as a heinous crime that could even result in the death penalty, while in others it was seen as a minor offence. National legislation should therefore be standardized and the United Nations should ensure that general, impartial norms were elaborated that could serve as a basis for the elimination of sexual violence in all countries.

14. The transmission of specific illnesses should be considered an aggravating factor. When the author of sexual violence knowingly transmitted HIV/AIDS, that was a premeditated crime meriting the most severe punishment. There was also the case of sexual violence against prisoners by those who were ostensibly in charge of them, or by soldiers against those they were meant to protect. That type of act involved a gross abuse of authority and violation of human rights, because victims were powerless to resist or complain.

15. Ms. HAYASHI said it was probably necessary to review the definition of rape under national criminal codes. In some countries, rape was defined as a crime whereby the perpetrator sexually abused the victim using verbal threats or physical force. However, some victims could be overpowered without threats or force, when there was a power differential between the victim and the perpetrator, and one of the greatest obstacles to justice was judges' failure to understand why women could not resist even in the absence of violence.

16. In that context, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, could serve as a useful legal standard, given that, under the Protocol, trafficking in persons was defined not only by the threat or use of force, but also by other forms of coercion, including fraud, deception and the abuse of power or of a position of vulnerability for the purpose of exploitation.

17. If Ms. Rakotoarisoa decided to examine national criminal codes concerning rape, that would require some coordination with Ms. Hampson's working paper on the criminalization, investigation and prosecution of acts of serious sexual violence (E/CN.4/Sub.2/2004/12), in which she raised the question of whether she should collect evidence of good and bad practice in national criminal legal systems.

18. With regard to mandatory medical treatment for offenders, while the issue should be examined by considering the offender's fundamental human rights, opinions were divided on how effective medical or psychological treatment was in preventing future crimes. In a context

of limited public resources, States had to decide whether to give priority to treatment for perpetrators or to protective measures for victims. It would be useful if Ms. Rakotoarisoa could continue examining the effectiveness of medical and psychological treatment for offenders in her next working paper.

19. Mr. Sorabjee (Chairperson) took the Chair.

20. Mr. CHERIF said that the phenomenon of sexual violence had taken a new and serious turn. It was being used as a weapon of intimidation and domination, particularly in times of armed conflict, such as in Bosnia and Herzegovina and Rwanda. Furthermore, the question of proof had assumed a new dimension with the recent developments in genetic and psychological expertise. Justice had a significant role to play in the determination of guilt and responsibilities. Use of inquisitorial or accusatorial systems was called for, with witness protection if appropriate. Although a woman's control of her own body was a fundamental human right, the issue should be approached very carefully, given that it raised a number of moral, social and religious issues.

21. Ms. HAMPSON said that the use of rape, sexual assault and sexual violence as a weapon of war was, regrettably, far from being a new phenomenon. In that regard, she referred the members of the Sub-Commission to her working paper on the criminalization, investigation and prosecution of acts of serious sexual violence (E/CN.4/Sub.2/2004/12) which had been discussed by the working group on the administration of justice.

22. Ms. BRETT (Friends World Committee for Consultation) said that prison systems should be created that protected detainees from abuse, inter alia, by providing proper supervision and independent and effective complaints mechanisms and by ensuring due separation of male and female prisoners. There should be certain restrictions on the roles that could be played by male prison staff in relation to female prisoners; for example, male wardens should not be allowed to perform strip searches of female prisoners. The closed and hierarchical nature of the prison system meant that female prisoners were particularly vulnerable to abuse and to reprisals for seeking to avoid or report abuse. Furthermore, prisoners who reported abuse were far less likely than the staff to be believed. Sexual abuse in prisons was directly linked to the spread of HIV/AIDS and other sexually transmitted diseases and affected the general physical and mental health of female prisoners. A particular problem that arose in some areas was the tendency to detain women victims of sexual violence for their own protection or to ensure that they appeared in court. Further attention should be given to that problem, in relation both to the difficulties of establishing guilt and/or responsibilities with regard to crimes of sexual violence and to the question of discrimination in the criminal justice system.

23. Mr. DECAUX, introducing his preliminary report on the universal implementation of international human rights treaties (E/CN.4/Sub.2/2004/8), said that the study he had undertaken had numerous theoretical and practical implications. When examining the universal application of treaties, it was important to consider not only the legal and diplomatic factors at the international level, but also the implementation of international commitments in law and in practice at the domestic level. Not only had the Sub-Commission already undertaken some work into various aspects of the issue of treaty implementation, but there was also considerable doctrinal interest in the subject.

24. His preliminary report focused on defining the scope of his study and outlined the recent activities of the Commission on Human Rights with regard to universal implementation. It set out his working methods and reflected the discussions that had taken place within the Sub-Commission. Even though he had endeavoured to adopt an essentially empirical approach, it had been impossible to ignore the legal aspects of the issue in the context of public international law. The notion of universality had been approached in the light of the jurisprudence of the International Court of Justice (ICJ) and the practice of the international organizations. He had decided to include in his report a number of tables, including a demographic one, which served to highlight notable absences in the lists of ratifications. He had identified three aspects of efforts to secure universal ratification of the human rights treaties, involving institutional, treaty and diplomatic practice. It was important to consider what action should be taken to promote such ratification and what the consequences of such ratification would be. Despite the theoretical questions on the distinctions between treaty and customary law and international and domestic sources of law, it was the effectiveness of human rights that was in question.

25. He welcomed the fact that the Commission on Human Rights had agreed to provide him with all necessary assistance to enable him to carry out his mandate, inter alia in his contacts with States. That opportunity to hold a constructive dialogue with States was particularly valuable. It would also be valuable to receive information from the international human rights institutions with a view to making an overall appraisal of the situation.

26. Mr. KARTASHKIN said that in his next report the Special Rapporteur would have to resolve two difficult issues: to choose between the various existing opinions on the implementation of international human rights treaties or to put forward an opinion of his own; and ways to secure universal ratification and implementation of such treaties. The preliminary report formed a good basis for future work.

27. With regard to chapter I of that document, it would be useful to know the Special Rapporteur's own view on the question of when an international treaty became universal and binding even on non-party States. Some experts thought that only universal ratification could render a treaty binding on all States and that a treaty could not impose legal obligations on non-party States. Others thought that when an overwhelming majority of States had ratified a treaty and other States tacitly supported it, the treaty became universally binding because its rules had become customary rules of international law. Views also differed on the question of which international treaties were fundamental. One widespread view was that in order to be regarded as fundamental a treaty must establish a monitoring body. That approach was logical: States established a monitoring body because they regarded the content of the treaty as especially important and wished to ensure its implementation by the parties. On the other hand, no monitoring body had been set up under the Genocide Convention, for example, because at the time the international community had not been ready for such action. The Special Rapporteur would have to give his opinion on criteria for determining which were the fundamental treaties. If all human rights treaties were to be regarded as fundamental, his task of drawing some conclusions on universal ratification and implementation would become much more difficult.

28. Turning to chapter II of the report, he said that the Special Rapporteur would have to take up the question of the work of the monitoring bodies. They had already accumulated considerable practice in dealing with States parties which did not submit reports. But the question remained as to what to do about non-party States. Perhaps the Special Rapporteur should consider adopting the practice of the International Labour Organization (ILO), which examined even information relating to labour conventions which had not been ratified by the States concerned.

29. Mr. ALFONSO MARTÍNEZ agreed with Mr. Kartashkin about the complexity of the task confronting the Special Rapporteur. The question of universal implementation transcended the realm of law and had considerable political implications. However, in his preliminary report, the Special Rapporteur had demonstrated a clear understanding of all the practical and technical implications resulting from his work.

30. The Special Rapporteur had recently made reference to an emerging trend in United Nations forums, namely the gradual erosion of State sovereignty. Such sovereignty was an essential component of good international relations. Many factors had contributed to that tendency, including certain decisions by the Secretary-General of the United Nations. The “salami tactic” of gradually slicing away the sovereignty of States was being applied in various different areas of the daily work of the United Nations. In his view, promotion of the notion of universality should be approached with great caution. The Special Rapporteur should ask himself what the difference was, in terms of applicability, between a treaty to which a State had given its consent and one to which it had not. Clearly, a treaty was universally applicable only when the principles contained in that instrument had ascended to the rank of jus cogens.

31. In practice, the issue of universality arose in particular when one of the special procedures of the United Nations tried to hold a State accountable for failing to meet obligations under a treaty to which it was not a party. The Commission on Human Rights should remind the special procedures that such anomalous expectations were unacceptable. He wished Mr. Decaux every success in the difficult task ahead of him. The Special Rapporteur should be aware that the contents of his final report would be the subject of close scrutiny by many non-governmental organizations (NGOs).

32. Ms. MOTOC said that the task entrusted to Mr. Decaux was one of the most important to have been undertaken by the Sub-Commission in recent years. She welcomed the fact that the Special Rapporteur had not approached the question of the universality of treaties from a purely legal perspective, but had also examined the matter in terms of the implementation of treaties in practice. In his preliminary report, the Special Rapporteur demonstrated that the boundaries drawn by the United Nations and by States between the different types of international instruments were blurred. It was therefore important for the Sub-Commission to consider the impact of human rights mainstreaming in international treaties.

33. The question of the duality of norms had become relatively clear in international law following the Nicaragua case of 1986, when the ICJ had clearly stated that obligations could be derived from customary law as well as from treaty law. The United States had been bound by the decision of the International Court in that case, despite its reservations concerning the compulsory jurisdiction of the Court, because the laws referred to by the Court had been derived from customary rather than treaty sources. The theories of the British legal philosopher Hart,

who had developed the idea that a distinction should be made between primary and secondary legal rules, supported the notion that a distinction should be drawn between customary and treaty law. According to Hart's theory, if a norm had a primary source, a State could not be bound to the control of the treaty monitoring bodies.

34. The issue of the hierarchy of human rights norms in international law was less clear-cut. Although there had been growing acceptance of the notion of jus cogens in international law following the ICJ's ruling on the Barcelona Traction case, there continued to be a great deal of misunderstanding surrounding the content of jus cogens and its connection with the notion of erga omnes. The existence of those two different notions justified the existence of two different hierarchies of norms in international law. The universal nature of customary law was a third hierarchy that had to be taken into account. Further complications arose from the fact that Article 103 of the Charter of the United Nations stated that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail. It was important to examine the different hierarchies of human rights norms in relation to the question of the indivisibility of those norms. In conclusion, she inquired what tools and methodologies the Special Rapporteur intended to use when examining the application of norms by States parties to an international treaty.

35. Ms. HAMPSON said that she agreed with the methodology adopted by Mr. Decaux in his report. However, the Special Rapporteur might find it useful in his next report to draw a clearer distinction between the general practice of States and the particular features of State practice. Although the implementation of a treaty required much more than the development of legislation, the legislative stage was important and it would be useful to examine the practice of States in the specific field of domestic legislation. She wondered whether it would be possible to envisage regional, rather than national, human rights institutions for micro-States. She also wondered whether, in the context of the role of domestic jurisprudence in the effective application of international instruments, it would be worth suggesting that domestic courts might find it helpful to use general comments as a basis for the standards they were meant to apply. It might also be useful to make reference to the right to an effective remedy, as a means to encourage the domestic implementation of the norm in question. Regarding the relationship between customary law and treaty law, she wondered how the content of custom could be determined in cases where the overwhelming majority of States had ratified a particular treaty. Excluding the conduct of all States that were bound by the treaty would seem unnecessarily arbitrary and would leave custom to be determined only by States that had not ratified the instrument. The implications of a high level of ratification for the development of customary law was an important issue.

36. Mr. CASEY agreed with Mr. Alfonso Martínez that the trend towards the denigration of the sovereignty of States was alarming. When considering universality, it must be borne in mind that treaties were contracts based on consent. In his future work the Special Rapporteur should give close attention to the actual practice of States, including the enactment and implementation of domestic legislation, as he endeavoured to reach a conclusion as to what constituted customary international law and addressed the controversial question of jus cogens.

37. Mr. SALAMA said that the area under discussion was one in which “human-rights-ism” could easily become counterproductive and move things away from rather than towards universality. He was intrigued by the question of apparent universality versus genuine universality. What really counted, as Ms. Hampson had said, was the practical implementation of the international human rights rules incorporated in domestic law, for that established the cultural legitimacy of the rules at the grass-roots level. The Sub-Commission should beware of discussing customary rules which simply did not exist. It would also be dangerous to use the indivisibility of human rights to justify an “assumed universality”. A tool for cultivating universality was already available in the general comments of the treaty monitoring bodies, but it would be unwise to call on judicial authorities, as Ms. Hampson had suggested, to resort to general comments: excessive speed in that area would again be counterproductive.

38. Mr. DECAUX said that, with regard to the question of the effect of treaties on third parties raised by Mr. Kartashkin, he was convinced that sovereignty remained the cornerstone of international law. The point had been made in the Sub-Commission’s recent debate on reservations to treaties that, even in the context of the duality of norms referred to by Ms. Motoc, some States did not apply treaties as such as the source of their obligations even when they applied customary international law. States could of course be encouraged to exercise their sovereignty by ratifying the most important treaties, but it was impossible to proceed as if their sovereignty did not exist.

39. Two types of universality could be distinguished: the treaties ratified by an overwhelming number of States referred to by Ms. Hampson constituted “quantitative universality”; the notion of “qualitative universality” was more complex. The ICJ often referred to the international community as a whole and to quasi-universal treaties. But the practice of a State might not be identifiable with a customary or peremptory rule in the absence of a legal obligation.

40. On the question of declaratory law raised by Mr. Alfonso Martínez, it should be remembered that the two universal Covenants were also resolutions of the General Assembly. The system operated at two levels: treaty obligations acquired in accordance with the traditional law of treaties; and “institutional obligations” acquired in accordance with “derived law” under the United Nations system. While it was true that the ICJ had spoken in the La Grand case of treaties relating to persons without describing such treaties as human rights treaties, he was not sure that it would be wise to engage in “human-rights-ism” and label the content of such instruments in that way.

41. He understood Mr. Kartashkin’s arguments about fundamental treaties and monitoring bodies. Of course, fundamental human rights treaties such as the Slavery and Genocide Conventions were regarded by the ICJ as universal instruments, although they did not have monitoring arrangements; he proposed calling them “orphan conventions”. Perhaps the Sub-Commission had a special responsibility with regard to such treaties, but there again a problem of indivisibility arose. The Sub-Commission should not duplicate the work of the monitoring bodies or seek to transform their jurisdictions into erga omnes jurisdictions.

42. Turning to the question of general comments, he said that the report of the Berlin Conference of the International Law Association in fact mentioned the application of domestic law as an indirect source of such comments. Efforts to force the hand of States through the erga omnes application of treaties offered a practical means of establishing good practice, notwithstanding the doubts expressed by Mr. Alfonso Martínez on that point.

43. The ILO practice referred to by Mr. Kartashkin was very interesting for the Sub-Commission: instead of focusing on the large numbers of ratifying States it should perhaps concentrate on the non-ratifiers and engage in a dialogue with them to determine the legal obstacles to ratification. There were of course non-legal obstacles as well in the case of the symbolic ratifications. The question was how to achieve effective ratification and universal implementation of the human rights treaties; that meant moving from the sociological to the political dimension.

44. Ms. SIKORA (Transnational Radical Party) said that her organization was profoundly concerned about the lack of justice and democratic values persisting in Laos even though that country had signed the two International Covenants; citizens of Laos were systematically denied the rights contained therein. The evidence of Laotians and foreigners held in detention testified to the deplorable situation in the prisons, and international humanitarian organizations were not allowed to enter Laos to investigate. Show trials were commonplace and were used in particular to convict political prisoners, conscientious objectors and members of ethnic and religious minorities.

45. After citing several examples of individuals who had been denied their rights in Laos, she called upon the Sub-Commission, echoing the appeal made by the Committee on the Elimination of Racial Discrimination in August 2003, to request the specialized agencies of the United Nations to send a mission to Laos to inquire into the abuses of justice and to request the competent bodies of the United Nations system to persuade the Laotian authorities to bring their legislation and its implementation into line with international law.

46. Ms. HEYER (International Commission of Jurists) said that her organization welcomed Mr. Decaux's updated report on the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7); it had itself held a conference on that topic in January 2004. The issue went beyond the judicial dimension to the very heart of the rule of law as the guardian of human rights. The matters dealt with in the Special Rapporteur's draft principles had been taken up by a number of regional human rights bodies, which had concluded that military tribunals should confine themselves to offences of a purely military nature committed by military personnel. The International Commission of Jurists requested the Sub-Commission to initiate an examination of the draft principles and to permit the Special Rapporteur to continue to develop them. It intended to organize a second conference on specific aspects of military criminal jurisdiction.

47. It also supported the Sub-Commission's continuing work on discrimination in the criminal justice system, which was one of the root causes of the marginalization of disadvantaged groups and the violation of their human rights. International legal standards and jurisprudence in that area were fragmented and did not give clear guidance to States. A detailed study by the Sub-Commission would help to clarify the situation and offer an opportunity to present recommendations for change.

The meeting was suspended at 5 p.m. and resumed at 5.15 p.m.

48. Ms. AULA (Franciscans International) said that Franciscans International welcomed the legal proceedings conducted by Indonesia's first permanent human rights court in Makassar, even though the judges had dismissed the claim for compensation using the class-action mechanism. Notwithstanding the progress report presented by Indonesia's National Commission on Human Rights to the sixtieth session of the Commission on Human Rights, the National Commission had failed to inform the Papuans about its investigation of the Wamena case of 4 April 2003, in violation of the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

49. It was regrettable that the Minister of Religious Affairs of Pakistan had recently announced that the blasphemy laws would continue to provide for the death penalty. In addition to the blasphemy laws, several other legal provisions discriminated against religious minorities and undermined the proper administration of justice.

50. The principle of separation of powers was being flouted in Togo in contravention of article 113 of that country's Constitution. Most judges were in fact under government control, and some trials were simply farcical. The situation was one of de facto impunity.

51. Franciscans International recommended that the Sub-Commission should call upon all Governments to conduct human rights trials in accordance with international standards, to develop independent and competent justice systems, and to ratify and implement all relevant human rights treaties and accept their complaint procedures.

52. Ms. KHAN (Interfaith International) expressed concern at a recent decision by the Indonesian courts to overturn the convictions of four senior Indonesian military officials and to halve the 10-year sentence of Mr. Eurico Guterres, a former leader of the notorious Aitarak militia in East Timor. The Indonesian judicial system was unable and unwilling to act independently and to render justice for the human rights abuses carried out by its military in East Timor. An independent commission of experts should be appointed to review the judicial process and to ensure that, in accordance with Security Council resolution 1272 (1999), those responsible for such abuses were brought to justice.

53. In spite of the 1997 peace agreement between the Government of Bangladesh and indigenous leaders of the Chittagong Hill Tracts, in Bangladesh, peace remained but a distant reality. The security forces and Bengali settlers enjoyed impunity for human rights abuses perpetrated against indigenous peoples in the region. The Government of Bangladesh failed to recognize impunity as one of the main causes of continuing human rights abuses there.

54. Ms. O'CONNOR, introducing her working paper on the issue of women in prison (E/CN.4/Sub.2/2004/9), said that, regrettably, internal political problems had prevented her from fulfilling her mandate to the best of her ability. She thanked the United Nations editorial staff and the Quaker United Nations Office for their valuable assistance. The Basic Principles for the Treatment of Prisoners, the Standard Minimum Rules for the Treatment of Prisoners, and the

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment were rarely implemented successfully where women were concerned. In particular, the right to an effective remedy was systematically denied to women. Fear of reprisals ensured silence, which facilitated the continuation of systemic abuses.

55. The need for systematic monitoring of national rules and regulations governing the treatment of prisoners should be investigated. In the light of the provision in the United Nations Code of Conduct for Law Enforcement Officials that senior officers should be held responsible for the acts of those under their command, possible action against superintendents could be explored, in cases where victims were willing to speak after their release. Given the situation of dominance of officers over inmates, inmates should be regarded as particularly vulnerable to coercion. Therefore no sexual activity between an officer and an inmate should be regarded as consensual.

56. With regard to the children of women in prison, a balance needed to be struck between the view that children should not be kept in prison with their mothers, and the view that separation could have far greater negative effects. Mothers faced an almost impossible task in retrieving children from State care on their release from prison. Where children were cared for by relatives, economic factors usually led to neglect and ill-treatment, involvement in criminal activity, transfers between homes, and homelessness. From a rights-based perspective, pregnant women and women with young children, especially first offenders charged with non-violent crimes, should not be given custodial sentences.

57. Contradictions existed between national legislation and international rules governing the treatment of prisoners. In the United States of America, anti-sex-discrimination laws allowed male staff to work in women's prisons. In contrast, the principle of separation was enshrined in the Geneva Conventions, and was the norm in customary international law. In many cases, women officers had been as abusive as male officers. Therefore it was important for all officers to receive adequate training, incorporating standards of humanitarian law.

58. In future studies, she proposed to investigate the following issues: the connection between the drugs trade and the increasing number of women in prison; the problem of foreign nationals imprisoned overseas; attitudes towards sentencing; and the impact of imprisonment on women's families. The Sub-Commission might consider whether to update the Standard Minimum Rules for the Treatment of Prisoners, or to prepare a set of principles for the treatment of women in prison.

59. Ms. HAMPSON said that, in her next report, Ms. O'Connor should provide guidance on whether a set of new principles was in fact necessary. She wondered whether the situations of women serving prison sentences and women in pre-trial detention should be looked at in separate reports. It was useful to consider the case law of regional human rights institutions concerning the treatment of prisoners. If a detainee had been uninjured at the time of detention and injured on release, the European Court of Human Rights put the burden of proof on the respondent Government to explain how the applicant had sustained such injuries. The International Criminal Tribunal for the former Yugoslavia had determined that, with regard to rape, an environment could be deemed coercive to the extent that no sexual relations could be deemed consensual.

60. Ms. BRETT (Friends World Committee for Consultation) said that Ms. O'Connor's working paper helped to identify some of the key issues concerning women in prison. Future reports should also refer to the situation of indigenous women and the children of imprisoned mothers, particularly from a child-rights perspective. A full, three-year study should be carried out by the Sub-Commission concerning women (including juvenile females) in prison (and pre-trial detention) and the children of imprisoned mothers. That study should take into account Sub-Commission work on related areas, including discrimination in the criminal justice system, and the difficulties of establishing guilt and/or responsibility with regard to crimes of sexual violence. It should identify applicable standards and practical measures to address the various problems experienced throughout the world.

61. Mr. GARWICK (Minnesota Advocates for Human Rights) said that, between 1980 and 2000, Peru had experienced violent internal conflict resulting in the death and disappearance of an estimated 69,000 persons and internal displacement of some 600,000. A Truth and Reconciliation Commission had been created in 2001. However, with the exception of new legislation on internally displaced persons, many of the recommendations contained in that Commission's final report of August 2003 had yet to be implemented.

62. An estimated 75,000 persons had been killed and 2 million displaced as a result of more than 10 years of civil war in Sierra Leone. A Truth and Reconciliation Commission and a Special Court for Sierra Leone had been set up, inter alia, to investigate atrocities committed by all parties to the conflict. He called upon the Government of Sierra Leone, political and civil society organizations, and the international community, to support efforts to disseminate that Commission's report and implement its findings. The Government should take immediate steps to combat corruption and poverty, and to enhance access to education and the rule of law. He urged the Government of Nigeria to ensure that Charles Taylor faced trial at the Special Court for Sierra Leone.

63. Ms. SHARFELDDIN (International Organization for the Elimination of All Forms of Racial Discrimination) said that there could be no peace without justice. Destruction, humiliation and oppression were the consequences of injustice, from the occupied Palestinian territories to Afghanistan and Iraq. Just as conflicts were inherent to human societies, people had always found solutions to conflicts by using their wisdom and experience. The logic of domination and force had never brought peace and security, even for the powerful themselves. Even though judicial systems had developed within national borders, an effective international court had never been set up. The International Criminal Court and the ICJ were steps in the right direction. However, the former had been compromised by the United States' consistent refusal to cooperate, while the latter lacked the power to implement its rulings. The total disregard shown by States for the recent decision concerning the wall of racism in Palestine was further proof of its ineffectiveness. The Court must be strengthened by the establishment of an international military force and the termination of international relations in case of non-compliance.

64. Ms. EICHMAN (International Educational Development) said that, pursuant to the 1984 Montreal Declaration, military tribunals should only be used to try military personnel accused of violations of humanitarian law or of specific provisions of national military codes. In his preliminary report on universal implementation of human rights treaties (E/CN.4/Sub.2/2004/8), Mr. Decaux had rightly pointed out that the ratification of treaties was no pointer to effective compliance. Her organization supported a more aggressive approach to removing domestic and international obstacles to ratification and enforcement.

65. The administration of justice, the rule of law and democracy were inextricably linked. The legal systems of modern democracies were characterized not only by the idea of majority rule, but also by the equally important concept of minority and individual rights. As the Secretary-General had pointed out, States were instruments at the service of their peoples, and therefore State sovereignty did not take precedence over fundamental freedoms. Even though the international community had taken steps in the aftermath of the Rwandan genocide, including creation of the International Criminal Tribunal, most of the perpetrators of human rights abuses had managed to escape justice.

66. The uneven enforcement of human rights and humanitarian law standards jeopardized the enjoyment of rights everywhere. In Indian-occupied Kashmir, human rights abuses continued to occur in spite of India's ratification of major international treaties. As reflected in the low voter turnout of between 3 and 7 per cent, Kashmiris had little or no faith in Indian democracy. Although the conflict over Kashmir was political, the population suffered on account of India's disregard for human rights standards.

The meeting rose at 6 p.m.