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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 21st MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 11 August 2004, at 10 a.m.

Chairperson: Mr. SORABJEE

later: Ms. RAKOTOARISOA
(Vice-Chairperson)

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The meeting was called to order at 10.05 a.m.

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

1. Ms. SHANKAR (Voluntary Action Network India), after stressing that the rule of law - equality for all before the law and the administration of justice without discrimination - was the foundation of good governance and inextricably intertwined with democracy, said she was very pleased that her country, India, had incorporated all those concepts into its system of government. She was particularly proud of India's judicial system, for which Mr. Sorabjee, Chairperson of the fifty-sixth session of the Sub-Commission, provided a fine example. She paid tribute to him for having successfully fought, in his role as Attorney-General, to promote the right to education for all children and to eradicate discrimination in all its forms. Time and again the Indian people had ejected a political party from power for adopting a partisan attitude which endangered people's fundamental rights. That was what democracy was all about. In countries still under authoritarian regimes, civil society was waking up and demanding greater democracy. The Sub-Commission's role was to facilitate that process.

2. The world was dominated by violence - violence committed by unemployed young people, violence against women, violence in films and in newspapers - to the point that ordinary citizens were beginning to worry about their children's future. It seemed as though people had completely lost any sense of responsibility and were not taught that, while they had rights, they also had duties. The organization she represented proposed that, under the dynamic leadership of Mr. Sorabjee, a mechanism should be developed to restore the idea of "fundamental duties" to the human rights debate. A group of experts could study the concept and its operational aspects by collecting information on best practices. Her organization was willing to collaborate in that endeavour.

3. Mr. AHSAN (All for Reparations and Emancipation) criticized the barbaric and corrupt feudal system that had hindered the establishment of democracy in Pakistan since the country had achieved independence in 1947. In Pakistan, the ruling oligarchy had deliberately encouraged the religious extremist parties so as to protract their rule. That allowed groups such as Jamaat-e-Islami and Jamiat-e-Ulema-e-Islam to carry on their activities, which included incitement to jihad and terrorism, with total impunity. Their reactionary teachings were aimed at the poor and downtrodden, who were obliged to observe Islamic law in its most archaic forms. In a report published by the Human Rights Commission of Pakistan, Ms. Hina Jilani, Special Rapporteur on violence against women, had given specific examples of the repression of the population, particularly in the North-West Frontier Province, where the Muttahida Majlis-e-Amal (MMA) held a majority. The Muttahida Quami Movement (MQM) was the only democratic, liberal and progressive party and it had never been accepted by the ruling oligarchy. The MQM wanted to establish an egalitarian order and replace the feudal system with middle-class values. Although the feudal lords had private armies and controlled all public services, from law enforcement personnel to election officials, and in spite of the harassment of its candidates, the MQM was able to attract a large number of votes in the rural areas of Sindh Province.

4. Mr. BUTT (World Peace Council) drew attention to the deplorable situation of the people of Gilgit and Baltistan, which was part of the State of Jammu and Kashmir. The

Pakistani authorities were bent upon annexing Gilgit and Baltistan and had even renamed it the Northern Areas. In a historic verdict, the Chief Justice of the High Court of Azad Kashmir had declared that Gilgit and Baltistan was indeed part of and should be administered by the State of Azad Kashmir, but the Pakistani authorities had refused to comply. They had even built a dam on Kashmiri land - the Mangla Dam - which had already forced thousands of people from their homes. Worse still, the Pakistani authorities had violated Kashmiri State legislation prohibiting non-Kashmiris from purchasing land in the area, by systematically encouraging settlers from Punjab and elsewhere, who then controlled local industry and took all the jobs, leading to widespread resentment among residents who feared that they were in danger of becoming a minority on their own land.

5. He asked the Sub-Commission to take appropriate steps to stop the abuse of those people and make sure that they could exercise their basic rights, including their right to self-determination.

6. Ms. Cecilia TOLEDO (American Association of Jurists) said she was very concerned about the way in which the Sub-Commission had approached the issue of military courts. The Human Rights Committee, along with other bodies, had deemed that the jurisdiction of military courts should be limited to disciplinary offences and to crimes committed by military personnel. The 1992 Declaration on the Protection of all Persons from Enforced Disappearance specifically excluded people charged with acts of enforced disappearance from the jurisdiction of military courts. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights had ruled in the same way, considering that such courts did not meet the required conditions of independence, objectivity and impartiality, a view that had been proved right in practice. Experience clearly showed that, from a human rights perspective, military courts and courts of special jurisdiction had, and always had had, an absolutely negative role. Consequently, to claim, as the Special Rapporteur did in paragraph 7 of the report, that military justice must be "an integral part of the general judicial system", was an attempt to give a human face to an institution that had nothing to do with justice, whose function was to ensure impunity for military personnel when they committed human rights violations and to repress the civilian population, particularly workers.

7. The proposal made in Principle No. 1 of Mr. Decaux's report was particularly dangerous, suggesting that military courts should be established by the constitution of a country. Such a measure would make it all the more difficult for countries to choose, as some already had chosen, to eliminate military courts altogether, or at least strictly limit their jurisdiction to crimes committed by military personnel.

8. Come what may, military courts would remain what they had always been: tools used to serve the repressive strategies of States. She wondered whether the attempt to "normalize" those courts, to use the term employed by the Special Rapporteur, was not aimed at turning courts of special jurisdiction, whose main objective was to criminalize public protest, into permanent and omnipresent institutions.

9. The American Association of Jurists urged the Sub-Commission to renounce its frankly reactionary position and warned that instead of "civilizing" military courts, there was a risk of militarizing the administration of justice.

10. Mr. MAEDA noted that Ms. Rakotoarisoa and Ms. Hampson, in their respective reports on sexual violence, had highlighted the difficulties in punishing the perpetrators of serious sexual violence. That impunity was due not so much to any legal obstacles as to a general failure to take such crimes seriously. State-sanctioned rape committed during armed conflicts was a case in point. Japan had provided the most infamous example of that heinous practice, as its army used sexual slavery during the Second World War. The courage and tenacity of the women who had survived the appalling treatment during the war had led to rape and sexual assault being listed as crimes in the International Criminal Court's Rome Statute and also being considered as such by the International Criminal Tribunal for the former Yugoslavia and by the International Criminal Tribunal for Rwanda.

11. States which had backed, even encouraged, sexual slavery must not merely apologize to the victims, but must compensate them as well. The Japanese Government had not done either. An International Labour Organization (ILO) Committee of Experts had however reaffirmed in 2003 that sexual slavery constituted a violation of the ILO Forced Labour Convention (No. 29), which the Japanese Government had signed in 1932. In that regard, he welcomed the recent decision made by the Niigata District Court in Japan, ordering the Government and a company to pay 88 million yen to Chinese people who had been used as forced labour during the Second World War.

12. It was high time for the Japanese Government to restore the dignity of the victims of sexual slavery, who would soon no longer be alive to testify to the great physical and psychological damage they had suffered. It was therefore important for the Sub-Commission to study the right to remedy for the victims of sexual violence by developing the principles and guidelines formulated by Mr. Van Boven and Mr. Bassiouni.

13. Mr. PUNJABI (Himalayan Research and Cultural Foundation) recalled the criteria for a healthy democracy - the rule of law, a transparent executive, an elected legislature and an independent judiciary - and noted that in 2003, an expert seminar convened by the Office of the United Nations High Commissioner for Human Rights had found that only 47 out of 81 countries claiming to be democracies in fact met those criteria.

14. The Himalayan Research and Cultural Foundation had identified three situations in which the promotion of democracy was facing obstacles. Firstly, in former colonies, a particular social class which had enjoyed privileged treatment by the colonizers had seized the reins of power at all levels, thus preventing any kind of participatory democracy. The vigilance of the mechanisms of the Commission on Human Rights, which monitored that kind of situation very closely, offered grounds for hope that such situations would disappear, leaving the way clear for genuine democracies. The second obstacle was in countries where the army held power, imposing diktats on the people and repressing legitimate political parties. The international community should not be fooled by military dictators wearing a garb of democracy, but rather should exert pressure so that democratic norms were fully restored in those countries. The third obstacle was that created by the dreadful new phenomenon of global terrorism. Websites launched by terrorist organizations left no doubts as to their intention to destroy democracy and democratic institutions, as illustrated by the attacks on the Indian Parliament and the State Assembly in Jammu and Kashmir and the assassination of moderate political leaders in

Kashmir. In addition, anti-democratic terrorist organizations enjoyed covert support from military regimes, and it was urgent to expose those dangerous links. He asked the Special Rapporteur, Mr. Koufa, to look into such situations in more detail.

15. Ms. HAMPSON, addressing the issue of forced disappearances and the relevant draft convention, said that she had represented applicants before the European Court of Human Rights who had alleged the forced disappearance of family members. In her experience, the tragic situation of those people was due to their inability to mourn for those who had disappeared: to give up trying to find them would be to betray them.

16. The phenomenon of forced disappearances was not solely a Latin American problem. All regions of the world were affected. For example, there was still no news of two young boys who had been taken into custody in Pakistan in 2002 in an apparent attempt to put pressure on their father, and had then allegedly been sent to the United States.

17. Even though there was a positive spirit within the Working Group of the Commission on Human Rights responsible for preparing the Draft International Convention on the Protection of All Persons from Forced Disappearance, the negotiations were proving to be more difficult than anticipated. Strange as it might seem, a person's right not to undergo forced disappearance and the right of relatives to know what had happened to a family member who had disappeared were apparently not self-evident. However, those rights derived directly from the internationally recognized right not to be subjected to inhuman treatment. There was a danger that seeking consensus at all costs during the negotiations might mean making too many concessions. It was essential to preserve what had already been achieved with regard to the international law on disappearances. The Sub-Commission's responsibility had not ended when it had sent the text of the Draft Convention to the Commission on Human Rights: it should follow its progress closely. She urged non-governmental organizations (NGOs) to bring the next of kin of persons who had disappeared from all corners of the world to testify at each session of the Working Group. She urged States not to be trapped by the need to reach consensus into getting the text wrong. Everyone should keep in mind the fundamental aim of the Draft Convention: to give a glimmer of hope to the thousands of relatives of disappeared persons around the world and reduce the risk that others would have to live through the same hell.

18. Mr. DECAUX presented his report (E/CN.4/Sub.2/2004/7) on the issue of the administration of justice through military tribunals. He thanked his predecessor, Mr. Louis Joinet, who had set out the areas to be covered by the study, and the Commission on Human Rights which, through its resolutions on the issue, particularly the most recent one (2004/32), had defined the aim of the present study, which was to normalize and "civilize" military justice, not to militarize society, as one NGO had just put it. Once the aim had been defined, it only remained to proceed accordingly, and he had done so by proposing 17 principles which, with their respective commentaries, made up the bulk of the report. He thanked the International Commission of Jurists for organizing an expert seminar about the ongoing study, involving military personnel, in Geneva in January 2004. He had very much appreciated the involvement of Commonwealth judges in particular, had learned a great deal from coming face to face with different historical and legal experiences, and had been led to clarify, supplement and sometimes even to correct the principles. He also thanked the International Commission of Jurists for making the English-language version of the documents from that seminar available to the Sub-Commission.

19. That meeting had confirmed his belief that military justice should be "normalized" rather than being sanctified by some and demonized by others. While it was true that, particularly in Latin America, military justice had all too often gone hand in hand with military dictatorship, current experience also showed that genuine military justice could be the ultimate safeguard against arbitrariness and impunity. However, the principal difficulty lay in determining the residual jurisdiction of that form of justice, which would not be able to try civilians, should not become corporate justice either, and should not have jurisdiction to try serious human rights violations. In addition, if the principal argument in favour of military justice was that it was present in the field, particularly during external operations, what became of that argument when trials were relocated? What would then be the advantage of a military trial over a common law trial? Those questions, still in abeyance, required further consultation. He was pleased that the International Commission of Jurists planned to organize an in-depth discussion on the issue and he hoped that the Office of the High Commissioner, through the impetus given by Ms. Louise Arbour, would participate fully.

20. Mr. GUISSÉ expressed his appreciation of Mr. Decaux's report and asked him to elaborate on the as yet poorly defined concept of a military offence, which was to determine the jurisdiction of the courts in question. For the sake of precision, that concept should cover military acts exclusively. In other words, as courts of special jurisdiction, military courts could not in any circumstances hear civilian cases. The situation became more complicated, however, when civilians, who were not considered to be military personnel, took part in acts of war and committed serious acts of violence. Under what kind of jurisdiction would those civilians fall?

21. The approach adopted by Mr. Joinet and Mr. Decaux was interesting as it aimed to distinguish military offences from anything that might resemble them. Once that distinction was established, however, military courts should be required to remain within the bounds of the domestic law in force. It was also necessary to consider why military courts were courts of special jurisdiction, in other words to analyse the source of that special jurisdiction, if military justice was to remain truly residual. It should also be asked to what extent the application of military law could be contrary to respect of human rights.

22. Mr. CASEY said he recognized the value of Mr. Decaux's work, but disagreed with several of the proposed principles. He fully agreed that civilians should appear before ordinary courts rather than military courts, but disagreed with the idea implicit in the report that military justice was inferior to civilian justice.

23. In regard to Principle No. 1, the establishment of a military court by the executive did not necessarily violate the principle of separation of powers. That would depend on the constitutional system at issue.

24. Removing serious human rights violations from the jurisdiction of military courts, as required by Principle No. 3, would take war crimes away from their jurisdiction, again under the pretext that those courts were inferior. If they were inferior, they should not be allowed to try any cases at all.

25. He completely disagreed with the idea that military courts were inherently incapable of impartiality, as suggested by Principle No. 6, and the idea that the competence of those courts should be limited to the first degree of jurisdiction (Principle No. 10). Principle No. 13

presupposed that the Convention on the Rights of the Child was applicable in all cases, whereas some States had not ratified it. Principle No. 16 would limit the use of the death penalty, particularly for offences committed by minors. Although there might well be a trend towards abolishing the death penalty in some areas of the world, the issue remained controversial and it was not the Sub-Commission's role to take sides in that debate.

26. Mr. CHÉRIF said that Mr. Decaux's study encouraged reflection on an issue that was highly topical in a number of countries, and fraught with dangers. Military courts were indeed courts of special jurisdiction and came under the auspices of Ministries of Defence and War, rather than Ministries of Justice. That meant that, as Mr. Decaux had shown, they were an interference by the executive power in the administration of justice. Consequently, the best solution would be simply to abolish them completely. However, if for various reasons that was not possible, the first step should be to restrict their jurisdiction to disciplinary offences and to crimes committed by military personnel. Some countries had already done that, which had considerably improved the situation of the accused and ensured them a fair trial. The fact remained that, for military personnel who were brought before military courts, it was imperative to uphold international norms on the administration of justice and to ensure that the judges were adequately trained and had proven experience. In some countries, civilian judges presided over military courts. If those conditions were met, military courts would no longer be courts of special jurisdiction and would become a specialized section of the judiciary. That would indeed be a good thing, as specialization meant that judges were more competent, cases were dealt with more quickly, and hence the accused and their defence were better treated.

27. Ms. HAMPSON agreed with Mr. Casey that military justice could be fair and impartial, but in practice that was far from the case in most countries. In the United States, it was undeniable that since the reforms introduced after the Viet Nam war, military courts were effectively applying regular legal procedures and were exemplary in that regard. However, their jurisdiction only covered members of the armed forces.

28. There was nothing in Mr. Decaux's principles to suggest that military justice could not be genuine justice. One of the good things about the seminar organized by the International Commission of Jurists, which she had attended, was that it made those involved in civilian courts aware that military courts were essential, particularly in "common law" countries. Under the common law system the courts had territorial jurisdiction, which meant that the only way of avoiding impunity for military personnel who committed crimes or offences abroad was to court-martial them.

29. Referring to Mr. Guissé's question as to which jurisdiction applied to civilians involved in acts of war, she noted that the law governing armed conflicts only recognized two categories of person: combatants and civilians. The concept of "illegal combatants" did not exist. Combatants were defined in article 43 of Protocol I Additional to the Geneva Conventions as members of the armed forces. In certain circumstances, as described in Protocol I, combatants could lose their rights to protection, for example if they engaged in espionage. Individuals who carried out acts of war without belonging to the armed forces were civilians taking part in the conflict illegally. They could be tried for participating, for attacking other civilians, if that was the case, or even for shooting at soldiers. She was aware that the United States did not share that view but felt that it was not up to the United States to speak for the rest of the world. Anyone who read the Protocols, the commentaries on the Protocols, manuals of military law, including

the manuals of common law jurisdictions like the recently published British manual of military law, would realize that they all reached the same conclusions that she had just described. The fact that the United States did not share them was just one more manifestation of its desire to be an exception.

30. To suggest that the application of capital punishment for minors was still controversial was to ignore reality. It was considered by all but two States to be against customary international law and international treaties. There was only one country in the world that claimed the right to legally execute persons under 18 years of age: the United States. There was not the slightest doubt about the validity of Principle No. 16 in view of the fact that all countries, with the exception of Somalia and the United States, had ratified the Convention on the Rights of the Child. In addition, the Sub-Commission had acknowledged several years previously that capital punishment for persons under 18 years of age was prohibited by customary international law, an argument which had been invoked in the American courts.

31. Likewise, it could not be claimed that there was room for doubt when not only international human rights law but also international humanitarian law ruled out the possibility of civilians being given a fair trial in a military court. Article 75 of Protocol I Additional to the Geneva Conventions, which indicated clearly and in detail what was meant by an impartial and independent tribunal, had been recognized by the International Criminal Tribunal for the former Yugoslavia as representing customary international law. Even the United States military codes reproduced the content of that article. The generally accepted idea was that, given the special nature of the relationship between military personnel and civilians, it was not possible for civilians to receive what was considered in law to be a fair trial in a military court, because military courts did not have, or were not seen to have, the necessary impartiality. She directed Mr. Casey to the judicial decisions of the European Court of Human Rights, which confirmed that view: verdicts handed down in the United Kingdom and Turkey had been appealed in the European Court, and the European Court was not the only international body to act in that way.

32. With reference to Principle No. 2, she would like Mr. Decaux to clarify in his future reports the issue of identifying which courts were competent to determine the legal status of persons. Traditionally, the question of status had arisen in respect of persons claiming prisoner-of-war or combatant status when they were not being held as such, but over the past 15 years the opposite had become increasingly common, with people claiming to be civilians and not combatants. It was important to know whether the status of such persons should be determined by civilian or military courts. In the context of article 75 of Protocol I, it would also be worth looking at the applicability of procedure outlined in articles 43 and 78 of Geneva Convention IV on internment and assigned residence. For his consideration of all those issues, she suggested that Mr. Decaux should read the report, to be published shortly, of a seminar organized in Geneva shortly before the opening of the Sub-Commission by the University Centre for International Humanitarian Law in association with the Geneva Graduate Institute of International Studies. The importance of the seminar was that it had brought together civilians and military personnel, experts from the Human Rights Committee and representatives of the International Committee of the Red Cross.

33. Mr. GUISSÉ pointed out, in response to Mr. Casey, that he had never said military justice was fundamentally unfair, simply that, to be acceptable, military justice must meet certain conditions, notably by respecting the right to a fair trial. A fair trial was a public trial, in which

the accused could choose his own defence, where it was certain that any confessions had not been obtained through torture and where the verdict was pronounced by an independent tribunal, as required by article 14 of the International Covenant on Civil and Political Rights. The fact that the decisions of the Nuremberg military tribunal were no longer referred to was because the justice dealt by that tribunal had been partisan: justice of the conquerors over the conquered. Military justice as currently administered provoked concern because it did not respect most of the recognized human rights. As Mr. Chérif had said, there was no reason why civilian judges could not preside over military courts; he himself had presided over a military court for more than five years.

34. Mr. CASEY said it was significant that Ms. Hampson had referred several times to Protocol I Additional to the Geneva Conventions in support of her argument that there was in law no such category as illegal combatants. Until the adoption of the Protocol in 1977 that category had indeed existed and still did exist for countries which, like the United States, had not ratified the Protocol. In deciding in 1988 against ratification of Protocol I, the Reagan administration had clearly stated its intention to give preference to regular combatants. Moreover, in the light of the practice of States, it could hardly be claimed that the distinction established by Protocol I constituted customary law. With regard to the European Court of Human Rights, its task was to interpret the instruments adopted in Europe but its jurisdiction was not worldwide.

35. Mr. Guissé had rightly mentioned the Nuremberg tribunal, which had indeed been criticized for being partisan. However, that was not the only military tribunal set up by the Allies after the Second World War. There had been thousands of military tribunals, which had tried people accused of violating the laws of warfare. Consultation of the records of those tribunals showed that they had dispensed justice in an exemplary manner. There had been many acquittals. Their procedures had been in order and had conformed fully with the provisions set out in Mr. Decaux's Principle No. 6. They were useful examples of the manner in which military tribunals should behave.

36. Ms. HAMPSON said she wished to clarify the questions arising with regard to Protocol I. First of all there was the question of status. The United States seemed to be confusing two different problems. For example, if members of armed forces failed to distinguish themselves from the civilian population or engaged in espionage, they lost the privileges conferred on them by their status as combatants. That was very different from the case of civilians who took part in hostilities illegally and who should be tried on that basis. The other question concerned article 75 of Protocol I, which the United States had officially recognized as representing customary international law, which presumably meant that they considered themselves bound by that article. The article set out the minimum fundamental guarantees that must be complied with in the absence of other forms of protection, including guarantees relating to the rights of defence, and required that the trial should take place in an independent and impartial court. It was clear from paragraph 8 of article 75 that civilians could not be tried by military courts. In that respect, the European Court of Human Rights had interpreted the concepts of impartiality and independence in exactly the same way as the Inter-American Court of Human Rights, the Human Rights Committee and all the other thematic bodies.

37. Mr. CASEY said that Ms. Hampson's interpretation of the concept of "armed forces" was too limited. When a group formed outside the law used force to attain its ends, its members

could hardly be granted the status of combatants enjoying the protection of military law. Granting them such status would amount to encouraging civilians to violate the law while enjoying the protection it afforded.

38. Ms. HAMPSON replied that persons acting outside the law were not entitled to the status of combatants. When they fired on soldiers they were civilians liable to prosecution.

39. Ms. MOTOC, recalling that she had been Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo, a country where military tribunals had been set up, welcomed Mr. Decaux's report and expressed full support for the principles brought to the attention of the Sub-Commission. She considered Principle No. 3, which excluded serious human rights violations from the jurisdiction of military courts, to be highly relevant. She herself had described the procedure of the Congolese courts to which she had referred as "window dressing", because they had led to purely cosmetic sentences. Nevertheless, if military courts were banned from trying serious human rights violations, such cases would have to be referred to civilian courts. In practice such courts were either so overworked or in such a sorry state that they were incapable of taking over. What should be done in that case? Lastly, noting that in Principle No. 6 Mr. Decaux had employed nuanced wording concerning the implementation of the death penalty, she asked what was his precise position on that subject.

40. Ms. Rakotoarisoa, Vice-Chairperson, took the Chair.

41. Ms. KOUFA noted that the work of Mr. Decaux, whose excellent report she welcomed, continued that of Mr. Louis Joinet, who himself had continued the work undertaken by a former member of the Sub-Commission, Mr. Jules Deschênnes, which had culminated in the adoption of the Montreal Declaration in 1984. She urged Mr. Decaux to consult that Declaration. She especially welcomed Principles Nos. 2 and 3 of the report limiting the jurisdiction of military tribunals, fully in conformity with the Montreal Declaration, and Principle No. 8 listing the guarantees implied by exercise of the rights of the defence in a just and fair trial. That list was all the more welcome because some States were taking advantage of the lack of detailed rules in the Geneva Conventions to interpret the fundamental principles of justice to suit their own ends.

42. Ms. WARZAZI said that Mr. Decaux's work was particularly opportune in view of the concerns raised by certain current situations. She gave her full and unqualified support to all the principles formulated by Mr. Decaux and especially to the statement at the end of the commentary on Principle No. 1 that "the protection of rights in peacetime should be greater than if not equal to that recognized in wartime".

43. Ms. BRETT (Friends World Committee for Consultation (Quakers)) said she warmly welcomed the principles drafted by Mr. Decaux, which were very precise and exhaustive in nature.

44. Referring to Principle No. 12, in conjunction with Principle No. 2, she said that the issue of conscientious objection continued to raise problems. She cited the case of a conscientious objector who, after several terms of imprisonment in his own country, had finally been expelled from the armed forces and then summoned before a court martial for disobeying orders. Apparently the military code of that country permitted that kind of Kafkaesque and

totally unacceptable situation. A person who had been expelled from the army should be regarded as a civilian again and no longer come under the military courts, as stipulated by Principle No. 2.

45. Principle No. 13 did not take account of the full range of international law concerning minors. That Principle ought to refer to the Optional Protocol to the Convention on the Rights of the Child, which prohibited the recruitment of persons under the age of 18 to take part in armed conflicts, and ILO Convention No. 182 concerning the prohibition of the worst forms of child labour. The latter Convention, which had been ratified by a large number of countries, included a ban on the forced recruitment of children for use in armed conflict. Both those instruments had been ratified by the United States.

46. Principle No. 14 (military prison regime) ought to take account of the growing participation of women in the armed forces. She knew that some women serving in the army were currently in prison but had no information on their conditions of imprisonment.

47. Mr. MONOD (War Resisters' International and International Fellowship of Reconciliation) said he had read Mr. Decaux's report with interest, especially the part dealing with conscientious objectors. He suggested that Mr. Decaux should add conscientious objectors, whose legitimacy had been recognized in general comment No. 22 of the Human Rights Committee, to the list of people on whom the death sentence could not be passed, even though it had been applied to them in wartime.

48. Likewise, when countries made reservations to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, such reservations should not apply to conscientious objectors. That was what the Sub-Commission had recommended in its resolution 1999/4 concerning the death penalty. Since it was difficult to investigate conscience, capital punishment should not be applied in the event of doubt. That had been recommended by the Working Group on Arbitrary Detention in its report E/CN.4/1999/63 and it was what should have been done by countries that had executed deserters. It would be highly desirable to mention the non-imposition of the death penalty on conscientious objectors in a draft resolution on military tribunals.

49. Ms. DROEGE (International Commission of Jurists) said she appreciated the fact that military justice was not treated as intrinsically inferior to civilian justice in Mr. Decaux's report. Indeed, the fundamental purpose of the report was to demarginalize that system of justice and bring it within the compass of international human rights law. But that implied that military tribunals must meet the requirements of independence and impartiality. Impartiality must not only be subjective (no conflicts of interests among the judges, for example), it must also be objective with regard to the guarantees that form of justice must offer, such as the independence of judges, non-interference by the executive, and job security. Military justice must not only be impartial and independent, it must be seen to be so.

50. She endorsed Ms. Hampson's comments: civilians must not be tried by military courts even though, as Mr. Casey had pointed out, there were cases where the military courts might be induced to try civilians, particularly when the civilian judicial system was no longer in operation. She also shared Ms. Hampson's views on prohibiting the application of the death penalty to minors.

51. Mr. ZOLLER (South Asia Human Rights Documentation Centre) said that, having worked in almost all regions of the world and witnessed many conflicts, he had realized how sensitive an issue military justice was for NGOs. Recalling what one NGO representative had said prior to Mr. Decaux's statement, he confirmed that in practice military tribunals had often permitted, and did permit, pretences of trials that favoured immunity. There were two options for dealing with that situation. One would be to launch an international campaign for the abolition of military tribunals, but that was not very realistic. On the other hand, an approach that started from reality and accepted that there was a need to introduce minimum rules and a framework which must be respected, would amount to an acknowledgement of the usefulness of Mr. Decaux's principles. Contrary to what one of the experts had said, the purpose of a court was not to ensure respect for discipline but to uphold the law. It was therefore necessary to strengthen the judiciary and the approach adopted by Mr. Decaux was the right one. It was essential to integrate military tribunals further and to provide them with a framework, criteria and principles. The NGOs working in the field should study Mr. Decaux's principles and consider how they might be improved from a practical viewpoint.

52. Mr. DECAUX thanked the speakers for their comments, which had taken the debate to the heart of the matter. He was particularly grateful to Ms. Hampson and Ms. Warzazi for supporting his approach.

53. He realized that everyone approached the issue of military tribunals from the viewpoint of their own experience, their own history and their own judicial system. The seminar mentioned by Ms. Hampson had been most revealing in that respect. Jurists from Latin countries, initially confined by their conceptions based on civil law, had eventually come to realize that they had much to learn from contact with common law judges.

54. After all that had been said during the discussion, he remained convinced that military tribunals had a residual jurisdiction that was irreducible, and that naturally had an impact on the ordinary system of justice. The linkage between the military and ordinary systems of justice was an issue that needed to be studied in greater depth.

55. He noted that some of the principles had given rise to discussion, whereas others had not even been mentioned. He wondered whether Mr. Casey, in not mentioning certain principles, had wished to indicate that he accepted them.

56. With regard to Principle No. 1, he still found it very difficult to accept that a court of special jurisdiction could be established by the executive, in view of the principle of the separation of powers.

57. Defining military offences, as Mr. Guissé had suggested, was precisely the crux of the matter, and there were certainly some grey areas. There were some categories of persons that needed to be taken into account, such as paramilitary personnel, mercenaries and even prison warders, who were recruited on a contractual basis and could commit serious violations. In the absence of a judicial system for those categories of people, there was a danger of impunity.

58. The question of the administration of justice in cases of serious human rights violations - war crimes, crimes against humanity - needed to be studied in greater depth, in particular, as Mr. Casey and Ms. Motoc had suggested, in situations where the civilian judicial system had broken down completely.

59. Principle No. 6 concerning the independence, impartiality and competence of military tribunals appeared to be self-evident. It had been useful to draw attention to the importance of tribunals "being seen to be" impartial, a very familiar concept in the system of the English-speaking world. Such visible impartiality was all the more important because, in that system, the profession of military judge was totally separate from that of other judges.

60. He fully accepted that military judges and lawyers in the United States were independent, but he stressed that the principles must take all systems into account, including those of countries that were not democratic and did not have the tradition of the rule of law.

61. Moreover, he reminded Mr. Casey that, in a recent judgement, the United States Supreme Court had cited the judicial practice of the European Court of Human Rights. The task of the European Court was in fact to apply universal law in a regional context. Admittedly its proceedings only concerned 45 States parties, but its great merit was that it represented what was best in the different judicial systems, so that when the European Court defined the concept of independence and impartiality it could legitimately be trusted.

62. It was perfectly true that the role of military justice was not solely to uphold good order and discipline. But when it was affirmed that military justice must not be less favourable to the defendant, he feared that there was an imperceptible shift from the viewpoint of criminal law towards the disciplinary viewpoint and that a serious human rights violation might come to be regarded as a mere act of insubordination.

63. Regarding the allegation sometimes made that military judges were inferior, Mr. Decaux remarked that, at the seminar he had mentioned, some participants had maintained precisely the opposite. A number of jurists had taken the view that in some countries the military justice system was better than the civilian system, largely because military judges were better paid and had a smaller workload than ordinary judges. It was necessary to bear in mind the constraints on the civilian justice system, which produced undesirable effects. In his opinion, however, those considerations did not weaken the validity of Principle No. 6.

64. Neither did he believe that it was possible to question the right to appeal, a right that the Commission on Human Rights itself had confirmed. The existence of two levels of jurisdiction in criminal cases provided a fundamental safeguard, as the frequency of judicial errors unfortunately demonstrated.

65. He welcomed the fact that Principle No. 12 concerning conscientious objection had not given rise to any negative reaction and that the idea was gaining ground. He assured the representative of the Quakers that her remarks on Principle No. 13 would be taken into account in his future work. He intended to work in liaison with Ms. O'Connor on the question of prisons, to which Principle No. 14 related.

66. With regard to non-imposition of the death penalty on minors (Principle No. 16), Mr. Casey had pointed out that the United States had not ratified the Convention on the Rights of the Child. Mr. Decaux commented that the purpose of the principles was to highlight common values and that there were moral, ethical and even religious arguments supporting Principle No. 16. Replying to Ms. Motoc, he explained that, in regard to the non-imposition of capital punishment, he had simply endeavoured to distinguish the categories of persons specifically mentioned by the International Covenant on Civil and Political Rights and the Human Rights Committee. He was somewhat reluctant to add another category of persons, namely conscientious objectors, to the list contained in Principle No. 16, as one NGO had urged. It seemed to him that adding new categories might appear to exclude others. In other words, by going beyond the existing framework he would be attempting to advance international law. That stage had not been reached.

67. Ms. BRETT (Friends World Committee for Consultation (Quakers)) recalled that, at the previous session of the Sub-Commission, the organization she represented had raised the issue of imprisoned women and their children. The studies conducted by that organization showed that, although women formed a very small minority of the overall prison population, that fact in itself presented a problem. In many cases, the lack of women's prisons meant that women, even very young women, were imprisoned together with adult males. Moreover, the number of imprisoned women was increasing rapidly, which appeared to be due more to new priorities in law enforcement than to an increase in crimes committed by women.

68. She drew attention to the particularly difficult situation of foreign women imprisoned in a country where they did not speak the language. Having no family members at hand to provide assistance, particularly in the form of hygiene products and clothing, they were vulnerable to exploitation by other prisoners or prison warders. The problem of language also arose for indigenous women, who in many countries represented the fastest-growing segment of the prison population.

69. The situation of children whose mothers were in prison presented many problems. While it was certainly preferable in such cases not to separate the children from their mothers, the necessary facilities to ensure their development must be available. When children were entrusted to relatives or taken into care, the difficulty was to maintain the relationship with the mother while doing everything possible to alleviate the distressing experience of prison visiting. Women were more likely to be sent to prison nowadays, and might not have the time to make arrangements for the care of their children. That had led some States to defer the start of the prison term to enable the women concerned to make appropriate arrangements.

70. Standards of medical care in prisons varied widely, but on the whole women prisoners had far poorer physical and mental health than men. Health care could be provided either inside or outside the prison, both systems having advantages and drawbacks.

71. While there had been increased recognition in recent years of the need to introduce a gender perspective into United Nations policies and programmes, that was not so far the case with the institutions responsible for the administration of criminal justice. Those institutions should therefore pay much more attention to the special difficulties that imprisonment created for

women. Her organization intended to continue its research on the issue and to submit the results to the Sub-Commission, and in particular to its Working Group on the Administration of Justice, at its next session.

72. Mr. Sorabjee, Chairperson, resumed the Chair.

73. Mr. BALTI (Tunisian Association for Self-Development and Solidarity) said that the Association he represented, although primarily concerned with development, wished to speak on item 3 because of its conviction that there could be no progress and development without democracy, the rule of law, justice, freedom of expression and other civil and political values. Countries which, even before the fall of the Berlin wall, had like Tunisia committed themselves to a series of economic, political and social reforms, had realized the correctness and efficacy of that balanced approach. The reports of the Sub-Commission experts showed that some progress had been made. However, it would be a long and difficult struggle to establish a genuinely democratic culture in all parts of the world and to ensure that violations no longer remained concealed because of the lack of freedom of expression and the lack of an independent system of justice. Here the role of the developed countries should not be confined to denouncing violations, while regarding themselves as the sole benchmark. They must encourage good initiatives and strengthen cooperation. With regard to the administration of justice, in particular, specific projects concerned with the training of judges and their assistants or the mobilization of the necessary funds for conducting investigations might be instituted. Nonetheless, it was the responsibility of Government to ensure that every person presumed guilty was entitled to a fair trial. Arbitrary detention and poor prison conditions must be strongly condemned and human rights defenders must take action to put an end to such violations. At all events, the promotion of human rights was not possible in any country of the world without a political will that found concrete expression in reforms in all areas: political, institutional, legal and social.

74. Ms. SAITO (International Association of Democratic Lawyers) said that, according to information reaching her organization, the Government of Iraq had decided, for no valid reason, to dissolve the Iraqi Bar Association. It was deplorable that a newly installed Government recognized by the United Nations should ignore the importance of the independence of lawyers.

75. Turning to the massive human rights violations committed by Japan during the Second World War, she drew attention to the deplorable fate of Japanese pacifists, who had been victims of ferocious repression by the imperial Government in implementation of the Public Order Maintenance Act adopted in 1925. They had been imprisoned under appalling conditions and submitted to treatment similar to that recently inflicted on Iraqis in Abu Gharib prison and which had so revolted world public opinion, but they had received no expression of regret or apology from the Japanese authorities and of course no financial compensation, whereas their torturers continued to receive their pensions. Hundreds of thousands of people had been prosecuted under the Public Order Maintenance Act, over 50 of whom had died under interrogation, while 1,617 had died in prison as a result of torture or disease. The Japanese Government at the time had set up a special police unit which, like the Gestapo in Germany, had had a free hand to crack down on anyone expressing the slightest criticism of the militarist regime.

76. Whereas everywhere else in the world, from the Republic of Korea to European countries such as Germany, Italy and France, resistance fighters had received honours and compensation, and whereas the United States and Canada had apologized to Americans of Japanese origin

interned during the war, only Japan had proved incapable not only of compensating the victims of its own laws but even of acknowledging their suffering. Those facts had been repeatedly described to the Sub-Commission, and she hoped that the voice of the victims would at last be heard.

77. Mr. LITTMAN (Association for World Education), referring to the question of military tribunals, denounced the illegality of the Egyptian laws under the state of emergency which denied the right of appeal against decisions by military tribunals. He quoted the case of Dr. Neseem Abdel Malek, former director of El Khanka psychiatric hospital in Cairo, whose detention had been considered unjustified by the Working Group on Arbitrary Detention. However, five years later the Egyptian Government had still not responded to the requests for release addressed to it on the prisoner's behalf. He reminded the Sub-Commission that Dr. Abdel Malek had been imprisoned following false accusations of corruption made against him by a murderer who had been officially certified as insane and whose claims had been contradicted by his own mother. Before that man had been executed on 17 September 1997 for the massacre of nine German tourists and their Egyptian driver, he had expressed his regret on television at not having killed more "infidels". That had not prevented the Egyptian courts from accepting his accusations against Abdel Malek, who continued to languish in jail while thousands of Islamists were regularly pardoned. A year ago Mr. Littman had brought the case to the attention of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, and a communication had been sent to the Egyptian Government. No reply had been received. At the previous session of the Sub-Commission he had contacted Ms. Leila Zerrougi, requesting her to look into the case from the viewpoint of religious discrimination, in accordance with her mandate, and she had agreed to do so. Mr. Littman repeated his request to the Special Rapporteur, Mr. Leandro Despouy, to make the Egyptian Government understand the gravity of its refusal to correct the situation. Finally, the Association for World Education respectfully requested the head of the Egyptian Government, Mr. Hosni Mubarak, to release Dr. Abdel Malek on compassionate grounds before the Coptic Easter. Such a blatant case of arbitrary and discriminatory detention said a great deal about the Egyptian system of justice and about the inability of the United Nations mechanisms to have their decisions implemented. He referred the members of the Sub-Commission to the written statement submitted by his organization (E/CN.4/Sub.2/2003/NGO/40) containing information on the discrimination practised under the Egyptian criminal justice system, especially against Copts.

78. Mr. Littman congratulated Mr. Decaux on his preliminary report on the universal application of human rights treaties. He recalled that in 2000 the organization he represented had contested the justification for the inclusion, in Volume II of the Compilation of International Instruments on human rights, of the Cairo Declaration on Human Rights in Islam. He was pleased to announce that he had received a letter from the legal counsel of the Office of the High Commissioner for Human Rights stating clearly that States which had signed and ratified the United Nations human rights conventions remained bound, whatever the circumstances, by the provisions of those texts and by the erga omnes obligations deriving from customary international law. He expressed his full agreement with the excellent report on that matter (E/CN.4/2003/14) submitted to the Commission on Human Rights by the former High Commissioner for Human Rights, Mr. Vieira de Mello, to whose memory he paid sincere tribute.

79. Finally, the organization he represented drew attention to a report just published by Human Rights Watch denouncing the evident intention of the Sudanese Government to destroy the means of existence of millions of people in Darfur. He urged the members of the Sub-Commission to act without delay. The inhabitants of Darfur needed international protection at once.

80. Ms. MOTOC, presenting the report of the sessional working group on the administration of justice (E/CN.4/Sub.2/2004/6), described the membership of the working group and listed the items on its agenda.

81. For the consideration of international criminal justice, the first item on the working group's agenda, two studies by the Human Rights Centre of the University of Essex had been presented by Ms. Hampson. The first study analysed the differences between national courts in the application of criminal law and concluded that legal procedures and standards needed to be harmonized in order to protect the rights of victims more effectively. The second study concerned respect by international criminal tribunals for the rights guaranteed by the International Covenant on Civil and Political Rights. Two options had been considered for creating some form of institutional monitoring of such tribunals. One was to prepare an additional protocol to the Covenant, which would allow the Human Rights Committee to receive complaints from individuals whose rights guaranteed by the Covenant had not been respected by international tribunals. The other would be to appoint a special rapporteur to monitor the situation.

82. Ms. Hampson had presented her own study on the criminalization of acts of serious sexual violence, including rape. She had shown the need to formulate more precise definitions of rape, since the national definitions sometimes differed from those applied by the International Criminal Tribunals for the former Yugoslavia and Rwanda. For those two tribunals, lack of consent was sufficient to constitute rape, but many national laws had different requirements. The fact that rape was not defined with sufficient explicitness by international humanitarian law permitted a variety of judicial practices in rape cases. The situation was further complicated by the fact that the age of consent to sexual relations varied from country to country. For all those reasons, anomalies in the definition of rape had been found in certain countries.

83. In a more general context, the direct link between the laws governing amnesty and impunity in cases of serious crime had been considered. There was a need to consider the idea of reducing functional immunity to the absolute minimum.

84. Ms. Rakotoarisoa had raised the problems involved in gathering evidence, particularly in child abuse and rape cases. The questioning process itself, by causing stress and confusion, especially among children, could lead to contradictory statements. In the United States, experts were able to speak on behalf of children to save them from a traumatic experience. With regard to rape, the working group considered, like the European Court of Human Rights, that virginity should not be a prerequisite for prosecution. Moreover, the judicial decisions of the European Court in rape cases had already been taken into account by international tribunals, thereby acquiring the force of customary international law.

85. With regard to sexual tourism the working group considered that, when States opposed the extradition of their own nationals, the solution lay in extraterritorial jurisdiction, so as to protect women and children in the countries where the acts had been committed. The working group was concerned at the extent of paedophilia and the difficulties in monitoring it on account of the role played by the Internet.

86. For the next session, two general themes had been selected on which NGOs were invited to work: firstly, women and the criminal justice system, including the rules of procedure for women subjected to sexual violence and the issue of women in prisons; and secondly, international criminal justice. Consideration would also be given to transitional justice, a concept that covered not only the question of international criminal justice but also justice as a whole.

87. Ms. CHUNG welcomed Ms. Motoc's intention to tackle the issue of transitional justice at the next session. That issue was of particular interest to her own country, the Republic of Korea, as indeed it interested all countries that were still undergoing transition from an authoritarian regime to a democratic regime. In the absence of universal norms, transitional justice would never be free from manipulation, at either national or international level. The Sub-Commission seemed particularly well placed to consider that issue. It was unfortunate that, in the discussions on transitional justice, the gender perspective was never taken into account.

88. Ms. YABU (Japan Fellowship of Reconciliation) said that the earliest court judgement against traffickers who had abducted women for the purpose of sexual slavery in Japan had recently come to light. It had been issued by the Nagasaki District Court in February 1936. Unfortunately, it had not prevented the Japanese Interior Ministry from tolerating such trafficking as a necessary evil.

89. In contravention of the law, trafficking in women had continued in Japan on a large scale. After the war, Japanese war criminals had been prosecuted by the International Military Tribunal for the Far East, but never for practising sexual slavery. The introduction of democracy in Japan in 1947 had changed nothing. There had been no investigation, no prosecution for crimes of sexual slavery.

90. In that regard, she denounced the particularly harmful role played by the Buddhist sect of Nishi Hongwanji, which had served as a propaganda instrument for the imperial Japanese regime. It had spread its perverted teachings throughout all the Japanese-occupied territories with the sole aim of turning the inhabitants into obedient subjects of the Japanese Empire. In doing so, it had acted directly against the teachings of Shinran, its founder, who had advocated respect for equality and the peaceful coexistence of all peoples of the world. It was true that, after the war, the sect had acknowledged its responsibilities and expressed its apologies, but that was not sufficient. The Government and people of Japan, including the supporters of the sect, should confront the victims directly and seek their forgiveness.

The meeting rose at 1 p.m.