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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Report of the sessional working group on the administration of justice

Chairperson-Rapporteur: Ms. Antoanella-Iulia Motoc

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Summary

By its decision 2005/101, the Sub-Commission on the Promotion and Protection of Human Rights established the sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Ms. Françoise Hampson (Western European and Other States), Ms. Antoanella-Iulia Motoc (Eastern Europe), Mr. Janio Iván Tuñón Veilles (Latin America and the Caribbean), Mr. Abdul Sattar (Asia) and Ms. Lalaina Rakotoarisoa (Africa). The working group elected, by acclamation, Ms. Antoanella-Iulia Motoc as Chairperson-Rapporteur for its 2005 session.

The sessional working group held discussion on the subjects of international criminal justice; women and the criminal justice system; the right to an effective remedy; and transitional justice. Papers were presented on a number of these topics. The working group proposed that the subjects of the right to an effective remedy and transitional justice be included in the provisional agenda for its next session. The working group stressed the need to continue to work closely with academics and non-governmental organizations in the future.

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Introduction

1. By its decision 2005/101, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Ms. Françoise Hampson (Western European and Other States), Ms. Antoanella-Iulia Motoc (Eastern Europe), Mr. Janio Iván Tuñón Veilles (Latin America and the Caribbean), Mr. Abdul Sattar (Asia) and Ms. Lalaina Rakotoarisoa (Africa).

2. The following members of the Sub-Commission also took part in the discussions of the working group: Mr. Mohamed Habib Cherif, Mr. Emmanuel Decaux, Mr. Ibrahim Salama, Mr. Yozo Yokota, Mr. Miguel Alfonso Martínez and Ms. Florizelle O'Connor.

3. The working group held two public meetings, on 25 and 29 July 2005. The present report was adopted by the working group on 8 August 2005.

4. An observer for the Office of the United Nations High Commissioner for Human Rights opened the session of the working group. The working group elected, by acclamation, Ms. Antoanella-Iulia Motoc as Chairperson-Rapporteur for its 2005 session.

5. Observers for the following non-governmental organizations took the floor during the debate: World Peace Council, Friends World Committee for Consultation (Quaker Office Geneva), Interfaith International, International Association of Democratic Lawyers, Migrants Rights International, Minnesota Advocates for Human Rights, Pax Romana, South Asia Human Rights Documentation Center, and Worldwide Organization for Women. The International Committee of the Red Cross (ICRC) also attended.

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

> Report of the 2004 sessional working group on the administration of justice (E/CN.4/Sub.2/2004/6);
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> Working paper by Mr. Mohamed Habib Cherif on the right to an effective remedy in criminal proceedings (E/CN.4/Sub.2/2005/13);
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> Working paper by Ms. Françoise Hampson and Mr. Ibrahim Salama on the relationship between human rights law and international humanitarian law (E/CN.4/Sub.2/2005/14);
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> Working paper by Ms. Françoise Hampson on the implementation in domestic law of the right to an effective remedy (E/CN.4/Sub.2/2004/15).

7. Furthermore, Mr. Tuñón Veilles introduced an informal paper on truth and reconciliation commissions in Latin America:

> Justicia de transición: mecanismos de averiguación de la verdad y reconciliación (no document symbol).

8. In response to a question on the working methods of the working group by the observer for Minnesota Advocates for Human Rights, the Chairperson-Rapporteur clarified that papers on the administration of justice should be presented first to the working group and only subsequently to the plenary of the Sub-Commission.

Adoption of the agenda

9. At its first meeting, on 25 July 2005, the working group considered the provisional agenda contained in document E/CN.4/Sub.2/2004/6. Following discussion among members of the working group, the agenda was adopted as follows:

1. Election of officers.

2. Adoption of the agenda.

3. International criminal justice.

4. Women and the criminal justice system.

5. Transitional justice.

6. The right to an effective remedy.

7. Provisional agenda for the next session.

8. Adoption of the report.

10. Ms. Hampson suggested that in the future the working group should identify a theme with the view that there would be three or four reports on different aspects of the same theme. She further suggested that the same theme be retained for two years in order to give NGOs an opportunity to comment on these papers.

I. INTERNATIONAL CRIMINAL JUSTICE

11. Mr. Salama introduced the working paper that he co-authored with Ms. Hampson on the relationship between human rights law and international humanitarian law (E/CN.4/Sub.2/2005/14). The first part of the working paper, which Mr. Salama authored, discussed the potential for institutional complementarity and mutual reinforcement of human rights law and international humanitarian law.

12. Ms. Hampson presented the second part of the paper, which focused on terminology, the history of the law of armed conflict (international humanitarian law), whether human rights law and international humanitarian law could be applicable to the same circumstances and whether human rights law could be applied outside national territory. The paper concluded with further questions for study and the recommendation that a working group of the Sub-Commission be established to further study the interrelationship between human rights law and international

humanitarian law. Despite the recognized difficulties of establishing a new working group, Ms. Hampson stated that this would be preferable to having a Special Rapporteur to do such work alone.

13. A number of non-governmental organizations, including Minnesota Advocates for Human Rights, Pax Romana and Interfaith International, argued that national disasters such as the recent tsunami in Asia should also be included in a discussion of international humanitarian law. The observer for Minnesota Advocates for Human Rights suggested that states of emergency declared at the national level could also be covered by international humanitarian law.

14. Ms. Hampson clarified that the term "international humanitarian law" referred exclusively to the law of armed conflict and not to other situations such as natural disasters. She explained that, for states of emergency, international humanitarian law would apply only if there was also armed conflict, otherwise human rights law with the possibility of derogation would apply.

15. The observer for the International Committee of the Red Cross (ICRC) emphasized that human rights law and international humanitarian law were distinct but complementary. She underlined that the differences in scope and application of these regimes should not be blurred and that during armed conflict international humanitarian law was the *lex specialis* in relation to human rights law. In this regard, she noted that, during armed conflict, issues relating to deprivation of life and liberty were governed by international humanitarian law and not human rights law. She also noted that the compliance mechanisms of international humanitarian law and human rights law were different, and that compliance mechanisms of international humanitarian law were of an immediate character during an armed conflict, while such mechanisms under human rights law tended to work after the fact. She also noted that the methods of work of ICRC and the United Nations human rights mechanisms were different. She underlined in particular that ICRC was neutral, and that while it was a frequent observer at meetings of the United Nations, ICRC did not necessarily subscribe to resolutions or decisions taken by political bodies of the Organization. She also noted that ICRC worked on the basis of confidentiality with States that were party to an armed conflict, rather than the public proceedings that tended normally to be used by human rights treaty bodies and special procedures. She added that ICRC continued to have some concerns about whether it was appropriate for human rights mechanisms to examine violations of international humanitarian law and to make pronouncements in this regard.

16. The observer for ICRC noted that there was no lack of legal standards applicable to armed conflict, but emphasized the problem of a lack of political will among some States to comply with international humanitarian law.

17. Mr. Salama responded by noting that recognition of the distinct nature of human rights law and international humanitarian law did not exclude the possibility of mutual benefit for ICRC and OHCHR from a well-structured dialogue. He noted the common underlying question of how to increase implementation when one or both of these bodies of law were applied.

18. Ms. Hampson agreed with the observer for ICRC about its independent and neutral status, adding that, as an observer to the United Nations, ICRC was not bound by or should be seen to be bound by decisions made by the United Nations or its human rights mechanisms. Ms. Hampson also agreed with the observer for ICRC that problems in armed conflict tended to arise from a lack of compliance with international standards, not because of a lack of legal norms. Nevertheless, she voiced her disagreement with ICRC's statement that international humanitarian law was the *lex specialis* during an armed conflict, stating that human rights law can apply before, during and after a conflict. She then discussed the International Court of Justice's (ICJ) jurisprudence on international humanitarian law as *lex specialis* during an armed conflict, and noted that the issue had received further clarification in the case on the barrier in the occupied Palestinian territories. In that case, ICJ had stated that there were some situations during an armed conflict where either human rights law or international humanitarian law could be applicable, and that often international humanitarian law was more appropriately applicable to issues closer to the battlefield. Ms. Hampson noted that ICJ, the General Assembly and the treaty bodies were all in agreement that human rights law could be applicable to issues that arose during armed conflicts. She noted that there were two States in particular who continued not to accept this view. Nevertheless, in light of the weight of opinion to the contrary, she added that in situations of armed conflict human rights treaty bodies should examine human rights norms in the light of international humanitarian law. She added that treaty bodies in such situations were only competent to find violations of human rights law.

19. Ms. Hampson noted that, in situations of armed conflict, international humanitarian law had more detail regarding issues of detention whereas in non-conflict situations human rights law had more specificity. The real issue, she noted, was how a conflict was characterized. She mentioned that the relationship between international humanitarian law and human rights law had been raised in the context of United Nations peace support operations and in two cases currently before the European Court of Human Rights.

20. Mr. Decaux underscored the importance of interdisciplinary work in this area and noted with interest the proposal in paragraph 35 of the paper by Mr. Salama and Ms. Hampson to create a working group on the relationship between human rights law and international humanitarian law in order to do further work in this area. He mentioned grey areas or gaps in the law where further work might be done, such as maintenance of law and order and United Nations peace support missions with military, police and civilian components.

21. The observer for Minnesota Advocates for Human Rights suggested that a comparison of the role of non-State actors in international humanitarian law and human rights law would also be an interesting area for research.

22. The observer for Friends World Committee for Consultation (Quaker Office Geneva) commented on possible areas for future study and referred to the Quakers' commentary on minimum standards for persons detained, in particular female detainees. She suggested that further work focusing on the rules and conditions of detention could be useful.

23. Mr. Yokota agreed that the traditional distinction that international humanitarian law applied during armed conflict and human rights law applied in time of peace was no longer correct. Nevertheless, he expressed concern about the issue of transitional justice and its role

in the legal framework. He posed a hypothetical situation involving violations of international humanitarian law or human rights law committed by soldiers of a country during an armed conflict surrounding one region's struggle for independence. After this hypothetical region succeeds in gaining independence, Mr. Yokota asked how the courts of this new country could punish the soldiers of the other country for violations against its citizens. He discussed the limitations on effective compliance with international humanitarian law and human rights law in such a situation owing to the possibility of amnesties or other forms of political protection, and suggested that a special international tribunal could be the only effective mechanism in such circumstances.

24. Mr. Salama responded to Mr. Yokota's question by noting that international humanitarian law applied during internal armed conflicts as well as international armed conflicts. He said that ICRC had procedures that focused on compliance during an armed conflict. He nevertheless argued that human rights mechanisms would still be relevant to human rights violations that might have occurred and could play a complementary role in such cases. Mr. Salama further suggested that human rights mechanisms and NGOs in such circumstances could put pressure on the States concerned to bring perpetrators to justice.

25. Ms. Hampson also responded to Mr. Yokota's hypothetical case, and noted that human rights law is about the accountability of States, not individuals; the latter would face criminal proceedings under either national criminal law or under the Rome Statute of the International Criminal Court (ICC). She said that the availability of proceedings before ICC would provide incentives to States to prosecute their own soldiers. She also noted that sometimes victims would also be able to bring individual soldiers before a transitional justice system. Ms. Hampson also discussed the increasing availability of universal jurisdiction and that it had made it difficult to avoid prosecution by moving to another State. She noted the very real difficulty of getting a ceasefire without granting amnesties. She concluded with the observation that, in the case of Latin America, it was hard to maintain political support for amnesties over a period of time, particularly in cases where there had been large-scale disappearances.

26. Mr. Yokota agreed with Ms. Hampson's analysis of his question and referred to the creation of the international tribunals for Rwanda and the former Yugoslavia, as well as the potential applicability of the Rome Statute. He noted the potential problems of ad hoc criminal tribunals, such as that they only existed in limited situations and normally had a limited time duration. He also noted that a number of States had not yet ratified the Rome Statute. He said that the possible reluctance of some States to prosecute perpetrators of war crimes was also a factor inhibiting compliance with international standards. Mr. Yokota also said he agreed with Ms. Hampson that the principal issue was compliance with international humanitarian law and not its legal effect, and said that this had been a result of an imprecise translation from Japanese. He concluded with the observation that the current situation was far from ideal in many circumstances.

27. Ms. Hampson said that the focus should be on national courts, in particular with regard to the prosecution of their own soldiers and universal jurisdiction. She indicated that a significant number of prosecutions had been brought in a number of European countries and that the number

of these prosecutions might exceed the number of prosecutions by the International Criminal Tribunal for the Former Yugoslavia. She also noted that where a State fails to prosecute its own soldiers, it might well be in breach of human rights law.

28. Mr. Salama also emphasized the role of States in enforcing international criminal law and the capacity of human rights treaty bodies to bring pressure on States to undertake investigations and prosecutions of perpetrators. He described this as the added value of human rights mechanisms. He also stated that it was preferable, for reasons of public perception and cultural sensitivities, for a State to prosecute alleged perpetrators rather than having international courts do so.

29. The observer for Argentina said his country was very active in this area, particularly with reference to the right to the truth. He noted that a society in conflict could have recourse to both human rights law and international humanitarian law and that the right to the truth was implicit in Ms. Hampson's list of subjects for further study (chap. IV of the working paper).

30. Mr. Decaux observed that previous Sub-Commission resolutions had encouraged States to ratify the Rome Statute and noted that this year it would be timely to welcome the decision by the Security Council to submit the issue of the Sudan to the International Criminal Court. He also referred to the issue of hybrid courts, noting the difficulties of these experiences, for example, in Cambodia, Timor-Leste and Sierra Leone. He noted that while the Secretary-General had sanctioned hybrid courts, the structure and functioning of these courts warranted further study, as did the issue of how third-party States could cooperate with these hybrid courts.

II. WOMEN AND THE CRIMINAL JUSTICE SYSTEM

31. The observer for the Friends World Committee for Consultation (Quaker Office Geneva) noted with regret that there was no working paper on the subject this year. She suggested that the working group should consider the issue of discrimination in relation to women and the criminal justice system. She argued that because there were fewer facilities for female prisoners, women frequently were incarcerated further from home and more frequently in more severe conditions. She also suggested that women face indirect discrimination, arguing that it was more likely that women would be placed in pre-trial detention than men, because women were less likely to be able to afford bail. The observer noted that as there was already a Special Rapporteur on discrimination in the criminal justice system, perhaps she would be willing to devote a report to the gender discrimination aspects of this issue.

32. Another subject for further research could be women and children in prison. The observer for the Friends World Committee for Consultation (Quaker Office Geneva) noted that there were two competing interests: on the one hand there was the desire to keep young children with their mothers; and, on the other hand, the desire to keep young children out of the prison environment. Noting that some States allow women to have their children with them in prison only for the first few months of life while other States allow this until the age of 12 years, she noted there were no international guidelines or criteria on this subject and work in this area would be helpful. A related area for further study and guidelines might cover possible rights

of a child when his or her mother was in prison, including, for example, whether the child had the right to be informed of the mother's incarceration, whether the child had visitation rights, whether the child had the right to be consulted about decisions concerning the mother. On the issue of imprisoned mothers, the representative noted that the Quakers had been preparing a draft commentary on the United Nations Standard Minimum Rules for the Treatment of Prisoners, which lacked a gender perspective, given that it was drafted many years ago. Other issues not addressed in these standards on minimum treatment of prisoners as applied to women included guidelines on the issues of pregnancy, childbirth, and post-natal care. The representative concluded by noting that many States would welcome guidelines on these issues.

33. Ms. O'Connor underlined the importance of the issue of women in prison and noted that the quality and type of care afforded to children with mothers in prison varied between States and in different regions within a given country. She observed that while historically there had been few women in prison, the rise in the number of women in prison had not seen a corresponding development in adequate prison facilities for women. She emphasized the role of economic factors in increasing the number of women in prison, noting that most of the crimes for which women were in prison were drug-related and that these crimes were largely motivated by lack of economic opportunities. She discussed how poverty had forced many women from developing countries into using their bodies to smuggle drugs and raised the problem of these women being arrested and imprisoned abroad, frequently at the borders of another State. She also noted the issue of rape of women prisoners, which went largely unpunished. Ms. O'Connor concluded that prison administrators needed to focus on how to better reintegrate women into society after their prison terms had been served.

34. Ms. Rakotoarisoa observed that, while all violations of the law must be punishable, special consideration should be given to women, particularly those with children. She highlighted the role of dignity of women in prison. In this respect, she mentioned the lack of care often afforded when a women is about to give birth in prison and recommended that pregnant women should only be imprisoned under exceptional circumstances; they should instead be subject to non-custodial measures. Ms. Rakotoarisoa also raised the issues of education for children with imprisoned parents so that these children would not become street children. She also underlined the importance of preparing women to reintegrate into society, including education relating to childcare. She concluded by observing that poverty could accentuate women's vulnerability and therefore their propensity to commit criminal acts.

35. The observer for Algeria said that in his country there were pardons and reductions of sentences on the day of national celebrations (8 March). He said that this year, these measures applied only to women, particularly to women with serious or incurable diseases, who were released immediately so that they could spend their remaining time with their families.

III. TRANSITIONAL JUSTICE

36. Mr. Tuñón Veilles introduced his informal paper on investigative mechanisms for truth and reconciliation in Latin America (Justicia de transición: mecanismos de averiguación de la verdad y reconciliación), which addressed transitional mechanisms established by States for truth and reconciliation, as well as efforts to combat impunity based on the experiences of

Latin American countries in the 1970s and 1980s. He referred to Mr. Louis Joinet's work in 1997 on the question of impunity ("Set of principles for the protection and promotion of human rights through action to combat impunity", contained in the annex to his report to the Sub-Commission, E/CN.4/Sub.2/1997/20/Rev.1), noting that the right to know was not just for victims and their families, but also a right to avoid future violations. Issues that arose in the truth and reconciliation commissions that were studied included the question of whether to publish the names of perpetrators, difficulties in assessing the functions of the commissions, and challenges in combating the public perception of impunity of perpetrators of human rights violations. Mr. Tuñón Veilles suggested the following as points for further consideration: the financial weakness of many of the truth and reconciliation commissions; the need for protection of witnesses; the time limits on penal action and the broader question of amnesties; the relationship between truth and reconciliation commissions and the domestic legal system, particularly making the commissions' findings available to regular criminal bodies for further action; the identification of victims through DNA, in particular the importance of having neutral forensic analysis; the issue of reparation and compensation for victims; and the question of the rights of families and victims to the truth.

37. The observer for Minnesota Advocates for Human Rights mentioned that the Office of the High Commissioner for Human Rights would be publishing "five tools" on transitional justice later this year, based on the different experiences in the field. She suggested that transitional justice be selected as a theme for next year's working group with working papers by a number of authors.

38. Mr. Decaux said that the informal paper of Mr. Tuñón Veilles was very interesting and referred to Commission on Human Rights resolution 2005/70 on human rights and transitional justice. He observed that purely compensatory schemes, which compensated victims and their families for wrongs suffered, were insufficient and impinged upon the right to the truth. He noted that the South African Truth and Reconciliation Commission had the power to grant amnesty in exchange for a full accounting of events by perpetrators of wrongful acts. He also noted difficult issues relating to the use of both domestic and international experts in truth and reconciliation commissions. He observed that, in El Salvador and Sierra Leone, it was sometimes difficult to strike the correct balance in the use of outside experts, who brought neutrality but also lacked familiarity with the national context. Mr. Decaux concluded by raising the issue of time limits normally governing such institutions, noting that work done by truth and reconciliation commissions sometimes was not completed and should be continued in some form by other institutions because otherwise the same issues would resurface years later. He asked whether any truth and reconciliation commissions had worked on the issue of writing a common version of history, particularly in the post-colonial context. He urged Mr. Tuñón Veilles to take into account the recent, very important experiences of other continents, notably in Africa.

39. Ms. Rakotoarisoa asked about the relationship between truth and reconciliation commissions and regular domestic judicial processes. She also suggested that there be a mechanism for providing compensation to victims when the perpetrators of crimes could not be identified.

40. Mr. Yokota underscored that the core issue was the relationship between truth and reconciliation commissions and the domestic justice system, including whether the findings of commissions could be used as a basis for domestic criminal prosecutions. He noted that amnesties for perpetrators of wrongful acts had been proposed in South Africa in the framework of a truth and reconciliation commission because victims had wanted the truth more than criminal prosecutions. He emphasized the importance of confrontations between victims and perpetrators as well as the threat of prosecution as a motivation for perpetrators to come forward and tell the truth in South Africa. He noted that other truth and reconciliation commissions had neglected the importance of the threat of prosecution as an incentive to testify and had instead only focused on a commission's ability to grant amnesty. He suggested that the mandate of truth and reconciliation commissions could be broadened to include medical care and financial compensation, which would be of particular importance to widows and their families. He concluded by asking what happened to a civil claim if a prosecution was dropped and how States or the international community could devise schemes to ensure that compensation for victims, particularly in cases where the perpetrators, frequently State agents of modest means, were unable to provide compensation, even if they were held civilly liable.

41. Ms. O'Connor asked about the circumstances that lead to the establishment of a truth and reconciliation commission. She noted that some of the same weaknesses that already existed in the administration of justice also seemed to be present in the truth and reconciliation commissions, for example, inadequate protection of witnesses.

42. Mr. Tuñón Veilles answered Mr. Yokota's question by saying that some truth and reconciliation commissions only undertook investigations, and so could not bring matters before the courts, while in other cases, they could. He agreed with Mr. Yokota that the most frequent demand from victims was for the truth. In response to Ms. O'Connor's question, he said that, in Argentina and Chile, the commissions were set up by executive decree and in some other contexts were established as part of a peace agreement. He mentioned that in Latin America, the military was often closely associated with political power, and had often influenced government action so that the full truth was not brought to light.

43. The observer for Argentina said that the discussion on transitional justice was relevant to information requested in Commission on Human Rights resolution 2005/66 on the right to truth, and that Mr. Tuñón Veilles' report had been very helpful.

44. Ms. Hampson observed that, in situations where the United Nations had intervened as the effective government, for example in Kosovo and Timor-Leste, transitional-justice issues were also relevant. In such situations, the question arose as to what law the United Nations should apply because the previous law had been the former State's law. This might consequently have had negative connotations for the population. She criticized efforts of the United Nations to use a model code of law unconnected to the territory in question when it was granted executive governmental authority, and said that the laws to be applied should come instead from the community.

45. The observer for the International Association of Democratic Lawyers spoke about the problem of impunity resulting from immunities granted during the truth and reconciliation process, in particular that officials who were perpetrators were sometimes redeployed in other

parts of Indonesia where they committed the same sort of human rights violations. She spoke about the difficulty, particularly for rape victims, of coming forward and then seeing that the perpetrators went unpunished.

46. Mr. Decaux raised concerns about transitional justice in a society emerging from a devastating conflict and underscored the importance of having a system of justice that could deal with emergencies and thereby prevent people from taking justice into their own hands.

47. The observer for Minnesota Advocates for Human Rights said it was important to understand the scope of transitional justice, from its beginning in peace agreements to its end in the development of new law enforcement and judicial institutions. She noted that these institutions were often set up too quickly to address human rights issues and that oversight mechanism and training on human rights should accompany the establishment of these new institutions.

IV. THE RIGHT TO AN EFFECTIVE REMEDY

48. Mr. Cherif opened the discussion with a presentation of his working paper on the right to an effective remedy in criminal proceedings (E/CN.4/Sub.2/2005/13). He noted the issue's relevance in both situations of armed conflict and during periods of peace. He said that the right to an effective remedy was one of the most fundamental principles of the rule of law. He further observed that the right to go before a court and the right to reparation for a person who had suffered a loss could only be realized through a third right: the right to information. People needed to be informed of their right to a remedy so that they could benefit from it, including regional and international rights to a remedy if the efforts to obtain a remedy at the national level had been exhausted. Mr. Cherif recalled that the Sub-Commission had already done a study on the right to a fair trial and mentioned Sub-Commission resolution 1991/15 that called on States to adopt a procedure similar to habeas corpus. He said that all people should benefit from this right at all times, including during a state of emergency and suggested that a third optional protocol to the International Covenant on Civil and Political Rights (ICCPR) on the issue of a fair trial, including such procedures, would be useful.

49. Mr. Decaux noted that this was a very useful study on a difficult subject, in particular within the Sub-Commission. He observed that the subject of a third optional protocol to ICCPR had been under discussion at length many years ago. He noted that the Human Rights Committee had reacted negatively to the proposal of a third optional protocol because it preferred to let the jurisprudence on the issue develop and because it also feared that the ratification process for a third optional protocol would give States the possibility of opting out of the right. He discussed how the right was dealt with by the European Convention on Human Rights in its article 13 and by the European Court of Human Rights, which had recognized a right of redress following an arbitrary arrest, on the basis of article 5.

50. Ms. O'Connor said that she would not support the elaboration of a third optional protocol. She noted that, in Latin American and Caribbean countries, there had been an evolution in the understanding about the rights of persons arrested or detained, including the creation of legal aid programmes that assisted indigent defendants and the development of

non-custodial measures in criminal sentencing. She further observed the economic difficulties in realizing the implementation of an optional protocol, noting that even though there was a possibility of successfully arguing a civil case against the Government for arbitrary arrest in certain countries in the region, payment was problematic; even where a right to compensation existed, meagre government resources frequently meant that one could wait several years before receiving compensation for an illegal detention. Consequently, Governments have been focusing on preventive measures to avoid arbitrary arrests by providing police with training on human rights standards for arrest and detention.

51. Ms. Hampson noted the need for conceptual clarity between violations of human rights and the right to a remedy, stating that human rights violations by a State or State agents gave rise to a right to redress under human rights law. However, if there had been a wrongful act by a non-State actor causing harm to a victim, there would be no human rights violation, but if the State failed to take effective measures, there would be a right to a remedy in relation to that failure. She emphasized the importance of examining the right to a remedy in the framework of domestic law. She argued that the right to a remedy for violations of human rights by the State was already in the human rights treaties, for example as in article 2, paragraph 3 of ICCPR, and therefore there was no need for an additional optional protocol.

52. Mr. Cherif acknowledged Mr. Decaux's comments about previous discussions relating to the desirability of elaborating a third optional protocol. He agreed with Ms. O'Connor on the importance of human rights education. He also indicated his agreement with Ms. Hampson's analysis regarding the right to remedy for human rights violations by the State.

53. Ms. Hampson introduced her working paper on an effective remedy in civil matters against violations of human rights (E/CN.4/Sub.2/2004/15). She used the example of torture to demonstrate the difference between theoretical rights, which included the human rights treaties ratified by States, and actual rights, which were determined by practice in the domestic legal system. She noted that human rights bodies could far more easily analyse laws passed by States than assess actual implementation in the framework of remedial procedures. She said that a victim of torture seeking redress could first submit a complaint to the police or prosecutor, which should then trigger an investigation and charges against the suspected perpetrators. The victim could also seek civil redress. Ms. Hampson focused on what happened in practice and said that frequently no investigation was undertaken or that if undertaken, the investigation was inadequate and no charges or only minor charges were brought. This led to her conclusion that torture occurred because State officials knew that they could get away with it. She observed the interrelationship between international and domestic law, noting that, for the international system to be subsidiary, it was necessary for domestic remedial systems to work. If the right to a remedy was not respected in practice, an international mechanism became the remedy of first, rather than last, resort. She also noted the regional jurisprudence establishing the characteristics of effective domestic remedies and thorough and independent investigations. In order to help human rights treaty bodies operationalize the right to a remedy, NGOs needed to submit information not only on the primary human rights violations, but also on the operation in practice of domestic remedies in relation to the violations. She proposed that the human rights treaty bodies should be contacted and asked for comments on the usefulness of further work in this area.

54. Mr. Decaux observed the importance of adhering to established procedures and argued that working papers should go from the working group to the Sub-Commission before being sent to other parts of the United Nations system. He noted the benefits of broad consultations, particularly from ombudsmen and national human rights commissions that had experience in this field. This could lead to the identification of best practices on the right to a remedy, including information on alternative dispute resolution procedures.

55. Mr. Alfonso Martínez referred to the suggestion made by Ms. Hampson and noted that superior bodies such as the Commission could ask for the Sub-Commission to do studies, but expressed reluctance about treaty bodies beginning to treat the Sub-Commission as a sub-council to the treaty bodies. He suggested that any studies done in relation to the treaty bodies should be done in consultation with them.

56. The observer for Minnesota Advocates for Human Rights noted the conflict of interest for a non-governmental organization on the issue of confidentiality. This was particularly true when the victim's desire for confidentiality in pursuing a claim was inconsistent with a non-governmental organization's view that publicity would be the best strategy to bring pressure to bear on the State to adequately investigate and provide a remedy for human rights violations by State agents.

57. Ms. Hampson underscored that the working paper focused on what happened in practice, not on theoretical remedies. She noted the difficulty of deciding when a paper was sufficiently complete to begin asking for comments and suggestions from other bodies. She also noted the likely utility of the views of human rights treaty bodies on whether further work should be done on the issue of remedies. She said that, for serious human rights violations, confidential proceedings were not appropriate and gave the example of the European Court of Human Rights decision to continue with a case, despite the applicant's disapproval, because of the importance of the issue raised. She also suggested the possibility of merging her working paper with that of Mr. Cherif.

58. Ms. Motoc stated that, given time limitations, it would be more practical to proceed with Ms. Hampson's request to contact the human rights treaty bodies and seek their views on the advisability of further work in this area. The Chairperson-Rapporteur then indicated that other issues relating to administration of justice generally could be addressed in the time remaining to the working group.

59. The observer for the World Peace Council noted that many States today have adopted anti-terrorism laws that can be applied to a broad number of situations and gave the example of indigenous peoples being prosecuted under the counter-terrorism law of Chile. He suggested that studies should be prepared in the light of contemporary practices and noted the anti-terrorism measures recently taken by the London Metropolitan Police.

60. The observer for Interfaith International spoke about the lack of justice in countries with totalitarian regimes and mentioned the examples of Cambodia and the Soviet Union. She also talked about China and mentioned nine commentaries about a reign of terror and large loss of life resulting from persecution of those who did not conform with the official ideology there.

61. The observer for the Worldwide Organization for Women referred to discrimination in the laws of the Islamic Republic of Iran and posed the question of the administration of justice in the context of unjust laws that had been legally adopted. He spoke about the discrimination in law against women in the Islamic Republic of Iran, including that girls could be punished at the age of 9 whereas for boys the age was 15, that two women were only as effective as one man as witnesses, and stoning was a form of punishment. He commented on the futility of the rule of law when the law was unjust and caused severe pain. He requested that the working group or the Sub-Commission address these issues.

62. An observer for Interfaith International told about a family member who was in jail in China for practising Falon Gung. She mentioned other cases of family members in danger and said that there was no freedom or justice in China, and that lawyers did not help because of their fear of being put in jail. She asked for an investigation of Chinese prisons, forced labour camps, and mental hospitals.

63. The observer for Minnesota Advocates for Human Rights suggested that non-governmental organizations participating in the working group would benefit from having documentation about how individuals could pursue a complaint within the United Nations system.

64. An observer for Interfaith International talked about the difficulty of bringing perpetrators of atrocities to justice in the northern part of Sri Lanka. She said that soldier perpetrators succeeded in having their cases transferred to more sympathetic areas of the country. She noted that, as there was no regional mechanism for human rights protection in Asia, international scrutiny was very important in cases where impunity existed at the national level.

65. Ms. Hampson observed striking similarities between the problems and cases brought before the Sub-Commission. She said that the issues referred to by the NGO representative describing Sri Lanka are similar to information she had received about a situation in a European country. She said that civil compensation was never enough to remedy a violation in cases of torture, wrongful killings or disappearances. She also argued that there was a structural problem in asking a security official to investigate allegations of wrongful killings or violence by security forces because, first, there was a lack of independence in the investigation and, second, there was a tendency for any group to close ranks behind its members. Ms. Hampson observed that it was important not only to receive complaints but also to follow up on remedial actions, an area for which NGO cooperation is essential. She noted that NGOs were also good at identifying why the remedial mechanisms put in place by a State did not work and emphasized the importance, even in crisis situations, of investigating complaints against State actors with the same thoroughness as against non-State actors.

66. The observer for Migrant Rights International spoke of an absence of administration of justice concerning migrants along the United States of America-Mexico border. She used the example of a migrant who had covertly entered the United States through the desert and who was subsequently detained and suffered physical abuse by civilian border vigilantes prior to being turned over to United States border police for deportation. She said that 900 cases of

abuse by border vigilantes had been documented, but that they were not normally subject to prosecution because United States authorities turned a blind eye to this type of violation. She said that abuses were also committed against Mexican-Americans and Mexicans legally in the United States, and that, even in cases where the police had investigated the abuses, prosecutors generally did not take appropriate action. She concluded by criticizing some United States officials for indicating support for the activities of these civilian vigilantes.

V. PROVISIONAL AGENDA FOR THE NEXT SESSION

67. The Chairperson-Rapporteur proposed that contributions on the subject of transitional justice could, for example, include contributions from experts and other participants in the working group who had knowledge of the situation in one or more specific regions, or who had expertise on particular transitional justice bodies, be they national, hybrid or international, or who had experience with specific issues that had arisen in different contexts. She also suggested the possibility of contacting NGOs and academics who work in this area so they could make contributions at the working group's next session.

68. Mr. Decaux suggested that information from national truth and reconciliation commissions would also be very useful.

69. Ms. Hampson suggested that papers submitted by NGOs should also be sponsored by a member of the working group. She said that she and Mr. Cherif would do a joint paper on the right to an effective remedy in human rights law for next year. She further requested that human rights treaty bodies not yet contacted in reference to the subject matter of this working paper be sent requests for their views, and that any replies should be directed to Ms. Hampson and Mr. Cherif prior to the next session of the working group.

70. The observer for the South Asia Human Rights Documentation Center said that documentation prepared by the United Nations on the subject of transitional justice would be useful as background information.

71. In response to a suggestion by the observer for Minnesota Advocates for Human Rights, the Chairperson-Rapporteur requested the Office of the United Nations High Commissioner for Human Rights to make a presentation to the working group's next session on the work of the United Nations in the field of transitional justice, including on the publications that OHCHR has been developing in this area. She further requested OHCHR to prepare a compilation of pertinent United Nations documents on the subject of transitional justice. She indicated that the working group would welcome any suggestions relating to what issues required further research and analysis, particularly as experts in the working group planned to prepare papers on transitional justice in the future.

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

1. Election of officers.

2. Adoption of the report.

3. Transitional justice.

4. The right to an effective remedy.

5. Other matters.

6. Provisional agenda for the next session.

7. Adoption of the report.

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

73. On 8 August 2005, the working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request that the Sub-Commission allocate two full meetings of three hours each, plus an additional meeting of one hour for adoption of the report, during its 2006 session.
