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Review of Developments at the 48th Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities

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Part C: Appendices

Appendix I: Review of Developments at the 48th Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

David Weissbrodt* and Sosamma Samuel**

I Introduction

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities convened its 48th Session from 5 August through 30 August 1996, in Geneva, Switzerland.¹ The UN Commission on Human Rights is the parent body of the Sub-Commission and elects the Sub-Commission's 26 members to staggered four-year terms. Members are nominated by governments from various regions, but do not represent their governments. The Sub-Commission membership includes seven individuals from Africa, five from Latin America, five from Asia, three from Eastern Europe, and six from the 'Western Europe and Other' regions (including the United States).

Since its origin in 1947, the Sub-Commission has had many accomplishments in (1) drafting standards, (2) recommending new implementation procedures, (3) encouraging the UN to focus on country situations, (4) providing a forum for vulnerable groups, (5) initiating useful studies of human rights issues, and (6) offering access to the creative ideas of Non-Governmental Organisations. Despite these accomplishments, the Sub-Commission's parent body has insisted upon the need for significant reform. The Sub-Commission has recognised this need and has begun to respond to the Commission's requests for reform.²

II Standard-Setting

In its nearly 50 years, the Sub-Commission has helped to draft several of the most important treaties and other instruments which underlie all UN efforts to protect human rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration and Convention on the Elimination of All Forms of Racial Discrimination, the Body of Principles on the Treatment of Detainees, and the Declaration on the Protection of All Persons from Enforced Disappearances. The Sub-Commission's standard-setting efforts have been some of its most significant

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¹ See Quaker United Nations Office – Geneva, *Report on the 48th Sub-Commission on Prevention of Discrimination and Protection of Minorities (5-30 August 1996)*; International Service for Human Rights, *UN Sub-Commission, 48th Session, Geneva, 5-30 August 1996, List of Resolutions & Decisions* (September 1996); David Weissbrodt and Jennifer Prestholdt, *1995 Developments at the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, NQHR, Vol. 13, No. 4, 1995, pp. 481-490; David Weissbrodt and Wendy Mahling, 'Highlights of the Forty-Sixth Session of the UN Sub-Commission', *Civ. Liberties Rep.*, 1995, No. 5.

² See CHR Resolution 1992/66, UN Doc. E/CN.4/1992/84, 1992.

contributions to human rights work. But those efforts have reached certain limits. Partially due to the efforts of the Sub-Commission, international human rights has become the most thoroughly codified domain of international law. Now that so many treaties and other instruments have been promulgated, however, there is far less need for such standard-setting, except in narrow or less important areas. Indeed, the Commission on Human Rights is already overloaded with standard-setting work such that it will not for some time be able to absorb more proposals from the Sub-Commission.

At the 1996 session the Sub-Commission had before it several draft standards prepared by Sub-Commission members on (1) the right to reparations for victims of gross violations of human rights and humanitarian law, (2) protection of the cultural and intellectual property of indigenous peoples, (3) a draft Convention on the Protection of All Persons from Enforced Disappearances, and (4) impunity of perpetrators of violations of human rights (civil and political, as well as economic, social, and cultural).³ While the Sub-Commission considered that it had completed its standard-setting work on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, and on the protection of the heritage of indigenous people, the Sub-Commission wisely abstained from transmitting those documents to the Commission in such a way as to compel immediate Commission consideration. Instead of continuing to generate new standards, the Sub-Commission should focus on the implementation of existing standards.

III Implementation Procedures

The Sub-Commission played an important role in proposing the first of the Commission's thematic procedures, the Working Group on Enforced or Involuntary Disappearances. The Sub-Commission also recommended the Commission's Working Group on Arbitrary Detention, as well as its Special Rapporteur on the Independence and Impartiality of the Judiciary, Jurors and Assessors and Independence of Lawyers. Such thematic procedures are the most effective and relatively even-handed implementation techniques available to the Commission. The Commission, however, has now established 14 thematic procedures and lacks the staffing and capacity to review the work of more thematic procedures. The Sub-Commission needs to consider the consequences of adding more to a monitoring system which is understaffed and overloaded.

At its 48th session the Sub-Commission considered a proposal to establish a new thematic working group on transnational corporations and human rights.⁴ Such a proposal would have overlapped with several of the existing thematic procedures, including the Working Group on the Right to Development and the Special Rapporteur on Toxic Wastes. It would also have taken resources and attention from the existing procedures. In fact, some of its advocates acknowledged that this proposal might have endangered the renewal of other working groups, including the Sub-Commission's own Working Group on Minorities or the Commission's Working Group on Arbitrary Detention. At the last moment the Sub-Commission made a wise decision to recommend that the Commission only consider establishing the new Working Group, but not to transmit a proposal which would have required a decision from the Commission.

³ These draft standards are discussed in later sections of the article.

⁴ UN Doc. E/CN.4/Sub.2/1996/L.47, 1996.

The Sub-Commission needs to assess the consequences of proposing further thematic procedures in the light of available resources and in view of the Commission's limited capacity to review so many thematic reports. Although transnational corporations deserve greater attention because of the important implications – both affirmative and negative – they may have for the enjoyment of human rights, the Sub-Commission has not adequately studied this issue. Therefore, it may be more sensible for the Sub-Commission to consider the preparation of a study on the implications of the activities of transnational corporations with regard to human rights, rather than making overly ambitious proposals for new thematic working groups to the Commission.

At the 48th Session, the Sub-Commission also discussed another aspect of the thematic procedures – the idea of preparing a tabular summary of the information provided in the present 14 thematic reports. The Sub-Commission considered a draft resolution that would have requested two Sub-Commission members to prepare such a tabular summary which would have revealed those countries in which several thematic rapporteurs had found serious human rights violations.⁵ For example, the tabular summary might have shown that a particular country had been criticised for engaging in torture, summary executions, disappearances, arbitrary detention, violations of free expression, and other violations within the mandates of thematic rapporteurs. Such a summary would have helped the Commission and the Sub-Commission to decide which countries deserve particular scrutiny under its review of country situations.

Although such a tabular analysis does suffer from several methodological problems, it would still be an important tool in assisting both the Sub-Commission and the Commission. The proposal, however, received criticism, largely by members who were concerned that their governments might appear frequently and unfavourably in such a tabular display. Because of the opposition which the draft resolution generated, it was withdrawn by the sponsors before any vote could be taken. Since the proposal relied upon materials which are publicly available, the idea of a tabular summary may still be pursued by an individual member of the Sub-Commission or by an NGO. Certainly, such a tabular report could contribute to the Sub-Commission's and the Commission's consideration of country situations.

IV Review of Country Situations

A. 1235 Public Procedure

About 20 years ago it was impossible for either governments or NGOs even to mention a specific country in debate – much less to adopt a resolution expressing concern. There were a few countries, however, South Africa and Israel, which received regular UN criticism. The Sub-Commission led the effort to broaden the number of countries about which the UN could express serious attention. The Sub-Commission began to encourage more open debates in which countries were specifically identified in public sessions and later to adopt resolutions about violations in particular countries. The Sub-Commission was authorised to do so by the Commission on Human Rights in its Resolution 8 (XXIII)⁶ and the Commission's parent body, the Economic and Social Council (ECOSOC), in its

⁵ UN Doc. E/CN.4/Sub.2/1996/L.5, 1996; withdrawn on 19 August 1996.

⁶ CHR Resolution 8 (XXIII), UN Doc. E/CN.4/1967, 1967.

Resolution 1235.⁷ But the Commission on Human Rights has slowly accepted and has now largely eclipsed the Sub-Commission in taking action on many country situations.

As the first substantive item in the Sub-Commission's 48th session, under agenda item 6, various NGOs and a few government representatives presented information about human rights violations in many countries and regions including Albania, Algeria, Bangladesh (Chittagong Hill Tracts), Burundi, Canada, Chad, China (Tibet), Colombia, Former Yugoslavia, Indonesia (East Timor and South Moluccas), India (Jammu and Kashmir), Iran, Iraq, Japan, Liberia, Mexico, Morocco, Myanmar (Burma), Nigeria, Pakistan, Palestinian and other Arab Territories occupied by Israel, Papua New Guinea (Bougainville), Peru, Russian Federation (Chechnya), Rwanda, Sudan, Syria, Tanzania, Tunisia, Turkestan, Turkey, United States, Western Sahara, and Zaire. The Sub-Commission considered draft resolutions or decisions on the situations in Burundi,⁸ Chechnya,⁹ Colombia,¹⁰ Cyprus,¹¹ Guatemala,¹² Iran,¹³ Iraq,¹⁴ Kosovo,¹⁵ Middle East Peace Process,¹⁶ Palestinian and other Arab Territories occupied by Israel,¹⁷ Rwanda,¹⁸ and Turkey.¹⁹ Most of these resolutions, however, were repetitions of actions taken by the Commission or other bodies, and were often weakened by drafting and procedural problems.

The Sub-Commission adopted a resolution on Burundi without a vote, even though the Sub-Commission's resolution did not significantly contribute to the UN scrutiny of the situation in that country. In addition, Burundi had been the subject of a Commission resolution in April 1996,²⁰ and a much tougher resolution of the Committee on the Elimination of Racial Discrimination a few days earlier in August 1996.²¹ The Sub-Commission also adopted a resolution on violations in the Palestinian and other Arab Territories occupied by Israel, the Middle East Peace Process, and Rwanda even though those resolutions were repetitive of similar actions by the Commission.²² The resolutions

⁷ ESC Resolution 1235 (XLII), UN Doc. E/245/rev.1/42, 1967.

⁸ Sub-Commission Resolution 1996/4, UN Doc. E/CN.4/Sub.2/L.11, 1996; adopted without a vote on 19 August 1996.

⁹ Sub-Commission decision 1996/108, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; Chairman's statement, adopted without a vote on 21 August 1996.

¹⁰ UN Doc. E/CN.4/Sub.2/1996/L.13, 1996; withdrawn on 21 August 1996.

¹¹ Chairman's statement, adopted without a vote on 16 August 1996.

¹² Sub-Commission decision 1996/106, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; Chairman's statement adopted without a vote on 20 August 1996.

¹³ Sub-Commission Resolution 1996/7, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 12 in favour, 6 opposed, 6 abstaining on 20 August 1996.

¹⁴ Sub-Commission Resolution 1996/5, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 11 in favour, 6 opposed, 7 abstaining on 19 August 1996.

¹⁵ Sub-Commission Resolution 1996/2, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 15 in favour, 4 opposed, 5 abstaining on 19 August 1996.

¹⁶ Sub-Commission Resolution 1996/1, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 19 August 1996.

¹⁷ Sub-Commission Resolution 1996/6, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 15 in favour, 4 opposed, 5 abstaining on 20 August 1996.

¹⁸ Sub-Commission Resolution 1996/3, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 19 August 1996.

¹⁹ UN Doc. E/CN.4/Sub.2/1996/L.12, 1996; defeated by a vote of 9 in favour, 12 opposed, 3 abstaining on 20 August 1996.

²⁰ CHR Resolution 1996/1, UN Doc. E/CN.4/1996/L.11, 1996.

²¹ UN Doc. CERD/C/49/Misc.2/Rev.3, 1996.

²² See CHR Resolutions 1996/3, 1996/7, 1996/76, UN Doc. E/CN.4/1996/L.11, 1996.

on Iran and Iraq were adopted by a closer number of votes than in the previous year.²³ The resolutions' intemperate language, which had unfortunately been accepted from suggestions of opposition groups, caused the slimmer voting margin. A similar problem of intemperate language caused the resolution on Turkey to be defeated by a vote of 9 in favour, 12 against, and 3 abstaining. The resolution failed to acknowledge either the progress made by Turkey in dealing with some of its problems or adequately to reflect the endemic problems of torture, arbitrary killings, and other grave human rights problems in that country.

Three positive exceptions were the consensus actions on Cyprus and Guatemala as well as the Sub-Commission's decision on Chechnya. On 16 August, the Sub-Commission Chairman presented a statement deploring the violent clashes during demonstrations on 11 and 14 August in Cyprus. The statement expressed regret for the deaths of two Greek-Cypriot men and injury to many others as a result of Turkish armed Cypriot civilians being allowed to pass through the United Nations buffer zone where they clashed with demonstrators. The Chairman's statement, which was accepted without a vote, represented a timely and necessary response to an urgent and serious human rights situation.

Several Sub-Commission members, including Louis Joinet (Member from France), Miguel Alfonso-Martinez (Member from Cuba), and Alberto Díaz Uribe (alternate Member from Colombia) played helpful roles in facilitating a dialogue between the Government of Guatemala and the armed opposition, the Unidad Revolucionaria Nacional Guatemalteca (Guatemalan National Revolutionary Unit or URNG). During the Sub-Commission session on 14 August the Government undertook to disband the civil defense committees, which had been criticised for their involvement in human rights abuses. The Sub-Commission eventually accepted without a vote a Chairman's statement concerning the transition to peace in Guatemala. Both a representative of Guatemala and the URNG were given an opportunity to comment on the Sub-Commission decision, although a few members of the Sub-Commission indicated that giving an armed opposition group the right to speak should not be taken as a precedent for other situations.

On 21 August, just before the close of the day's session at 6:00 p.m., Halima Embarek Warzazi (Member from Morocco) proposed a draft decision regarding the humanitarian situation in Chechnya and in particular the ultimatum by the commander of the Russian forces that he would attack Grozny, the capital of Chechnya, on 22 August. With very little opportunity for discussion and no notice to the Russian delegation, the Sub-Commission adopted a decision by a vote of 17 in favour, 2 against, and 4 abstaining, regretting repeated violations of the Nazran Cease-fire Agreement of 10 June 1996; bearing in mind that an estimated 40,000 persons, mostly civilians, had been killed; and urgently calling for an immediate and lasting cessation of hostilities, other acts of violence, and violations of human rights. The Russian commander did not carry out the threatened attack on Grozny the next morning, because the Sub-Commission's appeal was joined by other, more influential leaders. Later a representative of the Russian Federation expressed regret that the Sub-Commission had not taken into account the efforts of the Government to achieve a peaceful solution to the conflict. While the Chechnya statement like the Cyprus statement was a timely response to a critical situation, it was encumbered by

²³ See Sub-Commission Resolution 1995/3 (adopted by a vote of 15 in favour, 5 opposed, 4 abstaining) and Resolution 1995/18 (adopted by a vote of 13 in favour, 7 opposed, 2 abstaining), UN Doc. E/CN.4/Sub.2/1995/51, 1995.

insufficient opportunity to consult, discuss, or receive response from the country delegation.

During the 48th Session, a number of Sub-Commission members noted that the Commission had criticised the Sub-Commission for needlessly repeating Commission actions on country situations. Indeed, most of the Sub-Commission's resolutions in 1996 related to countries under consideration by the Commission. In a path-breaking reform, however, the Sub-Commission decided that at its 1997 session, it would not take action in respect of human rights situations which the Commission is considering under the public procedures for dealing with human rights violations.²⁴ Accordingly, at the next session, the Sub-Commission will need to focus on newly arising country situations.

B. 1503 Confidential Procedure

In addition to the public consideration of violations for human rights in all countries, the Sub-Commission also recommended and later received in 1970 authority from the Commission and ECOSOC to review in confidential session communications revealing a consistent pattern of gross violations of human rights – particularly for those countries as to which it was politically difficult to adopt public resolutions. The confidential procedure, known by its authorising Resolution number 1503,²⁵ was initially intended to handle gross violations, that is, violations of the non-derogable rights identified in Article 4 of the Covenant on Civil and Political Rights, *e.g.* racial discrimination, torture, and arbitrary killing.²⁶

The 1503 procedure has had more than 25 years to develop a jurisprudence in regard to what constitutes a 'consistent pattern of gross and reliably attested violations of human rights.' There seems to be no present effort to develop a commonly accepted definition of that phrase. Instead, the Sub-Commission seems to apply an extremely vague and overly broad 'I know it when I see it' approach. A jurisprudence of interpretation can be discerned from the past and should be developed for the future – particularly from the decisions of the Commission as to which cases have been accepted and which have been dropped.

The Sub-Commission needs to give further attention to assuring that the substantive requirements of ECOSOC Resolution 1503 are fulfilled. As a first measure, the Sub-Commission should explain the reasons for its transmittal of communications under ECOSOC Resolution 1503. Accordingly, the Sub-Commission's Working Group on Communications should propose for adoption by the Sub-Commission what they consider to be (1) gross violations, (2) the consistent pattern, (3) how domestic exhaustion has been achieved or why it is excused, and generally (4) how the communication fits the receivability standard of Sub-Commission Resolution 1 and ECOSOC Resolution 1503. Such a brief explanation would facilitate the Commission's review of 1503 determinations and would begin the process of developing the needed jurisprudence.

²⁴ Sub-Commission decision 1996/115, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 19 in favour, 3 opposed, 2 abstaining on 29 August 1996.

²⁵ CHR Resolution 1503 (XLVII), UN Doc. E/245/rev.1/1970, 1970.

²⁶ These types of violations, however, are now better handled by the thematic procedures.

V Working Groups

The Sub-Commission has received authority to establish three inter-sessional working groups: the Working Group on Indigenous Populations, the Working Group on Minorities, and the Working Group on Contemporary Forms of Slavery; as well as one intra-sessional working group: the Working Group on Administration of Justice and the Question of Compensation. These working groups provide important fora to address issues facing vulnerable people and to implement human rights norms directly.

A. Working Group on Indigenous Populations

The Sub-Commission's Working Group on Indigenous Populations has been the most successful of the inter-sessional working groups. In 14 years, it has built a remarkable constituency with representatives of tribal and other indigenous communities from all parts of the world. The major accomplishment of the Working Group has been preparing a Draft Declaration on the Rights of Indigenous Peoples, which is now under consideration by the Commission on Human Rights. Having drafted the Declaration, the Working Group is facing the question of what it should do now. One consideration is how to better address the problems, grievances, and concerns expressed by indigenous representatives. The Working Group's open forum allows numerous oral interventions, but does not offer a true dialogue or way to alleviate the problems. The Working Group should work to develop a mechanism for mediating disputes with government representatives or at least encourage fruitful exchanges of views.

In 1996 the Working Group convened from 29 July through 2 August. The key issues at the Working Group included the concept of 'indigenous peoples' and whether a definition of 'indigenous' would be harmful or helpful to the protection of the rights of indigenous peoples. The Working Group also asked participants to discuss health and environmental issues, but relatively few participants were prepared to focus on those issues. Next year the Working Group will encourage participants to focus on the educational problems of indigenous peoples. The Working Group also recommended that its Chair Erica-Irene Daes (Member from Greece) undertake a study on the land rights of indigenous peoples; and as discussed below, the Sub-Commission accepted that recommendation.²⁷

In addition, the Working Group and attendees discussed the International Decade of the World's Indigenous People and how to establish a permanent forum for indigenous peoples within the UN system. Many indigenous communities have been pressing for a higher level 'Permanent Forum' which would give them greater representation. There has been much debate as to whether this type of Permanent Forum would replace the Working Group or render it less necessary. Some argue that the Permanent Forum should be considered as an additional body to address the concerns of indigenous peoples at perhaps the level of the Economic and Social Council. In any case, it is clear that the Working Group has generated a very active constituency among both indigenous communities and interested governments which must be accommodated within the UN system.

²⁷ Sub-Commission Resolution 1996/38, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

B. Working Group on Minorities

The Sub-Commission's Working Group on Minorities is nearly the only place within the UN system in which the problems of minorities are being addressed. These problems raise some of the most difficult issues facing the world community. Although the Working Group has only met for two years, Asbjørn Eide, Chairman of the Sub-Commission's 48th Session and Chairman of the Working Group, noted three elements to the body's mandate: to review the promotion and practical realisation of the Declaration on the Rights of Minorities; to examine possible solutions to problems involving minorities, including promotion of mutual understanding between minorities and governments; and to make recommendations for further protection, where appropriate, of persons belonging to minorities.²⁸ The Working Group stresses dialogue, understanding, tolerance, and peace.

The Working Group on Minorities convened its second session from 29 April through 3 May 1996. The Working Group hopes to pursue studies of relevant topics such as the assertion that affirmative action amounts to 'reverse discrimination', specific concerns of aliens, and multicultural and multilingual education. Some of the most interesting debate and challenges facing the Working Group include the rights of minorities to decide between assimilation and integration with majority populations; concentrating on the problems confronting minorities rather than on definitions of 'minority'; and determining means for peaceful resolution of problems while respecting the rights of States. Although still in its earliest stages, the Working Group on Minorities is making a unique contribution to the United Nations and the world community.

C. Working Group on Contemporary Forms of Slavery

The Sub-Commission's Working Group on Contemporary Forms of Slavery initially focused on problems of bonded labour in India and the remnants of slavery in such countries as Mauritania and Sudan. It has gradually broadened its purview. For example, in 1996, the Working Group convened from 17 through 26 June, and reviewed developments in the areas of suppression of the traffic of persons and the prostitution of others, illegal adoptions, traffic in human organs and tissues, bonded labour and child labour, forced labour, migrant workers, child prostitution, detained juveniles, early marriage, incest, sexual slavery during wartime, and violence against women.²⁹ While the Working Group considers poverty and ignorance to be the main causes of contemporary forms of slavery and calls on the coordinated efforts of the United Nations specialised agencies, in recent years the Working Group's recommendations have been unfocused and its efforts diffuse.

D. Working Group on Administration of Justice and the Question of Compensation

The intra-sessional Working Group on Administration of Justice and the Question of Compensation is currently addressing a number of issues: follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearances; *habeas corpus* as a non-derogable right (and as a requirement for the right to fair trial); guiding principles concerning the right to remedy for victims of gross violations of human rights

²⁸ See CHR Resolution 1995/24, UN Doc. E/CN.4/1995/176, 1995.

²⁹ See UN Doc. E/CN.4/Sub.2/1996/24, 1996.

and fundamental freedoms; capital punishment and extrajudicial executions; and juvenile justice. The Working Group made a major step in developing a draft convention regarding disappearances. Initial texts have been discussed, but the challenge is in developing a method for implementation of the convention.

Of particular significance at the 48th session, was Special Rapporteur Theo van Boven's study entitled 'The right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms'.³⁰ The Working Group considered Mr. van Boven's revised set of basic principles and guidelines on the right to reparations for victims of gross violations of human rights and humanitarian law. The Working Group referred the study and guidelines to the Sub-Commission and then to the Commission, but did not take any specific action on the matter. Given the complexity of the subject, some disagreement with the text from a few Sub-Commission members, and the unwillingness of many governments to accept the responsibility of reparations, it is unclear what will happen to Mr. van Boven's many years of work.

VI Studies

The Sub-Commission has over the years provided the Commission and the human rights community with many path-breaking studies of significant issues. Probably the best studies were done in the past on (1) religious intolerance, which ultimately resulted in the Declaration on Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief; (2) the right to leave and return; and (3) arbitrary detention and exile. More recently there have been useful studies on (4) minorities (which resulted in the establishment of the Working Group on Minorities), (5) fair trial (which brought together for lawyers and judges all the jurisprudence on that topic), (6) states of emergency (which provided an important updated resource on that serious problem), and (7) on economic, social, and cultural rights.

In the past these studies have received considerable support and assistance from the staff of the UN Centre for Human Rights. But in recent years, because of the new demands on the Centre from the treaty bodies, country rapporteurs, and thematic procedures, the studies have received less support and have, with some exceptions, decreased in quality. Also, the Sub-Commission has given so much attention to country situations and other topical issues, that the studies have received less scrutiny and have thus not really benefitted from thorough discussion. Accordingly, at the 48th session, the Sub-Commission adopted a decision that the Sub-Commission will not propose any new studies or reports, with the exception of working papers and studies or reports specifically recommended by a competent working group of the Sub-Commission.³¹ That decision marks the beginning of a process whereby the Sub-Commission can select topics for study which would really improve the understanding of human rights or improve implementation rather than respond to narrow personal interests of Sub-Commission members or particular NGOs. In addition, the Chairpersons of the six treaty bodies, at their annual meeting in September 1996, have already pointed to a second critical focus of new Sub-Commission

³⁰ UN Doc. E/CN.4/Sub.2/1993/8, 1993; UN Doc. E/CN.4/Sub.2/1996/17, 1996.

³¹ Sub-Commission decision 1996/113, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted by a vote of 19 in favour, 3 opposed, 2 abstaining on 29 August 1996.

studies, that is, assistance to the treaty bodies.³² By selecting studies suggested by the treaty bodies, both the Sub-Commission and other UN bodies benefit from more coordinated and necessary work.

There were, however, several studies presented at the 48th session that need mention.

A. Fields With Which The Sub-Commission Has Been Concerned

The Sub-Commission's decision not to initiate any new study that had not been recommended by a Working Group prevented the authorisation of a study on human rights and democracy. The Sub-Commission had received a working paper from Osman El-Hajjé (Member from Lebanon) proposing a full study on democracy as a human right. The Sub-Commission deferred the initiation of his study and instead asked Mr. El-Hajjé to prepare an expanded working paper on how democracy can help achieve other economic, social, cultural, civil, and political rights.³³

The Sub-Commission also authorised a working paper on human rights and terrorism to be prepared by Kalliopi K. Koufa (alternate Member from Greece).³⁴ While the resolution was proposed by Erica-Irene Daes, the issue of terrorism was a particular concern of several members, including those from Algeria and Colombia. Ms. Koufa's working paper should be an important first step in developing a thoughtful approach to this difficult and pervasive problem.

B. Practices Affecting Women

Two studies which focused on practices that predominantly affected women were also presented to the Sub-Commission's 48th Session. Under agenda item 4, Special Rapporteur Halima Embarek Warzazi (Member from Morocco) discussed the final report of her ten year study on traditional practices affecting the health of women and children.³⁵ Ms. Warzazi's study initially helped to encourage and has since marked the rise of an international movement to end female genital mutilation (FGM). Her final report was principally a catalogue of the materials she had received and the steps which had been taken, rather than an incisive analysis of the problem. Nonetheless, Ms. Warzazi's study has been a pioneering effort to protect the health of women and children. The Sub-Commission determined that the topic of traditional health practices should continue to be reviewed and linked to education and the efforts of other bodies. For example, the

³² The Chairpersons of the treaty bodies convened their seventh annual session during the week of 16-20 September 1996, in Geneva, Switzerland, to discuss common problems facing the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; and the Committee on the Rights of the Child. One of the conclusions and recommendations of the Chairpersons in their report, which was agreed upon on 20 September 1996, and published on 11 October 1996, was the following: 'The Chairpersons recommended that, where appropriate, the treaty bodies take a more active role in supporting, suggesting topics for, and cooperating in the preparation of studies by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as the special rapporteurs ...' (UN Doc. A/51/482, paragraph 53, 1996).

³³ Sub-Commission decision 1996/117, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

³⁴ Sub-Commission Resolution 1996/20, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

³⁵ UN Doc. E/CN.4/Sub.2/1996/6, 1996.

Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women have both implemented the Beijing Declaration provision against FGM and have the capacity to make a significant contribution toward ending traditional practices affecting the health of women and children, particularly girl-children. The Sub-Commission decided to ask Ms. Warzazi to continue monitoring developments in this field.³⁶

In addition, under agenda item 15 on contemporary forms of slavery, Special Rapporteur Linda Chavez (former Member from the US) submitted her study on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, including internal conflict.³⁷ The preliminary report provided a historical overview of the use of rape as an instrument of policy; detailed the existing norms in international human rights and humanitarian law; explored issues of responsibility and liability; and described possible sanctions against violations and possible forms of reparation. The Sub-Commission asked that the final report on this study be submitted at the 49th Session, which will permit Ms. Chavez to inquire further as to how those standards can be disseminated broadly, used to prevent further violations, applied to past misconduct, and invoked to provide remedies for victims.³⁸ The preliminary report created a great deal of discussion, especially regarding the Japanese army's use of 'comfort women' during World War II. The Japanese Government has encouraged the establishment of a private fund to provide monetary compensation for the surviving victims. While the Japanese Government's efforts are a positive step toward acknowledging those violations, several participants in the Sub-Commission session indicated that such compensation should not be interpreted as limiting or impairing any of the legal claims of the victims.

C. Economic, Social, and Cultural Rights

Under agenda item 8 on the realisation of economic, social and cultural rights, Special Rapporteur Leandro Despouy (former Member from Argentina) presented the final report on his study of extreme poverty;³⁹ Special Rapporteur Jose Bengoa (Member from Chile) presented the provisional report of his study on income distribution;⁴⁰ and Special Rapporteur El-Hadji Guissé (Member from Senegal) presented the second interim report of his study on impunity of perpetrators of violations of economic, social, and cultural rights.⁴¹ Both Mr. Despouy's and Mr. Bengoa's reports focused on the problem of increasing economic disparities between and among developing and industrialised countries. The Special Rapporteurs discussed the growth of poverty and provided statistics demonstrating that increasing inequality and economic imbalance constitute some of the greatest concerns facing the international community. While Mr. Despouy's and Mr. Bengoa's studies are thoughtful and comprehensive, Sub-Commission members urged that future work in these areas go one step further. Not only should studies provide statistics,

³⁶ Sub-Commission Resolution 1996/19, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

³⁷ UN Doc. E/CN.4/Sub.2/1996/26, 1996.

³⁸ Sub-Commission Resolution 1996/11, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 23 August 1996.

³⁹ UN Doc. E/CN.4/Sub.2/1996/13, 1996.

⁴⁰ UN Doc. E/CN.4/Sub.2/1996/14, 1996.

⁴¹ UN Doc. E/CN.4/Sub.2/1996/15, 1996.

they must also disaggregate those statistics and findings by taking into account specific factors and impacts based on gender, age, and racial or minority status.

All studies of poverty and economic disparity, both on a national and international level, should look more closely at the groups most affected by poverty and economic disparity – specifically women, children, elderly, and minorities. Women are the overwhelming victims of poverty and economic disparity, and face multi-layered challenges. In addition, groups caught at the intersection of race and poverty (those facing racial discrimination compounded by economic strife and social isolation) are more susceptible to suffering and least likely to overcome their particularly severe situations of poverty and disparity.

Similarly, Mr. Guissé's study on impunity also has substantial implications for vulnerable groups. Without a means to redress the wrongs suffered by women and minorities, in particular, the ability to exercise their rights is limited, if not altogether extinguished. Mr. Guissé will continue preparing his study and will analyse the need for an optional protocol to the Covenant on Economic, Social and Cultural Rights relating to impunity.

D. Administration of Justice

Under agenda item 10 on the administration of justice and the human rights of detainees, two significant studies were presented. First, Special Rapporteur Louis Joinet (Member from France) submitted his 'final' report on the question of impunity of perpetrators of violations of civil and political rights.⁴² Mr. Joinet's submission included a Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. He noted that the right to know, the right to justice, and the right to reparation comprise the basic principles which are the basis for combating impunity. Mr. Joinet indicated that he needed another year to finish his study and, in particular, to complete the Principles. The Sub-Commission requested that he complete the work by the 49th session in 1997.⁴³

Second, the Sub-Commission asked for the compilation, updating, and prompt publication of its previous study entitled 'The right to a fair trial: current recognition and measures necessary for its strengthening'. The Sub-Commission's resolution was co-sponsored by nearly every member and was adopted by consensus. It called for the publication of the study's comprehensive review of the fair trial jurisprudence of the Human Rights Committee, other treaty bodies, the Inter-American Court of and Commission on Human Rights, the European Court and Commission of Human Rights, the African Commission on Human and Peoples' Rights, and other international bodies.⁴⁴ Indeed, publication of the study had already been authorised by the Commission and ECOSOC, and the Sub-Commission was anxious that it appear in the United Nations Human Rights Study Series.

The Sub-Commission and the Commission had in previous years discussed the idea of a third optional protocol to the International Covenant on Civil and Political Rights

⁴² UN Doc. E/CN.4/Sub.2/1996/18, 1996.

⁴³ Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

⁴⁴ Sub-Commission Resolution 1996/29, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

guaranteeing the right to a fair trial even during periods of emergency. But the Sub-Commission in its 1996 Resolution did not pursue that idea further. Instead, in an entirely separate action, the Working Group on the Administration of Justice and the Question of Compensation asked one Sub-Commission member to prepare a communication to the Human Rights Committee suggesting that the Committee revise and re-issue its General Comment on Article 4 of the Civil and Political Covenant to reaffirm that *habeas corpus*, the right to a remedy, and the right to a fair trial are non-derogable.

E. Rights of Indigenous Peoples

Under agenda item 14 on discrimination against indigenous peoples, important strides were made in the protection of cultural and intellectual property of indigenous people as well as indigenous land rights. At the 48th session, Special Rapporteur Erica-Irene Daes provided an expanded version of her study on measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples.⁴⁵ Ms. Daes' supplementary report elaborated draft principles and guidelines for the protection of the heritage of indigenous people. The Sub-Commission asked that Ms. Daes be given a continuing mandate to exchange information and participate in a technical meeting with the World Intellectual Property Organization, UNESCO, the World Trade Organization, and other agencies concerning her draft principles and guidelines.⁴⁶

Further, acknowledging that many of the human rights problems faced by indigenous people are linked to the historical and continuing deprivation of ancestral rights over lands and resources, and recognising the spiritual, cultural, social, and economic relationship that indigenous people have to their environment, the Sub-Commission recommended that Ms. Daes also be appointed as Special Rapporteur to conduct a comprehensive study on the problem of recognition of and respect for indigenous land rights.⁴⁷ Both the cultural property and land rights topics were of substantial concern and debate during the Working Group on Indigenous Populations. Ms. Daes' study, as proposed by the Working Group on Indigenous Populations, was the only new study authorised by the Sub-Commission during the 1996 session.⁴⁸

VII Access to NGOs

Many of the Sub-Commission's achievements over the years have been made because of the urging and effort of NGOs. Although many of the NGOs at both the Commission and Sub-Commission simply attend the sessions to watch or to make statements (largely intended for their own constituencies), some have learned how to make their views really useful. And, in the past NGOs have given the Sub-Commission keen support. In fact, it

⁴⁵ UN Doc. E/CN.4/Sub.2/1996/22, 1996.

⁴⁶ Sub-Commission Resolution 1996/37, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

⁴⁷ Sub-Commission Resolution 1996/38, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

⁴⁸ Working papers without financial implications were authorised on the topics of human rights and democracy, terrorism and human rights, recognition of gross and massive violations of human rights as an international crime, human rights and scientific and technological developments, and freedom of movement. In addition to the studies mentioned in the text, studies were continued on states of emergency, indigenous treaties, and population transfers.

was the NGOs that saved the Sub-Commission from extinction in 1986. In response to the Secretariat's decision not to hold a Sub-Commission session that year due to lack of funds, the NGOs convened a special informal session that summer to demand that the Sub-Commission continue.

The Sub-Commission is far more accessible than the Commission to the ideas and advocacy of NGOs. The 48th Session reiterated the important role NGOs can play in providing constructive assistance to the Sub-Commission's efforts. But, NGOs must do more than merely attend sessions or make statements. To be useful, NGOs must concentrate on being a significant source of information, opinion, and analysis. NGOs represent a wide variety of interests and regions, and have the ability to reach and educate numerous groups. In addition, NGOs can directly assist the Sub-Commission by providing analyses of country situations. NGOs have been and can continue to be helpful in recommending resolutions and other actions. In that regard NGOs must, however, try to ensure the quality and accuracy of their input. The draft resolution on Turkey previously discussed was a casualty of improper drafting and inaccurate substance which reflected negatively on the NGOs that helped draft it and also on the Sub-Commission which could not adopt appropriate measures.

The Sub-Commission needs to work with NGOs to develop a new paradigm for NGO contributions at both the Commission and the Sub-Commission. As the number of NGOs grows and the relevance of their oral interventions decline, NGOs, the Sub-Commission, and Commission must consider whether there might be ways for the NGOs to have earlier, more direct, and more effective input for the decision-making role of those bodies. And at the same time, there should be careful discussion of better ways for NGOs views to be heard other than through the numerous speeches which primarily benefit the NGO membership and constituency rather than the Sub-Commission or Commission participants. New thinking must focus on how to make the NGO contribution more meaningful to the Sub-Commission's human rights work.

VIII Reform Efforts

The Sub-Commission has since its inception been the subject of criticism from the Commission on Human Rights and governments. Governments have never been entirely satisfied by the idea that Sub-Commission members are at least nominally independent of their governments. In its early days the Sub-Commission attempted to define the concept of 'minority' and so alienated the Commission that it was temporarily disbanded – only to be reinstituted at the insistence of the General Assembly. Historically, the United States Government has been one of the Sub-Commission's most visible critics.⁴⁹ For example, US Ambassador Morris Abram, who had been a member of the Sub-Commission in its early days, returned in the early 1990's to call the Sub-Commission 'a train out of control'.⁵⁰ The US Government at the Economic and Social Council in 1995 tried unsuccessfully to get the Sub-Commission to meet every other year, which would have effectively undermined its effectiveness and would probably have led to its abolition.

⁴⁹ See Asbjørn Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities', in: Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford, 1992.

⁵⁰ See Morris Abram, 'Human Rights and the United Nations: Past as Prologue', 4 *Harvard Human Rights Journal*, 70, 1991; *Sub-Commission must go, says U.S. Ambassador*, 1 On the Record 1 (23 July 1991).

A. Call for Reform

In the early 1990's the Commission called strenuously for the Sub-Commission to reform itself and the Sub-Commission produced its 1992 Guidelines which dealt principally with the development and pursuit of studies, but which attempted to limit country resolutions, and otherwise professionalise the body's work.⁵¹ The Commission welcomed the Guidelines and they have had some residual effect. But, the 1992 Guidelines were never considered mandatory and were not sufficiently severe in limiting tangential studies. Also, as time has passed, such reform has had less impact than expected.

In 1995, the Commission instructed the Sub-Commission to pursue further reform particularly in avoiding duplication of the Commission's work on country situations, but also on revising its agenda, working methods, and studies.⁵² The Sub-Commission in 1996 did not take the criticisms sufficiently to heart, but nonetheless it decided (1) to avoid taking action on any country which was under consideration by the Commission at its previous session; (2) to avoid new studies unless recommended by one of the working groups; (3) to review its rules, guidelines, and procedures;⁵³ (4) to examine alternative methods of organising its sessions;⁵⁴ and (5) to revise and rationalise its agenda. Indeed, as compared with the Commission, the Sub-Commission has been far more successful in reforming its work and agenda.

B. Further Recommendations

Nonetheless, more Sub-Commission reform needs to be accomplished. The reforms of 1992 and 1996 need to be reconfirmed, reinforced, and made more permanent. In that regard, the Sub-Commission should consider the following recommendations for further reform:

- (1) The 1992 guidelines should be made mandatory, with the exception that the maximum number of studies should be reduced from 13 to a limit of about 6 or 8, unless the new studies are better focused, as indicated in recommendation 3 below.
- (2) The Sub-Commission should adopt a permanent restriction such that it will not adopt any resolution on a country as to which the Commission has adopted a resolution during the previous session.
- (3) The Sub-Commission should reaffirm its decision not to undertake new studies unless requested by one of the duly constituted working groups. Further efforts should be made to define the focus of Sub-Commission studies and to coordinate with those studies needed by the human rights treaty bodies. If such a focus could be developed, it would be less necessary to decrease the number of studies, because there would be some assurance that the studies would not be on overly diverse and marginal topics.
- (4) The Sub-Commission should adopt its revised provisional agenda and it should make further efforts to codify its working rules.

⁵¹ Sub-Commission Resolution 1992/8, UN Doc. E/CN.4/Sub.2/1992/2, 1992.

⁵² CHR Resolution 1995/26, UN Doc. E/CN.4/Sub.2/1995/176, 1995.

⁵³ Sub-Commission decision 1996/114, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

⁵⁴ Sub-Commission decision 1996/112, UN Doc. E/CN.4/Sub.2/1996/L.11, 1996; adopted without a vote on 29 August 1996.

- (5) The Sub-Commission should consider recommendations to the Commission as to how to reinforce the independence and expertise of its members in selection, election, and retention.
- (6) The Sub-Commission should give further thought as to how to improve the usefulness of NGOs' contributions – not only for the Sub-Commission's benefit, but because the Commission needs guidance in this area.

In addition to these recommendations, the resolution drafting and deliberative process of the Sub-Commission must also undergo reform. The Sub-Commission tries to accomplish almost as much in four weeks with 26 individuals as governments try to do in six weeks with large governmental delegations at the Commission. The result is that the quality of Sub-Commission deliberations and resolutions is lower than that of their counterparts in the Commission. Sub-Commission members lack time to undertake the careful consultations and drafting sessions which are the norm in Commission drafting of resolutions. Painfully slow consideration of resolutions and numerous redrafts and amendments during the Sub-Commission's formal sessions reflect this problem.

One way to deal with this problem would be for the Sub-Commission to organise its sessions for five or six weeks rather than the present four weeks. During that longer period, members could meet in formal session for part of the day, and utilise the other part of the day to read the mass of materials, consult with one another, and cooperatively prepare draft resolutions and decisions. As mentioned above, the Sub-Commission decided to examine alternative methods of organising its sessions, including financial implications. Although meeting for a longer period of time would require an increase in *per diem* payments to Sub-Commission members, it may actually decrease the overall cost since fewer hours would be required in formal meetings and debate over resolutions. Hence, the conference service cost might be reduced. In addition, efficient use of the daily meetings will ensure more focused, thorough, and constructive deliberations and decision-making.

IX Conclusion

The Sub-Commission has played a significant role in international human rights for nearly fifty years.⁵⁵ The Sub-Commission must now, however, carefully consider its purpose and justification. Although the Sub-Commission's greatest contributions have been in the areas of standard-setting and recommending implementation procedures, these objectives are largely outmoded. In today's context of numerous existing standards and insufficient resources, establishing further standards and new procedures is both inefficient and ineffective, and may even do harm to an already overwhelmed system. Instead, the Sub-Commission should focus its energies on (1) existing implementation procedures – particularly through the Sub-Commission's Working Groups, (2) helping the treaty bodies with studies they cannot themselves do, and (3) suggesting countries with urgent human rights problems which have not previously been the subject of adequate attention under the 1235 public procedure. The Sub-Commission must refocus its energies on these core objectives. Otherwise, the Sub-Commission may jeopardise its future, and in turn, place at risk its potentially important role in advancing human rights worldwide.

⁵⁵ The Sub-Commission will convene its forty-ninth session in August 1997.