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SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Fortieth session

SUMMARY RECORD OF THE 19th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 22 August 1988, at 10 a.m.

Chairman: Mr. BHANDARE
later: Mr. RIVAS POSADA

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The meeting was called to order at 10.15 a.m.

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES (agenda item 9) (continued):

(a) QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION AND IMPRISONMENT (E/CN.4/Sub.2/1988/13, E/CN.4/Sub.2/1988/14, E/CN.4/Sub.2/1988/15, E/CN.4/Sub.2/1988/16, E/CN.4/Sub.2/1988/NGO/10, E/CN.4/1988/15, E/CN.4/1988/17 and Add.1, E/CN.4/1988/22 and Add.1 and 2, E/CN.4/1988/NGO/51, E/CN.4/Sub.2/1987/15, E/CN.4/1987/16, E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2, and E/CN.4/Sub.2/1987/20)

(b) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY (E/CN.4/Sub.2/1988/18 and Add.1)

(c) INDIVIDUALIZATION OF PROSECUTION AND PENALTIES, AND REPERCUSSIONS OF VIOLATIONS OF HUMAN RIGHTS ON FAMILIES (E/CN.4/Sub.2/1988/19)

1. Mr. BOSSUYT, (Special Rapporteur) presenting his analysis concerning the proposition to elaborate a second optional procotol to the International Convenant on Political Rights aiming at the abolition of the death penalty (E/CN.4/Sub.2/1987/20), said that his study was the result of an initiative by the General Assembly, which had decided to examine the idea of elaborating such a protocol in 1980 (decision 35/437). In 1984, the Commission on Human Rights had invited the Sub-Commission to examine the idea and, in the same year, the Sub-Commission had proposed that he should be assigned to make the analysis. In 1985, the Economic and Social Council had adopted the Commission's recommendation to authorize the Sub-Commission to assign the task to him. It had not proved possible to submit the analysis in 1986, as planned, for the Sub-Commission had not held any meetings that year. Consequently, he had submitted it at the 1987 session, but the Russian version of the document had not been ready and the Sub-Commission had therefore preferred not to take a decision on the proposal to transmit the analysis to the Commission on Human Rights.

2. It should be said from the outset that the analysis was not a study of the various arguments for or against establishing the death penalty, but rather a far more limited investigation, as it was in fact an analysis of the opinions expressed either for or against the proposition to elaborate an optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. The death penalty was by no means a new item in the United Nations system. Consequently, the first part of his analysis described the work already done on the matter, by first of all examining the relevant travaux préparatoires for the Covenant, and particularly article 6, paragraph 6, which stated: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant". The report then went on to analyse the relevant activities of the Human Rights Committee. When they examined periodic reports by the States parties to the Covenant, the members of the Committee always raised questions concerning the situation in respect of the death penalty in the country concerned. Furthermore, in 1982 the Committee had adopted, by consensus, some General Comments on article 6 of the Covenant in which it noted that the article had referred to abolition in terms

which strongly suggested (paras. 2 and 6) that abolition was desirable. The Committee had concluded that all abolition measures should be considered as progress in the enjoyment of the right to life (loc. sit., para. 18).

3. The analysis (E/CN.4/Sub.2/1987/20) continued by examining the relevant provisions in other human rights instruments, in particular the Sixth Additional Protocol to the Council of Europe's European Convention on Human Rights, which had been adopted in 1982 and which had come into effect in 1985; article 4 of the American Convention on Human Rights of the Organization of American States; the jurisprudence of the Inter-American Court and the Inter-American Commission on Human Rights; the provisions of the 1949 Geneva Conventions and the two additional protocols adopted in 1977. Work done by the United Nations in connection with the death penalty included resolution 2857 (XXVI), adopted in 1971, in which the General Assembly had affirmed the desirability of abolishing the death penalty in all countries. Furthermore, the Economic and Social Council had invited the Secretary-General to present to the Council at five-year intervals periodic, updated and analytical reports on the situation, trends and safeguards concerning capital punishment in the world. According to information provided by Amnesty International, more and more States abolished the death penalty every year. Liechtenstein and the German Democratic Republic should also be added to the countries which had abolished the death penalty, as listed in paragraph 75 of the report.

4. The second part of the analysis (E/CN.4/Sub.2/1987/20) set out the views for and against the elaboration of a second optional protocol, as expressed by Governments in the Third Committee of the General Assembly and in the Commission on Human Rights. As requested, in his analysis he had taken care to set out the views of retentionist and abolitionist Governments separately. He had also analysed the comments made by various members of the Sub-Commission in 1984.

5. With regard to the draft second optional protocol submitted to the Sub-Commission, he had carefully examined the draft second optional protocol to the International Covenant on Civil and Political Rights that had been submitted by a number of countries at the thirty-fifth session of the General Assembly, in 1980, and had also taken into account the comments of Governments and information available from regional bodies.

6. The preambular part of his draft (loc. cit., para. 157) was very straightforward. It referred to article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights, and the third and fourth paragraphs reproduced the views expressed by the Human Rights Committee in 1982 in its General Comments on article 6 of the Covenant.

7. Article 1, which was by far the most important, would contain two paragraphs:

> "1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.
>
> 2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction."

8. The first of those provisions reflected the right of the individual, while the second reflected the obligations of the State party. The question had arisen as to whether it was necessary to provide for an exception in the case of crimes committed in wartime. Although such a provision had not been included in the draft submitted to the General Assembly in 1980, he had considered it desirable to incorporate one in his own draft in the form of a single reservation, in article 2. A number of States had abolished the death penalty in peacetime, but retained it in wartime. Consequently, he had sought to make the draft protocol acceptable to a greater number of States and to facilitate ratification. Furthermore, he had found that the majority of the countries which had submitted the initial draft at the General Assembly had, in 1982, within the framework of the Council of Europe, adopted the Sixth Additional Protocol to the European Convention on Human Rights, which afforded the possibility of making such a provision. However, that reservation had been couched in narrow terms, since it stipulated that the State party making the reservation would, at the time of ratification or accession, communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime and notify the Secretary-General of any beginning or ending of a state of war applicable to its territory.

9. The other articles, which were of a rather more technical nature, provided for application and verification measures through the presentation by States parties of reports to the Human Rights Committee, which was also empowered to receive communications concerning States or individuals. Those provisions were based on the terms of the International Covenant on Civil and Political Rights.

10. His conclusions (loc. cit., paras. 182-186) pointed out that his purpose had not been to press States to abolish capital punishment or to become parties to a second optional protocol. He had confined himself to taking note of the growing trend in the world towards abolition of the death penalty and to illustrating that the trend was in accord with the Covenant. Too often, there appeared to be some confusion between two issues, namely every State's ability to abolish hic et nunc the death penalty, and the desirability of adopting a second optional protocol to secure abolition of the death penalty. Yet examination of the comments by Governments revealed that a number of retentionist States were not opposed to the idea of elaborating a second optional protocol, whereas one State which had abolished the death penalty said that it felt unable to lend its support to the proposed protocol. Consequently, it was plainly possible to make a clear distinction between the two aspects of the issue.

11. The task he had been assigned in 1984 was to submit information to allow the Commission on Human Rights and the General Assembly to take an informed decision on the issue and on the basis of a legally acceptable draft text. He hoped that his analysis would be transmitted to the Commission on Human Rights so that it could be considered in 1989, i.e., five years after the original decision.

12. Mr. van BOVEN said that tribute should be paid to the Special Rapporteur, whose analysis of the elaboration of a second optional protocol with a view to abolishing the death penalty was the outcome of careful research. Without repeating arguments for or against the abolition of the death penalty which

had already been adduced in the Sub-Commission as well as other bodies, he would point out that the death penalty was a form of cruel and inhuman treatment and, consequently, he was fully in favour of doing away with it. As the Special Rapporteur had noted, there was a general trend towards the abolition of the death penalty, in keeping with the spirit of article 6 of the International Covenant on Civil and Political Rights. Special attention should also be paid to the General Comments on article 6 by the Human Rights Committee, whose members represented different legal, social and political traditions, and the Comments were consequently the result of negotiations and of a consensus. The Committee had concluded (E/CN.4/Sub.2/1987/20, para. 18) that "all measures of abolition should be considered as progress in the enjoyment of the right to life". Hence the Sub-Commission should encourage States to make international commitments in that field by ratifying a protocol that would remain optional. The proposed protocol would present the additional advantage of being linked to the International Covenant on Civil and Political Rights. Verification of its application would consequently fall within the mandate of the Human Rights Committee and it would not be necessary to estabish supplementary mechanisms. Consequently, the Sub-Commission should transmit to the Commission the draft second optional protocol elaborated by the Special Rapporteur, which was in conformity with the draft submitted to the General Assembly in 1980. A decision in that respect would already have been taken if a procedural problem had not prevented it.

13. As to the overall question of the human rights of persons subjected to any form of detention and imprisonment (agenda item 9 (a)), the Sub-Commission should make a critical re-examination of the very principle of the reports that contained information transmitted by Governments and the Secretary-General annually submitted to the Sub-Commission. The reports seemed to have become rather routine, failed to arouse much interest among the members of the Sub-Commission, and the latest one (E/CN.4/Sub.2/1988/13) revealed that only 14 Member States had transmitted information to the Secretary-General on the situation of detainees, in other words less than 10 per cent of the number of States Members of the United Nations. There were grounds for questioning the usefulness of an exercise which aroused so little interest both in the Sub-Commission and among Governments. Nor did the synopsis of material on the same subject received from non-governmental organizations (E/CN.4/Sub.2/1985/15) at the present session seem to have aroused much interest. There was already a special rapporteur on the subject of torture, another special rapporteur on summary or arbitrary executions and a working group on enforced or involuntary disappearances. The synopsis was even less useful in that it did not mention any country by name. In the interests of economy, it seemed a suitable moment to stop preparing the annual report and the synopsis, for in any case the contents soon became out of date. In that regard, he would like in particular to have the opinion of the experts who were members of the Working Group on Detention.

14. Agenda item 9 (b), "Question of human rights and states of emergency", was of considerable importance and he was highly appreciative of the work of the Special Rapporteur, Mr. Despouy. Mrs. Questiaux, when she had prepared a report on the subject several years previously, had also insisted that, every time a state of siege or of emergency was declared, particular attention should be paid to the human rights situation.

15. In his first annual report, the Special Rapporteur had concluded that, while the information thus far received permitted a prima facie analysis, it should be supplemented and examined in detail with a view to studying the criteria concerning the legality of the state of emergency (proclamation, legality, exceptional threat, proportionality, temporary and non-discriminatory character), reaffirming the absolute ban on derogation from certain fundamental rights and enabling the Sub-Commission, in accordance with Commission on Human Rights resolution 1983/18, to propose for the consideration of the Commission measures designed to ensure respect throughout the world for human rights and fundamental freedoms in situations where states of siege or emergency existed (E/CN.4/Sub.2/1987/19/Rev.1, para. 58). It was somewhat surprising to note that, while Mr. Despouy's findings consisted of three paragraphs, in his second annual report (E/CN.4/Sub.2/1988/18), the recommendations covered approximately 10 pages. A considerable number of the "recommendations" should in fact have appeared under the heading of "findings". Consequently, the presentation of the document was not satisfactory. Furthermore, to what extent had the second annual report actually been drawn up on the basis of the criteria concerning the legality of the state of emergency, as set out in the first report? Mr. Despouy had none the less done a very worthwhile job, although it should be developed by placing particular stress on the criteria of the legality of the state of emergency.

16. Mrs. MBONU said that she had read Mr. van Boven's report on the prevention of the disappearance of children (E/CN.4/Sub.2/1988/19) with considerable attention. The fate of disappeared children was an issue to which the international community should attach very great importance as it concerned the most vulnerable group within society. It was gratifying that the Argentine Government had provided the Special Rapporteur with all the necessary assistance for him to discharge the mandate assigned to him by the Sub-Commission under decision 1987/107, of 3 September 1987, but regrettable that the Government of Paraguay had refused to co-operate on the grounds that the presence of the Special Rapporteur in Paraguay might look like interference in the Paraguayan judicial process.

17. According to the information provided by the Working Group on Enforced or Involuntary Disappearances, a large number of women - particularly pregnant women - and children had disappeared during the military dictatorship in Argentina. Some of the children had subsequently been located and the Special Rapporteur cited the case of five children who had been kidnapped by members of the federal police or the army. The kidnappers had then fled to Paraguay before tests to establish the identity of the children concerned had been carried out. As the Special Rapporteur noted, the return and reuniting of those children with their families were essential to avoid them suffering the psychological trauma which would affect them when they learnt that their adoptive parents had been involved in the disappearance of their biological parents. The role played by non-governmental organizations, and in particular by the Grandmothers of the Plaza de Mayo in the efforts to relocate those children was very important and they should be given all the requisite assistance in accordance with the recommendation of the Special Rapporteur (paragraph 54 of the report). It was also gratifying that tests had been introduced in Argentina to determine the identity of children who had disappeared.

18. She endorsed the Special Rapporteur's position on the need to discourage the illegal appropriation of children. It was inadmissible that a country should become a hiding place for people who kidnapped children, and she supported the recommendation made by the Special Rapporteur in paragraph 56 of his report, whereby the Government of Paraguay was urged to take immediate measures to co-operate with the Government of Argentina and without delay, extradite all those persons guilty of such kidnappings and ensure the return of the children to their country of origin. Furthermore, co-operation between all States and bodies involved in those matters was essential in order to help families find children who had been kidnapped, for trafficking in children was a heinous crime.

19. Lastly, she supported the recommendations made by the Special Rapporteur in paragraph 61 of the report and urged the Observer from Argentina to explain why the Argentine Government had not deemed it necessary to take all possible measures to find the Argentine children kidnapped by members of the armed forces during the military dictatorship which had ruled the country between 1976 and 1983. The answer to that question would solve some of the enigmas.

20. Mr. AL-KHASAWNEH said that he would like to remind new members of the Sub-Commission of his views regarding the elaboration of a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, which was the subject of a report by Mr. Bossuyt (E/CN.4/Sub.2/1987/20).

21. The main point in that regard was the alternative open to States. Any multilateral instrument was optional in the sense that nothing could compel a State to accede to it. However, the issue was more complex in the case of the proposed optional protocol.

22. In some countries, the basis of criminal law lay in the Islamic Shari'a, which prescribed the death penalty in certain specific cases. Consequently, those States would be denied the opportunity of making a choice, which was implicit in the term "optional". In such circumstances how was it possible to speak of an "optional" protocol? The instrument would not be universal, unlike the existing Optional Protocol on civil and political rights, which concerned recognition of the jurisdiction of the Human Rights Committee, and in contrast, with the optional clauses in article 36 (2) of the Statute of the International Court of Justice, which were based on the assumption that all States parties to the Statute would eventually recognize the Court's jurisdiction as compulsory.

23. Consequently, was it not better to envisage the elaboration of an instrument intended to restrict misuse of the death penalty? That would make it possible to take into account the multicultural and heterogenous nature of the human community.

24. Furthermore, in his view, paragraphs 2 and 6 of article 6 of the Covenant did not advocate abolition of the death penalty. They merely stated that nothing in that article should be invoked to delay or prevent the abolition of capital punishment by any State Party to the Covenant.

25. Lastly, each State was free to abolish or to retain the death penalty, and hence there was no reason to elaborate an instrument of international law that was not in keeping with the realities of the world and the wishes of the vast majority of States.

26. Mr. KHALIFA congratulated the Secretariat on its efforts in preparing document E/CN.4/Sub.2/1988/16.

27. The document showed that, through its various organs, the United Nations frequently tackled the same issues from different angles. For example, the question of the administration of justice was the subject of the work of the Sub-Commission and of the Committee on Crime Prevention and Control, and contacts between these two bodies should be maintained and enhanced. He also hoped that the report would be issued every year and contain all the necessary information to enable all bodies concerned to have an accurate idea of what was being done throughout the system as a whole. Furthermore, as Mr. van Boven had observed, it would not be worthwhile to prepare other documents on that agenda item.

28. Nevertheless, document E/CN.4/Sub.2/1988/16 omitted two important issues, namely the question of administrative detention without charge or trial and the declaration of a state of emergency, which was dealt with by Mr. Despouy in document E/CN.4/Sub.2/1988/18. Admittedly, paragraph 2 of the Secretary-General's report (E/CN.4/Sub.2/1988/16) stated that it did not contain any information on certain questions which were considered by other bodies, but he was of the view that it would have been desirable to cover those two issues, since they both concerned the rights of detainees. Moreover, to understand the human rights situation in a given country, a knowledge of the legislation in force in that country was necessary.

29. As to document E/CN.4/Sub.2/1988/18, he questioned whether the list of countries which had declared a state of emergency was really useful. A declaration of a state of emergency was not an unlawful act, but an act of sovereignty and a State could not be held to account for its decision. Furthermore, violations of human rights could take place whether there was a state of emergency or not. In paragraph 60 of his report the Special Rapporteur also noted that many states of emergency reported to him had not been the subject of an official declaration and were therefore outside his field of investigation. Countries where a de facto state of emergency existed were not mentioned in the list, which thus did not perhaps reflect actual circumstances. In certain cases in which a state of emergency had been officially declared, it was applied with considerable moderation, whereas severe restrictions occasionally affected the exercise of human rights without a state of emergency. In paragraph 25 of the report the Special Rapporteur suggested, moreover, that the Sub-Commission recommend that the Commission should request those States which had not yet done so to consider adopting domestic legal provisions which were in accordance with the requirements of international norms on states of emergency. He had never been favourably disposed towards the idea of such a list, and considered that before it was drawn up all of those factors should be taken into account so as to avoid any misunderstanding and any hint that, for example, since a country appeared on the list the human rights situation was not satisfactory.

30. As to the elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, a distinction had to be drawn between

the death penalty under internal law for certain specific cases and assassinations under the guise of the death penalty, in other words, extrajudicial and summary and arbitrary executions which should be condemned. When the death penalty was applied in accordance with a country's legislation the aim was to defend the members of society at large. It was hard to speak of the right to life of terrorists who, for their part, had nothing but contempt for the lives of their innocent victims, and the obligation to guarantee everyone's right to live in peace and security should not be forgotten. He was in favour of retaining the death penalty, more particularly on account of the horrifying crimes now being committed throughout the world, and considered that it was natural for the death penalty to be part of a country's law. However, he was not opposed to the elaboration of a second optional protocol, for each State would be free to decide whether to adopt it. But those who did not should not be outlawed by the international community. Lastly, the question of the application and the abolition of the death penalty fell within the competence of States and it was not a matter for debate by the United Nations.

31. He welcomed the entry into force in 1987 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, for the issue had been discussed since 1974. Equally gratifying was the establishment of the Committee against Torture. It was necessary to distinguish between torture in the true sense of the word and other kinds of treatment or punishment which the Special Rapporteur classified in paragraph 36 of document E/CN.4/Sub.2/1988/16 as being within a "grey area". While it was true that some treatment could be likened to torture, it should not be forgotten that some societies adopted traditional methods, different from those employed in other richer countries, to punish those responsible for offences and crimes. Account should thus be taken of differing notions, for example, regarding parent/child relationships, which in turn affected other aspects of a society's outlook.

32. Mr TURK joined in congratulating Mr. Bossuyt on his report on the elaboration of a second optional protocol for the abolition of the death penalty (E/CN.4/Sub.2/1987/20). There were two arguments in favour of the abolition of the death penalty: on the one hand, it had been empirically established that its deterrent effect was extremely limited, while on the other, any judicial error became irrevocable. However, in his view care should be taken not to confuse the issue of the death penalty and that of the elaboration of a protocol. The abolition of the death penalty could only be the result of a sovereign decision by States. For those countries which were not parties to the new optional protocol, it would remain res inter alios acta, and the rule applicable would be pacta tertiis nec nocent nec prosunt.

33. A third factor that could make it easier to adopt the second optional protocol appeared in article 2 of the draft protocol submitted by the Special Rapporteur, which made a reservation for the most serious crimes of a military nature committed during wartime. That notion should none the less be clarified - did it correspond to the concepts of war crimes and crimes against humanity mentioned in particular in article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity? Generally speaking, the Special Rapporteur should refer to existing documents; at any rate, the matter could not fail to arise in the course of

future debates. Lastly, he supported the proposal to transmit Mr. Bossuyt's report to the Commission on Human Rights.

34. Mrs. FLORES, referring to Mr. van Boven's report on the disappearance of children (E/CN.4/Sub.2/1988/19), said that Argentines were extremely grateful to Mr. van Boven, who had had the opportunity to come to their assistance during the difficult period of the military régime. Subsequently, the new, democratic, authorities had invited him to stand as a witness during the trial of the former military leaders. Consequently, the Argentines had welcomed the fact that Mr. van Boven had been entrusted with a humanitarian mission in respect of one of the most tragic consequences of the dictatorship: the case of children who had disappeared along with their parents or during their parents' detention, and had been found in Paraguay.

35. The report (E/CN.4/Sub.2/1988/19) was undoubtedly the work of a man of sincerity, but it did call for a number of observations. First of all, it contained some criticism of initiatives which Argentina had supposedly taken or failed to take, criticism which had, moreover, been echoed by the Argentine Press even before the authorities had received the Spanish text of the report. In actual fact the Argentine authorities had taken a large number of steps both at the bilateral level and within the Organization of American States. Nor was she certain that the report would allow the Sub-Commission to form a clear enough idea as to what had happened to Argentine children, their present circumstances and the prospects of a solution. For example, paragraph 5 said the Government of Paraguay had reported that in all those cases in which extradition of individuals who had kidnapped children had been requested, the courts of first and second instance had agreed to the requests, and the cases concerned were before the Supreme Court, which would give its ruling in due time. In that connection, she was obliged to point out that while a decision by the Supreme Court concerning the extraditions was indeed awaited, as far as the return of children was concerned the Paraguayan courts had taken no decision, at least not in first instance.

36. The report left a false impression that the Supreme Court of Paraguay was gradually solving the problem of children who had disappeared and been located in that country. However, as she had just shown, that was far from the case. Furthermore, Commission decision 1987/107 concerned the children themselves, yet the Special Rapporteur did not distinguish between the situation of children and that of the individuals who had kidnapped them - and on whose extradition the Supreme Court was to decide. It should be emphasized that none of the measures adopted so far had made it possible to return the children. The measures included those repeatedly taken by the Mothers and Grandmothers of the Plaza de Mayo, at both the bilateral and the multilateral levels. In that connection, she mentioned cases such as that of the Rossetti children, who had been kidnapped by Mr. and Mrs. Miara and whose father was still awaiting their return to Argentina. In his report, Mr. van Boven mentioned Paraguay as being a country for kidnappers to hide in. However, if Paraguay was a hiding place, that was no reason to conclude that a further mission should not be undertaken. On the contrary, the Sub-Commission should seize the opportunity to solve the affair and other similar affairs in the future. It was also to be hoped that the Paraguayan authorities would respond favourably, and as rapidly as possible in view of the anxiety caused by the fate of Argentine children.

37. Mr. RHÊNAN SÉGURA said he endorsed the remarks made by Mrs. Flores. The Argentine Government had undoubtedly made a considerable effort to secure the return of Argentine children from Paraguay, but it was hampered by bureaucratic delay. The problem was to speed up the process. Mrs. Flores had rightly recalled the role played by the Mothers and Grandmothers of the Plaza de Mayo, and the support the Argentine Government had given them. It was gratifying that the Organization of American States had decided to begin examining the issue. He thought, as Mr. van Boven had observed in his report, that Paraguay should not become a hiding place for kidnappers. He congratulated Mr. van Boven on his work and emphasized that it was now necessary to go even further with international action on behalf of the children concerned.

38. Mr. EIDE congratulated Mr. Bossuyt on his report on the elaboration of a second optional protocol (E/CN.4/Sub.2/1987/20). The report was well arranged and made for a far-reaching examination of the issue of the abolition of the death penalty, which was essential if human rights were to be safeguarded. The death penalty meant that a judicial error was irrevocable. It was of dubious value as a deterrent and it was a cruel punishment. It was argued that in certain countries where the death penalty remained in force, the majority of the population was in favour of it. In reply, he would point out that there had also been societies in which torture was a traditionally accepted practice, but that did not make it any the more acceptable. In response to some of Mr. Al-Khasawneh's objections, he would answer that, he was not an expert on Islam but none the less believed that the interpretation of religious precepts varied with time, and it could not be asserted that the death penalty would continue to be demanded by religion, even in the future. He approved of Mr. Bossuyt's draft protocol. However, it would be better not to use the expression "all necessary measures" in article 1 (2) but to state more clearly: "shall abolish the death penalty". Like Mr. van Boven he thought that Mr. Bossuyt's draft optional protocol should be submitted to the Commission without delay.

39. Mr. Despouy's report on the question of human rights and states of emergency (E/CN.4/Sub.2/1988/18 and Add.1) was a valuable contribution and a continuation of a previous study carried out by Mrs. Questiaux. The report included a list of States which had declared, maintained or terminated a state of emergency. Paragraph 30 mentioned the need for fuller information from Governments, and requested that they be sent a summary of the information concerning them for such comments or corrections as they might wish to make. Paragraph 25 suggested that the Sub-Commission request States which had not yet done so to adopt provisions of internal law in keeping with the requirements of international norms on states of emergency. For his own part, he wished to emphasize, as had Mr. Khalifa, that the termination of a state of emergency was not in itself sufficient: undeclared states of emergency could exist under which States committed violations of human rights without even justifying themselves. Such undeclared states of emergency should at least be subject to the same criteria as declared states of emergency. In paragraph 46 of his previous report (E/CN.4/Sub.2/1987/19), Mr. Bossuyt had referred to serious allegations concerning violations of human rights in a country at war, Iraq. The Iraqi Government had replied that, even in wartime, it continued to apply all constitutional guarantees. However, Amnesty International had

provided information on Iraq that could only be described as terrifying. The gap between the information provided by Amnesty International and the replies from the Government of Iraq was so great that a report should perhaps be requested from the Government.

40. Mr. van Boven's report on the disappearance of children (E/CN.4/Sub.2/1988/19) alluded (paras. 50 and 51) to the Convention on the Prevention and Punishment of the Crime of Genocide. In that respect, Mr. van Boven mentioned groups targeted for destruction for reasons which, in the case in point, were political. The information presented in the report was indeed horrifying. In view of what had happened in Argentina, it was all the less acceptable that Paraguay should, according to the report, have become a hiding place for kidnappers. International machinery to deal with those situations should be set up urgently, not only in the interest of the children concerned but in order to deal with similar situations should they arise in the future. As Mrs. Flores had said, it was necessary to go further; the Sub-Commission possibly had an opportunity to put an end to that type of odious practice and should not fail to grasp it.

41. Mr. MacDERMOT (International Commission of Jurists) said his organization had distributed to the members of the Sub-Commission a briefing paper on the human rights situation in Singapore and Malaysia, where internal security legislation was used in order to detain persons indefinitely without charge or trial. In Singapore, 22 persons had been arrested in May 1987 for an alleged marxist conspiracy. Subsequently, all but one had been released and had denied any involvement in a marxist conspiracy and maintained that some of them had been ill-treated during their detention. However, the Government had re-arrested the signatories of the statement, as well as two of their lawyers. It was deplorable that the Government should have re-arrested those persons instead of inquiring into the allegations of ill-treatment and establishing its own accusations of conspiracy in an open trial. Consequently, six of the persons arrested, together with another arrested a year previously, were still under detention.

42. In Malaysia, 106 people had been detained without trial or charge in October 1987, and 32 of them were still under detention. When the arrests had been made, the Government had sought to justify them as necessary to prevent racial violence. Indeed, there had been tension between the Malays and the Chinese community over Government policy on Chinese schools. However, most of those arrested had had nothing to do with those problems. Various persons involved in the defence of human rights had claimed that the Internal Security Act was being misused and that the Malaysian Government was using racial tension to silence its critics and to overcome internal party problems. One of the constituent members of the ruling coalition had joined in the criticisms of the Government over its handling of the Chinese schools controversy. Growing tension was also apparent within the Prime Minister's own party. There were also tensions between the Government and the judiciary, as was illustrated by the case of Mr. Karpal Singh, a leading lawyer and opposition party member who was under detention. The High Court had ordered his release, but the Government, rather than appeal to the Supreme Court, had re-arrested him under the Internal Security Act and subsequently amended the Act so that no detainee could challenge his or her detention in any court, thereby making the powers of the executive absolute.

43. Experience in all parts of the world showed that the dangers of ill-treatment were greater where there was no judicial review of detention orders made by the executive. In that respect, his organization was concerned with the latest developments in Fiji, where for the first time a decree authorizing administrative detention without charge or trial had been issued. Under the decree, a person could be detained up to two years in order to prevent him or her acting in any manner prejudicial to the security of Fiji or to the maintenance of public order. The decree also provided for the establishment of an Advisory Board whose members were to be appointed by the Attorney-General, although the final decision lay with the Minister and was not open to appeal. His organization requested the Sub-Commission to urge the Governments of Fiji and Malaysia to provide for full judicial review of detention orders and also to urge the Government of Malaysia and Singapore to release the persons who were still under detention or to bring them to trial for any criminal acts they were alleged to have committed.

44. The International Commission of Jurists also wished to bring to the attention of the Sub-Commission the fact that India had recently adopted the 59th amendment to the Constitution, under which article 21 was automatically suspended if a state of emergency was declared in all or any part of India. Article 21 ensured the protection of life and liberty and, under the terms of the article, the legality of a detention order could be challenged by a habeas corpus petition to the High Court or the Supreme Court. Suspension of article 21 meant that that procedure could no longer be used and human rights groups and lawyers in India feared that it would lead to an increase in arbitrary arrests and to the risk of torture and disappearances. By introducing the amendment, India had violated its obligations under the International Covenant on Civil and Political Rights, to which it was a party. It was to be hoped that the Government of India would withdraw the 59th amendment, confirm that article 21 could not be suspended even in the case of an emergency, and thereby restore its obligations.

45. Lastly, his organization continued to support the elaboration of a second optional protocol to the Covenant on Civil and Political Rights aimed at abolishing the death penalty.

46. Mr. Rivas Posada, Vice-Chairman, took the Chair.

47. Mr. RAJKUMUR (Pax Romana) said that his organization was deeply concerned about the question of arbitrary detention, and particularly administrative detention without charge or trial, for abuses were common and those types of detention were not widely practised throughout the world. His organization had already drawn the attention of the Commission on Human Rights to specific violations, particularly in Malaysia, Singapore, Bangladesh and South Korea, committed as part of a penalty that was degrading, to say the least. It was a penalty applied under legislation that was immoral, as it violated a fundamental right, the right to an open trial, whatever the country's circumstances and security considerations. Like the previous speaker, he was very disturbed about the amendments to the Internal Security Act in Malaysia, under which no one affected by a detention order was entitled to challenge its legality in court. The Sub-Commission should intercede and urge the Malaysian authorities to release immediately the persons who had been detained for two years under that legislation.

48. In Singapore, administrative detention was also being frequently misused, more particularly to crush the opposition and to silence criticism and protest. The Singapore authorities should be asked to free immediately the persons detained under the Internal Security Act.

49. His organization was also concerned by another type of problem, namely, holding people incommunicado, a practice followed all too frequently in certain countries, and one which had been used against Mr. Noel Vilalba in the Philippines between 27 June and 6 July 1988. Mr. Vilalba was the Co-ordinator of the Asian Committee, a regional body which was sponsored by the Federation of Asian Bishops' Office for Human Development and by the Christian Conference of Asian Urban-Rural Missions and whose aim was to encourage grass-roots participation. After being detained without a warrant, Noel Vilalba had been held incommunicado, tortured and forced to sign a false confession, and his demands for legal assistance had been denied until the trial had begun. Following the trial he had been released on bail. Pax Romana appealed to the Philippine authorities to take the necessary steps to allow the Co-ordinator to resume his activities. In that connection, it would be remembered that the Commission on Human Rights had adopted a resolution stressing the importance of restricting the use of solitary confinement as much as possible.

50. He recommended that the Sub-Commission first of all take every possible step, within the limits of available resources, to ensure that the United Nations Secretariat and the relevant human rights bodies dealt properly with the problem of the misuse of administrative detention and allied violations; second, it should request the Special Rapporteur not only to identify trends in that field but also to point to identifiable situations in which such trends were apparent; third, it should provide non-Governmental organizations with the requisite facilities to enable them to communicate information on the topic to the Sixth Committee, with the aim of elaborating a draft set of principles for the protection of detainees.

51. Mr. TARDU (International Centre for Penal Studies) said that his organization, which had its headquarters in Messina, was prepared to share with the Sub-Commission its experience, acquired over more than 10 years' research and teaching in various aspects of the relationship between human rights and the administration of justice. He would also contribute his own personal experience gained as Chief of the Research Section of the United Nations Centre for Human Rights.

52. Suitable human rights training for the police and other law enforcement personnel was covered by many resolutions, declarations and conventions, but it was both simplistic and dangerous to believe that such training would solve all problems. For that reason, the Sub-Commission and other competent bodies, such as his organization, considered that action of that kind was undoubtedly important, but in no sense enough to safeguard fundamental freedoms vis-à-vis the machinery of justice.

53. Generally speaking, the police and law enforcement personnel as a whole mirrored the trends of the institutional framework and the power structures within which they operated. Training them would achieve little unless it went hand-in-hand with social and political reforms beyond actual policing. In view of those basic considerations, what could be done to ensure that the police observed standards of conduct that were in accord with human rights?

The Messina Centre had acquired extremely valuable experience through the international training courses on human rights it had organized every year since 1978 for high-ranking police officers from 30 to 40 countries in all regions of the world, as well as a series of regional training seminars designed for senior prison personnel, which had been organized in collaboration with the Henri Dunant Institute.

54. The conclusions the Centre had drawn from those two series of courses were, first of all, that police and prison officials as a whole, and even army personnel, were no more hostile to human rights norms than any other occupational groups; indeed, a large number of them were extremely well disposed to new ethical and legal rules. However, they should not be called upon to imbue themselves with human rights principles by learning texts, codes, manuals or brochures by heart, since they wanted practical responses to specific situations. They wanted for example, to know, when faced with a rapidly approaching howling, stone-throwing mob, at what distance they should react and in what way. Consequently, a broadly situation-oriented teaching method directly linked to policemen's daily experience was required. For instance, during one of the courses organized by the Centre a high-ranking officer from the London Metropolitan Police had given concrete explanations, assisted by audio-visual methods, on how his subordinates managed to control crowds of football hooligans at important matches while none the less respecting fundamental freedoms (emergency traffic arrangements, compulsory routes, police cordons, etc.). Such a method attracted policemen's attention and also stimulated the imagination in new circumstances. Comparative instruction methods at the international level should be pursued and adopted by national police colleges. In turn, those national efforts were covered by reports sent by the national sections to the Messina Centre, which was thus able to assess the impact of its teaching. In any event, to be fully effective every training programme should be incorporated in professional recruitment and promotion examinations and marks should be given for the participants' performance.

55. Another fundamental problem concerned superior orders which were contrary to human rights. Obedience had always been the basis of police and military conduct. The most signficant progress in that respect at the national level had been the authorization not to execute orders which were "manifestly" unlawful. However, it was more difficult to define the concept of "manifest" by reference to international law, which remained vague on that point. One of the first tasks would be to teach the police sufficiently clear international human rights norms. There should also be broadly accessible and effective remedies and other legal means, such as ex officio inquiries and judicial and administrative inspections, to ensure real protection for policemen who refused to carry out an order that was contrary to human rights. Existing texts (like the Code of Conduct for Law Enforcement Officials and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) were extremely inadequate in that respect, and the Baden draft was even more inadequate. Generally speaking, so far as the problem of superior orders was concerned, the public should be alerted to certain retrograde trends observed in international forums since the adoption of the Charter and Judgement of the Nürnberg Tribunal. For example, at the Milan Congress in 1985 and at the Baden meeting in 1987 only in extremis had it been possible to avoid a major step backward.

56. On the question of protection of the human rights of international civil servants under arbitrary arrest, the documents before the Sub-Commission were alarming, as they indicated that approximately 200 officials were either detained, had disappeared or had been the victims of summary executions. They were in very special circumstances on account of their professional duty to refrain from making public pronouncements and to display reserve, something that could prevent them from setting their case before non-governmental organizations or the media. Furthermore, their own country might hesitate to afford them the diplomatic protection extended to other persons, out of a desire not to interfere in matters which in its view were the sole responsibility of the executive head of the organization concerned. Again, international officials were not so far a unified group within their country and thus they were not a political force which Governments took into consideration. Accordingly, he particularly welcomed the sustained action by the United Nations Secretary-General to assist officials who had been the victims of human rights violations, action which had been reinforced in recent years, as was shown by the extremely detailed reports under consideration. The Messina Centre also welcomed the action of the Administrative Committee on Co-ordination, which had in 1987 agreed to recommend to all organizations in the United Nations system that, whenever a country violated the Convention on Diplomatic Privileges and Immunities in the case of an international official, the organizations could suspend all operational and other programmes being carried out by them in that country until the matter was settled. If the recommendation proved effective, it would constitute a major step foward. In any event, the action of the Commission on Human Rights and the Sub-Commission was fundamental, precisely because the issue was not one of privileges and immunities alone.

57. Mr. GRAVES (International Commission of Health Professionals for Health and Human Rights) said that, on its own behalf and on behalf of the International Commission of Jurists, his organization wished to submit to the Sub-Commission evidence supplied by a physician, a professor of toxicology, who had looked into the use of toxic gas in the bombardment of the town of Halabja, in northern Iraq, a region mainly inhabited by Kurds. The Government of Iraq had described the attack as an operation carried out as part of the war against Iran. However, the use of gas against large numbers of non-combatants, women and children, had quite rightly horrified all those who had seen pictures of the massacre. Professor Heyndrickx, from the University of Ghent, in Belgium, was known throughout the world for his research into the use of toxic substances in times of crisis and into the treatment of victims of such substances. He was also a project director for UNIDO.

58. Mr. HEYNDRICKX (International Commission of Health Professionals for Health and Human Rights) confirmed that when he and his team had arrived in Halabja, in the north of Iraq, he had found a completely dead town, with streets full of corpses, 70 per cent of them of women and children. There had been so many bodies that the members of his team had been unable to count them. Some of the houses did not seem to have been hit by bombs, yet no one had been alive inside. The research carried out and interviews with the few survivors, above all children, had confirmed that the bombs contained three types of gas: cyanogen, "mustard gas" (yperite) and a neuro-toxic gas. When questioned, the children explained what had happened. Some persons had died instantly. Others had survived for 8 to 9 minutes. The examinations carried out on young girls of the ages of 9, 10 or 11 who had survived revealed that

they had suffered gynaecological injuries which would affect them for the rest of their lives. It would be remembered that it was precisely in Geneva, in 1925, that the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare had been adopted. The Sub-Commission should weigh up those events. In his opinion, it would have been better for some of the survivors to have died, as there was no medical treatment capable of helping them to overcome the irreversible pathological consequences of the injuries they had received. The mixtures of gases used at the time, and especially over the past two years, had been particularly toxic, and the United Nations should seriously examine means of putting an end to their use, as well as helping the large numbers of victims. Even in Iraq, the town of Halabja was not the only one concerned: in flying over the region he had been able to see that other villages were totally lifeless.

The meeting rose at 1.05 p.m.