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COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion and
Protection of Human Rights
Fifty-seventh session
Item 1 of the provisional agenda

ORGANIZATION OF WORK

The work of the Sub-Commission under agenda item 2

Working paper prepared by Françoise Hampson

Summary

The present working paper sets out the background to the concern regarding how the Sub-Commission handles item 2 of its agenda. After examining the role and importance of agenda item 2, the paper considers various ways of improving the effectiveness of the work of members of the Sub-Commission and non-governmental organizations (NGOs). There are suggestions with regard to the communication of the Sub-Commission's deliberations to the Commission. An annex* lists the countries, regions and territories referred to in recent years by members of the Sub-Commission and NGOs and the countries which exercised the right of reply.

* Annex reproduced in the language of submission only.

Introduction

1. During its fifty-sixth session, following an intervention by the non-governmental organization (NGO) Minnesota Advocates for Human Rights, members of the Sub-Commission met outside the official meetings to discuss the issue of agenda item 2. On each occasion, more than half of the members of the Sub-Commission were present. A proposal was formulated which called for the creation of a “virtual” working group. During the course of the discussion regarding a draft resolution on the subject, it was decided instead to request a working paper.

2. In its decision 2004/120, the Sub-Commission decided to entrust Françoise Hampson with the preparation of a working paper on the organization, content and outcome of the Sub-Commission’s work under agenda item 2, taking into account Commission on Human Rights resolution 2004/60 and the discussions that took place at the fifty-sixth session of the Sub-Commission and on the basis of the fullest possible consultation.

3. A meeting was held on 25 January 2005 in the office of a Geneva-based NGO. The representatives of about a dozen NGOs were present. A note was taken of those discussions and was circulated more widely. Building on those discussions, Françoise Hampson met with a representative of Minnesota Advocates for Human Rights on 5 February 2005 in London.¹

4. In its decision, the Sub-Commission invited States, national human rights institutions, NGOs and all interested parties to submit ideas and suggestions. They have not chosen to do so, except in the context of the activities referred to in the previous paragraph.

5. The annex to the present document lists the countries, regions and territories referred to by members of the Sub-Commission and NGOs during the discussions under agenda item 2 in 2002, 2003 and 2004.

I. THE ISSUE

6. Agenda item 2 is entitled “Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation, in all countries, with particular reference to colonial and other dependent countries and territories: report of the Sub-Commission under Commission on Human Rights resolution 8 (XXIII)”.

7. The basis for the work of the Sub-Commission is resolution 8 (XXIII) of 16 March 1967 of the Commission on Human Rights, which requested the Sub-Commission to indicate “all situations, in any country where there is serious reason to believe that constant and systematic violations of human rights and fundamental freedoms occur”. This mandate was endorsed by the Economic and Social Council (ECOSOC) in resolution 1235 (XLII) for the public procedure and 1503 (XLVIII) for the confidential procedure.

¹ I should like to thank the NGO representatives at the meeting for sharing their ideas and, in particular, Adrien-Claude Zoller, Penny Parker and Basak Cali.

8. The Commission has put restrictions on which States may be considered under this agenda item and how they are to be considered, but it has constantly reiterated, most recently in its resolution 2005/53, “that the Sub-Commission should continue to be able to debate country situations not being dealt with in the Commission, as well as urgent matters involving serious violations of human rights in any country”. The Commission has stated that the Sub-Commission should not adopt country-specific resolutions, decisions or Chairperson’s statements and, in negotiating and adopting thematic resolutions or decisions, should refrain from including references to specific countries. It is worthy of note that whilst the Sub-Commission is requested not to pass country-specific resolutions, it is simply told to “refrain” from including references to specific countries in thematic resolutions. In practice, since the adoption of Commission decision 2000/109 on enhancing the effectiveness of the mechanisms of the Commission on Human Rights”, paragraphs 42 to 56 of which relate to the Sub-Commission, the Sub-Commission has in fact not adopted thematic resolutions in which reference is made to specific countries.

9. Neither the Sub-Commission nor NGOs, following the adoption of the Commission resolution referred to above, have adapted the form and content of the discussions under agenda item 2. There is a need to examine what is done and how it is done in order to establish whether agenda item 2 could be used more effectively.

II. THE PURPOSE OF AGENDA ITEM 2

10. Agenda item 2 enables the Sub-Commission to focus attention on a situation not otherwise the subject of scrutiny before a human rights body. This includes the ability to examine situations that the Commission itself, for whatever reason, cannot address. The greater freedom of action of the Sub-Commission carries with it great responsibilities. It could be seen as implying the obligation to raise situations of widespread or systematic human rights violations. The Sub-Commission has an advantage over other human rights bodies with regard to situations of widespread violations. It is more accessible to NGOs, through whose interventions it may learn of serious situations that are not receiving attention. Agenda item 2 enables the Sub-Commission to address a situation as a whole, as opposed to dealing with specific thematic issues. In certain circumstances, the seriousness of a situation is more than the total of the component elements. This is particularly likely to be the case where a crisis develops very suddenly. Agenda item 2 also enables the Sub-Commission to address situations that arise between the end of the annual Commission meeting and the middle of August. There is no other forum for such discussions until the beginning of the annual session of the General Assembly. It is not uncommon for a crisis to emerge during that period. Whilst it is legitimate for interventions to include examples of good practice, that is not the principal function of agenda item 2. Such examples are more relevant to the Sub-Commission’s thematic deliberations.

11. In order to fall within the terms of the mandate of the Sub-Commission, a situation must show the following characteristics:

- The situation is one not dealt with by the Commission. That precludes discussion of the country referred to in Commission agenda item 8 and any State currently being considered under Commission agenda item 9, which addresses “situations”;

- Either the situation should concern human rights generally, which includes racial discrimination and segregation, on condition that the violations in question are “constant and systematic”, or should be an urgent matter involving serious violations of human rights.

12. In the light of the changes introduced in 2000, the Sub-Commission needs to review its deliberations under agenda item 2. Before 2000, the Sub-Commission was able to fulfil the function of agenda item 2 by passing country-specific resolutions, decisions and Chairperson’s statements, thereby bringing situations to the attention of the Commission and usually identifying the specific subject matters of concern. New means need to be found in order to ensure that:

- The information received is fed into the thematic deliberations of the Sub-Commission;
- Issues not otherwise discussed can be followed up (e.g. journalists and freedom of expression);
- Information received in one session is followed up in a subsequent session;
- Appropriate situations are brought to the attention of the Commission.

13. In doing so, the Sub-Commission should avoid duplication with the work of the Commission, the special procedures and the treaty bodies. As reiterated by the Commission in its resolution 2005/53, the Sub-Commission should not engage in monitoring except with the agreement of the Commission.

14. A variety of separate issues need to be considered:

- The role of individual members of the Sub-Commission;
- Preparation for agenda item 2 interventions;
- Information available to members of the Sub-Commission;
- The possibilities of dialogue with Member States;
- The possible role of national human rights institutions;
- The possible role of the Office of the United Nations High Commissioner for Human Rights (OHCHR);
- The manner, form and content of NGO interventions;
- The product.

III. AGENDA ITEM 2 AND MEMBERS OF THE SUB-COMMISSION

15. Members of the Sub-Commission are appointed on account of their expertise and independence. This makes them particularly well qualified to comment on situations of serious human rights violations.

16. An examination of the States referred to in agenda item 2 interventions by members of the Sub-Commission since 2002 reveals significant variations in the treatment of different regions (see annex), although the figures need to be treated with some care. First, any imbalance in the countries considered by the Commission will have a knock-on effect on the deliberations of the Sub-Commission, since the latter cannot address any situation with which the former is dealing. Second, if the seriousness of human rights violations varies between regions, it would be discriminatory and arbitrary to insist on an equal treatment of each region.

17. Since Sub-Commission members are independent experts, it would be inappropriate to dictate how they should make their interventions. The Sub-Commission has previously addressed this type of issue. In order to reinforce their independence, members of the Sub-Commission have adopted a principle that members should not refer to their own countries. The Sub-Commission may wish to consider the adoption of further guidelines in relation specifically to agenda item 2, so as to ensure a measure of even-handedness in the choice of countries referred to. If it were minded to go along this route, the Sub-Commission would need to consider whether the goal is even-handedness across the Sub-Commission as a whole and/or by individual members of the Sub-Commission.

18. It is not clear whether members of the Sub-Commission, as the basis for their interventions, seek out information themselves or whether they rely on information that is brought to their attention. Nor is it clear how the interventions are affected by the content of NGO statements. If the Sub-Commission were to adopt the goal of even-handedness, it might have implications for the preparation of their interventions under agenda item 2 and for the range of information to which members currently have access.

19. One of the proposals made in the framework of the ongoing reform is that OHCHR should produce an annual global report covering every State. It is not clear whether this is practicable. If it were to consist of a compilation of the reports of the special procedures and the treaty bodies, it would still not be comprehensive and global. If it were to be other than such a compilation, any document would probably be so controversial as to lose any potential usefulness. Such comprehensive reports already exist and the reports of the various human rights mechanisms are already available on the Internet. The members of the Sub-Commission have the experience and expertise to be able to seek out for themselves the information which they might need. It might, however, be useful to remind States, national institutions and NGOs to consider sending their reports to members of the Sub-Commission.

20. The Sub-Commission receives a list of countries on the agenda of the Commission. Every two years, the Sub-Commission receives a list of States in which a state of emergency prevails. It might assist the Sub-Commission if useful information were provided ahead of the session by OHCHR. Such information could include: the countries on the agenda of the

Commission; countries in which there is a state of emergency; countries that have issued a standing invitation to the special procedures; countries in relation to which the special procedures and/or the treaty bodies have signalled inadequate or non-existent follow-up, etc.

21. There are a variety of possibilities for improving the dialogue with Member States. They already have the possibility of exercising the right of reply. The charts in the annex indicate which States have chosen to exercise the right. On its own, the right of reply does not constitute a dialogue, nor is it any indication that such a dialogue will ensue. In a limited number of cases, there has in fact been follow-up between sessions, between a member of the Sub-Commission and the State concerned. It might be possible to promote such dialogues. This would be facilitated if members of the Sub-Commission indicated in precise terms the nature of their information and its source(s). To that end, members of the Sub-Commission might consider making available a written text supporting their oral intervention and providing further information about the alleged human rights violations.

22. National institutions are free to take part in the work of the Sub-Commission but, in practice, it is unusual for them to do so. The Sub-Commission may wish to consider encouraging such participation.

23. At present, the only proposal for the involvement of OHCHR is the annual report referred to above. There might be other possibilities the Sub-Commission may wish to explore with the United Nations High Commissioner for Human Rights, including the possibility of a report on the country-specific priorities of OHCHR; the participation of the High Commissioner in the agenda item 2 deliberations; and asking OHCHR to report on situations raised at the previous year's discussions on agenda item 2.

24. It is recommended that the possible role of OHCHR under agenda item 2 be raised in a closed meeting with the High Commissioner.

IV. AGENDA ITEM 2 AND NGOS

25. The change in the pattern of attendance of NGOs suggests that some of them stopped attending the Sub-Commission when it lost the ability to pass country-specific resolutions. Those who continue to attend focus their interventions on particular regions (see annex). Generally speaking, the interventions provide information but do not indicate what they want the Sub-Commission to do.

26. At present, many of the interventions of NGOs under agenda item 2 are repetitive. NGOs are encouraged to make use of joint statements through the rules on time allocation. More could be done to explain the benefits of joint statements (e.g. the ability to give more detailed information).

27. It would be helpful if NGOs would continue the discussions started during the fifty-sixth session, in an attempt to clarify how they could assist the Sub-Commission to "operationalize" agenda item 2.

28. Suggestions for improving the quality and usefulness of the NGO interventions include:
- (a) Before the session:
 - To prepare an NGO orientation brochure specifically dealing with agenda item 2;
 - To train NGOs in making more effective use of their interventions, including identifying what, if anything, they want from the Sub-Commission;
 - To assist NGOs by the preparation of a country-by-country list of treaty ratifications, overdue reports and standing invitations to special procedures;
 - To identify the range of other human rights mechanisms available, so that NGOs can determine whether they offer a useful addition/alternative;
 - To encourage NGOs to make more use of joint statements;
 - To seek to ensure greater and better press coverage of the discussion under agenda item 2.
 - (b) During the session:
 - To encourage NGOs to put copies of their agenda item 2 interventions in the pigeon-holes of members of the Sub-Commission;
 - To conduct an NGO forum such as the one that took place during the fifty-sixth session, to consider how to improve the participation of NGOs in agenda item 2 and the quantity and quality of press coverage of agenda item 2, to make suggestions to the Sub-Commission for further improvements, etc.
 - (c) After the session:
 - To compile a summary of all the interventions under agenda item 2, which could be submitted as an NGO document to the Sub-Commission and Commission.

29. It is up to the NGOs to determine how best to proceed. The Sub-Commission should merely encourage them to continue examining, during the fifty-seventh session, ways of improving the effectiveness of agenda item 2 and indicate its willingness to entertain any suggestions that may be made.

V. RECORDING THE DELIBERATIONS

30. The Commission requires the Sub-Commission to consider any serious human rights situation that is urgent, presumably so that the Commission can be alerted to the concerns of the Sub-Commission. In addition, the Sub-Commission is to debate country situations that are not being considered by the Commission and reveal a consistent and widespread pattern of human rights violations.

31. The Sub-Commission has three ways of communicating with the Commission: through its report, through the summary record and through the report of the Chairperson. The Sub-Commission report does not indicate which States were the subject of concern under agenda item 2. Although this year the summary records were available on time for the next session of the Commission, there is no guarantee that this always is the case. The Commission resolution specifies that the summary record of agenda item 2 should be forwarded to the Commission, rather than simply be made available on the Internet. The statement of the Chairperson of the Sub-Commission to the Commission is brief. It would be possible, if they were available on time, to annex the relevant summary records to the written text of the Chairperson's intervention to the Commission. The annex could include either the entire summary record of agenda item 2 or else the summary record of interventions by members of the Sub-Commission. It would be necessary to ensure the prioritization of the summary record of agenda item 2, to ensure that it is available by the time the Chairperson of the Sub-Commission addresses the Commission.

32. None of the normal channels of communication make it possible to communicate swiftly to the Commission a serious human rights situation that in the view of the Sub-Commission is urgent. The Sub-Commission meets with the Bureau of the Commission, but this usually occurs before the Sub-Commission's consideration of agenda item 2, and is a closed meeting. Nevertheless, the Commission requires the Sub-Commission to address urgent situations. The only action the Sub-Commission can take with regard to such a situation is to communicate its concern to the Commission. The obvious solution would be for the Sub-Commission to authorize the Chairperson to send a letter to the Bureau of the Commission, requesting that its urgent concern be communicated to the Commission as a whole. As a letter of the Chairperson, there would be no need for the Sub-Commission to approve its contents. In the interests of transparency, the content of the letter should be disclosed at least to the members of the Sub-Commission and, ideally, more widely.

VI. POSSIBLE WAYS FORWARD

33. On the basis of the considerations suggested above, the following would constitute desirable improvements to agenda item 2 deliberations:

- The adoption of guidelines to seek to ensure even-handedness in the countries/regions addressed by members and/or the Sub-Commission as a whole;
- A list of documents that the Sub-Commission would request the secretariat to distribute one month before the beginning of its session, so as to assist members of the Sub-Commission in the preparation of their interventions under agenda item 2;
- A member of the Sub-Commission should be chosen to follow up the matters raised at one session with the countries concerned and to report at the following session; alternatively this could be done by OHCHR;

- A member of the Sub-Commission should be chosen to provide a briefing with regard to human rights emergencies within the mandate of the Sub-Commission that have arisen since the previous session;
- Time should be set aside during the discussion of agenda item 2, after the interventions of members of the Sub-Commission and NGOs, to identify any themes that may have emerged and are not elsewhere on the agenda; a member of the Sub-Commission should be identified to prepare a working paper on that issue under agenda item 2 for the following session - at present, no working papers are submitted under agenda item 2. There is no reason in principle why they should not be submitted;
- Working papers should be prepared on the Sub-Commission mandate under agenda item 2 and on how human rights machinery has handled the type of issues considered under agenda item 2, as opposed to substantive themes raised during a particular session. Examples include the response of human rights machinery to sudden emergencies or situations of urgency; indicators of systematic patterns of violation; indicators of “urgency”; what the mandate means by segregation-type violations; and colonial and dependent territory situations in general;
- Working papers should be prepared on issues relevant to agenda item 2 and not considered elsewhere, such as case studies on local initiatives that have significantly reduced widespread violations, and on the interrelationship between different violations usually examined separately, with a view to determining whether the interrelationship has the effect of changing the usual picture when the particular violations are examined separately;
- Where a human rights issue arises during the Sub-Commission session, there is precedent for the Sub-Commission, through the Chairperson to raise the issue with the relevant national authorities by means of a letter;
- The summary records of the deliberations on agenda item 2 should be annexed to the written version of the statement addressed by the Chairperson of the Sub-Commission to the Commission;
- In cases of urgency, the Sub-Commission should authorize the Chairperson to send a letter to the Bureau of the Commission, indicating its urgent concern with regard to serious human rights violations in a particular country.

34. These suggestions would enable the Sub-Commission to remain within its mandate, and at the same time to make a distinctive contribution to the examination of consistent and widespread human rights violations or serious violations of human rights of an urgent nature and to avoid duplication with the work of other bodies.

Annex

COUNTRIES, REGIONS AND TERRITORIES REFERRED TO BY MEMBERS OF THE SUB-COMMISSION AND NGOS UNDER AGENDA ITEM 2 AND THE DELEGATIONS THAT EXERCISED THE RIGHT OF REPLY, 2002-2004^a

2002

Violations mentioned by NGOs

Asia	Africa	Latin America	Western Group	Eastern Europe
Bhutan China India Indonesia Israel Pakistan Sri Lanka	Democratic Republic of the Congo Liberia Rwanda Sudan Tunisia Western Sahara	Argentina Bolivia Colombia Guatemala Guyana Mexico Suriname	Canada Europe (immigration laws) France Germany Italy United Kingdom United States of America	Kyrgyzstan Russian Federation Serbia and Montenegro
7	6	7	7	3

Violations mentioned by Sub-Commission experts

Asia	Africa	Latin America	Western Group	Eastern Europe
Afghanistan China Democratic People's Republic of Korea India Indonesia Israel Nepal Saudi Arabia Sri Lanka United Arab Emirates	Congo Democratic Republic of the Congo Egypt Liberia Nigeria Rwanda Somalia South Africa Sudan Zimbabwe	Argentina Colombia Uruguay	Australia Belgium France Italy United Kingdom United States of America	Bosnia and Herzegovina Serbia and Montenegro
10	10	3	6	2

Interventions and rights of reply by Governments

Asia	Africa	Latin America	Western Group	Eastern Europe
Bahrain China Democratic People's Republic of Korea Nepal Pakistan Syrian Arab Republic	Morocco	Mexico	Turkey	Azerbaijan Russian Federation
6	1	1	1	2

2003

Violations mentioned by NGOs

Asia	Africa	Latin America	Western Group	Eastern Europe
Bangladesh India Indonesia Iran (Islamic Republic of) Israel Japan Lao People's Democratic Republic Pakistan Sri Lanka	Sudan Togo Zimbabwe	Bolivia	United Kingdom United States of America	
9	3	1	2	0

Violations mentioned by Sub-Commission experts

Asia	Africa	Latin America	Western Group	Eastern Europe
China (Weissbrodt) Democratic People's Republic of Korea (Decaux, Park and Yokota) Indonesia (Hampson) Israel (Decaux) Philippines (Hampson)	Democratic Republic of the Congo (Hampson, Park) Kenya (Hampson) Liberia (Hampson, Park) Uganda (Hampson) Zimbabwe (Weissbrodt)	Mexico (Weissbrodt)	Denmark and other European countries Italy (Eide) United Kingdom (Hampson) United States of America (Decaux, Eide, Hampson, Sorabjee)	Russian Federation (Hampson) Turkmenistan (Decaux) Uzbekistan (Weissbrodt)
5	5	1	4	3

Interventions and rights of reply by Governments

Asia	Africa ^b	Latin America	Western Group	Eastern Europe
Bahrain Democratic People's Republic of Korea Japan Pakistan	Sudan	Bolivia		
4	1	1	0	0

2004

Violations mentioned by NGOs

Asia	Africa	Latin America	Western Group	Eastern Europe
China India Indonesia Iran (Islamic Republic of) Iraq Israel Pakistan Sri Lanka	Sudan Uganda Western Sahara		Australia Canada New Zealand Turkey United States of America	
8	3	0	5	0

Violations mentioned by Sub-Commission experts

Asia	Africa	Latin America	Western Group	Eastern Europe
Afghanistan (Rivkin) India (Chung) Indonesia (Hampson) Iraq (Bossuyt, Chen, Decaux, Warzazi) Iran, (Islamic Republic of) (Decaux) Israel (Alfonso Martínez, Bossuyt, Warzazi) Republic of Korea (Chung)	Côte d'Ivoire (Decaux) Democratic Republic of the Congo (Bossuyt) Sudan (Bengoa, Biro, Bossuyt, Decaux, Hampson, Sattar, Wadibia-Anyanwu) Uganda (Wadibia-Anyanwu)	Colombia (Hampson)	United States of America (Guissé, Warzazi, Alfonso Martínez, Chen, Decaux, Salama, Hampson)	Russian Federation (Chung, Decaux) Uzbekistan (Hampson)
7	4	1	1	2

Interventions and rights of reply by Governments

Asia	Africa	Latin America	Western Group	Eastern Europe
Democratic People's Republic of Korea Indonesia Pakistan Sri Lanka				Uzbekistan
4	0	0	0	1

Notes

^a This annex was created on the basis of information from Minnesota Advocates for Human Rights - <http://pennyparker.net/2005/>.

^b One Tunisian NGO also spoke in support of its Government's human rights record.
