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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fifty-seventh session

SUMMARY RECORD OF THE 9th MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 3 August 2005, at 10 a.m.

Chairperson: Mr. KARTASHKIN

later: Mr. SALAMA
(Vice-Chairperson)

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The meeting was called to order at 10 a.m.

ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY (agenda item 3) (continued) (E/CN.4/Sub.2/2005/6, 7, 8 and Corr.1 and Add.1, 9, 12-15 and 42; E/CN.4/Sub.2/2005/NGO/6, 9, 12, 16, 19, 24 and 25; E/CN.4/Sub.2/2004/6)

1. Ms. KHAYATI (Union de l'Action Féminine) drew the Sub-Commission's attention to the alarming human rights situation in the refugee camps of Tindouf, western Algeria, ruled over by the Frente POLISARIO with the connivance of the Algerian Government. There had been no elections in the region for over 30 years. Since 1975, there had been thousands of murders and disappearances: political prisoners were detained without a fair trial or legal aid, which was tantamount to abduction.

2. She called upon the international community to take urgent action to ascertain what had happened to the thousands of people who had disappeared, including the journalist Abdelaziz Haidala, who had not been seen for over 20 years. The international community should urge the Algerian Government to put an end to the illegal acts committed on its territory, investigate cases of forced disappearance and compensate victims of human rights violations and their families.

3. Moroccan prisoners of war were detained in inhuman conditions and used as slave labour, in defiance of all legal and moral standards - in particular, article 118 of the Geneva Convention relative to the Treatment of Prisoners of War, under which they should have been repatriated following the ceasefire of 1991.

4. The international community had ignored the tragedy of an innocent civilian population, herded into concentration camps without even the most minimal levels of health and hygiene. She condemned the systematic violation of the rights of a defenceless population by a tyrannical and corrupt oligarchy.

5. Mr. ZIA MUSTAFA (World Federation of Trade Unions), recalling Commission on Human Rights resolution 1999/57 of 27 April 1999, which had recognized the existence of the right to democracy, drew the Sub-Commission's attention to the situation in Pakistan-occupied Kashmir and Gilgit-Baltistan. The military rulers of Pakistan continued to stifle political freedoms, undermine the rule of law and intimidate the judiciary. The people of Pakistan-occupied Kashmir and Gilgit-Baltistan were denied any real representation in decision-making forums, and there were no independent judiciary or media. The road and communications infrastructure remained underdeveloped in order to prevent the people joining together to demand their rights.

6. The Pakistan Government was now complaining about the criticism it had received in the United Kingdom media, after the men thought responsible for the recent bombings in London had been found to have links with Pakistan. However, the Government had benefited handsomely from Western double standards in the past, when its crimes against democracy had been forgiven because of its alleged willingness to join in the fight against terrorism.

7. Minorities and other vulnerable groups in Pakistan were the victims of unprecedented violence, and innocent people continued to suffer brutality at the hands of the police and paramilitaries, illegal detention, torture and extrajudicial execution.

8. He called upon the Sub-Commission to send a fact-finding mission to investigate the problems faced by the citizens of Pakistan, Pakistan-occupied Kashmir and Gilgit-Baltistan and to suggest effective remedial measures. The victims of gross and systematic human rights violations looked to the Sub-Commission to listen to their problems and suggest a solution.

9. Mr. OUHELLI (Consultative Council on Human Rights, Morocco) said that King Mohammed VI of Morocco had worked to harmonize the country's legislation, revise it to reflect human rights considerations and create mechanisms for the promotion and protection of human rights and fundamental freedoms. He had established a national reconciliation commission, the Equity and Reconciliation Body (IER), which was due to submit its final report later in 2005.

10. A number of new laws relating to civil, economic, social and cultural rights had been adopted. Torture had been declared a criminal offence, and Morocco had withdrawn its reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A new family code and labour code had been adopted, and an ombudsman appointed. The Special Court of Justice had been abolished. A new High Audiovisual Communication Authority had been established - an independent body which guaranteed freedom of expression.

11. The National Human Development Initiative had been adopted to combat poverty, exclusion and insecurity, and a law on compulsory sickness insurance guaranteed the right to health. A new institute, the Royal Institute of Amazigh Culture, had been created to integrate the Amazigh (Berber) culture into the education system and the media.

12. Morocco could not claim to be completely free of human rights problems, but there were more and more activities to increase promotion of and respect for human rights. His own organization investigated all complaints of human rights violations. An annual human rights report had been published for 2003 and 2004, as well as a report on prison conditions.

13. Demonstrations in support of demands related to social issues took place throughout the country. Sometimes they got out of hand, and the forces of law and order were obliged to intervene. His organization monitored all such situations to ensure that the rule of law was maintained.

14. Mr. CHIPAZIWA (Zimbabwe) said that the restoration of the land stolen from the indigenous people of Zimbabwe by British settlers was a fundamental part of the country's liberation efforts. The successive droughts which the Southern African region had suffered made it impossible for the country to produce food surpluses. He totally rejected the notion that, because white settlers no longer farmed the land, the native people would never again succeed in growing enough food to feed themselves.

15. The recent clean-up campaign in the slums, where opponents of the Government had carried out their illegal currency trading, had reduced crime and made the settlements more attractive. Order had been restored and the economy had begun to recover. Many people had suffered, it was true, but the Government was now building better housing for those affected. It would welcome any assistance in that task.

16. The enemies of the Government had sought to make the country ungovernable by means of undeclared economic sanctions and other collective punishments. The Government's determined efforts to thwart them had led to numerous accusations of torture, publicized by those who had sponsored the criminal activities. The allegations were not true. Any law enforcement agent who practised torture was duly punished. His Government rejected torture as a legitimate practice for maintaining law and order or a means of eliciting information from persons suspected of committing a crime.

17. Zimbabwe was a beautiful and peaceful country. The Sub-Commission should dismiss with contempt all attempts to exaggerate the misdeeds of small countries, while ignoring those of big countries.

18. Mr. ALI (Iraq) said that the new Iraqi Government aimed to draw up a new constitution which would create the social and political conditions required for a pluralist and federalist State, respecting the rule of law and the independence of the judiciary. A higher council of the magistrature would be established to that end.

19. Even in the current climate of assassinations and terrorist attacks, the Government sought to maintain the rule of law and ensure a fair trial for all defendants. The Ministry of Human Rights and civil society organizations kept a strict watch on the implementation of human rights. Prisons and detention centres came under the control of the Ministry of Justice, rather than the Ministry of Home Affairs.

20. The majority of Iraqis wanted a permanent constitution based on justice, democracy, pluralism, respect for fundamental freedoms and the rule of law, which would enable a secure and stable Iraq to play its due role in subregional, regional and international affairs. He called upon the international community to help to build that new Iraq, which would live in stability and prosperity, respecting the basic freedoms of all.

21. Ms. CHUNG, speaking on the issue of transitional justice, said that she had listened with interest to the comments by Ms. Zerrougui, Special Rapporteur of the Sub-Commission to conduct a detailed study of discrimination in the criminal justice system, and a number of NGOs, particularly in respect of legal and non-legal impediments to transitional justice. In her own country, the Republic of Korea, the Government and civil society had begun to work for the establishment of special laws on fact-finding, remedies and penalties, although more systematic standards for transitional justice were still required.

22. At its sixty-first session in 2005, the Commission on Human Rights had adopted resolution 2005/70, entitled "Human rights and transitional justice" and had discussed other relevant issues, including the right to a remedy (resolution 2005/35) and principles to combat impunity (document E/CN.4/2005/102/Add.1).

23. The Secretary-General had published a report entitled "The rule of law and transitional justice in conflict and post-conflict societies" (S/2004/616), in which he had emphasized the need to ensure a common basis in international norms and standards and had said that truth commissions were a potentially valuable complementary tool in the quest for justice and reconciliation.

24. Peacekeeping operations had become a core activity of the United Nations. The revised draft outcome document on the high-level plenary meeting of the General Assembly on the reform of the United Nations (A/59/HLPM/CRP.1/Rev.1, paras. 59-70) proposed the creation of a "Peacebuilding Commission", including a dedicated institutional mechanism to address the special needs of countries emerging from conflicts.

25. The Sub-Commission should address the issue of transitional justice, including those situations where no transitional justice arrangements had been put in place, or where the arrangements which were made bypassed United Nations-sponsored initiatives.

26. Much attention had rightly been paid to the legal aspects of transitional justice, including the prosecution of offenders and the right of victims to truth and compensation. However, the issue of economic, social and cultural rights in the context of distributive justice had received less attention - i.e. the distribution of, and access to, resources and power that might have been a root cause of the original conflict. In other cases, the wealth and assets of peoples and nations had been transferred out of their control by a corrupt regime. Many such issues remained unresolved, leading to a lack of confidence in the transitional process.

27. Post-conflict reconstruction efforts required a combination of approaches, including those based on human rights - an approach which had not been adopted in South Africa's "willing buyer - willing seller" policy, which had been criticized by the landless people's movement. She felt that the Sub-Commission would be the appropriate body to undertake a rigorous study of human rights and transitional justice.

Meeting with members of the Committee on the Elimination of Racial Discrimination

28. The CHAIRPERSON welcomed Mr. Sicilianos, Vice-Chairperson of the Committee on the Elimination of Racial Discrimination, Mr. de Gouttes, member of the Committee, and Ms. Zerrougui, Special Rapporteur of the Sub-Commission on discrimination in the criminal justice system.

29. Mr. SICILIANOS (Vice-Chairperson, Committee on the Elimination of Racial Discrimination) said that the Committee had collaborated usefully with the Sub-Commission, particularly in the areas of discrimination based on descent (general recommendation No. 29 of the Committee on article 1, paragraph 1 of the Convention (Descent)) and non-citizenship (general recommendation No. 30 on discrimination against non-citizens). Representatives of the Sub-Commission had attended the Committee's thematic debates on both those issues.

30. The Committee was now taking up a new general recommendation, on the prevention of racial discrimination in the administration and functioning of the system of criminal justice. Ms. Zerrougui's report (E/CN.4/Sub.2/2005/7) and the Sub-Commission's comments would be of great assistance to it in that task. Ms. Zerrougui's report usefully complemented the

Committee's work. He particularly wished to highlight her conclusions that access to law and the justice system was highly inequitable for certain groups; that the criminal justice system reproduced the structural inequalities, stereotypes and prejudices of society; that the situation of victims of crime in the criminal justice process required more attention; and that minority groups were underrepresented in the staff of the criminal justice system.

31. Mr. de GOUTTES (Committee on the Elimination of Racial Discrimination) said that, at its sixty-fifth session, the Committee had decided to prepare a general recommendation on discrimination in the criminal justice system because information contained in State and NGO reports often revealed dysfunction and weaknesses in that regard. Racial discrimination in the administration of justice represented a particularly serious attack on the rule of law and the principle of equality before the law by directly affecting people belonging to groups which the justice system was specifically charged with protecting. In addition, the risk of racial discrimination in the administration of justice had increased as a result of immigration and anti-terrorism measures.

32. The draft general recommendation was targeted at Governments, to encourage them to improve their criminal justice systems; law enforcement authorities, the judiciary and lawyers, to raise awareness of the risk of institutional racial discrimination; and human rights educators.

33. The Committee had initially been concerned that there might be a degree of duplication between the general recommendation and Ms. Zerrougui's report, but they were, in fact, complementary. The two approaches differed, particularly in terms of the fields of application, as the Special Rapporteur's report dealt with all forms of discrimination, and methodologies, while the Committee's document was briefer and more practical.

34. The draft general recommendation contained a preamble, which set out the objectives of the exercise, and three main sections. The first outlined proposed general measures to better evaluate the existence and extent of racial discrimination in the administration of criminal justice, which included developing statistical indicators as well as identifying gaps in anti-racist legislation, and developing national strategies to prevent racial discrimination in the administration of justice. The second section set out measures to prevent racial discrimination in terms of the victims, which included access to the law and justice system and the submission of complaints to the courts by the competent authorities. The third section recommended practical measures to prevent racial discrimination against accused persons or suspects at each stage of judicial proceedings, from arrest to sentencing.

35. A draft of the general recommendation, which it was hoped would be adopted before the end of the Committee's session, would be submitted to the Sub-Commission and the Special Rapporteur.

36. Mr. DECAUX agreed that the work of the Committee and the Sub-Commission was entirely complementary. However, it would be useful to better organize cooperation and exchanges between the two bodies. The Sub-Commission was at the disposal of the treaty bodies to carry out studies which could contribute to general comments or recommendations.

Insofar as committees could envisage joint comments, perhaps the Sub-Commission could play a role, without usurping the competence of the committees to interpret and apply their conventions. Attempts should be made to develop a methodology for working together, and to coordinate relations with the International Law Commission.

37. Ms. HAMPSON said she fully agreed with the comments made by Mr. Decaux. The introduction to the draft general recommendation highlighted the complementary roles of the treaty bodies and the Sub-Commission. In a general comment, a treaty body was elaborating upon a binding legal norm, while the Sub-Commission could consider an issue without such restrictions. There was clearly a need for both treaty bodies and a body with a broader mandate.

38. Further to her working paper on the implementation in domestic law of the right to an effective remedy (E/CN.4/Sub.2/2005/15), it was specifically asked whether it was of interest to the treaty bodies to have a study on the operationalization of the right to a remedy. She hoped that during its session, the Committee would consider that matter and respond to the Sub-Commission in writing.

39. Mr. BENGOA said that, in drafting the general recommendation on discrimination in the criminal justice system, it was important that the Committee should adopt a broad concept of racial discrimination which included indigenous populations. He welcomed the preparation of the general recommendation, which he hoped would lead to the development of specific indicators.

40. Mr. YOKOTA said that as he was co-rapporteur with Ms. Chung on a report on discrimination based on work and descent, he shared a certain degree of common ground with the Committee's work on discrimination based on descent. The International Labour Organization (ILO) was also tackling the issue of work-based discrimination. The Sub-Commission had the unique opportunity to examine the two forms of discrimination and the interrelationship between them.

41. There was a difference of emphasis between the work of the Committee and that of the Sub-Commission. The Sub-Commission's primary concern was conducting studies and elaborating general principles or guidelines, rather than advocacy. He therefore agreed that the work of the two bodies was complementary and could be mutually strengthening. The Sub-Commission had learned a great deal from the Committee's discussions on general recommendation XXIX on descent-based discrimination, which had provided a starting point for work in that area.

42. Ms. ZERROUGUI (Special Rapporteur) said that the Committee's work had been very useful in the preparation of her report (E/CN.4/Sub.2/2005/7), and she had referred to an early draft of the general recommendation in order to avoid duplication. Once the general recommendation had been adopted, she would be able to elaborate on that work.

43. From her experience in the field, she had noted that even when States adopted measures which had been recommended with the intention of helping the most vulnerable groups, such measures were not effective because the work was not always carried out professionally, taking

into account the reality of the situation. It was often ignored that steps should also be taken in relation to the majority that discriminated, and not only to the minority that was discriminated against.

44. The report prepared by the Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous people (E/CN.4/2005/88) could be useful when discussing discrimination against indigenous populations.

45. Mr. de GOUTTES (Committee on the Elimination of Racial Discrimination) said that, after reading Ms. Zerrougui's report, he would introduce a number of new elements to the draft general recommendation.

46. Regarding discrimination against indigenous populations and based on descent, the preamble contained a non-exhaustive list of groups particularly vulnerable to racial discrimination in the administration of justice, which included non-citizens, migrants, stateless persons, refugees, indigenous people and those discriminated against on the basis of their descent.

47. Mr. SICILIANOS (Vice-Chairperson, Committee on the Elimination of Racial Discrimination) said that he had noted Ms. Hampson's proposal, which was an important point related to article 6 of the Convention that was frequently raised during the consideration of individual communications; he would discuss the matter with the rest of the Committee.

48. The CHAIRPERSON thanked the members of the Committee for their participation.

49. He invited State observers to exercise their right of reply under agenda item 3.

50. Mr. SOUALEM (Algeria) thanked Mr. Salama for his words of compassion following the assassination of two Algerian diplomats in Baghdad by terrorist groups.

51. It was regrettable that a recent NGO statement had referred to Al-Qaida elements in Algeria as a "rebel group". In that case the attacks against Madrid and London must also be classified as the work of "rebels", unless there was a distinction between victims of the North and those of the South. By referring to the terrorists as "rebels", the NGO was encouraging terrorism.

52. In response to the comments by the Union de l'Action Féminine, he said that Algeria had offered asylum to Saharawi populations deprived of the right to self-determination for almost three decades under the control of the United Nations and its operational agencies present in the country.

53. Ms. FORERO UCROS (Colombia) said that for the first time in Colombia, legislation on peace included provisions on justice and reparation. In previous peace processes, amnesties had been granted to members of guerrilla groups in exchange for demobilization and peace. Nonetheless, those agreements were widely considered to have been important for stability and reconciliation. Certain leaders of those guerrilla groups now even held seats in Congress and had been elected to provincial and municipal office.

54. Since coming to power, President Álvaro Uribe had offered a negotiated solution to illegal armed groups on condition that they ceased hostilities. A significant number of illegal self-defence groups had begun to cease hostilities and demobilize, monitored by a Special Mission of the Organization of American States.

55. It was unacceptable to claim that the Justice and Peace Act was simply the result of a deal with the illegal self-defence groups. It was the result of a two-year transparent public discussion process, and imposed conditions in terms of justice and reparation on all illegal armed groups which accepted it, whether guerrilla or illegal self-defence groups. Individuals who demobilized would have to give details of the events in which they had participated, and victims had guarantees of being able to make claims. Any cases not confessed to or cleared up would continue to be investigated.

56. In addition to serving the sentences imposed by the tribunals, which would be followed by a period of probation, convicted persons would not be able to accede to public posts or stand for election.

57. Victims had the right to privacy, security, truth, justice, full and prompt reparation, a hearing and assistance in submitting evidence, assistance towards their recovery, representation by a lawyer or by the Public Prosecutor, and, in the case of particularly vulnerable persons, special treatment.

58. The Act established a fund for reparations to victims and included the criteria of restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. The National Commission for Reparation and Reconciliation, with the participation of victim representatives, was charged with ensuring that the demobilization process and the activities of the State institutions in the regions were carried out.

59. Mr. FARD (Iran) said that during the general debate under agenda item 3, unfounded allegations had been made against the recently elected President of Iran. Allegations that he had participated in the event referred to had been based on the oral recollections of a small number of individuals, and had been denied by the President, Iranian officials and a large number of those present at the event. The attitude of that NGO to the recent presidential elections, which had had a turnout of almost 35 million people, was regrettable.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 4) (E/CN.4/Sub.2/2005/16, 17 and Add.1, 18, 19, 20 and Add.1 and 23-25; E/CN.4/Sub.2/2005/NGO/1, 6, 11, 22; E/CN.4/Sub.2/2004/21, 26 and Corr.1 and 27; E/CN.4/Sub.2/2003/12/Rev.2 and 38/Rev.2; E/CN.4/2005/25 and 91; E/CN.4/2005/WG.18/2)

60. Mr. BOSSUYT (Special Rapporteur), introducing his report on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (E/CN.4/Sub.2/2005/19), stressed the preliminary nature of the document, which had been prepared without support from the Secretariat. A number of interesting new developments in the area of economic and social rights, both at the international and internal levels, which had come to his attention only after submission would be included in subsequent reports.

61. The preliminary report took account of controversies concerning the legal nature of economic and social rights which had led to misunderstandings and incorrect interpretations that could impede the realization of those rights. The mandate for the report was non-discrimination as enshrined in article 2 of the International Covenant on Economic, Social and Cultural Rights, and therefore did not cover non-discrimination with regard to all human rights. That raised the question of whether non-discrimination had any legal particularities when applied to economic, social and cultural rights, or whether those rights had any legal particularities which distinguished them from other human rights.

62. Economic and social rights had not been included in the first human rights texts, and had assumed an important position for the first time in the Universal Declaration of Human Rights. In 1966, the General Assembly had adopted two international covenants: one on economic, social and cultural rights, the other on civil and political rights. The two covenants were distinguished both by the scope of the commitments undertaken by States parties and by the mechanism established to monitor the implementation of those commitments.

63. The reasons given to explain that difference in treatment referred to the different legal nature of those two categories of rights: one set required an obligation on the part of States parties essentially not to interfere in those freedoms, while the other required the active intervention of States parties to ensure the progressive realization of economic and social rights.

64. Unfortunately, those theoretical considerations had sometimes led to incorrect conclusions. It had never been claimed that one of the two categories of rights was less important than the other, or that the realization of one set of rights was less urgent than the respect of the other. The rights were interdependent and indivisible, in the sense that the violation of any human right harmed the enjoyment of the other human rights. It was essential for the realization of economic and social rights to dispel such misunderstandings.

65. The extent to which a human right demanded the active intervention of a State for its realization or respect entailed consequences with regard to whether it was necessary to specify in the international instrument or domestic legislation the scope of the undertaking by States with regard to those for whom those rights were recognized. There was a tendency to minimize them, but, in his view, taking account of those differences contributed to increasing the efficiency of the protection of all human rights, by indicating more specifically the measures necessary for the realization of each category of rights.

66. It was certainly not claimed that all the rights contained in the International Covenant on Civil and Political Rights were merely rights requiring a duty of abstention on the part of States or that all the rights contained in the International Covenant on Economic, Social and Cultural Rights required active intervention by States. It was often a question of degree, and the fact that a right or freedom was included in one or other of the Covenants did not mean that it had all the characteristics of a civil right or a social right. To the contrary: it was the fact that a right had those characteristics which determined that it was a civil right or a social right.

67. Furthermore, a right which was incontestably a social or cultural right was just as susceptible of judicial control as any civil right. However, without legislation specifying under which conditions which persons were entitled to which social benefits, the recognition of a right

to social security remained a dead letter. It was important to bear in mind the extent to which the international instruments and national legislation could actually guarantee the exercise of social and economic rights. That was where the prohibition of discrimination came in, for it applied to all the rights without distinction as to their nature. It was in fact a prohibition of arbitrary distinctions, which were incompatible with the notion of law.

68. However, the effects of the prohibition of discrimination were different for civil and social rights. The violation of a universal civil right implied discrimination, and it was difficult to conceive of a violation of the prohibition of discrimination in respect of a civil right without that being a concomitant violation of the right itself. The case of social rights was different. In the absence of a precise definition of the content, modalities and beneficiaries of a social right, a determination that a person could not exercise the right in question did not mean that the right itself had been infringed. But when a right was accorded to some people but withheld from others on the ground that such withholding did not affect the right itself, the State party in question would be violating the prohibition of discrimination applicable to that right. And while the non-exercise of the right did not in itself constitute a violation of the international treaty in question, the discrimination in the delivery of the right under national legislation would constitute such a violation. Furthermore, the prohibition of discrimination with respect to a social right would have the effect of creating law, for a person who was not entitled to exercise the right either under the treaty or under national legislation would acquire such entitlement by virtue of the prohibition of discrimination. He stressed that his report was a preliminary one and that he intended to explore in greater detail the issues connected with the prohibition of discrimination.

69. Mr. DECAUX said that one of the big assets of the Special Rapporteur's study was its presentation of a historical and theoretical survey of the topic. Such a survey did not mean taking a step backwards; the past 25 years had seen extensive development of legal practice with regard to the two Covenants which had to be taken into account.

70. There were two basic ideas which should be borne in mind as a framework for the study. Firstly, the general uncertainty on the subject of judicial enforceability counselled a cautious approach. The Special Rapporteur himself showed proper caution when he said that in some cases economic, social and cultural rights were judicially enforceable, the right to primary education for example. General caution should be exercised on the subject because the main client of the study was the Committee on Economic, Social and Cultural Rights, which itself had very clear ideas on enforceability. It was also important not to interfere with other exercises being conducted elsewhere, for example in the Commission's Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights. The Sub-Commission should not pre-empt the outcome of that work by expressing excessively radical or negative views on enforceability.

71. In contrast to that need for caution, the Sub-Commission could proceed with certainty on the question of non-discrimination. The right to non-discrimination cut across all the other rights, and the idea that the effects of the non-discrimination differed according to the nature of the right in question should be examined in the light of the extensive case law. The communications procedures operated under the International Convention on the Elimination of All Form of Racial Discrimination, and the European Social Charter offered examples of the

enforceability of economic, social and cultural rights in the context of non-discrimination. Indeed, the Commission on Human Rights itself had clearly established an extensive practice under article 26 of the International Covenant on Civil and Political Rights.

72. It would also be useful to look at national practice. Non-discrimination was the principle which perhaps stood in greatest need of intervention by a court to access what was fair and reasonable, but that did not exclude recourse to other measures such as good offices and mediation or, more importantly, the development of independent administrative authorities to deal with cases of discrimination.

73. Mr. Salama, Vice-Chairperson, took the Chair.

74. Ms. MOTOC said that the Special Rapporteur's historical review and the discussion so far suggested that the Sub-Commission was still living in the period of the cold war. The Special Rapporteur had overemphasized what had happened between 1960 and the World Conference on Human Rights in 1993, which had clearly established the indivisibility of all human rights. That overemphasis gave the false impression that things had not advanced. In fact, the view of the Chicago School that countries should not include economic, social and cultural rights in their constitutions on the ground that they were unenforceable had become marginal in the doctrine. The principle of indivisibility applied to all economic, social and cultural rights, not just to the example of the right to education given by the Special Rapporteur.

75. The Special Rapporteur said in paragraph 33 that his analysis should not be applied "in a black-and-white fashion"; he should indeed be more receptive to the way in which the Committee on Economic, Social and Cultural Rights had already been working on the topic.

76. On the question of enforceability, she endorsed what Mr. Decaux had said about the Commission's Working Group: it was clear from its proceedings so far that the positions of States were generally far apart but closer on the question of the enforceability of economic, social and cultural rights. Finland, for example, had given examples of how those rights were enforced under its system, and some developing countries, including India and South Africa, were also proceeding along those lines. The Special Rapporteur should take that case law into account in his future work.

77. Ms. KOUFA said that she endorsed most of the comments made by Mr. Decaux and Ms. Motoc. It was often difficult to see from a preliminary report the direction which the study would later take, but she was glad that the Special Rapporteur had begun with an academic discussion of the nature of economic, social and cultural rights and their enforceability. The Sub-Commission itself had developed indicators for a number of those rights and had even produced guidelines and principles, not to mention its long history of work on the economic, social and cultural rights of indigenous peoples.

78. The principle of non-discrimination applied to the rights in question in the same way as to civil and political rights. Although there might be economic obstacles to the delivery of the rights, even poor countries could apply the principle of non-discrimination by refusing to allocate their scant resources only to certain groups.

79. Mr. ALFREDSSON said that he remained unconvinced by many of the distinctions made by the Special Rapporteur between the two categories of rights. The historical survey was useful, but he hoped that in future reports the Special Rapporteur would give more attention to subsequent developments, such as the work of the Committee on Economic, Social and Cultural Rights and of the many special rapporteurs of the Commission and Sub-Commission, and draw lessons from the practice established under article 26 of the International Covenant on Civil and Political Rights, as well as from the work done on the rights of indigenous peoples, mentioned by Ms. Koufa, in particular under the ILO Indigenous and Tribal Peoples Convention (No. 169). He agreed with Mr. Decaux that it would be useful to study national practice on the question of non-discrimination.

80. Ms. HAMPSON said that she agreed with Mr. Decaux, Ms. Motoc and Mr. Alfredsson on the question of enforceability and on the need to take account of subsequent practice. She entirely disagreed with the arguments put forward by the Special Rapporteur in paragraph 10. Civil rights did not imply merely a duty of abstention: for example, States had to make a big effort to guarantee the right to due process. Civil rights were not simply negative: there was extensive case law on, for example, the positive obligation of States and the positive measures which they needed to take. The idea that civil rights were invariable was simply not borne out by the treaty texts or the case law: in many instances States were allowed to take measures necessary for particular ends provided that the measures were proportionate. And the notion of the absolute nature of civil rights was inconsistent with the qualifications written into the treaties.

81. She was therefore pleased to note that in his oral introduction the Special Rapporteur had departed from the arguments of paragraph 10. She had also been struck by his suggestion in that introduction that in cases of discrimination in respect of civil and political rights there were two concomitant violations. That was not true in the light of the case law of the European Convention on Human Rights: there might be two concomitant violations but it was also possible for the primary right not to be violated in itself but to be violated with regard to the discrimination.

82. Ms. MBONU said the ground of lack of resources should never be used by any State to deny economic, social and cultural rights to its citizens, for that would mean that some rights were superior to others. The arguments set out by the Special Rapporteur in paragraph 10, in particular subparagraph (b), and in paragraph 22 were unacceptable. Civil rights did in fact impose positive obligations: the costly construction of prisons and the operation of the judicial system, for example. She agreed on the need to study national practice to clarify the problems of the enforceability of economic, social and cultural rights, which some States regarded as inferior.

83. Mr. BÍRÓ said that the debate on the differences between the two categories of rights appeared to belong to a wider process: the irreversible transformation of international law into supranational law. That gradual process was stimulated by the endeavour of a number of States and non-State actors to move beyond the preservation of the international order towards the far more ambitious goal of global governance. From a supranational perspective any such differences were of secondary importance: since all human rights were universal, indivisible and interrelated, the legal status and purpose of the two categories of rights were the same, and equal emphasis should be given to their implementation. The only problem was that supranational law was as yet a programme and not a reality. At the present stage a legal analysis of distinctions was still warranted, for there were indeed distinctions of legal nature, scope and implementation.

84. In 1950 and 1952 both the General Assembly and the Commission on Human Rights had been of the opinion that the right of peoples to self-determination was a prerequisite for the exercise of the rights set out in the Universal Declaration of Human Rights. Once the decolonization process had been completed, many people had thought that the right to self-determination would be "consumed" and the individual rights would gain an independent existence. There were four objections to that position. Firstly, the transformation of eastern and central Europe in 1989-1991 had placed the question of self-determination back on the agenda. Secondly, the draft declaration on the rights of indigenous peoples had not yet been adopted. Representatives of indigenous peoples had rightly claimed for years that without recognition of their right to self-determination and permanent sovereignty over their resources they would continue to suffer severe discrimination, in particular in the economic, social and cultural fields. Thirdly, political and civil rights were given priority in the process of "democratization" on the understanding that democracy would bring social and economic development; that had not been the case in the past 15 years. Fourthly, supporters of economic globalization argued that laissez-faire policies would also bring social and economic development. That assumption was taken for granted by some as carte blanche for blaming Governments for failing to deliver economic and social rights.

85. In short, on the one hand there was a programme aimed at the full realization of all human rights and, on the other hand, a practice which was not always in accordance with that programme. In that sense the Special Rapporteur's analysis facilitated an understanding of the imbalance between the rights in question and the nature of the discrimination in their exercise. Such an understanding would certainly lead to more efficient methods of dealing with the complexity of the issue.

86. Mr. CHERIF said that while the two categories of rights were different in nature, they were certainly of equal value. The doctrine distinguished between civil and political rights, whose exercise required abstention from action by the State, and economic, social and cultural rights, whose exercise required a considerable effort on the part of the State to deliver, for example, the rights to education and health. Furthermore, a refusal to make value judgements between various rights did not exclude useful theoretical distinctions and classifications.

87. The main point of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights was that no one should enjoy an unfair advantage in the exercise of those rights. That applied in particular to equality of access to public services and equal use of natural resources by all citizens. The issue was closely related to the rights of minorities and in particular of immigrants, who often suffered discrimination.

88. The question of the enforceability of economic, social and cultural rights should receive special attention in the Special Rapporteur's further work so that it could be reflected in concrete terms in the various national judicial systems.

89. Mr. SATTAR said that, while he had benefited from the Special Rapporteur's illuminating analysis of the difference between the two Covenants, he did not necessarily agree with all the conclusions. It was true that the two categories of rights were enforced differently and there was certainly a need for them to be treated equally. But it was impossible to agree with the scholar cited by the Special Rapporteur who even questioned that the rights pledged in the International Covenant on Economic, Social and Cultural Rights could be called human rights.

Surely the principle of the indivisibility of human rights was accepted by the world community? He was aware, of course, of the lack of attention given by the world community to the realization of economic, social and cultural rights, but that was primarily a question of lack of political will.

90. Article 2, paragraph 1, of the Covenant made it clear that States had an obligation to achieve the progressive realization of those rights. Moreover, the Covenant forbade States to do anything aimed at the destruction of the rights and freedoms in question. Such principles could be interpreted as requiring the reform of policies of international trade, etc., when such policies undermined the exercise of rights.

91. The Covenant had originally not provided for a monitoring body; the subsequent establishment of such a body represented progress which he hoped would continue to the point where the world community worked for the application of the International Covenant on Economic, Social and Cultural Rights with the same enthusiasm as in the case of the International Covenant on Civil and Political Rights.

92. Mr. Kartashkin, Chairperson, resumed the Chair.

93. Mr. SALAMA said he agreed with Mr. Sattar that all human rights should be treated equally even though their legal natures differed, for such differences did not mean that some rights were inferior to others. But what was lacking was not only political will but also empirical evidence to identify the extent of the violation of economic, social and cultural rights. The Special Rapporteur might be able to indicate the extent to which the notion of the right to development might be useful in redressing what was an artificial distinction left over from the cold war period. In that connection, the Open-ended Working Group on the Right to Development had identified the principles of non-discrimination, transparency, participation and accountability as a kind of functional definition of a development process which interpreted the right to development as a right to an environment free from unfair structural obstacles. The Working Group had agreed that it was fundamental for States to try to produce impact assessments of trade policies, for example, on human rights in general, with a view, in fact, to obtaining empirical evidence.

94. He therefore welcomed the technical breakdown of the principles underlying the two Covenants in order to deal with their individual components separately. The indivisibility of all human rights could be guaranteed only on the basis of analysis of the requirements for the delivery of economic, social and cultural rights, such as the four principles identified by the Working Group. He agreed with Mr. Decaux that it would be useful to study national practices in that respect. The current difficulties in the negotiation of an optional protocol to the International Covenant on Economic, Social and Cultural Rights indicated that until international cooperation matched by indicators was included in the implementation process, the false duality of the two groups of rights would persist.

95. Ms. MOTOC said that, in point of fact, reliable indicators had been developed by a former member of the Sub-Commission, Danilo Türk, and his data had been used by the United Nations Development Programme, among other United Nations bodies.

96. Mr. BOSSUYT (Special Rapporteur) said that any differences in view among the members were largely superficial. He welcomed the reference by Mr. Decaux to the crucial role played by article 26 of the International Covenant on Civil and Political Rights in making it possible to bring cases involving social and economic rights before the courts, and not only those relating to the prohibition of discrimination. However useful the reference to economic, social and cultural rights in international instruments, cases involving such rights could be brought before the courts only once they had been incorporated into domestic law or regulations. As for the point raised by Ms. Motoc, he had first written about the importance of the indivisibility of human rights in 1976. As for Ms. Hampson's comments on paragraph 10 of the preliminary report, the issue should be seen in the context of the end of paragraph 9, although he conceded that the wording might have been better chosen. With regard to Ms. Mbonu's point, there could be no question of one right being superior to another: they were all of equal value. As for Mr. Sattar's comment, it was not so much that, since the adoption of the Universal Declaration of Human Rights, the recognition had grown that human rights were not restricted to civil rights, as that the concept of civil rights had become broader so as to embrace other rights as well. The right to development, as mentioned by Mr. Salama, was essentially a combination of the whole spectrum of rights, in that it could not be realized until all other social rights had been achieved.

97. Ms. MBONU (Special Rapporteur), introducing her progress report on corruption and its impact on the full enjoyment of human rights, in particular, economic, social and cultural rights (E/CN.4/Sub.2/2005/18), said that she had focused mainly on the issues raised by members at the fifty-sixth session, with particular reference to institutions that were vital to the entrenchment of democracy, such as political parties and parliaments. Corruption took many forms that violated citizens' rights. For example, buying votes constituted corruption, as did interference by election administrators with voter registration, ballot boxes or voting papers. Such corruption distorted the free choice of the electorate.

98. Similarly, as a Supreme Court Justice in Nigeria had said, corruption in the legislature was inimical to democracy. Legislation that was the product of corruption would affect the societal equilibrium. Not only legislation but also financial control - the collection of taxes, welfare spending and financial reporting - were at risk. Corruption also eroded the foundations of democratic institutions and undermined the independence of the judiciary, the armed forces and the police. She drew attention to paragraphs 12-20 of the report, which considered the negative impact of corruption in the judiciary and the law enforcement agencies on the full enjoyment of human rights.

99. Corruption existed in all systems of government, nor did it respect borders and boundaries. Corruption in procurement, identified as an area particularly prone to corruption, was found in both developed and developing countries. It harmed companies that produced goods and services by increasing their operating costs. It throve in the absence of openness, transparency and regulations that were not strictly enforced. Indeed, such corruption was at the root of the oil-for-food scandal in Iraq, as mentioned in paragraph 37.

100. Paragraphs 38-40 of the report dealt with the problem of capital flight through corruption. Developing countries were, however, faced with daunting obstacles in their efforts to repatriate funds siphoned from financial institutions by various corrupt leaders. Although the Swiss Federal Court had ruled that the Swiss authorities could return assets of obviously criminal

origin to Nigeria without a court decision in the country concerned, US$ 458 million of which was to have been spent on rural electrification, roads, primary health care, education and water in Nigeria, the Swiss authorities had hindered the repatriation of the stolen funds. The report reiterated the importance of technical assistance and international cooperation in the repatriation of such funds.

101. Chapter IV of the report considered national, regional and international mechanisms put in place to fight corruption, notably the United Nations Convention against Corruption. Although signed by all countries, however, ratification by only 15 had delayed the Convention's entry into force. Another new development was the African Peer Review Mechanism, which formed part of the New Partnership for Africa's Development. The Mechanism, established by some African leaders to encourage States' commitment to good governance, entailed the systematic examination of a State's performance by its peers. If effectively utilized, it should reduce, if not completely eradicate, corruption across Africa. Considerable success had been achieved by an anti-corruption unit in her own country, Nigeria. The Budget Monitoring and Intelligence Unit had saved Nigeria over US$ 1 billion that would otherwise have been paid out in inflated contracts. Such effective anti-corruption mechanisms could help eliminate corruption. Yet, in many countries, lack of adequate funding for existing mechanisms was a major obstacle. Corrupt officials could afford to hire expensive defence lawyers, so sufficient funding was essential. Another obstacle was the proliferation of mechanisms, in some cases with overlapping functions. Parliaments should enact laws to ensure the independence of such mechanisms, unless they were established solely for purposes of propaganda and public relations. The report also stressed the role of NGOs and the media in the fight against corruption. Lastly, she drew attention to the conclusions and recommendations appearing in paragraphs 59-66 of the report.

102. Ms. MOTOC commended the focus of the report, which generally reflected the discussion at the fifty-sixth session. The references to the universality of corruption, however, gave an indication of the scope of the topic; and the report could be only a beginning, since the Special Rapporteur had had no room to be more specific. One important element that was worth exploring was the effect of globalization. In developed countries, the rule of law had existed before the advent of globalization, but in Latin America, Eastern Europe, Africa and elsewhere traditional societies had been disrupted by globalization and insufficient attention had been paid to the rule of law. Yet, without access to justice, no other rights could exist. Given that the report constituted a general framework, she wondered how the Special Rapporteur planned to proceed. Perhaps she should undertake a systematic review of the impact of corruption on all economic, social and cultural rights.

103. Mr. ALFREDSSON said that, having identified the issues, the Special Rapporteur would face her real challenge in deciding what course of action to follow. There was a need to draw parallels with and lessons from existing human rights experience. Equal rights and discrimination standards were directly affected by corruption. The report mentioned the Code of Conduct for Law Enforcement Officials, but he wondered what new standards the Special Rapporteur would recommend; and, since standards could not stand alone, thought would need to be given to the question of monitoring. Again, lessons could be learnt from previous human rights experience. States might be required to report; or a complaints mechanism could be established for groups or individuals, to be used either before or after the exhaustion of local remedies. Another possibility would be for the Commission to appoint a Special Rapporteur.

104. Ms. CHUNG said that the report underlined the importance of the topic. Corruption involved the transfer of wealth from the poor to the rich. In her next report, the Special Rapporteur should focus on a number of specific factors: the corruption involved in arms sales; the nexus between business and political parties; and corrupt links between transnational corporations and government officials. In that context, she should discuss the recently introduced tenth principle of the Global Compact, which was directed at countering all forms of corruption. The next report should also concentrate more on State policies and practices and State responsibility in every region of the world.

105. Mr. CHEN said that the report was rich in content and analysis. Of particular importance was the Special Rapporteur's treatment of the issue of capital flight through corruption and the recommendations on how to deal with the problem. As Mr. Alfredsson had said, the next stage would be equally challenging. Consideration should be given to the measures to be taken both by States and by the international community. An instrument already existed in the United Nations Convention against Corruption, but it had been ratified by only 15 States. Further consideration should also be given to the question of how corruption affected international legal cooperation, including extradition. He supported the idea that the Commission should appoint a special rapporteur on corruption.

106. Mr. SALAMA said that the specific role of the Sub-Commission was to give added value from a human rights perspective. His suggestion for further action was to contemplate the drafting of anti-corruption principles; to issue guidelines would not be practical, since national environments varied too widely. Such principles would merely set out the parameters that should be met. The guidance for Member States issued by the Security Council Committee established pursuant to resolution 1373 (2001) could be a useful model. The problem with the United Nations Convention against Corruption was that it was very weak; the Sub-Commission should find another way of broaching the topic of corruption. One possibility would be to call for the establishment of national bodies of inquiry. The Sub-Commission should, however, take care not to spread itself too thinly; it would be a mistake to tackle the question of links between transnational corporations and Governments, for fear of being overwhelmed by a host of other issues.

The meeting rose at 1.05 p.m.