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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

REPORT OF THE SESSIONAL WORKING GROUP ON THE ADMINISTRATION OF JUSTICE

Chairperson-Rapporteur: Ms. Antoanella-Iulia Motoc

* Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled "Human Rights Council", all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council. Consequently, the symbol series E/CN.4/Sub.2/_, under which the Sub-Commission reported to the former Commission on Human Rights, has been replaced by the series A/HRC/Sub.1/_ as of 19 June 2006.

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Summary

By its decision 2006/103, the Sub-Commission on the Promotion and Protection of Human Rights established the sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Françoise Hampson (Western European and Other States), Antoanella-Iulia Motoc (Eastern Europe), Lalaina Rakotoarisoa (Africa), Janio Iván Tuñón Veilles (Latin America and the Caribbean), and Yoko Yokota (Asia). The working group elected, by acclamation, Ms. Motoc as Chairperson-Rapporteur for its 2006 session.

The sessional working group held discussions on the subjects of the accountability of international personnel taking part in peace support operations; the right to an effective remedy for human rights violations; amnesties, impunity and accountability for violations of international humanitarian law and human rights law; the circumstances in which a party can open fire in international humanitarian law and human rights law; and transitional justice. Presentations were made on all of these topics.

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Introduction

1. By its decision 2006/103, the Sub-Commission on the Promotion and Protection of Human Rights decided to establish a sessional working group on the administration of justice. With the agreement of the other Sub-Commission members, the Chairman appointed the following experts of the Sub-Commission as members of the working group: Françoise Hampson (Western European and Other States), Antoanella-Iulia Motoc (Eastern Europe), Lalaina Rakotoarisoa (Africa), Janio Iván Tuñón Veilles (Latin America and the Caribbean), and Yozo Yokota (Asia).

2. The following members of the Sub-Commission also took part in the discussions of the working group: Shiqiu Chen, Mohamed Habib Cherif, Emmanuel Decaux, El-Hadji Guissé, and Soli Jehangir Sorabjee.

3. The working group held two public meetings, on 8 and 11 August 2006. The present report was adopted by the working group on 23 August 2006.

4. The working group elected, by acclamation, Ms. Motoc as Chairperson-Rapporteur for its 2006 session.

5. The observer of the non-governmental organization World Citizens Association also took the floor during the debate.

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

Report of the 2005 sessional working group on the administration of justice (E/CN.4/Sub.2/2005/11);

Expanded working paper by Françoise Hampson on the accountability of international personnel taking part in peace support operations (A/HRC/Sub.1/58/CRP.3);

Expanded working paper by Ms. Hampson and Mr. Mohamed Habib Cherif on the implementation in practice of the right to an effective remedy for human rights violations (A/HRC/Sub.1/58/CRP.4);

Working paper by Ms. Hampson on the circumstances in which a party can open fire in law of armed conflict/international humanitarian law and human rights law (A/HRC/Sub.1/58/CRP.5).

7. Furthermore, the working group had before it the following informal paper:

Working paper by Mr. Yokota on the issues of amnesties, impunity and accountability for violation of international humanitarian law and international human rights law (no document symbol).

Adoption of the agenda

8. At its first meeting, on 8 August 2006, the working group adopted the provisional agenda contained in the 2005 report of the sessional working group on the administration of justice, as amended. The agenda included the following items:

1. Election of the Chairperson-Rapporteur.

2. Adoption of the agenda.

3. Transitional justice.

4. The right to an effective remedy.

5. Other matters.

6. Provisional agenda for the next session.

7. Adoption of the report.

I. ACCOUNTABILITY OF INTERNATIONAL PERSONNEL TAKING PART IN PEACE SUPPORT OPERATIONS

9. Ms. Hampson introduced her expanded working paper on the accountability of international personnel taking part in peace support operations (A/HRC/Sub.1/58/CRP.3). Ms. Hampson indicated that this working paper was an update of the working paper of the same title that she presented to the working group in 2005 (E/CN.4/2005/42). She noted that in its resolution E/CN.4/2005/L.14, the Sub-Commission had requested the Commission on Human Rights to authorize the appointment of Ms. Hampson as Special Rapporteur on the accountability of international personnel taking part in peace operations, but that with the creation of the Human Rights Council and the delays that this had engendered, no authority had yet been accorded to submit a preliminary report.

10. Ms. Hampson noted that the database referred to in footnote 9 of her original report should be available via the website of the Human Rights Centre of the University of Essex in 2007. She also made reference to a process initiated by the Secretary-General, acting pursuant to General Assembly resolution 59/283, of 13 April 2005, which established a Redesign Panel on the United Nations System of Administration of Justice. The Redesign Panel aimed to propose a model for resolving staff grievances in the United Nations that is independent, transparent, effective, efficient and adequately resourced and that ensures managerial accountability. However, it appears to have left unresolved many core issues concerning wrongful acts of United Nations personnel who participate in peace operations. She noted that the Redesign Panel focuses on internal grievances, and not grievances by individuals outside the United Nations system against the United Nations or its personnel. She observed that it was not clear that the Redesign Panel would address the wider issues relating to criminal and civil liability of United Nations personnel for their individual actions, and the related question of civil liability of the United Nations for the wrongful actions of its

personnel. She expressed concern that the relatively narrow scope of the Redesign Panel on the United Nations System of Administration of Justice could have the unfortunate consequence that the broader problem of criminal and civil liability of United Nations personnel in peace operations might not be addressed.

11. Ms. Hampson drew attention to the fact that the United Nations Interim Administration Mission in Kosovo (UNMIK) had submitted a report to the Human Rights Committee (CCPR/C/UNK/1). She noted that UNMIK had also concluded arrangements with the Council of Europe so that UNMIK would submit reports related to the Framework Convention for the Protection of National Minorities, and to allow inspections from the Committee on the Prevention of Torture of the Council of Europe. She noted, however, that the situation in Kosovo is highly unusual in that UNMIK has a mandate from the Security Council that effectively makes it the Government in Kosovo, while in other peace operations, international personnel work alongside the national Government.

12. In the discussion that followed, Mr. Guissé said the reality of impunity for United Nations personnel who had committed serious offences was not acceptable. He deplored that all the United Nations itself could do was to apply internal disciplinary sanctions, even if the offences were criminal in nature. Although he acknowledged that United Nations personnel have immunity under international agreements, he expressed the view that if United Nations personnel commit crimes in a country in which they serve, they should be held responsible before the national courts. While acknowledging immunity was the current reality for United Nations personnel, he said that at the least the United Nations should pay compensation and provide other types of reparations, if appropriate, to victims who have suffered at the hands of United Nations staff. Otherwise, victims would not receive any type of reparation. He added that the United Nations administrative tribunal should make a determination of whether an action can be characterized as disciplinary or criminal or both. He also added that if the act of an individual was considered outside the scope of his or her employment, this would not be a sufficient reason to absolve the United Nations of liability, reasoning that the fact of sending individuals to participate in peace operations missions engages the responsibility of the organization. He noted that the United Nations had developed approaches to providing compensation to victims in other situations, and in particular referred to the development of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147). Mr. Guissé also made reference to the issue of war reparations.

13. Ms. Rakotoarisoa said that United Nations personnel should be accountable for their acts. She noted that immunity should exist for personnel when acting in the scope of their professional functions, and internal disciplinary proceedings were appropriate if United Nations personnel had failed to act in an appropriate manner. However, she said that if the nature of the act was of a criminal character, then both criminal and disciplinary procedures should be brought against the individual. She added that the United Nations should not be absolved of civil liability on the rationale that criminal conduct was considered outside the scope of the employment relationship. To the contrary, the United Nations should be civilly liable for the wrongful conduct of its employees in peace operations, including criminal conduct.

14. Mr. Decaux said the issues identified in the paper of Ms. Hampson should be studied. He cautioned that before drawing any conclusions regarding the work of the Redesign Panel, the United Nations administrative tribunal should be consulted and have an opportunity to comment. While he acknowledged that the United Nations administrative tribunal did not allow for true equality of arms and was understaffed, he was reluctant for it to take the complete blame for the current lack of accountability of United Nations personnel involved in peace operations. He questioned whether it was the best course of action to waive immunity for United Nations personnel as a matter of uniform policy and leave jurisdiction to local courts, reasoning that there could be risk of paralysis of United Nations action as a result.

15. Mr. Decaux made reference to UNMIK, and noted that the top United Nations official cumulates all power in the province. He noted that normally executive power was constrained by an independent judiciary. He put forth the idea that perhaps peace operations by the United Nations could be subject to reporting to human rights committees more generally, and not just in cases where the mission had a mandate to exercise governmental authority, as is the case with UNMIK. With respect to disciplinary and criminal responsibility of military units of United Nations peace operations, he noted that national contingents were subject to the laws governing military personnel in their respective countries, each with its own military and legal traditions. This was a source of concern because there was a lack of harmonization of how wrongful acts would be addressed, and Mr. Decaux stressed that there was a need for a degree of harmonization which could be achieved by setting minimum United Nations standards in this respect. He also noted that there were two different levels of responsibility to keep in mind for the purposes of analysis: the responsibility of the individual and the responsibility of the United Nations.

16. Mr. Yokota said immunity should not be allowed for United Nations personnel, and indicated that it was important that reparations were not limited to compensation. There might be a need to provide rehabilitation or psychological counselling as well. He said there was a need to ensure that United Nations personnel were accountable for criminal acts. He said that the International Criminal Court could, under certain circumstances, deal with such cases. He added that the United Nations might need to create new mechanisms to address this issue, particularly as the United Nations administrative tribunal deals only with professional misconduct within the scope of the employment relationship. He suggested that perhaps Member States could be urged to amend their military codes of conduct to provide not only for punishment of disciplinary and criminal offences, but also reparations to victims. He added that illegal activities of private companies that were hired for security or military purposes by a State should be attributed to the State, giving rise to the responsibility to that State.

17. Mr. Chen indicated that the paper of Ms. Hampson raised issues that merited further study. He said that national authorities have little or no jurisdiction over personnel taking part in United Nations peace operations. He noted that the paper raised complicated issues of criminal and civil liability, and that the mechanisms of the United Nations were administrative in nature and did not address these concerns. He also said there could be other types of suffering in a war zone that potentially could involve United Nations personnel, such as harm to economic activity, infrastructure or social life. Mr. Chen asked whether it made sense to initiate new studies at this time when the future of the Sub-Commission was uncertain.

18. The observer for World Citizens Association noted that there were other cases of legal holes in the system of human rights protection of people in areas marked by conflict. She noted the case that non-State actors in some States control territory and inflict suffering on the population, and the persons aggrieved have no effective remedy.

19. Ms. Hampson responded to the issues raised in the discussion by indicating that her paper was not a new study, but was only an update of a paper that had been submitted last year. She emphasized that her paper was not on war reparations, but on the accountability of United Nations personnel for their actions during peace operations. While acknowledging that this would not be sufficient in terms of punishment, she raised the issue of whether United Nations personnel could be disciplined for criminal acts. She said that there were a number of legal and practical reasons why this was not normally done. She added that in practice the United Nations often did not hold people to account even according to its internal administrative procedures, but simply moved them to a different location and function, sometimes with a promotion. She noted that there had been some discussion about delegating greater authority to the head of the peace operation in the field to deal with these issues. This could present a danger of lack of uniform treatment, particularly if the issue of accountability was not a priority of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms when countering terrorism.

20. Ms. Hampson noted that having two broad categories of offences within the rules of the United Nations was not helpful, as the applicable procedures were different depending on the category of offence and the distinctions between the categories was somewhat arbitrary. She observed that there had been proposals for an Ombudsperson and a Standing Board of Inquiry, but was doubtful whether either innovation would make an effective contribution to the goal of making United Nations personnel accountable for their actions. She said that another significant problem was that there was no place where all complaints could be processed centrally, and that the locations for receiving complaints in States where peace operations function were not well known, or in so few locations, as to substantially deprive a large part of the population from effectively making a complaint. She added that in some respects the United Nations was better at providing compensation for property claims as opposed to injury or death to persons, because the former type of compensation was normally done quickly without a formal proceeding, whereas the latter type of claim required time-consuming formal proceedings.

II. THE RIGHT TO AN EFFECTIVE REMEDY FOR HUMAN RIGHTS VIOLATIONS

21. Ms. Hampson and Mr. Cherif presented their expanded working paper on the implementation in practice of the right to an effective remedy for human rights violations (A/HRC/Sub.1/58/CRP.4). Ms. Hampson said that the key question was what mechanisms needed to be put into place to evaluate whether the right to a remedy is implemented in practice. She indicated that two basic types of information were needed. First, in each case of an alleged human rights violation, the human rights body needed to determine how, within the particular legal system, the violation should be raised before the domestic authorities. Second, human rights bodies would need to have additional information from States concerning such questions

as how many complaints there were each year against State officials alleging ill-treatment; how many were successful; how many prosecutions were carried out; and what was their success rate. As a complement to the information supplied by the States, information based on the experience of individuals who had sought relief would also be needed. Finally, she said that once the preceding two issues had been adequately dealt with, then human rights bodies could make recommendations about what mechanisms, formal or informal, might be put in place in a given State to ensure the right to an effective remedy in practice. She said the paper should be of interest to the Human Rights Council, treaty bodies, special procedures and NGOs. If there were more effective remedies at the national level, States would be less likely to be subject to international scrutiny.

22. Mr. Sorabjee said that this paper was quite important because without adequate remedies, human rights protections were just paper rights, without any use in practice. He also mentioned the issue of sanctioning personnel in the public administration, and said that this was a real problem as often there was a reluctance to punish wrongdoing and complicity within management not to hold individuals in public administration accountable for their acts. He questioned the model of having internal administrative proceedings and sanctions, and said that a different model would be more effective.

23. Ms. Rakotoarisoa said that there were some systems where the only avenue of complaint for people who were held in detention was to the very persons who were responsible for their surveillance. Such a framework was not independent and detainees would normally not dare to make complaints for fear of reprisals. This effectively restricted any meaningful access to justice in this context and created a climate of impunity.

24. Mr. Sorabjee noted that in India, persons held in pretrial detention could make a petition to an advisory board, which was composed of a board of retired judges. He said this advisory board was useful in that it could examine both the factual conditions of detention as well as legal issues. He added that court remedies to complaints of individuals in pretrial detention were sometimes of limited usefulness because judges were not always aware in detail of the factual conditions of detention. In terms of providing a remedy for pretrial detention, he argued that one should distinguish between a case where a person is released on a technicality, such as an order not being made by the required deadline, and a situation where after a substantive determination it was found that there were no grounds for holding the individual. Normally, a remedy should only be available in the latter case.

25. Mr. Tuñón Veilles said that while in his country, Panama, the right to *habeas corpus* existed, in practice the processing of a petition was lengthy and a person could effectively wait a week to be freed, taking into account also the time of the judge to act. He also noted that in some cases, individuals were held in preventive detention for two or three years, and that when the case came to trial it quickly became apparent that there had been no evidence to support the charges. In such circumstances, there was a need to address what kind of remedy should be made available. He also said that legal aid could be very important in ensuring access by individuals to remedies, and that a lack of resources inhibited the availability of legal aid.

26. Mr. Guissé said that in his country there had been efforts to avoid holding individuals in pretrial detention for prolonged periods. He said that there had been situations where a person had been held in pretrial detention for an extended period, and that subsequently it had become known that there was no substance to the case. He said that in such an event, the aggrieved person could petition for a remedy. He also indicated that legal aid could be very important in assisting individuals to obtain remedies. He suggested that States should consider providing assistance to non-citizens who were detained unjustifiably and then, when released, wanted to return to their country of origin.

27. Mr. Cherif said that it was important to make a distinction between preventive action and situations where a wrong had been committed and a remedy was warranted. The availability of legal representation, including through legal aid, might, for example, prevent unjustifiably long pretrial detention because the lawyer would normally take appropriate action to protect his or her client. The other case involved a situation where a wrong had actually been committed and the issue was what remedy was available to the aggrieved person. He noted that in France the law provided for a remedy if a person had been detained illegally.

28. An observer for the World Citizens Association stated that, in some countries, detention centres for migrants were privately run, and noted that no remedies were available for unjustified detention. She referred to the situation of undocumented migrants who had been returned to their country of origin, and raised the issue of whether these people should receive some sort of compensation or assistance.

29. Ms. Hampson referred to the problem of complaints not being taken seriously or even registered because the police or complaint body made an initial determination of credibility by not believing the person lodging the complaint. She said this could particularly be the case in complaints directed at the police, whereby the person responsible for receiving complaints assumed the complainant was mistaken or lying and that the police version of the facts was truthful.

30. She added that other problems could include that the body receiving complaints did not have adequate resources to undertake an appropriate investigation or did not have staff with the appropriate training or specialized personnel, such as forensic specialists or medical doctors, who had expertise in evaluating whether a person had been the subject of abuse. She noted that in theory there might be situations where a remedy was available, but a lack of knowledge or the lack of skilled lawyers or legal aid might effectively preclude the right to a remedy in practice for a large number of people. She said that the Council of Europe had done some work on how the right to a remedy worked in practice at the national level. In concluding, she said that only when the conceptual work was done about what issues needed to be addressed concerning the right to a remedy in practice could its applicability be considered in a wide range of circumstances. She expressed the view that up to the present time, the right to an effective remedy in practice had not been adequately unpacked and analysed. Once a satisfactory conceptual approach found wide agreement, further work might be necessary to determine the information needed by treaty bodies and the best formal and informal mechanisms for obtaining it. That would very likely involve NGOs.

III. AMNESTIES, IMPUNITY AND ACCOUNTABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

31. Mr. Yokota introduced his working paper on the issues of amnesties, impunity and accountability for violation of international humanitarian law and human rights law. He noted that it was prepared pursuant to Sub-Commission decision 2005/108. He indicated that amnesty in the context of the relationship between international humanitarian law and human rights law had gained prominence in connection with the truth and reconciliation process in South Africa, which had taken place after the collapse of the system of apartheid. He said that it could have been divisive to try to bring all perpetrators of serious crimes to justice, and that there had been fears that to do so would have led to social unrest or violence between different ethnic groups. Nevertheless, even with these concerns, the public had expected some action to take place, and he explained that there had also been a fear that people might have taken the law into their own hands if no action had been taken. He said that in this difficult situation, the Government had adopted a policy of truth and reconciliation where amnesties for criminal acts committed during the apartheid period were granted to perpetrators if they voluntarily came forth and told the truth about what acts they had had committed and apologized. He noted that, in some instances, the perpetrators had had to face the victims and their families in the process. He added that in general the process of truth and reconciliation had worked well, although some problems and difficulties had been reported. Mr. Yokota also referred to the cases of Sierra Leone and Timor-Leste, where amnesties had been provided. He said these had been less successful situations because while amnesties had been provided, the process of coming forth to tell the truth and face the victims and their families had been largely ignored. Consequently, these latter two cases of providing amnesties had been severely criticized by the victims and their families. He also noted that the case of South Africa related to human rights violations committed in time of peace, whereas the cases of Sierra Leone and Timor-Leste related to human rights violations in a period of hostilities.

32. Mr. Yokota drew a distinction in his paper between responsibility and accountability for human rights violations. He argued that State responsibility had a specific meaning in international law, as traditionally interpreted, and meant that any State that commits a violation of international law engages its responsibility. According to this traditional approach, only States could invoke a violation of international law and only States could assume State responsibility. In order to provide reparation to another State for a violation, a State, depending on the situation and the wishes of the victim State could: (a) apologize; (b) restore the original situation or provide restitution; (c) punish the perpetrators; or (d) pay compensation for damages suffered. This would be the case even if a violation of international law, including human rights or international humanitarian law, was committed by an individual who might be a soldier, a policeman or other government official. In such a case, it would then be the responsibility of the State to take appropriate action against the individuals who had caused the harm. He argued that accountability of the State was a broader notion. He posited that in such a framework, non-State actors such as individuals could claim reparations for violations of human rights law or international humanitarian law and hold the State accountable for such violations. Hence, the notion of accountability in human rights law and international humanitarian law was broader than the traditional notion of State responsibility under international law.

33. As a result of his analysis, Mr. Yokota drew the following conclusions. He argued that the expanded notion of accountability had been developed to address new situations such as a need to focus on the individual sufferings of serious human rights violations and to provide direct remedies to victims. It had also been used, and should continue to be used, to avoid total amnesty or impunity of perpetrators of serious human rights violations and to bring such perpetrators to justice. In addition, he argued that the accountability, in addition to the responsibility, of the State of the perpetrators should also be invoked in parallel.

34. In the discussion that followed, Mr. Guissé spoke of the difficulties of achieving true reconciliation because the suffering of victims of a conflict was ongoing long after a conflict had finished. He said that there were two types of amnesties. One was an amnesty of the facts, where a veil of secrecy was drawn over all the incriminating facts of the serious crimes that had been committed. This was the worst type of amnesty as the truth was covered up and not known or acknowledged. The second type of amnesty provided an amnesty for a certain category of persons who had been implicated in certain types of activities during a determined time period. Although this was more transparent as it acknowledged the truth that serious crimes had been committed by the perpetrators who were amnestied, it led to a generalized atmosphere of impunity. He added that because of a lack of justice in these two different situations, a hostile atmosphere among the population could develop as a reaction to such impunity. He noted that amnesties for serious crimes, in addition to creating a climate of impunity, also did not address the issue of providing reparation to the victims of serious crimes and therefore created further dissatisfaction among the public.

35. Ms. Hampson said that Mr. Yokota's paper raised many questions and pointed to the need to have a series of papers on this subject. She observed that the paper presented a traditional approach to the subject. She argued that the concept of pre-emptory norms of international law, referred to as *jus cogens*, was unfortunately an overused concept that was increasingly being used by international jurists and others as a way of saying that they were in favour of a particular position. She said very few things were *jus cogens*, and that in order to establish *jus cogens* one first had to prove that a position had become accepted as customary international law. This was not possible to prove in most cases. She cautioned against using *jus cogens* to defeat something in a bilateral treaty that was deemed objectionable. She also questioned on policy grounds the concept that parties to a conflict at the national level could not enter into agreements that provided for amnesties in exchange for an end to the fighting, reasoning that this possibility could save lives and avoid further injuries by allowing for a negotiated end to a conflict that might otherwise continue. Ms. Hampson added though that it would normally be a violation of human rights law if a State does not bring criminal proceedings against the perpetrators of crimes. As a way to combat impunity, she also endorsed the idea of universal jurisdiction to allow for the prosecution of violations of human rights law. She said the working group might wish to consider recommending that States be required to allow claims to be brought in their own courts against actions by their military forces. Finally, she cautioned against looking primarily to the International Criminal Court (ICC) as a means for holding perpetrators of serious crimes responsible for their acts in all cases, noting that the jurisdictional limitations on the ICC's powers would very considerably limit the number of cases that could be brought.

36. Mr. Yokota responded that there was not general agreement on what constituted *jus cogens*, but that he thought human rights law was *jus cogens* because otherwise bilateral agreements would have the same status as human rights instruments and the latter could be weakened in their application. He acknowledged, however, that it was not easy to prove that human rights law had been recognized as customary international law. He also noted that constitutionally in many States, the Head of Government or State had the right to provide pardons for crimes. How could it be said that amnesties granted under constitutional law violated human rights unless the existence of *jus cogens* was recognized? He noted that while the concept of State responsibility has long been accepted, in practice it had not worked that well to protect human rights. In his view, this had given rise to the broader notion of accountability, which included in a more direct way the right of victims to directly seek reparations from the State if they had suffered violations of international human rights or international humanitarian law.

37. Mr. Tuñón Veilles stated that while he recognized that amnesties and amnesty laws could be useful to bring an end to a conflict, he nevertheless did not agree that such provisions should be allowed to provide amnesties for serious human rights violations.

IV. CIRCUMSTANCES WHEN A PARTY CAN OPEN FIRE IN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

38. Ms. Hampson introduced her working paper on the circumstances in which a party can open fire in the law of armed conflict/international humanitarian law and human rights law (A/HRC/Sub.1/58/CRP.5). In presenting her paper, she noted that in analysing the subject, three general issues needed to be borne in mind. The first concerned the relationship between the applicability of international humanitarian law and human rights law.[1] The second concerned the extraterritorial reach of human rights law. The third involved the implications of the first two issues for a human rights body. She acknowledged that her paper sought to raise and explain various problems, without resolving them. She added that additional study of the issues raised in her paper was needed.

39. Ms. Hampson stated that nowhere was the difference between international humanitarian law and human rights law more clear than in the rules applicable to attacks, noting that the different rules were the product of two radically different models: the war model and the law and order model. She noted that the rules on the lawfulness of the resort to armed force (*ius ad bellum*) were quite separate from the rules which applied to the conduct of military operations (*ius in bello*). She said that once fighting had commenced, the rules on the conduct of the conflict applied to all parties, regardless of the lawfulness of the initial resort to armed force. In an international armed conflict, a party was free to target opposing combatants at any time, irrespective of what he or she was doing at the time and whether or not at the time he or she constituted a threat to the opposing armed forces.

40. Ms. Hampson also pointed out that international humanitarian law did not allow civilians to be subject to target, i.e. subjected to intentional attack. She added, however, that there were two areas of legal uncertainty. The first concerned the circumstances under which a civilian forfeited the protection of their status as a civilian and became subject to possible attack.

She noted that according to article 51.3 of the Protocol I Additional to the Geneva Conventions of 1949, civilians were protected "unless and for such time as they take a direct part in the hostilities". Second, when a person had forfeited the protection of civilian status but was not a combatant, i.e. the person was not a member of the opposing State's armed forces, the question remained whether he or she could only be attacked while engaged in hostile operations or whether the person could be engaged on the same basis as a combatant, i.e. irrespective of what the person was doing and whether or not the person constituted a threat at the time.

41. Ms. Hampson also noted that the rules of international humanitarian law were much less developed in the case of a non-international armed conflict than in the case of international armed conflict. Her paper noted, however, that there was a significant body of international customary law applicable, in large part due to the work of the ad hoc international tribunals for the former Yugoslavia and Rwanda. Ms. Hampson stated that human rights law was based on a policing or law enforcement model. In this framework, armed officials were expected to open fire only as a last resort and only in very specific circumstances. Although human rights treaties allowed a degree of flexibility, most had adopted a formulation that states that arbitrary killing was prohibited.[2] She added that what was considered arbitrary might vary depending on whether the situation was purely one of traditional law enforcement, involved law enforcement in a situation of serious internal disturbance, or involved the conduct of military operations during a war.

42. Ms. Hampson pointed out that the key issue was whether one chose to use international humanitarian law or human rights law to analyse a particular situation. She noted that this issue was complicated in the context of non-international conflicts where States had been reluctant to admit the existence of an internal conflict. She added that in practice most human rights bodies had dealt with cases that had involved killings in non-international conflicts rather than international conflicts. In the context of non-international conflicts, she observed the tendency of human rights bodies to rely exclusively or almost exclusively on human rights law. She observed that the European Court of Human Rights had been the human rights body which has shown the greatest reluctance to make reference to international humanitarian law.

43. Ms. Hampson drew the following preliminary conclusions from this situation. She noted that the use of human rights law rather than international humanitarian law might have the effect of expecting more from States than might be appropriate in certain circumstances. She noted that any refusal by human rights bodies to take international humanitarian law into account might over time have the effect of raising the threshold for application of this body of law, including common article 3 of the Geneva Conventions of 1949. She acknowledged that her paper raised more questions than answers. She noted that there would be problems if human rights bodies did not take account of international humanitarian law, as this had the potential to be inimical to the interests of victims of a conflict, and that there would be problems if they did because it might result in either or both of the following. If human rights bodies took international humanitarian law into account in non-international conflicts, it might reduce protection of victims in some areas. If they only took it into account in international conflicts, this might call into question the applicability of the rules of non-international conflicts. As time constraints prevented a discussion of the paper, Ms. Hampson asked interested experts, States and NGOs to please send her their comments and observations.

V. TRANSITIONAL JUSTICE

44. At the request of the working group, a representative of the Office of the United Nations High Commissioner for Human Rights (OHCHR) made a presentation of the work of the United Nations in the field of transitional justice. She provided information on the recent creation of the Peacebuilding Commission and the Peacebuilding Support Office, which were established by joint resolutions of the General Assembly and the Security Council in 2005. She noted that the Commission would: (a) propose integrated strategies for post-conflict peace building and recovery; (b) help to ensure predictable financing for early recovery activities and sustained financial investment over the medium to long term; (c) extend the period of attention by the international community to post-conflict recovery; and (d) develop best practices on issues that require extensive collaboration among political, military, humanitarian and development actors.

45. The OHCHR representative noted that the Office's Strategic Management Plan envisaged attention to a range of implementation gaps on the ground. The Plan placed a heightened emphasis on country engagement through an expansion of staff and resources devoted to field activities, and would include the establishment of standing capacities for rapid deployment, investigations, human rights capacity-building, advice and assistance, and work on transitional justice and the rule of law. She noted that a number of programmes in the field of transitional justice were already being supported in a number of States, such as Afghanistan, Burundi, Cambodia and Uganda.

46. She noted that OHCHR was presently supporting an Independent Special Commission of Inquiry for Timor-Leste to establish the facts and circumstances relevant to incidents on 28 and 29 April, and 23-24 and 25 May 2006 and other related events or issues; to clarify responsibility for these events; and to recommend measures to ensure accountability for crimes and serious violations of human rights allegedly committed during this period. She stated that a team of OHCHR staff was in the Democratic Republic of Congo conducting a mapping of the most serious violations of human rights and international humanitarian law that were alleged to have been committed in the territory between March 1993 and June 2003, and taking into account work already done by the special procedures of the former Commission on Human Rights. In this regard, the OHCHR representative noted the very useful work that had been done by Ms. Motoc during her tenure as the Special Rapporteur of the Commission for the Democratic Republic of Congo. The team would assess the existing capacities of the national justice system to deal with human rights violations that were determined to have occurred, and would formulate a series of options aimed at assisting the Government to consider appropriate transitional justice mechanisms that could address these alleged violations, in terms of justice, truth, reparation and reform.

47. The representative of OHCHR indicated that the Office of the High Commissioner had developed or was in the process of developing a number of methodological tools to support transitional justice efforts in the field. These included five publications called "Rule-of-Law Tools for Post-Conflict States" issued in 2006, that focus respectively on prosecution initiatives, truth commissions, mapping the justice sector, an operational framework for vetting, and legal systems monitoring. She added that two other publications were being developed for use in transitional justice situations, one of which focused on the legacy of international and hybrid courts, and the other on reparations programmes for victims of gross violations of human rights.

Other initiatives included the preparation of a compilation of national legislation related to the mandate and structure of truth commissions that will be posted on the OHCHR website when completed, and the development of a performance measurement system for the justice sector in post-conflict States in cooperation with the United Nations Department of Peacekeeping Operations (DPKO). The representative of OHCHR also made reference to significant United Nations documents relating to transitional justice:

(a) Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616);

(b) Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system (E/CN.4/2006/93);

(c) Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth (E/CN.4/2006/91).

48. In a question and answer session that followed, the representative of OHCHR responded to a question by Mr. Yokota and indicated that the mission to Timor-Leste that she had described was different from the mission in which he participated in 2005. In response to a question from Mr. Sorabjee, she indicated that the mission to Timor-Leste took place at the request of the Government. In response to a question from Ms. Rakotoarisoa about whether national authorities were consulted during programme planning, the representative of OHCHR indicated that all transitional justice activities were the result of national consultations and that local ownership of such programmes was the key to their success. In response to a question from Mr. Tuñón Veilles on United Nations policy on amnesties, she indicated that the United Nations had taken the position that it would not endorse a peace agreement if it provided an amnesty for war crimes, crimes against humanity or genocide. Ms. Hampson said it was important to distinguish between situations when OHCHR acts alone through its stand-alone offices, and when it was effectively integrated into DPKO missions. She said that it was remarkable what OHCHR could achieve when it acts alone, and that the situation was, to the contrary, quite problematic when OHCHR was subordinated to DPKO and where there was the potential for human rights to be relegated to a low priority. In responding to a question from Ms. Hampson as to whether OHCHR had ever considered pulling out of a DPKO field mission, the representative of OHCHR stated that she knew of no such cases, and that the human rights components of DPKO missions had reporting obligations to both the head of the DPKO field mission and the High Commissioner for Human Rights.

VI. PROVISIONAL AGENDA FOR THE NEXT SESSION

49. The Chairperson-Rapporteur proposed that since it was hoped that an expert body of the Human Rights Council would be established, it was important to plan for this eventuality so that the work of the experts in the field of the administration of justice would not be unduly delayed because of uncertainty. She noted that uncertainty regarding this year's meeting of the Sub-Commission had led some experts not to prepare their papers, and observed that it would be regrettable if the working group was faced with the same situation next year because of continuing uncertainty. She indicated that it would be prudent and advisable to plan for next year's session of the working group so that experts could continue their work. She noted that in

the event a new body was created, elections would most probably have to take place and not all of the current experts of the present Sub-Commission would necessarily be represented. Nevertheless, she felt that an expert body in some form was likely to be established and that a number of experts currently participating in the working group were likely to continue their work on issues already identified in the field of the administration of justice. Therefore, on this basis and with these qualifications, she proposed that the working group plan for a session of the working group next year and identify papers to be prepared.

50. Mr. Yokota indicated that he was prepared to continue work on the relationship between international humanitarian law and human rights law that he had started with his informal paper, and which was based on the Sub-Commission's decision 2005/108. He noted that this same decision also requested Ms. Hampson to prepare a working paper on the circumstances in which civilians lose their immunity from attack under international humanitarian and human rights law, and Mr. Ibrahim Salama to prepare a working paper on measures designed to prevent violations in circumstances in which international humanitarian law and human rights law are both applicable. He suggested that as the requests for the three papers emanated from the same Sub-Commission decision, Ms. Hampson should continue her work on this subject, and Mr. Salama should prepare his paper as envisioned by the decision of the Sub-Commission.

51. Mr. Tuñón Veilles indicated that he could prepare a paper on transitional justice in Latin America.

52. Taking into account the qualifications expressed by the Chairperson-Rapporteur with regard to the future of the working group and the Sub-Commission, it was agreed that the provisional agenda for its next session, should it take place, would be as follows:

1. Election of the Chairperson-Rapporteur.

2. Adoption of the report.

3. The relationship between human rights law and international humanitarian law.

4. Transitional justice.

5. Other matters.

6. Provisional agenda for the next session.

7. Adoption of the report.

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

53. On 23 August 2006, the sessional working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request that the Sub-Commission, or its successor body, allocate two full meetings of three hours each, plus an additional meeting of one hour for adoption of the report, during its 2007 session.

Notes

[1] The paper of Ms. Hampson notes that the International Court of Justice has identified three different situations that can apply to the relationship between international humanitarian law and human rights law: (1) human rights law only may be applicable; (2) human rights law and international humanitarian law may be simultaneously applicable; or (3) international humanitarian law may only be applicable. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice Advisory Opinion of 9 July 2004, para. 106.

[2] Ms. Hampson's paper notes that the European Convention on Human Rights approaches this subject in a slightly different way. Rather than prohibiting arbitrary killing, it sets out exhaustively in article 2 the only grounds on which potentially lethal force may be used when absolutely necessary.
