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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. Iulia-Antoanella Motoc

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Introduction

1. By decision 2003/101 of 28 July 2003, 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 Sub-Commission members, the Chairman appointed the following experts as members of the working group: Ms. Françoise Hampson (Western European and other States), Ms. Iulia-Antoanella Motoc (Eastern Europe), Ms. Florizelle O'Connor (Latin America), Mr. Soli Jehangir Sorabjee (Asia), Mr. Yozo Yokota (alternate) and Ms. Lalaina Rakotoarisoa (Africa).

2. The following members of the Sub-Commission also took part in the discussions of the working group: Mr. Emmanuel Decaux, Ms. Barbara Frey, Mr. El-Hadji Guissé, and Ms. Leïla Zerrougui.

3. The working group held two public meetings, on 28 and 30 July 2003. The present report was adopted by the working group on 7 August 2003.

4. A representative of the Office of the High Commissioner for Human Rights opened the session of the working group. The working group elected, by consensus, Ms. Motoc as Chairperson-Rapporteur for its 2003 session.

5. The members of the working group expressed their concern at the need to divide their time between the plenary session of the Sub-Commission and the public meetings of the working group.

6. Representatives of the following non-governmental organizations took the floor during the debate: Interfaith International, Japan Fellowship for Reconciliation, Association for World Education, Minnesota Advocates for Human Rights, Pax Romana, and Friends World Committee for Consultation - Quaker UN Office Geneva.

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

Report of the 2002 sessional working group on the administration of justice (E/CN.4/Sub.2/2002/7); and

Document de travail sur la difficulté de preuve en matière d'abus sexuel (E/CN.4/Sub.2/2003/WG.1/CRP.1).

8. The Chairperson-Rapporteur also pointed out that the important studies on the issue of the administration of justice through military tribunals by Mr. Decaux and discrimination in the criminal justice system by Ms. Zerrougui were initiated at the working group and would be discussed during the plenary session of the Sub-Commission.

Adoption of the agenda

9. At its first meeting, the working group considered the provisional agenda contained in document E/CN.4/Sub.2/2002/7. Following discussion among members of the working group, the title of item 3 was changed. On the proposal of Ms. Hampson, a new topic, "Question of a

need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies", was added to the agenda. With that addition, the agenda for the session was adopted as follows:

1. Issues relating to deprivation of the right to life, with special reference to the imposition of the death penalty.

2. Privatization of prisons.

3. Current trends in international penal justice.

4. The domestic implementation in practice of the obligation to provide domestic remedies.

5. Transitional justice: mechanisms of truth and reconciliation.

6. Witnesses and rules of evidence:

   (a) Medical secrecy;

   (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination;

   (c) Question of a need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies.

7. Provisional agenda for the next session.

8. Adoption of the report of the working group to the Sub-Commission.

I. ISSUES RELATING TO DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO THE IMPOSITION OF THE DEATH PENALTY

10. Mr. Guissé reported that the movement for the abolition of the death penalty has been on the rise and had made progress in some countries. However, in other countries, renewed executions were being carried out. Additionally, in some countries that had traditionally handed down the death penalty, executions were being carried out in record numbers. The death penalty was not socially useful and history had shown that it did not have an impact on reducing crime. In some cases, it led to punishment of the innocent in an irreversible manner. The media had played a negative role in publicizing executions, sometimes even encouraging people to commit crimes as a way of attracting attention. While some countries were de facto abolitionist, it would be preferable if they would also abolish the death penalty in their legislation (de jure abolition). In many countries, the death penalty had been abolished during peacetime but remained on the

books for use during wartime. The death penalty sometimes had a racial overtone, as in the United States. While the death penalty has been on the decline, it was alarming that summary executions had been on the rise in the last few years. The Sub-Commission should consider this negative development. Mr. Guissé also reminded the working group that vulnerable groups were often victims of injustice, with indigenous people, women and the poor being particularly vulnerable. Application of the death penalty to minors and to the mentally ill was in breach of international law. Mr. Guissé also noted that, when looking for an alternative punishment to the death penalty, both the State and the victim should be satisfied. Mr. Guissé appealed to the working group members to think about alternatives to the death penalty for those States that wanted to abolish it.

11. Ms. Hampson pointed out that the present meeting was taking place in a death penalty-free area. She welcomed the latest resolution of the Commission on Human Rights calling for the abolition of the death penalty. Ms. Hampson said that any State that retained the death penalty had to be able to at least guarantee a fair trial and the absence of discrimination in the imposition of the death penalty. Should there be any risk of finding an innocent person guilty, the death penalty should not be imposed. Any State claiming it could always avoid miscarriages of justice was claiming to be God. Ms. Hampson was particularly concerned about imposing the death penalty on juveniles and recalled Sub-Commission resolution 2000/17 which noted that the execution of people who were under the age of 18 at the time of the commission of the offence violated customary international law. Additionally, she was concerned about the imposition of the death penalty by military tribunals, particularly when trying civilians. In those scenarios, there was likely to be inadequate access to legal defence and irregular forms of appeal procedures. Ms. Hampson noted that she had a particular form of a military procedure in mind: the one that was to be used to try the detainees in Guantánamo Bay. Ms. Hampson also referred to a case involving a mentally ill person on death row in the United States. The state in which the execution was to take place attempted to force this person to take medication for the mental illness in order that the execution could proceed. She noted that that made no sense. Referring to Mr. Guissé's call for the elaboration of an alternative punishment to the death penalty for States that wanted to abolish it, Ms. Hampson said that she believed that the obvious alternative was life imprisonment without possibility of parole. Lastly, she put forth the view that the working group should take into consideration the recent rise of extrajudicial executions and targeted killings.

12. Mr. Decaux shared the pessimism of other members with regard to the increase in extrajudicial executions. On a positive note, Mr. Decaux reported that the Parliament of Turkey had authorized ratification of Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty in peacetime. While Armenia and the Russian Federation had signed the Protocol some time ago, they had yet to ratify it. The Parliamentary Assembly of the Council of Europe also called upon two observer States, Japan and the United States, to align themselves with the policy of seeking the abolition of the death penalty. Mr. Decaux also noted the problem of discrimination with regard to foreigners. According to the Vienna Convention on Consular Relations, there was a right to information about consular access for persons detained in a foreign country subject to the death penalty. Mexico brought the *Avena* case to the International Court of Justice which subsequently ordered provisional measures against the United States, requesting it not to execute any Mexican held on death row. Respect for the principles of the Vienna Convention should be ensured.

13. Ms. Frey said that she lived in the State of Minnesota, which did not have the death penalty. However, the United States Attorney-General's Office had initiated prosecution of a federal crime for a murder which took place in Minnesota and had indicated an interest in seeking the death penalty. Ms. Frey also commented on the issue of excessive force. Her analysis of the topic of small arms indicated that many problems arose from police forces not being properly trained in the use of force. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are not adequately taught to officials of law enforcement agencies. She was planning to discuss the issue with colleagues and would consider preparing a questionnaire to seek information regarding the experience of States with respect to training techniques for law enforcement personnel.

14. Ms. Hampson then commented on the issue of transfer of individuals and said that a State member of the Council of Europe would not transfer an individual to a State where that individual might face the death penalty. Generally, in the international arena, States would not extradite to places where individuals might be subject to torture or to cruel, inhuman or degrading treatment or punishment. It might be thus useful to remind States of those international principles as it seemed that, at present, some States did transfer individuals, to Guantánamo Bay, for example, in violation of these principles. Ms. Hampson then asked Ms. Frey whether there were any similar standards in the United States applicable either to transfers of individuals between states or transfers from the state level to the federal level, when such a transfer could result in the imposition of the death penalty in the receiving jurisdiction. She then asked whether it would be useful for the Sub-Commission to make a recommendation on the matter.

15. Ms. Frey believed that there was no prohibition on transfers of individuals between states but that the state's legislators could enact legislation to that effect. The issue of federal jurisdiction was more complex. When the Federal Government decided to prosecute a case, states must submit to its jurisdiction unless it agreed otherwise.

16. Mr. Guissé said that aside from the implementation of the death penalty, there was the issue of people condemned to death and their families being subjected to mental torture. He also observed that some heads of State had been complicit in extraditing individuals to countries where they would be subject to the death penalty. States must be clearly reminded that a person should not be extradited under those circumstances. Ms. Rakotoarisoa believed that the prohibition on extradition to a State where an individual might face the death penalty should be accompanied by a corresponding right to asylum in the State which is prohibited from carrying out the extradition.

17. Ms. Zerrougui agreed that there had been a regression in recent years towards an increase in summary and extrajudicial executions, carried out in many countries in the name of preventing terrorism and protecting State security. This year, the Sub-Commission must recall that this practice was a serious violation of international law and constituted a crime which could involve the authority of the International Criminal Court. With regard to judicial executions, she reminded the working group of the need to guarantee a fair trial.

18. The observer for Pax Romana welcomed the working group's undertaking on the issue of summary and extrajudicial executions.

19. The observer for the Friends World Committee for Consultation - Quaker UN Office Geneva informed the working group that a joint statement, together with the World Organization against Torture, had been prepared on the issue of juveniles detained in Guantánamo Bay and juveniles in the Democratic Republic of the Congo subject to the jurisdiction of military tribunals. She noted that many States had abolished the death penalty in peacetime and recognized the prohibition on the imposition of the death penalty on juveniles. However, some States might have overlooked the fact that their legislation allowed for imposing the death penalty in wartime and they might recruit individuals under the age of 18 into the military, whereby these minors would be subject to such a wartime penalty. This possible lacuna in national legislation should be brought to the attention of States. Ms. Hampson said that the lacuna might exist in national legislation but that international law clearly prohibited the imposition of the death penalty on juveniles.

II. PRIVATIZATION OF PRISONS

20. Mr. Alfonso Martínez was unable to make a presentation on this topic during the working group's session but offered to do so during the plenary, if authorized by the Sub-Commission.

21. Mr. Yokota recalled that the Sub-Commission had been dealing with the issue of the privatization of prisons for the past several years. Generally, the discussion had focused on the privatization of prisons as a whole. In Japan, there had recently been a discussion about the possibility of privatizing some prison functions, such as services providing food or cleaning, while other core prison functions would remain public. Mr. Yokota wanted the working group to consider whether such a partial privatization would be acceptable from the human rights point of view.

22. Mr. Sorabjee noted that when talking about privatization of quasi-governmental functions, the concern should be on whether the private agency was subject to the same judicial scrutiny as the Government. India had taken the view that, for that purpose, private agencies were subject to the same control as the State. It was essential that judicial control not be diluted. Mr. Sorabjee agreed that some prison functions but not the core ones could be privatized.

23. Ms. Hampson agreed that the focus should be on responsibility. States continued to have obligations to prevent and investigate human rights violations in private prisons as well as in public ones.

24. Mr. Guissé believed that the privatization of prison functions would not serve the purpose of protecting all individuals. Ms. Zerrougui said that the privatization of prisons sometimes had tragic consequences for the situation of detainees and for the respect for human rights. With the privatization of prisons, the first thing to be noticed is that more prisons were built. The prison became a profit-making industry and the logic of commerce governed. Ms. Zerrougui said that while she was not against new management systems, she was concerned about their impact on the rights of detainees.

25. Ms. Rakotoarisoa believed that the goal of the privatization of prisons was to improve conditions of detention. Generally, the private sector had a better reputation for the quality of its services. While some prison functions could be subcontracted, States should remain in charge of

others, such as security. As there were sometimes no clear guidelines as to who should be sent to a private or public prison, and because the conditions in those prisons differed significantly, the problem of discrimination could arise. Ms. Rakotoarisoa agreed that the privatization of prisons should not be governed by profit but believed that it could humanize the conditions of detention.

26. Ms. O'Connor noted several issues that the working group should look at: (a) whether private companies would be willing to stand by the 1977 Standard Minimum Rules for the Treatment of Prisoners; (b) whether individual States would be required to change their legislation to enable companies to become the implementing arm of the court; (c) which rules would apply to regulate the wage for working inmates; and (d) whether the privatization of prisons would provide the inmates with the possibility of learning new skills.

III. CURRENT TRENDS IN INTERNATIONAL PENAL JUSTICE

27. Mr. Guissé reported that following the Second World War, there had been initiatives to develop an international system of criminal justice with the establishment of the Tokyo and Nürnberg war crimes tribunals. Some had criticized the tribunals, which had hampered the establishment of such a system. Nevertheless, international criminal justice continued to evolve, with bilateral agreements being reached, international police forces being engaged in peacekeeping and ad hoc jurisdictions being created for the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Subsequently, the International Criminal Court was set up by the Rome Statute. The concept of universal jurisdiction had evolved and, until recently, could have continued evolving. Recent amendments to Belgian law had seriously weakened the concept of universal jurisdiction. Mr. Guissé reminded the working group that the International Criminal Court was not intended to replace national justice but to fill gaps that currently existed. Universal jurisdiction complemented national jurisdiction, so as not to allow perpetrators of offences to escape. When discussing international justice, the issue of reparations for victims should be also considered. Mr. Guissé offered to prepare a working paper for the next session of the working group on the current trends in international penal justice. Ms. Motoc suggested that the topic of current trends in international penal justice be given priority by the working group next year.

IV. DOMESTIC IMPLEMENTATION IN PRACTICE OF THE OBLIGATION TO PROVIDE DOMESTIC REMEDIES

28. Ms. Hampson reported that many States ratified treaties, made them part of their domestic law and admitted special rapporteurs. Nevertheless, serious allegations of widespread human rights violations continued to be made. It was necessary to examine systematically the causes of this problem. Ms. Hampson was principally concerned with the protection of civil and political rights. States had an obligation to implement treaties in good faith. The right to a remedy was closely linked with the issue of implementation. International monitoring mechanisms should only be subsidiary: it was primarily the responsibility of States to monitor implementation and to provide remedies. Ms. Hampson gave an example of a judgement by the European Court on Human Rights (ECHR) in *Akdivar and Others v. Turkey*, which addressed the issue of inadequate national remedies. Since then, ECHR had found violations of the right to a remedy in more than 50 cases. Ms. Hampson pointed out that implementation consisted of policies and effective enforcement of law. Unremedied violations were evidence of flawed

implementation. There was a need for formal, but also effective implementation. What was necessary for effective implementation depended on the issue. For example, in cases involving enforced disappearances, custody records and rules surrounding custody needed to be improved. Additionally, however, the situation could be improved if judges were required to examine records and visit the places of detention, including those of an irregular nature. The independence of the judiciary vis-à-vis the detaining authority should be also examined. Stringent rules on record-keeping had a twofold benefit, also providing protection to State officials against unfounded allegations of misconduct.

29. Ms. Hampson noted that the Human Rights Committee was in the process of revising a general comment on the implementation of human rights obligations and exploring what was meant by implementation. It is also important to recall that non-governmental organizations could play an important role in providing information about the failure of domestic remedies, so that the Human Rights Committee could explore the issues of implementation and provision of remedies and carry out more effective supervision. Ms. Hampson further said that some problems were created by a lack of training and resources. While some States had genuine resource problems, there could also be a lack of political will to give effect at the local level to protection of human rights.

30. Mr. Guissé agreed with the appeal made to NGOs as they were in a good position to make complaints and assist victims with bringing their cases to judicial and administrative bodies in order to seek a remedy. It was also important that illiterate populations be provided with assistance in pursuing their claims. With regard to unlawful detention, Mr. Guissé noted that those who had been illegally detained were often not aware that they were entitled to compensation.

31. Mr. Yokota found it problematic that judges were often not familiar with international human rights law and thus unable to reflect it in their judgements. Additionally, judges were not trained to understand international treaties ratified by their countries and did not follow the developments in United Nations treaty bodies.

32. Ms. Zerrougui shared concerns about the effectiveness of remedies, in particular at the national level. The question was not only about the existence of remedies but also about access to remedies. It should be determined to what extent all victims, regardless of their status, had access to existing remedies. The education and training of judges and law enforcement officials was not the only problem: the culture of impunity also had to be addressed.

33. Ms. Hampson agreed that there was a need to train judges about the international instruments, but believed that judicial ignorance was not the only problem. The victims often did not know that a right had been violated or where to turn for redress. In this regard, NGOs could be very effective.

34. The experts also discussed judicial and administrative remedies. Mr. Guissé believed that judicial remedies were more effective than administrative ones. Mr. Yokota said that administrative remedies were usually not sufficient and that judicial remedies were often necessary. Ms. Hampson noted that the right to a remedy did not always mean the right to a

judicial remedy and included administrative remedies as well. There was nothing inherently wrong with administrative remedies if they worked in practice and were independent. Mr. Decaux said that judicial and administrative remedies could be complementary. One should recognize the trend towards recourse to an independent administrative remedy.

35. Mr. Yokota enquired about the sources of the right to a remedy. Mr. Decaux noted that article 13 of the European Convention on Human Rights, which provided for a right to an effective remedy before a national authority, was assuming greater importance. A State had not only negative obligations but also positive duties to provide remedies. There had been an interesting series of judgements in which ECHR had introduced the notion of a positive duty to provide remedies. Ms. Hampson pointed out that the right to a remedy is clearly a part of treaty law, and of article 2 of the International Covenant on Civil and Political Rights specifically. The Human Rights Committee, in its general comment No. 24, asserted that it would not be possible to make a reservation with respect to article 2. One should also look to specific thematic areas, such as arbitrary detention, to determine whether a State had an obligation under customary law to provide a remedy for a particular violation; whether there was a right to a remedy in customary international law would depend on whether the State had ratified a treaty providing for it.

36. The observer for Interfaith International said that in many countries, victims of serious human rights abuses had no access to remedies. Reference was made to the trial in Chicago in the United States, of Jiang Zemin who was accused of carrying out a State policy aimed at total eradication of Falun Gong followers in China. While China had ratified various international human rights instruments, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, cases of torture in China continued to be reported.

37. The observer for the Association for World Education referred to a case which had been examined by the Working Group on Arbitrary Detention. In its opinion No. 1999/10, the Working Group determined the detention in that case to be arbitrary. Nevertheless, the individual in question continued to be detained. Ms. Zerrougui did not recall the specific case, but noted that when the Working Group considered a detention to be arbitrary, the State in question should act to remedy the situation.

V. TRANSITIONAL JUSTICE: MECHANISMS OF TRUTH AND RECONCILIATION

38. Ms. Motoc stated that international criminal justice and transitional justice were related. She discussed the historical developments of transitional justice mechanisms, including the establishment of the first truth and reconciliation commissions and subsequent efforts to combat impunity. She also discussed the meaning of transition and of justice after massive violations of human rights. There were various mechanisms of transitional justice to deal with human rights violations. Firstly, there were ad hoc international criminal tribunals such as ICTY and ICTR. Secondly, there were hybrid tribunals such as the ones established for Sierra Leone and Cambodia. Thirdly, there were the examples of Kosovo and Timor-Leste which had organized their domestic justice systems with international assistance. There was also the possibility of national solutions. For example, Eastern European countries adopted lustration laws which

excluded certain individuals from occupying high-level public posts. Ms. Motoc also noted that transitional justice mechanisms could face problems of conflict of norms and standards, of a lack of credibility, and of achieving goals and objectives. Another effective solution was the concept of universal jurisdiction and the working group could also consider that issue next year.

39. Ms. Hampson agreed that the working group should consider universal jurisdiction and the repeal of the Belgian law. States should be reminded that ratification of the Geneva Conventions obligated them to try suspected perpetrators of grave breaches of international law.

40. The observer for Minnesota Advocates for Human Rights informed the working group that the organization would read a statement during the plenary expressing their concern about certain aspects of transitional justice in Peru.

VI. WITNESSES AND RULES OF EVIDENCE

41. Sub-items (a) Medical secrecy and (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination, were taken together.

42. Ms. Rakotoarisoa presented her working paper on the problem of evidence in cases of sexual abuse (E/CN.4/Sub.2/2003/WG.1/CRP.1). While sex crimes were not a new phenomenon, the number of reported victims had been on the rise in recent years. The phenomenon of sexual abuse was still surrounded by confusion. Different definitions were used, depending on whether a psychological, legal or journalistic point of view was taken. Ms. Rakotoarisoa thus recalled certain definitions of conventional terms. With regard to direct and circumstantial evidence of sexual abuse, she noted that the difficulties encountered in the production of evidence were rarely confronted. The rules of evidence in cases of sexual abuse and exploitation were especially complex. The testimony of victims and expert examinations of the victims must be made with full informed consent. Experts looked at the closest intimate details of the victim. With regard to medical secrecy, she noted that doctors and social workers had dual obligations and might feel torn between professional ethics and their duty to society. As they could provide essential evidence, they should be absolved of the requirement of confidentiality for the purpose of disclosing human rights violations. Ms. Rakotoarisoa also noted that sexual abuse could be used as a weapon to intimidate or to obtain information during political turmoil, tension or conflict. The international law on armed conflict applied to armed conflicts of both an international and a non-international character and prohibited torture and cruel, inhuman or degrading treatment or punishment. With regard to testimony, Ms. Rakotoarisoa said that it was always difficult to ascertain how accurate and reliable a given witness's testimony was. In all proceedings, care should be taken to guard against the risk of false testimony. Witness protection was necessary when statements raised the possibility of serious harm to witnesses and those around them.

43. Ms. Rakotoarisoa also reported that the Internet was becoming one of the most potent means of promoting child exploitation and trafficking in child pornography. Interpol had emphasized the need for specialization of police officers. There needed to be international cooperation among specialists to strengthen the response to Internet sexual exploitation. Additionally, Ms. Rakotoarisoa reported that tourism-related businesses such as hotels had a role to play in preventing sexual abuse and in furnishing evidence. She noted that circumstantial evidence should be evaluated on a case-by-case basis. It was important to stress that

circumstantial evidence should not be a substitute for direct evidence. At the conclusion, Ms. Rakotoarisoa said that poverty and illiteracy were among the factors that contributed to sexual exploitation. The lives of thousands of women and children could be at risk from HIV/AIDS acquired by sexual exploitation. The challenge was to break with traditional practices that made sexual exploitation acceptable. Crimes often went unpunished because of a lack of evidence. In many countries, victims did not report crimes of sexual abuse and the culprits were never sought or could not be found. In the absence of corroborating evidence, victims who testified faced the risk of not being believed. The outcome, however, should not be a lack of measures to protect the victim, as it must be acknowledged that sexual assault was difficult to prove. The fear of punishment by an international tribunal could serve as a check on serious violations of human rights. Ms. Rakotoarisoa also noted that national laws prescribing severe penalties for sexual crimes were not effective enough. Owing to shortcomings in criminal investigations and the lack of corroborating evidence, the courts were reluctant to impose severe penalties. Extraterritorial criminal provisions, such as those in France providing for the prosecution of French nationals who had sexual relations abroad with children, were one aspect of efforts to prevent sexual tourism. However, such provisions were rarely enforced owing to the difficulty of collecting evidence and the lack of cooperation with local judicial authorities. Such approaches needed to be refined.

44. Mr. Guissé spoke about sexual abuse in the context of poverty. Sexual exploitation of children in the South by people from the North was a serious concern. He was concerned that the tourism environment made it possible for wealthy adults from the North to have contact with children in Africa. Even if there was proof of sexual misconduct, the perpetrators were not always punished. It was often corruption that allowed them to get away with misconduct. Mr. Guissé was very concerned about sexual abuse committed for the purpose of transmitting HIV. Such crimes violated human dignity and its perpetrators should be brought to international justice. Sometimes, State officials responsible for protecting people failed to prevent such crimes in their desire to attract tourism.

45. Ms. O'Connor noted that, in Jamaica, the incidence of HIV/AIDS had increased greatly, particularly in the coastal regions where tourism was prevalent. She also reflected on cultural beliefs that propagated the false notion that sexual relations with a virgin would cure sexually transmitted diseases. Since the appearance of HIV/AIDS, Jamaica had witnessed a dramatic increase in rapes and killings of very young girls, which was unusual for that society. With regard to bringing the perpetrators to justice, Ms. O'Connor noted various problems. For example, in cases of sexual abuse of children by a male family member, mothers tended not to want to believe the children. Even where the complaint reached the courts, it was frequently withdrawn as the child and mother responded to pressure from the rest of the family. With regard to the sexual exploitation of youth in tourism, Ms. O'Connor agreed that the perpetrators should be seen as international criminals and steps should be taken to bring them to justice.

46. Ms. Hampson said that many issues were involved in connection with this topic and that the working group should consider splitting them up into different areas. Other human rights mechanisms were already dealing with some of the issues. The question which appeared to be particularly suitable for the working group to consider was what happened, in terms of the judicial process, once an allegation of sexual abuse was made. Firstly, this entailed consideration of how police handled allegations and the need for forensic evidence. Secondly, the issue of what happened once the allegations reached a court should be considered. One

should distinguish between criminal courts and other forms of civil proceedings. The mandate extended beyond child sexual abuse and the focus was likely to be on criminal proceedings and problems of securing proof. The definition of crimes should be also examined: in many jurisdictions, there was a very narrow definition of rape while a broader definition had been used by ICTY. The general understanding of rape seemed to be that the requisite mens rea was a lack of consent. The issue was how to prove it. There was also a problem with the application of the normal rules of evidence, such as the exclusion of hearsay. In some countries, the testimony of four women had the same value as that of one man. Thus, the testimony of one woman must be corroborated by that of either one man or three other women in order to be accepted in court. Additional issues such as whether the jurisdiction required medical evidence and what should be done to protect the anonymity of victims and witnesses should be considered. Also, a line needed to be drawn between medical secrecy and providing information to judges and courts.

47. Ms. Hampson also pointed out the problem of civil proceedings being unavailable to many owing to financial constraints. Cases of people with recovered memory of sexual abuse constituted another problem as those individuals abused as children often recalled the abuse long after the statute of limitations had expired. There was also the problem of sexual offences, most notably torture, committed by State agents. That issue, however, came under the mandates of the Committee against Torture and the Human Rights Committee. In concluding, Ms. Hampson reiterated that the working group should focus on the issue of court rules regarding evidence in criminal proceedings that applied to sexual violence. The issue of sex tourism was also very important but the working group needed to consider to what extent the other components of the Sub-Commission were examining it.

48. Ms. Zerrougui discussed the discrimination against women and children in some criminal justice systems. For example, certain jurisdictions deemed that a medical certificate was insufficient to prove the violation and required the testimony of an eyewitness, which was virtually impossible to obtain if the violence or sex abuse took place in a private domain. Often, that requirement was not based on law but on the discretion of a judge. Ms. Zerrougui also noted the problem of obtaining evidence in cases of rape occurring during detention. She welcomed the fact that some countries had reversed the burden of proof in such cases, requiring that the detention authorities disprove allegations of rape. The Sub-Commission should consider highlighting best practices on this issue.

49. Mr. Sorabjee noted that there were two main reasons for the failure of a system to bring the perpetrators of sexual abuse to justice and that they needed to be addressed. The first reason was blatant discrimination such as requiring the testimony of four women to counter that of one man. The second reason was the failure of the investigative system, including ineffective prosecution and investigators often not being sensitive to the rights of women and children. The working group members further noted that it should not be assumed that women were safe guardians of other women and that female prison guards, investigators, prosecutors and judges also needed to be sensitized and properly trained.

50. Ms. O'Connor reported that in Jamaica, a Special Unit for the Investigation of Sexual Abuses had been established in the Police Force. Selected police personnel, both male and female, had been specially trained to deal with sexual abuses and domestic violence in order to lessen the deterrent effects of the pressures exerted on the abused and thus ensure that efforts to obtain justice were not thwarted. After training, an officer was assigned to each region. The

training was ongoing as the goal was to have these specially trained officers assigned to each station. The use of DNA in the investigations, the importance placed on ensuring that the dignity of victims was respected and the availability of counselling for the victims had lessened the burden on the victims. Since the establishment of the Unit, far more cases of rape and abuse had been reported and successfully investigated and prosecuted.

51. Several working group members also discussed the definition of rape. Some countries did not have a definition of rape in their domestic legislation. In others, the domestic law on the matter was outdated. Attention was drawn to the ICTY jurisprudence for examples of gender-neutral definitions.

52. At the conclusion, it was proposed that Ms. Rakotoarisoa should prepare an expanded background paper, examining procedural and evidential barriers that impacted upon victims of sexual abuse. Once such a paper was prepared, the Sub-Commission, at its next session, could consider requesting that the Commission on Human Rights appoint a special rapporteur on the issue of problems in prosecuting rape and sexual assault.

53. The observer from Pax Romana drew attention to the alarming situation of sexual abuse in schools perpetrated by teachers.

54. During the discussion on sub-item (c) Question of a need for guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies, Ms. Hampson drew attention to the Sub-Commission study on sexual violence in armed conflict prepared by Ms. Gay McDougall in 1998. There was clear evidence from the Democratic Republic of the Congo, Liberia and other conflicts that the problem of rape was not disappearing. Even though many of the acts concerned were within the jurisdiction of the International Criminal Court, many States had not criminalized various offences on the domestic level. Ms. Hampson thus suggested that the working group should engage in the operationalization of Ms. McDougall's study and the elaboration of guidelines, which should assist national legal systems. Ms. Frey expressed her support for this proposal.

55. The observer for the Japan Fellowship for Reconciliation informed the working group that his research had indicated that for at least 80 years, women's groups had demanded redress for sexual offences occurring during armed conflict. He supported Ms. Hampson's proposal that the working group elaborate guidelines on the matter.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

56. During its second meeting, on 30 August 2003, the working group agreed to consolidate its agenda for next year and to consider the following topics on a biannual basis: "Issues relating to the deprivation of the right to life, with special reference to the imposition of the death penalty" and "Privatization of prisons". Ms. Motoc suggested that the working group should increasingly cooperate with academia and NGOs in its work.

57. The working group agreed that the provisional agenda for the next session would be as follows:

1. Election of officers.

2. Adoption of the agenda.

3. International criminal justice.

4. Witnesses and rules of evidence:

   (a) Medical secrecy;

   (b) Problems in prosecuting rape and sexual assault, especially the problem of gender discrimination;

   (c) Guidelines on criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population, as well as provision of remedies.

5. The domestic implementation in practice of the obligation to provide domestic remedies.

6. Provisional agenda for the next session.

7. Adoption of the report.

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

58. On 7 August 2003, the working group unanimously adopted the present report to the Sub-Commission. The working group agreed to request that the Sub-Commission allocate two full meetings of three hours each, plus an additional session of one hour for adoption of the report, during its 2004 session.
