

2003

## A Review of the Fifty-Fourth Session of the Sub-Commission on the Promotion and Protection of Human Rights

David Weissbrodt

University of Minnesota Law School, weiss001@umn.edu

Penny Parker

Laura Gerber

Muria Kruger

Joe W. (Chip) Pitts III

Follow this and additional works at: [https://scholarship.law.umn.edu/faculty\\_articles](https://scholarship.law.umn.edu/faculty_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

David Weissbrodt, Penny Parker, Laura Gerber, Muria Kruger, and Joe W. (Chip) Pitts III, *A Review of the Fifty-Fourth Session of the Sub-Commission on the Promotion and Protection of Human Rights*, 21 NETH. Q. HUM. RTS. 291 (2003), available at [https://scholarship.law.umn.edu/faculty\\_articles/370](https://scholarship.law.umn.edu/faculty_articles/370).

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## PART C: APPENDIX

# A REVIEW OF THE FIFTY-FOURTH SESSION OF THE UNITED NATIONS SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

DAVID WEISSBRODT, PENNY PARKER, LAURA GERBER,  
MURIA KRUGER and JOE W. (CHIP) PITTS, III\*

### 1. INTRODUCTION

The United Nations Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) held its fifty-fourth session in Geneva from 29 July to 16 August 2002.<sup>1</sup> It was the third year the Sub-Commission had worked under its shortened three-week session and restrictions against adopting country-specific resolutions – both limitations having been imposed by its parent body, the UN Commission on Human Rights (Commission).<sup>2</sup>

Among the important developments at this session were ongoing and new studies relating to terrorism and counter-terrorism; the continued development of initiatives in the field of economic, social and cultural rights; the convening of the first official session of the Social Forum –

---

© 2002 David Weissbrodt, Penny Parker, Laura Gerber, Muria Kruger and Joe W. (Chip) Pitts, III. The authors would like to thank Barbara Frey, Arthi Belani, and Katherine Anderson for their cooperation and help during the 2002 Sub-Commission session.

\* David Weissbrodt, Fredrikson and Byron Professor of Law, University of Minnesota; Member, UN Sub-Commission on the Promotion and Protection of Human Rights (1996-2003); Penny Parker, Private business lawyer, pro bono human rights lawyer, based in Brussels, Belgium; Laura Gerber, J.D./M.P.A. candidate, June 2003, University of Washington School of Law and the Daniel J. Evans School of Public Affairs; Maria Kruger, J.D. 2001, *magna cum laude*, University of Minnesota Law School; Joe W. (Chip) Pitts, III, International lawyer and law educator, based in Dallas, Texas.

<sup>1</sup> See International Service for Human Rights, *Sub-Commission on the Promotion and Protection of Human Rights, 54<sup>th</sup> Session, Geneva, 29 July to 16 August 2002, Summary of Resolutions & Decisions* (No. 64, August 2002). For examinations of the most recent sessions of the Sub-Commission see David Weissbrodt, Mayra Gómez, Bret Thiele, and Muria Kruger, *A Review of the Fifty-Third Session of the United Nations Sub-Commission on the Promotion and Protection of Human Rights*, NQHR, Vol. 20, No. 2, p. 231; David Weissbrodt, Mayra Gómez, and Bret Thiele, *A Review of the Fifty-Second Session of the United Nations Sub-Commission on the Promotion and Protection of Human Rights*, NQHR, Vol. 18, No. 4, p. 545.

<sup>2</sup> UN Doc. E/CN.4/Dec/2000/109 (2002), implementing the Working Group report E/CN.4/2000/112 (2002) in its entirety, approved by ECOSOC in its Resolution 2000/3 of 16 June 2000.

designed to spark new, innovative ways of addressing important social concerns such as extreme poverty; and the significant work of several of the Sub-Commission's working groups. While the Sub-Commission has been making progress in adjusting to the limitations imposed by the Commission and in finding new worthwhile subjects of work, a few governments have continued to question whether the Sub-Commission should exist at all and the Chairperson of the Commission has been pondering a significant change in the calendar of the Sub-Commission in which its sessions would be moved to December or January each year in order to fit better with the annual sessions of the Commission in March-April.

The 53<sup>rd</sup> session of the Sub-Commission had concluded before the events of 11 September 2001. Hence, the 54<sup>th</sup> session was the first to confront the new post-11 September realities. The 2002 session was also set in the context of continued serious violence in the Middle East, ongoing conflict in Kashmir, news stories anticipating a US-led military intervention into Iraq, Turkey's announced abolition of the death penalty on 1 August 2002, the execution in the US of a Mexican national, a US Federal District Court decision mandating disclosure of the names of persons still detained in connection with the events of 11 September, the coming into force of the Rome Statute of the International Criminal Court on 1 July 2002, and two optional protocols to the Convention on the Rights of the Child in January-February 2002. The year 2002 also marked the 50<sup>th</sup> anniversary of the Convention against Torture. The High Commissioner of Human Rights, Mary Robinson, was scheduled to step down from her post early the following month.<sup>3</sup> The World Summit on Sustainable Development was also set to convene in a few weeks in Johannesburg.

Some have described the international human rights movement as a complex system, with interactions at multiple levels, amongst many different types of actors.<sup>4</sup> The Sub-Commission at its 54<sup>th</sup> session illustrated some of these systemic characteristics, as it struggled to adapt to edicts from higher UN bodies restricting its resources and the scope of its deliberations, and as it adopted new approaches for collaborating with other actors, both inside and outside the UN system. The proceedings of its working groups also illustrated the different stages of evolution of such groups and the effects of different systemic influences. This article will describe some of these

<sup>3</sup> Sergio Vieira de Mello assumed the post of High Commissioner for Human Rights on 12 September 2002.

<sup>4</sup> See, e.g., Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of Soft Law', in: Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, 2000* (describing several fields of international law including human rights as 'an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule of law framework').

systemic relationships and effects in the context of the deliberations at its 54<sup>th</sup> session.

The Sub-Commission consists of 26 individuals who are elected by the Commission and act in their personal capacities rather than as government representatives.<sup>5</sup> Members serve a four-year term, with half being elected each even-numbered year. In 2002, 13 members had been elected before the Sub-Commission session began, including five new members,<sup>6</sup> five re-elected members<sup>7</sup> and three persons who had served as alternates previously and were now elected as members.<sup>8</sup> The mandate of the Sub-Commission includes human rights standard-setting and preparing studies of current human rights issues in all parts of the world.<sup>9</sup> Because of its role in initiating action within the United Nations human rights system and its accessibility to non-governmental organisations (NGOs), each year hundreds of human rights activists from scores of countries travel to Geneva to attend and address the session of the Sub-Commission. This year, over 1,000 persons participated in the Sub-Commission session, from 104 governments and 106 NGOs.

The Sub-Commission develops resolutions that are presented to, and are often adopted by, the Commission on Human Rights.<sup>10</sup> Members of the Sub-Commission also prepare working papers and comprehensive studies on human rights problems and issues.<sup>11</sup> This year's session generated 31 resolutions and 18 decisions. Since many treaties and other human rights instruments have been promulgated, the Sub-Commission has de-emphasised its standard-setting function and has given greater attention to developing strategies aimed at promotion, problem solving, implementa-

<sup>5</sup> Under the principle of geographic distribution, the Sub-Commission has seven members from Africa, five from Latin America, five from Asia, three from Eastern Europe, and six from the Western Europe and Other group of nations (including Australia, Canada, New Zealand, and the United States).

<sup>6</sup> The new members are Mr. Shiqui Chen (China), Mr. Rui Baltazar Dos Santos Alves (Mozambique), Ms. Florizelle O'Connor (Jamaica), Ms. Lalaina Rakotoarisoa (Madagascar), and Mr. Abdel Sattar (Pakistan).

<sup>7</sup> The re-elected members are Mr. José Bengoa (Chile), Mr. El Hadji Guissé (Senegal), Ms. Françoise Jane Hampson (United Kingdom), Mr. Paulo Sérgio Pinheiro (Brazil), and Mr. Soli Jehangir Sorabjee (India).

<sup>8</sup> The former alternates now elected as members are Mr. Emmanuel Decaux (France), Mr. Vladimir Kartashkin (Russian Federation), and Mrs. Kalliopi Koufa (Greece).

<sup>9</sup> For further details on the mandate of the Sub-Commission see the terms of reference of its predecessor: the Sub-Commission on the Prevention of Discrimination and Protection of Minorities as defined by the Commission and its particular responsibilities established, *inter alia*, in Commission resolutions 8 (XXIII) of 16 March 1967 and 17 (XXXVII) of 10 March 1981, and Economic and Social Council resolutions 1235 (XLI) of 6 June 1967, 1503 (XLVIII) of 27 May 1970, 2000/3 of 16 June 2000; see *infra* note 10.

<sup>10</sup> David Weissbrodt, Joan Fitzpatrick, and Frank Newman, *International Human Rights: Law, Policy, and Process* 25, 3<sup>rd</sup> ed. 2001.

<sup>11</sup> *Idem*.

tion, and the effective use of international pressure to improve human rights situations around the world.<sup>12</sup>

Each year the Sub-Commission elects a Bureau to lead the session, with one representative from each regional group. This session Mr. Paulo Sérgio Pinheiro (expert from Brazil) served as Chairperson, and elected Vice Chairpersons were Mrs. Leïla Zerrougui (expert from Algeria), Mr. Yozo Yokota (expert from Japan), and Mr. Vladimir Kartashkin (expert from the Russian Federation). Mr. Emmanuel Decaux (expert from France) was elected as Rapporteur.

The outgoing High Commissioner for Human Rights, Ms. Mary Robinson, addressed the Sub-Commission at its first meeting.<sup>13</sup> In her statement, she noted that it would be difficult to imagine a year in which more could have happened to alter the context within which the Sub-Commission worked, including the World Conference against Racism (31 August – 7 September 2001), the attacks of 11 September 2001, and the very difficult fifty-eighth session of the Commission on Human Rights (held in March-April 2002), in which Middle East violence had predominated deliberations, crowding out much of the remaining agenda. To maximise its impact she emphasised that the Sub-Commission should concentrate on providing high-quality analysis to the Commission, avoiding political and ideological divisions, and operating in accordance with the highest standards of independence and integrity.

Mr. Pinheiro, incoming Chairperson of the Sub-Commission, noted in his opening speech that while the Sub-Commission had been re-cast in recent years as a 'think tank', its prime concerns continued to be the major categories of human rights, and situations in various parts of the world that were not receiving sufficient attention. Echoing concerns of the other opening speakers, he also urged that anti-terrorism measures not be implemented in such a way as to undermine the agenda of cooperation among countries and erode the foundation of human rights that had taken so long to construct. In addition, he said it was vital to ensure that the root causes of terrorism were considered, and that other major human rights concerns were not neglected in the rush to combat terrorism.

---

<sup>12</sup> It is important to note the significant role public criticism can play with respect to the assurance of human rights. Governments are often very motivated to avoid negative international attention. Indeed, as a result, government delegates launch extensive lobbying efforts to prevent resolutions criticising, mentioning, or even referring indirectly to their countries. In turn, international public attention can strengthen local human rights advocacy, just as local advocacy has strengthened the human rights movement at the international level. See, Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics*, 1998.

<sup>13</sup> See UN Press Release (30 July 2001, morning).

## 2. THE SOCIAL FORUM

This year marked the inaugural session of the Social Forum, which had been conceived over several years as a platform within the UN system for the exchange of ideas and possible actions aimed at effectively incorporating human rights, especially economic, social, and cultural rights, into policymaking, for the benefit of those members of the poor and vulnerable segments of society whose voices are not usually heard. In a working paper submitted to the 2002 meeting of the Sub-Commission, the Sub-Commission member from Chile and the leading advocate for the Social Forum, Mr. José Bengoa, described the years of discussion aimed at creating a 'new forum for debate within the United Nations for analysis of the relationship between globalisation and human rights, in particular economic, social, and cultural rights, in a globalized world.'<sup>14</sup> The Social Forum complements the UN's overall priorities of promoting and protecting peace, stability, human rights, sustainable development, and poverty eradication, including the specific anti-poverty priority that emerged from the Millennium Summit.

### 2.1. Globalisation and the Historical Context for the Social Forum

Early consciousness of the new questions surrounding globalisation resulted in a 1995 proposal by Norwegian Sub-Commission member Asbjørn Eide to study income distribution nationally and internationally. Mr. Bengoa was selected Special Rapporteur of this study, and completed his preliminary report on the subject the same year, noting the links between income distribution and equality of opportunity in a given society.<sup>15</sup> His subsequent and final reports found increases in inequality and poverty accompanying late twentieth century globalisation.<sup>16</sup> Mr. Bengoa's methods of comparing national income between countries and households anticipated the more recent work of World Bank economist Branko Milanovic,<sup>17</sup> who found that in the five-year period between 1988 and 1993, global inequality increased 5%, with the real incomes of the richest 20% increasing and the poorest 5% decreasing – a result comparable to the growth in inequality in the United Kingdom during the Thatcher years or the United States during the Reagan years.<sup>18</sup> Even adjusting for lower prices in developing countries to focus on

<sup>14</sup> Working Paper Submitted by Mr. José Bengoa, E/CN.4/Sub.2/2002/3 (2002).

<sup>15</sup> 'The Relationship between the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, and Income Distribution', E/CN.4/Sub.2/1995/14 (1995).

<sup>16</sup> E/CN.4/Sub.2/1996/14 (1996), E/CN.4/Sub.2/1997/9 (1997), and E/CN.4/Sub.2/1998/8 (1998).

<sup>17</sup> Milanovic, Branko, 'True World Income Distribution, 1988 and 1993: First Calculations Based on Household Surveys Alone', *Economic Journal*, January 2002.

<sup>18</sup> In technical terms, the GINI coefficient (a common measure of inequality in which 0 means everyone is equal and 100 means one person has all the income) increased during this period from 62.5 to 66.0.

real purchasing power, according to the Milanovic study almost 80% of the world would fall below the poverty lines established in the United States and Western Europe. Moreover, of the 83 million people added to the world each year, 82 million of them are reportedly in developing countries as opposed to developed countries. These developments do not auger well for reducing inequality. Neither does the fact that some regions, such as Sub-Saharan Africa, are notably worse off than they were before the last trade round. Nonetheless, the recommendations of the Copenhagen World Summit in 1995 that developed countries dedicate 0,7% of their GNP for developing countries have been implemented by only a handful of nations (notably Norway, Sweden, Denmark, and the Netherlands).

Bengoa's report noted the association of persistent poverty with increasing concentrations of wealth occurring simultaneously with globalisation. Since his report, the concentration has only increased. In a widely quoted World Health Organization and UN Development Program comparison, the net worth of the world's richest 358 people in 1997 was greater than the combined net worth of the world's poorest 2.3 billion people, and by 1998, the gap had grown to the point that the richest 200 individuals had net worths surpassing the world's poorest 2.5 billion people.<sup>19</sup> As reiterated by the President of the World Bank, '[o]f the world's 6 billion people, 2.8 billion live on less than \$2 per day, and 1.2 billion live on less than \$1 a day'.<sup>20</sup> Bengoa's conclusion was that a Social Forum was needed to exchange information and insights regarding these issues.

## **2.2. Creation of the Social Forum**

The Sub-Commission had devoted a day of its proceedings in 2001 to discussions on the purpose and effectiveness of such a Social Forum. During those discussions topics floated for consideration included shaping globalisation so that it is more fair to the poor and vulnerable, the impact of international trade, and protection of labor rights and the environment. A major concern of the participants was to carve out a special, non-duplicative niche for the Social Forum as opposed to other UN bodies and mechanisms. The consensus was that the Social Forum's unique role could be to give a voice within the UN to the poor and who are otherwise excluded on these issues. Ideally, the Social Forum could thus contribute to democratising global economic governance by encouraging prior consultation with and participation by those affected by crucial decisions underlying globalisation. Significantly, the Sub-Commission invited not only NGOs in consultative status with the UN, but also other actors including governments, intergovernmental organisations, and newly emerging actors

<sup>19</sup> WHO and UNDP, *Human Development Report 1999*, Toronto, Oxford University Press, p. 3.

<sup>20</sup> World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press, p. v.

(including business, but also and especially actors from the South) to participate.<sup>21</sup> The mandate given this more public Social Forum was not only to 'exchange information on the enjoyment of economic, social and cultural rights and their relationship with the processes of globalisation', but also to 'follow up on situations of poverty and destitution throughout the world.'<sup>22</sup> In other words, the Social Forum was envisioned from the outset as authorised not only to provide a platform for talk, but also for action. Specific authorisation was granted 'to propose standards and initiatives of a juridical nature, guidelines and other recommendations for consideration by the Commission on Human Rights, the Working Groups on the right to development, the Committee on Economic, Social and Cultural Rights, the specialized agencies and other organs of the United Nations system'.<sup>23</sup> The Social Forum was also authorised to follow up on agreements at major international events and discussions of issues related to its mandate.

In order to begin with an appropriate and limited focus on a practical matter, the Sub-Commission decided by resolution that the primary topic of the first UN Social Forum would be '[t]he relationship between poverty reduction and the realization of the right to food.'<sup>24</sup> The appropriateness of this focus arguably stems from the basic nature of the subsistence right to food as a core economic, social, and cultural right, and one particularly susceptible to effective action through more sensible governmental policies. It is appalling that in the twenty-first century, when humankind has learned how to produce adequate food and actually has abundant food in the world, famines and starvation continue to occur as a result of ignorant, irrational, and otherwise misguided decision-making. Food is also one of the least controversial economic, social, cultural rights, as everyone immediately understands its importance to the right to life. It is also closely related to other rights, such as the right to water, and a part of and prerequisite to rights such as the right to health, or the right to education.

### **2.3. ECOSOC Vote Threatens the Social Forum**

In order to convene, the Social Forum depended on an affirmative vote of approval from the UN Economic and Social Council (ECOSOC) for the Commission on Human Rights' recommendation authorising the Social Forum.<sup>25</sup> As of the day before the Social Forum's scheduled session in 2002, this ECOSOC vote had not yet taken place. The United States and certain other developed countries had been reluctant to authorise a meeting or to create another UN mechanism that, in their views, could be at best an

<sup>21</sup> UN Doc. E/CN.4/Sub.2/RES/2001/2 (2001).

<sup>22</sup> *Idem.*

<sup>23</sup> *Idem.*

<sup>24</sup> *Idem.*

<sup>25</sup> CHR 2002/106 of 22 April 2002.



instrument for challenging the Northern-dominated global economic agenda, and at worst could be simply a wasteful, duplicative, and political forum for bashing developed countries and their interests. The NGO Preparatory Event described below thus took place under the cloud of not knowing whether the Social Forum would be held. While eventually the ECOSOC approval came through, it was over opposition from the US, Australia, and Japan, and with the European Union countries abstaining. The final vote was 33 favoring, 3 against, and 17 abstaining.<sup>26</sup> While the Social Forum thus received eventual approval, this approval did not come in time for the planned 25 July opening day. So on that day, High Commissioner Mary Robinson regretfully announced that the Social Forum would be delayed. (At the same time she voiced a hope that informal discussions could continue, but enough governments protested proceeding in the absence of ECOSOC approval that even an informal meeting became impossible.) The first full day of the Social Forum finally opened on 26 July after ECOSOC had acted, but the planned second day had to be postponed until Friday of the following week. The net result was that the Social Forum, intended to serve as space for the voices of the poor, was hampered at the outset by uncertainty and a serious meeting delay undoubtedly prohibiting many of the poor from participating as fully as planned.

#### **2.4. NGO Preparatory Event**

A Preparatory NGO Meeting was held on 24 July 2002, the day before the first UN Social Forum was supposed to begin, hosted by the Conference of Non-Governmental Organizations (CONGO) in Geneva, the UN NGO Liaison Service (UN-NGLS), and the Office of the High Commissioner for Human Rights. Hamish Jenkins of UN-NGLS served as Moderator, with Peter Prove of the CONGO's Special Committee of NGOs on Human Rights and Sub-Commissioner Member José Bengoa playing prominent roles. Mr. Bengoa described the history and purpose of the Social Forum as sketched above. Citing the economic collapse of Argentina and difficulties in Thailand and elsewhere, he said that were he to conduct his study today the results would probably be even worse. His hope was that the new spirit seen in Porto Alegre, and outside the walls of the UN, could infuse proceedings within the UN through the Social Forum. The focus on the 'new' economic, social, and cultural rights and the inclusion of new actors (the poor, business, and International Financial Institutions (IFIs)) in the dialogue presented possibilities of progress and even some accountability through the Social Forum. The Social Forum could also achieve this end through proposing juridical initiatives. Mr. Bengoa's comments were followed by presentations on human rights and globalisation, poverty reduction, and the right to food. There were also working group meetings

<sup>26</sup> ECOSOC resolution of 25 July 2002.

on Trade and Food Security, Trade in Services, and Voluntary Guidelines for the Right to Food. Key foundational documents were made available.

## **2.5. Proceedings of the Social Forum<sup>27</sup>**

On the first day a wide range of speakers were heard on the relationship among extreme poverty, the right to food, and adequate nutrition.

The second day of the Social Forum, which took place on 2 August 2002 (a week after the first day), focused on discussion of draft conclusions and recommendations, which Mr. Bengoa had prepared after the first day. He explained that after the day's discussion, the ten members of the Sub-Commission would discuss and finalise the document in private for the Sub-Commission's consideration and adoption.

In its conclusions for the 2002 session, the Social Forum affirmed its mandate as described above,<sup>28</sup> emphasising not only the ultimate objective of 'sharing knowledge and experiences' through an interactive dialogue, but also 'to suggest appropriate intervention by the concerned stakeholders' and to contribute to major international conferences and collaborate with other forums, like the Permanent Forum on Indigenous Issues.<sup>29</sup>

## **2.6. Recommendations of the Social Forum**

The main recommendations of the Social Forum were as follows:<sup>30</sup>

The themes recommended for 2003 focused on the rural poor, *i.e.* (i) rural poverty and rural poor communities, including the rights of landless peasants' movements, pastoralists, and people who engage in fishing; (ii) the right to education and rural communities, including the importance of capacity-building and training; (iii) corruption and its impact on the rural poor; and (iv) the role of international cooperation in peasant agriculture and rural communities.

The main recommendations of the Social Forum after considering the issues pertaining to poverty reduction and the right to food were divided into national and international aspects.

At the national level, the Social Forum recommended that:

- States should adopt a national strategy on the right to food in accordance with General Comment 12, and also take into consideration other General Comments including 11, 13 (right to education) and 14 (right to health).

<sup>27</sup> This discussion draws on the authors' notes of the proceedings as well as the Report of the Chairman-Rapporteur, José Bengoa (E/CN.4/Sub.2/2002/18 (2002)).

<sup>28</sup> See notes 22 and 23 above and accompanying text.

<sup>29</sup> Report of the Chairman-Rapporteur, José Bengoa (E/CN.4/Sub.2/2002/18 (2002)), at 14, para. 51.

<sup>30</sup> *Ibidem*, at 15 (paras 70-80).

- States should also, conforming to the human rights principles of nondiscrimination, accountability, transparency, and participation:
  - Establish early warning systems regarding threats to livelihood due to environmental degradation, production changes, or market instability;
  - Establish buffers to mitigate shocks and facilitate early recovery;
  - Avoid discrimination in giving support to farming communities, and consider affirmative action if necessary;
  - Avoid discrimination against women in particular, by giving full access to resources (land, credit, natural resources, technology, and the right of all pregnant and breastfeeding mothers to food and health care);
  - Protect rights of tenant farmers and promote effective land reform and indigenous peoples' right to land;
  - Facilitate market access for small farmers;
  - Protect the rights of landless agricultural workers, including the right to organise and unionise;
  - Ensure conformity of private business activities with the progressive realisation of the right to food;
  - Assist HIV/AIDS-affected communities.

At the international level, the Social Forum recommended that:

- International organisations, especially the IFIs, should incorporate human rights norms, including the right to food, into their work, activities and value systems with due respect to their respective mandates;
- States should give more emphasis in national poverty reduction strategies to the right to food and the urgent need for more institutionalised participation by stakeholders including representatives of the poor and civil society organisations;
- The High Commissioner for Human Rights' Guidelines to incorporate human rights concerns into poverty reduction strategies should be field tested as soon as possible;
- Actions reflect the interrelationship between human rights, for example, the right to food and the right to health, education and other rights, and on a priority basis for women and young children;
- The High Commissioner for Human Rights' reports on intellectual property, agriculture, and trade in services should all be formally transmitted to the WTO General Council and the relevant WTO committees and Director General;
- Human rights principles including nondiscrimination, as the High Commissioner for Human Rights says, support targeted and enforceable differential treatment and affirmative action for developing countries, as opposed to mere 'best endeavor' commitments for such treatment;

- States should take steps (in existing as well as further international agreements and overseas aid) to facilitate access to food and respect for enjoyment of the right to food in *other* countries as well as their own;
- Public funds should be made available through international co-operation to strengthen agricultural research aimed at improving productivity of small and marginal farmers.

The ultimate value of the Social Forum, if it continues its evolution into an effective body, would consist largely in informing the decisions of those shaping globalisation with alternative perspectives relevant to concerns of the world's poor and vulnerable groups.

### **3. THE SUB-COMMISSION'S DEBATE ON COUNTRY SITUATIONS**

The Commission decided in April 2000 to stop the Sub-Commission from further voting on country-specific human rights situations. While it would be permissible under the April 2000 decision for the Sub-Commission to reserve an agenda item for the debate of country situations, the adoption of country-specific resolutions of any kind was prohibited, including the disguising of such issues as so-called thematic or general resolutions under other agenda items.

#### **3.1. General debate under this agenda item**

This year was the third session in which the Sub-Commission was forced to operate under these new constraints. Participation under its item 2 debate on country situations has steadily declined under these rules. Initially only 17 NGO speakers and 4 government speakers had signed up, leading to a reallocation of the allotted time to be increased to 11 minutes for each speaker.<sup>31</sup> The item 2 deliberations this year spanned four sessions, with 22 NGO speakers and 15 Sub-Commission experts making interventions. In addition, 6 government representatives made general observations and 6 others spoke in right of reply. These numbers are roughly equivalent to last year's numbers (21 NGOs, 14 Sub-Commission experts), though down

---

<sup>31</sup> This year only 3 NGO written reports were issued under this agenda item, compared with 8 such reports in 2001 and 2 NGO reports in 2000. NGOs seem to be making less use of this right to submit written statements before the session and have them published as official UN documents. Only 26 statements from 16 NGOs were filed this year for all agenda items. The 2002 NGO reports under this item 2 included: the Jammu and Kashmir Council for Human Rights (UN Doc. E/CN.4/Sub.2/2002/NGO/3 (2002)) (concerning Kashmir), France Libertés (UN Doc. E/CN.4/Sub.2/2002/NGO/7(2002)) (concerning Iran), and the Association for World Education (UN Doc. E/CN.4/Sub.2/2002/NGO/19 (2002)) (concerning human rights and Islam).

considerably from three years ago. The session started quite confusingly with many of the scheduled NGO speakers not being present, due to last-minute changes to the Sub-Commission timetable. As a consequence, three NGO speakers were given an opportunity to present their interventions after the speaker's list was closed.

### 3.2. Resolutions, decisions, and statements under item 2

As in the prior two years the Sub-Commission seemed to 'test the waters' of this prohibition against country-specific voting by adopting a decision on the human rights situation of the Iraqi people. During this session it also adopted a Chairperson's statement on the execution of a Mexican national in the United States. Other resolutions also arguably addressed country-specific situations relating to the war on terrorism, World War II comfort women, and the Rome Statute of the International Criminal Court.<sup>32</sup> A prior, annually adopted resolution on the situation of women and girls in Afghanistan was not adopted this year, having been overtaken by events (*i.e.* the overthrow of the Taliban government). Whether and how the Commission may react to these Sub-Commission voting initiatives will be important to watch in the upcoming years.

In the case of Iraq, the Sub-Commission adopted a decision, without a vote, addressing the human rights situation of the Iraqi population.<sup>33</sup> The decision appeals again to the international community and the Security Council to lift the embargo provisions affecting the humanitarian situation; and urges the international community and all governments, including Iraq, to alleviate the suffering of the Iraqi population, in particular by facilitating the delivery of food, medical supplies, and the wherewithal to meet the basic needs of the Iraqi people.

On 8 August 2002, in a statement by the Chairman adopted without a vote,<sup>34</sup> the Sub-Commission drew urgent attention to the situation of Javier Suarez Medina, a Mexican national, detained on death row in the United States for thirteen years, who was scheduled for execution by lethal injection on 14 August 2002, in the State of Texas. The case had initially been raised by an NGO speaker during the Sub-Commission's item 3 debate on the administration of justice.<sup>35</sup> The Chairman's statement noted that the United States had not complied in the case with the 1963 Vienna Convention on consular relations, which guaranteed consular assistance for foreign

<sup>32</sup> UN Doc. E/CN.4/Sub.2/RES/2002/2 (2002) (Rome Statute); UN Doc. E/CN.4/Sub.2/RES/1 (2002) (armed intervention); and UN Doc. E/CN.4/Sub.2/RES/2002/29 (2002) (sexual slavery in times of armed conflict).

<sup>33</sup> UN Doc. E/CN.4/Sub.2/DEC/2001/115 (2001).

<sup>34</sup> Chairman's Statement, 8 August 2002.

<sup>35</sup> The NGO representative spoke on behalf of Dominicans for Justice, Franciscans International, and Pax Christi International.

detainees, despite a 1999 advisory opinion on the Convention's applicability to circumstances like these from the Inter-American Court of Human Rights and the 2001 *LaGrand* judgment of the International Court of Justice (*Germany vs United States of America*) in which the Convention's requirements were also underlined. The Sub-Commission earnestly asked the United States authorities to reprieve the execution of Mr. Suarez Medina and to re-examine his case in order to guarantee his right to benefit from consular assistance and his right to a fair trial. The Suarez Medina case was also addressed in a letter to US Secretary of State Colin Powell from High Commissioner Mary Robinson on 13 August 2002, urging a stay of execution and noting that there were serious concerns that the trial proceedings in the case had not complied with international human rights standards, in particular the International Covenant on Civil and Political Rights and safeguards guaranteeing protection of the rights of those facing the death penalty. Mr. Suarez Medina was executed by lethal injection in Texas on 14 August 2002. Statements of regret were presented by the Chairperson and by a representative of the Mexican government at the next day's session of the Sub-Commission, 15 August 2002.

### 3.3. Other item 2 resolutions

The Sub-Commission also adopted (without a vote) under this agenda item a resolution on colonial slavery, repeating much of the substance from a resolution adopted in 2001 and requesting 'all countries concerned to acknowledge their historical responsibility and the consequences which follow from it to take initiatives which would assist, notably through debate on the basis of accurate information, in the raising of public awareness of the disastrous consequences of periods of slavery, colonialism and wars of conquest and the necessity of just reparation', calling for the establishment of a common worldwide date each year as public recognition of the abolition of slavery and the slave trade, and requesting the High Commissioner's office to initiate a process of reflection on appropriate procedures for guaranteeing the implementation of this resolution.<sup>36</sup>

Another draft resolution under this agenda item, 'Effects of measures to combat terrorism,' sponsored by Ms. François Hampson,<sup>37</sup> would have appointed a sessional Working Group on terrorism, composed of all Sub-Commission members, and a coordinator. This draft resolution was eventually withdrawn by the sponsor, apparently due to lack of support and the potential overlapping mandates that would have been created.

<sup>36</sup> UN Doc. E/CN.4/Sub.2/2002/RES/1 (2002).

<sup>37</sup> UN Doc. E/CN.4/Sub.2/2002/L.2 (2002).

### 3.4. Item 2 debate summary

Nearly every Sub-Commission member who spoke during the item 2 debate expressed concern over the human rights implications of counter-terrorism.<sup>38</sup> Several members also commented on violence in the Mid-East.<sup>39</sup> By contrast very few NGO speakers mentioned either topic<sup>40</sup> – perhaps a reflection of the growing failure of NGO speakers to adapt to current or emerging human rights issues; the tendency of some NGOs to focus on their perennial concerns and, hence, to ignore current developments in the human rights world; and/or the decision of NGOs with broader concerns not to participate any more in Sub-Commission sessions.

The counter-terrorism concern was expressed in an especially compelling manner by Sub-Commission member Mr. Asbjørn Eide in his presentation under this agenda item. He began by referring to another 11 September in 1973 – when General Pinochet came to power in Chile and commenced a reign of terror, which later spread to several other Latin American countries. Eide noted that these events generated human rights mobilisation in the United States, which led to the compilation of the annual State Department reports on human rights in foreign countries. Whatever criticism one might level against that process now, it should be remembered that the human rights reports were initiated to hold the United States administration accountable for involvement in human rights violations perpetrated by armed forces supported by the United States. One of the persons initially perceived by that US administration as a terrorist was already sitting in a small cell in Robben Island outside Cape Town. His name was Nelson Mandela and he later became the President of South Africa and a winner of the Nobel Peace Prize.

Mr. Eide said that as to the terrible attacks of 11 September 2001, some of the responses were less constructive than those that followed the 11 September 1973 events. The use of the Guantanamo base for Taliban and Al Qaeda prisoners, the US lobbying for immunity from the International Criminal Court for its peacekeeping personnel, and US opposition to the Optional Protocol to the Convention Against Torture, all were extremely worrisome from a human rights perspective. Violence begets violence, Mr. Eide stressed. The situation in the occupied Palestinian territories, Chechnya, Kashmir, and Sri Lanka are examples where violence has led to nothing except even more violence.

<sup>38</sup> 12 of 15 members who spoke addressed the issue of counter-terrorism and human rights. Note: this section of the article is based on the authors' notes of the item 2 debate, together with copies of speakers' statements when made available and a review of the daily UN press releases for this period.

<sup>39</sup> Seven Sub-Commission members raised concerns about the violence in Israel-Palestine.

<sup>40</sup> Six of 22 NGO speakers raised the issue of counter-terrorism; five raised concerns about Israel-Palestine.

This thematic approach by Mr. Eide, tracing the historical connection between human rights issues of the past and the present, with specific countries and practices identified, was fresh and unique and seemed to be received favourably by those in attendance. Mr. Weissbrodt also offered a thematic approach in his intervention under item 2 – centered on the cross-cultural and cross-border trafficking of persons in many regions of the world, naming in particular Bosnia, India, Italy, Nepal, Nigeria, the United Arab Emirates, and a private corporation in the US (DynCorp). Both interventions were well received and will likely spark others to develop thoughtful and unique contributions to the item 2 debate in future sessions. In total, 34 specific country situations were raised by members concerning human rights during the item 2 debate, including Afghanistan (particularly in the regions outside of Kabul), several countries in Africa (situations of armed conflict and arms trafficking where there had been a lack of effective UN intervention, especially in Angola, Congo, Rwanda, and Sudan), Argentina (conditions arising out of economic distress), Australia (treatment of refugees), Belgium (historical situation of the Lumumba assassination), Bosnia (prostitution and trafficking to SFOR forces), China (treatment of refugees from the Democratic People's Republic of Korea), Colombia, Egypt, and France.

Other country situations addressed by one or more members included: India (particularly the violence in Kashmir), Indonesia (Moluccas and Aceh), Italy (a trafficking destination), Liberia, Nepal (trafficking), Nigeria, the Democratic People's Republic of Korea (flight of refugees), Saudi Arabia (terrorists, suppressing dissent), and Somalia.

Members also commented on the situations in Southern Africa (14 million facing starvation), Sri Lanka, Sudan, Tunisia, United Arab Emirates (child camel jockeys), United Kingdom, Uruguay (dire economic conditions), and Zimbabwe. In addition, eight different members commented on some aspect of United States programs or policies affecting human rights, including counter-terrorism measures, Guantanamo Bay detainees, threats of invasion into Iraq, and its opposition to the International Criminal Court.

NGO speakers addressed over 30 different country situations in the debate under item 2: Argentina, Bhutan, Bolivia (indigenous peoples), Canada (indigenous peoples), China (Tibetans, Falun Gong, Mongols, and others), Colombia, Republic of Congo (Brazzaville), Democratic Republic of Congo (Kinshasa), European countries in general (laws discriminating against immigrants), France, Germany, Guatemala, Guyana, India (Asam, Manipur, Nagaland, Tripura and Kashmir), Indonesia, Israel (as to Palestine), Italy, Kyrgyzstan, Liberia, Mexico (indigenous peoples), Pakistan, Russia, Rwanda, Sri Lanka, Sudan, Suriname, Tunisia, the United Kingdom, the United States (Vieques Puerto Rico, secret military tribunals, indigenous peoples, and anti-terror legislation), Western Sahara, and Yugoslavia. In



addition, NGO documents addressed Kashmir, Iran, and human rights generally under Islam.<sup>41</sup>

Furthermore, 13 government delegations chose to speak during the Sub-Commission's item 2 debate – six of whom spoke in right of reply to statements made by others.<sup>42</sup> In a possible positive trend, however, five of the 14 governments took the opportunity to address human rights reforms in their country rather than mount a defensive attack against others.<sup>43</sup> In particular, the government of Nepal took the opportunity in a right of reply to address statements on the serious trafficking problems in their country, acknowledging the concerns, addressing the complexity of the problems, and describing reforms and initiatives that were underway to combat these problems.<sup>44</sup> Several Sub-Commission members publicly thanked Nepal for these comments, as a particularly constructive approach to remarks in right of reply.

#### 4. REALISATION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS INCLUDING THE RIGHT TO DEVELOPMENT

In addition to the Social Forum and the efforts of several of its Working Groups, this year the Sub-Commission again adopted a number of resolutions addressing economic, social, and cultural rights. These resolu-

<sup>41</sup> See UN Docs E/CN.4/Sub.2/2002/NGO/3, 7, and 19 (2002).

<sup>42</sup> Rights of reply were exercised by China, Colombia, the Democratic People's Republic of Korea (two times), Morocco, Nepal, and the Russian Federation. General statements on human rights were presented by Azerbaijan, Bahrain, the Democratic People's Republic of Korea, Iraq, Mexico, Pakistan, Syria, and Turkey.

<sup>43</sup> Bahrain (new constitution, recent municipal elections available for first time to women voters, and three important decrees in July 2002 regarding political rights), Mexico (establishment of High Commissioner Office in the country, work on a national plan of action, recent visits by UN experts and rapporteurs), Nepal (measures to combat trafficking), Pakistan (Augustus 2001 free local elections, efforts to eliminate honour killings and other violence against women, efforts to eliminate child labour, *etc.*), and Turkey (comprehensive October 2001 reform package, recent abolition of the death penalty, and projected lifting of state of emergency, December 2002).

<sup>44</sup> The representative of Nepal noted that trafficking of women and girls constitutes a gross violation of human rights; that several constitutional and civil code provisions now criminalised such conduct in his country; that traffickers are now subject to prison sentences of up to 15 years; that Nepal is a party to all major human rights treaties as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; that the problem of trafficking was complex; that a number of new initiatives were being undertaken in the country to combat it including adoption of a national plan of action; that Nepal had established a national commission; that technical assistance from the High Commissioner's office had been welcomed and implemented in the country; that several training sessions of local police and others had been ongoing since 1999; that they were working with several other countries of the South to combat trafficking between countries; and that they would continue to dedicate their best efforts in combating this problem.

tions covered a range of issues including extreme poverty;<sup>45</sup> drinking water and sanitation;<sup>46</sup> the right to food;<sup>47</sup> housing and property restitution in the context of refugees;<sup>48</sup> the non-discrimination clause in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>49</sup> and the draft Optional Protocol to the Covenant on Economic, Social and Cultural Rights.<sup>50</sup> Resolutions on related issues included those covering corruption and its impact on the enjoyment of human rights,<sup>51</sup> globalisation,<sup>52</sup> and the liberalisation of trade in services and human rights.<sup>53</sup>

#### 4.1. Extreme poverty

With respect to the subject of extreme poverty, the Sub-Commission received the joint working paper of the *ad hoc* working group appointed last session to explore a possible programme of work to prepare a study and contribute to the drafting of an international declaration on extreme poverty and human rights.<sup>54</sup> Mr. José Bengoa (expert from Chile) was coordinator of the group, composed also of Mr. Paulo Sérgio Pinheiro (expert from Brazil), Mr. Yozo Yokota (expert from Japan), and Mr. El-Hadji Guissé (expert from Senegal). The group has set a three-year programme of work, with the objective of preparing a draft declaration. The Sub-Commission adopted without a vote a resolution welcoming the project, enlarging the working group and inviting wide participation by governments, the Secretariat, international financial institutions, regional bodies, and others in the group's work.<sup>55</sup>

<sup>45</sup> UN Doc. E/CN.4/Sub.2/RES/2002/13 (2002).

<sup>46</sup> UN Doc. E/CN.4/Sub.2/RES/2002/6 (2002).

<sup>47</sup> UN Doc. E/CN.4/Sub.2/RES/2002/10 (2002).

<sup>48</sup> UN Doc. E/CN.4/Sub.2/RES/2002/7 (2002).

<sup>49</sup> UN Doc. E/CN.4/Sub.2/RES/2002/9 (2002).

<sup>50</sup> UN Doc. E/CN.4/Sub.2/RES/2002/14 (2002).

<sup>51</sup> UN Doc. E/CN.4/Sub.2/DEC/2002/106 (2002).

<sup>52</sup> UN Doc. E/CN.4/Sub.2/DEC/2002/105 (2002).

<sup>53</sup> UN Doc. E/CN.4/Sub.2/RES/2002/11 (2002).

<sup>54</sup> UN Doc. E/CN.4/Sub.2/2002/15 (2002).

<sup>55</sup> UN Doc. E/CN.4/Sub.2/RES/2002/13 (2002). The enlarged group will consist of Ms. Antoanela-Iulia Motoc, Mr. Asbjørn Eide, Mr. Yozo Yokota, Mr. El Hadji Guissé, and Mr. José Bengoa, with Mr. Bengoa as Coordinator, and Mr. Emmanuel Decaux and Mr. Paulo Sérgio Pinheiro as alternates, to prepare, without financial implications, a joint working paper in three stages: a preliminary stage, to be submitted to the Sub-Commission at its fifty-fifth session; an interim stage, to be submitted at its fifty-sixth session; and a final stage, to be submitted at its fifty-seventh session, on the need to develop, on the basis of the various relevant international instruments, the ongoing work in other forums, the conclusions and recommendations of the Expert Seminar on Human Rights and Extreme Poverty, and any other relevant inputs, in particular those received from governments, guiding principles on the implementation of existing human rights norms, and standards in the context of the fight against extreme poverty.

## 4.2. *Housing and property restitution for refugees*

Last session Mr. Paulo Sérgio Pinheiro, expert from Brazil, was requested to prepare a working paper on the return of refugees' or displaced persons' property. This topic was one of nine subjects that the Committee on the Elimination of Racial Discrimination (CERD) had proposed in 1997 that the Sub-Commission address. Mr. Pinheiro's working paper addressed the terminology issues in this field, the relevant international standards, and issues requiring further study.<sup>56</sup> He concluded that for the right to return to be meaningful it must encompass more than merely returning to one's country, but to one's home and lands as well. Grappling with the difficult issues of housing restitution, including conditions for a safe and dignified return, safeguards and mechanisms for ensuring successful repatriation, and using compensation only as a last resort, are some of the thorny problems in this field.

The Sub-Commission requested that Mr. Pinheiro conduct a three-year study on this topic, and to collaborate with CERD in his research since CERD had originally proposed this study.<sup>57</sup> This appointment must now be approved by the Commission on Human Rights before being officially launched.

## 4.3. *Drinking water*

The relationship between economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation has also been taken up by the Sub-Commission, in the form of a study to be conducted by Mr. El Hadji Guissé. The pursuit of the study had initially been declined by the Commission on Human Rights, but was finally approved in April 2002.<sup>58</sup> Mr. Guissé had only a short time period between approval of the appointment in April and preparation of this first, preliminary report, which had to be submitted in May. In his report Mr. Guissé notes the causes of drinking water shortages, the legal basis to the right to drinking water – both under international law and regional and national legal standards – and the reasoning for making the right to drinking water and sanitation a human right. Mr. Guissé concludes his preliminary report by positing that the right to drinking water should be a non-derogable right under international law – even though no other economic right has attained that status. Also, Mr. Guissé did not distinguish between the right to water and the right to access to water.

<sup>56</sup> UN Doc E/CN.4/Sub.2/2002/17 (2002).

<sup>57</sup> UN Doc. E/CN.4/Sub.2/RES/2002/7 (2002).

<sup>58</sup> UN Doc. E/CN.4/DEC/2002/105. The Sub-Commission had originally appointed Mr. Guissé to this study in 1998 by its resolution 1998/7, but the Commission had failed in several subsequent sessions to approve the study, finally authorising it to go forward in April 2002.

The Sub-Commission welcomed Mr. Guissé's preliminary report, requested a progress report in 2003, and endorsed his preliminary conclusions, in particular that various obstacles linked to the realisation of the right of everyone to drinking water supply and sanitation seriously impede the realisation of economic, social and cultural rights, and that equality is an essential element for effective participation in the realisation of the right to development and the right to a healthy environment.<sup>59</sup>

#### **4.4. Right to food**

The Sub-Commission also noted the intergovernmental Working Group of the Food and Agricultural Organization (FAO) which had been established, had been tasked to prepare voluntary guidelines for States' efforts to realise the right to food and to be free from hunger. The Sub-Commission encouraged participation and support for these efforts, as well as co-ordination with the recent proceedings of the Social Forum where the right to food had been discussed.<sup>60</sup>

#### **4.5. Non-discrimination**

In its resolution 2002/9 the Sub-Commission reiterated its invitation to Mr. Fried Van Hoof (expert from the Netherlands) to prepare a working paper for its 2003 session on non-discrimination as enshrined in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, taking into account other relevant studies of the Sub-Commission and the work of the Committee on Economic, Social and Cultural Rights. In this regard, the Sub-Commission acknowledged the need to develop a further understanding of the scope, content, and implications of the non-discrimination principle in the context of economic, social and cultural rights. Article 2 to the Covenant states that parties undertake to guarantee that the rights enunciated will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **4.6. Draft Optional Protocol**

For several years the Sub-Commission had urged the Commission to continue with the drafting of an optional protocol to the Covenant on Economic, Social and Cultural Rights, in order to provide an individual complaint mechanism under that Covenant and a more particularised remedy for violations of the Covenant. The Commission had recently

<sup>59</sup> UN Doc. E/CN.4/Sub.2/RES/2002/6 (2002).

<sup>60</sup> UN Doc.E/CN.4/Sub.2/RES/2002/10 (2002).

appointed an independent expert to review this matter who had submitted two annual reports. In 2002 the Commission had also finally appointed an open-ended Working Group to consider the subject. The open-ended Working Group has not yet, however, been tasked with drafting an optional protocol, but only of considering alternatives for elaborating such a protocol.

In its resolution this year, the Sub-Commission welcomed these recent developments but again urged the Commission to task the Working Group with the drafting of a substantive text, noting the importance of this effort, and deciding to continue to follow the progress of this project in future years.<sup>61</sup> The resolution on the draft Optional Protocol, while welcoming the appointment of an Independent Expert of the Commission charged with examining the question of the draft Optional Protocol, stated once again that an inter-sessional open-ended Working Group of the Commission is the appropriate mechanism to examine such a question and reiterated its suggestion to the Commission that such a Working Group be established at its next session.<sup>62</sup>

#### **4.7. Corruption**

The topic of corruption and its effect on the undermining of economic, social and cultural rights arose in several different contexts at this session of the Sub-Commission.<sup>63</sup> Ms. Christi Mbonu (alternate from Nigeria) noted in her remarks under this agenda item that the enjoyment of economic, social and cultural rights was seriously undermined by corruption, which could be reflected and defined in several different ways. She felt in particular that focus should be upon those who had taken advantage of their national position of power to enrich themselves. Many dictators across the world had been involved in such corruption. In several countries corruption had become a way of life and had disastrous effects on the most vulnerable groups. In practice many societies had failed to put in place adequate measures to fight corruption. It was not only a moral question, but it undermined all rights of a country's citizens, such as access to basic social services and salaries. She also noted that the African Union was drafting a declaration highlighting the concern of corruption.

<sup>61</sup> UN Doc. E/CN.4/Sub.2/RES/2002/14 (2002).

<sup>62</sup> UN Doc. E/CN.4/Sub.2/RES/2001/6 (2001); *see also* UN Doc. E/CN.4/Sub.2/2000/9 (2000).

<sup>63</sup> Issues were raised about corruption and its tendency to undermine human rights activities during the Social Forum debate, the discussion of slavery, in the report and resolution on the Working Group on Contemporary Forms of Slavery, in discussions on extreme poverty, during the presentation on the promotion and consolidation of democracy, and in the right to access to drinking water.

As a consequence Ms. Mbonu was asked to prepare a working paper on the subject for the next year's session.<sup>64</sup>

#### **4.8. Globalisation**

The multi-year study on globalisation and its full impact on human rights has been an important development over the last several Sub-Commission sessions. This session no report was received, but the Special Rapporteurs were invited to submit their final report to the Sub-Commission at its next session.<sup>65</sup> The expectation is that the Commission on Human Rights would receive this final report at its 60<sup>th</sup> session in 2004. Globalisation nonetheless was discussed in the context of several other initiatives and items on the Sub-Commission's agenda, including the Social Forum, the right to food, trade and investment, indigenous peoples, extreme poverty, threats to workers' rights, transnational corporations and other business enterprises, corruption, the globalisation of law enforcement processes, influences on democratisation, increases in migration flows, housing rights, terrorism, and the globalisation of communications and mass media.

#### **4.9. Trade and investment**

The Sub-Commission again addressed the subject of trade and investment in its debate and voting this year. The High Commissioner on Human Rights submitted a report on liberalisation of trade in services, in particular on the human rights impact of the General Agreement on Trade in Services (GATS).<sup>66</sup> The report was the third in a series of reports the High Commissioner had submitted concerning human rights and trade, the others being a report on the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>67</sup> and a report on the WTO Agreement on Agriculture which had been submitted to the Commission in April 2002.<sup>68</sup> The High Commissioner also reported on the efforts of her office, as tasked earlier by the Sub-Commission, to seek observer status with the World Trade Organization for the ongoing review of

<sup>64</sup> UN Doc. E/CN.4/Sub.2/DEC/106 (2002).

<sup>65</sup> UN Doc. E/CN.4/Sub.2/DEC/105 (2002).

<sup>66</sup> The report urges that human rights should be among the objectives of trade liberalisation; emphasises the role of the State in the process of liberalisation; and seeks consistency in the relationship between progressive liberalisation of trade and the enjoyment of human rights. A list of areas is identified, requiring further action, including ensuring equal access for basic services; ensuring the right and duty of governments to regulate basic services; encouraging interpretations of GATS that are compatible with human rights; undertaking human rights assessments of trade policies; providing international cooperation and assistance; and increasing dialogue on human rights and trade. UN Doc. E/CN.4/Sub.2/2002/9 (2002).

<sup>67</sup> UN Doc. E/CN.4/Sub.2/2001/13 (2001).

<sup>68</sup> UN Doc. E/CN.4/2002/54 (2002).

the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), and to examine the need to investigate whether the patent, as a legal instrument, was compatible with the promotion and protection of human rights and corresponding State obligations.<sup>69</sup>

In Resolution 2002/11 the Sub-Commission expressed concern that human rights issues were not adequately taken into account in trade and investment matters generally. The Sub-Commission asks the office of the High Commissioner to submit a further report on its activities in this regard in 2003 and to continue its efforts to obtain observer status for upcoming trade and investment related proceedings, in particular the September 2003 Ministerial Conference of the upcoming GATS-WTO negotiations, and to hold briefings to trade policymakers on human rights concerns in this context.

## 5. STUDIES

The Sub-Commission completed one study this year (on affirmative action), commented on five ongoing studies that will be updated again next year (terrorism, rights of non-citizens, globalisation, drinking water, and traditional practices), voted to launch four new studies which must first be approved by the Commission before formally commencing (small arms/light weapons, discrimination in criminal justice, refugees' rights to property, and indigenous peoples permanent sovereignty over natural resources), and approved the continuation of several working papers on potential studies, including five new topics (corruption, universal ratification of human rights treaties, rights of women married to foreigners, regulation of citizenship by successor States, and new topics for the Working Group on Indigenous Populations to consider).

In addition, the Sub-Commission asked the High Commissioner's office to update its reports next year on GATS (as noted above in section 4), systematic rape and sexual slavery in armed conflict, and states of emergency.

Updated or expanded working papers are invited next year from various members or ex-members on: democracy; human rights treaty reservations; extreme poverty; the Social Forum; constructive approaches for minorities; discrimination based on work and descent; military tribunals; the human genome; non-discrimination under Article 2 of the International Covenant on Economic, Social & Cultural Rights; accountability of armed forces and other UN personnel taking part in peace support operations; weapons of mass destruction, and a commentary with regard to human rights standards for transnational corporations and other business enterprises.

<sup>69</sup> UN Doc. E/CN.4/Sub.2/2002/41 (2002).

## 5.1. Terrorism

As mentioned earlier, the subject of terrorism threaded through many of the discussions at the 2002 Sub-Commission session. Several ongoing studies were directly affected by the events following 11 September 2001, including the studies and working papers on terrorism, rights of non-citizens, military tribunals, discrimination in criminal justice systems, refugee rights, small arms and light weapons, accountability of UN security forces, and the consolidation and promotion of democracy. As noted earlier, the topic was also frequently mentioned in the debate under item 2 and other agenda items of the session.<sup>70</sup> Mrs. Kalliopi Koufa's ongoing study on terrorism and human rights was the most affected.

Mrs. Koufa, who was elected as a member of the Sub-Commission for the first time in 2002, had for many years been an alternate member of the Sub-Commission, from Greece. She began her reporting on this topic in 1996 by preparing a working paper on the question of terrorism and human rights for the Sub-Commission and in 1998 was appointed for a multi-year study on the topic. A preliminary report was submitted in 1999 and a progress report in 2001. Her report this year was to be a second progress report with a final report to be submitted next year, but due to the ongoing events, the Sub-Commission endorsed Mrs. Koufa's recommendation that her study be continued for at least another two years, in order to better absorb and reflect on the recent events that had occurred and were still occurring as a result of terrorist activities and counter-terrorism measures taken in response.

In her report this year Mrs. Koufa reviewed the recent international anti-terrorist activities undertaken at the global, regional, and intergovernmental levels, including at the European Union, the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, and by international human rights bodies and mechanisms.<sup>71</sup> In her concluding observations she repeated concerns about the broad scale and scope of a work of this type in terms of legal issues and analysis, that there had been an escalation of terrorist events around the globe in recent years even without considering the events of 11 September 2001, that responses to terrorism themselves have been dramatic – sometimes taken with a sense of panic or emergency – ; that these 'close-to-panic' reactions have serious implications for international human rights law – as well as humanitarian law; that there has been a plethora of new proposals for national and international anti-terrorism measures – many of which have serious human rights implications; that the Security Council's new Counter-Terrorism Committee has not yet undertaken to include human rights issues into its work in any major way, the issue of sub-State

<sup>70</sup> A search for the term 'terrorism' in the official press releases of the Sub-Commission's session reveal 131 references.

<sup>71</sup> UN Doc. E/CN.4/Sub.2/2002/35 (2002).



terrorism having also disintegrated into a heated debate, including the legal status of Al Qaeda members and its leadership; and that addressing the root causes of terrorism has also become highly contentious.<sup>72</sup>

In its resolution 2002/24 the Sub-Commission thanked the Special Rapporteur for her report; repeated its condemnation of terrorist attacks, particularly the heinous attacks of 11 September 2001; noted the severe challenge to democracy, civil society, and the rule of law posed by terrorism; emphasised the need to intensify the fight against terrorism at the national and international levels and to strengthen the role of the United Nations system in this respect; reaffirmed that all measures to counter terrorism must be in strict conformity with international law, including international human rights and humanitarian law standards; noted the complexity of the phenomenon of terrorism and the extraordinary range and quantity of developments at the international, regional, and national levels since 11 September 2001; requested the Special Rapporteur to continue her work, to update data and information for the study, and to expedite her work; requested the Secretary-General to continue to collect information, including a compilation of studies and publications, on the implications of terrorism for, as well as the effects of the fight against terrorism, on the enjoyment of human rights; and requested the Special Rapporteur to submit an additional progress report to the Sub-Commission at its fifty-fifth session including a discussion of national, regional, and international measures adopted and/or applied after 11 September 2001, and of the conceptual debate arising therefrom.<sup>73</sup> As such, the Sub-Commission is not proposing any date for the final report by Mrs. Koufa (which may mean additional progress reports will also be submitted in 2005 and beyond).

## **5.2. Studies Undertaken Pursuant to the Sub-Commission's Cooperation with the Treaty-Monitoring Bodies**

One way in which the Sub-Commission contributes to the field of human rights is by cooperating with the treaty-monitoring bodies. In an effort to further such cooperation, the Sub-Commission has prepared studies for the benefit of those bodies.

In continuing its ongoing cooperation with the Committee on the Elimination of Racial Discrimination (CERD), in particular, the Sub-Commission this session received a final report on the concept and practice of affirmative action, a progress report on the rights of non-citizens, and a working paper on property restitution for refugees and other displaced persons. The working paper on non-discrimination described earlier was

<sup>72</sup> *Ibidem.* at paras 59 to 64.

<sup>73</sup> UN Doc. E/CN.4/Sub.2/2002/RES/24 (2002).

also tasked to a Sub-Commission member; this topic had been suggested by the Committee on Economic, Social and Cultural Rights.

### 5.2.1. Affirmative Action

Special Rapporteur Mr. Marc Bossuyt, former Sub-Commission expert from Belgium who now serves on CERD, presented his final report on the concept and practice of affirmative action.<sup>74</sup>

Mr. Bossuyt concluded that a persistent policy in the past of systematic discrimination may in some cases justify or require affirmative action measures to overcome the inferiority conditions affecting such groups and individuals. Sweeping general statements regarding the extent to which affirmative action should be implemented or the criteria for applying such measures, however, are not appropriate. Special attention should be given to the temporary nature of such measures, as a common problem has been the indefinite or open-ended nature of such programs. It is also not appropriate to provide special benefits or programs to persons or groups who do not need them, regardless of the pattern of past historical abuses. Affirmative action should be centered on taking measures expected to meet the particular needs of the category it is intended to favour, rather than on restricting the benefits to others. A careful balance is needed to make sure that the choice, timing, and location of such measures benefit the intended recipients, insofar as possible without violating the rights of others. Bossuyt argued that affirmative action policies are only admissible insofar as they do not contravene the principle of non-discrimination. Mr. Bossuyt acknowledges that his report does not offer an easy tool to evaluate affirmative action measures, and that this is due to the complexity of the issue overall and the need for carefully considered, contextual decisions in this field.<sup>75</sup>

Comments to Mr. Bossuyt's report noted the complexity of the problem, the well reasoned and balanced report, his sound conclusions, but also that it was frustrating that he had not offered any simple solutions or criteria for this field.<sup>76</sup> The Sub-Commission thanked Mr. Bossuyt for his final report, asked that it be submitted to the Commission, CERD, and other treaty bodies, and asked the Commission to consider that it be translated into the official UN languages and widely distributed.<sup>77</sup>

<sup>74</sup> UN Doc. E/CN.4/Sub.2/2002/21 (2002).

<sup>75</sup> *Ibidem*, at paras 101 to 114.

<sup>76</sup> One member suggested a follow up working paper to Mr. Bossuyt's report in order to develop guidelines for the use of affirmative action measures, but this draft resolution, L.32, was eventually withdrawn by the resolution's sponsor, Ms. Lammy Betten of the Netherlands.

<sup>77</sup> UN Doc. E/CN.4/Sub.2/2002/22.

### 5.2.2. Rights of Non-Citizens

Mr. Weissbrodt, as Special Rapporteur, presented his second report on the rights of non-citizens.<sup>78</sup> As had been the case in regard to the study of affirmative action, this working paper was in response to a 1997 request from CERD.<sup>79</sup> The report responded to the suggestions and comments at the Sub-Commission's 53<sup>rd</sup> session, in addition to identifying the precise scope of the rights currently granted to non-citizens under international human rights law and the extent to which States may differentiate, in exceptional circumstances, between citizens and non-citizens in the protection of human rights. Addenda to the main report chronicled United Nations activities in this field, regional activities, and developments in a number of countries.

The Special Rapporteur reiterated his concern that existing standards have not adequately protected the human rights of non-citizens and that, as CERD had itself said, governments have increasingly been making distinctions between different categories of non-citizens and between non-citizens from different nations. He also expressed concern that those distinctions may contravene international law.

In his tentative recommendations, offered for comment in this year's report and to be finalised in a future report, are that continued discriminatory treatment of non-citizens demonstrates the need for clear, comprehensive standards governing the rights of non-citizens and their implementation by States; that problems relating to the treatment of non-citizens arise under each of the international human rights instruments; and that the treaty bodies jointly should prepare general comments and recommendations that would establish a consistent, structured approach to protecting the rights of non-citizens. At a minimum, he recommends that the treaty bodies that have adopted specific standards should consider updating them and those bodies that have yet to issue interpretive guidance relating to non-citizens should do so. In addition, treaty bodies should intensify their dialogues with States parties in regard to the rights accorded to, and the actual situations faced by, non-citizens.

In its resolution 2002/18 the Sub-Commission extended the deadline for submitting replies to Mr. Weissbrodt's questionnaire to States parties and other interested parties (to 15 November 2002), requested the High Commissioner's office to notify recipients of the extension, encouraged more replies (only 7 responses were received from last year's questionnaire), and asked Mr. Weissbrodt to submit his final report to next year's session.<sup>80</sup>

<sup>78</sup> UN Doc. E/CN.4/Sub.2/2002/25 and E/CN.4/Sub.2/2002/20/Add.1, Add.2 and Add.3 (2002).

<sup>79</sup> See UN Doc. E/CN.4/Sub.2/1997/31, Annex (1997).

<sup>80</sup> UN Doc. E/CN.4/Sub.2/2002/RES/18 (2002).

### 5.2.3. Property Restitution for Refugees and Internally Displaced Persons (IDPs)

As noted earlier, Mr. Pinheiro, expert member from Brazil, also submitted a working paper on the topic of property restitution, and was appointed by the Sub-Commission to conduct a three-year study on this subject. This had been another topic recommended for consideration by CERD.

### 5.3. Other Studies

Other working papers presented at this year's session in which Sub-Commission members have been asked to conduct multiple year studies included those on small arms and light weapons,<sup>81</sup> discrimination in the administration of criminal justice,<sup>82</sup> and permanent sovereignty of indigenous peoples over their natural resources.<sup>83</sup> Further working papers on new or continuing subjects have been requested next year on weapons of mass destruction, promotion and consolidation of democracy, human rights treaty reservations, military tribunals, the rights of women married to foreigners, the regulation of citizenship by successor states, human rights and the genome, the accountability of UN armed forces, discrimination based on work and descent, universal ratification of human rights treaties, and on peaceful, constructive approaches for minorities (an update of a prior study).<sup>84</sup>

<sup>81</sup> UN Doc. E/CN.4/Sub.2/RES/2002/25. The resolution appoints Ms. Barbara Frey Special Rapporteur to prepare a three-year study on the question of trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms. The appointment will have to be approved by the Commission before the study is formally commenced. See also Ms. Frey's working paper on this subject in UN Doc. E/CN.4/Sub.2/2002/39 (2002).

<sup>82</sup> UN Doc. E/CN.4/Sub.2/RES/2002/3 (2002). The resolution appoints Ms. Leila Zerrougui Special Rapporteur to prepare a three year study on discrimination in criminal justice systems. The appointment will have to be approved by the Commission before the study is formally commenced. See also Ms. Zerrougui's working paper on this subject in UN Doc. E/CN.4/Sub.2/2002/5 (2002).

<sup>83</sup> UN Doc. E/CN.4/Sub.2/RES/2002/15. The resolution appoints Ms. Erica Irene Daes Special Rapporteur to prepare a two-year study on indigenous peoples' permanent sovereignty over natural resources. The appointment will have to be approved by the Commission before the study is formally commenced. See also Mrs. Daes working paper on this subject in UN Doc E/CN.4/Sub.2/2002/23 (2002).

<sup>84</sup> UN Doc. E/CN.4/Sub.2/DEC/2002/113 (2002) (weapons of mass destruction); UN Doc. E/CN.4/Sub.2/DEC/2002/116 (2002) (democracy); UN Doc. E/CN.4/Sub.2/DEC/2002/110 (2002) (reservations to human rights treaties); UN Doc. E/CN.4/Sub.2/DEC/2002/103 (2002) (military tribunals); UN Doc. E/CN.4/Sub.2/DEC/2002/112 (2002) (rights of women married to foreigners); UN Doc. E/CN.4/Sub.2/DEC/111 (2002) (the regulation of citizenship by successor states); UN Doc. E/CN.4/Sub.2/DEC/2002/114 (2002) (human rights and the genome); UN Doc. E/CN.4/Sub.2/DEC/2002/104 (2002) (accountability of armed forces and other UN personnel taking part in peace support operations); UN Doc. E/CN.4/Sub.2/DEC/2002/108 (2002) (discrimination based on work and descent); UN Doc.

## 6. WORKING GROUPS

The Sub-Commission makes a unique contribution to the human rights field through its Working Groups. There are currently two sessional working groups on transnational corporations and administration of justice and four inter-sessional groups on minorities, indigenous populations, slavery, and communications. The Working Groups provide the possibility for a participatory study of current issues, trends, and difficulties in thematically important areas, and involve monitoring of human rights problems by providing a channel for the airing of grievances.

For example, there is no other venue in the United Nations where minority issues are being addressed as intensively as in the Working Group on Minorities, no forum for reviewing violations of several key multilateral treaties relating to slavery other than the Working Group on Contemporary Forms of Slavery, and no current venue for promulgating human rights standards for businesses other than the Working Group on the Working Methods and Activities of Transnational Corporations. In addition, the Working Group on Indigenous Populations has made a unique and unprecedented impact on indigenous peoples and representatives in the twenty years of its existence. Sometimes these Working Groups attract larger numbers of participants and observers than the plenary sessions of the Sub-Commission itself.

Each Working Group is composed of one Sub-Commission expert from each of the five geographic regions.<sup>85</sup> All of the Working Groups – with the exception of the Working Group on Communications – are open to participation by observers. Consequently, they have become important fora for NGOs, interested individuals, and others to participate in a discussion of a particular subject. In addition, participation in Working Groups permits Sub-Commission members to focus on a particular area of interest or expertise. Further, the Working Groups allow for reports of human rights violations and give governments the chance to respond.

The Working Groups on transnational corporations, administration of justice, minorities, indigenous populations, and slavery each compile a report of their respective sessions, to submit to the Sub-Commission's plenary session. In addition, these Working Groups may place proposals before the Sub-Commission to take action with respect to a particular issue. As such, the Working Groups can influence the agenda and the performance of the Sub-Commission.

---

E/CN.4/Sub.2/DEC/2002/115 (2002) (modalities of effective universality of international human rights treaties); and UN Doc. E/CN.4/Sub.2/DEC/2002/16 (2002) (a follow-up over the next two years of a prior study on constructive and peaceful solutions to minorities issues).

<sup>85</sup> For general rules regarding working groups (and the Sub-Commission), see Rules of Procedure of the Functional Commissions of the Economic and Social Council, UN Doc. E/5975/Rev.1 (1983).

## 6.1. Transnational Corporations

With the recent Enron, WorldCom, and other corporate accounting scandals, in addition to the World Summit on Sustainable Development in Johannesburg, the issue of corporate social responsibility continues to be a very visible topic within the UN and other organisations. The 2002 session marked the first year of the renewed three-year mandate for the Sub-Commission's Working Group on the Working Methods and Activities of Transnational Corporations. At this session, the Working Group continued to grapple with drafting human rights standards for business enterprises and began addressing issues of implementation of any such standards.

Sub-Commission resolution 1998/8 of 20 August 1998 established the sessional Working Group for a three-year period in order to examine the working methods and activities of transnational corporations.<sup>86</sup> Sub-Commission resolution 2001/3 of 15 August 2001 renewed this mandate for an additional three years and, *inter alia*, called upon the Working Group to pursue activities such as 'contribut[ing] to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights' and 'analyz[ing] the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations, and contribute to the drafting of binding norms for this purpose.'<sup>87</sup>

For his fourth consecutive year, Mr. El-Hadji Guissé (expert from Senegal) was re-elected to chair the Working Group. Mr. Miguel Alfonso Martinez (expert from Cuba), Mr. Vladimir Kartashkin (expert from the Russian Federation), Mr. Soo Gil Park (expert from South Korea) and Mr. David Weissbrodt (expert from the United States) were also re-elected as members of the Working Group.<sup>88</sup> The Working Group considered three new documents in 2002, including the 'Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights',<sup>89</sup> the Commentary to the Human Rights Norms,<sup>90</sup> and an introduction to these two documents.<sup>91</sup> Additionally, Asbjørn Eide's paper on implementation submitted in 2001 was once again made available for discussion.<sup>92</sup>

<sup>86</sup> Sub-Commission, The relationship between the enjoyment of economic, social and cultural rights, and the right to development, and the working methods and activities of transnational corporations, 1998/8, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

<sup>87</sup> UN Doc. E/CN.4/Sub.2/RES/2001/3 (2001).

<sup>88</sup> UN Doc. E/CN.4/Sub.2/2002/13 (2002).

<sup>89</sup> UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1 (2002).

<sup>90</sup> UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2 (2002).

<sup>91</sup> UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2 (2002).

<sup>92</sup> UN Doc. E/CN.4/Sub.2/WG.2/WP.2 (2001)

The version of the standards before the Working Group this year looked considerably different from drafts previously submitted to the Working Group. The difference arose because the Working Group met in February 2002 to create a revised draft of the Human Rights Guidelines.<sup>93</sup> At that meeting, the Working Group focused on broad fundamental human rights standards. Therefore, the Working Group was able to accept eighteen short and precise, yet comprehensive standards with regard to human rights conduct expected of business enterprises, including provisional statements regarding implementation. This draft created by the Working Group was called the 'Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (Norms of Responsibility). All five members of the Working Group submitted the Norms of Responsibility to the Sub-Commission session in 2002 for further consideration at that time.

Although the Working Group lacked sufficient time to review comprehensively the Commentary on the Norms of Responsibility at their February 2002 meeting, they agreed that individual members should present the Commentary as a separate document at the fifty-fourth session of the Sub-Commission. Accordingly, the Norms of Responsibility with Commentary reflected the views of Vladimir Kartashkin, Soo-Gil Park, and David Weissbrodt. With its greater attention to detail, the Commentary provides an elaboration of the standards of conduct required and contains more references to the documents used to derive the standards. The Commentary will continue to be addressed throughout the upcoming year and will be more fully considered by the Working Group and the Sub-Commission at a later date.

Many NGOs and others came out in support of the Norms of Responsibility at the August 2002 Working Group sessions, including Amnesty International, Christian Aid, Human Rights Advocates, Human Rights Watch, Lawyers Committee for Human Rights, Federation Internationale des Ligues des Droits de l'Homme (FIDH), the Novartis Foundation, Oxfam, Prince of Wales International Business Leaders Forum, and the World Organization Against Torture (OMCT). Joint comments on the Norms of Responsibility were also received from the International Chamber of Commerce and the International Organisation of Employers. Additionally, the ILO, WHO, and UNRISD provided further comments and substantive suggestions for the content of the Norms of Responsibility.

One substantive change, which occurred during negotiations of Working Group members at the Sub-Commission, was the creation of a 'de minimis' exception for small businesses, which would not be held accountable to the Norms of Responsibility. Members of the Sub-Commission were concerned that the standards should particularly focus upon large transnational

---

<sup>93</sup> The Human Rights Guidelines was the version of the standards considered by the Working Group in 2001, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1 (2001).

businesses and not apply to small local businesses that have only a local impact and may not have access to the same amount of resources as larger businesses. Previous drafts of the Norms of Responsibility clearly applied to all businesses with no exception for size or entirely local impact of a company's activities, but only to the extent of the activities and influence of the businesses. Part of the concern with creating an exception to universal applicability is the fear that businesses would use any exception as a loophole to evade responsibility for their conduct.

Because of greater pressure to create an exception in which small businesses would not be held accountable under the Norms of Responsibility, the Working Group started to consider how it might draft such an exception. One suggestion came from Sub-Commission member Ms. François Hampson, who proposed stating that the Norms of Responsibility only apply to businesses with over one hundred employees. The number one hundred was not based on any particular formulation or study, other than that requiring companies to have at least one hundred employees would clearly omit very small businesses. In negotiations, the Working Group decided it was not solely the size that mattered, but it was also the connection to a transnational corporation (TNC) or the impact beyond just the local neighborhood that was of real concern. For these reasons, the Working Group drafted an exception which would exclude a business from the Norms of Responsibility if the business could prove (1) its impact is entirely local, (2) it has no connection with a TNC, and (3) the activity complained of is not one of the activities described in the security section of the Norms of Responsibility (such as genocide, torture, *etc.*).<sup>94</sup> The Working Group hoped that such a narrow exception will omit the small local grocer or baker, but will not create a loophole that could be abused by a big business so as to avoid application of the Norms of Responsibility.

Also of note, the name of the document changed once again within the first few days of the annual session. The project is now called the 'Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.' This change was a result of the Working Group's desire to underline the non-'voluntary' nature of the instrument. During their meetings at this Sub-Commission session, the Working Group continued to take into account comments and feedback from those experts, government delegates, business representatives, union representatives, additional NGO representatives, and others attending the Working Group meetings. A version of the Norms of Responsibility taking into account comments made at the Working Group meeting at this fifty-fourth session of the Sub-Commission was attached to the 2002 Working Group Report with the aim of promoting even greater dissemination of the document. As indicated in Sub-Commission resolution 2002/17, it is expected that after one more year of dissemination and discussion, the Working Group will

<sup>94</sup> E/CN.4/Sub.2/2002/13/Add.1 (2002).



adopt the Norms of Responsibility in 2003 and send them to the Sub-Commission and eventually to the Commission for adoption.<sup>95</sup> Also included in resolution 2002/17 are some provisional ideas for examining methods of implementation. The resolution suggests that the Working Group should explore implementation by (1) encouraging the Norms of Responsibility to be used to determine the procurement policies of the UN or its specialised agencies as to the purchase of goods and services and the identity of partners, or (2) asking the Commission to create a group of experts, working group, or Special Rapporteur to receive complaints of violations of the Norms of Responsibility. These issues of implementation, in addition to other mechanisms and final adoption of the standards, will be the first issues addressed by the Working Group at its sessional meetings during the fifty-fifth Sub-Commission meeting in July-August 2003.

## **6.2. Administration of Justice**

The Sub-Commission's sessional Working Group on the Administration of Justice was convened in two public meetings on 30 July 2002, and 2 August 2002. The following experts were selected as members of the Working Group: Ms. Françoise Hampson (Western Europe and other States), Ms. Antoanella Iulia Motoc (Eastern Europe), Ms. Florizelle O'Connor (Latin America), Mr. Soli Sorabjee (Asia), Mr. Yozo Yokota (alternate from Asia), and Ms. Lalaina Rakotoarisoa (Africa). At the first session, Ms. Motoc was elected Chairperson-Rapporteur.

This year's agenda reflected the Working Group's exploration of a number of issues related to administration of justice. The Chairperson noted that several working papers initiated in the group have now moved to the plenary agenda of the Sub-Commission, including military tribunals, discrimination in the criminal justice system, and the accountability of United Nations peacekeeping and peace enforcement officers. As a result of the progression of studies and reports to the Sub-Commission, many of the presentations this year in the Working Group were exploratory factual reports, with limited analysis of the relationship between the issues raised and international human rights law. Further, no standard-setting activities were undertaken by the Working Group this year.

The Working Group on the Administration of Justice had a lengthy agenda for consideration. The substantive agenda items for this session of the Working Group included: (1) issues relating to the deprivation of the right to life, with special reference to the imposition of the death penalty; (2) prison privatisation; (3) improvement and efficiency of the judicial instruments for the national protection of human rights and their international impact; (4) domestic implementation of the obligation to provide domestic remedies; (5) transitional justice: mechanisms of truth

<sup>95</sup> E/CN.4/Sub.2/RES/2002/8 (2002).

and reconciliation; and (6) other issues, including discriminatory rules of evidence, and current trends in international criminal justice

Under the topic of deprivation of life, Mr. Guissé presented a follow-up report on the death penalty to a presentation made last year. This update included the number of countries presently maintaining the death penalty. A member of the Working Group noted that execution of criminals who were under the age of 18 at the time of the offence is a violation of customary international law. Other members of the Working Group stated that the death penalty should never be carried out in public, that use of the death penalty to get rid of political enemies should be considered unacceptable, that national sovereignty may not be used to shield States from their international human rights obligations, and that life imprisonment should be used instead of the death penalty.

Prison privatisation was also addressed under this agenda item. Miguel Alfonso Martinez (expert from Cuba) presented an oral report on this topic and provided an overview of the various rationales that States use to support prison privatisation, as well as some of the human rights implications of privatisation. He also noted the applicable standards of treatment for prisoners and surveyed State practice with regard to privatisation or future privatisation plans. Alfonso Martinez recommended that this subject be authorised for study by a higher body, but in light of the previous decisions of the Commission indicating that it was not convinced of the usefulness of such a study, that the Working Group keep the issue under consideration for another year.<sup>96</sup>

Under the agenda item of domestic implementation of the obligation to provide domestic remedies, Ms. Hampson provided a report and noted that while most States have ratified international human rights instruments, the international community continues to receive reports of serious human rights violations. She concluded there is a great need for training judges as to the applicable international legal obligations. Other Working Group members noted the disparities in some countries between the rich who have access to the courts, and the poor who may be denied access. Additionally, comments were made regarding the need to move toward complementary national and international systems regarding provision of domestic remedies. NGO observers commented on the issues that arise in indigenous communities regarding the criminal justice system. Ms. Hampson clarified later that her working paper is not solely focused on the criminal process, but on what an individual can do in order to achieve an effective domestic remedy.

Ms. Motoc provided an oral presentation on 'Transitional justice: mechanisms of truth and reconciliation', in which she reviewed relevant basic institutions, as well as the function and limitations of these mechanisms. She concluded by noting that often a single mechanism of

---

<sup>96</sup> Draft Report of the sessional Working Group on the Administration of Justice, at p. 10.

transitional justice in a country is not enough. Further, that results vary from country to county and that sometimes it is helpful to have concurrent truth commission type mechanisms and international courts, as well as national commissions and national courts.

Under the agenda item of 'Other issues', Ms. Hampson raised the problem of discriminatory rules of evidence in rape and sexual assault cases. She noted that there are problems related to both the general rules of evidence, as well as the specific rules of evidence. Other Sub-Commission members noted that sexual exploitation of minors is also a problem in this regard, when the accused are family members. Ms. Rakotoarisoa plans to submit a working paper on this subject at the next session.

Current trends in international criminal justice were also discussed under this agenda item. Mr. Guissé presented some thoughts that he had on the international criminal justice system, its present status, and the direction that it should pursue for development. He reviewed the creation of the *ad hoc* criminal tribunals, as well as the International Criminal Court. Mr. Guissé suggested that it was important to ensure that the ICC Statute did not dilute international law. In this regard, he proposed that the Working Group should be considering changes in the international justice system pursuant to its mandate, which is to consider the emergence and evolution of present practices of international justice. Mr. Guissé offered to prepare a presentation for future sessions with a summary table of all the international criminal justice decisions and developments that are taking place during this period. Other Working Group members noted that another consideration of this study might be national criminal jurisdictions exercising jurisdiction over foreigners. NGO observers commented that there were many NGOs that are focusing on ICC issues and that it might be helpful for this study to be prepared in consultation with experts.

During its final session, the Working Group adopted its provisional agenda for next year, which will include continuation of the agenda items covering deprivation of life, privatisation of prisons, domestic implementation of the obligation to provide domestic remedies, and transitional justice. New agenda items will include current trends in international penal justice and witnesses and rules of evidence. It was decided to combine the medical secrecy rules and discriminatory rules of evidence into one agenda item for next year, with a working paper submitted by Ms. Rakoatarisoa. Ms. Hampson offered to provide a complete presentation on 'The domestic implementation in practice of the obligation to provide domestic remedies'. Ms. Motoc will continue her work on Transitional Justice, and Mr. Guissé will present his report on the overview of international criminal justice developments.

This session of the Working Group on Administration of Justice both continued work from last year, and saw the proposal of some new projects. Overall, there was no coherent focus to the work of this sessional Working Group, and the time devoted to various agenda items did not allow them to

be discussed in sufficient detail. It may be beneficial for the Administration of Justice Working Group to reduce the size of its agenda, reconsider its methodology, and consider authorising working papers on related topics in order to provide more comprehensive coverage to particular areas of concern. Further, it would be helpful if the working papers and reports were structured in such a manner so as to include more analysis of their relationship to human rights law, rather than simply focusing on factual situations in the administration of justice.

### 6.3. Working Group on Minorities

The Working Group on Minorities has been, since its inception, one of the best examples of how a human rights working group can be effectively organised and run. In 2002 the Working Group convened for its sixth session from 27 to 31 May.<sup>97</sup> This Working Group is a subsidiary body of the Sub-Commission and was authorised by the Commission on Human Rights in its resolution 1995/24 of 3 March 1995, and endorsed by the Economic and Social Council in its resolution 1995/31 of 25 July 1995.<sup>98</sup> By decision 1998/246 of 30 July 1998, the Economic and Social Council extended the mandate of the Working Group with a view to its holding one session of five working days annually.<sup>99</sup> In accordance with its mandate, the Working Group is expected to:

- (a) review the promotion and practical realisation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; (b) examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments; and (c) recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.<sup>100</sup>

At its eighth session, Mr. Asbjørn Eide (expert from Norway) was re-elected as Chairperson-Rapporteur.<sup>101</sup> Other members included Mr. José Bengoa (expert from Chile), Mr. Vladimir Kartashkin (expert from Russia), Mr. Soli Sorabjee (expert from India), and Mrs. Leila Zerrougui (expert from Algeria).<sup>102</sup> Representatives of 52 governments, 62 NGOs, two UN

<sup>97</sup> Report of the Working Group on Minorities on its seventh session, UN Doc. E/CN.4/Sub.2/2001/22 (2001).

<sup>98</sup> *Idem.*

<sup>99</sup> *Idem.*

<sup>100</sup> *Idem.*

<sup>101</sup> *Idem.*

<sup>102</sup> *Idem.*

organisations, one inter-governmental organisation and 42 scholars from educational institutions attended this year's session.<sup>103</sup>

The main purpose of the Working Group is to propose constructive solutions to various problems faced by minority peoples. The Group has taken a topic-by-topic approach, focusing on matters such as intercultural and multicultural education for minorities, the role of the media in regard to minorities, and generally on constructive ways to handle situations involving minorities.<sup>104</sup> Each year several working papers prepared by members of the group or outside experts have been available to the group, enabling a rich, informative discussion of relevant issues.<sup>105</sup> During its session this year, the Working Group considered four principal themes: (1) reviewing the promotion and practical realisation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; (2) examining possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments; (3) recommending further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national and ethnic, religious and linguistic minorities; and (4) determining the Working Group's future role in promoting and protecting the rights of minorities.

The session this year began with contributions from NGOs and others, highlighting problems faced by particular minority groups in different parts of the world, including Kurds in Iraq; conditions in Gujarat, India; armed conflict areas in Sudan and Chechnya; peace building efforts in Sri Lanka; Ethiopia; the plight of Roma and Albanian minorities; Bahai's in Iran; small scale fisher peoples in Africa and Asia (more than 100 million who depend entirely on fish for their livelihoods); Haitian descendants in the Dominican Republic; the Baluchi people in Pakistan; the Welsh-speaking minority of

<sup>103</sup> See *idem* for a complete list of participants.

<sup>104</sup> See, e.g., UN Doc. E/CN.4/Sub.2/2001/22 (2001); UN Doc. E/CN.4/Sub.2/2000/27 (2000); UN Doc. E/CN.4/Sub.2/1999/21 (1999).

<sup>105</sup> Working Papers and reports available to the group this year included the Report on the visit to Mauritius (E/CN.4/Sub.2/AC.5/2002/2), Report of the third workshop on multiculturalism in Africa (Gaborone, February 2002) (E/CN.4/Sub.2/AC.5/2002/4), Report of La Ceiba seminar on Afro-descendants (E/CN.4/Sub.2/AC.5/2002/5), Report of an International Seminar on Autonomist and Integrative Approaches to Minority Protection (Copenhagen, April 2002) (E/CN.4/Sub.2/AC.5/2002/WP.1), Jurisprudence of the European Court and Commission on Human Rights in 2001 and minority groups (by Professor Geoff Gilbert, University of Essex) (E/CN.4/Sub.2/AC.5/2002/WP.2), Report of Montreal seminar on Afro-descendants (E/CN.4/Sub.2/AC.5/2002/WP.3), a paper on minority rights and development: overcoming exclusion, discrimination and poverty by the NGO Minority Rights International (E/CN.4/Sub.2/AC.5/2002/WP.6), the future role of the Working Group prepared by Minority Rights Group International (E/CN.4/Sub.2/AC.5/2002/WP.7), a report from the Secretary-General on the rights of persons belonging to national or ethnic, religious and linguistic minorities (E/CN.4/2002/91, Add.1 and Add.2), and a Report on the International Seminar on Cooperation for the Better Protection of the Rights of Minorities (Durban, South Africa, September 2001) (E/CN.4/2002/92).

Wales; the Bhutanese Nepali-speaking refugees in Nepal; Greek members of the Turkish Muslim minority; former Yugoslavia; Hmong minority children in Laos; the Basque minority in Spain; and the Pygmy people in the Congo.<sup>106</sup>

The Working Group then had a detailed thematic discussion on autonomy and integration, followed by regional developments in the Americas and Africa, based on seminars held in those regions. Views expressed during the discussion on autonomy included promoting effective participation of minorities in decision-making processes, establishing minority ombudsmen in some types of institutions, giving minorities a voice but not a veto concerning democratically adopted legislation, cautioning that autonomy would be hard to accept if it was imposed and not designed according to the wishes of the concerned minority, balancing autonomy with self-determination wishes, and suggesting that possible future initiatives might be a legally binding document on autonomy and the establishment of a High Commissioner for Autonomy. Mr. Bengoa commented that in his view, autonomy was becoming the preferred approach by minorities as the demand for secession decreased. He therefore suggested the need for legal analysis and a code of conduct concerning autonomy.<sup>107</sup>

With regard to Europe, an interesting discussion occurred in the Working Group on so-called kin-State policies in regards to minorities living in neighbouring States. A recent law adopted in Hungary concerning ethnic Hungarian groups abroad was used as an example. Concern was expressed that the Hungarian law had extraterritorial effects and that it granted unequal economic and social benefits, not simply cultural rights. A recent memorandum of understanding between Hungary and Romania had significantly reduced some of the tensions regarding this particular law, but similar laws present similar issues. Views expressed included: that such laws should not be adopted without first consulting the concerned countries, that the question was relevant to many countries; that non-binding guidelines would be helpful since not all aspects of the issue were addressed by international law; that special benefits provided by kin-States could cause instability in the home or host State; that focus should also be given to the benefits of these laws for the minority concerned, not simply the effects on State sovereignty; and that the work on guidelines would best be started in Europe where the problem was most topical. The Chairman-Rapporteur recommended that the OSCE High Commissioner for Minorities take the initiative in drafting such guidelines, that the Hungarian law was important because it might serve as a precedent for other kin-States, that there was an urgent need for clear guidelines and that the Working Group would follow the issue closely.<sup>108</sup>

<sup>106</sup> See UN Doc. E/CN.4/Sub.2/2002/19 (2002), paras 15-25.

<sup>107</sup> *Ibidem*, paras 27-34, 46.

<sup>108</sup> *Ibidem*, paras 39-45.

The Working Group also began this year a multi-year review of development issues affecting minorities. In particular, views were expressed regarding: the rights of minorities to economic development programs; overcoming exclusion, discrimination and poverty of minorities; the need to mainstream minority rights into development; the lack of implementation of the right to participate effectively in decisions at the national and regional levels; and the need to increase the collective knowledge of minorities so that any participation is meaningful and fully informed.<sup>109</sup>

The Working Group decided that its main task at next year's session would be to begin drafting a code of conduct on implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In addition, it will study in greater depth the development issue and will promote further contacts with regional mechanisms and encourage training programs for minorities.

The Working Group also visited the country of Mauritius during the year at the invitation of the government and one of the Sub-Commission's previous members, Mr. J. Yeung Sik Yuen, and produced a separate report with key conclusions and recommendations from that visit. Because of UN limits on the number of pages in documents, the Mauritius visit was not included in the main report of the Working Group, although it was mentioned in the presentation of the Group's report to the Sub-Commission. This visit was the first of its kind by the Working Group. The objectives were to draw lessons from the experiences of Mauritius with regard to good practices of group accommodation in a multicultural society, as well as to explore integrative and autonomous approaches and practices with respect to minority protection in that country. The Working Group visited the main island of Mauritius on 8 to 10 September 2002 as well as Rodrigues Island, which assumed autonomous governing structure, on 7 September. Among the suggestions and recommendations made by the Working Group were the collection of disaggregated data and information on disadvantaged groups in order to improve designs for future policy for minorities, to encourage greater cultural education and awareness, to improve facilities at primary school levels in marginalised areas, and to exercise caution in promoting tourism and other development projects in minority communities.<sup>110</sup> In addition, the Working Group recommended further strengthening of the National Commission on Human Rights by dealing with individual complaints, establishing a system of early warning, and analysing implementation of legislation, the electoral system and the educational system, and appropriate police training.<sup>111</sup>

---

<sup>109</sup> *Ibidem*, paras 49-57.

<sup>110</sup> Report on the visit by the Working Group to Mauritius. E/CN.4/Sub.2/AC5/2002/2 (2002), paras 48-51.

<sup>111</sup> *Ibidem*, paras 52, 54.

The Sub-Commission in its resolution adopting the Working Group's report this year,<sup>112</sup> welcomed the Working Group's practice of requesting its members and others to prepare papers on thematic issues, noted that 2002 marks the tenth anniversary of the adoption of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, recommends additional pamphlets in additional languages be prepared on minority resource materials, and that consideration be given to holding an international year for the world's minorities and to the possible establishment of a voluntary trust fund to facilitate the participation in the Working Group of minority representatives and experts from developing countries and for the organisation of other activities relating to the protection of minorities.

The Sub-Commission also requested in this resolution that Mr. Asbjørn Eide update his study on peaceful and constructive approaches to situations involving minorities (progress report in 2003 and final report in 2004), and recommended that the Commission consider establishing a Special Rapporteur or Special Representative on minorities. Additional seminars are recommended for Asia, the Baltics, and in Afro-descendant regions.

#### **6.4. Working Group on Indigenous Populations**

The Working Group on Indigenous Populations held its twentieth session from 22-27 July 2002 in Geneva. The Working Group first began holding annual sessions in 1982 after ECOSOC authorised the Sub-Commission to establish an annual Working Group on Indigenous Populations with a two-part mandate: (1) to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples; and (2) to give attention to the evolution of international standards concerning indigenous rights. The Working Group consists of five Sub-Commission members: Mr. El Hadji Guissé (expert from Senegal); Ms. Françoise Jane Hampson (expert from the United Kingdom), Mr. Miguel Alfonso Martinez (expert from Cuba); Ms. Antoanella-Iulia Motoc (expert from Romania); and Mr. Yozo Yokota (expert from Japan). Participation at the 2002 Working Group meeting was noteworthy with a total of 1,076 accredited participants, including 43 member and non-member State observer delegations, 6 representatives of United Nations bodies and specialised agencies, 170 representatives of indigenous and non-governmental organisations, as well as participants from academic institutions and other organisations.<sup>113</sup>

<sup>112</sup> E/CN.4/Sub.2/RES/2002/16 (adopted without a vote, 14 August 2002).

<sup>113</sup> Report of the Working Group on Indigenous Populations on its twentieth session, Chairperson-Rapporteur: Mr. Miguel Alfonso Martinez, UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 3.



The twentieth session was remarkable not for substantive developments relating to the Working Group's mandate, but rather for evaluation of its working methods and role within the UN system, development of a substantive work plan, and procedural modifications that will be implemented during the next session to improve the efficacy of the Working Group. At the opening meeting, Miguel Alfonso Martinez was elected Chairperson-Rapporteur of the Working Group. In assuming this position, Alfonso Martinez remarked, 'this is not a celebratory year for the Working Group in light of the first successful meeting of the UN Permanent Forum on Indigenous Issues (Permanent Forum) in May of 2002.'<sup>114</sup> Indeed, the creation of the Permanent Forum is viewed by some governments, as well as other observers, as an opportunity to end the Working Group in order to prevent possible duplication of activities addressing indigenous issues within the UN system. ECOSOC will be undertaking a review in 2003 of all United Nations mechanisms, procedures, and programs concerning indigenous issues, including the Working Group. Members of the Working Group concluded that with the beginning of the Permanent Forum there indeed existed a 'real danger' that the Working Group mandate could be cancelled and terminated.<sup>115</sup> Hence, while the official theme of this year's Working Group was 'Indigenous peoples and their right to development', due to overriding concerns regarding the future of the Working Group, much of the discussion centered around reflection on past accomplishments, and visions for the future of the Working Group, including specific agenda items addressing the future working relationship of the Permanent Forum, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and the Working Group.

In keeping with the Working Group's mandate, substantive agenda topics for the twentieth session included a review of recent developments, discussion of the right to development, and standard-setting activities. In reviewing recent developments pertaining to promotion and protection of human rights and fundamental freedoms, indigenous representatives recounted for the Working Group some of the serious issues facing indigenous populations including: (1) denial of the right to self-determination and issues relating to recognition of indigenous peoples; (2) the effect of extractive industries and mega-development projects on indigenous communities, and the need for free, prior, and informed consent prior to commencement of these projects; (3) state militarisation on land of indigenous communities; (4) special problems relating to promotion of indigenous languages and education; (5) land and natural resources issues, including the imposition of external land tenure and titling regimes on

---

<sup>114</sup> The Permanent Forum's mandate is to focus upon indigenous aspects of issues on the ECOSOC agenda, to raise awareness and promote the integration and coordination of activities relating to indigenous issues within the UN system.

<sup>115</sup> UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 17.

indigenous lands, environmental exploitation of land and resources by State governments and corporations, and eviction from ancestral lands without compensation; and (6) the right to a religion. State observer delegations responded in some instances by drawing attention to areas where they had taken measures to address concerns raised by their indigenous populations.

Discussion of indigenous peoples' right to development centered around the concept of the need for 'free prior and informed consent' for development projects, as well as the interrelationship between the right to development and the right to self-determination. Indigenous representatives also spoke of the need to balance the negative aspects of globalisation with the sharing of benefits, and requested that multilateral aid agencies be held accountable for environmental damage caused by external development projects.<sup>116</sup> The World Bank also contributed to the discussion and stated that the World Bank policy on indigenous populations and development projects is under revision.

Standard-setting activities were also discussed, and many speakers lamented that the draft declaration on the rights of indigenous peoples has still not been adopted. Suggestions for future standard-setting activities of the Working Group were also presented, and included creation of standards addressing: (1) relations between indigenous peoples and extractive industries; (2) intellectual property rights of indigenous peoples; (3) environmental and development policy guidelines; (4) indigenous health; (e) juvenile justice; and (f) guidelines for political participation of indigenous communities.<sup>117</sup> Members of the Working Group noted that the mandate of the Working Group as far as standard-setting activities are concerned is far from complete, as evidenced by the status of the draft declaration. Hence, a consensus quickly emerged that the future of the Working Group must include standard setting on a variety of issues related to indigenous populations. Working Group members also encouraged incorporation of the work of academics and external experts in future standard setting by the Working Group.

Agenda topics relating to the assessment of the effectiveness of the Working Group and its future role in the UN system were regarded with great urgency at the twentieth session. In reviewing the past successes and visions for the future of the Working Group, the Indigenous Caucus presented a strong statement of support for the continuation of the Working Group and called upon the Working Group to strengthen its standard-setting activities.<sup>118</sup> Other indigenous speakers noted benefits that have resulted from the creation and functioning of the Working Group including indigenous capacity-building, information sharing, construction of a knowledge base, creation of a space where indigenous peoples can

<sup>116</sup> *Ibidem*, at p. 8.

<sup>117</sup> *Ibidem*, at p. 12.

<sup>118</sup> *Ibidem*, at p. 6.

freely inform the international community and their State delegations about issues affecting their communities.<sup>119</sup> Former Chairperson-Rapporteur of the Working Group, Erica-Irene Daes, made a presentation reviewing the history and accomplishments of the Working Group and her ideas for its future. The Working Group decided to honour Ms. Daes by declaring her an honorary member of the Working Group in recognition of her many years of service to the Working Group.<sup>120</sup> The Sub-Commission later endorsed this decision by making her an honorary Working Group member for life.<sup>121</sup>

The future working relationship of the Permanent Forum, the Special Rapporteur, and the Working Group was discussed at length. Almost all speakers stated that the mandates of the three bodies are not necessarily duplicative, but rather, complementary. The Permanent Forum Chair, Ole Henrik Magga, made a presentation on the status of the Permanent Forum. He stated that the Permanent Forum presently lacks a secretariat and a budget, and cannot begin to fulfill its own mandate until those issues are resolved by ECOSOC. Special Rapporteur, Rodolfo Stavenhagen, observed that the three bodies had distinct mandates and he encouraged the three mechanisms to work together in a coordinated way.<sup>122</sup> Indigenous groups repeatedly stressed that the Working Group was unique and must be maintained because it provides crucial access to the UN for indigenous groups. Among indigenous representatives the perception exists that the composition of the Permanent Forum, with eight government representatives and eight indigenous experts will be subject to the veto of State representatives, and may operate so as to deny indigenous groups open access to the UN. Member States commenting on the future of the Working Group either expressed support for the continuation of the Working Group or stated that they would withhold judgment pending the planned ECOSOC review in 2003.

Working Group members underlined the importance of relaunching the Working Group and imbuing it with a new energy. The Working Group agreed that the establishment of these two new bodies should serve as a catalyst for thorough reflection and consideration of new and improved working methods.<sup>123</sup> The Sub-Commission expressed its support for the Working Group by adopting a resolution expressing its full support for the continuation of the Working Group, and requested that the Commission on Human Rights endorse the view that there is a continuing need for the Working Group on account of its unique mandate, which is distinct from that of the Permanent Forum and the Special Rapporteur.<sup>124</sup>

---

<sup>119</sup> *Idem.*

<sup>120</sup> *Ibidem*, at p. 21.

<sup>121</sup> UN Doc. E/CN.4/Sub.2/DEC/2002/107 (2002).

<sup>122</sup> UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 10.

<sup>123</sup> *Ibidem*, at p. 17.

<sup>124</sup> UN Doc. E/CN.4/Sub.2/RES/2002/17 (2002).

The Working Group report and recommendations for the future evince the Working Group's genuine desire to reinvigorate its mandate and work. The Working Group report concluded that it was necessary to 'thoroughly explore practical steps to establish and expand cooperation among the three bodies now existing within the United Nations in the sphere of indigenous issues'.<sup>125</sup> Actions taken to fulfill this commitment included a decision to explore at its twenty-first session the ways and means to develop cooperation with the Permanent Forum, as well as preparation of two working papers exploring coordination with the Permanent Forum and the Special Rapporteur.<sup>126</sup>

Pursuant to the recommendations of the Working Group, the substantive work will be more coordinated and focused during the next session. The theme from the twentieth session, 'Indigenous peoples and their right to development', will be further explored both through the relationship with next year's official theme, 'Indigenous peoples and globalisation', as well as through follow-up working papers by members of the Working Group. Additionally, prior to the next annual meeting, a working paper on the theme will be prepared to serve as framework for discussions.<sup>127</sup> The new attention to the substantive work plan should improve the focus and quality of discussions at the twenty-first session, as well as enhance standard-setting activities regarding indigenous peoples and development projects. Some of the elements of the work plan for the coming two years include: (1) Requesting creation of indigenous development indicators by UN bodies; (2) Organisation of a seminar on the practices of transnational corporations affecting the rights of indigenous peoples; and (3) Preparation of two working papers on relevant topics including draft guidelines for transnational corporations activities and indigenous communities, and indigenous peoples' relationship to extractive industries.<sup>128</sup>

With a view toward the importance of the Working Group's mandate, efforts are also underway to accelerate the Working Group's standard-setting activities. The Sub-Commission passed a resolution requesting two working papers to be presented at the next session. One paper will provide a list of standard-setting activities that might be developed by the Working Group at future sessions.<sup>129</sup> A second working paper will review the most important or controversial provisions of the draft declaration on the rights of indigenous peoples.<sup>130</sup> Finally, a list of possible new studies to be undertaken by Working Group members in the future will also be prepared.<sup>131</sup>

<sup>125</sup> UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 17.

<sup>126</sup> *Ibidem*, at p. 18; E/CN.4/Sub.2/RES/2002/21 (2002).

<sup>127</sup> UN Doc. E/CN.4/Sub.2/RES/2002/21 (2002).

<sup>128</sup> *Idem*; UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 18.

<sup>129</sup> UN Doc. E/CN.4/Sub.2/RES/2002/21 (2002).

<sup>130</sup> *Idem*.

<sup>131</sup> UN Doc. E/CN.4/Sub.2/2002/24 (2002), at p. 20.

The Working Group also took concrete steps to improve its working methods. The existing meeting structure has resulted both in repetitious interventions on multiple agenda items, and a general lack of organisation, making it difficult to analyse the information presented. In future sessions, the general debate will be structured on the basis of issues raised at the prior session, and the Chairperson-Rapporteur will encourage indigenous participants to cluster their statements around a particular topic in order to facilitate dialogue with members of the Working Group and States.<sup>132</sup> The conclusions and recommendations of the Working Group reveal its commitment to renewing its work. The streamlined organisation and procedures for the twenty-first meeting, the important relationship between this year's theme and next year's theme, and the focus on identifying future standard-setting priorities are welcome changes and should be commended. When the mandate of the Working Group is considered alongside the strong support of the indigenous community and some States for the Working Group, and the still tenuous status of the Permanent Forum, it is clear that in the near term, the work of the Working Group must continue. This position is reflected both in the report of the Working Group, as well as in the Sub-Commission's recommendations to the Commission.<sup>133</sup>

### **6.5. Working Group on Contemporary Forms of Slavery**

The Working Group on Contemporary Forms of Slavery is the only mechanism in the UN system for monitoring compliance with several multilateral human rights treaties relating to slavery and slavery-like practices. This Working Group has taken the initiative in developing programs of action against the sale of children, child prostitution, and child pornography; on child labour; on prevention of the traffic in persons and the exploitation of the prostitution of others; and on economic exploitation including the rights of domestic and migrant workers, bonded labour, forced labour, and slavery-like practices in armed conflicts.<sup>134</sup> This year marked the 10<sup>th</sup> anniversary of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography.<sup>135</sup>

The Working Group is a subsidiary body of the Sub-Commission and Commission and was established pursuant to Economic and Social Council decisions 16 (LVI) and 17 (LVI) of 17 May 1974.<sup>136</sup> It was established in 1975 and has met regularly before each session of the Sub-Commission.<sup>137</sup> This Working Group's mandate is to:

<sup>132</sup> *Ibidem*, at p. 21.

<sup>133</sup> UN Doc. E/CN.4/Sub.2/RES/2002/17 (2002).

<sup>134</sup> See UN Doc. E/CN.4/Sub.2/2002/33 (2002).

<sup>135</sup> See UN Doc E/CN.4/Sub.2/AC.2/2002/1/Add.1 (2002) para. 6.

<sup>136</sup> See UN Doc E/CN.4/Sub.2/2002/33 (2002) at para. 1.

<sup>137</sup> *Idem*.

review developments in the field of slavery, the slave trade and the slavery-like practices, of *apartheid* and colonialism, the traffic in persons and the exploitation of the prostitution of others, as defined in the Slavery Convention of 1926, the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the Convention of 1949 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>138</sup>

In 2002, the Working Group on Contemporary Forms of Slavery convened for its twenty-seventh session from 27 to 31 May.<sup>139</sup> This year the Working Group elected Mrs. Halima Embarek Warzazi (expert from Morocco) as Chairperson-Rapporteur. The other members of the Working Group were Ms. Barbara Frey (alternate from the United States), Mr. Stanislav Ogurtsov (expert from Belarus), and Mr. Paulo Sérgio Pinheiro (expert from Brazil). No representative from the Asian region was able to attend this year's session (Mr. Goonesekere from Sri Lanka, the prior representative was not reelected by the Commission in April and no substitute representative from Asia was available on short notice). Several representatives of governments and NGOs also attended the 2002 session of the Working Group.

In addition, the Vice Chairperson of the Committee on the Rights of the Child attended the Working Group's session, and updated those in attendance on the work of the Committee. The Committee and Working Group noted that cooperation was indispensable between their respective organisations.

This year the Working Group paid priority attention to the topic of exploitation of children, particularly in the context of prostitution and domestic servitude. The Working Group listened to a number of interventions regarding child exploitation, including testimonies concerning the trafficking of girls from Nigeria to Italy, through African countries such as Gabon and other countries such as the United Kingdom; trafficking from India to Nepal and Bangladesh; and trafficking from Zambia and the Democratic Republic of the Congo to other countries. A project in Guatemala was addressed, offering help to street girls who had become prostitutes.

Domestic servitude abuses involving children were also explored in Uganda, the Philippines, India, Haiti and concerning child camel jockeys in the United Arab Emirates and other Gulf countries.

On 14 August the Sub-Commission, taking note of the report of the Working Group, adopted a resolution calling upon States to recognise that human trafficking is a gross violation of human rights and fundamental freedoms and, hence, to criminalise it in all its forms; to provide protection, assistance, and temporary residence permits to victims that are not

<sup>138</sup> *Idem.*

<sup>139</sup> Report of the Working Group on Contemporary Forms of Slavery on its twenty-sixth session, UN Doc. E/CN.4/Sub.2/2002/33 (2002), para. 3.

contingent on their cooperation with the prosecution of their exploiters, as articulated in Articles 6, 7, and 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The resolution also recommends the creation of special observatories at the national and regional levels to gather information from non-governmental organisations and individuals with relevant expertise in order to further the goals of the Programme of Action on the Traffic in Persons and the Exploitation of the Prostitution of Others; calls upon United Nations bodies and agencies to develop and implement codes of conduct that prohibit all forms of sexual exploitation by United Nations employees and contract workers and humanitarian aid workers; and recommends that the General Assembly consider declaring a United Nations year against trafficking in persons, especially women, youth, and children.

The Working Group decided that its principal theme for 2003 will be the issue of contemporary forms of slavery related to and generated by discrimination, in particular, gender discrimination, focusing attention on abuses against women and girls, such as forced marriages, early marriages, and sale of wives<sup>140</sup> and in 2004 the theme will be forced labour.

### **6.6. Working Group on Communications**

The Working Group on Communications convened immediately after the conclusion of the Sub-Commission's session in order to consider confidential communications alleging gross violations of human rights. The contents of the Working Group's report remain confidential and will be transmitted to the Commission's Working Group on Situations for consideration prior to the Commission session in March-April 2003.

## **7. THE SYSTEM IN WHICH THE SUB-COMMISSION OPERATES**

A systems analysis of a complex legal or political structure can sometimes offer insights with regard to its functioning and prospects.<sup>141</sup> Several aspects

<sup>140</sup> UN Doc. E/CN.4/Sub.2/RES/2001/14 (2001).

<sup>141</sup> Several have argued that a systems approach to the study of legal subjects has more relevance and is a more realistic analytical method than more theoretical approaches. See, e.g., L. LoPucki, 'The Systems Approach to the Law', 82 *Cornell L. Rev.* Vol. 82, 1997, pp. 479, 481. '[Legal scholarship has moved] toward substitution of the world of concepts for the actual world in which the justice function must be performed. (...) "Systems analysis" is a methodology developed (...) to manage complexity. Instead of screening complexity out, the systems analyst attempts to accommodate as much complexity as possible.'; J. B. Ruhl, 'Alternative Dispute Resolution Symposium: Thinking of Mediation as a Complex Adaptive System', *B.Y.U. L.Rev.* Vol. 777, 1997. 'Complex adaptive systems combine qualities of coherent stability and disordered change to produce sustaining, adaptive performance over

of the Sub-Commission's activities illustrate classic system properties and may suggest some areas for evaluation, reform, and/or advocacy for human rights scholars and activists. While a comprehensive analysis of the Sub-Commission as a system is beyond the scope of this article, the authors would like to offer a few observations of the Sub-Commission in the context of its 54<sup>th</sup> session to illustrate some areas where a more extensive systems analysis might prove useful.

The present Working Groups of the Sub-Commission illustrate the different stages of growth and evolution of such institutions within a larger system. The Working Group on Indigenous Populations, having developed its modalities over the last 20 years and having completed its original task of adopting a draft declaration on indigenous peoples, is now struggling to find a new mission. A new Working Group at the Commission has taken over the task of reviewing and adopting the draft declaration. The Sub-Commission and its parent bodies (ECOSOC and the Commission) must now consider whether the Sub-Commission Working Group should be continued and reformulated in new directions, or whether its mandate should be terminated. The Sub-Commission's Working Group on Contemporary Forms of Slavery has a longer history and initially had a strong sense of its objectives, but in recent years has struggled to find its way. Other Sub-Commission Working Groups, under new or shorter-term mandates, do not have a long institutional history to build upon and are seeking ways to structure their agenda and proceedings in an effective manner.<sup>142</sup> A useful

---

the long run. [Certain] important features of complex adaptive systems explain how they are able to balance stability and change to produce this outcome.'; Steven Hartwell, 'Legal Processes and Hierarchical Tangles', *Clinical L.Rev.* Vol. 8, p. 315, Spring 2002. 'Litigation and negotiations are both systems for processing information. As with other informational systems, these two systems consist of a series of stages (or categories) within a hierarchical structure.'; A. Kiss and D. Shelton, 'Systems Analysis of International Law: A Methodological Inquiry', *Neth. Y.B. of Int'l L.* Vol. 17, p. 45 (1986) ('The web of relations between States is the main characteristic of the present world. While the interdependent, dynamic character of modern society may first have been recognized by multinationals and terrorists, no government today can ignore it.'). and Christian Sano Homs, Student Note: 'Self-Contained Regimes' – No Cop-Out for North Korea, 24 *Suffolk Transnat'l L.Rev.* 89 (Winter 2000) ('Today, legal concepts such as diplomatic law, human rights treaties, the European Economic Community Treaty (EEC Treaty), or provisions of environmental law constitute systems of international law that pose the question of whether such independent legal systems cause the universal legal order to dissipate or fragment.').; T. L. Friedman, *Longitudes & Attitudes: Exploring the World after September 11*, at 4 (2002) ('The globalisation system is different. It has one overarching feature – and that is integration. The world has become an increasingly interwoven place, and today, whether you are a company or a country, your threats and opportunities increasingly derive from who you are connected to.'). The authors note that there are different approaches for applying systems analysis or systems theory to legal topics (e.g., the approach advocated by Professor LoPucki versus the approach taken by Professor Ruhl, as illustrated in the articles above). No preferred approach is intended here.

<sup>142</sup> The Social Forum, for example, is trying to balance a more inclusive participation of a diversity of different groups and individuals, with the need to keep the agenda streamlined and practical. The Working Group on the Administration of Justice has been re-established in recent years and is labouring under a multi-item agenda.



systems analysis of the Working Group structure might include an identification of key components or modalities which have been most successful for Working Groups in the past, key criteria or approaches recommended for future groups, and an evaluation of different information, lobbying, and presentation strategies in the Working Group structure.

The growing collaboration of the Sub-Commission with several of the human rights treaty bodies illustrates another characteristic of systems which could offer a useful example of building productive, integrated relationships with other human rights bodies. The Sub-Commission has now undertaken several in-depth studies of topics requested by the Committee on the Elimination of Racial Discrimination (CERD). A topic requested by the Committee on Economic, Social and Cultural Rights has also recently been assigned to a Sub-Commission member. Members of the Committee on the Rights of the Child attended this session's Working Group on the Contemporary Forms of Slavery. This year the Sub-Commission also met in a joint session with CERD on the issue of discrimination based on work and descent – an exchange where members of both bodies expressed views and explored ways to collaborate without duplicating efforts. Soon after the joint session CERD issued its general recommendation XXIX on Article 1(1) regarding discrimination based on descent.<sup>143</sup>

The phenomenon of 'soft law'<sup>144</sup> is characteristic of a so-called 'emergent property'<sup>145</sup> of a system. The human rights movement as a whole, as well as the Sub-Commission in particular, has taken increasing advantage of soft law approaches to developing and implementing human rights norms.<sup>146</sup> In the present Sub-Commission proceedings the work on the 'Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' illustrates the development of a set of standards where soft law approaches have been purposely incorporated from the beginning, in order to codify principles that can be implemented more quickly than the traditional treaty-based

<sup>143</sup> General recommendation XXIX on Article 1(1), of the Convention (descent), 1 November 2002.

<sup>144</sup> Soft law is the expression used for norms and standards which were not formally adopted in a manner which would recognise as binding legal commitments but which nonetheless, for various reasons, assume some binding characteristics. See, e.g., Shelton, *op.cit.* (note 4) (the editor argues that soft law has been used in some fields more frequently than others – in particular in the areas of environment and human rights).

<sup>145</sup> Joseph O'Connor and Ian McDermott, *The Art of Systems Thinking*, 1997, pp. 6-8. ('[S]ystems function as a whole, so they have properties above and beyond the properties of the parts that comprise them. These are known as *emergent properties* – they "emerge" from the system when it is working.' Examples discussed by the authors include rainbows, tornadoes, computer software bugs and team morale).

<sup>146</sup> Shelton, *op.cit.* (note 4) ('In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinion juris*) to evidence the emergent custom and have assisted to establish the content of the norm.')

timeline.<sup>147</sup> A review of the different ways and degrees of effectiveness in which soft law approaches have emerged in the human rights field, in particular through the Sub-Commission and Commission, might prove useful for those launching new norm-setting activities in the future.<sup>148</sup>

Observing the flow characteristics of systems can also lead to some insights into how a structure is functioning and where it can be improved.<sup>149</sup> For example, a flow of refugees between different countries and regions of the world can be linked to human rights problems and has human rights consequences. The different studies and projects concerning refugees in the Sub-Commission's proceedings, are indicative of how important this problem of the large scale movement of people can be from a human rights perspective.<sup>150</sup> Similarly, one can see how a flow of information that has historically occurred between various bodies within the human rights movement might be linked to human rights causes and human rights impacts.

Some have argued that the types of social problems addressed in economic, social and cultural rights are by their nature more complex, multi-causal, and multi-dimensional than other rights.<sup>151</sup> This aspect of the Sub-Commission's work may also be well-suited to a systems analysis, particularly as it pertains to the effectiveness of the Social Forum; the efforts to include a broader base of participants from more disciplines into economic, social and cultural rights topics on the Sub-Commission's agenda; and the many examples in the Sub-Commission's work of

<sup>147</sup> See *infra* at notes 86-95 and accompanying text.

<sup>148</sup> See, e.g., Shelton, *op.cit.* (note 4) at p. 3 ('The line between law and not-law may appear blurred. Treaty mechanisms are including more 'soft' obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of instruments may have compliance procedures that range from soft to hard.')

<sup>149</sup> See Hartwell, *loc.cit.* (note 141) (information flows in legal systems); and Ruhl, *loc.cit.* (note 142) at p. 792 ('Complex adaptive systems are (...) dynamic, constantly changing, in flux. Generally speaking, the change in complex adaptive systems involves a flow of some medium. In an economy, for example, money and the factors of production move throughout the systems from component to component. Ecosystems could be described by following the flow of biokinetic energy. The Internet is all about the flow of information.').

<sup>150</sup> For example, the criticisms of immigration policies of western governments under the item 2 debate; the alleged mistreatment of refugees from the Democratic People's Republic of Korea in China and the Sub-Commission's resolution on this subject, UN Doc. E/CN.4/Sub.2/2002/RES/23 (2002) (the international protection of refugees); the Sub-Commission's resolution on the right to return of refugees and internally displaced persons, UN Doc. E/CN.4/Sub.2/2002/RES/30 (2002); Mr. Pinheiro's working paper and future study on the right of restitution or return of property of dispossessed refugees, UN Doc E/CN.4/Sub.2/2002/17 (2002); and Mr. Weissbrodt's ongoing study on the rights of non-citizens, UN Doc. E/CN.4/Sub.2/2002/25 & Add.1-3 (2002).

<sup>151</sup> Cf. Kiss and Shelton, *loc.cit.* (note 141) at p. 70 ('A further consequence of the systems approach is a recognition of the inevitable necessity of international legal rules formulated by, and applicable to, the whole international community in response to social problems.').

attempting to add a human rights perspective to other fields and programs.<sup>152</sup>

NGOs are also a classic example of a 'soft system actor' or 'non-State' actor that can be a catalyst for change both between components of a system and within a system. In one sense NGOs are the 'curious grapevine' that Eleanor Roosevelt originally predicted<sup>153</sup> would be the most important force for improvement of human rights throughout the world. In another, very real sense, NGOs as well as transnational corporations and global terrorist organisations represent an evolutionary adaptation which has changed the nature of the international system itself, and to which that system must adapt either explicitly or implicitly. NGOs in the human rights field, in general, and at the Sub-Commission, in particular, have had a great impact historically on the improvement of human rights, but they are struggling to find a meaningful voice at the present time. A study of what has worked and what has not, as well as what a systems analysis might suggest for becoming more effective in the context of the present structures, might prove useful.

The Sub-Commission has also struggled over the years to find a meaningful and constructive role for itself *vis-à-vis* its parent body, the Commission on Human Rights. These struggles have created tensions, efforts to remove or radically reform the Sub-Commission, and limits to the Sub-Commission's agenda and proceedings. Certain elements of the conflict are inherent in the Sub-Commission's role in the present system – a system in which the Sub-Commission answers to a parent body composed of nation States whose human rights practices are being criticised in aspects of the Sub-Commission's work.<sup>154</sup> The election of Sub-Commission members reflects that tension by combining classic vote-collection politics, with a mixture of voting motives (some are voting to select the most effective

<sup>152</sup> For example, the current Sub-Commission session touched upon human rights impacts in all of the following fields: WTO, GATS, World Summit on Sustainable Development, FAO nutrition standards, drinking water, human genome, accountability of UN armed forces, anti-terrorism measures, small arms and light weapons, weapons of mass destruction, globalisation, Iraqi embargo, foreign investment, corruption, and transnational corporations. In a sense this has been the role of human rights law throughout its formal existence – putting a human rights overlay onto activities in other fields. As such a systems analysis of this aspect of human rights implementation might prove useful.

<sup>153</sup> See William Korey, *NGOs and the Universal Declaration of Human Rights*, 1998, p. 9. ('Eleanor Roosevelt had anticipated the indispensable value of NGOs when, just before the vote on the Universal Declaration of Human Rights, she projected the image of a "curious grapevine" that would penetrate closed societies. Such a 'grapevine' could transmit the messages of human rights abuses to the international community').

<sup>154</sup> The productive limits of the relationship between the Sub-Commission and Commission have also been apparent in the reluctance of the Commission to request the Sub-Commission to undertake some major tasks. Instead, the Commission has preferred to establish its own thematic procedures. Rather than use the Sub-Commission as a so-called 'think-tank' to get deeper into various initiatives of the Commission, the Commission, though sometimes referring to the Sub-Commission as a think-tank, has tended instead to appoint its own experts, special rapporteurs, and working groups for these types of projects.

candidates for promoting human rights, while others may seek candidates who will defend the human rights record of their respective governments), amidst the search for members who are experts and truly independent from the governments who nominate and select them. A systems analysis might reveal useful areas for reform or restructuring of the Sub-Commission, as well as illustrate some of the problems inherent in a system that has limited independence from its parent body but that is attempting to be critical of some of the actions of the member countries of that parent body.

There are several other aspects of the Sub-Commission's work that may be relevant and worth deeper consideration from a systems perspective.<sup>155</sup> Among the relevant issues will be basic questions of defining the system (*e.g.*, the UN system, the 'international human rights system', the 'international system generally'), as well as the real and desired inputs, intermediate processing, and outputs.

<sup>155</sup> For example, the growing administrative collaboration between the Bureaus of the Sub-Commission and Commission; the withholding of a funding decision by ECOSOC which interrupted the Social Forum's first session; the increased participation of special rapporteurs from the Commission in the proceedings of the Sub-Commission (in 2002, the Special Rapporteurs on housing, sale of children, and indigenous peoples attended and made presentations either to the Sub-Commission plenary or one of its working groups); the discussion to move the Sub-Commission session to January each year so that it is 'sequenced' better with the Commission's March-April session or, alternatively, so that it can be eventually eliminated as redundant by those who argue for its termination; the expanding list of participants at working group sessions, including many from fields other than human rights and/or who do not come from the traditional NGO-credentialed field; the reluctance of some to initiate a proposed study by Ms. Hampson on reservations to human rights treaties in light of parallel work ongoing at the International Law Commission; the growing attention to non-State actors under various agenda items, including transnational corporations, international financial institutions, medical, and pharmaceutical research and development organisations, paramilitary groups, and terrorist groups; the call by outgoing High Commissioner Mary Robinson for more interaction with and assistance to national commissions on human rights, in order to make them more effective; the use of a chairman's statement on the death penalty to get around the Commission's prohibition against country-specific resolutions under agenda item 2; the use of extended working papers, with no financial implications to the UN (for example, in the case of the six-person group who will be working on a draft declaration on extreme poverty), to get around the cumbersome process of creating new studies or new pre-session working groups through an official Commission approval process); and the impressive build up of a well-informed and well-prepared international community of indigenous peoples' advocates within the UN system, due in large part to the 20 years of proceedings of the Working Group on Indigenous Populations (including the clever way in which indigenous peoples issues were inserted into the proceedings of the World Conference on Sustainable Development through resolutions in the Sub-Commission and other bodies in the UN system). Some human rights aspects of the UN system, however, have been strangely detached from each other, such as the failure of the Security Council to incorporate human rights concerns in many of its activities including counter-terrorism initiatives and the lack of attention in the recent Sub-Commission session to obvious follow-up issues from the World Conference on Racism (despite considerable attention to such issues before the World Conference).

## 8. CONCLUSION

The Sub-Commission's session was again characterised by a diversity of important topics and too little time. Several important studies will be coming before the Sub-Commission next year, but the Sub-Commission's future within the United Nations system may also be a topic of discussion. Meetings in the interim of the Commission on Human Rights and the Economic and Social Council may signal different, more limited roles for the Sub-Commission, the moving of its session to a different portion of the calendar, or significant changes to some of its functions (for example, the Working Group on Indigenous Populations and the Social Forum). The impact of the new High Commissioner and his first twelve months may also be felt.

The changing nature of systems and the resilience and adaptability of a system to change has been well illustrated in the proceedings of the Sub-Commission in the last several years. The Sub-Commission's ability to survive and prosper in the future will depend in part on its ability to adapt to further change; avoid rigidity in its structures and procedures; and manage the natural tension between its mandate, the interests of its parent body (including the interests of individual members of that body), and the limited independence it has been able to achieve within this complex system.

The Sub-Commission is scheduled to meet next in Geneva for its fifty-fifth session from 28 July to 15 August 2003, with pre-session Working Group meetings scheduled in May 2003 (Working Group on Contemporary Forms of Slavery and Working Group on Minorities), July 2003 (Working Group on Indigenous Populations), and with a possible second session of the Social Forum in November 2003 or earlier.