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Katherine Brennan

Reed Brody

David Weissbrodt

University of Minnesota Law School, weiss001@umn.edu

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The 40th Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

Katherine Brennan, Reed Brody, and David Weissbrodt

Throughout 1988, the United Nations celebrated the fortieth anniversary of its seminal human rights instrument, the Universal Declaration of Human Rights.¹ At its August 1988 session the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities² (hereinafter the Sub-Commission) noted a similar milestone in its history; it met for the fortieth time since its creation in 1947. While the fortieth anniversary of the Declaration has inspired self-congratulatory activities throughout the United Nations, the 1988 session of the Sub-Commission was marked more by self-evaluation. The Sub-Commission has been engaged in a process of taking stock of its work for some years, prompted in part by criticism from interested observers and its parent body, the Commission on Human Rights (hereinafter the Commission).³

1. G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), adopted 10 Dec. 1948.

2. The official report of the 40th session is found in U.N. Doc. E/CN.4/Sub.2/1988/45 (1988) (hereinafter *1988 Report*). The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was established by the Economic and Social Council (ECOSOC) in 1947 as a subsidiary body of the Commission on Human Rights. The Sub-Commission is composed of twenty-six experts in the field of human rights. It meets annually in Geneva, roughly for the month of August, to undertake studies and make recommendations to the Commission on Human Rights on a wide range of human rights topics.

3. The Commission on Human Rights formally examined the role of the Sub-Commission at its thirty-seventh session in 1981 and made several recommendations for better organizing the report and the work of the Sub-Commission. Comm'n Res. 17 (XXXVII), E/CN.4/1475, at 219 (1981). In response to the Commission's discussions, the Sub-Commission decided in 1981 to add an agenda item entitled "Review of the status and activities of the Sub-Commission and its relationships with the Commission and other United Nations bodies." Sub-Comm'n Decision 2 (XXXIV), E/CN.4/Sub.2/495, at 95 (1981). See

Outside critics have charged that the members of the Sub-Commission, who are supposed to be independent of their governments, are motivated by political considerations to the same degree as the openly political bodies of the UN. The independent character of the Sub-Commission is theoretically maintained by an election process in which expert members are elected in their individual capacities rather than as representatives of their governments. This process is not entirely successful in maintaining independence, however, because some member countries nominate persons who work for the government, making it difficult for those experts to act with true independence.⁴ In addition, the Commission on Human Rights has increasingly expressed the view that the Sub-Commission duplicates the work of the Commission rather than playing a unique role in the field of human rights.⁵

also Review of the Status and Activities of the Sub-Commission and Its Relationship with the Commission on Human Rights and other United Nations Bodies, E/CN.4/Sub.2/1982/3, at 1 (1982). The Sub-Commission has undertaken, since that time, to discuss its own role and effectiveness in a systematic manner. The Sub-Commission's concern over outside criticism was heightened by the decision of the Commission and ECOSOC to cancel its 1986 session. The reasons given for cancellation were financial, but there has been speculation that budget constraints offer a justification to Sub-Commission critics for curtailing its activities. The Sub-Commission's discussions about its role have since that time taken on a greater urgency.

4. Currently nine members of the Sub-Commission are employees of the foreign ministries of their governments. In addition, six of the alternates are staff members in their countries' permanent mission to the United Nations in Geneva. See bibliographical data in *Election of Members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/1988/46 & Add.1-4 (1988). Such data suggests that these members will be vulnerable to pressure by their governments and that their decisions will be interpreted, to some extent, as government decisions.
5. See *infra* note 39 and accompanying text for a discussion of this criticism. The Commission has also expressed a concern which contradicts the perception that the Sub-Commission is duplicative. This concern is that the Sub-Commission acts so independently of the Commission that it has ignored its role in providing assistance to the Commission. For analyses of the work of the Sub-Commission see generally Rosen & Weissbrodt, *The 39th Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 10 Hum. Rts. Q. 487 (1988); Tolley, *The U.N. Commission on Human Rights* 163 (1987); Haver, *The United Nations Sub-Commission on Prevention of Discrimination and the Protection of Minorities*, 21 Colum. J. Transnat'l L. 103 (1982); Garber & O'Connor, *The 1984 U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 79 AJIL 168 (1985); Hantke, *The 1982 Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Current Developments*, 77 AJIL 651 (1983); Gardeniens, Hannum & Kruger, *The U.N. Sub-Commission on Prevention of Discrimination and the Protection of Minorities: Recent Developments*, 4 Hum. Rts. Q. 353 (1982); Gardeniens, Hannum & Kruger, *The 1981 Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Current Developments*, 76 AJIL 405 (1982); Hannum, *Human Rights and the United Nations: Progress at the 1980 Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 3 Hum. Rts. Q. 1 (1981); Hannum, *The Thirty-Third Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 75 AJIL 172 (1981); Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AJIL 869 (1968). Further information concerning the Sub-Commission may be found in the Human Rights Internet Reporter,

In an attempt to increase the effectiveness and independence of the Sub-Commission, the Commission decided in 1987 to reform the process by which it elects the Sub-Commission members.⁶ Under the old system, in which all the members were subject to election every three years, the Sub-Commission found it difficult to take controversial actions during the last year of its term due to the impending elections. The 1987 reform instituted staggered elections and lengthened the members' terms to four years.⁷ This past session was the first Sub-Commission elected under the new process.

The 1988 session of the Sub-Commission was characterized by an atmosphere of renewed energy and increased cooperation, due at least in part to the election. Approximately half the members were new to the Sub-Commission and all were serving the first year of their terms.⁸ As a result, the level of productivity greatly increased over that of the 1987 session, exemplified by the Sub-Commission's completing its discussion of several studies which had been pending for many years and the initiation of a considerable number of new projects.

This article will report on the accomplishments of the fortieth session of the Sub-Commission. It will describe the most significant work of the Sub-Commission during its 1988 session: protecting the human rights of one of its own former members; resolutions regarding gross violations of human rights in specific countries; proposed reform of the procedure for country violations; studies and reports on specific human rights issues; the presessional and sessional working groups; and new initiatives. In describing these achievements, we will also look at some of the central questions which have been posed by observers and members of the Sub-Commission. Does the Sub-Commission, as a body of independent experts, make a unique contribution to the UN human rights work? Do the members of the Sub-Com-

the ICJ Review (published by the International Commission of Jurists), the AIUSA Legal Support Network Newsletter, the Analytical Reports of the International Service for Human Rights, and reports compiled by the Quaker United Nations Office.

6. Prospective Sub-Commission members are nominated by their governments, and of those nominated, the Commission elects twenty-six experts to serve on the Sub-Commission. The geographic distribution of the Sub-Commission has been established in the following manner: seven members from the African states, five from Asia, three from Eastern Europe, five from the Latin American states, and six from Western Europe and other states. U.N. Doc. E/CN.4/1988/46, at 1 (1987).
7. Half the membership will be subject to election every two years. For the election held at the 1988 Commission meeting, the members drew lots to determine which half will serve a shortened two-year term in order to start the staggered election process. *Id.* at 2.
8. Several members noted the welcome addition of more women to the Sub-Commission. Although still a small minority—six out of the twenty-six experts are women—they had considerable visibility by virtue of their leadership roles. The bureau, which is made up of five officers elected at each session of the Sub-Commission, included two women. The bureau members were: chairman, Murlidhar Chandrakant Bhandare (India); three vice-chairs, Claire Palley (United Kingdom), Fatma Ksentini (Algeria), and Rafael Rivas Posadas (Colombia); and the rapporteur, Danilo Türk.

mission truly enjoy independence from the governments who nominate them? Has the Sub-Commission tried to take on too much work, making its agenda unwieldy and short-changing its deliberations on important human rights issues? This article will examine what the 1988 session tells us about the possible answers to these questions.

I. THE SUB-COMMISSION'S FIRST CHALLENGE: PROTECTING THE HUMAN RIGHTS OF ITS OWN MEMBERS

The Sub-Commission's effectiveness in protecting human rights was immediately challenged at the opening of the 1988 session when it was learned that Dumitru Mazilu, the former member of the Sub-Commission from Romania and the special rapporteur on human rights and youth, would not be coming to Geneva to present his draft report on youth. Mazilu had not attended the 1987 session of the Sub-Commission, ostensibly due to illness, but there was widespread speculation that the Romanian government had prevented him from attending.⁹ This speculation was confirmed by a handwritten letter sent in April 1987 by Mazilu to Leandro Despouy, the outgoing chairman of the 1987 session.

Mazilu stated in the letter that his government was strongly against his report on human rights and youth, and that government officials put pressure on him to abandon the study when he sought approval to travel to the UN Centre for Human Rights in Geneva. Mazilu described the pressure tactics of the Romanian government as an "arsenal of repressive measures," which he said included withdrawing his candidature for the International Law Commission, revoking his passport, interrupting his foreign correspondence and telephone calls, and deploying "more than 20 policemen [to] follo[w] me, my wife and my son day and night."¹⁰

The Sub-Commission reacted strongly to the news that Mazilu would not be attending the August session. Both Under-Secretary Jan Martensen, Director of the Centre for Human Rights, and the outgoing chairman of the Sub-Commission, Leandro Despouy, referred to the case in their opening speeches. Despouy stated that he feared Mazilu's absence presented a human rights problem for the Sub-Commission.¹¹

The Romanian authorities went to considerable lengths to convince the Sub-Commission that Mazilu was simply ill and unable to travel to Geneva. Copies of medical transcripts "verified" by physicians were sent to the Centre

9. See United Nations Press Release, HR/2149, 26 Feb. 1988.

10. Letter from Dumitru Mazilu to the 1987 chairman of the Sub-Commission (19 Apr. 1988).

11. *Compte Rendu Analytique de la 1ère Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.1, at 2 (1988).

for Human Rights to prove that Mazilu was suffering from a cardiac condition and was in a health resort attempting to recuperate from a heart attack.¹² Both the government observer from Romania, Gheorghe Chirila, and the newly elected expert from Romania, Ion Diaconu, told the Sub-Commission that they were present at the time of Mazilu's heart attacks.¹³ In a ploy which enraged several members, Diaconu distributed a report on human rights and youth which was apparently intended to supplant the Mazilu report.¹⁴

The Sub-Commission declined to allow Mazilu's letter to be read publicly¹⁵ and no one directly accused the Romanian government of detaining Mazilu. Instead, Mazilu's absence was treated as a problem of ascertaining his whereabouts and inquiring into his ability to finish the study. A series of telexes were sent to the United Nations Information Center in Bucharest in an attempt to contact Mazilu. Because these telexes failed to generate new information, the Sub-Commission adopted a decision asking the secretary-general of the United Nations to request that the Romanian government assist in finding Mazilu and facilitate a visit by a member of the Sub-Commission to help Mazilu finish his study.¹⁶ The Romanian government refused to offer such assistance and accused the Sub-Commission of interfering improperly in a matter between a government and its citizen.¹⁷

In one of its final actions, the Sub-Commission called on the secretary-general to attempt once again to convince the Romanian government to cooperate in finding Mazilu by invoking the Convention on the Privileges and Immunities of the United Nations.¹⁸ The resolution requests that the

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12. Statement by Romanian observer to the Sub-Commission, *Compte Rendu Analytique de la 7ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.7, at 18 (1988).
 13. Diaconu told the Sub-Commission that he was present at the time that Mazilu was being taken to the hospital. *Compte Rendu Analytique de la 9ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.9, at 9 (1988). Chirila stated that he had, himself, driven Mazilu to the hospital after he suffered a heart attack. United Nations Press Release, HR/2217, 12 Aug. 1988, at 4 (1988). In response, Asbjorn Eide (Norway) commented that since these two gentlemen knew Mazilu well enough to be present at the time of his heart attacks, they should be of much assistance in finding him. *Compte Rendu Analytique de la 9ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.9, at 10 (1988).
 14. *Compte Rendu Analytique de la 1ère Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.1, at 2 (1988).
 15. When Louis Joinet (France) repeatedly asked for "permission" to read the letter, he was halted by Chairman Bandhare (India), though it is unclear on what authority. As a result, the letter was not officially made available to the public, but copies could be obtained without difficulty.
 16. Sub-Comm'n Decision 1988/102, *1988 Report* at 68. The resolution was adopted by fifteen votes in favor, two against, four abstentions, and three members not participating.
 17. *Compte Rendu Analytique de la 11ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/11, at 3 (1988).
 18. The Convention on the Privileges and Immunities of the United Nations provides that, "United Nations officials are to be accorded the privileges and immunities necessary for the independent exercise of their functions." Convention on the Privileges and Immunities of the United Nations, adopted by the G.A. 13 Feb. 1946; 1 U.N.T.S. 15, 21 U.S.T. 1418, T.I.A.S. 6900, came into force 17 Sept. 1946.

Commission be informed if the Romanian government denies the applicability of the convention in the case of Mazilu. In that case it calls on the Commission, through its parent body, the Economic and Social Council (ECOSOC), to seek an advisory opinion from the International Court of Justice to determine the applicability of the convention.¹⁹

This decision, in its attempt to apply the Convention on the Privileges and Immunities, is a frank acknowledgment that the Sub-Commission believed Mazilu's claims that the Romanian government was violating his fundamental rights. This acknowledgment presented the Sub-Commission with an important challenge to its effectiveness and credibility as a human rights body engaged in preventing such violations. Louis Joinet (France) stated that the prestige of the Sub-Commission was in danger of being diminished if it was unable after a year of efforts to establish the whereabouts of Mazilu, as this failure would lead to the conclusion that the Sub-Commission was unable to deal with concrete human rights problems—even the apparent disappearance of one of its own members.²⁰ The decision, passed by the Sub-Commission with very little debate, represents an attempt to address that credibility problem. It remains to be seen how effective this action will be in protecting the human rights of Mazilu or the reputation of the Sub-Commission.

II. COUNTRY SITUATIONS

A. Resolutions on Violations of Human Rights in Specific Countries

The Sub-Commission considers violations of human rights in specific countries under its agenda item on the "Question of the violation of human rights and fundamental freedoms."²¹ For the second successive year, the Sub-Commission has failed to adopt some of the draft resolutions considered under this item due to intensive lobbying efforts on the part of country delegations. This fact has resulted in a decline in the number of new reso-

19. Sub-Comm'n Res. 1988/37, *1988 Report* at 64. This resolution was adopted by a vote of sixteen votes in favor, four against, and three abstentions. United Nations Press Release, HR/2248, 1 Sept. 1988, at 6 (1988).

20. *Compte Rendu Analytique de la 9ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.9, at 10 (1988).

21. The full name of this agenda item is "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in all countries, with particular reference to colonial and other dependent countries and territories: Report of the Sub-Commission established under Commission on Human Rights resolution 8 (XXIII)."

lutions adopted on country situations and a pattern of repeating almost the same list of country resolutions year after year.²²

In 1988 the Sub-Commission considered ten resolutions with regard to country situations and adopted resolutions concerning the human rights situations in eight of those countries: Albania,²³ Chile,²⁴ El Salvador,²⁵ Guatemala,²⁶ Haiti,²⁷ Occupied Arab Territories,²⁸ Namibia,²⁹ and South Africa.³⁰ The failure to add new resolutions is significant when considered in conjunction with a similar trend in the Commission on Human Rights. The Commission terminated the mandates of the country rapporteurs for Guatemala and Haiti under the 1503 procedure in 1987—a termination which was premature in the latter case if not in the former.³¹ No new country rapporteur has been appointed by the Commission since 1984.

The most disturbing aspect of this apparent reluctance to adopt new country-specific resolutions is that the two resolutions which were not

22. In 1984 and 1985 the Sub-Commission adopted ten such country-specific resolutions, while adopting eight in 1987 and eight in 1988. (There was no Sub-Commission session in 1986). The 1984 list included: Afghanistan, Chile, East Timor, El Salvador, Guatemala, Iran, Paraguay, South Africa/Namibia, Sri Lanka, and Uruguay. See *1984 Report of the Sub-Commission*, U.N. Doc. E/CN.4/Sub.2/1984/43 (1984). In 1985 the countries were: Albania, Afghanistan, Chile, El Salvador, Guatemala, Iran, Occupied Arab Territories, Pakistan, Paraguay, and South Africa/Namibia. See *1985 Report of the Sub-Commission*, U.N. Doc. E/CN.4/Sub.2/1985/57 (1985). The 1987 list was: Chile, Cyprus, East Timor, El Salvador, Iran, Namibia, Occupied Arab Territories, and South Africa. See *1987 Report of the Sub-Commission*, U.N. Doc. E/CN.4/Sub.2/1987/42 (1987). For the list of 1988 countries, see text, *infra*. (Some of the resolutions, notably those on Paraguay, Uruguay, South Africa, and Namibia were not considered under the agenda item on "violations." These resolutions have been included in this examination, however, because their subject matter is generally related to human rights violations in a specific country.)

23. Sub-Comm'n Res. 1988/15, *1988 Report* at 40.

24. Sub-Comm'n Res. 1988/16, *1988 Report* at 41.

25. Sub-Comm'n Res. 1988/13, *1988 Report* at 37.

26. Sub-Comm'n Res. 1988/14, *1988 Report* at 39.

27. Sub-Comm'n Res. 1988/12, *1988 Report* at 36.

28. Sub-Comm'n Res. 1988/10, *1988 Report* at 33.

29. Sub-Comm'n Res. 1988/5, *1988 Report* at 28.

30. Sub-Comm'n Res. 1988/4, *1988 Report* at 26.

31. See Comm'n Res. 1987/13, U.N. Doc. E/CN.4/1987/60, at 48–50 (1987) (resolution terminating the mandate of the special rapporteur for Haiti) and Comm'n Res. 1987/53, U.N. Doc. E/CN.4/1987/60, at 118–20 (1987) (resolution terminating the mandate for the special rapporteur on Guatemala). The number of human rights violations in Haiti continued to be very serious in 1987 after the termination of the rapporteur. Throughout 1987 military personnel were responsible for killing antigovernment demonstrators and activists working for political reform in Haiti. This violence culminated in rampant killing of persons attempting to vote in the November 1987 elections. US State Dept., *Country Reports on Human Rights Practices for 1987*, at 510–12 (Feb. 1988). In Guatemala, critics and opponents of the government were subject in 1987 to arbitrary seizure, torture, and extrajudicial execution. Amnesty International, *Amnesty International Report 1988*, at 114 (1988). In 1988, such human rights violations have increased significantly. Americas Watch, *Closing the Space, Human Rights in Guatemala, May 1987–October 1988* (Nov. 1988).

adopted this year reportedly failed because of strong-arm lobbying tactics used by the target countries. Representatives of Indonesia and Iraq reportedly contacted high-level government officials around the world to get their assistance in fighting the draft resolutions concerning Indonesia's treatment of East Timor and the situation in Iraq. These officials exerted political pressure on the experts from their respective countries in order to assist the governments of Iraq and Indonesia in defeating the resolutions. One expert told the authors that a vote in favor of a particular country resolution would result in that expert being dismissed from a position in the foreign ministry.

The apparent success of this approach was demonstrated by the case of East Timor. Three of the original cosponsors repudiated their support for the resolution³² and it lost on a motion to take no action by a vote of ten to nine with five abstentions. Tactics involving political pressure were also applied by the People's Republic of China in its lobbying effort against a proposed resolution expressing concern over the human rights situation in Tibet. The cosponsors of the draft resolution on Tibet decided not to introduce it, due to this political maneuvering. Representatives of China reportedly obtained a meeting with the UN secretary-general after the withdrawal of the resolution to complain that a proposed draft resolution on Tibet constituted an interference in its internal affairs.

The refusal of the Sub-Commission to adopt a resolution on Iraq was arguably the most striking example of the need for more political independence on the part of the experts. It has been suggested that the "theme" mechanisms of the Commission on Human Rights should serve as an objective guide to the existence of gross violations of human rights in specific countries.³³ If the assumption underlying this suggestion is valid, that the information disseminated within these Commission mechanisms are a clear indication of where the most serious violations occur, Iraq should have been the subject of a country resolution. Information about unresolved disappearances and summary executions in Iraq was brought to light in the 1988 reports of the special rapporteur on summary and arbitrary executions and of the Working Group on Enforced or Involuntary Disappearances.³⁴ The

32. Christy Mbonu (Nigeria) and Mary Concepcion Bautista (Philippines) removed their names as cosponsors and voted in favor of taking no action on the resolution. Rafael Rivas Posada (Colombia) abstained on the motion for taking no action.

33. For a discussion of this assertion, see Kamminga, *The Thematic Procedures of the United Nations Commission on Human Rights*, 34 *Neth. Int'l L. Rev.* 299, 321 (1987) and the *Oral Statement by Amnesty International to the 44th Session of the United Nations Commission on Human Rights: Impartial Study of Situations of Serious Human Rights Violations*, delivered 4 Mar. 1988.

34. The Working Group on Enforced or Involuntary Disappearances in its latest report listed over 300 unresolved disappearances in Iraq. See U.N. Doc. E/CN.4/1988/19, at 37 (1988). The special rapporteur on summary or arbitrary executions sent messages to the government of Iraq inquiring into reports of extrajudicial executions of sixty-four persons, many

draft resolution on Iraq referred to these reports, as well as to the reliable reports of Iraqi use of chemical weapons against Iranian soldiers and its own citizens. Several nongovernmental organizations (NGOs) also highlighted the case of Iraq in their interventions to the Sub-Commission.³⁵

In addition to the private lobbying campaign by the Iraqi government to prevent passage of the resolution expressing concern over the situation in Iraq, the five Arab members of the Sub-Commission offered stiff public opposition to the proposed action. These members pointed to the peace negotiations between Iraq and Iran, which were commencing in another room of the Palais des Nations³⁶ just as the Sub-Commission voting got underway, as a justification for avoiding any condemnation of Iraq. Awn Shawkat Al-Khasawneh (Jordan) also made reference to the fact that the Sub-Commission had discussed Iraq in its confidential communications procedure on gross violations.³⁷ In the end, a motion not to take action on the resolution was adopted by a vote of eleven to eight with five abstentions. At the same time that the Sub-Commission was voting to take no action, thousands of Iraqi Kurdish refugees were arriving in Turkey, many bearing fresh wounds from chemical weapons.³⁸

B. Reform of the Procedure for Violations in Specific Countries

In addition to the problem of politicization of the procedure for naming specific countries, the Sub-Commission has also been accused of unnec-

of whom were children. The Iraqi government justified the execution of seven persons by stating that they were guilty of "acts of sabotage" and denied the execution of the others. See *Report of the Special Rapporteur*, U.N. Doc. E/CN.4/1988/22, at 17-18 (1988).

35. Amnesty International, in an unusual action, devoted its entire intervention on gross violations to Iraq. The Amnesty International intervention described torture of political prisoners in Iraq as "routine." See *Human Rights Violations in Iraq*, oral statement by Amnesty International, delivered 17 Aug. 1988. The International Commission of Jurists and the International Association of Health Professionals presented a Belgian doctor who testified about the use of chemical weapons against the Kurdish town of Halabja.
36. The Palais des Nations is the headquarters of the United Nations in Geneva.
37. The confidential procedure was created by ECOSOC in 1970. ECOSOC Res. 1503 (XLVIII), 48 U.N. ESCOR Supp. (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970). This procedure calls for the Sub-Commission to bring to the attention of the Commission situations which reveal a consistent pattern of gross and reliably attested violations of human rights. Communications submitted under this procedure are considered in closed sessions in the preessional Working Group on Communications, in the Sub-Commission, and in the Commission. The names of the countries considered are not supposed to be announced until the end of the Commission proceedings. The inclusion of Iraq in the 1503 procedure was reportedly adopted by consensus, raising the possibility that Iraq and its allies deliberately sought to have Iraq included on the confidential list in order to avoid public scrutiny, the same tactic used by Argentina during the military dictatorship from 1976 to 1983.
38. *Kurdish Civilians Massacred*, 18 Amnesty International Newsletter, at 1 (Nov. 1988).

essarily duplicating the work of the Commission in regard to gross violations of human rights. Critics charge that the Sub-Commission has failed to take advantage of its potential as a body of independent experts and has expressed concern about the same human rights violations as the Commission.³⁹ The Commission implicitly acknowledged that criticism in a 1988 resolution reviewing the Sub-Commission's work, in which it called on the Sub-Commission to concentrate its efforts on specific human rights issues on which it can make a distinctive contribution.⁴⁰

Some Sub-Commission members looked to an apparently dormant section of the Sub-Commission's original terms of reference on violations in specific countries for guidance in formulating a new role for the Sub-Commission with regard to country violations. The Sub-Commission's terms of reference on specific violations outline three responsibilities. First, ECOSOC Resolution 1503 (XLVIII) established a confidential procedure by which the Sub-Commission identifies and draws to the attention of the Commission communications concerning specific situations of gross violations of human rights.⁴¹ Second, Commission Resolution 8 (XXIII), in paragraph 6, entrusted the Sub-Commission with the task of bringing to the Commission's attention any situation which revealed a consistent pattern of human rights violations.⁴² Third, paragraph 2 of the same Commission resolution called on the Sub-Commission to prepare factual reports, compiled from "all available sources," which the Commission would use in its examination of the question of violations of human rights in specific countries. The Sub-Commission has only complied once with its mandate to prepare the Resolution 8 reports. A report containing information on specific violations of human rights from

39. A thorough analysis of this criticism is beyond the scope of the present article. An examination of the Commission and Sub-Commission country-specific resolutions in recent years reveals, however, that many of the public resolutions adopted in the two bodies concern the same countries. For example, both the Commission and the Sub-Commission have adopted resolutions almost every year since 1984 on El Salvador, Iran, Guatemala, Namibia, the Occupied Arab Territories, and South Africa. The Sub-Commission, however, has also adopted resolutions concerning countries which the Commission has not publicly criticized. Examples are: East Timor, Haiti, Paraguay, and Uruguay. In addition, the Sub-Commission has adopted public resolutions on countries before the Commission did so. See, e.g., Sub-Comm'n Res. 8 (XXXIV), E/CN.4/Sub.2/495, at 80-81 (1981) (resolution in which Iran is criticized for its treatment of Baha'is) and Comm'n Res. 1982/27, E/CN.4/1982/30, at 144 (1982) (resolution in which the Commission first criticized Iran and mentioned the Sub-Commission's earlier action on Iran). A thorough examination would require a look at the pattern of country resolutions in the two bodies and it would also require a look at the confidential 1503 procedure during the same period.

40. Comm'n Res. 1988/43, U.N. Doc. E/CN.4/1988/88, at 103 (1988).

41. See *supra* note 37 for a description of the 1503 procedure.

42. Comm'n Res. 8 (XXIII), U.N. Doc. E/CN.4/940, at 131 (1967). See also ECOSOC Res. 1235, 42 ESCOR Supp. (No.1) at 17, U.N. Doc. E/4393 (1967).

all available sources was annexed to Resolution 3 (XX) adopted in the 1967 session of the Sub-Commission.⁴³

Two members suggested that the Sub-Commission should again prepare the Resolution 8 reports as a way of increasing its effectiveness in pointing out human rights abuses. Sub-Commission members, Theo van Boven (Netherlands) and Asbjorn Eide (Norway), introduced a working paper during the 1988 session which formally proposed that the Sub-Commission examine the possibility of reviving the factual reports.⁴⁴

Eide and van Boven proposed that a working group of five experts be charged with examining the available information on country-specific violations and with preparing a factual report after the agenda item devoted to that issue was completed.⁴⁵ They suggested that the working group could also devise an "omnibus resolution" which would outline trends in human rights violations and would act as a sort of early warning system for the Commission.⁴⁶ Eide contended that the reports would enhance the Sub-Commission's role with regard to country-specific human rights violations and that preparation of the report may help to depoliticize the debate on this matter.⁴⁷

43. Sub-Comm'n Res. 3 (XX), E/CN.4/Sub.2/286, at 38–41 and Annex at 42 (1967). According to a former member of the Sub-Commission, there was much disagreement in the Commission about whether the report submitted by the Sub-Commission was of the type envisioned in Resolution 8. Ultimately, no action was taken on Resolution 3, suggesting one reason why the Sub-Commission has not prepared any subsequent reports. See *Discussion paper prepared by Mr. I. Toscruski in accordance with Sub-Commission decision 1983/9*, U.N. Doc. E/CN.4/Sub.2/1984/32, at 2 (1984).

44. This working paper may have been prompted by a similar suggestion made by John Carey (USA) during the 1987 debate on country-specific resolutions. Carey offered amendments to several country resolutions proposing that the substantive operative paragraphs of the resolutions be substituted for reports containing information on violations in that country compiled by NGOs and intergovernmental organizations (IGOs). These amendments were defeated. See *Summary Record of the Second Part of the 33rd Meeting*, U.N. Doc. E/CN.4/Sub.2/1987/SR.33/Add.1, at 3 (1987).

45. *Working paper presented by Mr. Theo van Boven and Mr. Asbjorn Eide*, U.N. Doc. E/CN.4/Sub.2/1988/WP.1, at 3 (1988). Eide and van Boven did not describe the details for preparation of the report, but this question has been examined in another context. Commission members, in their discussion of the one Resolution 8 report it received from the Sub-Commission in 1968, made some suggestions about what function the report could have. Several members suggested that the Sub-Commission could assess the relevance and credibility of the allegations made by NGOs and use this information to assess for the Commission whether a prima facie case had been established that there was a consistent pattern of human rights violations in a given country. See *Discussion paper prepared by Mr. I. Toscruski in accordance with Sub-Commission decision 1983/9*, E/CN.4/Sub.2/1984/32, at 2–3 (1984).

46. *Working paper presented by Mr. Theo van Boven and Mr. Asbjorn Eide* at 4.

47. *Summary Record of the 8th Meeting*, U.N. Doc. E/CN.4/Sub.2/1988/SR.8, at 8–9 (1988). Eide stated that preparing the reports would provide a system for clarifying and examining the validity of the information received. This more formalized system would focus the

Eide also stated that compiling all information related to one issue in a report would assist in organizing the interventions of NGOs and government observers. The Commission, in a resolution adopted at its 1988 session, asked that the Sub-Commission organize the contributions of the NGOs and government observers in such a way as to leave time for ample debate of the issues among the experts.⁴⁸ One way in which the Sub-Commission already attempts to organize interventions is to request that the NGOs and government observers confine their interventions on specific human rights violations to the agenda item on "violations." Supporters of compiling the factual reports suggest that these reports would assist in enforcing this requirement because NGOs and government observers would ensure that their information is included in the report by confining their statements to the "violations" item.⁴⁹

The Eide and van Boven proposal drew support from many Sub-Commission members, but some expressed concern over the practical difficulties of producing such a report during the session, due to lack of time.⁵⁰ Others, such as Miguel Alfonso Martinez (Cuba) and Awn Shawkat Al-Khasawneh (Jordan), pointed out that the paragraph of Resolution 8 calling for a report was adopted before the creation of the confidential 1503 procedure and claimed it was now unnecessary because the 1503 report served the same purpose.⁵¹ Eide suggested that a model report be drafted during the current session in order to test the idea, but this recommendation was never presented as a formal resolution, presumably because it did not have sufficient support. Instead, the Sub-Commission adopted a decision which simply committed

discussion on the factual justification for a given resolution and away from political considerations. It has also been suggested that the reports could depoliticize this agenda item by doing away with formal resolutions on each country.

48. Comm'n Res. 1988/43, U.N. Doc. E/CN.4/1988/88, at 103 (1988).

49. This requirement is apparently interpreted differently by NGOs and Sub-Commission members, however. Throughout the 1988 session, for example, Sub-Commission members objected when NGOs referred to specific human rights violations under agenda items other than "violations," even when the incidents were properly related to other agenda items such as "the human rights of detainees" or "the protection of children." The NGOs have already indicated a willingness to comply with the Commission's request for a more efficient intervention process, however. This year, in an effort to avoid duplication, the International Service for Human Rights convened meetings of NGOs concerned with similar issues to discuss their interventions. As a result, numerous joint interventions were arranged. One example of such an intervention was a written statement by twenty-six NGOs on the rights of indigenous peoples introduced by International Commission of Jurists Secretary-General, Niall MacDermot. U.N. Doc. E/CN.4/Sub.2/1988/NGO/26 (1988). Several experts expressed their appreciation for this effort.

50. See, e.g., the intervention by Louis Joinet (France). *Summary Record of the 8th Meeting*, U.N. Doc. E/CN.4/Sub.2/SR.8, at 6 (1988).

51. *Compte Rendu Analytique de la 9ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.9, at 2, 4 (1988).

it to continuing the review of its work during the forty-first session and to address the question on a biennial basis after that time.⁵²

The Eide and van Boven proposal will likely continue to command much attention in the coming years because it attempts to address some of the problems facing the Sub-Commission. Supporters of this proposal contend that factual reports, which pull together all the available information on human rights violations in specific countries, would provide a valuable service to the Commission. This service would purportedly give the Sub-Commission a distinctive role in the field of human rights, and at the same time, would organize the interventions by NGOs and governments in a more efficient fashion. Whether or not the working paper introduced by Eide and van Boven addresses these problems, it will provide an important starting point for discussing possible solutions.

III. STUDIES AND REPORTS

Both Sub-Commission members and observers commented that the atmosphere of the 1988 session was strikingly more cooperative than the 1987 session. Despite the highly politicized voting on country-specific resolutions,⁵³ there was increased consensus among the Sub-Commission members on other issues. Even the most contentious debate on difficult resolutions lacked the acrimonious exchanges which marked the 1987 session. This movement toward consensus appeared to be the result of a collective awareness that the bitter political battles of the past had hurt the credibility of the Sub-Commission and had stymied its productivity.⁵⁴ This willingness to work together, in addition to the energy of the new members, resulted in a marked increase in output during the 1988 session as compared to 1987.

52. Sub-Comm'n Decision 1988/104, *1988 Report* at 70.

53. See *supra* notes 31–38 and accompanying text for a discussion of this politicization.

54. Many observers attribute the spirit of cooperation to an additional factor, the replacement of the former expert member from the Soviet Union, Vsevolod Sofinsky. Whereas Sofinsky played an obstructionist role by seeking to block many initiatives, his successor, Stanislav Chernichenko, participated cooperatively in the debates and took the lead on some issues. This change in attitude also resulted in a more productive relationship between the current expert from the Soviet Union and the alternate member from the United States, John Carey. (For a discussion of the politicized debates between Carey and Sofinsky, see Rosen & Weissbrodt, *supra* note 5, at 494). While Sofinsky and Carey engaged in hostile exchanges about the human rights situation in each other's countries, Chernichenko and Carey treated each other with respect and humor. An example of this amicable relationship occurred during the discussion on country-specific violations. Carey praised proposals recently formulated by the communist party for reform of the Soviet legal system and Chernichenko responded jokingly that he appreciated Carey's dissemination of the party's recent decisions. *Compte Rendu Analytique de la 17ème Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.17, at 10–11 (1988).

The Sub-Commission completed its consideration of several studies which have been languishing for some years and transmitted them to the Commission for further action. These studies were: the Draft Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers;⁵⁵ the Draft Body of Principles and Guarantees for the Protection of Mentally-Ill Persons;⁵⁶ and the Draft Second Optional Protocol to the International Covenant on Civil and Political Rights.⁵⁷

The Draft Declaration on the Independence of the Judiciary was prepared by L.M. Singhvi of India, a former member of the Sub-Commission who was appointed as special rapporteur in 1980.⁵⁸ He was charged with studying the question of the independence and impartiality of the judiciary and the independence of the legal profession as it relates to the protection of human rights. His mandate also included drafting standards for guaranteeing judicial independence. Singhvi presented a comprehensive and detailed set of 100 standards to the Sub-Commission in 1985, which had been prepared with the assistance of a series of expert meetings hosted by the International Commission of Jurists and the International Association of Penal Law.

The same year that Singhvi presented his standards to the Sub-Commission, however, the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders met in Milan, Italy, and adopted a set of twenty more general principles on the independence of the judiciary.⁵⁹ These principles were endorsed by the General Assembly in a 1985 resolution which called on governments "to respect them and to take them into account within the framework of their national legislation and practice."⁶⁰ This work of the Milan Congress, which advanced more quickly through the UN system than the Sub-Commission's efforts on the independence of the justice system, raises concerns over duplication in regard to Singhvi's study.⁶¹

55. U.N. Doc. E/CN.4/Sub.2/1988/Add.1, at 20 (1988).

56. *Report of the Sessional Working Group on the question of persons detained on the grounds of mental ill-health or suffering from mental disorder*, E/CN.4/Sub.2/1988/23 (1988). The "Principles and Guarantees for the Protection of Mentally Ill Persons" are found at 5-13.

57. U.N. Doc. E/CN.4/Sub.2/1987/20 (1987).

58. Comm'n Res. 16 (XXXVI), U.N. Doc. E/CN.4/1408, at 177 (1980).

59. "Basic Principles on the Independence of the Judiciary," *Report of the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders*, A/Conf.121/22/Rev.1, at 59 (1985). See also *Human Rights—A Compilation of International Instruments*, U.N. Sales No. E.88XIV.1, at 265.

60. A/Res./40/146, 13 Dec. 1985.

61. The Committee on Crime Prevention and Control arguably offers better prospects for effective standard-setting. This committee is a UN body of experts, which meets in Vienna and which makes recommendations to the UN Congress on the Prevention of Crime and the Treatment of Offenders and to ECOSOC. The draft standards are prepared by an experienced secretariat in Vienna on the basis of consultations with interested parties rather than by an individual rapporteur. Timetables are adhered to more strictly and the expert Committee on Crime Prevention and Control, which reports directly to ECOSOC,

In addition to the problem of duplication, there have been questions about the length and complexity of the Singhvi study. Because of this complexity and due to lack of time, the Sub-Commission has been unable to engage in a thorough consideration of his study,⁶² and there is concern that the Commission will treat the Singhvi study in the same fashion. Nevertheless, the Sub-Commission decided that it was time to transmit the draft declaration to the Commission for further consideration.⁶³ Several members stated that they wanted to comment more fully or make suggestions for improvements, but because of time constraints and their desire to transmit the report, they would withhold their statements. At the same time, responding to a request by alternate expert, Cornelis Flinterman (Netherlands), the Sub-Commission decided to inscribe the independence of judges and lawyers as a separate item on its agenda for its next session⁶⁴—an acknowledgment that the independence of the justice system is a central concern of the Sub-Commission.

The Sub-Commission's work on a draft body of principles for the protection of the mentally ill also began in 1980 with a resolution appointing Erica-Irene Daes (Greece) as special rapporteur.⁶⁵ Her final set of forty-seven principles, however, were not published by the Commission. Instead, the Commission asked ECOSOC in 1984 to authorize the creation of a sessional working group of the Sub-Commission to consider them further.⁶⁶ Since that time the working group on mental illness,⁶⁷ which only met for four hours each year, has examined and revised the principles. By 1988, however, only ten articles had been tentatively accepted. The 1988 working group, with Claire Palley (United Kingdom) as chairperson, finished revising the principles and a resolution was adopted by the plenary of the Sub-Commission transmitting the draft principles to the Commission.⁶⁸

The success which the 1988 working group had in completing the revision of the principles on mental illness can be attributed to several factors. One change from previous sessions was that the chairperson, Claire Palley, scheduled thirteen informal meetings in order to provide more time for discussing the language of the principles in detail. She worked closely with several NGOs and with representatives of the World Health Organization during these informal sessions. Another reason for the efficiency of the group

often appears to have more expertise and less political restraint than its counterpart, the Sub-Commission.

62. See Rosen & Weissbrodt, *supra* note 5, at 503 (1988).

63. Sub-Comm'n Res. 1988/25, *1988 Report* at 52.

64. Sub-Comm'n Res. 1988/25, *1988 Report* at 52.

65. Sub-Comm'n Res. 11 (XXXIII), U.N. Doc. E/CN.4/Sub.2/459, at 69 (1980). Her final report is found in U.N. Doc. E/CN.4/Sub.2/1983/17 and Add.1 (1983).

66. Comm'n Res. 1984/47, U.N. Doc. E/CN.4/1984/77, at 83 (1984).

67. The official name for this working group is the "Working group on the question of persons detained on the grounds of mental ill-health or suffering from mental disorder."

68. Sub-Comm'n Res. 1988/28, *1988 Report* at 55.

was the change in membership of the working group; the former expert from the Soviet Union, Sofinsky, had resisted the drafting of the principles on mental health. By contrast, the current expert from the Soviet Union, Stanislav Chernichenko, agreed to participate in the informal sessions despite the lack of interpretation and made substantial contributions to the discussion.⁶⁹

The draft principles provide, *inter alia*, that patients shall be informed of their rights upon admission, that they shall not be committed involuntarily unless there is a serious risk to themselves or others, and that medication is only to be given for therapeutic purposes. As with the draft declaration on the independence of the justice system, many of the Sub-Commission members commented that they felt improvements could be made in the draft, but that after eight years it was time to send the matter to the Commission for its consideration.

Marc Bossuyt, a former expert member from Belgium, was entrusted in 1984 with the task of preparing a comparative analysis regarding a second optional protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty.⁷⁰ This study was presented to the Sub-Commission in 1987 by Bossuyt, but the members voted to take no action on a resolution to transmit it to the Commission.⁷¹ Again, the change in membership of the Sub-Commission appeared to make consensus possible. While the Soviet member had led the move to take no action in 1987, the new Soviet member, Chernichenko was a cosponsor of the resolution this year. The Moslem experts, who for religious reasons have traditionally been strong supporters of the death penalty, made it clear during the debate that they would not force a vote if there was a consensus. As a result, the members agreed without a vote to transmit Bossuyt's analysis with their comments, along with the draft optional protocol he prepared, to the Commission on Human Rights for its consideration.⁷²

The Sub-Commission considered two additional complex and lengthy studies on human rights issues, but were unable to complete discussion of these matters. One was the final report on the "Right of Everyone to Leave Any Country, Including His Own, and to Return to His Own Country,"

69. A likely reason for Sofinsky's resistance was that the issue of protecting the mentally ill was first raised to call attention to human rights abuses in the Soviet Union with respect to psychiatric practices. For a discussion of psychiatric abuses in the Soviet Union at the time the Sub-Commission appointed a special rapporteur on the mentally ill, see Amnesty International, *Amnesty International Report 1980*, at 305-06 (1980). Chernichenko's attitude, by contrast, may reflect the recent changes in the Soviet Union's policy regarding the treatment of the mentally ill. See Amnesty International, *Amnesty International Report 1988*, at 219-20 (1988).

70. Sub-Comm'n Res. 1984/7, U.N. Doc. E/CN.4/Sub.2/1984/43, at 82 (1984).

71. Sofinsky (USSR) made the motion for no action, which was adopted by a vote of four to three with six abstentions. One of the reasons given for taking no action was that the report was not available in Russian. See Rosen & Weissbrodt, *supra* note 5, at 503.

72. Sub-Comm'n Res. 1988/22, *1988 Report* at 49.

prepared by C.L.C. Mubanga-Chipoya, a former expert member from Zambia.⁷³ The other was a progress report on a study entitled "The Status of the Individual and Contemporary International Law," undertaken by Erica-Irene Daes (Greece).⁷⁴ The shortage of time permitted only a preliminary consideration of these two reports and it is hoped that both will be considered at greater length at the forty-first session of the Sub-Commission.⁷⁵

The Sub-Commission also heard reports from Theo van Boven (Netherlands) on his study of the disappearance of children in Argentina⁷⁶ and from Louis Joinet (France) on his guidelines for the regulation of computerized personal data files.⁷⁷ Last year van Boven had been appointed, largely through the efforts of then Chairman Despouy to investigate the cases of Argentine children who had disappeared during the military dictatorship and who had subsequently been located in Paraguay.⁷⁸ In his report, van Boven noted that Argentina had fully cooperated with his mission there, but that Paraguay had refused to allow him even to visit the country.⁷⁹ Nevertheless, he questioned whether the Argentine authorities had done all they could to locate and repatriate the children, noting that most of the work of locating forty-five of 208 such children had been done by the Grandmothers of the Plaza de Mayo.⁸⁰ Both the observer from Argentina, Julio Strassera, who gained fame as a prosecutor in the human rights trials of former junta officials, and alternate expert Maria Teresa Flores (Argentina) took sharp issue with van Boven's criticism.⁸¹

Louis Joinet (France) presented the final version of his guidelines for the regulation of computerized personal data files. His report incorporated comments from governments which he had received on his original draft over the course of several years.⁸² The purpose of these guidelines is to provide minimum guarantees to protect the privacy rights and human rights of persons

73. U.N. Doc. E/CN.4/Sub.2/1988/Add.1, at 35 (1988).

74. U.N. Doc. E/CN.4/Sub.2/1988/Add.1, at 33 (1988).

75. See Sub-Comm'n Res. 1988/39, *1988 Report* at 67 (decision to examine Mubanga-Chipoya's report as a separate item at the forty-first session). See Sub-Comm'n Res. 1988/40, *1988 Report* at 67 (request to the special rapporteur that she update her study on the status of the individual and present this update at the forty-first session).

76. *Prevention of the disappearance of children*, U.N. Doc. E/CN.4/Sub.2/1988/19 (1988).

77. *Guidelines for the regulation of computerized personal data files*, E/CN.4/Sub.2/1988/22 (1988).

78. Sub-Comm'n Decision 1987/107, U.N. Doc. E/CN.4/Sub.2/1987/42, at 52 (1987). This decision requested the chairman to appoint one or several members urgently to establish and maintain contact with the competent authorities and institutions to gather information and ensure that there is no further risk of disappearances.

79. *Prevention of the disappearance of children*, U.N. Doc. E/CN.4/Sub.2/1988/19, at 1 (1988).

80. *Id.* at 10.

81. *Summary Record of the 22nd Meeting*, U.N. Doc. E/CN.4/Sub.2/1988/SR.22, at 12 (1988).

82. *Guidelines for the regulation of computerized personal data files*, E/CN.4/Sub.2/1988/22, at 2 (1988). The guidelines are found in Annex I, at 10-12.

required to submit information for computerized personal files. The guidelines are to be used by international organizations and by governments to incorporate these guarantees into national legislation.⁸³ The Sub-Commission adopted a resolution which recommended to the Commission and ECOSOC that the guidelines be published and distributed.⁸⁴

The Sub-Commission's consideration of studies and reports is a clear example of the difficulty it has in giving adequate attention to all aspects of its agenda. The studies discussed above represent important and extremely complex legal questions facing the international community. Because of the Sub-Commission's status as a body of independent experts, it is an appropriate forum for these questions to be analyzed and fully debated. It is a positive development that several major studies were completed and transmitted to the Commission on Human Rights, but it is also troubling that the Sub-Commission members must withhold their comments and suggestions on these studies in the interest of moving along the agenda.

IV. WORKING GROUPS OF THE SUB-COMMISSION

A. Working Group on Indigenous Populations

The Working Group on Indigenous Populations is one of the three presessional working groups of the Sub-Commission. It was established in 1982 by ECOSOC and was given a two-fold mandate: (1) to review developments pertaining to the human rights of indigenous populations and (2) to develop standards concerning the protection of those rights.⁸⁵ Its meetings are the most well-attended sessions of the Sub-Commission, particularly by NGOs and indigenous peoples.⁸⁶ This attention is testimony to the importance attached to the group by peoples who feel their rights have been ignored for centuries and who see this forum as one of the few ways in which they can address the serious human rights abuses they face.

83. See *id.*

84. Sub-Comm'n Res. 1988/29, 1988 Report at 56.

85. See ECOSOC Res. 1982/34, U.N. Doc. E/1982/82 Supp. 1, at 26 (1982).

86. The number of participants in the working group session has increased steadily over the last several years. The 1988 session was attended by 380 persons. Thirty-three governments and 142 nongovernmental organizations were represented in the meetings. *Report of the Working Group on Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1988/24, at 3 (1988) (hereinafter *Report on Indigenous Populations*). Some of the indigenous peoples who sent representatives to the session were: the Aborigines of Australia; the Ainu of Japan; the Crees of Quebec; the Inuit of Alaska, Canada, and Greenland; the Kalinja and Lokono of Surinam; the Mahoi of Tahiti (Mahoi-Toi); the Maori of New Zealand; the Miskito of Nicaragua; the Quechua of Peru; the Saami of Finland, Norway, and Sweden; and the Southern Cheyenne, Hopi, and Navajo of the United States.

This year's meeting of the working group met from 3 August to 7 August. The chairman-rapporteur of the working group was Erica-Irene Daes (Greece) and the other members were Judith Sefi Attah (Nigeria),⁸⁷ Tian Jin (People's Republic of China), Miguel Alfonso Martinez (Cuba), and Danilo Türk (Yugoslavia). The primary focus of the working group has been standard-setting; it has been engaged for five years in preparing a draft body of principles to be incorporated into a universal declaration for indigenous rights. During its 1988 session the chairman-rapporteur presented a working paper in which she outlined twenty-eight draft principles for indigenous rights.⁸⁸ Some key features of the draft proposed by Daes were: use of the term "indigenous peoples" rather than "indigenous populations;"⁸⁹ recognition of the individual and collective rights to be enjoyed by indigenous peoples, with a special emphasis on collective rights; protection of the identity of indigenous peoples as manifested by their culture, language, and customs; introduction of some aspects of indigenous self-determination; and the reaffirmation of land and resource rights.⁹⁰

A central question raised by the proposed universal declaration of indigenous rights is the degree of self-determination to which the indigenous peoples are entitled. Discussions throughout the working group session highlighted the differing views on this question. The indigenous peoples' organizations, through a collective statement prepared during informal meetings, stated that Daes' draft did not adequately address the issue of self-determination.⁹¹ For example, the indigenous peoples' organizations have declared that no state should have jurisdiction over an indigenous people unless

87. Judith Attah was unable to attend the meetings of the working group; the alternate from Nigeria, Christy Mbonu, attended in her place.

88. *A working paper by Ms. Erica-Irene A. Daes containing a set of draft preambular paragraphs and principles for insertion into a universal declaration on indigenous rights*, U.N. Doc. E/CN.4/Sub.2/1988/25 (1988).

89. "Indigenous populations" has previously been used in the Sub-Commission to refer to the indigenous groups, but the representatives from indigenous organizations prefer the term, "indigenous peoples." These representatives have stated that the term "populations" is demeaning to them and minimizes their distinct identity. See, e.g., *Statement by the Inuit Circumpolar Conference*, delivered 1 Aug. 1988. Daes' draft tacitly acknowledges this tension by using the term "indigenous peoples" in the body of the text, while the title of the document and the name of the working group continue to include the term "indigenous populations." The Sub-Commission, however, acted this year to change the name of the agenda item to "[d]iscrimination against indigenous peoples." Sub-Comm'n Res. 1988/18, 1988 Report at 44.

90. *Report on Indigenous Populations*, supra note 86, at 18 (description of the significant features of the proposed principles as outlined by Daes in her presentation of her draft).

91. E/CN.4/Sub.2/1988/24, at 21 (1988). The statement mentioned four matters which were not adequately addressed by Daes according to the indigenous groups: the right of self-determination; the collective right to ownership of land; the importance of lands and resources to indigenous peoples, specifically surface and subsurface resources; and the significance of treaties.

that people agreed to such authority.⁹² Many government observers, however, envision a different form of self-determination for indigenous peoples.⁹³ The draft prepared by Daes appeared to offer a compromise on these different views by including principles which would strengthen the right of self-determination for indigenous peoples without granting them outright self-government.⁹⁴ In preparation for next year's session the draft declaration will be sent to governments, intergovernmental organizations, NGOs, and indigenous peoples for their comments.⁹⁵ Working group members expressed hope that all concerned would work for consensus in order that the declaration could make speedy progress on its way to adoption by the UN General Assembly.

Another agenda item which commanded a sizeable portion of the working group's time was a discussion of the outline presented by Miguel Alfonso Martinez (Cuba) on his study of "treaties, agreements, and other constructive arrangements between governments and indigenous populations." Alfonso Martinez was appointed as special rapporteur by ECOSOC in May 1988 to prepare an outline for a study which would examine the usefulness of treaties in promoting and protecting the human rights and fundamental freedoms of indigenous peoples.⁹⁶ The study outlined by Alfonso Martinez would look

92. This declaration was made as part of the twenty-two principles drafted by the indigenous peoples at the 1987 session. See Annex V of the working group's 1987 report, U.N. Doc. E/CN.4/Sub.2/1987/22, at 30-32 (1987).

93. For example, the Australian observer described initiatives his government was planning to assist Aborigines in shaping their own futures. These initiatives include negotiating a treaty over the dispossession of aboriginal lands and establishing a coordinated national program to provide better "advancement programs" for Aborigines. None of the initiatives, however, contemplate the Australian government giving up its jurisdiction over the Aborigines. See *Address to the Sixth Session of the Working Group on Indigenous Populations*, oral statement delivered by C.N. Perkins, leader of the Australian observer delegation (2 Aug. 1988).

94. See *A working paper by Ms. Erica-Irene A. Daes containing a set of draft preambular paragraphs and principles for insertion into a universal declaration on indigenous rights*, U.N. Doc. E/CN.4/Sub.2/1988/25 (1988). The proposed principles included: the right to participate in the state through representatives chosen by themselves (para. 22); the collective right to manage their internal affairs such as education, housing, and social welfare (para. 23); and the right to control their autonomous institutions (para. 24).

95. Sub-Comm'n Res. 1988/18, *1988 Report* at 44.

96. ECOSOC Decision 1988/134, U.N. Doc. E/1988/INF/5, at 99 (1988). The Sub-Commission recommended at its 1987 session the appointment of Alfonso Martinez as special rapporteur to do a study of treaties between indigenous populations and governments. Sub-Comm'n Res. 1987/17, U.N. Doc. E/CN.4/Sub.2/1987/42, at 28 (1987). The resolution adopted by the Commission on Human Rights, however, reduced the mandate to the preparation of an outline on the "possible purposes, scope and sources of a study to be conducted on the potential utility of treaties. . . ." Comm'n Res. 1988/56, U.N. Doc. E/CN.4/Sub.2/1988/88, at 126 (1988). Alfonso Martinez, in his remarks prefacing the presentation of his outline, attributed this change in mandate to opposition by the United States and Canada to his appointment as special rapporteur. The Commission resolution also added language which called upon the rapporteur to take into account the "inviolability of (the states') sovereignty and territorial integrity."

at the historical practice of negotiating treaties with indigenous peoples and analyze the extent to which these treaties protected their rights. This analysis would serve as a foundation for determining whether treaties between indigenous peoples and governments might assist in resolving contemporary disputes facing these groups.⁹⁷ The full Sub-Commission endorsed the outline of the treaty study and recommended that the Commission and ECOSOC confirm Alfonso Martinez' mandate to undertake the full study.⁹⁸

Other matters discussed during the 1988 session of the working group were: the voluntary fund to assist indigenous people to participate in the working group sessions; the proposal to proclaim an international year for the promotion of indigenous rights; and the 1987 decision of the Sub-Commission calling for a member to attend US congressional hearings on the relocation of the Hopi and Navajo in Arizona.

The voluntary fund for indigenous people assisted twenty-seven individuals in attending the 1988 working group meeting in Geneva by paying for their travel, food, and lodging expenses. Several of the governmental and nongovernmental observers to the working group meeting pledged additional financial assistance to the fund.⁹⁹ The Sub-Commission adopted, by consensus, a resolution that 1993 be proclaimed the International Year for Indigenous Rights to coincide with the end of the Second Decade for Action to Combat Racism and Racial Discrimination.¹⁰⁰ The Sub-Commission has

97. See *Outline on the study of Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1988/24/Add.1, at 6 (1988). Many participants and observers of the working group regard this study as a crucial step in the process of guaranteeing indigenous rights. The Grand Council of the Crees of Quebec, a non-governmental organization with consultative status, pointed out in a written statement submitted to the Sub-Commission that the process of treaty negotiation represents both de facto and legal recognition of indigenous self-determination. U.N. Doc. E/CN.4/Sub.2/1988/NGO/20, at 5 (1988). The Australian government is currently planning treaty negotiations with the Aboriginal and Torres Strait Island People as a way of addressing the longstanding inequities faced by these peoples. These treaty negotiations are being called by the government "a genuine act of reconciliation." *Statement by Mr. R. Winroe On Behalf of the Australian Observer Government Delegation Under Item 6*, delivered 5 Aug. 1988 to the Working Group on Indigenous Populations.

98. Sub-Comm'n Res. 1988/20, *1988 Report* at 47. There was some criticism about the proposed budget for the study, prompted by remarks from alternate member, John Carey (USA), about the researcher's salary being too high. The vote to endorse the study, however, was almost unanimous. Only Palley (UK) voted against it and Carey abstained. No objection was made to similar salary levels for other research projects.

99. *1988 Working Group Report*, U.N. Doc. E/CN.4/Sub.2/1988/24, at 30 (1988).

100. The indigenous peoples' organizations had initially recommended that 1992 be proclaimed as the International Year of Indigenous Rights because it marked the 500th anniversary of the arrival of Columbus in the western hemisphere and the beginning of the colonization process by which they lost their autonomy. The Sub-Commission adopted this proposal in 1987. Sub-Comm'n Res. 1987/15, U.N. Doc. E/CN.4/Sub.2/1987/42, at 26 (1987). Because of opposition from Spain, however, the Commission declined to adopt the Sub-Commission's designation of 1992 and left the year unspecified. See Rosen & Weissbrodt, *supra* note 5, at 497-98. The resolution passed this year by the Sub-Commission is seen as a compromise between these two positions.

been hearing for some years about the dispute over conflicting land claims between the Hopi and Navajo of Arizona, and the US government's proposal for relocation of families as a result of the dispute. In 1987 the Sub-Commission adopted a decision calling for an expert member to attend congressional hearings on this matter, but the visit did not occur. This year the Sub-Commission adopted a decision that called for alternate member, John Carey (USA), and Erica-Irene Daes (Greece) to prepare jointly a summary of information about this issue in an effort to improve the Sub-Commission members' understanding of this complex and longstanding dispute.¹⁰¹

B. Working Group on Contemporary Forms of Slavery

The Working Group on Slavery met for its thirteenth year in 1988 and this session marked the beginning of a new program to revive interest in this declining working group. After several years of decreasing participation, both on the part of NGOs and the expert members themselves, the newly appointed members of the 1988 working group implemented several recommendations made during the previous year's session in an effort to repair its damaged reputation. The 1987 working group was attended by only two of the appointed Sub-Commission members,¹⁰² but these members made productive suggestions for revitalizing the group. Among these suggestions were the following: that the group change its name to reflect the fact that for some time it has considered issues outside the traditional notion of slavery; that the group increase female representation among its appointed members; and that those members who are selected should make every effort to attend the sessions.¹⁰³

These recommendations were heeded by the Sub-Commission. The name was changed to "Working Group on Contemporary Forms of Slavery"¹⁰⁴ and two women were appointed to the working group, Mary Concepcion Bautista (Philippines) and Fatma Ksentini (Algeria). Furthermore, all five members attended at least part of the session. In addition to Bautista and Ksentini, the other working group members are: Ion Diaconu (Romania),

101. Sub-Comm'n Decision 1988/105, *1988 Report* at 70.

102. The Chairman, Justice Abu Saeed Chowdhury, died while en route to attend the session and Dumitru Mazilu, the Romanian expert, was prevented from attending by his government. See *supra* notes 9–20 and accompanying text regarding Mazilu's case. See generally, Lassen, *Slavery and Slavery-Like Practices: United Nations Standards and Implementation*, 57 *Nordic J. Int'l L.* 197 (1988); Zoglin, *United Nations Actions Against Slavery: A Critical Evaluation*, 8 *Hum. Rts. Q.* 306 (1986).

103. *Report of the Working Group on Slavery on its Twelfth Session*, U.N. Doc. E/CN.4/Sub.2/1987/25, at 26 (1987).

104. Sub-Comm'n Res. 1987/32, U.N. Doc. E/CN.4/Sub.2/1987/42, at 45 (1987). This change was approved by the Commission in their resolution 1988/42. U.N. Doc. E/CN.4/1988/88, at 102 (1988).

Asbjorn Eide (Norway), and Luis Varela Quiros (Costa Rica).¹⁰⁵ Asbjorn Eide was elected as chairman at the first meeting by acclamation.

The interventions at this working group have traditionally revealed some of the most shocking practices in violation of human rights and this year was no different. A statement by Defence for Children International reported that children were being kidnapped in Pakistan and sold into forced labor camps.¹⁰⁶ One of the oldest human rights organizations, the Anti-Slavery Society, continued to express its concern about the large number of bonded laborers in India—debtors who work in bondage and whose families act as living surety on their debt.¹⁰⁷ A statement by the International Association of Democratic Lawyers aroused a particularly intense reaction this year. The representative alleged that indigent Haitian children have been exploited for sale of their organs, plasma, and blood in the United States and Canada by persons claiming to work for adoption agencies.¹⁰⁸ The Haitian government observer denied this allegation and due to the lack of proof of these allegations, the working group stated that it could take no action until such claims were substantiated.¹⁰⁹

The working group continued on the path of reform which was initiated at the 1987 session. It is believed that the new chairman, Asbjorn Eide, will be an effective leader for this revitalization process, an expectation which is based on his successful tenure as chairman of the first two sessions of the Working Group on Indigenous Populations. The Eide chairmanship was welcomed by many because previous working group sessions had been marked by a decided lack of focus due to the broad range of issues which “slavery” has come to include. The working group took an important step in organizing its agenda. The members devised a program by which they will address one primary issue during each of the next three sessions: prevention of the sale of children, of child prostitution, and of child pornography in 1989; child labor and debt bondage in 1990; and prevention of traffic in persons and prostitution of others in 1991.¹¹⁰

The working group also discussed improving communication with the Branch for the Advancement of Women at the UN Office in Vienna to coordinate their activities on such women’s issues as prostitution. This recommendation was subsequently adopted by the full Sub-Commission.¹¹¹

105. Varela Quiros, without explanation, only attended the final day, however.

106. *Report of the Working Group on Contemporary Forms of Slavery on its Thirteenth Session*, E/CN.4/Sub.2/1988/32 at 10 (1988) (hereinafter *Report of the Slavery Working Group*).

107. *Report of the Slavery Working Group*, *supra* note 106, at 13.

108. *Report of the Slavery Working Group*, *supra* note 106, at 6; *Rapport Sur une Enquête en Haïti du 2 au 9 Juin 1988 Concernant l’Utilisation d’Enfants Pour des Transplants d’Organes*, statement to the Working Group by the International Association of Democratic Lawyers.

109. *Report of the Slavery Working Group*, *supra* note 106, at 6–7.

110. *Report of the Slavery Working Group*, *supra* note 106, at 25–26.

111. Sub-Comm’n Res. 1988/31, *1988 Report* at 58.

The working group discussed the possibility of establishing a voluntary fund in an effort to make their sessions a forum for victims of slavery in much the same way that the Working Group on Indigenous Populations provides a forum for indigenous peoples.¹¹² There is a general feeling of optimism that these new measures and increased participation by the Sub-Commission members will provide the enthusiasm needed to revive the working group.

C. Working Group on Detention

The Working Group on Detention began its 1988 session by devising an innovative system for choosing its chairman. The members, for the first time, separated the functions of chairman and rapporteur and decided that the rapporteur would become the chairman the following year. Subsequently, the group elected by acclamation John Carey¹¹³ (USA) to be chairman and Miguel Alfonso Martinez (Cuba) to be rapporteur.¹¹⁴ The other members of the group were: Ribot Hatano (Japan), Aidid Abdillahi Ilkahanaf (Somalia), and Danilo Türk (Yugoslavia). Louis Joinet (France) and Cornelis Flinterman (Netherlands)¹¹⁵ also participated in the meetings.

The Working Group on Detention was responsible for two important Sub-Commission initiatives in 1988—the Draft Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances¹¹⁶ and the appointment of Danilo Türk (Yugoslavia) to prepare a working paper containing a proposal for a study on the right to freedom of expression and opinion and administrative detention.¹¹⁷

The initiative for a declaration on disappearances came from Amnesty International and the International Commission of Jurists. The initial text, largely modeled on the torture declaration, characterized disappearance as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. In particular, it described disappearance as a form of torture under the Convention against Torture and

112. *Report of the Slavery Working Group, supra* note 106, at 25. This recommendation was not included in the resolution adopted by the full Sub-Commission on "Slavery and Slavery-Like Practices."

113. John Carey is the alternate for the US member, William Treat. Carey attended the Sub-Commission session in Treat's place until the third week of the session and took his place on the working group throughout the session.

114. This change indicated an acceptance on the part of Carey to give up the chairmanship of the working group next year, after serving in that capacity for many years.

115. Flinterman is the alternate for Theo van Boven.

116. *Report of the Working Group on Detention*, U.N. Doc. E/CN.4/Sub.2/1988/28, Annex I, at 15 (1988).

117. Sub-Comm'n Decision 1988/110, *1988 Report* at 73.

Other Cruel, Inhuman or Degrading Treatment or Punishment,¹¹⁸ hence reaffirming that cases of disappearances could be addressed through this convention.¹¹⁹ The working group refined the language of this draft declaration at several informal drafting sessions and recommended to the plenary that the resulting draft be circulated to governments, NGOs, intergovernmental organizations, and other appropriate parties for their comments. The Sub-Commission adopted this resolution by consensus and requested that the working group complete its work on this draft declaration as soon as possible, preferably at its next session.¹²⁰

The working paper assigned to Türk is the preliminary step in outlining a study of the freedom of expression and opinion. The paper is to clarify the conceptual and methodological questions involved in such a study and to serve as a basis on which the Sub-Commission can decide whether to examine more closely this significant human rights issue.¹²¹

The working group also assigned to Mary Concepcion Bautista (Philippines) the task of examining the growing problem of violations of the human rights of UN staff members.¹²² According to a statement by the Federation of International Civil Servants' Associations (FICSA), there were some ninety staff members whose freedom of movement had been violated in some way as of the 1988 working group meeting.¹²³ The resolution adopted by the Sub-Commission asked Bautista to assess the impact of these human rights violations on the staff members, their families, and on the functioning of the UN system.

The working group finished work on several other issues in an effort to reduce its sizeable agenda. This work was accomplished by holding four informal meetings in addition to the eight officially scheduled meetings. One

118. GA Res. 46 (XXXIX), 39 UN GAOR Supp. (No.51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987.

119. Some Latin American groups stated that, by assimilating disappearances with torture, the draft did not go far enough in treating disappearances as a distinct phenomenon which constitutes a crime against humanity. The Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), for example, has recommended the adoption of a convention on disappearances. See the statement of FEDEFAM to the Sub-Commission under the item, "Administration of Justice and the Human Rights of Detainees."

120. Sub-Comm'n Res. 1988/17, 1988 Report at 43.

121. Sub-Comm'n Decision 1988/110, 1988 Report at 73. It is thought that an examination of freedom of expression and detention will offer a way of addressing the problem of prisoners of conscience without having to define the term precisely. For a discussion of the political difficulties in defining "prisoners of conscience," see Weissbrodt, *A Note on Amnesty International's work on Behalf of Prisoners of Conscience*, AIUSA Legal Support Network Newsletter, Fall 1988, at 103-04.

122. Sub-Comm'n Res. 1988/9, 1988 Report at 32.

123. Statement by FICSA to the Working Group on Detention, 16 Aug. 1988. UN staff are subject to, *inter alia*, detention, disappearance, and refusal of travel papers necessary to carry out their jobs as a result of their governments' displeasure. See *Detention of staff members of the United Nations and the specialized agencies*, U.N. Doc. E/CN.4/Sub.2/1988/17, at 4-5 (1988) and FICSA statement.

issue which it pursued from the previous year was an examination of the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹²⁴ Last year the working group had forwarded to the Sixth Committee of the General Assembly, which is currently considering these principles, a communication expressing its concern that the principles were being weakened substantially in their protection of persons under detention without charge or trial and those subjected to incommunicado detention.¹²⁵ This year the members again analyzed the draft body of principles and submitted to the Sixth Committee detailed suggestions for changes to strengthen the standards. This communication was approved by the plenary of the Sub-Commission without a vote.¹²⁶

The working group also communicated with the Committee on Crime Prevention and Control, which was meeting in Vienna at the same time. It forwarded through the Sub-Commission a working paper by John Carey containing a comparative analysis of texts on the effective prevention of extra-legal, arbitrary and summary executions and suggesting additional language for the draft principles being prepared on the use of force and firearms by law enforcement officials.¹²⁷ After clearing the agenda of these items, the working group began to look ahead at issues to begin addressing in future sessions. The group began preliminary discussion, prompted by suggestions of the expert from Cuba, Alfonso Martinez, of the execution of minors and the impact of privatization of prisons on the human rights of detainees.

124. U.N. Doc. E/CN.4/Sub.2/417, para. 109 (1978) (original text). The draft principles were being considered before the Sixth (Legal) Committee of the General Assembly, GA Res. 40/420, 40 UN GAOR (No.53) at 346, A/40/53 (1985).

125. See *Report of the Working Group on Detention*, U.N. Doc. E/CN.4/Sub.2/1987/15, at 5 (1987). This communication to the Sixth Committee was sent through the secretary-general of the UN. The traditional channels of communication would be for the Sub-Commission to send the information in the form of a resolution to the General Assembly via its parent bodies, the Commission and ECOSOC. This lengthy process was bypassed in order to expedite the transmission of information.

126. Sub-Comm'n Decision 1988/107, *1988 Report* at 71.

127. Sub-Comm'n Decision 1988/103, *1988 Report* at 69. Both of these issues were addressed at the 1987 session of the Working Group on Detention. The working group considered for the first time a draft set of standards for investigating suspicious deaths and deaths in custody, prepared by the Minnesota Lawyers International Human Rights Committee. It also examined the possibility of preparing a booklet which would provide guidance on the proper use of force in law enforcement and the possibility of drafting a declaration which would recommend punishing as a criminal offense the arbitrary or abusive use of force by law enforcement personnel. See Rosen & Weissbrodt, *supra* note 5, at 502-03. In order to provide preparatory information for the 1988 session, John Carey prepared working papers on investigating suspicious deaths and on the feasibility of preparing the booklet illustrating the proper use of force. See E/CN.4/Sub.2/1988/WG.1/WP.1 (1988) and E/CN.4/Sub.2/1988/WG.1/WP.2 (1988). Because both issues have been pursued by the Committee on Crime Prevention and Control, however, the working group decided to send the working papers to Vienna for consideration during its August 1988 session. See *supra* note 61 for a discussion of the role of the Committee on Crime Prevention and Control.

V. NEW INITIATIVES

The completion of studies which had been on the agenda of the Sub-Commission for several years opened opportunities for launching new projects. Although the Sub-Commission does not require the completion of one project before starting another, the Commission, at its 1988 session, called on the Sub-Commission to strive for this kind of self-restraint.¹²⁸ Despite a conscious effort to heed this admonition, there were many new projects initiated by the 1988 Sub-Commission. Some of the most important ones were: a study of discrimination against persons suffering from AIDS; the appointment of a special rapporteur on the realization of economic, social, and cultural rights; and a decision to begin looking at how the Sub-Commission can protect the rights of minorities.

The question of the human rights of AIDS victims was raised by Jan Martenson, the Director of the Centre for Human Rights, in his opening speech to the Sub-Commission. John Carey (USA) requested that this issue be added to the agenda, but this idea met with resistance due to the already overcrowded agenda.¹²⁹ Despite the Sub-Commission's decision not to add this issue formally to the agenda, the protection of the rights of AIDS victims and persons infected with the human immunodeficiency virus (HIV) was discussed under "Human rights and science and technology."¹³⁰ The Sub-Commission adopted a decision requesting that Luis Varela Quiros (Costa Rica) examine, without financial implications, the feasibility of a study on AIDS and human rights.¹³¹

The Sub-Commission has been asked for several years by the Commission to examine the question of the realization of economic, social, and cultural rights.¹³² The human rights bodies of the UN have traditionally concentrated on civil and political rights, with less emphasis on the rights outlined by the International Covenant on Economic, Social and Cultural Rights in favor of civil and political rights.¹³³ The Sub-Commission, in particular, has avoided discussing these rights, with the exception of a study

128. Comm'n Res. 1988/43, U.N. Doc. E/CN.4/Sub.2/1988/88 (1988).

129. *Compte Rendu Analytique de la 1ère Séance*, U.N. Doc. E/CN.4/Sub.2/1988/SR.1, at 8–10 (1988).

130. The World Health Organization and the International Commission of Jurists (ICJ) intervened to describe the problems that HIV-infected people are facing with regard to discrimination and stigmatization. See *The Global Strategy for the Prevention and Control of AIDS, and the Public Health Rationale for Non-Discrimination*, statement of the World Health Organization, 25 Aug. 1988 and see the oral statement by the ICJ, delivered 25 Aug. 1988. See also U.N. Press Release HR/2238 at 2–3, 25 Aug. 1988.

131. Sub-Comm'n Decision 1988/111, *1988 Report* at 73.

132. See, e.g., Comm'n Res. 1985/42, U.N. Doc. E/CN.4/1985/66, at 86 (1985).

133. See, e.g., Comm'n Res. 5 (XXXIII), E/CN.4/1257, at 76 (1977) (paragraph 2 states that the Commission "which has so far concerned itself mainly with violations of civil and political rights, should also study violations of economic, social, and cultural rights").

presented in 1987 by Asbjorn Eide on the right to food.¹³⁴ In 1987, however, the Sub-Commission requested and was given authorization to appoint a special rapporteur on the subject of economic, social, and cultural rights.¹³⁵ This year the Sub-Commission appointed Danilo Türk as special rapporteur to begin an analysis of the problems related to the realization of these rights.¹³⁶ The commencement of this study represents an important new direction for the Sub-Commission. The treatment of this question is likely to demand a great deal of time because it is a broad issue which is being addressed for the first time in the Sub-Commission, and also because the question of economic rights raises fundamental issues which are bound to stimulate contentious debate.

The resolution calling for an initial study on the protection of minorities was adopted with little debate or fanfare. This initiative, however, is potentially one of the most significant decisions of the 1988 Sub-Commission. It calls on Claire Palley (UK) to prepare a working paper on "the possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national, religious, and linguistic minorities."¹³⁷ Despite the name of the Sub-Commission, the issue of the protection of minorities has been sidestepped for much of its history.¹³⁸ The first attempt by the Sub-Commission to study the question of minorities in 1950 resulted in a backlash from ECOSOC so severe that the Sub-Commission has treated the issue with caution since that time.¹³⁹

The protection of minorities was not studied by the Sub-Commission again until the 1970s. In 1977 the Sub-Commission considered a report by special rapporteur, Francesco Capotorti, on the protection of minorities and recommended that the Commission draft a declaration on the rights of mi-

134. *The New International Economic Order and the Promotion of Human Rights, Report on the right to adequate food as a human right*, U.N. Doc. E/CN.4/Sub.2/1987/23, at 10 (1987). Eide points out in his study that this is the first effort to define a specific right outlined in the International Covenant on Economic, Social and Cultural Rights.

135. Sub-Comm'n Res. 1987/29, U.N. Doc. E/CN.4/Sub.2/1987/42, at 41-44 (1987). Comm'n Res. 1988/22, U.N. Doc. E/CN.4/1988/88, at 71 (1988).

136. Sub-Comm'n Res. 1988/33, *1988 Report* at 61.

137. Sub-Comm'n Res. 1988/36, *1988 Report* at 63.

138. For a thorough treatment of the early history of this issue, see Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AJIL 869 (1968).

139. At its 1950 session the Sub-Commission adopted a definition for "minority" and drafted an article on the protection of minorities to be incorporated into the international covenant being prepared in the General Assembly. An article on minorities was adopted by the General Assembly as Article 27 of the International Covenant on Civil and Political Rights. The Sub-Commission's proposed definition of "minority" was not considered, and in fact, ECOSOC attempted to abolish the Sub-Commission. According to a contemporary observer of the Sub-Commission, this backlash was due mainly because of controversy aroused by the Sub-Commission's work on the protection of minorities. See *id.* at 874-76.

norities.¹⁴⁰ As a result of the Commission's drafting work, the Sub-Commission was assigned the task of again defining "minority."¹⁴¹ Jules Deschênes, a former member, presented a proposed definition in 1985, which was transmitted to the Commission. The sensitivity of this issue was again demonstrated, however, in that the resolution transmitting Deschênes' definition contains unusual language stating that the Sub-Commission could not approve his definition due to the considerable differences of opinion.¹⁴²

Currently, the plight of minorities suffering human rights violations is addressed in the Sub-Commission through the country-specific resolutions or through agenda items dealing with a particular type of violation. There is no mechanism within the Sub-Commission specifically designed to address the particular concerns of racial, ethnic, religious, and linguistic minorities. Because this question is politically difficult, the effectiveness and independence of the Sub-Commission will be tested by its consideration of the issue. If the Sub-Commission can make an important contribution to the protection of minorities, however, it will greatly enhance its reputation as an important human rights body.

Another initiative taken by the 1988 Sub-Commission was a resolution providing that victims of gross violations of human rights should be entitled to restitution and fair compensation, as well as rehabilitation.¹⁴³ This resolution, which is the first step toward establishing guidelines for such compensation, was the result of persistent efforts by John Humphrey, the first director for the United Nations Division of Human Rights, who returned after many years of absence to be an NGO lobbyist at the 1988 Sub-Commission meeting.

VI. CONCLUSION

As with earlier sessions, the 1988 Sub-Commission faced the problem of an overcrowded agenda. The members were faced with a significant backlog, particularly serious after the cancellation of the 1986 session. This problem was demonstrated by the Sub-Commission's inability to discuss adequately several of the important studies presented during the 1988 session. The Sub-Commission also failed to address in any meaningful way such important topics on its agenda as the question of the prevention of discrimination and the protection of women. Furthermore, the voting on many of the resolutions was so rushed that several experts complained about not knowing precisely

140. *Sub-Comm'n Res. 5 (XXX)*, U.N. Doc. E/CN.4/Sub.2/399, at 45 (1977).

141. *Comm'n Res. 1984/62*, U.N. Doc. E/CN.4/1984/77, at 99 (1984).

142. *Sub-Comm'n Res. 1985/6*, U.N. Doc. E/CN.4/Sub.2/1985/57, at 85 (1985).

143. *Sub-Comm'n Res. 1988/11*, *1988 Report* at 35.

on what they were voting. This problem will apparently continue to plague the Sub-Commission due to the number of new projects added to its agenda for next year.

A possible approach to limiting the overcrowded agenda would be to utilize the sessional and pre-sessional working groups to greater advantage. These working groups perform a valuable service, in keeping with the expert nature of the Sub-Commission, because they provide time to discuss complex issues in a small group setting and they enable free exchanges with the NGOs.¹⁴⁴ The addition of other working groups, at the expense of the plenary or by adding another full week for pre-sessional groups, may be a way to increase the productive time available to the Sub-Commission in a cost-effective manner.¹⁴⁵

The more difficult questions about the independence of the Sub-Commission and its ability to make a unique contribution in the field of human rights will also continue to be raised by the members and participants in the process. In order to support the independence of the Sub-Commission, governments must, at the very least, resist the temptation to nominate government employees and the staff of their permanent missions to the United Nations to serve as expert members.

Two of the new studies initiated this year—the realization of economic, social, and cultural rights and the protection of minorities—are particularly controversial. The Sub-Commission's progress on these projects should offer some insight into how independent the newly elected Sub-Commission can be. These two complex issues will also provide an opportunity for the experts to make a distinctive contribution in areas which have not been adequately discussed elsewhere. It will remain to be seen whether the Sub-Commission can avoid the serious ideological and political pitfalls which these issues present.

144. An example of their advantages is the work done by the Working Group on Detention this year on a draft declaration on disappearances. The group was able to hammer out a draft in the course of several informal sessions through the combined efforts of the expert members and representatives of NGOs.

145. One limitation on this suggestion, however, is that there are only three Eastern European members. Hence, only three working groups can meet simultaneously if the geographical distribution is to be maintained. Adding working groups would also increase interpreter costs.