

THE LAST SESSION OF THE SUB-COMMISSION?

The Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) was the main subsidiary body of the Commission on Human Rights (the Commission). Its main functions were to undertake research on key human rights; contribute to the development of international human rights standards; give guidance on the interpretation of international standards; monitor violations of human rights; monitor and examine issues of implementation of human rights; and perform any other tasks delegated to it by the Commission or ECOSOC. The Sub-Commission was authorised to meet for the final time at its 58th session in August 2006. Its future is currently uncertain as the Human Rights Council is reviewing all the mechanisms of the former Commission on Human Rights.

OVERVIEW

During the 58th and final session of the Sub-Commission,¹ its members discussed the future of this body and their proposals for a future expert advice body for the new Human Rights Council (the Council). The Sub-Commission adopted 22 resolutions, 11 decisions, and one Chairperson's statement at its 58th session.² The following seven regular working groups of the Sub-Commission each met either before or during the Sub-Commission session: the Working Group on Minorities; on Contemporary Forms of Slavery; on Indigenous Populations; on Transnational Corporations; on Administration of Justice; on Guidelines on the Promotion and Protection of Human Rights when Combating Terrorism; and on Communications. The annual Social Forum, an inter-sessional forum on economic and social rights, also met on 3 and 4 August 2006.³

General Assembly *Resolution 60/251*, which created the Council, provides that the Council shall 'maintain a system of ... expert advice'.⁴ The use of the term 'system of expert advice' and the absence of any reference to the continuation of the Sub-Commission means that the Council is not required, under the terms of the Resolution, to retain the Sub-Commission and can set up a new system of expert advice.⁵ The Council is reviewing all the former mechanisms of the Commission on Human Rights, including the Sub-Commission.⁶ The 58th session of the Sub-Commission was therefore conducted under a cloud of uncertainty regarding its future and at times it appeared surprising that the members themselves were attempting to embark upon a programme of 'business as usual' without sufficient recognition of the fact that this session could be

¹ Geneva, 7-25 August 2006.

² For the texts of these resolutions and decisions see A/HRC/Sub.1/58/L.11, (24 August 2006), available at www.ohchr.org/english/bodies/subcom/58/draftreport.htm.

³ Detailed reports by the International Service for Human Rights (ISHR) on the discussions at the Sub-Commission's Working Groups and those held under each item of its agenda are available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/Sub58/Sub58-Reports.htm.

⁴ Paragraph 6.

⁵ See M. Abraham, *A New Chapter for Human Rights*, ISHR and Friedrich Ebert Stiftung (June 2006), pp. 51 - 60, available at www.ishr.ch/handbook (download chapter 4).

⁶ The Council set up an inter-sessional open-ended Working Group to review all the mechanisms and mandates of the former Commission on Human Rights. For further information on this Working Group and its discussions on the future system of expert advice, see www.ishr.ch/hrm/council.

their last. Despite the opportunity to establish new ideas for the future of the body, the Sub-Commission adopted recommendations for a future body strongly resembling the existing system, evidence its members were of the opinion that the current mechanism provides a good model for a future expert body.

While analysing its potential future as part of the UN human rights system, the Sub-Commission also continued its work in reviewing ongoing studies and passed a number of resolutions on these subjects. These not only finalised some outstanding work but proposed a number of new studies for the future. The Sub-Commission seemed undeterred by the likelihood that this would be its final session and instead of finalising pending business or suggesting options to address these initiatives should the Sub-Commission not be continued, many experts suggested both new studies and agenda Items. This indicates that perhaps some Sub-Commission members did not fully grasp the potential impact of the institution-building process that the Council is involved in on the future of the Sub-Commission, and also raises serious doubts about what will happen to these pending studies and initiatives if the Sub-Commission doesn't continue.

In line with the trend of recent years, and exacerbated by the uncertainty created by the reform process, there was a low level of participation in this last meeting of the Sub-Commission by States, non-governmental organisations (NGOs), and other observers.

General Assembly *Resolution 60/251*, which created the Human Rights Council, provides that the Council shall 'maintain a system of ... expert advice'.⁷ It also provides that the Council shall 'review, and where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission' including the Sub-Commission 'within one year after the holding of its first session'.⁸ At the first session of the Council, a decision was adopted to renew the mandate of the Sub-Commission for one

year to continue its work.⁹ The terms of a large number of members whose terms of membership were coming to an end in 2006 were also renewed for a year by the same decision.¹⁰

The Sub-Commission was authorised to meet for its final session for a period of four weeks.¹¹ The Council's *Decision 1/102* required that the Sub-Commission give due priority to preparing two documents for the Council: the first being a paper on its own vision and recommendations for the future system of expert advice to the Council; and the second being a list describing the status of ongoing studies and an overall review of its activities.¹² In Paragraph 4 of *Decision 1/102* the Sub-Commission was requested by the Council to include consideration of the contributions made by the Social Forum and the Sub-Commission's Working Groups.

Discussions during the Sub-Commission session about the possible future expert body were often held in closed session. At the conclusion of its 58th session the Sub-Commission adopted by consensus *Decision 2006/112: Implementation by the Sub-Commission of Human Rights Council Decision 102*,¹³ which outlines its vision on its future, expressing its view that the Council needs a standing, collegial, independent, expert body of general competence in the field of human rights.¹⁴ The Sub-Commission suggested that the name of this future body could be the Human Rights Consultative Committee (HRCC) and that this expert body should contain 26 to 28 members of varying backgrounds who would be elected with the view to maintaining the principle of regional representation.¹⁵ Its functions should include research, the promotion and progressive development of human rights (through thematic studies and standard-setting), coordination within the UN human rights system, promoting coherence, and identification of challenges and gaps.¹⁶ The functions of the HRCC may also encompass participation in the 1503 procedure and the new Universal Periodic Review (UPR) mechanism.¹⁷ The model that was put forward appeared to closely reflect the structure and functions of the current Sub-Commission with a few variations.

The Sub-Commission was split over the potential involvement of a new expert body in the UPR, with some members seeing no role for the expert advice body, and some seeing the HRCC involved

FUTURE OF THE SUB-COMMISSION

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Paragraph 6.

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General Assembly *Resolution 60/251*.

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Human Rights Council *Decision 1/102*.

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Paragraph 1, *ibid.*

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Paragraph 3 (b), *ibid.*

12

Paragraph 3(b (i) and (ii)), *ibid.*

13

Available at: www.ohchr.org/english/bodies/subcom/58/draftreport.htm.

14

Paragraph 17.

15

Paragraphs 10 and 27.

16

Paragraphs 20 – 24.

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Paragraph 21.

in the review.¹⁸ The members of the Sub-Commission reaffirmed that the inter-sessional working groups of the Sub-Commission were invaluable forums for the participation of affected communities, and stressed the importance of their continuation.¹⁹ Members also discussed how the work of the Sub-Commission should continue despite the transitional period, and reiterated their belief that the establishment of an expert body would enhance the legitimacy of the Council.

DISCUSSIONS ON SUBSTANTIVE ISSUES AND PENDING WORK

Human rights violations in all countries

Under Item 2 of its agenda, the Sub-Commission considers the 'question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation, in all countries, with particular reference to colonial and other dependent countries and territories'. Following Commission on Human Rights *Resolution 2000/10*, which prohibited the Sub-Commission from making country-specific resolutions, the work of the Sub-Commission in considering country situations under Item 2 stagnated. This has contributed significantly to the declining participation by Sub-Commission experts, States, and NGOs. Again in 2006 this agenda Item provided only a limited opportunity to the Sub-Commission to discuss country situations. The Sub-Commission only adopted one Chairperson's Statement on the human rights crisis in Lebanon.²⁰ The experts of the Sub-Commission also deliberated on how to deal with Item 2-type issues in a future body, and recommended an enhanced and clearer mandate for such a future expert body in addressing both thematic and country-specific situations.

Sub-Commission experts discussed how ensuring that the Sub-Commission or future expert body plays a role in examining situations in specific countries would enhance its effectiveness in proposing measures to end human rights violations in those States.²¹ Other Sub-Commission experts reiterated the important role of NGOs

in bringing issues to the attention of the Sub-Commission, explaining that by helping identify human rights violations, NGOs aided the Sub-Commission to take detailed resolutions on these matters.²²

Administration of justice, rule of law and democracy

The consideration of issues under Item 3 of the agenda was complicated by poor time management, restricting the discussion of these issues in the plenary to only those issues which had not been previously discussed in the Sub-Commission's working groups. The Sub-Commission adopted texts recommending three new comprehensive studies focusing on the right to effective remedy,²³ the universal implementation of international human rights treaties,²⁴ and accountability of international personnel taking part in peace support operations.²⁵ The Sub-Commission also requested two expanded working papers on human rights and State sovereignty²⁶ and on transitional justice and investigation mechanisms for truth and reconciliation with a special emphasis on the experiences in Latin America.²⁷ Ms. Rakotoarisoa was also asked to submit her interim and final report on the difficulty in establishing guilt or responsibility with regard to sexual violence to the next session of the Sub-Commission or the future expert body,²⁸ and action was suggested on the basis of the report of the sessional Working Group on the Administration of Justice.²⁹

On the topic of the universal implementation of human rights, a main focus of the discussion was how to implement human rights in more effective ways³⁰ and on the impact of the UN reform process. Many members commented on the High Commissioner's proposal for a unified treaty body.³¹ Mr. Emmanuel Decaux felt that since universal ratification is nowhere near being acquired, creating a unified treaty body might weaken the current human rights protection provided by the human rights treaties. He also noted that it is very important that all treaty bodies establish a system for handling individual complaints. In relation to the issue of ratification, Mr. Ibrahim Salama suggested that the new UPR mechanism of the Council should include an assessment of the level of implementation of

¹⁸ These members suggest that the size of the HRCC be increased to 28, with four chambers of seven members each carrying out those parts of the UPR process which require the input of independent experts. See Paragraphs 57 and 58.

¹⁹ Paragraph 66.

²⁰ For the text of the statement see www.ohchr.org/english/bodies/subcom/docs/58/Chairpersonstatement7-08-06.pdf.

²¹ Mr. Vladimir A. Kartashkin and Mr. Ibrahim Salama.

²² Ms. Françoise Hampson and Mr. Emmanuel Decaux.

²³ Sub-Commission *Resolution 2006/2*.

²⁴ Sub-Commission *Resolution 2006/1*.

²⁵ Sub-Commission *Resolution 2006/3*.

²⁶ Sub-Commission *Decision 2006/106*.

²⁷ Sub-Commission *Decision 2006/107*.

²⁸ Sub-Commission *Resolution 2006/4*.

²⁹ Sub-Commission *Resolution 2006/5*.

³⁰ The discussion, which was based on three documents prepared by Sub-Commission experts, focused on issues such as the right to an effective remedy; the universal implementation of international human rights treaties; and the relationship between human rights and State sovereignty. See further E/CN.4/Sub.2/2006/7, *Human rights and State sovereignty* (5 May 2006); A/HRC/Sub.1/58/CRP4, *Expanded working paper on the implementation in practice of the right to an effective remedy for human rights violations* (3 August 2006); and A/HRC/Sub.1/58/5 and add.1, *Final report on universal implementation of international human rights treaties* (28 July 2006).

³¹ *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, HRI/MC/2006/2, (22 March 2006).

human rights treaties as a criterion in its review of States. This opinion was also voiced by Pax Romana, an NGO who also suggested that the pledges and commitments given by States in relation to the election for the Council should be monitored and used in the UPR.

On the right to an effective remedy, Sub-Commission experts were concerned with the lack of *de facto* access to remedies in many countries. The Sub-Commission asked Mr. Mohamed Habib Cherif to conduct a comprehensive study on the right to an effective remedy.³² The inter-sessional Working Group on the Administration of Justice also discussed how amnesties should be used in transitional justice. The main discussion was focused on the difference between the national and the international aspect of giving amnesties. Some members noted that amnesties, if used at all, should only be given to persons responsible for minor violations. Other members replied that sometimes the prospect of amnesties is what leads human rights violators to hand over their power. These experts felt that it should at least be considered that the population in these countries might be more interested in peace and amnesty to the perpetrators than the continuation of a conflict. Ms. Hampson concluded that while giving amnesties might be in national interest, the international community will not accept this, especially when it comes to gross human rights violators. She also highlighted the need for a requirement for truth-telling accompanying any amnesty given. The Sub-Commission requested Mr. Veilles to prepare a working paper on truth and reconciliation mechanisms in Latin America.³³

Another issues raised under Item 3 was the draft international convention for the protection of all persons from enforced disappearance. Ms. Hampson called upon ratifying States to make so-called positive reservations to the convention enhancing the protection level of the text. She presented a specific suggestion that States could make declarations while ratifying the convention agreeing to a number of measures which would enhance the Committee's ability to interview witnesses during in-country visits. Furthermore, she expressed the hope that if these kind of declarations are made, the Committee will set up appropriate working methods to perform this function.

³²
Sub-Commission Resolution 2006/2.

³³
Sub-Commission Decision 2006/107.

³⁴
Sub-Commission Resolution 2006/9.

³⁵
Sub-Commission Resolution 2006/7.

³⁶
E/CN.4/Sub.1/58/L.14 (21 August 2006).

³⁷
A/HRC/Sub.1/58/16 (23 June 2006).

³⁸
Sub-Commission Resolution 2006/9.

Economic, social and cultural rights and transnational corporations

In the discussions on economic, social and cultural rights the following issues were addressed: the Millennium Development Goals (MDGs); globalisation and the effects of poverty; and the methods and activities of transnational corporations (TNCs). The Sub-Commission also discussed increased coordination between international and domestic law when dealing with TNCs; bilateral agreements and their impact on human rights; privatisation and mercenaries; corruption; and poverty. The Sub-Commission adopted a set of norms and guidelines for the promotion and protection of the human rights of the extremely poor.³⁴ In discussing the future of such issues under a future expert body, Mr. Gudmundur Alfredsson recommended that the Working Group on TNCs be absorbed into the responsibilities of the Special Representative of the Secretary-General on TNCs. Issues related to TNCs could be discussed by the future expert body during its plenary sessions. This suggestion was not supported by other Sub-Commission experts, who reiterated the need for a competent body to study the impact of TNCs on human rights. The Sub-Commission passed a Resolution³⁵ recommending that the Council adopt the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with respect to Human Rights*.³⁶

At the Social Forum, Mr. Bengoa led discussions on the subject of implementation of existing human rights norms and standards in the context of the fight against extreme poverty.³⁷ His working paper, which sets out guiding principles on the implementation of human rights norms for persons living in extreme poverty, was further discussed by the Sub-Commission. Although generally commended by Sub-Commission experts, there were some concerns that the text was too 'militant' and appeared to place the 'extremely poor' in a special category which somehow suggested they are more entitled to rights than others. Despite suggestions from Mr. Salama and Mr. Decaux that the Report be sent to the successor body of the Sub-Commission for further consideration, the Sub-Commission adopted the working paper and a resolution recommending that the Council study the principles with a view to adopting them and sending them to the General Assembly.³⁸ The Sub-Commission

also adopted resolutions requesting the continuation of the mandate of the Special Rapporteur on corruption and its impact on the full enjoyment of human rights;³⁹ and the Special Rapporteur on the realisation of the right to drinking water and sanitation.⁴⁰ It requested Ms. O'Connor to complete her concept paper on the right to development.⁴¹ Mr. Guisse was also appointed as Special Rapporteur on the impact of debt on the enjoyment and exercise of human rights.⁴²

Prevention of discrimination

Under Item 5 of its agenda, which covers the prevention of discrimination, the Sub-Commission focused on racism, racial discrimination and xenophobia, as well as the prevention of discrimination and protection of indigenous peoples and minorities. The discussion included the presentation of the Working Papers *Discrimination against leprosy-affected persons and their families*,⁴³ and *Discrimination based on work and descent*,⁴⁴ and the reports of the Sub-Commission's pre-session Working Group on Indigenous Populations⁴⁵ and the inter-session Working Group on Minorities.⁴⁶ The Sub-Commission highlighted the importance of the adoption by the Council of the draft declaration on the rights of indigenous peoples. It also suggested new studies to be undertaken by the future expert body on indigenous populations and national minorities and deliberated on the future of Item 5 under the new future expert body. The Sub-Commission experts were adamant that it is vital to maintain an expert body in some form that was competent to deal with issues relevant to indigenous populations and national minorities. Mr. Alfredsson pointed out that over 200 national minority participants supported the continuation of the inter-session Working Group on Minorities. Mr. Bengoa also noted that the recommendations of the Working Group expressed a clear need for a future reformed body as this is the only body dealing substantively with minorities in the United Nations system. The Sub-Commission recommended the continuation of this Working Group (or a similar expert body) in order to ensure the provision of specialised advice on minority rights issues to the Council.⁴⁷

Likewise, Mr. Yokota pointed to the valuable work of the Working Group on Indigenous

Populations and the fact that the 2006 session had over 583 participants. He emphasised the importance of this Working Group as the most accessible UN body in accepting NGO and indigenous populations without ECOSOC accreditation. Sub-Commission experts expressed support for the draft declaration on the rights of indigenous peoples and called for States to support this declaration at the General Assembly. The Sub-Commission passed a resolution stressing the need for an expert body to provide advice to the Council on the promotion, protection and realisation of rights of indigenous peoples, and recommending the adoption of the draft declaration by the next General Assembly.⁴⁸

The Sub-Commission also adopted resolutions requesting the continuation of the studies on discrimination against leprosy-affected persons and their families⁴⁹ and on discrimination based on work and descent.⁵⁰ Ms. Hampson was also appointed as a Special Rapporteur to carry out a comprehensive study on the legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples.⁵¹

Terrorism and contemporary forms of slavery

Under Item 6 of its agenda,⁵² the Sub-Commission spent most of its time addressing the issues of terrorism and counter-terrorism. Ms. Koufa presented an updated framework of draft principles and guidelines concerning human rights and terrorism to the Sub-Commission.⁵³ The Sub-Commission resolved to transfer these draft principles to the Council and requested Ms. Koufa to update them for the future expert body.⁵⁴

Ms. Hampson presented a working paper on the promotion and protection of human rights when combating terrorism.⁵⁵ The Working Paper identified many problems with judicial cooperation in the fight against terrorism, as well as issues associated with the gathering and admissibility of evidence. The Working Paper stated that many domestic terrorism laws are flawed, as they are either unable to prosecute

39
Sub-Commission Resolution 2006/6.

40
Sub-Commission Resolution 2006/10.

41
Sub-Commission Decision 2006/108.

42
Sub-Commission Decision 2006/111.

43
A/HRC/Sub.1/58/CRP.7
(2 August 2006).

44
A/HRC/Sub.1/58/CRP.2
(28 July 2006).

45
A/HRC/Sub.1/58/22 (14 August 2006).

46
A/HRC/Sub.1/58/19 (16 August 2006).

47
Sub-Commission Resolution 2006/11.

48
Sub-Commission Resolution 2006/13.

49
Sub-Commission Resolution 2006/15.

50
Sub-Commission Resolution 2006/14.

51
Sub-Commission Resolution 2006/16.

52
Specific Human Rights Issues including the Working Group on Terrorism and the Working Group on Contemporary Forms of Slavery.

53
A/HRC/Sub.1/58/30*.

54
Sub-Commission Resolution 2006/20.

55
A/HRC/Sub.1/58/CRP.6
(3 August 2006).

suspected terrorists or are too willing to prosecute people for suspected terrorist offences. One of the important issues identified in the Working Paper is the need for accurate definitions. Several experts questioned how they could define a terrorist act, with one member suggesting that they avoid the debate entirely and rely on the General Assembly to reach a solution. The Sub-Commission also discussed the definition of the victims of terrorism. The members debated the possible inclusion of the families of victims or even the victims of counter-attacks. The Sub-Commission members concluded that their focus was not so much on terrorism itself, but how States respond to terrorism. One member argued that there are certain circumstances when the military has the necessary expertise to respond to a terrorist attack. Other members commented that while the military can be used, they should still operate under police rules and regulations. Some experts considered the identification of the causes of terrorism to be integral to combating terrorism, with one member even suggesting that there should be a State duty to identify the causes of terrorist attacks and why terrorists find support. Many different causes were discussed by the Sub-Commission, including the global distribution of wealth. The experts considered the creation of an international fund to provide reparation to the victims of terrorism.

Sub-Commission member Mr. Abdul Sattar presented the report of the Working Group on Contemporary Forms of Slavery saying that the Working Group had experienced several handicaps this year as a number of NGOs could not participate and many victims of slavery and slavery-like practices who had received travel grants could not come due to revised dates and late announcement of the body's meeting. The session was also reduced to four afternoon meetings instead of the usual ten over five days. The Working Group this year focused on the human rights dimension of prostitution with many NGOs arguing that different national policies and legalisation of prostitution in some countries led to the increase of prostitution usually linked with violence against women, sexual exploitation, and poverty. On the status of the Conventions on Slavery⁵⁶ many experts and some NGOs suggested that a monitoring mandate could be sought for the Working Group, obliging States to provide information on the implementation

of the Slavery Conventions. A positive outcome was the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery's pledge to double the amount given to NGOs working in this field. The report considered at length various alternatives for ensuring that the future expert advice mechanism would effectively address contemporary forms of slavery, in light of the Council's *Decision 2006/102*. A number of possibilities for future reform were proposed, including the continuation of the Working Group in its present form; reinforcement of its monitoring mandate; or the establishment by the Council of a mandate for a Special Rapporteur on Contemporary Forms of Slavery, whose reports would be discussed with the new expert advice body under a permanent agenda Item. The Sub-Commission passed a resolution on the report of the Working Group on Contemporary Forms of Slavery, recommending that the Working Group be maintained and possibly strengthened.⁵⁷

The Sub-Commission also considered the final report by Ms. Barbara Frey on the prevention of human rights violations committed with small arms and light weapons.⁵⁸ This Report raised issues relating to States' responsibilities for the prevention of human rights violations in the context of the use of small arms. A standard of due diligence was introduced in the Report, which emphasised the nature and extent of a State's obligation to adopt effective measures preventing small arms violence rather than merely criminalising acts of armed violence. The Report also notes the need to universally define the principle of self-defence and to limit its application in terms of necessity and proportionality. The draft principles were widely supported by the Sub-Commission experts and were adopted in a resolution.⁵⁹

The Sub-Commission also adopted a resolution calling on the High Commissioner for Human Rights to submit an updated report to the Sub-Commission or to its successor body, on the issues of systematic rape, sexual slavery and slavery-like practices during armed conflicts.⁶⁰ It adopted two resolutions on the protection of civilians during armed conflicts⁶¹ and on the World Programme for Human Rights Education.⁶² Ms. Motoc was requested to submit a final report on human rights and the human genome⁶³ and Mr. Chung to prepare a working paper on the human rights of elderly people.⁶⁴

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Which include the *Slavery Convention*, the protocol amending the *Slavery Convention* signed in Geneva on 25 September 1926, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, the *Forced Labour Convention*, 1930 (No. 29), the *Abolition of Forced Labour Convention*, 1957 (No. 105), the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*.

57

Sub-Commission Resolution 2006/17.

58

A/HRC/Sub.1/58/27 (27 July 2006).

59

Sub-Commission Resolution 2006/22.

60

Sub-Commission Resolution 2006/18.

61

Sub-Commission Resolution 2006/21.

62

Sub-Commission Resolution 2006/19.

63

Sub-Commission Decision 2006/110.

64

Sub-Commission Decision 2006/109.

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