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### STUDY OF THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

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## I. HISTORICAL SURVEY

### A. The concept and some causes of genocide

1. In the preamble of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, it is noted that "at all periods of history genocide has inflicted great losses on humanity". While the concept of genocide is a recent one, the acts which it covers are as old as the history of mankind itself.
2. Without going back to the dawn of man, it can be seen from a number of historical facts that the course of human history has often been marked by cases where national, ethnic, racial or religious groups were destroyed; under the terms of the 1948 Convention, any such act constitutes an essential element of the crime of genocide. 1/
3. While this is not the place to consider the train of massacres perpetrated throughout mankind's history, it is nevertheless desirable to recall the few most important factors which helped to create a climate in which this phenomenon emerged in its true light as a violation of the essential human right from which all others derive: the right to life.
4. Among these factors, war seems to occupy a predominant place. As has been noted, 2/ during antiquity war was often the only form of relations between certain peoples, even between peoples of common origin, and its purpose was generally to annihilate, exterminate or enslave another people. Thus, war opened the door to many excesses and massacres which history has recorded.

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1/ See paras. 49-87 below. Examples of massacres and the extermination of human groups are also mentioned by Raphael Lemkin, Axis Rule in Occupied Europe (Washington D.C., Carnegie Endowment for International Peace, 1944), p. 80; J.Y. Dautricourt, "La prévention du génocide et ses fondements juridiques", Etudes internationales de psycho-sociologie criminelle, No. 14-15 (1969), p. 20; Antonio Planzer, Le crime de génocide (thesis) (St. Gallen, F. Schwald A.G., 1956), pp. 10 and 12; Octavio Colmenares Vargas, El Delito de Genocidio (Mexico City, Editorial Amistad, 1951), pp. 18 et seq.; Eduardo L. Gregorini Clusellas, Genocidio: su prevención y represión (Buenos Aires, Abeledo-Perrot), pp. 11 et seq.; Francisco P. Laplaza, El delito de genocidio o genticidio (Buenos Aires, Ediciones Arayú, 1953), pp. 17-24 and 32; Eligio Sanchez Larios, El Genocidio: Crimen contra la Humanidad (Mexico City, Ediciones Botas, 1966), pp. 259-268; Dr. Bauer, "Considérations sur le génocide", Etudes internationales de psycho-sociologie criminelle, No. 11-12-13 (July 1967), pp. 9-11; see also Robert Jaulin, ed., L'ethnocide à travers les Amériques, Textes et documents (Anthropologie critique, Collection dirigée par Alain Gheerbrant) (Paris, Librairie Arthème Fayard, 1972).

2/ Antonio Planzer, op.cit., p. 9.

5. Although trends towards making war more humane appeared during the Middle Ages, "it required a long period of evolution in civilized society to mark the way from wars of extermination, which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and States". 3/ It is only in modern times that international law has prohibited any war of aggression, 4/ which the Charters of the International Military Tribunals declared to be a crime against peace and, as such, to be condemned. 5/

6. However, it should be noted that, since 1914 war has in fact been transformed more and more into "total war", "military operations having been extended from the purely military plane ... to the economic, commercial, financial and even intellectual planes, to what has been called the 'potential' for war...". 6/

7. The relationship between genocide and total war is sufficiently illustrated by the fact that the crime of genocide was committed in the territories occupied by the Nazis, who were conducting such a war. 7/ The almost limitless destructive power of modern weapons tends to accentuate the exterminatory nature of war, which can lead to the destruction of human groups.

8. Genocide is also considered to occur as a consequence of colonialism. In this connexion, one writer notes that, after having won an easy military victory over indigenous peoples:

"... the colonial troops maintained their authority by terror - by perpetual massacre. These massacres were genocidal in character: they aimed at the destruction of 'a part of an ethnic, national or religious' group, in order to terrorize the remainder and to wrench apart the indigenous society ...". 8/

9. The same writer also observes that the value of indigenous peoples as a work-force receiving almost no remuneration protects them to a certain extent from physical genocide. 9/

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3/ Raphael Lemkin, "Le génocide", Revue internationale de droit pénal, 1946, No. 10, p. 373.

4/ Article I of the Kellogg-Briand Pact of 27 August 1928; article 2, paragraph 4, of the Charter of the United Nations.

5/ Charter of the International Military Tribunal at Nuremberg of 8 August 1945 (article 6 (a) and Charter of the International Military Tribunal for the Far East of 19 January 1946 (article 5 (a)).

6/ Georges Scelle, Cours de droit international public (Paris, Domat Montchrestien, 1948), p. 847.

7/ Lemkin, "Le génocide", Loc. cit.

8/ Jean-Paul Sartre, "On genocide" in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton eds., Crimes of War (New York, Random House, 1971), p. 536.

9/ Ibid.

10. Racism in all its forms is also one of the decisive causes of genocide. It has been noted that:

"... 'exemplary' genocide, if one may use the term, must be distinguished from the concealed, more or less inconspicuous forms of genocide, the cunning and insidious aspects of racism, which prepare the ground for genocide. In short, genocide is only an extreme case of racism. At the same time, racism has many faces, which are sometimes masked and contradictory". 10/

11. There is a close relationship between religious intolerance and genocide. According to one writer:

"... after obtaining the tolerance they sought, the Christians quickly became extremely intolerant towards non-Christians. Some demanded the complete destruction of the heathen ...". 11/

12. Without undertaking a detailed analysis of the genocide committed by the Nazis 12/ which would exceed the scope of this historical survey - it should be noted that the idea of genocide was an integral part of the racist ideology of national socialism and of its conception of war as a means of colonizing the occupied territories after their populations had been exterminated or decimated. The Nazi intention to destroy nations, races and religious groups in accordance with a pre-established plan was manifested well before the Second World War. 13/ However, as one writer has noted, it was the war which offered the Nazis the most appropriate occasion for carrying out their policy of genocide. 14/

13. In order to destroy national, ethnic, racial or religious groups, the Nazi occupying authorities drew up a veritable genocide plan which was adapted to specific situations in the various countries. 15/

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10/ Dr. M. Pariente, "L'approche psychologique du génocide", Etudes internationales de psycho-sociologie criminelle, No. 11, 12 and 13 (1967), p. 19; see also A.N. Trainin, Zashchita mira i borba s prestupleniyami protiv chelovechestva (Moscow, Izdatelstvo Akademii Nauk SSSR, 1956), p. 222.

11/ Dr. Bauer, loc. cit., pp. 12-13.

12/ See paras. 17-27 below.

13/ See, for example, R. Lemkin, "Genocide: a new international crime", Revue internationale de droit pénal, No. 10 (1946), pp. 361-362; O. Wormser-Migot, "Les phases du pré-génocide nazi (1933-1940)", Etudes internationales de psycho-sociologie criminelle, No. 11-12-13 (1967), pp. 3-7.

14/ Lemkin, Axis Rule in Occupied Europe, op. cit., p. 81.

15/ Ibid.

14. On the basis of the evidence gathered for the Nuremberg trial, one writer has described the "delayed-action genocide" committed against the peoples of the Soviet Union and Poland, aimed at sapping their biological vitality, particularly through measures intended to prevent births among those peoples and through forcible transfers of children. He also described the genocide consisting of the extermination of six million Jews and of acts of mass destruction against the peoples of the Soviet Union, the Polish people and the gypsies. 16/

B. Development of the concept of genocide

15. The concept of genocide, as a crime under international law, designed to destroy particular human groups as such, was formulated in scholarly works on the subject of international criminal law, before it came to be embodied in official documents.

16. Some of the premises of this concept were postulated by Professor Raphael Lemkin in a special report to the Fifth International Conference for the Unification of Penal Law, 17/ held at Madrid from 14 to 20 October 1933, in which he proposed that certain acts aimed at destroying a racial, religious or social group should be declared delicta juris gentium. The author of the report considered that such acts should be considered as two separate crimes which, although both aimed at destroying such a group, employ different methods in order to do so: the crime of barbarity, which would consist of attacks against the lives or economic existence of the members of the group, and the crime of vandalism. The latter, involving the destruction of the group's cultural values, would entail: (a) transfer of children to another human group; (b) forced and systematic removal of elements representing the culture of the group; (c) prohibition of the use of the national language, even in private; (d) systematic destruction of books printed in the national language, of religious works, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group, or prohibition of their use. He advocated the conclusion of an international convention to make such acts punishable.

17. Lemkin coined the term "genocide" from the Greek word genos (race, tribe) and the Latin suffix cide (killing), developing a theory of the crime of genocide after thorough research into the inhuman practices followed by Hitler's Germany, according to a set plan, in the occupied countries of Europe during the Second World War, for the purpose of destroying, disintegrating or weakening their peoples and Germanizing their territories. 18/

18. Lemkin defined genocide as follows:

"By 'genocide' we mean the destruction of a nation or of an ethnic group ... Generally speaking, genocide does not necessarily mean the

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16/ See J. Billig, L'Allemagne et le génocide (Plans et réalisations nazis) (Paris, Editions du Centre, 1950), pp. 32-35.

17/ Lemkin, Les actes créant un danger général (interétatique) considérés comme délits de droit des gens (Paris, Pedone, 1933).

18/ See Lemkin, Axis Rule in Occupied Europe, op. cit., p. 79.

immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group." 19/

19. In Lemkin's view, genocide has two phases: destruction of the national pattern of the oppressed group and the imposition of the national pattern of the oppressor. He felt that "denationalization", the word used in the past to describe the destruction of a national pattern, was inadequate, particularly since the term does not connote the physical destruction of the group and the imposition of the national pattern of the oppressor.

20. Lemkin described in detail the techniques of genocide developed by the Nazis in the occupied countries. Genocide was practised in the political, social, cultural, economic, biological, physical, religious and moral fields, and represented a concentrated and co-ordinated attack upon all elements of nationhood. 20/

21. The notion of genocide, and the term itself, were first used officially in documents concerning the criminal liability and the trial of the German major war criminals.

22. The notion of genocide as an international crime begins with the drawing up of the Charter of the International Military Tribunal at Nuremberg. 21/ Under the Charter, the following acts were to be counted as crimes against humanity: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or

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19/ Ibid.

20/ Ibid., pp. 82-90.

21/ See Report of the Ad Hoc Working Group of Experts under Commission Resolution 8 (XXVI), Study concerning the question of apartheid from the point of view of international penal law (document E/CN.4/1075, para. 40).

persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". 22/

23. The indictment of 8 October 1945 against the German major war criminals brought before the Nuremberg Tribunal was the first international document to use the word "genocide". It stated that the defendants:

"conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups ...". 23/

24. Moreover, the concluding speech by the British Prosecutor stated that:

"Genocide was not restricted to extermination of the Jewish people or of the gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, people of the Low Countries and of Norway. The techniques varied from nation to nation, from people to people. The long-term aim was the same in all cases ... The Nazis also used various biological devices, as they have been called, to achieve genocide. They deliberately decreased the birth rate in the occupied countries by sterilization, castration and abortion, by separating husband from wife and men from women and obstructing marriage". 24/

25. Genocide was also referred to in the concluding speech by the French Prosecutor, who condemned the enormity of the crimes of the Nazis as follows:

"The real crime of these men was the conception of the gigantic plan of world domination and the attempt to realize it by every possible means. By every possible means, that is of course, by the breaking of pledges and by unleashing the worst of all wars of aggression, but, above all, by the scientific and systematic extermination of millions of human beings and more especially of certain national or religious groups whose existence hampered the hegemony of the Germanic race. This is a crime so monstrous, so undreamt of in history throughout the Christian era up

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22/ Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (8 August 1945). A similar, but not identical, definition is given in article 5 (c) of the Charter of the International Military Tribunal for the Far East (19 January 1946). On the connexion between genocide and crimes against humanity, see, *inter alia*, S. Glaser, Droit international pénal conventionnel (Brussels, Etablissement Emile Bruylant, 1970), p. 109; A. Planzer, Le crime de génocide (thesis) (St. Gallen, F. Schwald A.G., 1956), pp. 32 and 37.

23/ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Nuremberg, 1947, vol. I, pp. 43-44.

24/ Ibid., vol. XIX, pp. 497-498 (concluding speech by the British Prosecutor, Sir Hartley Shawcross).



to the birth of Hitlerism, that the term 'genocide' has had to be coined to define it and an accumulation of documents and testimonies has been needed to make it credible". 25/

26. Without using the word "genocide" and without alluding directly to that notion, the judgement of the Nuremberg Tribunal of 1 October 1946 none the less said of the heinous crimes committed by the Nazis against whole groups that: "the mass murders and cruelties 'were a part' of a plan to get rid of whole native populations, by expulsion and annihilation, in order that their territory could be used for colonisation by Germans". 26/

27. Later on, the word "genocide" was used in the trials of Nazi war criminals by the national courts of the allies. 27/ For example, in the trial of Ulrich Greifelt and others, 28/ the accused were convicted, inter alia, of crimes against humanity carried out as part of a systematic programme of genocide aimed at the destruction of foreign nations and ethnic groups, in part by extermination and in part by elimination and suppression of national characteristics. In the trial of Gauleiter Artur Greiser, 29/ the defendant was found guilty, inter alia, of repression, genocidal in character, of the religion of the local population by mass murder and incarceration in concentration camps of Polish priests, by restriction of religious practices to a minimum, and by destruction of churches, cemeteries and the property of the Church.

28. Thus, the crime of genocide committed by the Nazis, which aroused the indignation of mankind, can be seen as a decisive element in the train of events which led to United Nations efforts to adopt international measures for preventing a repetition of that crime and ensuring that it was punished. In the Sub-Commission on Prevention of Discrimination and Protection of Minorities, however, it was pointed out that the history of genocide did not end with the crimes committed by the Nazis. 30/

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25/ Ibid., p. 531 (concluding speech by the French Prosecutor, Champetier de Ribes).

26/ Judgement of the International Military Tribunal for the Trial of German Major War Criminals (London, H.M. Stationery Office), p. 52.

27/ See Law Reports of Trials of War Criminals (London, H.M. Stationery Office, 1947-1949), vol. VI, p. 48, vol. VII, pp. 7-9 and 24-26, vol. XIII, pp. 2, 3, 6, 112 and 114, and vol. XV, pp. 122-123.

28/ Ibid., vol. XIII, pp. 1-36 (Case No. 73: Trial of Ulrich Greifelt and others, United States Military Tribunal, Nuremberg, 10 October 1947 - 10 March 1948).

29/ Ibid., p. 112 (Case No. 74: Trial of Gauleiter Artur Greiser, Supreme National Tribunal of Poland, 21 June - 7 July 1946).

30/ E/CN.4/Sub.2/SR.684, p. 160, and SR. 685 pp. 169-170.

II. CONVENTION ON THE PREVENTION AND PUNISHMENT  
OF THE CRIME OF GENOCIDE OF 9 DECEMBER 1948

A. Procedural stages

29. At the second part of its first session, held from 23 October to 15 December 1946, the United Nations General Assembly included on its agenda the item entitled "Resolution on the crime of genocide" and adopted on the subject, on 11 December 1946, resolution 96 (I), which reads as follows:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

"Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

"The punishment of the crime of genocide is a matter of international concern.

"The General Assembly, therefore,

"Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable;

"Invites the Member States to enact the necessary Legislation for the prevention and punishment of this crime;

"Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end;

"Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly."

30. At its fourth session, held from 28 April to 29 March 1947, the Economic and Social Council adopted, on 28 March 1947, resolution 47 (IV) on the crime of genocide, in which it took cognizance of the General Assembly resolution No. 96 (I) and instructed the Secretary-General to undertake "with the assistance of experts

in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly" and "after consultation with the General Assembly Committee on the Development and Codification of International Law and, if feasible, the International Commission on Human Rights, and after reference to all Member Governments for comments" to submit that draft to the next session of the Economic and Social Council.

31. In pursuance of that resolution, the Secretary-General had a preliminary draft convention prepared, and requested three experts - Professors Lemkin, Pella and Donnedieu de Vabres - to give him the assistance of their valuable advice. On the basis of the comments of those experts, the Secretary-General amended and supplemented the preliminary draft, which thus became the draft convention on the prevention and punishment of the crime of genocide, drawn up by the Secretariat, with the assistance of experts in the field of international and criminal law. 1/

32. In accordance with Economic and Social Council resolution 47 (IV), the Secretary-General transmitted the draft, by his letter of 13 June 1947, to the Committee on the Development and Codification of International Law. That Committee's Chairman, by a letter dated 17 June 1947 addressed to the Secretary-General, replied that "the Committee fully realizes the urgency... of organizing co-operation between States with a view to facilitating the speedy prevention and punishment of the crime of genocide". The Committee however "regretted that, in the absence of information as to the views of the Governments, it feels unable at present to express any opinion in the matter". 2/

33. The draft convention was also transmitted to Member States for comments. 3/

34. Consultation with the Commission on Human Rights, which was also mentioned in Council resolution 47 (IV), was not possible, because the Commission did not meet between the fourth and fifth sessions of the Economic and Social Council.

35. At its fifth session, held from 19 July to 17 August 1947, the Economic and Social Council adopted resolution 77 (V) of 6 August 1947, in which, taking note of the fact that the General Assembly Committee on the Development and Codification of International Law and the Commission on Human Rights had not considered the draft convention on the crime of genocide prepared by the Secretariat and that the comments of the Member Governments on that draft convention had not been received in time for consideration at the fifth session of the Economic and Social Council, it decided "to inform the General Assembly that it proposes to proceed as rapidly as possible with the consideration of the question subject to any further instructions of the General Assembly". The

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1/ See E/447, part II, sect. I, II.

2/ Ibid., part III.

3/ For these comments, see A/401 and Add.1-3 and E/623 and Add.1-4.

Council requested the "Secretary General, in the meanwhile, to transmit to the General Assembly the draft convention on the crime of genocide" prepared by the Secretariat.

36. At its second session, the General Assembly adopted resolution 180 (II) of 21 November 1947, in which it declared inter alia that "genocide is an international crime entailing national and international responsibility on the part of individuals and States" and requested "the Economic and Social Council to continue the work it has begun concerning the suppression of the crime of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention...".

37. Taking cognizance of General Assembly resolution 180 (II), the Economic and Social Council at its sixth session, held from 2 February to 11 March 1948, established in resolution 117 (VI) of 3 March 1948 an Ad Hoc Committee composed of the following members of the Council: China, France, Lebanon, Poland, the Union of Soviet Socialist Republics, the United States of America and Venezuela, and instructed it:

(a) To meet at the Headquarters of the United Nations, in order to prepare the draft Convention on the crime of genocide in accordance with the above-mentioned resolution of the General Assembly, and to submit this draft Convention, together with the recommendation of the Commission on Human Rights, thereon, to the next session of the Economic and Social Council; and,

(b) To take into consideration in the preparation of the draft Convention, the draft Convention prepared by the Secretary-General, the comments of the Member Governments on this draft Convention, and other drafts on the matter submitted by any Member Government.

38. The Ad Hoc Committee on Genocide met at Lake Success from 5 April to 10 May 1948 and prepared a report 4/ containing a draft convention on the prevention and punishment of genocide. 5/

39. At its third session, held from 24 May to 18 June 1948, owing to lack of time the Commission on Human Rights was not able to consider thoroughly the draft convention on the prevention and punishment of genocide and therefore was not in a position to make any observations concerning its substance. It expressed the opinion that "the draft convention represents an appropriate basis for urgent consideration and decisive action by the Economic and Social Council and by the General Assembly during their coming sessions." 6/

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4/ Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 6.

5/ Ibid., annex.

6/ Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 2, para. 24.

40. At its seventh session, held from 19 July to 29 August 1948, the Economic and Social Council in resolution 153 (VII) of 26 August 1948 decided to transmit to the General Assembly the draft Convention on the Prevention and Punishment of the Crime of Genocide submitted to the Council in the report of the Ad Hoc Committee on Genocide, together with the remainder of that report and the records of the proceedings of the Council at its seventh session on that subject.

41. At the third session (first part) of the General Assembly, the draft convention prepared by the Ad Hoc Committee was referred to the Sixth Committee. The Sixth Committee examined the draft article by article, as well as the amendments submitted to it, 7/ at its 63rd to 69th meetings, its 71st to 81st meetings, its 91st to 110th meetings and its 128th to 134th meetings. The draft convention as revised by the Sixth Committee, together with certain amendments which had not been accepted by the Committee, was considered by the General Assembly at its 178th and 179th meetings. In resolution 260 A (III) of 9 December 1948, the Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide, which was annexed to the resolution, and proposed it for signature and ratification or accession by Member States in accordance with its article XI.

42. The provisions in the Convention regulating questions of substance relating to the prevention and punishment of the crime of genocide are the following:

#### "ARTICLE I

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

#### "ARTICLE II

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

#### "ARTICLE III

"The following acts shall be punishable:

- (a) Genocide;

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7/ See Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes to the summary records of meetings, pp. 13-25, 26-28, 32 and 34.

- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

#### "ARTICLE IV

"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

#### "ARTICLE V

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

#### "ARTICLE VI

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

#### "ARTICLE VII

"Genocide and the other acts enumerated in article III shall not be considered as political ~~crimes~~ for the purpose of extradition.

"The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

#### "ARTICLE VIII

"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations ~~as they~~ as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

#### B. The definition of genocide (article II of the Convention)

##### 1. The type of definition

43. One of the questions raised during the debate in the Sixth Committee was whether the definition of the crime of genocide should enumerate acts of genocide or whether it should be of a general character. 8/ A general definition proposed

8/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th, 71st and 72nd meetings.

in one amendment, which was withdrawn, read as follows: "Genocide is an attack on life directed against a human group, or against an individual as a member of a human group, on account of the nationality, race, religion or opinions of such group or individual" (A/C.6/224). 2/

44. In favour of a general definition it was argued that the crime of genocide was a new concept, of which history offered few examples, so that omissions would be likely to occur in any enumeration. Moreover, a broad definition would permit each State to take the legislative measures it considered most suitable.

45. It was argued on the other hand that, since genocide as a crime was a new concept, a definition of a general character, might create confusion either by not covering enough ground or by not determining in an adequate manner the nature of acts of genocide. Moreover, a general definition would allow States to decide what acts constituted genocide under their national legislation, with the result that certain acts would be regarded as genocide in some States and not in others. It was further stated that the drafting of a general definition should be deferred until later and should be entrusted to qualified jurists when the concept of genocide became more current.

## 2. Illustrative or exhaustive enumeration of acts of genocide

46. Another question raised during the debate in the Sixth Committee concerning the definition of genocide was whether to adopt an illustrative or an exhaustive definition of acts of genocide. 10/ Two amendments aimed at the adoption of an illustrative definition (A/C.6/232/Rev.1 and A/C.6/223 and Corr.1) were proposed but, after being discussed, were not accepted.

47. Among the arguments advanced in favour of an illustrative enumeration were (a) that it was impossible to give a complete enumeration of acts of genocide **because**, genocide being a new concept, one could not foresee the means to which the perpetrators of that crime might resort, and (b) that a precedent could be found in the Charter of the Nuremberg Tribunal 11/ which, in listing war crimes, used phraseology allowing for the punishment of perpetrators of crimes other than those set forth in the enumeration.

48. It was argued on the other hand that an exhaustive enumeration was necessitated by the principle nulla poena sine lege, which prevailed in national penal legislation, and that it would be impossible to provide for the punishment of

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2/ It should be recalled that elements of a general definition of genocide are to be found in the first preambular paragraph of General Assembly resolution 96 (I): "Genocide is a denial of the right of existence of entire human groups...".

10/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 71st, 72nd and 78th meetings.

11/ Article 6 (b) of the Charter of the Nuremberg Tribunal defines war crimes as violations of the laws or customs of war, which "shall include, but not be limited to" the crimes enumerated thereafter. The definition of crimes against humanity, given in article 6 (c) of the Charter, is also illustrative, as evidenced by the use of the words "other inhumane acts" (see Stefan Glaser, Droit international pénal conventionnel (Brussels, Etablissements Emile Bruylant, 1970), pp. 95 and 104).

crimes not specified in the criminal code. Moreover, an illustrative enumeration would leave each State free to define as genocide acts other than those enumerated, with the unfortunate result that one and the same act might be considered genocide in one country and not in another. It was also observed that an advantage of the exhaustive enumeration method would be that it allowed for the subsequent amendment of the Convention by the addition of further acts to the current enumeration.

3. Genocide as the destruction of a national, ethnic, racial or religious group

(a) The extent of the destruction of a group

49. On the question of the extent to which a group must be destroyed before an act committed with **that** end in view can be termed genocide, it was generally agreed, during the debate in the Sixth Committee, that it was not necessary for the act to be aimed at a group in its entirety. It was sufficient that an act of genocide should have as its purpose the partial destruction of a group. Accordingly, an amendment (A/C.6/228) proposing the insertion of the words "in whole or in part" after the words "to destroy" in the draft of the Ad Hoc Committee on Genocide was adopted. The purpose of the amendment was to make it clear that it was not necessary to kill all the members of a group in order to commit genocide. 12/

50. However, the question was raised whether genocide existed when a single individual was the victim of an act aimed at the destruction of the group. During the elaboration of the Convention, 13/ it was argued that genocide existed as soon as an individual became the victim of an act of genocide; if there was intent to commit the crime, genocide existed even if only a single individual was the victim. The use of the expression "members of the group" in the second paragraph of the article (subparagraphs (a) and (b)) would indicate that genocide occurred as soon as a member of the group was attacked.

51. A number of writers also believe that the Convention should be interpreted as applying to cases of "individual genocide". One writer takes the view that the words "in part", with the confirmation supplied by the reference to "members of the group", would permit the theoretical inference that even an act of individual genocide would be covered by the Convention. Even if in actual cases it was not easy to establish an infallible criterion, since an act of individual genocide would also, of course, be a common crime, the principle should be accepted. The same writer notes that the question would arise only in rare and rather hypothetical border-line cases. 14/

12/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 73rd meeting.

13/ Ibid., 69th and 73rd meetings. See also the amendment reproduced in paragraph 43 above.

14/ See Antonio Planzer, op. cit., pp. 86, 93-94. Another writer observes: "With regard to genocide, it seems to me that it was the definite intention... of the Genocide Convention... to recognize as genocide even cases where the act (killing, etc.) was committed against a single member of one of the specified groups, with intent to destroy it in whole or in part" (Stefan Glaser, op. cit., p. 112.



52. Another writer believes that, even though the purpose of the Convention is the prevention and punishment of acts of genocide directed against large numbers of persons, nothing in the Convention would prohibit interpreting its provisions and applying them to individual cases of murder. Any such murder should be termed genocide if it was committed by reason of the fact that the victim was a member of one of the groups specified in the Convention and with the intent to commit similar acts in the future and in connexion with the first crime. The material consideration was that the mens rea of the culprit must be directed against the life of more than one member of the group, even though the result was limited to one casualty. 15/

53. It was argued on the other hand that, where a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be, since the concept of genocide was characterized by the intention to attack a group. In addition, it was noted that, inasmuch as each individual was in fact a member of a group, it would be difficult to establish whether or not the murder of an individual was genocide. 16/

54. The Special Rapporteur does not consider it necessary to take a position in this controversy. However, he has serious doubts as to the utility of a broad interpretation of the Convention, the prime object of which is clearly defined: the prevention and punishment of genocide as an act committed with intent to destroy a large number of persons belonging to the groups specified or the group in its entirety. It must also be borne in mind that, according to the Convention, the punishable act must have been committed, or at least attempted.

(b) The groups protected

55. The 1948 Convention enumerates as the groups protected national, ethnical, racial or religious groups, without defining the meaning of those terms.

56. During the elaboration of the Convention, it was observed that genocide should generally be regarded as a crime committed against a group of individuals permanently possessing certain common features. Such groups should be easily identifiable by racial or national features, because they constituted **distinct**, clearly determinable communities. 17/

57. One writer considers that each of the concepts "national", "ethnical" and "racial" used by the 1948 Convention has a distinct meaning:

"What characterizes a nation is not only a community of political destiny, but, above all, a community marked by distinct historical and cultural links or features. On the other hand, a 'territorial' or 'state'

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15/ See Pieter N. Drost, The Crime of State: Book II, Genocide (Leyden, A.W. Sythoff, 1959), pp. 84-86; cf. Octavio Colmenares Vargas, op. cit., p. 31; Eduardo L. Gregorini Clusellas, op. cit., pp. 27-28.

16/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 73rd meeting. See also Francisco P. Laplaza, op. cit., p. 77; Nicolas Jacob, "A propos de la définition juridique du génocide", Etudes internationales de psycho-sociologie criminelle, No. 16-17 (1969), p.56.

17/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 64th, 66th and 74th meetings. See also Antonio Planzer, op. cit., p. 97.

link (with the State) does not appear to me to be essential. 'Race' means a category of persons who are distinguished by common and constant, and therefore hereditary, features. The concept 'ethnic' has a wider meaning; it designates a community of persons linked by the same customs, the same language and the same race (from the Greek ethnos = people)." 18/

58. However, defining the groups referred to in article II of the Convention seems to raise some problems, as does their limited number.

(i) National group

National group and national origin

59. Obviously, a national group comprises persons of a common national origin. The latter expression "national origin" is used, for example, in article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965). In defining "racial discrimination", the Convention refers to distinctions, exclusions, restrictions or preferences based, inter alia, on descent or national or ethnic origin.

60. During the elaboration of the final text of that article by the Third Committee, several proposals, which were not adopted, sought to specify the meaning of the words "national or ethnic origin". One proposal would have had the actual text of the Convention state that the expression "national origin" did not mean "nationality" or "citizenship". 19/ Another proposal sought to eliminate the word "national" and to insert, after the words "ethnic origin", a reference to nationalities in multinational States, by applying the term "nationalities" to citizens of different ethnic and cultural origins. 20/ Those proposals were intended to specify that the words "national origin" were used not in the politico-legal use of "nationality", but in a sociological sense.

61. It was argued on the other hand, that such specifications in the actual text of the Convention were not necessary. The words "national origin" and "nationality" had been widely used in international instruments and in literature as relating, not to persons who were citizens of or held passports issued by a given State, but to those having a certain culture, language and traditional way of life peculiar to a nation but living within another State. 21/ Furthermore, the opinion was

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18/ Stefan Glaser, op. cit., pp. 111-112.

19/ See A/C.3/L.1212.

20/ A/C.3/L.1226 and Corr.1.

21/ Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th meeting, para. 13.

expressed that "national origin" differed from "nationality" in that national origin related to the past - the previous nationality or geographical region of the individual - while nationality related to present status. "National origin" was narrower in scope than "ethnic origin"; the latter implied the existence of racial and cultural characteristics. 22/

62. Another opinion, however, was that "national origin" might also be equated with the term "nationality", which in many countries had a very specific legal meaning. 23/

63. One writer, discussing the International Convention on the Elimination of All Forms of Racial Discrimination, has expressed the opinion that:

"For the practical purposes of the interpretation of the Convention of 1965, the three terms 'descent', 'national origin' and 'ethnic origin' among them cover distinctions both on the ground of present or previous 'nationality' in the ethnographical sense and on the ground of previous nationality in the 'politico-legal' sense of citizenship." 24/

64. This distinction between "national origin" and "nationality" also seems evident from paragraphs 2 and 3 of article 1 of the 1965 Convention, 25/ which refer to "nationality" as a person's current political and legal status.

#### National group and national minorities

65. Another question which appears to warrant consideration is the relationship between the expressions "national group" and "national minorities". One opinion expressed during the elaboration of the Genocide Convention by the Sixth Committee was that "national group" meant the same as "national minorities". 26/ Similarities or analogies can be established between national groups and national minorities. A definition of "national minorities" could therefore serve to clarify the meaning of the expression "national group" used by the 1948 Convention.

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22/ Ibid., para. 23.

23/ Ibid., para. 15.

24/ Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", The International and Comparative Law Quarterly, vol. 15, No. 5 (October 1966), p.1007.

25/ Article 1, paragraph 2, reads as follows:

"This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

Paragraph 3 reads:

"Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

26/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 74th meeting.

66. There have been a number of attempts by the Sub-Commission to elaborate a definition of the term "minority", but the Commission on Human Rights has never taken a decision on the question. 27/

67. According to one definition submitted by the Sub-Commission, 28/ the term "minority" includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.

68. In the study on the rights of persons belonging to ethnic, religious and linguistic minorities, Mr. Francesco Capotorti, Special Rapporteur appointed by the Sub-Commission for the purpose of preparing that study, offered "a tentative definition of the term 'minority'":

"10. The Special Rapporteur wishes to emphasize that the definition he proposes is limited in its objective. It is drawn up solely with the application of article 27 of the Covenant in mind. In that precise context, the term "minority" may be taken to refer to: 'A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'." 29/

(ii) Ethnic group and racial group

69. During the elaboration of the Genocide Convention it was stated, inter alia, that the intended purpose of the addition of the ethnic group, which was mentioned in the draft convention produced by the Ad Hoc Committee on Genocide, was to protect groups not specifically included in the categories of national or racial group. One opinion was that an ethnic group was a subgroup of a national group, a smaller collectivity than the nation. Other members were of the opinion that the words "ethnic" and "racial" had the same meaning. 30/

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27/ The various attempts the Sub-Commission has made with a view to elaborating a definition of minorities are presented in the study on the rights of persons belonging to ethnic, religious and linguistic minorities (see E/CN.4/Sub.2/384/Add. 1, paras. 3-8).

28/ E/CN.4/Sub.2/384/Add.1, para. 4.

29/ On the relationship between the prevention and punishment of genocide and the protection of minorities, see Erica-Irene A. Daes, "Protection of Minorities under the International Bill of Human Rights and the Genocide Convention", Festschrift für Pan J. Zepos, vol. II, (Athens, Editions Katzikalis, 1973).

30/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 74th and 75th meetings.

70. Similar opinions on the difficulty of distinguishing between "ethnic" and "racial" were expressed during the consideration by the Sub-Commission of a draft resolution on the definition of minorities, in 1950. Some members felt that the word "ethnic" related to all the biological, cultural and historical characteristics of a group, while the word "racial" related only to hereditary and physical characteristics. In that connexion, it was argued that in the 1948 Genocide Convention the term "ethnic" was used to qualify the cultural, physical and historical characteristics of a group. 31/

71. Writers on legal topics have also argued that it is difficult to distinguish between ethnic and racial groups as referred to in article II of the Genocide 32/ Convention or that the terms "ethnic" and "racial" are identical, 33/ or that the concept of an "ethnic" group includes that of a "racial" group. 34/

72. Several writers who have dealt with questions relating to race have tried to establish a distinction between the terms "race" and "ethnic".

73. One writer states:

"By race we mean a group of persons with certain physical characteristics which are hereditarily transmissible. Ethnic groups are descent groups, differentiated by language, culture, style, national origin, kinship ties and religious belief". 35/

74. The concept of race was the subject of UNESCO-sponsored studies which resulted in several statements on the race question. 36/ According to the 1950 statement (paragraph 4), the term "race":

"...designates a group of population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and/or cultural isolation". 37/

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31/ E/CN.4/Sub.2/SR.48; E/CN.4/Sub.2/119, para. 39.

32/ Adolfo Miaja de la Muela, "El genocidio, delito internacional", Revista española de Derecho Internacional, vol. IV, No. 2 (1951), p. 376.

33/ Octavio Colmenares Vargas, op. cit., pp. 53-54.

34/ J. Y. Dautricourt, loc. cit., p. 22; Pieter N. Dröst, op. cit., p. 62.

35/ J. Massiah, "Ethnic Structure of the West Indies", paper submitted to the seminar "Caribbean Background II" held in 1970 by the Centre for Multiracial Studies in Barbados, p.1. See also Richard M. Burkey, "Discrimination and racial relations: a theoretical perspective", Report on the International Research Conference on Race Relations, Aspen, Colorado, 7-9 June 1970, p. 62.

36/ These statements were prepared by groups of experts brought together by UNESCO in 1950, 1951, 1964 and 1967, as part of its programme to make the scientific facts known. See Four Statements on the Race Question, (Paris, UNESCO, 1969).

37/ Ibid., pp. 30-31.

75. However, it is further stated (paragraph 6) that:

"National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connexion with racial traits. Because serious errors of this kind are habitually committed when the term 'race' is used in popular parlance, it would be better when speaking of human races to drop the term 'race' altogether and speak of ethnic groups." 38/

76. It has, however, been observed that:

"Despite the emotional overtones which attach to the term 'race' and despite the difficulties involved in scientific racial classification, the fact also remains that groups differ in their possession of certain inherited physical characteristics". 39/

At the same time, note was taken of the tendency, especially in writings and publications on race relations, to equate "race" simply with descent from a common stock. Under the heading of "race relations" such works and publications deal not only with relations between groups of a different colour, but also, inter alia, with relations between tribes, between castes, between different ethnic, linguistic or religious groups and between nationalities (in the sense, not signifying citizenship, in which the word is used in the Soviet Union and certain countries of Eastern Europe). 40/

(iii) Religious group

77. In 1967, when it began its consideration of the draft International Convention on the Elimination of All Forms of Intolerance and **of Discrimination Based on Religion or Belief**, the Third Committee of the General Assembly adopted the text of article 1, which provides, inter alia, that "For the purpose of this Convention: (a) the expression 'religion or belief' shall include theistic, non-theistic and atheistic beliefs...". 41/

78. One writer states that religious groups as referred to in the 1948 Convention include "any religious community united by a single spiritual ideal". 42/

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38/ Ibid., p. 31. With respect to the popular use of the term "race", the statement noted, in paragraph 5, that national, religious, geographic and cultural groups have wrongly been called "races".

39/ Implementation of resolution VII of the International Conference on Human Rights, entitled "Establishment of a new, additional United Nations programme on racial discrimination, review of studies of problems of race relations and of the creation and maintenance of racial attitudes, report by the Secretary-General (E/CN.4/1105), p. 46.

40/ Ibid., para. 56.

41/ See A/8330, paras. 16-20.

42/ Antonio Planzer, op. cit., p. 98. Cf. also Octavio Colmenares Vargas, op. cit., pp. 59-60.

(c) The problem of political groups

79. The Sixth Committee decided not to include political groups among the groups protected by the Convention. This problem gave rise to a lengthy debate in the Sixth Committee. 43/

80. The arguments advanced against the inclusion of political groups were, in essence, the following: (a) a political group had no stable, permanent and clear-cut characteristics in that it did not constitute an inevitable and homogeneous grouping, being based on the will of its members and not on factors independent of that will; (b) the inclusion of political groups would preclude the acceptance of the Convention by the greatest possible number of States and the acceptance of an international criminal jurisdiction, because it would involve the United Nations in the internal political ~~struggles~~ of each country; (c) such inclusion would create difficulties for legally established Governments in their preventive actions against subversive elements; (d) the protection of political groups would raise the question of protection under the Convention for economic 44/ and professional groups; (e) the protection of political and other groups should be ensured outside the Convention, under national legislation and the Universal Declaration of Human Rights.

81. In support of the inclusion of political groups it was argued that they should be treated like religious groups, a distinguishing mark of both types of group being the common ideal which united their members. Specific examples culled from the recent history of nazism proved that political groups were perfectly identifiable and, given the persecution to which they were subjected in an age of ideological conflict, their protection was essential.

82. One non-governmental organization considered that "the definition of genocide should be extended to include acts done with the intent to destroy in whole or in part a political group as such, as well as national, ethnic, racial or religious groups. The massacre of unarmed political opponents is just as criminal as the massacre of these other groups, and should be recognized as such." 45/

83. In the view of another non-governmental organization, a serious omission in the 1948 Convention with regard to the concept of genocide was the fact that acts of aggression with intent to destroy political groups were not mentioned as constituting acts of genocide. 46/

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43/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th, 74th, 75th and 128th meetings.

44/ A proposal (A/C.6/214) to include economic groups (69th meeting) was subsequently withdrawn (75th meeting).

45/ Information received on 15 January 1973 from the International Commission of Jurists.

46/ Information received on 30 January 1973 from the Société internationale de prophylaxie criminelle.

84. A number of writers consider that political groups should have been included in article II of the 1948 Convention. 47/

85. One writer believes that the Convention should have protected all human groups in general. He argues as follows:

"The Genocide Convention extends penal protection to national, ethnical, racial and religious minorities by providing safeguards under international criminal law for the human rights and fundamental freedoms of the members of these minorities. The argument that inclusion of political groups or of economic, social and cultural groups under the scope of the Convention would involve problems of the protection of minorities and the promotion of a respect for human rights any more than the four groups actually protected under the present Article II, serves merely as a pretext against the principle of international penal safeguards in general.

"By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loop-hole for any Government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state. If perhaps political reasons cannot be adduced as proper excuse for the genocidal measures against a group protected under Article II, then very likely such governmental policy will be defended on economic, social or cultural grounds. The national, ethnical, racial or religious character of the group in such case does not constitute the object of the alleged acts of destruction but the measures are said to be taken against the same persons as members of an economic, social or cultural, i.e. unprotected, group." 48/

86. And he concludes that:

"... the crime of genocide in its most serious form is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such." 49/

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47/ Stefan Glaser, op. cit. p. 112; Stanislaw Flawski, Etude des principes fondamentaux du droit international pénal (Paris, Librairie générale de droit et de jurisprudence, 1972), p. 114; Antonio Planzer, op. cit., p. 80; Nicolas Jacob, op. cit., p. 56; Francisco P. Laplaza, op. cit., p. 80; Miaja de la Muela, loc. cit., pp. 376-378.

48/ Pieter N. Drost, op. cit., pp. 122-123.

49/ Ibid., p. 125.



87. Should the adoption of new international instruments on genocide be contemplated the Special Rapporteur is of the opinion that it would not be desirable to include political and other groups among the protected groups, in that a consequence of such inclusion would be to prevent some States from becoming parties to the new instruments. He also believes that other international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, effectively protect political groups, without jeopardizing the objectives pursued with regard to the prevention and punishment of the crime of genocide.

#### 4. Acts constituting the crime of genocide

88. The acts enumerated in subparagraphs (a) to (d) of article II (quoted in paragraph 37 above) are acts of physical genocide (killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part) and of biological genocide (imposing measures intended to prevent births within the group). 50/

89. With regard to the act of genocide referred to in subparagraph (e) - forcibly transferring children of the group to another group - it should be mentioned that, in the draft Convention prepared by the Secretary-General, this act was classified under the heading of cultural genocide. 51/

90. During the debate in the Sixth Committee 52/ it was argued, in support of an amendment (A/C.6/242) which was eventually accepted and which proposed the inclusion of that act in article II, that the forced transfer of children had physical and biological effects since it imposed on young persons conditions of life likely to cause them serious harm or even death. The forced transfer of children could be as effective a means of destroying a human group as that of imposing measures intended to prevent births or inflicting conditions of life likely to cause death. Since measures to prevent births had been **condemned** as an act of genocide, there was **reason also to condemn measures intended to destroy** a new generation, such action being connected with the destruction of a group, that is to say with physical genocide (or, according to the classification in the Secretary-General's draft, with biological genocide). 53/

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50/ See the comments on the draft convention prepared by the Secretary-General (E/447, pp. 25-26).

51/ See article I, para. 3 (a), of the draft (E/447). The comment on this text states that "The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents'. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time." (E/447, p. 27).

52/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 82nd meeting.

53/ For similar arguments, see Antonio Planzer, op. cit., pp. 90-91; Eduardo L. Gregorini Clusellas, op. cit., p. 26.

91. Some objections were raised to the inclusion of subparagraph (e), on the ground that it was justifiable neither from the historical nor from the legal point of view. In historical cases of the forced transfer of children, the aim had been to enslave the children for economic reasons. If the children later died in the performance of their labour, their deaths could not be directly attributed to their abduction, but would be covered by subparagraph (c) of the article. From the legal point of view, the inclusion of such transfers would go far beyond the other provisions of article II, which was concerned exclusively with the physical destruction of groups. The forced transfer of individuals with a view to their assimilation into another group would constitute cultural genocide. 54/

92. One writer believes that forcibly transferring children of one group to another could constitute a crime against human or minority rights or, one might say, against humanity. The aim of such a transfer would not be the actual destruction of the generation. Consequently, it would not be a true case of genocide. 55/

93. During the debate in the Sixth Committee on acts constituting the crime of genocide, a proposal was made for the addition to the enumeration of such acts of the following: "Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" (A/C.6/234). That proposal was not accepted, on the ground that the act to which it referred did not fall within the definition of genocide. 56/

94. It should be mentioned that in article II (b), the words "or mental" did not appear in the draft of the Ad Hoc Committee on Genocide. They were added as the result of the adoption of a proposal for their insertions (A/C.6/244) in order to include acts of genocide committed through the use of narcotic drugs. 57/

95. According to one writer:

"The five acts of genocide enumerated in Article II do not cover all possible ways and means of intentionally destroying a human group as such. Deliberate destruction of a human group may well take the form of deportation or mass displacement, of internment and enslavement with forced labour, or denationalization by systematic terrorism, torture, inhuman treatment and physical intimidation measures. 58/

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54/ For similar arguments, see Stefan Glaser, op. cit., p. 110.

55/ Jean Graven, "Les crimes contre l'humanité", Académie de droit international de la Haye, Recueil des cours, 1950, vol. I, pp. 501-502 (translation into English by the Secretariat).

56/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 82nd meeting.

57/ Ibid., 81st meeting. See also the report of the Sixth Committee (A/760 and Corr.2), para. 10.

58/ Pieter N. Drost, op. cit., p. 124.

5. The subjective element

(a) Intent

96. During the debate in the Sixth Committee it was pointed out, inter alia, that what distinguished genocide from the common crime of murder was the intention to destroy a group.<sup>59/</sup> Genocide was characterized by the factor of particular intent (dolus specialis) to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the Convention, that act could still not be called genocide. <sup>60/</sup>

97. According to one writer:

"... measures resulting in the partial or total destruction of a group but taken without the intention of such purpose and result do not fall under the definition and therefore do not constitute acts of genocide under the Convention. An act of destruction can be punished as genocide under the terms of Article II when the intent to destroy the human group involved can be proven regardless of the results of the deed." <sup>61/</sup>

98. It should be pointed out in this context that a proposal to replace the words "committed with the intent to destroy" by the words "aimed at the physical destruction of" groups (A/C.6/223) was not accepted. It was explained that the proposal stemmed from the fact that the perpetrators of acts of genocide would in certain cases be able to claim that they were not guilty of genocide, having had no intent to destroy a given group, either wholly or partially. Accordingly, the purpose of the amendment was to guard against the possibility that the presence in the definition of the word "intent" might be used as a pretext, in the future, for pleading not guilty on the grounds of absence of intent. In the circumstances, the objective concept seemed to be more effective than the subjective concept. Acts of genocide should therefore be defined as acts "resulting in" the destruction of a group. In opposition to the proposal, it was observed that elimination of the intent to destroy a group would make it impossible to draw a distinction between genocide and ordinary murder. <sup>62/</sup>

99. One writer believes that because of the inclusion of the concept of particular intent:

"...the legal definition of genocide given in the 1948 Convention is particularly deficient. An objective definition of genocide should have been given, not one based on the ascertainment of intent.... And it is my belief

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<sup>59/</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th meeting.

<sup>60/</sup> Ibid., 72nd meeting.

<sup>61/</sup> Pieter N. Drost, op. cit., p. 82; for similar arguments, see also Nehemiah Robinson, Genocide Convention: A commentary, Institute of Jewish Affairs, World Jewish Congress, New York, 1960, p. 59.

<sup>62/</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 73rd meeting.

that the Genocide Convention, in failing to condemn in objective terms attempts against the life of human groups, has failed in its purpose and can never achieve the slightest impact or the slightest effectiveness." 63/

100. However, in the view of the Special Rapporteur, the elimination of the element of intent would efface any distinction between genocide and ordinary murder and also, as will be explained below (paragraph 384), between genocide and war crimes.

(b) Motive

101. The question whether the definition of genocide should cover not only the element of intent but also the motive of the crime 64/ was a subject of controversy, during the elaboration of the Convention by the Sixth Committee. 65/

102. It was argued, in support of a proposal for the inclusion in the definition of genocide of a reference to racial, national and religious grounds (A/C.6/223 and Corr.1), that the idea of genocide already implied the concept of motives. Deletion of a statement of motives would result in a mutilated definition, not covering the particular cases which it was desired to bring within the scope of the Convention. Only an express reference to motives could make clear and unequivocal the difference between a crime under ordinary law and genocide.

103. According to one writer, motive and intent are so linked in the case of genocide that it would be appropriate to refer to "intent-motive". In the special case of genocide, it would appear justifiable to depart from traditional criminal doctrine and to consider motive a constituent element of the crime. 66/

104. In opposition to the above-mentioned proposal, it was argued that a statement of motive would result in a definition which would allow the guilty parties to claim that they had not acted under the impulse of one of the motives held to be necessary to prove genocide. In most countries, the penal code did not regard motive, but only intent and act, as constituent elements of a crime.

105. The words "as such" which were inserted in the text as the result of the adoption of an amendment (A/C.6/231), were considered by the sponsor of the amendment and some members of the Sixth Committee to include the motives for genocide. Other representatives stated, on the contrary, that those words stressed the element of intention but did include the motives. In view of that difference of opinion, it was decided that a statement should be included in the report of the Sixth Committee to the effect that the Committee, in taking a decision on any proposal, did not necessarily adopt the interpretation given by its author. 67/

63/ Nicolas Jacob, op. cit., p. 56.

64/ In the draft of the Ad Hoc Committee on Genocide, motive appeared in the text of article II (E/794, p. 13).

65/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 75th, 76th and 77th meetings.

66/ Vespasien Pella, Actes de la VIIIe Conférence de Bruxelles pour l'unification du droit pénal (Paris, Pedone, 1949), p. 216.

67/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 76th and 77th meetings.

106. One writer considers, in the light of the discussion in the Sixth Committee and the fact that the Committee did not take any stand with regard to the interpretation of the words "as such", that those words do not imply any inclusion of motives in the definition of genocide:

"In the absence of any words to the contrary the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime. Whatever the ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected group, whenever the destruction of human life of members of the group as such takes place, the crime of genocide, is being committed."<sup>68/</sup>

C. Acts punishable under the Convention (article III of the Convention)

1. Some problems concerning the text of article III

107. According to subparagraph (a) of this article, it is the commission of acts of genocide which is punishable under the Convention. One writer argues that "in certain cases, particularly that of genocides by the infliction of inhuman conditions of life, the crime may be perpetrated by omission".<sup>69/</sup> Another writer regards "the absence of any express mention of omission" as a lacuna in the Convention. He goes on to say:

"Experience proves that a state of war or a military occupation régime gives authorities a convenient pretext not to provide a population or a group with what they need to subsist: - food, medicines, clothing, housing - although those authorities had the power and the duty to do so.

"It will be argued that this is inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. But the text requires that it should be done 'deliberately', and it will often be impossible or very difficult to prove that **this** was so.

"Another case of omission is the act of an authority which, by virtue of its functions, should and could have known **but** nevertheless allowed subordinates to massacre and torture prisoners, claiming ignorance of the acts."<sup>70/</sup>

108. So far as subparagraph (c) of article III is concerned, there was a proposal, which was not accepted, that incitement to genocide should be deleted from the acts punishable under the Convention. It was argued, in support of the proposal, that direct incitement was merely one aspect of an attempt or overt act of conspiracy. Moreover, the retention of incitement would give rise to dangerous repercussions in the field of freedom of speech of the press and might serve to encourage needless repressive measures. The text on incitement could be interpreted in many different ways and would give rise to practical difficulties in adapting the Convention to certain domestic legal systems.

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<sup>68/</sup> Pieter N. Drost, op. cit., p. 84; see also Antonio Planzer, op. cit., p. 95.

<sup>69/</sup> Stanislas Plawski, op. cit., p. 115.

<sup>70/</sup> J. Y. Dautricourt, loc. cit., pp. 22-23.

109. It was argued, on the other hand, that the Convention would lose its preventive effect if incitement was not made a punishable act. Freedom of speech could not in any way imply a right to incite people to commit a crime. <sup>71/</sup> In the Convention the aim of which was to define, prevent and punish a crime such as genocide, the perpetration of which could in all cases be traced back to the arousing of racial, national or religious hatred, could not exclude from the enumeration of punishable acts direct incitement, which many national legal systems punished in the case of other crimes. <sup>71/</sup>

110. One writer observes:

"The definition of direct and public incitement, however, may be somewhat vague. The implementary laws will have to spell it out in greater detail, otherwise the definition will have to be left to the courts." <sup>72/</sup>

111. As to the article as a whole, it is appropriate to reproduce the following statement by a representative which was recorded in the report of the Sixth Committee:

"The discussion at the beginning of this meeting seems to me to have shown that the significance of the terms corresponding to the French and English expressions here in question - incitement, conspiracy, attempt, complicity, etc. - is subject to certain variations in many systems of criminal law represented here. When these expressions have to be translated in order to introduce the text of the Convention into our different criminal codes in other languages, it will no doubt be necessary to resign ourselves to the fact that certain differences in meaning are inevitable. It would therefore be advisable to indicate in the Committee's report that article IV of the Convention does not bind signatory States to punish the various types of acts to a greater extent than the corresponding acts aimed at the most serious crimes, as, for example, murder and high treason, already recognized under national laws.

"I will not enter here into the details of Swedish legislation which moreover, does not present too great difficulties in this respect, but I find it necessary to formulate, somewhere, my reservation on this subject." <sup>73/</sup>

112. Several writers have made comments similar to the statement reproduced above. <sup>74/</sup>

<sup>71/</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 84th and 85th meetings.

<sup>72/</sup> Nehemiah Robinson, op. cit., p. 67; see also Joseph Kunz, "The United Nations Convention on Genocide", American Journal of International Law, vol. 43, No. 4 (October 1949), p. 739.

<sup>73/</sup> A/760 and Corr.2, para. 12. The article IV referred to in the statement was renumbered in the Convention as article III.

<sup>74/</sup> Joseph Kunz, op. cit., p. 739; Pieter N. Drost, op. cit., pp. 125 and 126; Nehemiah Robinson, op. cit., pp. 67-68.

## 2. Preparatory acts

113. A proposal submitted to the Sixth Committee (A/C.6/215/Rev.1), which was not accepted, would have added to the text of article III a new subparagraph reading as follows:

"The preparatory acts for committing genocide in the form of studies and research for the purpose of developing the technique of genocide: setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders and distributing tasks with a view to committing genocide." 75/

114. During the debate 76/ mention was made, in support of the adoption of this proposal, of the historical experience of Nazi crimes of genocide, the special nature of the crime, the search for the most effective prevention possible, and the fact that preparatory acts were punishable under the national legal systems of several countries.

115. It was argued in opposition to the proposal that, in the most serious cases, conspiracy, attempt and complicity would suffice to cover preparatory acts. Furthermore, the penal laws of many countries did not provide for the punishment of preparatory acts and their inclusion could prevent many States from accepting the Convention.

116. One writer considers it most regrettable that the punishment of direct preparatory acts was not included in the Convention. He goes on to say:

"Covering such acts does not mean 'getting away from the crime itself'; on the contrary, it means getting nearer to it, grasping it more closely, going to the heart of it... There must be ways to lay hold of a crime and if possible prevent it as soon as it is embarked upon, without waiting for it to be committed." 77/

## 3. Public propaganda in favour of genocide

117. According to an amendment (A/C.6/215/Rev.1), which was not accepted, the text of article III should have included a subparagraph making punishable as acts of genocide "All forms of public propaganda (press, radio, cinema etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide." 78/

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75/ A similarly worded text had appeared in the Secretary-General's draft (article II, E/447, p. 7) but had been rejected by the Ad Hoc Committee on Genocide.

76/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 86th meeting.

77/ Jean Graven, "Sur la prévention du crime de génocide: Réflexions d'un juriste", Etudes internationales de psycho-sociologie criminelle, No. 14-15 (1968), p. 12; by the same author, "Les crimes contre l'humanité," loc. cit., p. 66. For similar arguments, see Antonio Planzer, op. cit., p. 118.

78/ The Secretary-General's draft (E/447) contained provisions whereby propaganda in favour of genocide was declared punishable.

118. It was argued 79/ in favour of this proposal, that such public propaganda was a cause of acts of genocide. The Convention would not fulfil its preventive function unless it declared public propaganda in favour of genocide to be punishable. The proposal to make propaganda punishable would not duplicate the provision concerning incitement to genocide, which covered incitement to a crime committed at a particular time and in a particular place, whereas the propaganda defined by the proposal took the form of popular education and of moulding public opinion with a view to developing racial, national or religious hatred. The prohibition of propaganda in favour of genocide would not endanger freedom of information, because information preaching hate should not be permitted; groups, like individuals, were entitled to protection against libel and slander. Mention was also made of the danger of public propaganda for hatred that might be sufficiently orchestrated and repeated to lead not only to genocide but to war.

119. In opposition to the proposal, it was argued that it would be difficult to imagine propaganda in favour of genocide which would not at the same time constitute incitement to that crime. The Genocide Convention could not provide for the suppression of the forms of public propaganda "aimed at inciting racial, national or religious enmities or hatreds", as the intention to destroy a specific group, which was an essential part of the definition of genocide, would be absent. As for the other forms of propaganda covered by the amendment, their punishment would be ensured by subparagraph (c) of the article. Adoption of provisions relating to public propaganda in favour of genocide would endanger freedom of the press and freedom of speech.

120. One writer, in regretting the omission from the text of article III of propaganda in favour of genocide, endorses the arguments advanced in the Sixth Committee in favour of making it a punishable offence. 80/

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79/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 86th and 87th meetings.

80/ See Jean Graven, loc. cit., pp. 9-11.



121. Another writer takes the view that, since that kind of propaganda is punishable under the legislation of certain countries (and he mentions the penal codes of Denmark, Norway, Sweden, Poland and Brazil), "the inclusion of propaganda as an offence would have completed the provisions for the prevention of genocide". 81/

122. It should be noted that, under article 4 (a) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, States Parties:

"Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

123. The second international congress of the Société internationale de prophylaxie criminelle on the prevention of genocide (Paris, 10-13 July 1967) expressed the hope that:

"... national penal laws will rigorously punish any incitement to hatred or contempt for a human group, any defamation of such a group, any propaganda in favour of racial, religious, social or other discrimination... within the national territory or abroad". 82/

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81/ Antonio Planzer, op. cit., pp. 113-114.

82/ Resolution No. 5, Etudes internationales de psycho-sociologie criminelle, No. 14-15 (1968), p. 78.

D. Criminal responsibility (article IV of the Convention)

1. Preparation of the article

124. Article IV of the 1948 Convention provides as follows:

"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

125. In the draft convention prepared by the Secretary-General, the same article was drafted as follows:

"Those committing genocide shall be punished, be they rulers, public officials or private individuals." 83/

126. The Ad Hoc Committee on Genocide adopted the following text (article V of its draft):

"Those committing genocide or any of the other acts enumerated in article IV shall be punished whether they are heads of State, public officials or private individuals."

As will be seen, the Committee decided to replace the word "rulers" by "heads of State". 84/

127. The Sixth Committee of the General Assembly (third session, part I, 1948) examined several amendments to the text of the Ad Hoc Committee's draft. One of the amendments to that text (A/C.6/236 and Corr.1) called for the addition of the following:

"Criminal responsibility for any act of genocide as specified in articles II and IV shall extend not only to all private persons or associations, but also to States, governments, or organs or authorities of the State or government, by whom such acts are committed. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention." 85/

128. During the discussion, the sponsor of that amendment argued that it was impossible to conceive of punishment in the real sense of the word for States or Governments, inter alia, because they could not be brought before their own courts. It should therefore be provided that, if acts of genocide were committed

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83/ E/447, p.35.

84/ E/794, p.9. Article IV of the draft Convention prepared by the Ad Hoc Committee - which became article III of the Convention - listed the acts of genocide. For the discussion on this expression, see paras.136-139 below.

85/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes, p.24.

by or on behalf of States or Governments, they would constitute a breach of the Convention. It would then be possible, by claiming a breach of the Convention, to bring States or Governments before an international court which would not impose any punishment but would order the cessation of those acts. 86/

129. It was also argued in favour of the adoption of that amendment that, since genocide was always committed on a large scale, the acts of a State were not those of a single individual but of a whole system, for the decisions of a State were frequently not the result of an individual will but the concurrence of the will of a group of individuals. Consequently there was no possibility in certain cases of taking measures against individuals, and the whole system would have to be made responsible. The Convention should therefore recognize that in addition to acts by individuals there were also composite acts which could be carried out only with the connivance of the State.

130. In adopting the amendment mentioned above, no penal sanction would be instituted against States, but other sanctions, such as the dissolution of a criminal police or the seizure of material goods and financial resources belonging to those mainly responsible.

131. It was also asserted that provision for holding States responsible for the crime of genocide would bring out the close relationship between the question of genocide and the maintenance of peace, which might be placed in jeopardy by acts of genocide committed by States. In addition, since the Convention was being established not only in order to punish genocide but also in order to prevent it, the application of sanctions might act as a deterrent to States which were potential offenders. 87/

132. In opposition to the amendment cited in paragraph 127 above, it was said that the only punishment which could be imposed on a State would be the exaction of material reparations. That would not have the effect aimed at by all punitive sanctions - that of serving as an example - because the State would not be affected as a private individual would be in a similar situation, since the taxpayers would pay the required reparations.

133. Reference was also made, as a case in point, to the fact that the important Hitlerite criminals and not the Nazi Government had been convicted, and it was emphasized that their conviction had had more effect on the supporters of aggressive wars than a moral condemnation of the German State.

134. In criticism of the above amendment, the question was asked why it should be necessary to say that States were committing a breach of the Convention if there was no intention of punishing them. Such a provision would merely make it possible to claim responsibility of the State in order to evade individual responsibility. Moreover, if the courts held certain members of the Government responsible, it was not advisable to take action against the Government as a whole, i.e. against the other members who had not been found guilty. 88/

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86/ Ibid., Sixth Committee, 93rd meeting, pp.314-315, and 96th meeting, p.353.

87/ Ibid., 92nd meeting, p.302, and 96th meeting, pp.353 and 349.

88/ Ibid., 95th meeting, pp.345-346.

135. The amendment cited in paragraph 127 above was rejected by 24 votes to 22. 89/

136. Another amendment (A/C.6/247) was to replace the text adopted by the Ad Hoc Committee on Genocide by the following text:

"Those committing genocide or any of the other acts enumerated in article V shall be punished, whether they are public officials or private individuals." 90/

The sponsor of the amendment pointed out that the constitutions of certain States did not make heads of State (monarchs or presidents) subject to penal responsibility. Consequently the expression "heads of State" used in the text of the Ad Hoc Committee on Genocide was not acceptable. Some other expression should be found which would exclude heads of State who enjoyed constitutional immunity. 91/

137. During the discussion on that amendment, it was proposed that the words "heads of State" in the English text adopted by the Ad Hoc Committee should be replaced by the words "responsible rulers" (A/C.6/253). 92/ The sponsor of amendment A/C.6/247 withdrew it in favour of that proposal. 93/ Subsequently the expression "constitutionally responsible rulers" was proposed. 94/

138. With regard to the French text adopted by the Ad Hoc Committee, it was argued that the word "gouvernants" could be retained, since it was merely the English translation of that expression by "rulers" or "heads of State" which had caused difficulties. It was added that the expression "gouvernants" should be interpreted as excluding the idea of the heads of State of constitutional democratic Governments who had no real responsibility. 95/

139. The proposal to insert the expression "constitutionally responsible rulers" in the English text of the article was adopted by 31 votes to one, with 11 abstentions. 96/

140. Another amendment (A/C.6/252) was to replace the Ad Hoc Committee's text by the following:

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89/ Ibid., 96th meeting, p.555.

90/ Ibid., 92nd meeting, p.304.

91/ Ibid., pp.303-304.

92/ Ibid., 93rd meeting, p.318.

93/ Ibid., 94th meeting, p.320.

94/ Ibid., 95th meeting, p.343.

95/ Ibid., 93rd meeting, pp.315-320.

96/ Ibid., 95th meeting, p.343. Consequently, in the English text of article IV of the Convention, the words "constitutionally responsible rulers" correspond to the word "gouvernants" used in the French text.

"The States Parties to the present Convention shall ensure the punishment of the acts enumerated in article IV, whether their authors are agents of the State or not." 97/

141. In support of that amendment it was maintained that it would have the advantage of covering all categories of guilty persons without going into an enumeration which would by its very nature be incomplete. In addition the amendment provided for an undertaking by States to punish genocide, a point which had not been covered in the text proposed by the Ad Hoc Committee. 98/

142. Against that amendment it was argued that it used an idea which was not clear, that of the "punishment of acts", whereas the important thing was to punish those guilty of the crime and not to provide for abstract responsibility. Furthermore the amendment was considered ambiguous, for it appeared to eliminate altogether the responsibility of rulers; the expression "agents of the State" would apply only to officials, and consequently would not cover the members of parliaments or heads of State who exercised the real power. 99/

143. Amendment A/C.6/252 was rejected by 21 votes to 17, with 9 abstentions. 100/

144. Another amendment (A/C.6/246) sought to add to the list of possible perpetrators of the crime of genocide de facto heads of government and persons having usurped authority in a country. 101/

145. The sponsor of this amendment argued that legal theory and precedent recognized the categories of normal de facto heads of State, i.e., persons who were in power because of the breakdown of authority, and de facto heads of State who were usurpers, i.e., private individuals who had seized power without any right. A reference to those categories would make the text of the article clearer. 102/

146. It was objected that the amendment was superfluous: de facto rulers would have the same responsibility as de jure rulers, and usurpers of authority could be considered as private individuals. 103/

147. The amendment was rejected by 28 votes to 5, with 4 abstentions. 104/

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97/ Ibid., Annexes, p.28.

98/ Ibid., 95th meeting, pp.339-340.

99/ Ibid.

100/ Ibid., p.343.

101/ Ibid., 92nd meeting, p.303.

102/ Ibid., 96th meeting, p.356.

103/ Ibid.

104/ Ibid., p.357.

148. One problem raised during the debate was whether legislators who voted in favour of laws inciting to genocide could be held responsible under the Convention or whether they would continue to enjoy legislative immunity. 105/

149. The representative of Sweden, considering that the question had not been clarified during the Sixth Committee's discussions, made the following statement, which was inserted in the Sixth Committee's report:

"I must point out that the discussion that has taken place has in no way clarified the position of Members of Parliament under the article we have just adopted. This question raised by the Swedish delegation consequently remains unanswered. For our part, we conclude that no absolute obligation could be imposed by article V in this regard." 106/

## 2. The principle of individual criminal responsibility

150. The principle of the criminal responsibility of natural persons laid down in article IV of the 1948 Convention is confirmed by other conventions and international instruments.

151. In fact it may be said that international practice since the Second World War has constantly applied the principle of individual criminal responsibility for crimes of international law, including those of genocide.

152. Thus article 6 of the Charter of the International Military Tribunal of Nuremberg gave the Tribunal the power to try and punish persons who, acting in the interests of the European Axis countries, had committed any of the following crimes, as defined in the article: crimes against peace, war crimes and crimes against humanity. In applying these provisions, the Tribunal made pronouncements concerning the fundamental principle involved: the criminal responsibility of individuals under international law. 107/ In its judgement the Tribunal affirmed inter alia that individuals could be punished for violations of international law and continued: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 108/

153. The Charter of the International Military Tribunal for the Far East also provided, in its article 5, for individual criminal responsibility, 109/ and the judgement of the Tribunal applied the same principle.

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105/ Ibid., 92nd meeting, p.304.

106/ Official Records of the General Assembly, Third Session, Part I, Plenary meetings (A/760 and Corr.2), Annexes to the Summary Records of Meetings, p.497.

107/ "The Charter and Judgment of the Nürnberg Tribunal: history and analysis", memorandum submitted by the Secretary-General (A/CN.4/5), pp.39 and 41.

108/ Trial of the Major War Criminals before the International Military Tribunal, Proceedings, vol.I, Nuremberg, 1947, p.234.

109/ Trial of Japanese War Criminals, Documents, Washington, United States Government Printing Office, 1946, p.40.

154. Principle I set forth in the document "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" adopted by the International Law Commission at its second session (1950) reads as follows:

"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." 110/

155. Article 1 of the draft code of offences against the peace and security of mankind, which was adopted by the International Law Commission at its sixth session (1954), similarly provides that:

"Offences against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished." 111/

156. Article 25 of the draft statute for an international criminal court, which was adopted in 1951 by the Committee on International Criminal Jurisdiction established by General Assembly resolution 489 (V) of 12 December 1950, provides that:

"The Court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government." 112/

157. The 1953 Committee on International Criminal Jurisdiction, set up under General Assembly resolution 637 (VII) of 5 December 1952, in the revised draft statute for an international criminal court, adopted the following wording for the draft article 25:

"The Court shall be competent to judge natural persons, whether they are constitutionally responsible rulers, public officials or private individuals." 113/

In its report, the Committee stated that this text was based on article IV of the Convention on Genocide. 114/

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110/ Report of the International Law Commission covering its second session, 5 June to 29 July 1950 (A/1316), p.12. The Commission had been asked by the General Assembly, in resolution 177 (II) of 21 November 1947, to formulate the Nuremberg principles. By resolution 488 (V) of 12 December 1950, the General Assembly decided to send that formulation to the Governments of Member States for their observations and requested the Commission to take account of them in preparing the draft code of offences against the peace and security of mankind.

111/ Report of the International Law Commission covering the work of its sixth session, 3 June - 28 July 1954 (A/2693), p.11.

112/ Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951 (A/2136), annex I, p.23.

113/ Report of the 1953 Committee on International Criminal Jurisdiction, 27 July - 20 August 1953 (A/2645), p.25. (For a description of the work of the United Nations on the subject of an international jurisdiction, see paras. 238-249 below).

114/ Ibid., para. 37.

158. Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by General Assembly resolution 3068 (XXVIII) of 30 November 1973, provides inter alia that:

"International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

"(a) Commit ... the acts mentioned in article II of the present Convention."

159. In view of the practice mentioned above and the scope of his study, the Special Rapporteur does not think it necessary to analyse the views of those who hold that, alongside individual criminal responsibility, States should be recognized as bearing criminal responsibility for international crimes. 115/ In his opinion, at the present stage in the development of international criminal law, the State can bear only political responsibility for international crimes. 116/

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115/ See for example Vespasien Pella, La criminalité collective des Etats et le droit pénal de l'avenir (Bucharest, State Printing Office, 1925); La guerre et les criminels de guerre, Réflexions sur la justice pénale internationale, ce qu'elle est et ce qu'elle devrait être (Geneva, Editions de la Revue de droit international, de sciences diplomatiques et politiques, 1946); "Mémoire présenté par le Secrétariat" [concerning the draft Code of Offences against the Peace and Security of Mankind]. A/CN.4/39, Yearbook of the International Law Commission, 1950, vol. II (United Nations publication, Sales No.: 1957.V.3, vol. II), pp.315-322; Q. Saldana, "La justice pénale internationale", Académie de droit international de la Haye, Recueil des cours, 1925, vol. V, pp.223 et seq.; Donnedieu de Vabres, Les principes modernes du droit pénal international, (Paris, Recueil Sirey, 1928), p.417; "Le procès de Nuremberg devant les principes du droit pénal international", Académie de droit international de la Haye, Recueil des cours, 1947, vol. I, p.562; Pierre Bouzat and Jean Pinatel, Traité de droit pénal et de criminologie, (Paris, Librairie Dalloz, 1970), vol. II, pp.1696-1703; A Treatise on International Criminal Law, compiled and edited by M. Cherif Bassiouni and Ved P. Nanda, (Springfield, Charles C. Thomas, 1973), vol. II, pp.86-96. For criticism and rejection of this theory, see: Stefan Glaser, Introduction à l'étude du droit international pénal, (Brussels, Etablissements Emile Bruyant, 1954), pp.56-70; Stanislaw Plawski, op.cit., pp.56-67. For the examination of this view during the preparation of the Convention on Genocide, see paras. 127-134 above.

116/ In this connexion, see A/2136, para. 87; Plawski, op.cit., p.67.



3. Rejection of application of the doctrine of the act of the State

160. In recognizing the principle of individual guilt, article IV of the Convention on Genocide rejects the application of the doctrine of the act of the State in this matter. 117/ According to this doctrine, responsibility for acts committed by organs of the State is attributable only to the State itself, which would exclude eo ipso any individual guilt on the part of the natural persons through whom those organs were acting. 118/

161. In taking this position, the 1948 Convention followed the principles laid down by the Charters and judgements of the Nuremberg and Tokyo International Military Tribunals, according to which the perpetrators of international crimes cannot claim immunity in virtue of their official position.

162. To this effect, article 7 of the Charter of the Nuremberg International Military Tribunal provides that:

"The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

In application of this text, the Tribunal held that:

"The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings." 119/

163. A similar provision to that of article 7 of the Charter of the Nuremberg Tribunal is found in article 6 of the Charter of the International Military Tribunal for the Far East, whose judgement, rejecting the doctrine of the act of the State, reproduces the relevant considerations of the Nuremberg judgement mentioned above. 120/

164. After the adoption of the Convention on Genocide, the application of the doctrine of the act of the State to international crimes was also rejected in the formulation of the Nuremberg principles 121/ by the International Law Commission,

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117/ Nehemiah Robinson, op.cit., p.71.

118/ Antonio Planzer, op.cit., p.135.

119/ Trial of the Major War Criminals before the International Military Tribunal, Proceedings, vol. I, Nuremberg, 1947, p.234.

120/ See Trial of Japanese War Criminals, Documents, (Washington, United States Government Printing Office, 1946), p. 40; Judgement of the International Military Tribunal for the Far East (mimeographed), 1948, p.25.

121/ Principle III reads as follows:

"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".  
(A/1316, p.13).

in the draft code of offences against the peace and security of mankind, 122/ and in article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, reproduced in paragraph 158 above.

4. Problems of application and interpretation presented by  
article IV of the Convention

165. The inclusion of the Head of State among the persons who may be charged with the crime of genocide appears to have created some difficulty with regard to the application of article IV of the Convention in internal law.

166. On ratifying the Convention, the Philippine Government entered inter alia the following reservation:

"With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favourable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines." 125/

167. Finland acceded to the Convention: "... subject to the provisions of article 47, paragraph 2, of the Constitution Act, 1919, concerning the impeachment of the President of the Republic of Finland." 124/

168. Among the reservations to the Genocide Convention to which certain Governments objected were those made by the Government of the Philippines. 125/

169. The problem of reconciling article IV of the Convention with national constitutions was raised in the study communicated by the International Association of Penal Law. 126/ Referring to the Italian Act of 9 October 1967 concerning the prevention and punishment of the crime of genocide, which provides

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122/ Article 3 of the draft code provides that the fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in the code (A/2693, p.12).

123/ Multilateral treaties in respect of which the Secretary-General performs depositary functions. List of signatures, ratifications, accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/II) (United Nations publication, Sales No. E.78.V.6), p.85.

124/ Ibid., p.84.

125/ Ibid., pp.86-87. For the grounds and effects of the objections to reservations, see paras. 365-367 below.

126/ Information and views communicated by the International Association of Penal Law on 31 January 1973.

for the punishment of any person committing acts of genocide, 127/ the authors of the study observe that, although its scope is consistent with that of article IV of the Convention, it should nevertheless be brought into line with the provisions of the Constitution of Italy which accords immunity to certain categories of persons, including legislators. The authors of the study add that persons enjoying immunities cannot be punished by the State if they commit acts of genocide or other comparable acts in the course of their duties.

170. The Special Rapporteur points out that, in paragraph 186 below he expresses his opinion as to whether the constitutional provisions and other internal legislation of a State can or cannot block the application of a treaty to which that State is a party.

171. The specific provision in the English text of article IV that only "constitutionally responsible rulers" can be held criminally responsible for acts of genocide has been generally interpreted as excluding heads of State - monarchs or others - who have no executive power. 128/

172. Some writers have criticized the exclusion of heads of State having no executive power from criminal responsibility for genocide. Even if, in the case of monarchs, it used to be possible to understand and accept this immunity for practical reasons and out of international courtesy, such consideration would be out of place nowadays. In the view of these writers, "Royal immunity was justified when sovereigns ruled by divine right" but is out of date in our day when "everyone must comply with the law which is made for all", 129/ and when "mere considerations of national deference and international courtesy should not prevail over the greater grounds of justice and law". 130/

173. With regard to the president of a republic who has no executive power, it has been observed that his immunity should "be proportionate to the responsibility and de facto authority which the head of State exercises by virtue of his prerogatives. That responsibility will certainly exclude active participation in crimes of genocide, but it is perfectly possible that a head of State may be guilty of, or an accessory to, public incitement to or overt tolerance of such acts, which would in some cases be tantamount to an offence of omission." 131/

174. In the light of these considerations the conclusion is reached that, in a matter such as genocide and crimes against peace and humanity in general, no exception is justified. On the contrary, the monarch or other head of State, even if he has no executive power, should use his influence against the possibility

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127/ For the text of this Act, see para. 507 below.

128/ See for example Robinson, op.cit., pp.70-71; Planzer, op.cit., p.136; Pieter H. Drost, op.cit., p.92.

129/ Planzer, op.cit., p.1369 (translation into English by the Secretariat).

130/ Jean Graven, op.cit., p.526 (translation into English by the Secretariat).

131/ Planzer, op.cit., p.132 (translation into English by the Secretariat).

of such acts. 132/ The arraignment of the ex-Kaiser of Germany in article 227 of the Treaty of Versailles has been cited to the same effect. 133/

175. Notwithstanding the declaration to the contrary which was made by the representative of a State during the preparation of the Convention, and which is reproduced in paragraph 556 below, a number of writers have expressed the opinion that legislators also fall within the scope of article IV of the Convention. In their opinion this category of persons could play an important role in cases where acts of genocide were committed on the basis of laws enacted by a legislature or with its knowledge and assent. 134/

176. The Special Rapporteur thinks that, if the decision should be taken to draft any new instruments for the prevention and punishment of genocide, article IV of the Convention should be re-examined with a view to eliminating as many as possible of the problems of interpretation which it appears to present.

5. Command of the law or superior orders (questions raised in relation to article IV of the Convention)

177. An amendment (A/C.6/215/Rev.1) to article IV of the Convention, which was not accepted, proposed the addition to that article of a second paragraph reading as follows: "Command of the law or superior orders shall not justify genocide".

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132/ Ibid., p. 136.

133/ This article reads as follows:

"The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

"A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

"In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed."

As is known, the article remained a dead letter because the Netherlands refused to extradite Emperor William II.

134/ Planzer, op.cit., p.137; Drost, op.cit., p.93; Robinson, op.cit., p.70.

178. During the debate in the Sixth Committee, 135/ the following objections were voiced to the proposal: (a) it could not be said that an individual was guilty if he had committed an act of genocide by complying with an order, because in that case the element of intent, which was an essential element of genocide, would be lacking; (b) few domestic legislations recognized the principle that compliance with superior orders did not relieve the person carrying out the orders of criminal responsibility; (c) accordingly, such a provision would prevent a very large number of States from accepting the Convention; (d) The Nuremberg Tribunal had given a restrictive interpretation to article 8 of its Charter, which embodied that principle; 136/ (e) it would be more satisfactory not to include such a provision in the Convention in order to leave the judge free to pronounce judgement in each individual case, taking the special circumstances into account; (f) the Convention should contain only general provisions, acceptable to all, and leave it to national legislation to determine the various methods of application.

179. It was argued in favour of the above-mentioned proposal that (a) if those who executed the crime were permitted to invoke command of the law or superior orders, most offenders would evade punishment since in the majority of cases genocide was committed with the participation of the government; (b) domestic legislation which did not admit responsibility in the case of compliance with the law or superior orders should not be allowed to infringe international law; (c) it was normal that the Genocide Convention should contain instructions to the judges responsible for applying it; (d) the proposal was based on the Nuremberg principles, the importance of which stemmed from the fact that if they had not been adopted Hitler alone would have been responsible for the crimes committed by the Nazis;

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135/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 92nd meeting.

136/ Article 8 of the Nuremberg Charter reads as follows:

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

In its judgement, the Tribunal expressed itself on this question in the following manner:

"That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

(e) rejection of the principle would amount to accepting the system of so-called "official channels" thanks to which, in a modern State, every responsible person was covered by an order coming from a higher authority; (f) adoption of the proposal would constitute a solemn warning to all those who might be tempted to obey orders inciting to crime and would, in many instances, help to prevent the consummation of a crime.

180. According to one writer, the fact that the Convention does not contain a provision along the lines proposed by the above-mentioned amendment:

"... cannot, in a specific case, have the effect of conferring impunity on criminals who might endeavour to plead command of the law or superior orders, for it seems inconceivable that it will be possible in the future to repudiate a principle which has found acceptance both in legal theory and in juridical practice." 137/

181. Another writer states:

"Ordinarily it would seem that no intent could be ascribed to persons merely fulfilling superior orders; intent implies initiative. However, superior orders would not be a justification in such cases where the guilty party was not only a tool of his superior but participated in the 'conspiracy to commit genocide'. Guilt could likewise be established in a case where, although acting under orders, the person was in a position to use his own initiative and thus act with the intent to destroy the group. The non-inclusion of a proviso relating to a superior's orders thus leaves the tribunals applying the Convention the freedom of interpreting it in accordance with the domestic legislation and the specific circumstances of the case". 138/

182. The Special Rapporteur is not in a position to give an opinion on the question of command of the law or superior orders. He has raised these questions in order that they may be considered should it be decided to adopt new international instruments on the prevention and punishment of genocide.

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137/ Antonio Planzer, op.cit., p.141; for similar arguments, see George A. Jacoby, "Genocide", Schweizerische Zeitschrift für Strafrecht, No. 4 (1949).

138/ Nehemiah Robinson, op.cit., pp. 72-73. This author quotes similar arguments from Kurt Stillschweig, "Das Abkommen zur Bekämpfung von Genocide", Die Friedenswarte, No. 3 (1949), p.98.

E. The obligation of States parties to the Convention to adopt legislative measures with a view to the prevention and punishment of genocide (article V of the Convention)

183. Article V of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, reads as follows:

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

184. According to one author, this article is superfluous, because in ratifying a convention on international penal law States accept the obligation to punish the acts condemned in that treaty. He goes on to say:

"The elaborate wording of the ... article under discussion does not say anything beside laying down a general obligation which without any formal enunciation must be considered evident in the nature of the Convention as such and in the tenor of its text."<sup>139/</sup>

185. The Special Rapporteur is of the opinion that article V was included in the Convention in accordance with a well-established practice in the field of conventions concerning international penal law.<sup>140/</sup> Moreover, as has been pointed out, these conventions "generally do no more than trace or outline the general features of the acts condemned, while binding States to define those acts more precisely and to provide adequate penalties for them."<sup>141/</sup> In following this practice, article V of the Genocide Convention contains the general obligation to enact legislation with a view to guaranteeing the application of the Convention and, in particular, to establish effective penalties, while leaving every State free to determine what the legislative measures should be and to set the penalties.<sup>142/</sup> We should also add that this obligation constitutes one of the main means of giving effect to the Convention.<sup>143/</sup> Finally, it should be pointed out that it is never superfluous to recall in a particular convention the general obligation of States whose non-fulfilment would constitute an obstacle to the achievement of the desired goals.

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<sup>139/</sup> Pieter N. Drost, op.cit., p.129.

<sup>140/</sup> See also Stefan Glaser, op.cit., p.190.

<sup>141/</sup> Ibid., p.184.

<sup>142/</sup> Cf. Antonio Planzer, op.cit., p.158; Drost, op.cit., p.100.

<sup>143/</sup> Cf. Erica-Irene A. Daes, op.cit., pp.78-79.

186. Another problem raised in connexion with article V of the Genocide Convention was the meaning of the "constitutional reservation", that is, the clause according to which States undertake to enact the necessary legislation in accordance with their constitutional provisions. When the Sixth Committee of the General Assembly was preparing the final draft of the Convention the view was expressed that the "constitutional reservation" might limit the scope of the Convention.<sup>144/</sup> According to this interpretation, the "constitutional reservation" expresses the idea that the constitutions of States would prevail over the Convention to which those States are parties. In other words, some constitutional provisions might have the effect of limiting the scope of the Convention or rendering it partially inapplicable. The Special Rapporteur thinks that there is no reason to assume that the clause would have that effect firstly because it can be interpreted as providing that a national law must be enacted in accordance with the constitutional procedures, which is quite normal.<sup>145/</sup> He therefore feels that this clause must be interpreted as relating to rules of form rather than of substance. Moreover, as one author has noted: "If for some reason or other legislative measures ... prove to be illegal by reason of being ... unconstitutional, such illegality under domestic law in itself does not constitute a breach of treaty because the fulfilment of treaty obligations is not tested and determined by municipal law but exclusively under international law itself."<sup>146/</sup> This principle was confirmed by the 1969 Vienna Convention on the Law of Treaties. Indeed, article 27, entitled "Internal law and observance of treaties", contained in part III of the Convention, "Observance, application and interpretation of treaties", section 1, "Observance of treaties", states that a State which is a party to the treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>147/</sup> Moreover, a recent international instrument, namely the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted by the General Assembly in resolution 3068 (XXVIII) of 30 November 1973), no longer uses the "constitutional reservation". This Convention provides in article IV (b) that States parties undertake to adopt inter alia legislative measures "to prosecute, bring to trial and punish in accordance with their jurisdiction" persons responsible for, or accused of, the acts defined as criminal in the Convention.

187. Moreover, the question has been raised whether States which are not parties to the Genocide Convention and which, therefore, are not bound in accordance with article V, to ensure its application, are not all the same obliged to observe the principles upon which it is based. The International Court of Justice made the following comments in that connexion in its advisory opinion of 28 May 1951 on the question of reservations to the Genocide Convention:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a

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<sup>144/</sup> Official Records of the General Assembly, Third Session, part I, Sixth Committee, 93rd meeting.

<sup>145/</sup> Drost, op.cit., p.128.

<sup>146/</sup> Ibid., pp.128-129.

<sup>147/</sup> See document A, CONF.39/27.



denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."148'

188. In the 1961 trial of Adolf Eichmann the District Court of Jerusalem stated inter alia in its judgement - which was confirmed by the Supreme Court of Israel - that "the crime against the Jewish people" had been defined in the relevant Israel law in the same terms as in the 1948 Genocide Convention because it was not a crime under that law alone but also an offence against the law of nations.149 Moreover, the court deemed that, in view of the repeated statements to that effect in General Assembly resolution 96 (I) and in the 1948 Genocide Convention 150' and of the advisory opinion of the International Court of Justice, "there is no doubt that genocide has been recognized as a crime under international law in the full meaning of this term ex tunc, that is to say, the crimes of genocide committed against the Jewish people and other peoples during the period of the Hitler régime were crimes under international law".151'

189. It is in the light of the fact that the crime of genocide is a crime under international law and that the underlying principles of the Convention are principles which are recognized as binding on States even where there is no treaty, that the Special Rapporteur deemed it necessary to ask for information on constitutional and legislative provisions not only from States parties to the Convention but also from States which are not parties thereto.152'

F. The competent courts (article VI of the Convention)

1. National courts and the question of universal punishment

190. The problem of determining which national courts are competent to judge crimes of genocide gave rise to various solutions and opinions during the preparation of the 1948 Convention.

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148' Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951: I.C.J. Reports 1951, p.23. The information communicated by the Government of Cyprus on 12 January 1973 contained inter alia the statement that "although Cyprus is not a party to the Genocide Convention, yet the Government of Cyprus believes that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States even without conventional obligation".

149' International Law Reports, ed. E. Lauterpacht, vol. 36 (London, Butterworths, 1968), pp.29-30.

150' See the first operative paragraph of General Assembly resolution 96 (I), reproduced in para.29 above, and article 1 of the Convention, para.42 above

151' International Law Reports, ed. E. Lauterpacht, vol.36 (London, Butterworths, 1968), p.34.

152' See paras.514-519.

191. Article VII of the draft Genocide Convention, prepared by the Secretary-General,<sup>153/</sup> had stated that:

"The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed".<sup>154/</sup>

This article proposed the application of the principle of universal punishment or competence (Ubi te invenero, ibi te judicabo)<sup>155/</sup> with regard to the crime of genocide.

192. In its draft Convention on the Prevention and Punishment of the Crime of Genocide, the Ad Hoc Committee on Genocide <sup>156/</sup> replaced the text of article VII of the draft prepared by the Secretary-General by a different text which laid down the principle of territorial competence in the following terms:

"Persons charged with genocide or any of the other acts enumerated in article IV <sup>157/</sup> shall be tried by a competent tribunal of the State in the territory of which the act was committed ...".<sup>158/</sup>

The report of the Ad Hoc Committee summarizes as follows the discussions which took place on the question of the principle of universal punishment and which led to the rejection of a proposal to include that principle in the draft Genocide Convention:

"The principle of universal repression by a national court in respect to individuals who had committed genocide abroad was discussed when the Committee considered the fundamental principles of the Convention.

"Those in favour of the principle of universal repression held that genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime. Obviously in this case the national courts of that State would not enforce repression of genocide. Therefore, whenever the authorities of another State had occasion to arrest the offenders they should turn them over to their own

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<sup>153/</sup> See para.31 above.

<sup>154/</sup> E/447, p.8.

<sup>155/</sup> See the commentary on article VII of the Secretary-General's draft (E/447), p.38.

<sup>156/</sup> See paras.37 and 38 above.

<sup>157/</sup> Article IV of the draft prepared by the Ad Hoc Committee on Genocide listed the following acts: genocide as previously defined; conspiracy to commit genocide; direct incitement in public or in private to commit genocide whether such genocide be successful or not; attempt to commit genocide; complicity in any of these acts (E/794, p.20).

<sup>158/</sup> E/794, p.29.

Courts. The supporters of the principle of universal repression added that, since genocide was a crime in international law, it was natural to apply the principle of universal repression. They quoted conventions on the repression of international offences such as traffic in women and children, counterfeiting currency, etc.

"The opposite view held that universal repression was against the traditional principles of international law and that permitting the Courts of one State to punish crimes committed abroad by foreigners was against the sovereignty of the State. They added, that, as genocide generally implied the responsibility of the State on the territory of which it was committed, the principle of universal repression would lead national courts to judge the acts of foreign Governments. Dangerous international tension might result.

"A member of the Committee, while he agreed that the right to prosecute should not be left exclusively to the courts of the country where genocide had been committed, declared himself opposed to the principle of universal repression in the case of genocide. It is a fact, he said, that the Courts of the various countries of the world do not offer the same guarantee. Moreover, genocide is distinguished from other crimes under International Conventions (traffic in women, traffic in narcotic drugs, counterfeiting currency) by the fact that, though in itself it is not a political crime, as stated in article IX of the draft Convention, it nevertheless has or may have political implications. Therefore, there is a danger that the principle of universal repression might lead national courts to exercise a biased and arbitrary authority over foreigners. This representative therefore proposed that jurisdiction be given to an international court to which States would surrender the authors of genocide committed abroad whom they had arrested and whom they would be unwilling to extradite.

"The principle of universal repression was rejected by the Committee by 4 votes (among which France, the United States of America and the Union of Soviet Socialist Republics) against 2 with 1 abstention. (Eighth meeting - Tuesday, 13 April 1948).

"During the discussion of article VII the proposal to reverse the foregoing decision was rejected by 4 votes against 2 with 1 abstention. (Twentieth meeting - Monday, 26 April 1948).<sup>159/</sup>

193. The provisions of article VI of the Genocide Convention retain the text proposed by the Ad Hoc Committee with some drafting changes. These provisions read as follows:

"Persons charged with genocide or any of the other acts enumerated in article III 160' shall be tried by a competent tribunal of the State in the territory of which the act was committed ...".

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<sup>159/</sup> E 794, pp.32-33.

<sup>160'</sup> For article III see above, paras.42 and 107-112.

194. This text was adopted by the Sixth Committee after fairly lengthy discussion.<sup>161</sup> The Committee considered several amendments, including the amendment contained in document A/C.6/218 which proposed the addition of a new paragraph to article VII of the draft prepared by the Ad Hoc Committee on Genocide (which later became article VI of the Convention). This amendment read as follows:

"They may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition."<sup>162</sup>

The sponsor of this amendment stressed that the application of universal punishment was envisaged only as a subsidiary measure, according to the principle which dated from Grotius, "Aut dedere, aut punire".<sup>163</sup> The State would be bound to extradite offenders and would not put them on trial unless extradition was not requested or was impossible. This amendment was rejected by 29 votes to 6 with 10 abstentions.<sup>164</sup>

195. During the discussion it was argued in favour of universal punishment that the application of that principle would make it possible to ensure the punishment of the guilty party where he took refuge in a country other than that in which he had committed the offence. In such cases, under the principle of territorial competence, the criminal would not be punished where his extradition was not requested, by the country in which the crime had been committed or where extradition was impossible for reasons of force majeure or because States are not obliged to extradite their own nationals.<sup>165</sup> It was also maintained that universal punishment could secure the co-operation of national courts of law to protect the law and order of all the States constituting the family of nations, which is affected by the crime of genocide.<sup>166</sup> It was also maintained that even if the courts of the various countries in the world did not all offer the same guarantees the offender had only himself to blame if he fled from the place where he had committed his offence and proceeded to a State where the laws were more severe or whose courts offered him less guarantees.<sup>167</sup> The application of the principle of universal punishment would not be inconsistent with the sovereignty

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<sup>161</sup>/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 97th, 98th, 100th and 129-134th meetings.

<sup>162</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes to the summary records of the meetings, pp.20-21.

<sup>163</sup>/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 100th meeting, pp.394-395.

<sup>164</sup>/ Ibid.

<sup>165</sup>/ Ibid., pp.395, 397.

<sup>166</sup>/ Ibid., p.396.

<sup>167</sup>/ Ibid., p.400.

of States because if the State on whose territory the offence had been committed wished to try the offender itself, it would request his extradition; but if it expressed no such desire, it thereby tacitly renounced its right to try him.<sup>168/</sup> To counter the argument advanced by those who were opposed to the application of the principle that it was possible that the competence of other courts than those of the country where genocide had been committed to try the crime might cause international tension, it was replied that such tension could be avoided by the request for the extradition of the persons whom that country did not wish to be tried in foreign courts. Moreover, in order to avoid such tension, the sponsor of the amendment referred to in paragraph 193 above was prepared to accept any proposal which would exempt rulers from universal punishment.<sup>169</sup>

196. In opposition to the principle of universal punishment for the crime of genocide it was maintained that it would be wrong to apply automatically to the crime of genocide a penal system accepted in dealing with other crimes which also violated international law. Universal punishment would be justified in the cases of traffic in women, or piracy by the fact that it was often extremely hard, if not impossible, to determine where the crime had been committed. In the case of genocide, however, if judicial proceedings were to be instituted by courts of the States in which the offender had been arrested, documents and witnesses would have to be asked for from the State in whose territory the crime had been committed.<sup>170/</sup> It was also added that it would be wrong to jeopardize the ratification of the Convention by a great many States who would consider it politically inopportune to include the principle of universal punishment, out of a desire for an ideal text. Moreover, the inclusion of that principle would have little practical value since it was unlikely that criminals who had gone unpunished in their own countries would move to other countries where they would be liable to trial and punishment.<sup>171/</sup>

197. An unfavourable position regarding the principle of universal punishment also emerges from the following declarations and reservations concerning the Genocide Convention:

Algeria

"The Democratic and Popular Republic of Algeria declares that no provision of article VI of the said Convention shall be interpreted as depriving its tribunals of jurisdiction in cases of genocide or other acts enumerated in article III <sup>172/</sup> which have been committed in its territory or as conferring such jurisdiction on foreign tribunals."

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<sup>168/</sup> Ibid., pp.395, 399 and 400.

<sup>169/</sup> Ibid., p.405.

<sup>170/</sup> Ibid., p.403.

<sup>171/</sup> Ibid., pp.399, 403.

<sup>172/</sup> For article III see paras.107-123 above.

Burma

"With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said article shall be construed as depriving the courts and tribunals of the Union of jurisdiction or as giving foreign courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory."<sup>173</sup>

Morocco

"With reference to article VI, the Government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco."<sup>174</sup>

198. It should be noted that the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly in resolution 3068 (XXVIII) provides, inter alia, that persons charged with acts constituting this crime "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused ..." (article V of the Convention).

199. It might also be noted that the principle of universal competence was incorporated into the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 September 1970 and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, adopted under the auspices of the International Civil Aviation Organization (ICAO), as well as into the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the United Nations General Assembly in resolution 3166 (XXVIII) of 14 December 1973. Article 3 of the latter Convention specifies, inter alia, that each State party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in the Convention in cases where the alleged offender is present in its territory and it does not extradite him.

200. In its communication of 21 February 1974, the Government of Bulgaria stated that:

"The People's Republic of Bulgaria views positively the idea of adopting texts which would authorize national courts to prosecute and punish persons who have committed genocide outside the territory of their countries".

201. The Government of Canada communicated the following:

"Although the Convention classified genocide as a crime under international law, it does not seek to establish universal jurisdiction over the enumerated offences, that is, there is no provision requiring a Contracting Party to assume jurisdiction in cases where the crime has not been committed in the territory of that Party. A person charged with an act of genocide shall be

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<sup>173</sup> ST/LEG/SER.D/11, p.83.

<sup>174</sup> E/CN.4/Sub.2/302.

tried only 'by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...'. The Government of Canada believes there may be considerable merit in the suggestion that an international penal tribunal be established for the purpose of this Convention and the other duties which may be assigned to it by international agreement. The establishment of such a tribunal might be preferable to the assumption by national courts of universal jurisdiction; this suggestion merits further consideration. Currently, since no international criminal jurisdiction has been established for the crime of genocide, the court of the State where the act occurred is the only tribunal competent to try an offender".

"In the excellent preliminary report prepared by the Special Rapporteur (E/CN.4/Sub.2/L.565 of 23 May 1972), examples of acts of genocide are set forth. Several of these represent action taken by Governments within their own territory. In cases where these Governments remain in authority, the individual perpetrators of the acts of genocide would likely never be brought to trial. It would seem therefore, that until such time as an international criminal tribunal is established, the Convention would be more effective if universal jurisdiction were to be established for the competent domestic courts of the States party."175/

202. In the opinion of the Government of Finland:

"An additional Protocol to the Genocide Convention, conferring upon the courts of countries other than those in whose territory the crime of genocide was committed, competence to deal with that crime would obviously improve the effectiveness of the Convention. However, this goal could be achieved also by national legislation. In Finland, the system of universality of jurisdiction has already been effectuated so that Finnish citizens or foreigners permanently residing in Finland can be sentenced by a Finnish court in accordance with Finnish law for criminal acts committed in a foreign country. The same applies to foreigners who are not permanently residing in Finland, provided that the criminal act in question is punishable also according to the law of the country where it was committed, or it was committed in an area where the law of no country is in force, or the criminal act was directed against Finland or a Finnish citizen, society, institution or foundation or a foreigner permanently residing in Finland. In order to make the system of universality of jurisdiction complete, as regards crimes under international law, a Draft Government Bill was prepared to the effect that any foreigner could be sentenced by Finnish courts in accordance with Finnish law for a criminal act which is a crime under international law, including the crime of genocide, even if it is committed in a country according to whose law the act is not punishable. Also this Bill will be introduced to Parliament in a near future."176/

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175/ Information and views furnished by the Government of Canada on 27 February 1974.

176/ Information and views furnished by the Government of Finland on 26 February 1973.

203. The Government of the Netherlands was of the view that:

"As regards the possibility of adopting an additional protocol conferring upon the courts of countries other than those in whose territory the crime of genocide was committed competence to deal with that crime, the Netherlands Government would observe that this might improve the implementation of the Convention."177/

204. The Government of Romania observed that:

"The recognition of the right of national tribunals of all States Parties to the Convention to try and to punish crimes of genocide, irrespective of the place where they were committed, and a comprehensive definition of acts of this kind, would ensure appropriately the effectiveness of the 1948 Convention."178/

205. The Government of Ecuador, considering the preparation of an additional protocol to the 1948 Convention to be necessary, was of the opinion that such a protocol could confer, *inter alia*, competence with regard to genocide upon the courts of countries other than those in whose territory that crime was committed.179/

206. The Government of the United Kingdom communicated the following:

"The general question of incorporating into the Genocide Convention provisions conferring upon Courts of countries other than those in whose territory the crime of genocide was committed the competence to try the persons accused of that crime was considered by the International Law Commission and the Sixth Committee of the General Assembly at the time when the Genocide Convention was adopted in 1948. At that time the United Kingdom Government opposed the idea of extraterritorial jurisdiction on the grounds that it conflicted with the principle of territoriality on which the jurisdiction of Penal Courts in the United Kingdom is based. Criminal Courts in the United Kingdom do not usually punish British citizens for acts committed abroad and, except in special cases, the Courts cannot punish aliens for crimes committed outside the territory of the United Kingdom. The question of the jurisdiction of national Courts is one of exceptional importance and the United Kingdom Government would consider altering the present situation only in the most exceptional circumstances.

"There have been two recent examples of such exceptional circumstances. The United Kingdom Government have ratified the Convention for the Suppression of Unlawful Seizure of Aircraft, Article IV (2) of which requires each State Party 'to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him'

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177/ Information and views furnished by the Government of the Netherlands on 25 April 1973.

178/ Information and views furnished by the Government of Romania on 26 February 1973.

179/ Information and views furnished by the Government of Ecuador on 24 April 1974.



to the State in which the offence was committed. The United Kingdom Government have also signed and intend to ratify the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation which contains an identical obligation. It follows that the United Kingdom Government would be prepared to examine carefully any proposal to make similar arrangements in respect of those accused of crimes of genocide, but can of course make no commitment in the matter until detailed provisions have been put forward and agreed."180/

207. The Government of Italy considered that it was not necessary to prepare a protocol to the Genocide Convention conferring competence to try crimes of genocide upon courts of countries other than those in whose territory the genocide was committed. That Government was of the opinion that in almost all legal systems, including the Italian system, exceptions to the principle of territoriality of the criminal law are envisaged and, in view of its seriousness, the crime of genocide may easily be included among those exceptions."181/

208. The Government of Oman communicated the following:

"There may be a possibility of preparing an additional protocol to the Geneva Convention to grant competence to the courts to try the crime of genocide committed in a country other than theirs, but it is unlikely to be favoured by a majority of States and, moreover, it is feared that it may be a source of aggravating the conflict on an international level."182/

209. A number of non-government organizations in consultative status with the Economic and Social Council have also furnished views on the question under study. For instance, in a study furnished by the International Association of Penal Law, the preparation of an additional protocol on universal competence does not seem to have been deemed opportune.183/ The International Commission of Jurists transmitted the following: "We do not favour the suggestion for an additional protocol to the Genocide Convention conferring jurisdiction upon the courts of the countries other than those in whose territories the crime was committed. This proposal is also open to the objection that such proceedings would be likely to be, or be regarded as being, politically motivated."184/

210. The World Confederation of Organizations of the Teaching Profession was of the opinion that the preparation of an additional protocol conferring universal competence would be useful with a view to solving the problems relating to the punishment of genocide.185/

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180/ Information and views furnished by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973.

181/ Information and views furnished by the Government of Italy on 29 March 1973.

182/ Information and views furnished by the Government of Oman on 8 April 1974.

183/ Information and views furnished by the International Association of Penal Law on 31 January 1973.

184/ Information and views furnished by the International Commission of Jurists on 15 January 1973.

185/ Information and views furnished by the World Confederation of Organizations of the Teaching Profession.

211. The Special Rapporteur feels that, since no international criminal court has been established, the question of universal punishment should be reconsidered, if it is decided to prepare new international instruments for the prevention and punishment of genocide. In practice it may possibly be Governments that commit the most serious cases of genocide and consequently there has always been some doubt as to the possibility of indicting them, unless the existing régime is eventually replaced by a régime which will take the necessary legal action. While recognizing the political implications of the application of the principle of universal punishment for the crime of genocide, the Special Rapporteur remains convinced that the adoption of this principle would help to make the 1948 Genocide Convention more effective. Moreover, the adoption of the principle should not automatically entail the obligation to prosecute persons guilty of genocide. It would be a mere option which would be used, particularly in the case of Governments, in the light of all the de facto circumstances and the advisability of taking appropriate action.

## 2. Interpretation of article VI

212. A further question relating to article VI, which was discussed by the Sixth Committee during the preparation of the text of the Genocide Convention, concerned the actual scope of the provisions relating to State jurisdiction contained in this article. The Committee had before it a proposal (A/C.6/299) to insert the following paragraph in article VI: "Nothing in this article shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State."<sup>186/</sup> The sponsor withdrew the proposal, on condition that the terms of the text were incorporated into the Committee's report as a statement relating to the interpretation to be given to article VI.<sup>187/</sup> There was another proposal that the statement should have been supplemented by adding that, in addition, article VI should not be interpreted as depriving a State of jurisdiction in the case of crimes committed against its nationals outside national territory.<sup>188/</sup> After a discussion of these proposals, the Committee adopted, by 20 votes to 8, with 6 abstentions, <sup>189/</sup> the following explanatory text, which was inserted in the Sixth Committee's report to the General Assembly:

"The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State."<sup>190/</sup>

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<sup>186/</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes to the summary records of the meetings, p.23.

<sup>187/</sup> Ibid., 130th meeting.

<sup>188/</sup> Ibid., 131st meeting, p.685.

<sup>189/</sup> Ibid., 134th meeting.

<sup>190/</sup> A/760 and Corr.2, para. 24, footnote 1.

213. One author states that the validity of such a statement and its effective juridical scope might be questioned. It would have value only for the States which had accepted it, by voting in favour of it.<sup>191/</sup>

214. The Special Rapporteur believes that the explanatory text relating to article VI, inserted in the report of the Sixth Committee to the General Assembly without an agreement on its content and its relation to the actual text of the Convention, could not have an inherent interpretative value different from that of the other preparatory work of the Convention.<sup>192/</sup>

### 3. The question of the establishment of an international criminal court

#### (a) Preparation of the article

215. Article VI of the Convention on Genocide, after acknowledging the competence of tribunals of the State in the territory of which the act of genocide, or other act proscribed by the Convention, was committed, adds that persons charged with those acts may also be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

216. The draft Convention prepared by the Secretary-General contained two alternative drafts concerning the establishment of an international criminal court. The first involved the creation of a court having general competence to try all international crimes. Some experts took the view that, to this end, a criminal chamber might be set up within the International Court of Justice. The second draft envisaged the establishment of an international criminal court whose jurisdiction would be limited to cases of genocide, a court which might be permanent or ad hoc in nature.<sup>193/</sup>

217. In addition, the draft convention prepared by the Secretary-General contained an article under which the contracting parties would have pledged themselves to commit all persons guilty of genocide for trial to an international court in the following cases:

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<sup>191/</sup> Planzer, op. cit., p. 144.

<sup>192/</sup> Article 32 of the 1969 Vienna Convention on the Law of Treaties states that the preparatory work constitutes a supplementary means of interpreting a treaty, either in order to confirm the meaning resulting from the application of the general rule of interpretation, by which the treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (article 31, paragraph 1, of the Convention) or to determine the meaning when such an interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

<sup>193/</sup> See document E/441 and annexes I and II.

(a) When they were unwilling to try such offenders themselves or to grant their extradition;

(b) If the acts of genocide had been committed by individuals acting as an organ of the State or with the support or toleration of the State.<sup>194/</sup>

218. Article VII of the draft Convention prepared by the Ad Hoc Committee on Genocide provided that persons charged with genocide could be tried by a national court "or by a competent international tribunal".<sup>195/</sup>

219. During the debate on this article in the Ad Hoc Committee, those in favour of the establishment of an international tribunal argued that the granting of jurisdiction to an international court was an essential element of the Convention. They claimed that in almost every serious case of genocide it would be impossible to rely on the courts of the State where genocide had been committed to exercise effective repression because the government itself would have been guilty, unless it had been, in fact, powerless. The principle of universal repression having been set aside,<sup>196/</sup> the absence of an international court would result, in effect, in impunity for the offenders. Those who opposed the attribution of jurisdiction to an international tribunal declared that the intervention of such a court would violate the principle of the sovereignty of the State because this court would be substituted for a national court. They also claimed that mere reference in the Convention to an international court would have no practical value.<sup>197/</sup>

220. A number of the amendments submitted in the Sixth Committee to the above-mentioned texts of the Ad Hoc Committee proposed the deletion of the words "or by a competent international tribunal".<sup>198/</sup>

221. Those in favour of these amendments argued, inter alia, that even if genocide could not effectively be punished by national courts if it were committed, as was generally the case, with the connivance of the State and even if it was logical that an international crime should be punished at the international level, logic and theory must be subordinated to practical considerations. International punishment could not be achieved, at least not in the most serious cases, since it was impossible to see how a sentence pronounced by an international tribunal could be carried out. In those circumstances the prestige of the tribunal would soon be lowered and the very principle that genocide must be punished would be discredited.<sup>199/</sup>

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<sup>194/</sup> Document E/447

<sup>195/</sup> Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6, p. 11.

<sup>196/</sup> On the question of universal punishment, see paras. 190-211 above.

<sup>197/</sup> E/794, p. 11.

<sup>198/</sup> See document A/C.6/215/Rev.1; A/C.6/217; A/C.6/218.

<sup>199/</sup> Official Records of the General Assembly, Third session, Part I, Sixth Committee, Summary Records of Meetings, p. 366.

222. It was further maintained that the establishment of an international penal tribunal might, in a number of cases, call forth or increase international tension.<sup>200/</sup> Moreover, the necessarily compulsory jurisdiction of such a tribunal would raise difficult problems, for States had readily agreed to the creation of the International Court of Justice only because recourse to that Court was optional and did not impair State sovereignty.<sup>201/</sup> In addition, Article 36 of the Statute of the International Court of Justice, granting it compulsory jurisdiction for certain categories of international disputes, had been accepted by only a limited number of members of the United Nations.<sup>202/</sup>

223. The point was also made that there were other crimes, considered as crimes under international law, which came under the jurisdiction of national tribunals - for instance, counterfeiting currency, the white slave traffic and the circulation of obscene publications.<sup>203/</sup>

224. Another factor, it was maintained, which cast doubt on the possibility of establishing an international criminal jurisdiction was the stage of progress reached in international co-operation in the repression of international crimes. It was said that the organization of the international suppression of crimes developed pari passu with the organization of international co-operation and solidarity, both of which were in a period of uncertainty. The time had not yet come to establish an international criminal court, for there did not exist any international criminal law properly speaking.<sup>204/</sup>

225. It was also affirmed that it would be impossible to bring rulers before an international court; the only means by which that might be achieved was the waging of war. Such a court would not be effective in practice, at least not against powerful Governments. There would thus be practical obstacles hindering the establishment of an international penal tribunal.<sup>205/</sup>

226. In favour of retaining the reference to an international criminal court, it was argued that, as genocide was almost always committed with the complicity or the tolerance of a State, it was obvious that the courts in that State would be unable to prosecute not only the rulers but also those who had committed the crime.<sup>206/</sup> The purpose of the convention was not to punish individual murderers

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<sup>200/</sup> Ibid., p. 367.

<sup>201/</sup> Ibid., p. 388.

<sup>202/</sup> Ibid., pp. 377, 378.

<sup>203/</sup> Ibid., p. 369.

<sup>204/</sup> Ibid., p. 371.

<sup>205/</sup> Ibid., p. 377.

<sup>206/</sup> Ibid., p. 367.

but to ensure the prevention and punishment of crimes committed by rulers.<sup>207/</sup> Provision for punishment on an international level was the only effective measure which would make it possible to punish the guilty and, hence, to prevent the crime.<sup>208/</sup> Reference to an international tribunal in the convention would have a salutary effect on authorities who wished to commit acts of genocide and who, in the absence of such reference, would be ensured impunity.<sup>209/</sup>

227. The view was also expressed that the constitutional provisions of certain countries or the principle of the national sovereignty of States could not be adduced as an argument against the principle of the international punishment of genocide. The United Nations had, indeed, been established so that each State might realize its responsibilities and duties as a member of the community of nations. Member States would fail in their duty if, by taking an uncompromising stand on the provisions of their constitutions or the principle of their national sovereignty, they opposed the adoption of measures which proved to be necessary in the general interest.<sup>210/</sup>

228. It was further affirmed that opposition to the establishment of an international criminal court could not be justified by the fact that such a court did not yet exist. Once the convention had been signed, the method of functioning of the court would be considered and its competence and powers decided. If on the contrary, reference to an international tribunal were deleted, it would be necessary to amend the convention when a tribunal of that kind was established.<sup>211/</sup>

229. At its 98th meeting, the Sixth Committee voted on whether to delete the words "or by a competent international tribunal" in the text prepared by the Ad Hoc Committee on Genocide. By 23 votes to 19, with 3 abstentions, the Committee decided to delete those words. However, it was subsequently to reverse that decision, as indicated in paragraphs 234 to 237 below.

230. Two amendments (A/C.6/236/Corr.1 and A/C.6/252) proposed that article VII of the draft Convention prepared by the Ad Hoc Committee should be replaced by a text that would grant the International Court of Justice jurisdiction in all cases where one of the acts of genocide stipulated in the Convention was the act of the State or Government itself or of any State organ. Under these amendments, the Court would be competent only to order measures to put an end to the acts in question.<sup>212/</sup>

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<sup>207/</sup> Ibid., p. 373.

<sup>208/</sup> Ibid., p. 367.

<sup>209/</sup> Ibid., p. 369.

<sup>210/</sup> Ibid.

<sup>211/</sup> Ibid.

<sup>212/</sup> Ibid., Annexes, pp. 25 and 28. Despite the differences between the two proposals, an effort was made to stress their common elements.

231. In favour of these amendments, it was said that article VII of the draft Convention prepared by the Ad Hoc Committee was completely useless. The draft Convention already contained other provisions which affirmed the obligation of State parties to the Convention to punish genocide on the national level; and as to international jurisdiction, the mention of a competent international tribunal was useless since such a tribunal did not exist. Even if it did exist, it would be of as little use as national courts, for it was to be anticipated that culprits would not be handed over to it and that unless armed force were used it would be impossible to bring the perpetrators of an act of genocide to trial by that court. Consequently, it was necessary to adopt a realistic approach and to have recourse to the only existing international court in a position to enact measures capable of putting a stop to the criminal acts concerned.<sup>213/</sup> It was further argued that measures taken by the International Court of Justice for the prevention of genocide could be even more effective than those of a criminal court, for fanatics of the type that usually committed genocide were not afraid of penalties under criminal law.<sup>214/</sup>

232. Against these amendments, it was stated that, according to its Statute, the International Court of Justice could not pass judgement in the field of criminal law and, in other fields, its jurisdiction extended only over States, not over individuals. If it were desired that the competence of the International Court of Justice in respect to genocide should be recognized in the Convention, the Statute of the Court would first have to be amended.<sup>215/</sup>

233. Another proposal was designed to make provision for the statute of an international criminal court in the Convention.<sup>216/</sup>

234. At its 129th meeting, the Sixth Committee decided to reconsider article VI of the Convention. The sponsors of certain amendments were invited to form a small drafting committee in order to formulate a final text for the article.<sup>217/</sup> At the 130th meeting of the Sixth Committee, the following text was submitted for the final phrase of article VI: "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".<sup>218/</sup>

235. In favour of this text, it was said that, if the Convention made no mention of an international court, serious complications might arise. For cases of genocide to be tried by such a court, if its establishment was later decided, it would be

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<sup>213/</sup> Ibid., Summary Records of Meetings, p. 370.

<sup>214/</sup> Ibid., p. 368.

<sup>215/</sup> Ibid., p. 369.

<sup>216/</sup> Ibid., Annexes, document A/C.6/211, pp. 13-15; and ibid., Summary Records of Meetings, p. 373.

<sup>217/</sup> Ibid., Summary Records of Meetings, pp. 670-672.

<sup>218/</sup> Ibid., p. 674.

necessary to amend the convention on genocide, which would take a great deal of time. If the reference to the international criminal court was adopted, the jurisdiction of such a court would automatically extend to countries which had ratified both the convention on genocide and the convention establishing the international criminal court.219/

236. Against this proposal, it was again argued that the principle of an international criminal jurisdiction ran counter to that of State sovereignty.220/

237. At its 131st meeting, the Committee adopted, by 29 votes to 9, with 5 abstentions, the text mentioned in paragraph 234 above.

(b) Consideration of the question of an international criminal jurisdiction subsequent to the adoption of the Genocide Convention

(i) Consideration of the question by the General Assembly

238. The General Assembly, in its resolution 260 B (III) of 9 December 1948, considered that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law". It invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" and, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

239. Having considered the question at its second session, in 1950, the International Law Commission decided "that the establishment of an international judicial organ for the trial of **persons** charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable" and "that the establishment of the above-mentioned international judicial organ is possible".221/ With regard to the possibility of establishing a criminal chamber of the International Court of Justice, the Commission "decided to state that it had paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it".222/

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219/ Ibid., pp. 675-677.

220/ Ibid., pp. 678-680.

221/ Official Records of the General Assembly, Fifth Session, Supplement No.12, paras. 128-145.

222/ Ibid., para. 145.



240. On 12 December 1950, the General Assembly, by resolution 489 (V), established a committee, composed of representatives of 17 Member States, to prepare one or more preliminary draft Conventions and proposals relating to the establishment and the statute of an international criminal court, and requested the Secretary-General to communicate the report of the committee to the Governments of Member States for their observations.

241. Pursuant to that resolution, the Committee on International Criminal Jurisdiction met at Geneva from 1 to 31 August 1951. It made proposals relating to some of the most important questions posed by the establishment of an international criminal court and recorded in its report 223/ the various views expressed by the members of the Committee. To this report was annexed a draft statute for an international criminal court. In addition, the Committee expressed the wish that the instrument establishing the international criminal court should be accompanied by a protocol conferring jurisdiction on the court in respect of the crime of genocide. The Committee did not regard its proposals as final but viewed them merely as a contribution to a study which, in the Committee's opinion, would have to be carried several steps forward before the problem of an international criminal jurisdiction was ripe for decision. At the seventh session of the General Assembly, the consideration of the Committee's report led to the adoption, on 5 December 1952, of resolution 687 (VII) whereby the General Assembly established a new committee composed of representatives of 17 Member States and directed it to study the question further. This Committee, which met in New York from 27 July to 20 August 1953, based its work on, inter alia, a compilation 224/ of comments and suggestions relating to the draft statute for an international criminal court prepared by the Secretariat and containing the comments and suggestions submitted by Governments in writing 225/ or made orally during the seventh session of the General Assembly. It dealt with the main problems relating to the establishment of an international criminal court and re-examined the Geneva draft statute prepared by the Committee on International Criminal Jurisdiction in 1951. To the report 226/ which it adopted was annexed a revised draft statute for an international criminal court.

242. By its resolution 898 (IX) adopted on 14 December 1954, the General Assembly, after noting the connexion between the question of defining aggression, the draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, decided to postpone consideration of the last question until the General Assembly had considered the report of the Special Committee on the Question of Defining Aggression and had re-examined the draft Code of Offences against the Peace and Security of Mankind. This position was reaffirmed by General Assembly resolutions 1186 (XII) and 1187 (XII) of 11 December 1957. On 27 September 1968, the Assembly took note of the decision of

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223/ Official Records of the General Assembly, Seventh Session,  
Supplement No. 11.

224/ A/AC.65/1.

225/ A/2186 and Add.1.

226/ Official Records of the General Assembly, Ninth Session,  
Supplement No. 12, document A/2645.

its General Committee that it was not desirable for the items "Draft code of offences against the peace and security of mankind" and "International Criminal Jurisdiction" to be taken up until further progress had been made in arriving at a generally agreed definition of aggression. The Special Committee on the Question of Defining Aggression established by General Assembly resolution 2330 (XXII) of 18 December 1967 submitted its final report to the twenty-ninth session of the Assembly. On 14 December 1974, the General Assembly by resolution 3314 (XXIX) adopted the Definition of Aggression annexed thereto.<sup>227/</sup>

(ii) Consideration of the question by the Sub-Commission on Prevention of Discrimination and Protection of Minorities

243. The possibility of establishing an international criminal jurisdiction to try the crime of genocide was dealt with by various speakers during the Sub-Commission's consideration of the Special Rapporteur's reports (E/CN.4/Sub.2/L.565, L.583 and L.623) at its twenty-fifth, twenty-sixth and twenty-eighth sessions.

244. In favour of setting up such a body, it was observed that the perpetrators of acts of genocide were generally national authorities against whom it was difficult to apply national legislation. The setting up of the International Court of Justice had shown that the establishment of international bodies to guarantee respect for human rights, although not an easy task, was feasible.<sup>228/</sup>

245. If a revision of the 1948 Genocide Convention or the adoption of a new instrument was to be considered, it was further argued, the question of establishing an international body for the prevention of genocide would automatically arise, since it was essential to find an effective means of preventing genocide.<sup>229/</sup>

246. The view was also expressed that the potential role of the International Court of Justice in dealing with alleged charges of genocide should not be underestimated; for instance, a State might take the initiative of requesting the Court to investigate alleged cases of genocide in the territory of a State party to the Genocide Convention.<sup>230/</sup>

247. On the other hand, it was said that the limited number of States which had accepted the compulsory jurisdiction of the International Court and the impossibility of securing agreement to a clause relating to the jurisdiction of the International Court, even at multilateral treaty conferences held under United Nations auspices, made it futile to hope for the establishment of an international penal tribunal, which would be far more controversial than the International Court itself.<sup>231/</sup>

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<sup>227/</sup> For the text of the Definition of Aggression see Official Records of the General Assembly, Twenty-ninth Session, Supplement No.31 (A/9631), pp. 142-144.

<sup>228/</sup> E/CN.4/Sub.2/SR.658, p. 57.

<sup>229/</sup> E/CN.4/Sub.2/SR.684, p. 158.

<sup>230/</sup> E/CN.4/Sub.2/SR.736, p. 203.

<sup>231/</sup> E/CN.4/Sub.2/SR.736, p. 204.

248. For some members, the idea of setting up an international body which would endeavour to prevent genocide was unrealistic,<sup>232/</sup> unnecessary and unacceptable at the present time,<sup>233/</sup> or inappropriate.<sup>234/</sup> An effort should first be made to determine what could be done within the framework of the existing machinery.<sup>235/</sup> Rather than establish such an organ, it would be better to set up an international investigatory body to act not only on the basis of majority decisions by political organs of the United Nations but also on its own initiative, in cases where there was evidence that genocide was being or was about to be committed.<sup>236/</sup>

(iii) Replies of Governments

249. In reply to a request of 20 November 1972 for its views on the possibility of establishing an international criminal jurisdiction as proposed in article VI of the Genocide Convention, the Government of the Federal Republic of Germany wrote on 17 December 1974 that:

"... The establishment of an international body to carry out investigation is welcomed in principle, but the chances of its realization are slight.

"As is known, the Federal Republic of Germany has always rejected the idea ... of subjecting persons who come under the jurisdiction of our own courts to the jurisdiction of an international court. As we do not recognize a substantive and objective international penal law, the international rules of law under which cases of genocide would be tried would first have to be created."

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<sup>232/</sup> E/CN.4/Sub.2/SR.658, p. 54.

<sup>233/</sup> E/CN.4/Sub.2/SR.659, p. 63.

<sup>234/</sup> Ibid., p. 56.

<sup>235/</sup> Ibid., p. 64.

<sup>236/</sup> E/CN.4/Sub.2/SR.736, pp. 201-202.

G. Extradition of persons guilty of the crime of genocide  
(article VII of the Convention)

1. Preparation of the article

250. Article VII of the Convention reads as follows:

"Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

"The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

251. The Secretary-General's draft reads:

"The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

"The High Contracting Parties pledge themselves to grant extradition in cases of genocide."237/

252. The text adopted by the Ad Hoc Committee on Genocide read thus:

"Genocide and the other acts enumerated in article IV 238/ shall not be considered as political crimes and therefore shall be grounds for extradition.

"Each party to this Convention pledges itself to grant extradition in such cases in accordance with its laws and treaties in force."239/

253. The text prepared by the Ad Hoc Committee on Genocide was modified by the Sixth Committee of the General Assembly through the adoption of an amendment (A/C.6/236 and Corr.1)240/ which proposed that the phrase "for purposes of extradition" should be substituted for the phrase "and therefore shall be grounds for extradition".

254. In introducing this amendment, the sponsor argued, among other things, that the defect of the Ad Hoc Committee text was that it made extradition too compulsory. He added that the question of whether a request for extradition should be granted depended on a wide variety of factors and the question of whether the crime was political or not was only one of those factors. Furthermore, genocide was a political crime in that its commission could usually be traced to a political motive. It was precisely because of the political nature of the crime that it was necessary to state that, for purposes of extradition, it should be considered as non-political.241/

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237/ E/447, p.39.

238/ Article III of the Convention.

239/ E/794, p.13.

240/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes, p.25.

241/ Ibid., Sixth Committee, 94th meeting, pp.331-332.

255. Against the amendment, it was maintained that genocide, as the mass destruction of groups of human beings could never, in any event, be considered as a political crime. It was for that reason that the Ad Hoc Committee text had stated specifically that genocide should not be considered as a political crime and should therefore be grounds for extradition. It was also stated that in many domestic legal systems political crimes were subject to less serious punishment than other crimes. It would therefore be contrary to the purposes of the Convention if genocide were considered as a non-political crime only for the purposes of extradition.<sup>242/</sup>

256. The amendment referred to above was adopted by 27 votes to 7, with 2 abstentions.<sup>243/</sup>

257. Another amendment (A/C.6/217) to the text given in paragraph 153 above read as follows:

"The crime of genocide as defined in article II shall not be considered as a political crime exempt from extradition."<sup>244/</sup>

258. The sponsor of the amendment explained that not all the acts listed in article IV of the Ad Hoc Committee's text (article III of the Convention) should be considered as grounds for extradition. Those acts were not so serious as the actual commission of genocide and for that reason it would be better to limit the scope of the article concerning extradition to genocide as defined in article II of the Convention.<sup>245/</sup> Furthermore, incitement to the crime of genocide or complicity might be carried on in such a way that some States could not, under their domestic legislation, extradite those guilty of such acts.<sup>246/</sup>

259. Against the amendment, it was stated that the crimes listed in article III were extremely serious and should not therefore be exempt from extradition. It was further maintained that there was no need to draw any distinction between the acts listed in article III and those listed in article II; they should all be grounds for extradition, otherwise those who had committed the acts referred to in article III might be able to seek refuge in foreign countries.<sup>247/</sup>

260. The amendment referred to above was rejected by 17 votes to 16, with 4 abstentions.<sup>248/</sup>

261. During the discussion in the Sixth Committee, the question was also raised as to whether under the provisions of article VII of the Convention, a State would be obliged to extradite its own nationals. The prevailing opinion in the Committee was that the fact that the article contained the phrase "in accordance with its laws" make it quite clear that no country would be obliged to extradite its own nationals, if its laws did not permit that.<sup>249/</sup>

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<sup>242/</sup> Ibid., pp.334-337.

<sup>243/</sup> Ibid., p.337.

<sup>244/</sup> Ibid., Sixth Committee, annexes, p.20.

<sup>245/</sup> For articles II and III of the Convention, see paras. 43-93 above.

<sup>246/</sup> Ibid., Sixth Committee, 94th meeting, pp.329, 332.

<sup>247/</sup> Ibid., pp. 332-333, 334.

<sup>248/</sup> Ibid., pp. 337.

<sup>249/</sup> Ibid., p.332, and 95th meeting, p.337.

2. International instruments providing for the compulsory extradition of persons guilty of crimes under international law

262. A number of international instruments relating to war crimes and crimes against humanity, which come under the same category of crimes under international law as genocide, also make provision for extradition in the case of such crimes.

263. The Moscow Declaration of 30 October 1943 provided that, except in the case of offences having no particular geographical localization, the Nazi war criminals should be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein."250/

264. The Declaration issued by the Occupying Powers in Germany, on 5 June 1945, which followed the instrument of military surrender of the national-socialist Reich signed on 8 May 1945, contained in its article 11 formal clauses concerning the extradition of war criminals, and specified that the German authorities and the German people should comply with all instructions given by the allied representatives with a view to the arrest and surrender of those individuals.251/

265. The London Agreement of 8 August 1945 which established the Nuremberg International Military Tribunal provided as follows:

"Article 3. Each of the Signatories should take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

"Article 4. Nothing in this Agreement shall prejudice the position established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes."252/

266. Law No. 10 of the Allied Control Council for Germany, applying the principle laid down by the Moscow Declaration, provided that the Commanders of the occupation zones should surrender German war criminals in those zones to the countries where the crimes had been committed.

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250/ E/CN.4/906, para.10.

251/ Official Gazette of the Control Council for Germany, Supplement No. 1, p.7.

252/ United Nations Treaty Series, 1951, Vol. 82, p.282.

267. Failing a general international agreement on the extradition of war criminals, express extradition clauses were inserted in the peace treaties concluded at the end of the Second World War with Bulgaria (article 5),<sup>253/</sup> Finland (article 9),<sup>254/</sup> Hungary (article 6),<sup>255/</sup> Italy (article 45),<sup>256/</sup> and Romania (article 6),<sup>257/</sup>.

268. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968), which included genocide as defined in the 1948 Convention <sup>258/</sup> among the crimes under international law to which statutory limitations should not apply, provides as follows in article III:

"The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention."<sup>259/</sup>

269. Several resolutions adopted by the General Assembly immediately after the establishment of the United Nations, such as resolutions 3 (I) of 13 February 1946 and 170 (II) of 31 October 1947, recommended Member States to take all the necessary measures to cause war criminals to be sent back to the countries in which their abominable deeds had been done.

270. In operative paragraphs 2 and 3 of resolution 2840 (XXVI) of 18 December 1971, entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity", the General Assembly:

"1. Urges all States to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes;

"2. Further urges all States to co-operate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity;

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<sup>253/</sup> Ibid., vol. 41, p.50.

<sup>254/</sup> Ibid., vol. 48, p.228.

<sup>255/</sup> Ibid., vol. 41, p. 168.

<sup>256/</sup> Ibid., vol. 49, p.126.

<sup>257/</sup> Ibid., vol. 42, p.34.

<sup>258/</sup> Article I of the Convention, see para. 413 below.

<sup>259/</sup> Article II of the Convention reads as follows: "If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

...

"4. Affirms that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law..."

271. Mention should also be made in this connexion of resolution 3074 (XXVIII), entitled "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", adopted by the General Assembly on 3 December 1973, which provides inter alia that:

"...Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons.

"...States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

### 3. Effectiveness of the article

272. Starting from the view that until such time as an international criminal tribunal is established, the Convention on Genocide would be more effective if universal jurisdiction were to be established for the competent domestic courts of the States parties,<sup>260/</sup> the Government of Canada has communicated the following:

"The Government of Canada considers that a realistic method of determining that an act of genocide is being, or has been, committed, should be established in order that extraterritorial jurisdiction could be uniformly exercised. A Declaration by the Security Council or by the International Court of Justice that genocide has been committed would be a method of determining that an act comes within the scope of the Convention. Such a declaration would be a necessary pre-condition to a State taking jurisdiction in the case of a particular person alleged to have committed and intended to commit an act of genocide. As a pre-condition, however, it would merely set the stage for universal jurisdiction; it would not prejudice the case of a particular person. States would then have the option either to extradite the individual responsible, as they have under the present Convention, or to submit the case to the State's own competent authorities for the purpose of prosecution, as they would have in an amended Convention.

"Therefore following the model of Article 7 of the Hague Convention for the Prevention of the Unlawful Seizure of Aircraft (1970), the option to extradite or to submit the case for prosecution might be usefully established.

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<sup>260/</sup> See para. 201 above.



"The Hague and Montreal Conventions dealing with unlawful interference with civil aviation would also serve as useful models for improvement of Article VII of the Genocide Convention, (the extradition provision). Article 8 of the Hague Convention, for example, presents more varied alternatives than those contained in present Article VII of the Genocide Convention. Article 8 of the Hague Convention states:

'1. The Offence shall be deemed to be included as an extraditable offence in an extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

'2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

'3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.'

"The Government of Canada considers that inclusion of such alternatives would strengthen the Genocide Convention."261/

273. Referring to another aspect of article VII of the Convention, the Government of the Federal Republic of Germany has communicated the following:

"The Federal Government considers that the different interpretations of the concept of 'political crimes' in Article VII (1) of the Convention within the framework of requests for extradition may reduce the effectiveness of existing international measures for the prevention and punishment of genocide.

"Under Article VII (1) of the Convention genocide does not count as a political crime in terms of extradition law. Yet requests for extradition for racially motivated killings during the Nazi era have in several cases been rejected on the ground that the acts in question constituted political crimes. It can only be assumed that the countries concerned feel entitled on the strength of Article VII (2) of the Convention to refuse such requests because the extradition obligation is, in their view, subject to national law, which may place a special interpretation on the concept of a political crime. This approach is questionable considering the unequivocal wording of Article VII (1) of the Convention."

"As long as States take a different approach to the question of extradition for crimes of genocide, the legal effectiveness of the existing measures must be said to be limited."262/

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261/ Information and opinions communicated by the Government of Canada on 27 February 1974.

262/ Information and opinions communicated by the Government of the Federal Republic of Germany on 17 December 1974.

274. Expressing the view that in order to take effective international measures for the prevention and punishment of the crime of genocide, it was necessary to envisage concluding a new convention on genocide, the Government of Poland considered that such a convention should in particular provide for an unconditional obligation to extradite.<sup>263/</sup>

275. According to one author, genocide, despite its inevitable political implications, could not be considered a political crime in essence, because it constituted a violation of the integrity of the human race and its members. The author concluded that it was regrettable that the Convention had not adopted a position of principle on the matter, although article VII would achieve the proposed purpose of ensuring punishment.<sup>264/</sup>

276. The opinion has also been expressed that parties to the Convention have the obligation to amend or not to apply domestic legislation under which genocide would be regarded as a political offence which was not grounds for extradition.<sup>265/</sup> But the parties to the Convention are not obliged to adopt uniform measures to facilitate extradition by amending their legislation or concluding new bilateral extradition treaties. The extradition treaties in force would be supplemented eo ipso in respect of genocide of the States which had concluded them became parties to the 1948 Convention.<sup>266/</sup>

277. One author, examining article VII of the Convention in the light of Article VI, which affirms the competence of the tribunal of the State in the territory of which the act was committed and bearing in mind the fact that under their legislation a number of States did not extradite their own nationals, has observed that:

"In the event of a national of State A committing genocide on the territory of State B, only the court of State B is competent to try him. If he is on the territory of State A, that State is not obliged to bring him to trial, and furthermore, in accordance with the principle of refusing to extradite nationals, is not obliged to extradite him under its legislation."<sup>267/</sup>

278. In paragraph 211 above, the Special Rapporteur expressed the view that it would be desirable for a new international instrument on genocide to establish the principle of universal jurisdiction.<sup>268/</sup> Given that principle, such an instrument should offer the choice between extradition and the punishment of the crime by the State on whose territory the guilty person was living (aut dedere, aut punire).

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<sup>263/</sup> Information and opinions communicated by the Government of Poland on 30 April 1973.

<sup>264/</sup> Planzer, op. cit., p.164.

<sup>265/</sup> Robinson, op. cit., p.87; Gerhard Simson, "Genocide Konvention und die Nordischen Staaten", Jus gentium, Nordisk Tidsskrift for Folkeret og international privatret, 1951, vol.II, p.215.

<sup>266/</sup> Planzer, op. cit., p.162; Drost, op. cit., pp.164-165; Robinson op. cit., pp.87-89.

<sup>267/</sup> Flawski, op. cit., p.120 (translation into English by the Secretariat).

<sup>268/</sup> See para. 211 above.

#### 4. Application of the article

279. The need for legislative measures to ensure the application of article VII of the Convention was referred to by the United States representative in the Ad Hoc Committee on Genocide (see paragraph 559 below).

280. The Government of the Philippines made the following reservation to this article:

"With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the constitution of the Philippines, cannot have any retroactive effect."269/

A number of Governments objected to this reservation.270/

281. In its instrument of ratification, the Government of Venezuela stated that:

"With reference to article VII, notice is given that the laws in force in Venezuela do not permit the extradition of Venezuelan nationals."271/

One Government objected to this reservation.272/

282. It may be mentioned that the following countries have provided, in legislative measures relating to the application of the Genocide Convention, that this crime shall not be regarded as a political crime for the purposes of extradition: Federal Republic of Germany 273/, Brazil 274/, Italy 275/, Ireland 276/, Israel 277/, United Kingdom 278/.

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269/ Multilateral treaties in respect of which the Secretary-General performs depositary functions. List of signatures, ratifications, accessions, etc. as at 31 December 1977, (ST/LEG/SER.D/11) (United Nations publication, Sales No. E.78.V.6), p.85.

270/ Ibid., pp.86-87.

271/ Ibid., p.86.

272/ Ibid., p.87.

273/ Act concerning the Accession of the Federal Republic of Germany to the Convention for the Prevention and Punishment of the Crime of Genocide (article 4, E/CN.4/Sub.2/303/Add.2).

274/ Act No. 2889 Defining and Punishing the Crime of Genocide of 1 October 1956 (article 6), Yearbook on Human Rights for 1956 (United Nations publication, Sales No.58.XI.V.2), p.28.

275/ Constitutional Act No.1 of 21 June 1969: Extradition in the case of crimes of genocide (E/CN.4/Sub.2/303).

276/ Article 3 of the Genocide Act, 1973, communicated by the Government of Ireland on 28 June 1974.

277/ The Crime of Genocide (Prevention and Punishment) Act, 1950, article 8, Yearbook on Human Rights for 1950 (United Nations publication, Sales No. 1952, XIV.1), p.162.

278/ Genocide Act, 1969 (Information and opinions communicated by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973).

283. The Government of Mexico has communicated the following:

"...with regard to extradition, Mexican law and the various treaties and conventions to which Mexico is party require as a precondition of extradition that the act in respect of which the requisition for extradition has been issued should constitute an offence under Mexican law. This prerequisite has been met through the inclusion of genocide as a criminal offence in the criminal laws now in force".<sup>279/</sup>

H. The right of parties to the Convention to call upon the competent organs of the United Nations (article VIII of the Convention)

1. Preparation of the article

284. Article VIII of the Convention reads:

"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

285. In the draft convention prepared by the Secretary-General, the text corresponding to article VIII of the Convention reads as follows:

"Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

"In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations."<sup>280/</sup>

286. The Ad Hoc Committee on Genocide discussed the question whether or not a specific organ of the United Nations should be mentioned, to be called upon by the Contracting Parties and take such action as might be appropriate to put an end to the act of genocide. Another question which was raised was whether it should be made compulsory for the Parties to the Convention to lay the matter before the organs of the United Nations or whether they should merely be given the right to do so.<sup>281/</sup> The text finally adopted by the Committee contained a first paragraph similar to the text of article VIII of the Convention, the only difference being that in the Convention the words "such action ... as they consider appropriate" replaced the words "such action as may be appropriate". The text adopted by the Ad Hoc Committee on Genocide included a second paragraph as follows:

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<sup>279/</sup> E/CN.4/1010.

<sup>280/</sup> E/447, p.45.

<sup>281/</sup> E/794, p.12.

"A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention."282/

287. In the Sixth Committee, two amendments (A/C.6/217, A/C.6/236) 283/ were submitted proposing the deletion of the article. The sponsors of the amendments argued that such an article was superfluous since States Members were already entitled to appeal to organs of the United Nations in case of need, under the Charter.284/ It was therefore unnecessary and undesirable to repeat those provisions in the Convention.285/

288. For the retention of the article, it was argued that: (a) since the Convention was a concrete application of the Charter, it was desirable to include an article which made clear the relation between the Charter and the Convention; (b) since there was no international tribunal to enforce universal repression of the crime of genocide, the competent organs of the United Nations were best fitted to see to the application of the Convention.286/

289. At the 101st meeting of the Sixth Committee, it was decided by 21 votes to 18, with 1 abstention, to delete article VIII.287/

290. The question of including a provision in the Convention referring to action by organs of the United Nations to aid in the prevention and suppression of acts of genocide ~~was~~ again raised after the discussion on article X, on the competence of the International Court of Justice (see paragraphs 310-317 below). In order to avoid creating the impression that the Court was the only United Nations body competent in matters concerning genocide, an amendment (A/C.6/265) was proposed at the 105th meeting of the Sixth Committee to add a second paragraph to article X reading:

"With respect to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations."288/

291. The amendment was adopted by 29 votes to 4, with 5 abstentions.289/ The drafting committee made some changes in the text, which became article VIII of the draft adopted by the Sixth Committee and subsequently by the General Assembly.

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282/ Ibid., p.12.

283/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes, pp.20 and 25.

284/ Ibid., Sixth Committee, 101st meeting, p.409.

285/ Ibid.

286/ Ibid., pp.411-412.

287/ Ibid., p.417.

288/ Ibid., 105th meeting, p.454.

289/ Ibid., p.457.

292. Another amendment submitted to the Sixth Committee (A/C.6/215/Rev.1) 290/ was intended to make it compulsory for the Parties to the Convention to place any case of genocide before the United Nations and to specify the competent United Nations organ to which the matter was to be referred. The sponsor of that amendment withdrew it, agreeing to the text of amendment A/C.6/259, which read:

"The High Contracting Parties may call the attention of the Security Council to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security in order that the Security Council may take such measures as it deems necessary to stop the threat."291/

293. It was maintained that it should be specified that the competent organ to be called upon by the Parties to the Convention was the Security Council, because: (a) since it was permanently in session and could take swift and effective action, it was the most appropriate organ to ensure the application of the Convention and take preventive or suppressive action in respect to genocide; (b) by referring to the body with the widest responsibility for action against any threat to international peace and security, it would be made still clearer that genocide constituted such a threat.292/ Against the amendment, it was pointed out that when the Ad Hoc Committee on Genocide had discussed the question whether cases of genocide should be submitted to the Security Council, it had been thought dangerous to make obligatory the submission to the Council of cases over which it might have no jurisdiction. The juridical reasons for the rejection of the proposal had been the impossibility of amending the Charter or of enlarging the powers of the Security Council by subsequent conventions. It was added that if the amendment was to have the effect of enlarging the powers of the Security Council, that would involve amending the Charter; if it was not to have such an effect, it was unnecessary to mention the already existing powers of the Security Council.293/

294. During the discussion, there was a proposal that the powers of the General Assembly should be mentioned in the text, a proposal which was accepted by the sponsors of the amendment referred to in paragraph 203 above. This amendment was rejected by 27 votes to 13, with 5 abstentions.294/

## 2. Interpretation and effectiveness of the article

295. In the literature on the crime of genocide, it has been pointed out that article VIII did not strengthen the existing powers of United Nations organs in respect to the measures they might take in a case of genocide, and reference has been made in that connexion to the commentary on the relevant article in the draft convention prepared by the Secretary-General.295/ Moreover, in accordance

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290/ Ibid., Sixth Committee, Annexes, p.18.

291/ Ibid., Sixth Committee, 105th meeting, p.410.

292/ Ibid., pp.409-410.

293/ Ibid., pp.412-413.

294/ Ibid., 101st meeting, pp.409-423.

295/ This commentary points out that: "There is no need to expatiate on the preventive action which would be taken by the United Nations, for this is a question of the general competence of the United Nations being applied in a particular case". (E/447, p.45).

with the principle "pacta tertiis nec prosunt nec nocent", no treaty can invest organs of the United Nations with duties or functions going beyond their rights and powers under the Charter. Where specific duties and functions are entrusted to United Nations organs, this can be done only within the scope of their general competence as provided for in the Charter. Furthermore, the reference in the text of article VIII itself to the competent organs of the United Nations taking action "under the Charter of the United Nations", shows there was no intention in article VIII to enlarge or strengthen the powers of the organs of the United Nations in respect to genocide.296/

296. In the same context, the question was raised whether article VIII allowed United Nations organs to take action concerning crimes of genocide committed in the territory of a State which was not party to the Convention. It was pointed out that the draft convention prepared by the Secretary-General had dealt with the matter by stating that the organs of the United Nations would have power to take measures in respect to acts of genocide committed "in any part of the world" (see paragraph 285 above). In any event, it was said that the solution to the problem must be looked for in the provisions of the Charter. Those provisions gave the General Assembly and the Security Council competence in respect of matters affecting international peace and security and human rights to which there could be no territorial limits. It followed that an organ of the United Nations would have the right to take action to prevent and suppress genocide even in the case of States - Members or non-members - which were not parties to the Convention. Such action would not mean that the Convention was binding on States which were not parties to it, but would simply be an application of the general powers of United Nations organs in the specific case of genocide.297/

297. It has been pointed out that article VIII of the Convention makes it clear that all acts of genocide are excluded from the matters which are essentially within the domestic jurisdiction of any State, in which the United Nations has in principle no authority to intervene (Article 2, paragraph 7, of the Charter). The question has been raised whether a State Member of the United Nations which did not become a Party to the Convention could maintain, against any action by the United Nations, the objection that it had not acceded to the Convention, so that genocide was not excluded from the matters which were essentially within its domestic jurisdiction. It has been held that such an objection would not be valid, since genocide is an international crime,298/ a humanitarian matter and a violation of human rights, consideration of which falls within the competence attributed by the Charter to the General Assembly and the Security Council.299/

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296/ See, for instance, Planzer, op. cit.; Drost, op. cit., pp.106-107.

297/ Robinson, op. cit., pp.96-98, who bases his opinion on the following articles of the Charter: 2 (6), 10, 11 (2), 35 (2) and 99. Cf. also P. Drost, op. cit., pp.108-109.

298/ See J. Kunz, op. cit., p.738.

299/ P. Drost, op. cit., pp.108-109; Robinson, op. cit., pp. 94-95.

298. In the light of all these considerations, one writer concludes that:

"The general powers and functions of United Nations organs applied to the specific case of genocide do not depend on the present Convention but on the provisions of the Charter. In so far as Article VIII is concerned, the Convention affects the Signatories neither more nor less than any State not bound by the Convention. This legal conclusion is the logical confirmation of the article's lack of significance and consequence".<sup>300/</sup>

299. There has also been some discussion in the literature as to whether, by referring to the rights of the Parties to the Convention, among which there might be States not members of the United Nations, to call upon the competent organs of the United Nations, article VIII conferred on such States rights which they did not possess under the Charter. One writer takes the view:

"Furthermore, by virtue of Article VIII, signatories not members of the United Nations, are granted the right to call upon the organs of the United Nations, a right which they generally would not have otherwise, except insofar as the Security Council may be concerned. Under Article 13 of the Rules of Procedure of the General Assembly, only United Nations Members have the unrestricted right to request inclusion of an item in the agenda. Non-members may do so only in case of disputes and under the conditions prescribed in Article 35 (2) of the Charter. Rules 10 and 13 of the Rules of Procedure of the Economic and Social Council and Rule 9 (e) of the Rules of Procedure of the Trusteeship Council deal with United Nations Members only. On the other hand, Rule 6 of the Provisional Rules of Procedure of the Security Council speaks of communications from 'States', which in practice also means non-members".<sup>301/</sup>

300. The Special Rapporteur's view is that this opinion is unfounded, since the Convention on Genocide could not amend the Charter by granting non-member States more extensive rights in that connexion than those established under the Charter and the rules of procedure for its application.

301. The Government of the Congo has communicated the following:

"It must be acknowledged ... that the efforts made by the specialized United Nations bodies to define the acts which should be punished as genocide, in order to establish, or at least endeavour to establish, a system of international rules on the matter may have a certain moral influence in preventing acts which would count as genocide or attempted genocide. Governments hesitate to alienate international public opinion, and if that opinion is aware and aroused, it may have some influence on governmental decisions".<sup>302/</sup>

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<sup>300/</sup> P. Drost, *op. cit.*, p.109.

<sup>301/</sup> Robinson, *op. cit.*, pp.95-96.

<sup>302/</sup> Information and views communicated by the Government of the Congo on 14 May 1973.



302. Several writers take the view that article VIII adds nothing fresh and from the legal standpoint is an empty formula, since what it refers to is a right already existing under the Charter.<sup>303/</sup>

303. It had been pointed out, however, that:

"An appeal to the organs of the United Nations in cases of genocide is nevertheless of some psychological importance. It is a new form of intervention on humanitarian grounds by the world community.

"In the absence of an international court, an appeal to the United Nations would not be pointless, for it would bring the matter before world public opinion, which might induce a State to renounce any such acts."<sup>304/</sup>

304. The Special Rapporteur's view is that article VIII of the Convention, while adding nothing to the Charter, is of some importance in that it states explicitly the right of States to call upon the United Nations with a view to preventing and suppressing genocide and the responsibility of the competent organs of the United Nations in the matter. Furthermore, as has been pointed out,<sup>305/</sup> it is the only article in the Convention for the Prevention and Punishment of Genocide which deals with prevention of that crime, referring to the possibility of preventive action by United Nations organs called upon by Parties to the Convention. It should be noted, further, that such action by United Nations organs is action of a particularly humanitarian nature, the need and justification for which should not be underestimated. It would be desirable for the organs of the United Nations, in pursuance of article VIII of the Convention, to exercise their powers in this field actively.

305. The International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted by General Assembly resolution 3068 (XXVIII)) uses the text of article VIII of the Convention on Genocide, with some slight drafting changes. Article VIII of the Convention on the Crime of Apartheid reads:

"Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid."

306. Lastly, the value of an article specifying the role of the United Nations in the prevention and suppression of genocide is evident from the fact that until some special agency is set up, there is no other international organization to see to the implementation of the Convention.

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<sup>303/</sup> Planzer, op. cit., p.155; Drost, op. cit., p.109.

<sup>304/</sup> Planzer, op. cit., p.155 (translation into English by the Secretariat).

<sup>305/</sup> Adolfo Miaja de la Muela, op. cit., p.405.

I. The role of the International Court of Justice  
(article IX of the Convention)

1. Preparation of the article

307. Article IX of the Convention on Genocide provides that:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

308. In the draft convention prepared by the Secretary-General, it had been proposed that "Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice".<sup>306/</sup>

309. A more detailed text was adopted by the Ad Hoc Committee on Genocide:

"Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal."<sup>307/</sup>

310. One of the amendments (A/C.6/215/Rev.1) <sup>308/</sup> submitted to the Sixth Committee of the General Assembly (third session, part I) proposed the deletion of this article. Another (A/C.6/258) proposed that it should be replaced by the following:

"Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties."<sup>309/</sup>

This text gave rise to discussions on: (a) whether the Convention should give the International Court of Justice competence in respect of genocide; (b) whether the responsibility of the State, and the nature of that responsibility, should be included in the Convention.

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<sup>306/</sup> Draft article XIV, E/447, p. 50.

<sup>307/</sup> Draft article X, E/794, p. 13.

<sup>308/</sup> Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes, p. 28.

<sup>309/</sup> Ibid., p. 28.

311. Against the idea of giving the International Court of Justice competence in respect to acts of genocide, it was argued that since the matter was one in which other organs of the United Nations could play a more effective role, the Court's competence would be an obstacle to the more vigorous action which the Security Council and General Assembly could take; genocide was a crime that could be committed unexpectedly and on a large scale, in which circumstances legal guarantees were too slow to prevent it effectively; the mass extermination of a human group could not be called a dispute between the parties to the Convention and therefore could not lie within the province of the International Court of Justice; and the Court was not the competent body to consider situations endangering the maintenance of international peace and security, such as acts of genocide, since it did not have the means to prevent them.310/

312. In favour of the competence of the Court in regard to genocide it was argued that it would be useful to reiterate in the Convention the general provision contained in Article 36 of the Charter 311/ so as to make it applicable to the special case of genocide. It was further argued that appeal to the Court, as referred to in Article 33 of the Charter 312/ would not encroach upon the competence of the Security Council as provided for in Article 37 of the Charter.313/ Furthermore, referral of the matter to the Court would not be useless, since acts of genocide - which was a process in which a human group was gradually destroyed - did not occur suddenly and the Court would have time to intervene effectively.314/

313. It was argued, in favour of including a reference to State responsibility in the Convention, that it would be incomplete without any mention of that responsibility, which was almost always involved in acts of genocide. It had also to be borne in mind that in time of peace it was virtually impossible to exercise any effective international or national jurisdiction over rulers or heads of State. For that reason, it followed that the Convention would be more effective if reference was made to State responsibility and the jurisdiction of the International Court of Justice.315/

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310/ Ibid., Sixth Committee, 103rd meeting, pp. 435, 437 and 104th meeting, p. 440.

311/ Article 36(3) of the Charter reads as follows: "In making recommendations under this Article" (recommendations relating to procedures or methods of settling any dispute the continuance of which is likely to endanger the maintenance of international peace and security) "the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

312/ Article 33 mentions judicial settlement among the methods for the pacific settlement of international disputes.

313/ Article 37(1) provides that if the parties to a dispute fail to settle it by the means indicated in Article 33, they shall refer it to the Security Council.

314/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 103rd meeting, p. 431, and 104th meeting, pp. 436 and 444.

315/ Ibid., 103rd meeting, p. 430, and 104th meeting, p. 444.

314. For the contrary view, it was maintained that it would be premature to include in the Convention so loosely defined an idea as the responsibility of the State in regard to genocide. The expression "responsibility of a State" was too abstract for a convention on criminal law, in which care should be taken to avoid giving the State a fictitious legal character, a procedure which should only be used in civil or commercial matters. Moreover, although private persons might be held responsible, as individuals, for acts committed by the State, that did not necessarily mean that States should be held responsible for the acts of private individuals.316/

315. With regard to the nature of the responsibility of the State, the interpretation given by one of the sponsors of amendment A/C.6/258 and generally shared by the representatives of Member States who took part in that discussion was that it was a question not of criminal but of civil responsibility, which provided for damages. One of the sponsors of amendment A/C.6/258 maintained that what was involved was the international civil responsibility of States following violation of the Convention and that the question of cash reparations would not arise.317/ It was pointed out in that connexion that "if, however, that interpretation were accepted, the result would be that in a number of cases the State responsible for genocide would have to indemnify its own nationals. But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself".318/ Another view was that the responsibility of the State would arise whenever genocide was committed by a State in the territory of another State, and in such case, the State which had suffered damage would have a right to reparation.319/

316. An amendment was proposed by which, at the end of the text of amendment A/C.6/258 (reproduced in paragraph 310 above), the words "or of any victims of the crime of genocide (groups or individuals)" would be added, to ensure that the victims themselves benefited from the compensation.320/ This amendment was criticized as incompatible with the Statute of the International Court of Justice, which made no provision for private persons to be parties before the Court, and was withdrawn by its sponsor.321/

317. On proceeding to vote, the Sixth Committee adopted by 30 votes to 9, with 8 abstentions, an amendment (A/C.6/260) 322/ to replace the words "at the request of any of the High Contracting Parties" in amendment A/C.6/258 by the words "at the request of any of the parties to such dispute". Next, a separate vote was taken

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316/ Ibid., 103rd meeting, pp. 434 and 438, and 104th meeting, p. 442.

317/ Ibid., 103rd meeting, p. 440 and 104th meeting, p. 444.

318/ Ibid., 103rd meeting, pp. 432-433.

319/ Ibid., p. 438

320/ Ibid., 103rd meeting, pp. 428 and 436.

321/ Ibid., 104th meeting, p. 446.

322/ Ibid., 103rd meeting, p. 437.

on the words "including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV". That wording was adopted by 19 votes to 17, with 9 abstentions. The text of amendment A/C.6/258 (as amended by amendment A/C.6/260) was adopted by 23 votes to 13, with 8 abstentions.323/

## 2. Reservations

318. On becoming Parties to the Convention, Albania, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary, India, Mongolia, Morocco, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and Venezuela included in their declarations and reservations texts regarding article IX that were similar in substance. By those texts, they declared that they did not consider themselves bound by the provisions of the article and that they regarded the agreement of all parties to the dispute as essential for the submission of any particular case to the International Court for decision.324/

319. The Government of Argentina made the following reservations:

"Ad article IX: The Argentine Government reserves the right not to submit to the procedure laid down in this article any dispute relating directly or indirectly to the territories referred to in its reservation to article XII." 325/

320. The Government of the Philippines made the following reservations:

"With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. With further reference to article IX of the Convention, the Philippine Government does not consider said article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."326/

321. Some Governments stated objections to the declarations and reservations referred to above.327/

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323/ Ibid., 103rd meeting, p. 447.

324/ Multilateral treaties in respect of which the Secretary-General performs depositary functions. List of signatures, ratifications, accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/11) (United Nations publication, Sales No. E.78 V.6), pp. 83-86.

325/ Ibid., p. 83.

326/ Ibid., p. 85.

327/ Ibid., pp. 86-87.

322. Referring to article IX of the Convention, the Government of the United Kingdom has communicated the following: "This is an important provision and it is central to the implementation of the Convention. Consequently, the reservations entered by a number of States Parties to the Convention to the effect that they will not submit to the procedure laid down by article IX are directed against a crucial part of the machinery for the implementation of the Convention."328/

323. The Government of the Netherlands takes the view that: "... as a result of a number of reservations with regard to article IX application of the Convention may be less effective than would be desirable."329/

### 3. Interpretation and effectiveness of the article

324. The interpretation of article IX seems to raise some problems regarding the exact meaning of civil responsibility of the State. These problems, which arose in connexion with the preparation of article IX (see paragraph 315 above), have also been commented upon in the literature.

325. One writer makes the following points:

"The definition of civil responsibility is by no means clear. Usually, it involves the question of compensation, but no specific provision relating to reparation of damage was adopted. In the absence of such a specific reference, the question of compensation will have to be decided on the basis of accepted rules of international law. The problem becomes even more important owing to the fact that while ordinarily a State may intervene only on behalf of its citizens, Article IX grants the right of applying to the court to every party to the Convention.

"The question which may arise in connexion with civil responsibility and the lack of specific rules governing it, is thus whether civil responsibility under Article IX is to be understood in the traditional sense of responsibility to another State for injuries sustained by nationals of the complaining State in violation of principles of international law, or in a broader sense. In other words, does Article IX, as far as compensation is concerned, only create a compulsory jurisdiction where a claim exists under international law, or does it also provide for civil responsibility of the violating State for all violations?

"When the President of the United States submitted the Convention to the Senate for 'advice and consent' (ratification) on June 16, 1949, he endorsed a recommendation by the (then) Acting Secretary of State that this action be taken with the understanding that Article IX shall be understood in the traditional sense of responsibility to another State for injuries sustained by nationals of the complaining State in violation of principles

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328/ Information and views communicated by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973.

329/ Information and views communicated by the Government of the Netherlands on 25 April 1973.

of international law and shall not be understood as meaning that the State can be held liable for damages for injuries inflicted by it on its own nationals. This understanding was also recommended by the Subcommittee of the Senate's Committee on Foreign Relations which dealt with the Convention."330/

326. The same writer, however, expresses the view that:

"The fact that a special provision relating to the civil responsibility of the States, despite the general rule of international law that a violation of an international treaty establishes the obligation of the violating State to repair the resulting damage and that every State is authorized to pursue cases, was discussed, may well indicate that Article IX, in dealing with the problem of the civil responsibility of the States, goes beyond the generally accepted rules of international law.

"The following question may properly be raised: if Genocide is a crime under an international Convention and if such crimes, when committed by a government in its own territory against its own citizens, are a matter of international concern, why should not the State responsible for acts of genocide against its own nationals be liable for the reparation of the civil damages caused, just as it is responsible for the criminal prosecution of those who have perpetrated these acts against nationals of another State? This would seem to be the logical conclusion of the civil responsibility of the State."331/

327. In another writer's view, article IX of the Convention not only rejected the criminal responsibility of the State but even defined the principle of its civil responsibility "in terms which are not as exact as is customary in legal science. The application of article IX will prove difficult in practice, especially where the civil responsibility of a State to its own nationals is concerned". He concludes that the text of article IX is ambiguous.332/

328. Another writer expresses the opinion that:

"In view of the text of Article 36 sub. 2 of the Statute of the International Court of Justice the words of the present Article IX 'including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III' are superfluous. The jurisdiction of the Court comprises the determination of the civil liability of States for breach of international obligations. The Court is competent to establish a breach of treaty and to decide on the nature and extent of the reparation to be made for such breach."333/

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330/ Robinson, op. cit., pp. 102-103.

331/ Ibid., p. 104.

332/ Planzer, op. cit., p. 128 (translation into English by the Secretariat).

333/ Drost, op. cit., p. 134. Article 36 (2) of the Statute of the Court lists among the legal disputes for which States Parties to the Statute may recognize its jurisdiction as compulsory ipso facto "the nature or extent of the reparation to be made for the breach of an international obligation."

329. The Special Rapporteur finds it difficult to share the opinion (referred to in paragraphs 325 and 326 above) that article IX establishes an international civil responsibility of the State to its own nationals. In the absence of any case where the article has been applied and interpreted by the International Court of Justice, both the preparatory work, as described in paragraphs 310-317 above, and the text of the article itself lead him to doubt that the purpose of the provision was to include in the concept of international responsibility of the State, which of its very nature implies solely legal relations between States, 334/ a liability towards its own nationals. If such was not the case, the provision seems superfluous. In any event, if it were decided to review the Convention, it would be desirable to clear up the problem of the scope of State responsibility.

330. As regards the significance of article IX of the Convention, a writer has expressed the opinion that:

"The recognition of the compulsory jurisdiction of the Court in all disputes between Contracting Parties arising under the Convention constitutes an important means of international judicial implementation of a treaty on substantive criminal law by way of the international civil responsibility of States. Undoubtedly the Article contains a provision of cardinal significance but it does not contribute to international and individual criminal justice."335/

331. The Special Rapporteur would say that the compulsory jurisdiction of the International Court of Justice on genocide might, theoretically, be of some importance for the application of the Convention, bearing in mind the non-existence of an international criminal court and the ineffectiveness of the provisions of article VI on the competence of national courts in the territory where the crime was committed.336/ Nevertheless, the fact that article IX has not been applied, although acts of genocide have been alleged since the 1948 Convention came into force, casts doubt on the practical usefulness of this article.

J. Invitations to become parties to the Convention  
addressed by the General Assembly to non-member  
States in accordance with article XI of the  
Convention

332. Article XI of the Genocide Convention specifies, inter alia, that:

"The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly. ... After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid."

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334/ See, for instance, Report of the International Law Commission on the work of its twenty-fifth session (7 May-13 July 1973), draft articles on State responsibility (A/9010), para. 58, article I, (2) to (4).

335/ Drost, op.cit., p. 134.

336/ See para. 211 above.



333. By resolution 368 (IV) of 3 December 1949, the General Assembly requested the Secretary-General to send invitations:

"to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a Party to the Statute of the International Court of Justice".

334. Among the reservations and statements made by the Government of Mongolia when that country acceded to the Genocide Convention, the following text concerns article XI of the Convention:

"The Government of the Mongolian People's Republic deems it appropriate to draw attention to the discriminatory character of article XI of the Convention, under the terms of which a number of States are precluded from acceding to the Convention and declares that the Convention deals with matters which affect the interests of all States and it should, therefore, be open for accession by all States".337/

335. The following considerations contained in the advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide seem likely to shed light on the questions dealt with in this chapter:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11, 1946). The first consequence arising from this conception is that ... A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9, 1948 by a resolution which was unanimously adopted by fifty-six States ... The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis."338/

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337/ Multilateral treaties in respect of which the Secretary-General performs depositary functions. List of signatures, ratifications, accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/11) (United Nations publication, Sales No. E.78 V.6), p. 84.

338/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951: I.C.J. Reports 1951, pp. 23 and 24.

336. Moreover, it should be noted that the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted by the General Assembly in resolution 3068 (XXVIII) of 30 November 1973) provided in article XIII that:

"The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it."

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted by the General Assembly in resolution 3166 (XXVIII) of 14 December 1973) provided that:

"This Convention shall be open for signature by all States, until 31 December 1974 at United Nations Headquarters in New York." (article 14)

and that:

"This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations." (article 16)

337. The Government of Finland transmitted the following:

"In order to have the Convention universally applied, an invitation to non-member States to become parties to the Convention would be recommendable."339/

338. The Government of Romania transmitted the following:

"With regard to the problem of determining the Member or non-member States of the United Nations to which the United Nations General Assembly should address invitations to become parties to the 1948 Convention (in accordance with article XI, paragraph 3, of the Convention), Romania considers that the effective implementation of the principle of universality, and the need to create an effective international system to prevent and punish genocide, make imperative an invitation to every country, without distinction, to accede to this Convention."340/

339. The Government of the United Kingdom transmitted the following:

"The United Kingdom Government have no information to the effect that any State which is not a member of the United Nations wishes to become a party to the Convention. In the event that any such State wishes to become a party to the Convention, it will be open to any such State to inform the United Nations of its wishes."341/

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339/ Information and views furnished by the Government of Finland on 26 January 1973.

340/ Information and views furnished by the Government of Romania on 26 February 1973.

341/ Information and views furnished by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973.

340. One author writes: "Article XI has lost much of its significance since the United Nations have practically become universal ... However, as a matter of principle the procedure of adherence set out in the text must be censured."342/

341. In the Sub-Commission, some members referred to the necessity of opening the Convention to all States, in order to ensure its universal application.343/

342. In view of the universal character of the Genocide Convention, the Special Rapporteur feels that the possibilities offered to the General Assembly by article XI of the Convention of addressing invitations to any State which is not a member of the United Nations, without any discrimination, should be considered. Moreover, if it was decided to adopt new international instruments, it would be necessary to ensure that the Convention and such instruments would be open to all States.

K. Question of extending the Convention to territories  
for the conduct of whose foreign relations States  
parties to the Convention are responsible  
(Article XII of the Convention)

343. During the discussions which preceded the final drafting of the Genocide Convention one question was raised, namely whether the Convention would apply equally and de jure to territories for the conduct of whose foreign relations States parties to the Convention were responsible. After a lengthy discussion it was decided that application of the Convention to those territories could not be automatic.

344. As application could not be de jure and as it was desired that the sphere of application of the Convention should be as wide as possible article XII was introduced, which is worded as follows:

"Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible."

345. This article, which introduced what was called the "colonial clause" into the Genocide Convention, was not in the draft Convention prepared by the Secretary-General nor in that prepared by the Ad Hoc Committee on Genocide. The text of the new article was proposed in the Sixth Committee (A/C.6/236) and was adopted by that Committee by 18 votes to 9, with 14 abstentions.

346. The Committee rejected by 19 votes to 10, with 14 abstentions, an amendment (A/C.6/264) calling for the insertion in the Convention of a totally different clause, providing that: "The application of the present Convention shall extend equally to the territory of the State acceding to the Convention, and to all territories in regard to which that State performs the functions of the governing and administering authority (including trust and other non-self-governing territories)."

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342/ Drost, op.cit., p. 136.

343/ E/CN.4/1101, para. 140; E/CN.4/Sub.2/SR.659, p. 63.

347. In support of the proposal to insert article XII in the Convention it was argued that, as the Convention would require the adoption in most countries of new legislative measures to ensure its application, it was constitutionally impossible for a State responsible for the conduct of the foreign relations of other territories, some of which were completely self-governing in their internal affairs, to accept the Convention on their behalf without first consulting them. Moreover, there was no legal means of imposing on a metropolitan Government the obligation to extend a convention to colonial territories, particularly if those territories were, for internal purposes, self-governing. It was further stated that the proposal to add article XII was designed not to exclude any colonial territory from becoming a party to the Convention but to follow the usual practice of using every available legislative measure to recommend and persuade colonial territories to participate. 344/

348. In support of the opposite proposal, namely that the Convention should be automatically applicable to all territories in regard to which the State acceding thereto performed the functions of the governing and administering authority, it was argued that it was extremely important for the Convention to apply to all countries and especially to non-self-governing territories. The peoples of those territories were most likely to become the victims of acts of genocide and it was therefore extremely unlikely that any such territory would not wish to benefit from the provisions of the Convention. 345/

349. Moreover, the Sixth Committee adopted the proposal contained in document A/C.6/268 relating to a text to be included in the draft resolution which it was to submit to the General Assembly for approval. The Assembly approved the draft resolution submitted by the Sixth Committee. Part C ("Application with respect to dependent territories, of the Convention on the Prevention and Punishment of the Crime of Genocide") of resolution 260 (III) of 9 December 1948 entitled "Prevention and Punishment of the Crime of Genocide" reads as follows:

"The General Assembly recommends that Parties to the Convention on the Prevention and Punishment of the Crime of Genocide which administer dependent territories should take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible".

350. In becoming parties to the Convention, Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Mongolia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics included in their declarations and reservations a text similar in substance concerning article XII. In that text, the aforementioned Governments expressed their disagreement with the provisions of article XII of the Convention stating that all the clauses of the Convention should apply to non-self-governing territories, including Trust Territories. In the declarations and reservations made by Hungary, it was stated that Hungary reserved its rights "with regard to

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344/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 107th meeting, pp. 471, 475 and 476.

345/ Ibid., p. 472.

the provisions of article XII which do not define the obligations of countries having colonies with regard to questions of colonial exploitation and to acts which might be described as genocide". 346/

351. With regard to the application of article XII of the Convention, it should be noted that the Governments of Australia, Belgium and the United Kingdom, countries which became parties to the Convention at different times, notified the Secretary-General that they were extending application of the Convention to the territories for the conduct of whose foreign relations they were responsible. The Australian Government, in ratifying the Convention in 1949, reported that it was extending the application thereof to all the territories for whose foreign relations it was responsible. The Belgian Government, in ratifying the Convention in 1952, reported that it had extended the application of the Convention to the Belgian Congo and to the Trust Territory of Rwanda-Urundi. The United Kingdom, in acceding to the Convention in 1970, declared that it was extending the application of the Convention to the following territories: Channel Islands, Isle of Man, Dominica, Grenada, St. Lucia, St. Vincent, Bahamas, Bermuda, British Virgin Islands, Falkland Islands and Dependencies, Fiji, Gibraltar, Hong Kong, Pitcairn, St. Helena and Dependencies, Seychelles, Turks and Caicos Islands and the Kingdom of Tonga. 347/

352. The United Kingdom Government communicated the following:

"The United Kingdom Government consider that the existing provisions of article XII are satisfactory. At the time of accession to the Convention, the United Kingdom Government extended its application to the great majority of the territories for whose external relations they were at that time responsible. Subsequently legislation has been enacted in the remaining dependent territories to give effect to the provisions of the Convention when extended to them, and consideration is now being given to the formulation of the necessary Orders in Council effecting such extension". 348/

353. The Romanian Government communicated the following:

"Article XII of the Convention on the Prevention and Punishment of the Crime of Genocide maintains the colonial clause which recognizes the right of States parties to extend application of the Convention if they wish to the territories for the conduct of whose foreign relations they are responsible.

"In stipulating this right, the provisions of article XII of the Convention are manifestly anachronistic and outdated as they are contrary to important resolutions and documents adopted in recent years by the

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346/ E/CN.4/Sub.2/302, annex.

347/ Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/11) (United Nations Publication, Sales No. E.78.V.6), p. 82.

348/ Information and views furnished by the United Kingdom Government on 18 July 1973.

United Nations General Assembly: the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960), which recognizes the right of peoples to self-determination; the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV) of 24 October 1970), which stipulates that the subjection of peoples to subjugation, domination and exploitation constitutes a violation of their right to self-determination, a denial of fundamental human rights and is contrary to the Charter; the Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations (resolution 2627 (XXV) of 24 October 1970), which reaffirms the inalienable right of peoples to self-determination, recognizes the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal and strongly condemns the policy of apartheid and all actions designed to deprive the peoples of those rights. 349/

354. It should be noted that the multilateral conventions most recently adopted by the United Nations General Assembly, including the conventions with respect to international penal law (such as those mentioned in paragraph 336 above), no longer contain provisions similar to those in article XII of the Genocide Convention.

355. Referring to article XII of the Genocide Convention, one writer made the following remarks:

"A similar clause in other treaties may be correct and appropriate; in a convention on genocide it seems out of place. Surely, any colonial government will be able to comply with the provisions of the Convention. The obligations set out in Articles V, VI, VII can be performed in dependent territories just as well as in the metropolitan country. The legal rules and definitions under Article I, II, and IV are equally capable of application anywhere. Intrinsically the Convention does not contain

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349/ Information and views furnished by the Romanian Government on 26 February 1973.

anything which could withhold states to accept the consequences under Articles VIII and IX. There seem to be no reasons based on the contents of the Convention why its territorial scope should be limited. Why, then, exclude certain colonial territories if constitutional obstacles can be avoided along a different way?

"A signature on behalf of a government does not bind the state to ratify the Convention afterwards. Ratification or accession can always take place either on behalf of expressly specified colonies or by way of excepting expressly designated dependencies. When constitutional arrangements between the metropolitan and colonial governments do not allow international commitments binding the territorial dependencies without previous consultation between the two governments, ratification or accession could be effected subject to certain territorial reservations. The situation resembles the difficulty of federal governments accepting international obligations which require national implementation by means of legislative, executive and judicial measures under the domestic legal systems of the Member States.

"...

"As submitted before Article XII relating to the territorial application of the Convention and, therefore, really belonging to the substantive part which is hidden away as it were among the formal provisions, should not have figured in the text at all." 350/

356. The Special Rapporteur notes that article XII no longer reflects current United Nations practice with respect to multilateral conventions or the progress of international reality towards completion of the decolonization process.

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350/ Drost, op. cit., pp. 112 and 136.

L. Question of reservations to the Convention

357. In this chapter, the Special Rapporteur intends to present certain general problems which have been raised concerning reservations to the Genocide Convention. Declarations and reservations concerning specific articles of the Convention are mentioned at appropriate points in the present study.

1. Advisory opinion of the International Court of Justice  
of 28 May 1951

(a) Circumstances leading to the request for an advisory opinion of the Court

358. The Genocide Convention does not contain any provision relating to reservations. The draft Convention prepared by the Secretary-General included the title: "Article XVII (reservations)" but no text was proposed. According to the comments under that title:

"At the present stage of the preparatory work, it is doubtful whether reservations ought to be permitted and whether an article relating to reservations ought to be included in the Convention.

"We shall restrict ourselves to the following remarks:

"1. It would seem that reservations of a general scope have no place in a Convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order.

"For example, the Convention will or will not protect this or that human group. It is unthinkable that in that respect the scope of the Convention should vary according to the reservations possibly accompanying accession by certain States.

"2. Perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.

"These reservations might be of two kinds: either reservations which would be defined by the Convention itself, and which all the States would have the option to express, or questions of detail which some States might wish to reserve and which the General Assembly might decide to allow."351/

The Ad Hoc Committee on Genocide instructed a Sub-Committee to deal with that problem, and in adopting the Sub-Committee's conclusions 352/ decided that there was no need for any reservations. 353/

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351/ E/447, p. 55.

352/ E/AC.25/10, p. 5.

353/ E/AC.25/10, p. 7.



359. No proposal was put forward in the Sixth Committee for the inclusion of an article on reservations. After the final text was accepted, several delegations reserved the position of their Governments with respect to the draft Genocide Convention or certain articles thereof, 354/ which seemed to indicate that reservations would be formulated when the respective States became parties to the Convention.

360. The reservations made by a number of States when signing the Convention and those introduced by a number of States in their instruments of ratification and accession to the Genocide Convention, together with the objections by certain States to the substance of those reservations raised certain problems with respect to the performance of depositary functions by the Secretary-General under the provisions of article XIII relating to the entry into force of the Convention. 355/ As the Secretary-General pointed out in his report on reservations to multilateral conventions submitted to the General Assembly at its fifth session, the rule which he had followed in the absence of specific provisions in a convention governing reservation procedures was as follows:

"A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded." 356/

It had consequently appeared to the Secretary-General that the legal effect of objections to reservations to the Genocide Convention would require an early determination in order to establish whether States making reservations to which objection had been raised were to be counted among those necessary to permit the entry into force of the Convention. The Secretary-General had therefore requested that an item on reservations to multilateral conventions be included in the agenda of the fifth session of the General Assembly. The Assembly had referred the matter to the Sixth Committee for consideration. 357/

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354/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 132nd and 133rd meetings, pp. 701-711.

355/ These provisions read as follows:

"On the date when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

"The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession." (Article XI of the Convention was reproduced in para. 59 above).

356/ A/1372, para. 46.

357/ Official Records of the General Assembly, Fifth Session, Annexes, agenda item 56, Report of the Sixth Committee (A/1494/Corr.1, para. 3), p. 25.

361. The Sixth Committee discussed the question of reservations from its 217th to its 225th meetings and, following that debate, adopted a draft resolution. On the basis of that draft, on 16 November 1950, the General Assembly adopted resolution 478 (V) entitled "Reservation to multilateral conventions", part of which related to reservations to the Genocide Convention and read as follows:

"Considering that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,

1. Requests the International Court of Justice to give an advisory opinion on the following questions:

'In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

'I. Can the reserving State be regarded as being a part to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

'II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

'(a) The parties which object to the reservation?

'(b) Those which accept it?

'III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

'(a) By a signatory which has not yet ratified?

'(b) By a State entitled to sign or accede but which has not yet done so?';

..."

(b) Main elements of the opinion of the International Court of Justice

362. In accordance with the request of the General Assembly, the International Court of Justice gave the advisory opinion of 28 May 1951 on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

363. Some of the Court's considerations shed light upon the scope of its opinion. First, the Court observed that the three questions referred to it were expressly limited by the terms of the resolution of the General Assembly to the Genocide Convention and that consequently the replies which the Court was called upon to give to them were necessarily and strictly limited to that Convention.

Furthermore, the Court considered that the three questions were purely abstract in character and referred neither to the reservations which had, in fact, been made to the Convention by certain States, nor to the objections which had been made to such reservations by other States. 358/

364. In examining question I, the Court pointed out, *inter alia*, that in the current state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States were prohibited from making certain reservations. In the case of the Genocide Convention, the faculty for States to make reservations had been contemplated at successive stages of the drafting, as can be seen from the comment on the draft Convention prepared by the Secretary-General (see paragraph 32 above). The Court felt that even more decisive in that connexion had been the debate on reservations in the Sixth Committee at its 132nd and 133rd meetings, when certain delegates had clearly announced that their Governments could only sign or ratify the Convention subject to certain reservations. 359/ The Court recognized that an understanding had been reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it was permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. 360/

365. The Court then turned to the question of the nature of the reservations that could be formulated in the light of the special characteristics of the Genocide Convention. Those characteristics were defined as follows: the Convention is based on principles which are recognized as binding on States even without any conventional obligation (see paragraph 187 above); it has a universal character (see paragraph 335 above); it was manifestly adopted for a purely humanitarian and civilizing purpose. It is clear from the high purposes of the Convention that "one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties". 361/ From those considerations the Court drew the following conclusions with regard to reservations and, more specifically, the effects of objections to such reservations:

"The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour

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358/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951: I.C.J. Reports 1951, pp.20-21.

359/ Ibid., p. 22.

360/ Ibid., pp. 22 and 23.

361/ Ibid., p. 23.

of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation." 362/

366. The Court's opinion on question I was:

"That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention." 363/

367. With regard to question II, the Court made the following observations:

"The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

"The disadvantages which result from this possible divergence of views - which an article concerning the making of reservations could have obviated - are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

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362/ Ibid., p. 24.

363/ Ibid., p. 29

"It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

"Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between the State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation." 364/

Consequently, in replying to question II the Court expressed the view:

"(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention". 365/

368. After having examined question III the Court expressed the view:

"(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect." 366/

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364/ Ibid., pp. 26 and 27.

365/ Ibid., pp. 29 and 30.

366/ Ibid., p. 30.

## 2. Vienna Convention on the Law of Treaties

369. The 1969 Vienna Convention on the Law of Treaties, basing itself, generally, on the opinion of the International Court of Justice of 28 May 1951, specified inter alia that:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty." (art. 19)

...

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation." (art. 20)

370. With regard to the application of the foregoing provisions in the case of the Genocide Convention, once the Convention on the Law of Treaties enters into force, it should be pointed out that article 4 of that Convention reads as follows:

"Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

371. The Special Rapporteur cannot examine the question whether the rules relating to reservations laid down in the Convention on the Law of Treaties are applicable to the Genocide Convention under international law, independently of the Convention, for that question would be beyond the scope of this study.

### 3. Opinions of Governments

372. The Government of Finland was of the opinion that: "Reservations which are incompatible with the object and purpose of the Convention should be prohibited". 367/

373. The Government of Romania communicated the following:

"It is generally accepted in doctrinal writings and the 1969 Vienna Convention on the Law of Treaties establishes the fact that, in the absence of a specific 'no reservation' clause in a particular multilateral convention, the right to make reservations must be recognized in every case, provided that the reservation is compatible with the object and purpose of the treaty (the International Court of Justice, in its advisory opinion of 28 May 1951, also expressed a view to that effect).

"The right of States to make reservations to an international treaty stems from the exercise of the attributes of sovereignty, recognized as such." 368/

374. The Government of the Netherlands was of the opinion that "as a result of a number of reservations with respect to article IX 369/ application of the Convention may be less effective than would be desirable." 370/

375. Referring to the reservations made to that article, the United Kingdom Government considered that they "are directed against a crucial part of the machinery for the implementation of the Convention". And the Government added the following:

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367/ Information and views furnished by the Government of Finland on 26 January 1973.

368/ Information and views furnished by the Government of Romania on 26 February 1973.

369/ Article IX of the Convention provides:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

370/ Information and views furnished by the Government of the Netherlands on 25 April 1973.

"An examination of the question of reservations to article IX of the Convention and of the possibility of securing the withdrawal of existing reservations of that kind and their prohibition in future, would be a useful feature of any study looking to the improvement of the effectiveness of the Convention." 371/

376. In the study furnished by the International Association of Penal Law the opinion was expressed that it would be desirable for States parties to the Convention to reduce their reservations to the minimum and limit them exclusively to reservations of a technical nature. 372/

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371/ Information and views furnished by the Government of the United Kingdom on 18 July 1973.

372/ Information and views furnished by the International Association of Penal Law on 31 January 1973.



III. THE RELATIONSHIP BETWEEN GENOCIDE AND WAR CRIMES,  
CRIMES AGAINST HUMANITY AND APARTHEID

1. War crimes

377. To clarify the concept of war crimes as international crimes to which statutory limitations are not applicable, article I (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted by the General Assembly by resolution 2391 (XXIII) of 26 November 1968) refers to war crimes "as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims".

378. Article 6 (b) of the Charter of the Nuremberg Tribunal defines war crimes as being:

"... violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

379. The grave breaches enumerated in the Geneva Conventions 1/ are: wilful killing; torture; inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health. 2/

380. According to article I of the 1948 Genocide Convention, "genocide, whether committed in time of peace or in time of war, is a crime under international law". Thus, genocide differs from war crimes in that it can be committed independently of any war.

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1/ Article 50 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; article 51 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 130 of the Convention relative to the Treatment of Prisoners of War; article 147 of the Convention relative to the Protection of Civilian Persons in Time of War.

2/ In the first two Conventions the following was added to this enumeration: "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". The following was added in the third Convention: "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention". The following was added in the fourth Convention: "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

381. Commenting on the difference between war crimes and genocide, one writer states:

"War crimes ... are specific violations of the laws or customs of war, a more limited concept which presupposes the existence of hostilities and does not require motivation relating especially to the destruction of ethnic, religious or national communities.

"War crimes are committed between troops engaged in action, against prisoners, or by invaders against the invaded; whereas genocide can be committed against nationals or aliens, civilians or soldiers. Moreover, war could not be a justification on grounds of necessity, for acts of genocide committed in time of war." 3/

382. In order to define more clearly the difference between war crimes and genocide committed in connexion with a war, the comment on article I of the draft convention on genocide prepared by the Secretary-General included the following observations:

"1. War is not normally directed at the destruction of the enemy: such destruction is only the means used by a belligerent to impose his will on the opponent. When that result has been achieved, peace is concluded. However harsh the conditions imposed on the defeated party may be, it retains the right to existence.

"2. The infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide.

"In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses.

"It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide.

"3. War may, however, be accompanied by the crime of genocide. This happens when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this are the execution of prisoners of war, the massacre of the populations of occupied territory and their gradual extermination. These are clearly cases of genocide." 4/

383. One writer has argued that "the destruction of populous cities by techniques of total war can be regarded as genocide". 5/ This statement is clearly true only to the extent that the materiality of the acts is complemented by the element of intent, which has been regarded as essential.

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3/ Francisco P. Laplaza, op. cit., p. 78.

4/ E/447, p. 23.

5/ Stanislas Plawski, op. cit., p. 114.

384. Consequently, it appears to the Special Rapporteur that, taking into account the definition of genocide given in article II of the 1948 Convention, it is the element of intent that constitutes the criterion for differentiating between genocide and war crimes. Where there is conclusive evidence that the violations of the laws or customs of war or of the rules of international humanitarian law were committed - as in the case of the crimes perpetrated by the Nazis during the Second World War - with intent to destroy, in whole or in part, national, ethnic, racial or religious groups, that constitutes genocide.

## 2. Crimes against humanity

385. Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity refers to crimes against humanity "as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly ...".

386. The Charter of the Nuremberg Tribunal (article 6 (c)) had defined crimes against humanity as follows:

"Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

387. With respect to the relationship between genocide and crimes against humanity, in the light of the rulings of the courts of the allied countries which tried German war criminals after the Second World War, it was considered that:

"(viii) The crime of genocide, which received recognition by the Tribunal which conducted the Justice Trial, 3/ bears similarity to certain types of crimes against humanity but also certain dissimilarities; these have been discussed in previous volumes of this series, and the outcome seems to be that, while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown, 4/ and, on the other hand, genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are crimes against humanity within the meaning of Law No. 10 6/ if the political, racial or

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3/ See p. 122.

4/ See vol. XII, p. 41.

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6/ The reference is to Law No. 10 of the Allied Control Council for Germany, which was put into effect on 20 December 1945. Article II, paragraph 1 (c), of the Law defines crimes against humanity in a manner similar to article 6 (c) of the Charter of the Nuremberg Tribunal, namely, as:

"Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background; but that it is not necessary that the wronged person belong to an organized or well-defined group. 5/

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"5/ See vol. VI, p. 83, note 3." 7/

388. According to one writer:

"... genocide is the complete or partial ... physical ... and biological ... destruction of a group. The Nuremberg Charter qualifies as crimes against humanity all persecutions on political, racial or religious grounds ...

"Genocide can be committed against a human group, ethnic, racial or religious. The perpetrator directs his attack against the whole of the group that has the specified characteristic. Among the crimes against humanity enumerated in the Nuremberg Charter, a single individual can be a victim of this crime, provided that it is directed against him as a representative of a certain human group. The crime of genocide has a mass character." 8/

389. During the elaboration of the Genocide Convention by the Sixth Committee, an amendment to article I (A/C.6/211), which was not accepted, proposed that the article should begin with the words: "The crime against humanity known as genocide ...". In support of that proposal, it was argued that it was essential that the definition of genocide should be related to the previous instances of that crime which already existed under international law. In reply, it was stated that to define genocide as a crime against humanity would present serious disadvantages and be open to misinterpretation in view of the technical meaning given to the latter expression in article 6 (c) of the Charter of the International Military Tribunal, Nuremberg, which had had jurisdiction only over crimes committed during the war or in connexion with preparation for war. 9/

390. It was further stated that excluding from the Genocide Convention the concept of "crime against humanity" would prevent any confusion between genocide, which was a specific crime directed towards the extermination of human groups, and the crimes mentioned in the Charter of the Nuremberg Tribunal, which were connected only with war. 10/

391. In refutation of that view it was stated that the acts against which the Genocide Convention was aimed were identical with those which the Charter of the Nuremberg Tribunal qualified as crimes against humanity. The fact that the Charter of the Nuremberg Tribunal had linked crimes against humanity with other crimes was

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7/ George Brand, Law Reports of Trials of War Criminals, vol. XV; Digest of Laws and Cases, London, H.M. Stationery Office, 1949, p. 138.

8/ Stanislas Plawski, op. cit., p. 73.

9/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 67th meeting.

10/ Ibid., 109th meeting.

not conclusive. Having regard to the fact that the Genocide Convention was aimed against the commission of genocide both in war and in peace, it was clearly not permissible to qualify genocide as a crime against humanity when committed in connexion with a war, while refusing to do so when its commission was not connected with a war. 11/

392. With respect to that discussion, the Special Rapporteur would point out that article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, in referring to crimes against humanity, uses the words "whether committed in time of war or in time of peace", which is the same as the wording used in article I of the Genocide Convention. It would therefore seem that a distinction cannot be made between genocide and crimes against humanity from the standpoint of "time of war or time of peace".

393. One writer considers it indisputable that crimes against humanity and genocide:

"... fall within the same category, or, in other words, belong to one and the same class of acts ... the essential difference between crimes against humanity and genocide is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act - for example, murder - may be, or rather may be described as, either a crime against humanity or an act of genocide, depending on the motives of the person committing it; if his aim is to eliminate the victim because of the latter's race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, whereas if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it will be qualified as genocide.

"It follows that genocide, too, is by its nature simply a crime against humanity, and indeed an aggravated crime against humanity. Accordingly, it would seem more correct from the standpoint both of logic and of method to regard genocide as simply an aggravated case of crimes against humanity. The aggravation lies simply in the additional intent which is characteristic of genocide." 12/

### 3. Apartheid

394. A consideration of apartheid in relation to the Convention on the Prevention and Punishment of the Crime of Genocide is found in the report of the Ad Hoc Working Group of Experts established under resolution 2 (XXIII) of the Commission on Human Rights. The report was prepared under Commission resolution 8 (XXVI) and took the form of a Study concerning the question of apartheid from the point of view of international penal law (E/CN.4/1075, chapter VI (b), paras. 125-135).

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11/ Ibid., 109th meeting.

12/ Stefan Glaser, op. cit., p. 109. Another author writes that "genocide is undoubtedly the most serious and the most typical of crimes against humanity" (Jean Graven, loc. cit., p. 478).

395. The study states that "In its various reports resulting from careful studies of the question, the Ad Hoc Working Group of Experts has defined the elements of apartheid which constitute the crime of genocide. It has summarized them in its report (E/CN.4/984/Add.18)". That report lists, inter alia (ibid., para. 4), as practices of apartheid which are regarded as elements of genocide:

"(a) The institution of group areas ('Bantustan policies'), which affected the African population by crowding them together in small areas where they could not earn an adequate livelihood, or the Indian population by banning them to areas which were totally lacking the preconditions for the exercise of their traditional professions;

"(b) The regulations concerning the movement of Africans in urban areas and especially the forcible separation of Africans from their wives during long periods, thereby preventing African births;

"(c) The population policies in general, which were said to include deliberate malnutrition of large population sectors and birth control for the non-white sectors in order to reduce their numbers, while it was the official policy to favour white immigration;

"(d) The imprisonment and ill-treatment of non-white political (group) leaders and of non-white prisoners in general;

"(e) The killing of the non-white population through a system of slave or tied labour, especially in so-called transit camps."

396. The study (E/CN.4/1074) also states that "In various documents the Ad Hoc Working Group has described how politicians in South Africa, Southern Rhodesia and Namibia commit the crime of genocide directly or indirectly, and incite such crimes directly and publicly. Many examples of attempted genocide and of complicity in the crime have been described at length in documents E/CN.4/950 (paras. 82-1016, 1092-1093, 1107-1112); E/CN.4/984/Add.18 (paras. 4-10); E/CN.4/1020 (paras. 71-217); E/CN.4/1020/Add.2 (paras. 1-105)".

397. Referring to article IV of the Convention, the above-mentioned study also stated that "Persons committing the crime of genocide in South Africa, Southern Rhodesia and Namibia are Heads of State, members of the various Governments, public officials, official agents and all other persons responsible for giving effect to the policies of apartheid". In paragraph 161 of the study, the Group of Experts repeated its recommendation contained in document E/CN.4/984/Add.18 that the Commission on Human Rights should make specific proposals concerning a revision of the Genocide Convention, in particular to make "inhuman acts resulting from the policies of apartheid" punishable under that Convention.

398. The Group further recommended (in paragraph 163) that acts of "cultural genocide" should be expressly declared crimes against humanity.

399. At its twenty-eighth session, the General Assembly, by its resolution 3068 (XXVIII) of 30 November 1973, adopted and opened for signature and

ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid. The full text of the Convention was annexed to the resolution. 13/

400. The Convention entered into force on 18 July 1976, in accordance with paragraph 1 of its article XV. As of 31 December 1977, 38 States had ratified or acceded to the Convention, and 12 other States had signed but not yet ratified it. 14/

401. It should be mentioned that the General Assembly in its resolution 31/80 of 13 December 1976 invited the Commission on Human Rights to undertake the functions set out in article X of the Convention, in particular to prepare a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention. By the same resolution, the Assembly decided to consider annually, starting with its thirty-second session, the question entitled "Status of the International Convention on the Suppression and Punishment of the Crime of Apartheid".

402. The fifth, sixth and seventh preambular paragraphs of the Convention read as follows:

"Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law,

"Observing that, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 'inhuman acts resulting from the policy of apartheid' are qualified as crimes against humanity,

"Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity".

403. According to article I, paragraph 1, of the Convention: 15/

"1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, and in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security."

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13/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30 (A/9030), pp. 75-77.

14/ See Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions. List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977 (United Nations publication, Sales No. E.78.V.6).

15/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30 (A/9030), pp. 75-77.

404. It thus appears clear that there is a tendency to regard apartheid as a crime against humanity. Consequently, the observations presented above (paras. 385-393) concerning the relationship between genocide and crimes against humanity would also apply to apartheid.

405. It should moreover be pointed out that since the International Convention on the Suppression and Punishment of the Crime of Apartheid has been adopted and has entered into force, it will no longer be necessary to include provisions **relating** to apartheid in any new international instruments dealing with genocide.

#### 4. Draft Code of Offences against the Peace and Security of Mankind

406. By its resolution 177 (II) of 21 November 1947, the General Assembly entrusted the International Law Commission with the task of preparing a draft code of offences against the peace and security of mankind.

407. The International Law Commission adopted a first version of the draft code in 1951 16/ and a revised version in 1954. 17/ Article 2, paragraph 10, of the draft included among the acts constituting offences against the peace and security of mankind:

"Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) Killing members of the group;
- (ii) Causing serious bodily **or** mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group."

In its commentary, the Commission indicated that the text of that paragraph followed the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

408. Noting the connexion between the draft Code and the question of defining aggression, the General Assembly decided in its resolutions 897 (IX) of 4 December 1954 and 1186 (XII) of 11 December 1957 to make further consideration of the draft Code dependent on the progress of its work on the latter question. 18/

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16/ Official Records of the General Assembly, Sixth Session, Supplement No. 9, para. 59.

17/ Ibid., Ninth Session, Supplement No. 9, paras. 41-54.

18/ See also para. 242 above.



5. Question of punishment of war criminals and of persons who  
have committed crimes against humanity

(a) Convention on the Non-Applicability of Statutory Limitations to War Crimes  
and Crimes against Humanity

409. In its resolution 3 (XXI), adopted on 9 April 1965, the Commission on Human Rights, after referring to the Convention on the Prevention and Punishment of the Crime of Genocide in both the preamble 19/ and the operative part 20/ requested the Secretary-General to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and by priority a study of legal procedures to ensure that no period of limitation should apply to such crimes.

410. In pursuance of that resolution, the Secretary-General submitted to the Commission at its twenty-second session a study on the question of the non-applicability of statutory limitation to war crimes and crimes against humanity (E/CN.4/906). Chapter II.A. of the study dealt with legal procedures to ensure that no period of limitation should apply to the crime of genocide, as defined in the 1948 Convention, and in chapter III.B. it was suggested, inter alia, that that crime should be included among those which would be declared by a convention to be not subject to a period of limitations. 21/

411. On the proposal of the Commission, the Economic and Social Council, by its resolution 1158 (XLI) of 5 August 1966, took note of the study and invited the Commission to prepare, as a matter of priority, a draft convention stipulating that no statutory limitation should apply to war crimes and crimes against humanity. On the basis of the Commission's work at its twenty-third session and in accordance with the recommendation of the Economic and Social Council, the General Assembly considered the question at its twenty-second and twenty-third sessions. By its resolution 2391 (XXIII) of 26 November 1968, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and opened it for signature, ratification and accession by States eligible to become parties thereto.

412. The Convention entered into force on 11 November 1970, in accordance with article VIII. As at 31 December 1976, 21 States had become parties to the Convention.

413. Article I of the Convention, which defines crimes to which no statutory limitation shall apply, irrespective of the date of their commission, lists the following crimes in subparagraph (b):

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19/ In the second preambular paragraph, the Commission took note of the Convention and especially its article VIII, which states that any Contracting Party may call upon the competent United Nations organs to take such action under the United Nations Charter as they consider appropriate for the prevention and suppression of acts of genocide.

20/ In paragraph 1 (b), the Commission requested the Economic and Social Council to invite eligible States which have not yet done so to accede as soon as possible to the Convention.

21/ See E/CN.4/906, paras. 184-191 and para. 211.

"Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ..."

414. Article 1 of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, opened for signature on 25 January 1974, similarly provides:

"Each Contracting State undertakes to adopt any necessary measures to secure that statutory limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law:

"1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

..."

(b) Measures to ensure the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity and the exchange of documentation relating thereto

415. In a preliminary study on this question (E/CN.4/983) prepared by the Secretary-General in accordance with paragraph 4 of Economic and Social Council resolution 1158 (XLI) of 5 August 1966, the Convention on the Prevention and Punishment of the Crime of Genocide was mentioned in connexion with the problem of the competence ratione loci and ratione personae to prosecute and try persons responsible for war crimes and crimes against humanity <sup>22/</sup> and with the problem of the extradition of persons responsible for such crimes. <sup>23/</sup>

416. Resolution 2583 (XXIV) adopted by the General Assembly on 15 December 1969 on the recommendation of the Economic and Social Council recalled, in the second preambular paragraph, "the Declarations of 13 January 1942 and 30 October 1943 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, providing for the extradition and punishment of war criminals and of persons who have committed crimes against humanity". In paragraph 1, the General Assembly called upon all States to take the necessary measures for the thorough investigation of war crimes and crimes against humanity, as defined in article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. <sup>24/</sup> In paragraph 4, the Assembly called upon States which had not yet become parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to do so as soon as possible.

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<sup>22/</sup> See E/CN.4/983, para. 19.

<sup>23/</sup> Ibid., para. 172.

<sup>24/</sup> The appeal was reiterated in paragraph 5 of resolution 2712 (XXV) adopted by the General Assembly on 15 December 1970.

417. The report on the question of the punishment of war criminals and of persons who have committed crimes against humanity (A/8345) 25/ which the Secretary-General submitted to the General Assembly at its twenty-sixth session, reviewed certain international and national measures designed to ensure implementation of the Convention on the Prevention and Punishment of the Crime of Genocide. 26/

418. The Assembly adopted on 3 December 1973 resolution 3074 (XXVIII), declaring that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims certain stated principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

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25/ The report was prepared pursuant to General Assembly resolution 2712 (XXV) which had, inter alia, requested the Secretary-General to continue, in the light of the comments and observations submitted by Governments, the study undertaken by the Commission on Human Rights.

26/ A/8345, chapter II, paras. 21-30. The Convention is also mentioned in paragraph 73 in connexion with the question of the extradition of persons responsible for war crimes and crimes against humanity.

IV. EFFECTIVENESS OF EXISTING INTERNATIONAL MEASURES  
CONCERNING GENOCIDE AND THE POSSIBILITY OF TAKING  
FURTHER INTERNATIONAL ACTION

A. Views on the effectiveness of the 1948 Convention  
as a whole

419. Bearing in mind the fact that the Convention on Genocide is at present the only international instrument on this matter, the views presented in this section deal essentially with its effectiveness and the possibility of revising it or concluding a new convention on the question. The possibility of further international action will be reviewed in sections B and C of this chapter.

420. The Government of the Union of Soviet Socialist Republics is of the opinion that:

"As far as proposals for revising this Convention or concluding a new one are concerned, given that only a third of the Members of the United Nations are parties to the 1948 Convention, there does not appear to be any great urgency about the matter. Attention should mainly be concentrated, it would seem, on measures which would encourage more States to become parties to the existing Convention." 1/

Similar views have been expressed by the Government of the Ukrainian Soviet Socialist Republic 2/ and the Government of the Byelorussian Soviet Socialist Republic. 3/

421. The Government of Italy has communicated the following:

"In the Italian Government's view, the existing international measures concerning genocide seem to be sufficiently effective, provided that all Member States accede to them and fulfil their commitments.

"In this field, as with other kinds of serious violations of human rights, the United Nations has drawn up international instruments laying down the obligations of Member States. The record is less good, on the other hand, with regard to activities aimed at protecting such rights when they are violated in practice. The present procedures for examining individual communications about alleged violations of human rights are of recent adoption and will be slow to produce any practical results, whereas such situations would seem to call for more prompt and decisive intervention. It is from this standpoint that, in the Italian Government's view, it might be desirable to reflect in the relevant instruments certain recent trends in the United Nations towards strengthening the Organization's fact-finding capacity with regard to possible serious violations of human rights and encouraging international co-operation to achieve the humanitarian goals of the United Nations." 4/

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1/ Information and views communicated by the Government of the Union of Soviet Socialist Republics on 22 March 1973.

2/ Information and views communicated by the Government of the Ukrainian Soviet Socialist Republic on 23 April 1973.

3/ Information and views communicated by the Government of the Byelorussian Soviet Socialist Republic on 27 May 1973.

4/ Information and views communicated by the Government of Italy on 30 May 1973.

422. The Government of Austria has declared that:

"Austria holds that the effectiveness of existing international measures concerning genocide and of the provisions of the Convention of 1948 is rather limited considering that various kinds of genocidal actions continue to be perpetrated in various parts of the world. This is not, in the first place, due to limited participation by states in the Convention but may be attributed to the lack of willingness evidenced by certain states parties to fully carry out its provisions.

"Owing to the lack of an effective system of supervision and control, violations of the Convention may go without legal charges being made or may even go unnoticed ... Steps to strengthen existing legal instruments should ... be given priority ..." 5/

423. The Holy See has communicated the following:

"The Holy See feels that the present international measures concerning the crime of genocide are inadequate either for fully preventing or for punishing it. The most serious inadequacy, however, lies not so much in inadequate provisions as in the fact that the provisions and the underlying principles are not fully supported." 6/

424. The Government of the United Kingdom is of the opinion that:

"In the absence of any impartial assessment of allegations that genocide has been committed, it is impossible to comment on the effectiveness of the existing international measures for dealing with such situations. The possibility of taking further international action would appear to be a question which should be considered at a time when the existing international measures and machinery have been tested in practice. Until such time, the question of further international action must remain academic." 7/

425. In the opinion of the Government of Ecuador, the Convention of 1948 has been effective, but in view of the length of time which has elapsed since its adoption, it is necessary to adopt an additional instrument. 8/

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5/ Information and views communicated by the Government of Austria on 14 May 1973.

6/ Information and views communicated by the Government of the Holy See on 18 September 1972.

7/ Information and views communicated by the Government of the United Kingdom of Great Britain and Northern Ireland on 18 July 1973.

8/ Information and views communicated by the Government of Ecuador on 29 April 1974.

426. The Government of Poland has communicated the following:

"In the present state of international law, it must be very firmly emphasized that the international measures adopted to date, notably the Convention of 9 December 1948 concerning the prevention and punishment of crimes of genocide, have not proved effective. The conclusion of a new Convention should be sought." 9/

427. The Government of Romania is of the opinion that it should be possible to take further international action with a view to supplementing the Convention of 1948 bringing it up to date and making its provisions more effective. This action could be taken either through the adoption of supplementary conventions or through a revision of the Convention. 10/

428. The Government of Rwanda has communicated the following:

"The existing international measures concerning genocide are of limited effectiveness. The adoption of new measures, especially the adoption of new international instruments, seems possible and desirable." 11/

429. The Government of the Congo has communicated the following:

"The international measures at present in force would only appear to have limited effectiveness. Although article 6 of the Convention of 9 December 1948 provides for an international criminal court, such a court has not been set up, and this has tended to weaken the practical value of the Convention considerably; the fact that persons accused of genocide must be brought for trial before the courts of the State on whose territory the act was committed is calculated in practice to lead to total immunity in all the most flagrant cases of criminal acts, which always presuppose governmental participation.

"It must be acknowledged that the efforts made by the specialized United Nations bodies to define the acts which should be punished as genocide, in order to establish, or endeavour to establish, a system of international rules on the matter, may have a certain moral influence in preventing acts which would count as genocide or attempted genocide. Governments hesitate to alienate international public opinion, and if that opinion is aware and aroused, it may have some influence on governmental decisions.

"But as long as an international criminal court has not been established, the Convention of 1948 will only have a limited scope.

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9/ Information and views communicated by the Government of Poland on 26 April 1973.

10/ Information and views communicated by the Government of Romania on 26 February 1973.

11/ Information and views communicated by the Government of Rwanda on 17 January 1973.

"And it would seem that, in the present state of affairs, the efforts of the Commission on Human Rights should be directed to that end. Before adding to the substantive provisions already adopted and extending them to secondary forms of genocide - which will always be difficult to define - it seems more desirable to ensure that the existing rules, which may be regarded as a satisfactory first stage, are applied." 12/

430. The Government of Oman has commented that:

"The existing international measures have proved ineffective as the crime of genocide still exists in various parts of the world in one form or the other." 13/

431. Some non-governmental organizations in consultative status with the Economic and Social Council have also communicated their views on the question under consideration. In the opinion of the Société Internationale de Prophylaxie Criminelle, legal means have proved ineffective in preventing genocide and the most constructive and effective contribution will come from the researches of criminologists, psychologists, psychiatrists and educationalists. 14/ In a study communicated by the International Association of Penal Law, it is stated inter alia that "undoubtedly the international measures adopted by the Convention of 9 December 1948 for the prevention and the repression of crimes of genocide constitute an important milestone on the way towards protection of national, ethnical, racial or religious groups ... It is clear that the Convention presupposes that the systems of the agreeing states, have an international legislation which adapts itself to the Convention and carried it into effect. Therefore it is desirable that all the internal systems of separate states, agreeing to the Convention, accomplish the above as soon as possible and that it conforms to the Convention." 15/ The World Young Women's Christian Association has expressed the opinion that "the existing Convention, if ratified and really implemented by all nations, seems to be a sufficient instrument to prevent any kind of genocide." 16/

432. The views from other sources on the effectiveness of international measures for the prevention and punishment of genocide, and especially of the Convention of 1948, may be divided into three general categories: those which consider these measures to be effective; those which deny that they are effective at all; and those which regard them as effective to a limited extent.

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12/ Information and views communicated by the Government of the Congo on 14 May 1973.

13/ Information and views communicated by the Government of Oman on 8 April 1974.

14/ Information and views communicated by the Société Internationale de Prophylaxie Criminelle on 20 January 1973.

15/ Information and views communicated by the International Association of Penal Law.

16/ Information and views communicated by the World Young Women's Christian Association.

433. Thus Herbert Evatt, who was the Australian Prime Minister when the 1948 Convention was adopted, said inter alia that the Convention had provided individual guarantees for protected groups and that, in this field concerned with the sacred right of human groups to existence, the supremacy of international law had been proclaimed once and for all. 17/ In 1950 President Truman of the United States, described the Convention as an effective international legal instrument outlawing the crime of genocide which shocked the conscience of the world. 18/

434. Recently, a writer reviewing the 1948 Convention expressed the opinion that:

"This juridical document has an important place in the struggle of all progressive elements in every continent for political rights and freedoms ... Although only 77 countries out of 122 belonging to the UNO signed and ratified the agreement ... its importance was tremendous since it represented the defeat of facism and the desire to prevent any repetition of its cruelties. It is all the more significant today when the crime of genocide is being perpetrated in the Union of South Africa ..." 19/

435. On the other hand, another writer, referring to the 1948 Convention, has said:

"... The whole Convention is based on the assumption of virtuous Governments and criminal individuals, a reversal of the truth ... In any event even if this assumption were correct, the criminal law of every civilized State provides sufficiently against individual acts of the kind which are enumerated in the Convention.

...

"Thus the Convention is unnecessary where it can be applied and inapplicable where it may be necessary. It is an insult to intelligence and dangerous, because it may be argued a contrario by brazen upholders of an unlimited raison d'Etat that acts enumerated in the Convention, but not committed with intent of destroying groups of people 'as such' are legal. The convention ... is, as has been formulated politely by Professor Brierley, symptomatic of a 'tendency to seek a sort of compensation for all that is so terribly discouraging in the international outlook of today by dissipating energies to achieve results which prove on examination to mark no real advance'. 65/

"65/ 'The Genocide Convention', The Listener, 1949, p. 40." 20/

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17/ Quoted by Robinson, op.cit., p. 43.

18/ Quoted by Louis B. Sohn and Thomas Buergenthal, International Protection of Human Rights (Indianapolis, Bobbs-Merrill Company Inc., 1973), p. 971.

19/ Igor P. Blischenko, "Modern international law and genocide", Etudes internationales de psycho-sociologie criminelle (Paris), Nos. 16-17, 1969, p. 15.

20/ Georg Schwarzenberger, "The problem of an international criminal law", International Criminal Law, edited by Gerhard O. W. Mueller and Edward M. Wise (London, Sweet and Maxwell Ltd., 1965), pp. 32-33.



436. According to another writer, the most serious defect in the 1948 Convention is that in fact it rejects the principle of international action to punish the crime of genocide. This writer concludes that if effectiveness is preferred to spectacular texts, it will be necessary "to start again right from the beginning a work which is no more than the first step on an arduous road leading to absolute respect for the most sacred rights of mankind." 21/

437. One writer is of the opinion that in the 1948 Convention "prevention is very badly organized and full of gaps" and that "in any event, the will to apply it does not exist and any practical possibility of application is excluded, whether or not any complaints have been made to the United Nations," 22/ and this writer adds that:

"In the meanwhile, however, since the international legislator in the person of the United Nations has not been able or willing to fulfil its mission to establish an international law of prevention and punishment and to see that it is complied with, and since it is obvious that no existing international Declaration or Convention can effectively ensure the prevention and punishment of genocide, a fundamental and elementary truth becomes obvious: that it is necessary to educate the public to create a 'social conscience' teaching people to understand, to accept and, in spite of all acts of incitement and provocation, lying propaganda and appeals to hatred and violence, to insist on the need to respect the rules of justice and humanity in this human community which we are all in the end aware of and shall one day accept that we are equal members of, recognizing that everyone is or should be an equal and fully-fledged citizen, free from racial, political or religious discrimination, and that crimes against humanity, whether in the shape of war, extermination, persecution or violence of any kind, should be outlawed." 23/

438. Another writer has made the following comment:

"In the absence of means to make it effective, the Convention on the Prevention and Punishment of the Crime of Genocide joins all the pacts and international declarations, which, for lack of enforcement provisions, remain pure show and all contain the mental reservation: 'unless contrary to the higher interests of the State, of which the State is sole judge'." 24/

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21/ Marcel Sibert, Traité de droit international public (Paris, Librairie Dalloz, 1951), vol. I, pp. 445-446 (translation into English by the Secretariat).

22/ Jean Graven, op. cit., p. 12 (translation into English by the Secretariat).

23/ Ibid., p. 15 (translation into English by the Secretariat).

24/ J. Y. Dautricourt, p. 26 (translation into English by the Secretariat).

439. The following opinion may be mentioned as coming between positive and negative views of the 1948 Convention:

"It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression. Thus, as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalized by way of retroactive laws. On the other hand, the Convention obliges the Parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the jurisdiction of the International Court of Justice and of the United Nations. With regard to the latter, the result of the provision in question is that acts of commission or omission in respect of genocide are no longer, on any interpretation of the Charter, considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the Parties expressly concede to the United Nations the right of intervention in this sphere. This aspect of the situation constitutes a conspicuous feature of the Genocide Convention - a feature which probably outweighs, in its legal and moral significance, the gaps, artificialities and possible dangers of the Convention." 25/

440. The Special Rapporteur believes that the 1948 Convention can only be considered a point of departure in the adoption of effective international measures to prevent and punish genocide. Although he has had occasion to express some doubts and reservations as to the effectiveness of certain articles of the Convention, the Special Rapporteur now proposes to examine the possibility of fresh international measures for effective prevention and punishment of genocide. It has been demonstrated during the period since the adoption of the Convention on Genocide in 1948 that it has not been an obstacle to the perpetration of this crime.

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25/ L. Oppenheim, International Law, a Treatise, seventh edition, H. Lauterpacht ed. (London, Longmans, Green and Company, 1955), vol. I, p. 751. The dangers of the Convention reside essentially in the fact that "by giving the complexion of conventional law, of limited scope and conditioned by municipal legislation to recognized international obligations and principles of international law, the convention constitutes a recession from developments already accomplished".

B. Possibility of preparing additional conventions in order  
to make punishable acts of genocide which were not  
included in the 1948 Convention

1. Cultural genocide

(a) Preparation of the 1948 Convention

441. In the draft convention prepared by the Secretary-General (article 1, para.3), there was an enumeration of the types of acts constituting cultural genocide. These acts were: (a) Forced transfer of children to another human group; (b) Forced and systematic exile of individuals representing the culture of a group; (c) Prohibition of the use of the national language even in private intercourse; (d) Systematic destruction of books printed in the national language or religious works or prohibition of new publications; (e) Systematic destruction of historical or religious monuments or their diversion to alien uses; destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship. 26/

442. Article III of the draft of the Ad Hoc Committee on Genocide reads as follows:

"In this Convention, genocide means any deliberate act committed with intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group" 27/

443. This article gave rise to fairly full discussions in the Ad Hoc Committee on Genocide. Those who supported the inclusion of cultural genocide in the Convention emphasized that there were two ways of suppressing a human group, the first by causing its members to disappear, and the second by abolishing, without making any attempts on the lives of the members of the group, their specific traits. Those who opposed the inclusion of cultural genocide emphasized that there was a considerable difference between physical and cultural genocide, and that it was particularly physical genocide which presented those exceptionally horrifying characteristics which had shocked the conscience of mankind. They also pointed to the difficulty of fixing the limits of cultural genocide, which impinged upon the violation of human rights and the rights of minorities.

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26/ E/447, pp. 21, 27 and 28.

27/ E/794, pp. 6-7.

444. In the Sixth Committee, two amendments (A/C.6/216, 28/ A/C.6/218 29/) to delete this article were submitted.

445. Another amendment (A/C.6/229) to the Ad Hoc Committee's draft text was worded as follows:

"In this Convention, genocide also means any of the following acts committed with the intent to destroy the religion or culture of a religious, racial or national group:

1. Systematic conversions from one religion to another by means of or by threats of violence.
2. Systematic destruction or desecration of places and objects of religious worship and veneration and destruction of objects of cultural value." 30/

The sponsor of this amendment explained that its purpose was to restrict the scope of cultural genocide, which had been too broadly defined by the Ad Hoc Committee on Genocide. The proposed amendment merely listed acts which were already punishable under most criminal codes. 31/

446. The discussions in the Sixth Committee were confined to the question of principle as to whether the Convention would include cultural genocide, and so the above-mentioned amendment was not considered.

447. The main arguments advanced in favour of including an article on cultural genocide in the Convention were as follows: (a) it would be impossible to separate cultural genocide from physical and biological genocide, as a group could be deprived of its existence not only through the mass destruction of its members but also through the destruction of its specific traits, the loss of which led to the dissolution of its unity, even though no attempt had been made on the life of its members, and for that reason, cultural genocide was an integral part of the general definition of genocide; (b) declarations or charters establishing the rights and duties of man could not declare cultural genocide to be a crime or provide measures for its prevention and suppression; (c) as historical examples showed, especially the crimes perpetrated by the Nazis during the Second World War, cultural genocide was not a less hideous crime than physical or biological genocide; (d) it would not be enough to insert provisions in national legislation guaranteeing the right of self-expression for national, racial or religious groups, as history had shown that such guarantees do not prevent the perpetration of crimes against those groups; (e) if one pursued the argument of those who held that cultural genocide should be excluded from the Convention because there were inherent in it certain factors covered by other international instruments designed to protect minorities or in certain provisions of national legislation - such as laws on education and the protection of worship - the conclusion might be that that whole convention on genocide was useless, since all the acts constituting genocide were penalized by the laws of all civilized

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28/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 83rd meeting, p.200. This amendment said that the attention of the Third Committee should be drawn to the need for the protection of language, religion and culture within the framework of the international declaration on human rights.

29/ Ibid., Annexes, p.20.

30/ Ibid., p.23.

31/ Ibid., Sixth Committee, 83rd meeting, p.195.

countries; (f) the fact that national laws penalized cultural genocide in certain of its manifestations was an added reason for the inclusion of that crime in the Convention, just as mass murder and the causing of serious bodily harm, which were crimes penalized by national law, had been included; (g) the Convention would be incomplete if it were limited to the protection of human groups against physical genocide alone, because, if attacks against the culture of a group remained unpunished for the want of appropriate provisions in the Convention, that would facilitate the perpetration of physical genocide, in which such acts normally culminated; (h) the Universal Declaration of Human Rights proclaimed the individual's right to life, which might be interpreted as ensuring his protection against any act of physical genocide, yet no one disputed the need for a convention on physical genocide, and consequently the protection of cultural groups should also be ensured by such a convention; (i) acts of cultural genocide have always been inspired by the same motives as those of physical genocide and had the same object - the destruction of racial, national or religious groups - as had been shown inter alia by the crimes perpetrated by the Nazis in Czechoslovakia and Yugoslavia as part of a gigantic plan for the complete germanification of the occupied peoples. 32/

448. Those opposed to including cultural genocide in the Convention argued in the main that: (a) cultural genocide fell rather within the sphere of the protection of human rights or of the rights of minorities; (b) cultural genocide was too vague a concept to admit of precise definition for the purpose of inclusion in the Convention on Genocide; (c) the inclusion of cultural genocide in the Convention might give rise to abuses by reason of the vagueness of that concept; (d) if the scope of the Convention were unduly extended to include cultural genocide its value would be greatly reduced and it might become a tool for political propaganda instead of an international legal instrument; (e) from the practical point of view, the international or national tribunals which would have the task of suppressing genocide would find themselves in great difficulties if they were called upon to pronounce judgement in such an undefined field as cultural genocide, which was directly concerned with the most complex qualities of the human soul; (f) the interpretation of an article on cultural genocide would raise practical difficulties, as it would involve determining the concrete elements of a group's religion and culture, with which the government would have no right to interfere, deciding whether all cultures deserved to be protected and deciding whether the assimilation resulting from civilizing action would also constitute genocide; (g) the adoption of the article on cultural genocide might, on account of its political implications, prevent some countries from ratifying the Convention. 33/

449. The Sixth Committee decided not to include a provision on cultural genocide in the Convention by 25 votes to 16, with 4 abstentions; 13 delegations were absent during the vote. 34/

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32/ Ibid, pp. 195, 196 and 204-206.

33/ Ibid, pp. 198, 200 and 203.

34/ Ibid, p. 206.

(b) Views on cultural genocide and its inclusion in additional instruments to the Convention or in the Convention

450. Several Governments are of the opinion that cultural genocide should be included among the acts of genocide. The Government of Austria has communicated the following: "Austria believes that the additional conventions making acts of genocide punishable which are not included in the Convention of 1948, such as 'cultural genocide', should be taken into consideration. Steps to strengthen existing legal instruments should, however, be given priority over the preparation of any such additional convention." 35/ The Holy See was of the opinion that:

"Genocide is also a crime against the rights and dignity of a people. Each people has its own heritage. Although it is true that every people should be open to other cultures and grow in terms of union and exchange with other peoples, the fact remains that more or less natural groupings of persons exist in the form of peoples, each of which has a particular cultural heritage and is often of a particular racial type or a particular mixture of racial types. It is a people's cultural heritage that is the expression of that people and that is the true bond of the people's unity. A people's heritage with its traditional language, customs, beliefs, art, music, laws, social patterns, and ways of looking at reality, is not a static structure. It is a dynamic bond of unity, a matrix of human development, and a promise for the future of the people.

"All the individuals and social groups that make up a given peoples should be able to attain full cultural development in accord with their traditions. They should not be held back, nor have other cultures imposed on them.

...

"In view of the above-stated principles, serious consideration should be given to the matter of those acts which might be called 'cultural genocide' or 'ethnocide' or 'ecocide'". 36/

451. The Governments of Ecuador 37/, Israel 38/, Oman 39/, and Romania 40/ were also of the opinion that the inclusion of cultural genocide among the acts of genocide should be envisaged.

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35/ Information and views communicated by the Government of Austria on 14 May 1973.

36/ Information and views communicated by the Holy See on 18 September 1972.

37/ Information and views communicated by the Government of Ecuador on 14 April 1974.

38/ Information and views communicated by the Government of Israel on 19 March 1973.

39/ Information and views communicated by the Government of Oman on 8 April 1974.

40/ Information and views communicated by the Government of Romania on 28 February 1973.

452. The Government of Finland has communicated the following:

"As regards the possibility of making punishable such acts related to genocide which were not included in the Convention of 1948, this matter deserves a careful study taking into account all the relevant aspects. From the point of view of criminal law, however, some of these concepts suggested so far to be taken into consideration in this respect may be somewhat too vague to be accurately defined as criminal acts. As much as they are to be deplored, they may be better combated by other means." 41/

453. The Government of the United Kingdom has communicated the following:

"The United Kingdom Government regard the definition of genocide contained in Article II of the Convention and the definition of acts which shall be punishable in Article III as being satisfactory and exhaustive. The United Kingdom Government opposed in 1948 attempts to include provisions outlawing 'cultural genocide' in the Genocide Convention. The United Kingdom Government considers that there is a difference in kind between genocide proper and e.g. the destruction of churches, libraries or schools, however barbarous and unpardonable the latter may be. Proposals relating to 'cultural genocide' are fundamentally concerned with the questions of freedom of thought, expression and religion, and in the United Kingdom Government's view the substance of these matters is properly one for consideration in the human rights sphere and not in connexion with penal provisions. It should be noted that the proposals for dealing with 'cultural genocide' tabled in 1948 did not in fact guarantee the rights to freedom of thought and expression.

"The term 'cultural ethnocide' has not been satisfactorily defined. However, it would appear to be a term applied to those activities which are elsewhere described as 'cultural genocide'. Although the application of the term 'ethnocide' might be more appropriate than the incorrect use of the term 'genocide', it is evident, for the reasons advanced in the previous paragraph, that it is inappropriate to attempt to include such acts within the scope of the existing Convention or of any similar new Convention." 42/

44. The Société internationale de prophylaxie oriminelle considers that the protection of cultural groups ought to have been ensured by the 1948 Convention. 43/ In the study communicated by the International Association of Penal Law, the view was expressed that it would be advisable to draw up additional conventions covering inter alia cultural genocide. 44/ On the other hand, in the opinion of

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41/ Information and views communicated by the Government of Finland on 25 January 1973.

42/ Information and views communicated by the Government of United Kingdom 18 July 1973.

43/ Information and views communicated by the Société internationale de prophylaxie criminelle on 20 January 1973.

44/ Information and views communicated by the International Association of Penal Law on 7 February 1973.

the World Young Women's Christian Association, the addition to the 1948 Convention of an article on cultural genocide would be liable to make States hesitate still more about ratifying the Convention or express reservations in their ratifications. 45/

455. According to one writer, the concept of cultural genocide does not correspond to the etymological meaning of genocide, which refers only to the physical or biological destruction of a human group. 46/ Another writer, referring to the fact that cultural genocide is not mentioned in the 1948 Convention makes the following comment:

"These attacks on cultural life undoubtedly injure the legitimate rights which civilized States guarantee today. It would be desirable to condemn them, but this should be done in another way, as it would show a serious lack of a sense of proportion to 'include in the same convention mass murders and the closing of libraries'. Furthermore, the vague and imprecise wording of the definition does not make it possible to set precise limits and there would surely be many difficulties of interpretation in determining the concrete religious and cultural elements covered by this concept. This state of affairs is liable to create uncertainty and would leave the door open for abuse. But there is another consideration. A State may have legitimate reasons to follow a policy of assimilation by lawful means in order to create a certain degree of national and cultural homogeneity. But in practice, it would be difficult to trace precise limits between these acts of State sovereignty and cultural genocide.

"These legal and practical considerations lead to the conclusion that cultural genocide, if such a term can be justified, lies outside the scope of the idea of genocide, as conceived by the authors of the Convention. The rejection of this idea was thus the result of a realistic caution, all the more necessary as an international agreement was involved." 47/

456. Another writer is of the opinion that:

"The cultural extermination of a human group must be clearly distinguished from the physical destruction of a cultural group. In the first case the people are physically saved but culturally violated, disabled, despoiled and 'sterilized'. In the second case it is the human group which suffers in the personal lives of its individual members because of the cultural characteristics of the members of the group.

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45/ Information and views communicated by the World Young Women's Christian Association on 12 February 1973.

46/ Plawski, op.cit., p. 113.

47/ Planzer, op.cit., p.104 (translation into English by the Secretariat).



Again, the first case refers to the demolition of statues, shrines, temples, the devastation of towns and buildings, the abolition of artistic, literary or scientific manifestations. The second relates to the annihilation and perdition of human life.

"When cultural objects are being destroyed, the notion of genocide does not enter into consideration. When cultural groups of individual human beings become the collective object of the destruction of life, the conception of genocide is clearly involved but in its primary and principal aspect of a physical attack against people. Then there is no cultural genocide of a physical human group but physical genocide of a cultural human group.

"In so far as so-called cultural genocide actually amounts to physical genocide, the problem of protection against the crime really centers round the question whether cultural groups should be included among the groups of human people to be protected under a convention on international criminal law." 48/

457. Noting that cultural genocide is not included in the 1948 Convention, another writer comments as follows:

"Although this implies no praise for the decision taken not to include this type of offence in the Convention, its exclusion does not deserve the same censure as attaches to the exclusion of attempts against political and economic groups, and this not only because of the elementary principle of political caution which precludes seeking too much at the same time, but because of the considerable difference between acts aimed at destroying a culture and genocide properly so called. The latter is always an ordinary criminal offence; so-called cultural genocide has a marked political character. The former has no mitigating circumstances or excuse, at least in its more drastic forms, whereas the latter may seem more or less justifiable in preventing separatism. Although this argument is not enough in an individualistic view of the world and life, which places man above all his creations, it emphasizes an essential difference from genocide." 49/

458. Other writers have on the contrary deplored the fact that cultural genocide was not mentioned in the 1948 Convention. 50/

459. As for the word "ethnocide", it seems to be regarded as synonymous with "cultural genocide" 51/ or as having an obvious etymological link with the

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48/ Drost, op.cit., pp.59-60.

49/ De la Muela, loc.cit., p.376.

50/ Sibert, op.cit., vol.I, p.446; Herbert Kraus, Massenaustreibung und Völkermord (Kitzingen/Main, Holzner Verlag, 1953).

51/ Robert Jaulin, op.cit., p.12.

word "genocide". <sup>52/</sup> It has also been said that ethnocide means the denial of indigenous civilizations' right to life. <sup>53/</sup> It is said to be achieved through the assimilation, integration or cultural absorption of human groups with a different social structure and a different culture from the majority. <sup>54/</sup>

460. Another view is that ethnocide is an alternative to genocide, the latter being committed when the destruction of an indigenous civilization cannot be carried out peacefully or when geographical distance or lack of social organization have made it possible for massacres to take place in secret. It has also been possible these last few years to see how publicity given to massacres carried out for centuries with the knowledge of the authorities responsible for indigenous affairs has resulted in a revived campaign of ethnocidal assimilation as the only alternative to extermination. <sup>55/</sup>

461. On the basis of the information at his disposal, which has been outlined above, the Special Rapporteur is unable to draw a definite conclusion as to whether the acts regarded as cultural genocide or "ethnocide" are constituent elements of the crime of genocide and whether it is possible to conclude an additional convention covering cultural genocide or to include it in a revised convention on genocide. Naturally, the possibility of securing recognition of cultural genocide through conventional instruments depends on whether the States Members of the United Nations and particularly those which are parties to the 1948 Convention want to review the problems related to the prevention and punishment of genocide, among which cultural genocide cannot be ignored, and to take international action in this matter as part of the prevention and punishment of the crime of genocide.

## 2. Ecocide

### (a) Ecocide as an international crime similar to genocide

462. According to one writer:

"It can be said that the term or concept of 'ecocide' although not legally defined ... its essential meaning is well understood: it denotes various measures of devastation and destruction which have in common that they aim at damaging and destroying the ecology of geographic areas to the detriment of human life, animal life and plant life." <sup>56/</sup>

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<sup>52/</sup> Ibid., p.318.

<sup>53/</sup> Ibid., p.386.

<sup>54/</sup> Ibid., pp.193 and 386.

<sup>55/</sup> Ibid., pp.386-387.

<sup>56/</sup> John H.E. Fried, "War by ecocide: some legal observations", extract published in the Bulletin of Peace Proposals (1973, No.1), p.43.

463. Another writer has drawn up a draft international convention on the crime of ecocide. This draft closely follows the Convention on Genocide and it has been said that such a convention would supplement the 1948 Convention. 57/

464. The provisions of the draft international convention on the crime of ecocide which define this crime, are as follows:

"Article I. The Contracting Parties confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

"Article II. In the present Convention, ecocide means any of the following acts committed with the intent to disrupt or destroy, in whole or in part, a human ecosystem:

- (a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical or other;
- (b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- (c) The use of bombs and artillery in such quantity, density or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals or crops;
- (d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
- (e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- (f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

"Article III. The following acts shall be punishable:

- (a) Ecocide;
- (b) Conspiracy to commit ecocide;
- (c) Direct and public incitement to ecocide;
- (d) Attempt to commit ecocide;
- (e) Complicity in ecocide." 58/

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57/ Arthur H. Westing, "Proscription of ecocide", Science and Public Affairs, January 1974, p.26.

58/ Richard A. Falk, "Environmental warfare and ecocide - facts, appraisals, and proposals", Bulletin of Peace Proposals (1973, No.1), p.93.

465. The Government of Romania has communicated the following:

"So far as concerns the possibility of further international action with a view to supplementing the 1948 Convention, bringing it up to date and making its provisions more effective, it should be pointed out that the present provisions do not cover the acts of genocide likely to be committed nowadays. The suggestions made to punish 'cultural genocide', 'cultural ethnocide' and 'ecocide' are well known. A thorough study and analysis of these aspects could lead to the conclusion either that it is necessary to adopt supplementary conventions or that the 1948 Convention should be revised." 59/

466. An opinion in favour of considering acts of genocide not provided for in the 1948 Convention as part of further international action with a view to preventing and punishing genocide has been expressed by the Holy See (see paragraph 450 above).

467. In the Sub-Commission the view was expressed that any interference with the natural surroundings or the environment in which ethnic groups lived was in effect a kind of ethnic genocide because such interference could prevent the people involved from following their own traditional way of life. 60/

468. Apart from the Governments which consider that the 1948 Convention should not be revised (see paragraphs 420-424 above) or that it should not be extended to acts other than those it already covers (see paragraphs 452-453 above), the Government of the United Kingdom has communicated the following:

"There is no definition of the term 'ecocide' and it would appear that the term is incapable of carrying any precise meaning. The term has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an international Convention for dealing with matters of this kind." 61/

469. According to the World Young Women's Christian Association, the addition to the 1948 Convention of an article on ecocide would be liable to make States hesitate still more about ratifying the Convention or express reservations in their ratifications. 62/

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59/ Information and views communicated by the Government of Romania on 26 February 1973.

60/ E/CN.4/Sub.2/SR.658, p.53. See similarly E/CN.4/Sub.2/SR.658, p.55, and E/CN.4/Sub.2/SR.659, p.65.

61/ Information and views communicated by the Government of the United Kingdom on 18 July 1973.

62/ Information and views communicated by the World Young Women's Christian Association on 12 February 1973.

(b) Ecocide regarded as a war crime

470. After pointing out that the term "ecocide" does not have any precise meaning from the legal point of view, one writer has said that at all events the phenomenon denoted by this term represents an unprecedented violation of the fundamental laws of war in force, and consequently, is a war crime. 63/

471. Senator Clair Borne Peel of the United States submitted to the United States Senate a draft treaty on geo-physical war, which would prohibit any military action aimed at modifying the climate, producing earthquakes, or interfering with the water and ocean systems. 64/

472. One writer has drawn up a draft protocol on ecological warfare, which provides as follows:

"This Protocol prohibits in particular:

"1. All efforts to defoliate or destroy forests or crops by means of chemicals or bulldozing;

"2. Any pattern of bombardment that results in extensive craterization of the land or in deep craters that generate health hazards;

"3. Any reliance on weapons or tactics that are likely to kill or injure large numbers of animals.

"...

"The Protocol shall come into effect after the first five signatures and is binding thereafter on all governments of the world because it is a declaration of restraints on warfare that already are embodied in the rules and principles of international law;

"Violation of this Protocol shall be deemed an international crime of grave magnitude ..." 65/

473. At the first session of the Diplomatic Conference on the reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts - Geneva, 20 February-29 March 1974 - some amendments were submitted to the articles of the draft additional protocols to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts. The aim of these amendments was:

(a) To include in article 33 of the protocol, entitled "Prohibition of unnecessary injury", a clause forbidding the use of means and methods which destroy natural human environmental conditions; 66/

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63/ Fried, op.cit., pp.43-44

64/ Referred to by Westing, op.cit., p.27.

65/ Falk, op.cit., p.95.

66/ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, First Session (Geneva, 20 February-29 March 1974), Draft additional protocols to the Geneva Conventions of 12 August 1949, Comparative table of proposals and amendments Submitted by 15 September 1974 (CDDH/56), p.191.

(b) To add to article 48 of the draft (concerning objects indispensable to the survival of the civilian population) a clause under which it is forbidden to impair or destroy the natural environment as such by any means or methods whatsoever or to make it an object of reprisals. 67/

474. At its fourth session, held in Geneva from 17 March to 10 June 1977, the Conference adopted article 55 entitled "Protection of the natural environment", which appears in Protocol I and reads as follows:

"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

"2. Attacks against the natural environment by way of reprisals are prohibited." 68/

(c) Prohibition of action to influence the environment and climate for military and other purposes

475. At its twenty-ninth session, the General Assembly adopted on 9 December 1974 resolution 3264 (XXIX) entitled "Prohibition of action to influence the environment and climate for military and other purposes incompatible with the maintenance of international security, human well-being and health". In operative paragraph 1, the General Assembly considered it necessary to adopt, through the conclusion of an appropriate international convention, effective measures to prohibit action to influence the environment and climate for military and other hostile purposes which are incompatible with the maintenance of international security, human well-being and health. In operative paragraph 3, the General Assembly requested the Conference of the Committee on Disarmament inter alia to reach agreement as soon as possible on the text of such a Convention.

476. The General Assembly, in its resolution 3475 (XXX) of 11 December 1975, noted with satisfaction that the delegations of the Union of Soviet Socialist Republics and the United States of America had submitted at the Conference of the Committee on Disarmament identical drafts of a convention on the prohibition of military or any other hostile use of environmental modification techniques 69/ and that other delegations had offered suggestions and preliminary observations regarding those drafts.

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67/ Ibid, p. 230.

68/ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, July 1977, chap. III, p. 38.

69/ The texts of the drafts are reproduced respectively in documents CCD/471 and CCD/472.

477. On 10 December 1976, the Assembly adopted resolution 31/72 in which it noted with satisfaction that the Conference of the Committee on Disarmament has completed and transmitted to the General Assembly, in the report of its work in 1976, the text of a draft Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which it referred to all States for their consideration, signature and ratification. The Convention, the text 70/ of which was annexed to the aforementioned resolution, was opened for signature on 18 May 1977 at the United Nations Office at Geneva. In the field of prohibition of action to influence the environment and climate for military or other purposes, the Special Rapporteur believes that it will be helpful to reproduce the following articles of this new United Nations instrument:

"Article I

"1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

"2. Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

"Article II

"As used in article I, the term 'environmental modification techniques' refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

"Article III

"1. The provisions of this Convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use.

...

"Article IV

"Each State Party to this Convention undertakes to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control.

"Article V

"...

"3. Any State Party to this Convention which has reason to believe that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all relevant information as well as all possible evidence supporting its validity.

"..."

478. It follows from the above that the question of "ecocide" has been placed by States in a context other than that of genocide. This fact has led the Special Rapporteur to believe that it is becoming increasingly obvious that an exaggerated extension of the idea of genocide to cases which can only have a very distant connexion with that idea is liable to prejudice the effectiveness of the 1948 Convention Genocide very seriously.



C. The possibility of establishing an international body to carry out investigations with regard to genocide

479. At the Sub-Commission's 456th meeting, on 27 January 1965, Mr. Arcot Krishnaswami said that, although the United Nations Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948 by the United Nations General Assembly and had been in force since 12 January 1951, there was proof that acts of genocide were still being committed in various parts of the world. On several occasions, accusations of genocide had been brought to the attention of the General Assembly. Mr. Krishnaswami said that the crime of genocide was invariably directed against minorities, although the destruction of minority groups could assume various forms, including massacre, executions or acts subjecting members of the group to conditions such that they could not stay alive. When adopting the Convention the General Assembly had considered the question of an international court and had stipulated in article VI that persons accused of genocide would be tried by "such international penal tribunal as may have jurisdiction with respect to the Contracting Parties which shall have accepted its jurisdiction". The International Law Commission had been requested to examine whether it was desirable and possible to set up a judicial organ of this kind. However, in Mr. Krishnaswami's opinion, the urgent need was not so much for an international criminal organ as for an international body which would endeavour to prevent the crime of genocide before it actually occurred on a massive scale. Such a body should be able to investigate and to assess allegations of genocide, and to take the steps necessary to halt at its outset the deliberate destruction of a national, racial, religious or ethnic group as such. 71/

480. The Government of the Netherlands has communicated the following:

"As regards the possibility of establishing an international body empowered to carry out investigations, the Netherlands Government would like to stress its willingness - which it has repeatedly shown in the past - to entrust international bodies with the task of instituting objective investigations into the facts of cases, especially in the event of disputes. The Netherlands Government is certainly prepared to co-operate in any endeavour to make the implementation of this Convention more effective, and it is important that a large number of the Parties to the Convention should also show that they are willing to institute the objective assessment of facts and allegations concerning the crime of genocide." 72/

481. The Government of Congo has expressed the opinion that:

"However, while preserving the substantive provisions at present in force, it is undoubtedly possible to make them more effective by establishing an international body responsible for gathering all the information needed to determine whether allegations of genocide are well-founded, and to give this body the authority to proceed to the place in question to check the

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71/ E/CN.4/947, para. 164.

72/ Information and views communicated by the Government of the Netherlands on 25 April 1973.

information received. On the other hand, if such a body were given the power to take measures to halt attempts at genocide, this would raise other problems which it hardly seems possible to solve at present, given that the organization of international society is still rudimentary."

482. In this Government's opinion, the simple fact that an international body was empowered, after sifting information and checking it on the spot, to determine whether allegations of genocide were well-founded, could not fail to exert some pressure on world public opinion and on the decisions of the States more especially involved. In the present state of affairs, such action could have a far from negligible deterrent effect. And this Government further believes that if improvements are to be made to the 1948 Convention, it is in this direction that efforts should be made to find ways of banishing the spectre of genocide.

483. The Government of Congo also commented as follows:

"Moreover, it seems possible that such an international body could be established, at the appearance of the first signs of genocide or attempts to commit such criminal acts, and provided with sufficient means of investigation to enable it, if not to settle directly and by itself a situation reflecting an inclination or initial moves on the part of one or more States to commit the acts referred to in articles II and III of the Convention of 9 December 1948, at least to alert international public opinion and deter the Governments of the States concerned." 73/

484. The Government of Ecuador is of the opinion that the additional protocol to the Convention could include provision for a body to investigate allegations of genocide. 74/

485. The Government of the United Kingdom has communicated the following:

"In general it cannot be denied that the importance and seriousness of the crime of genocide are such as to suggest the desirability in principle of the creation of some kind of special machinery to investigate or assess allegations of genocide and to take necessary steps to halt at its outset the deliberate destruction of a national, racial, religious or ethnic group as such. However, the problem of obtaining international agreement to the establishment of any such body and its terms of reference suggests that this particular idea would be very difficult to implement. The task of investigation and assessment might be conducted by an ad hoc body convened by, for example the Commission on Human Rights to deal with a specific allegation or group of allegations. It would be necessary to ensure that any such body convened to investigate and assess allegations was genuinely impartial and went about its work in such a way as to command the confidence of all parties to the allegation. While it might be possible to establish an investigatory body of this sort, it would seem impracticable at present to create a special permanent body intended to halt the deliberate destruction of a national, racial or ethnic group." 75/

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73/ Information and views communicated by the Government of Congo on 14 May 1973.

74/ Information and views communicated by the Government of Ecuador on 24 April 1974.

75/ Information and views communicated by the Government of the United Kingdom on 18 July 1973.

486. The Government of Finland is also of the opinion that "ad hoc fact finding bodies similar to those utilized in some other cases by the United Nations could be established when necessary." 76/

487. The Government of Rwanda is of the opinion that the establishment of a permanent body to investigate allegations of genocide "would seem possible, on condition that it was completely objective and neutral, on the model of the International Red Cross, for instance, and on condition that its investigatory procedures were quick and discreet and capable of leading to prompt, discreet and powerful intervention by the Security Council itself." 77/

488. The Holy See has communicated the following:

"Repeating what it has stated on many occasions, the Holy See recommends the strengthening of existing international bodies or the establishing of appropriate organs within the framework of the United Nations so that allegations of genocide can be promptly investigated and that measures can be brought about to stop - from the very beginning - the total or partial genocide of a national, racial, religious or ethnic group. This would help to make of the United Nations the kind of effective world body described by Pope John XXIII in his encyclical Pacem in terris: 'it is our earnest wish that the United Nations Organization - in its structure and in its means - may become ever more equal to the magnitude and nobility of its tasks, and that the day may come when every human being will find therein an effective safeguard for the rights which derive directly from his dignity as a person, and which are therefore universal, inviolable and inalienable rights.'" 78/

489. The Sultanate of Oman has communicated the following:

"Pending the establishment of an international judicial organ the idea of creating an international body under the auspices of the Commission on Human Rights appears more suitable and it should be given proper consideration and full support. This body should receive a mandate to investigate and to assess allegations of the crime of genocide wherever it exists and should be given reasonable powers to take appropriate measures to halt and prevent this crime. It should be free to ascertain information from a proved source other than government agencies - such a provision has already been included in the 1971 Protocol amending the 1961 Convention on Narcotic Drugs. Gradually this investigating body should enlarge its role against all practices violating human rights, such as racial discrimination, apartheid

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76/ Information and views communicated by the Government of Finland on 26 January 1973.

77/ Information and views communicated by the Government of Rwanda on 17 January 1973.

78/ Information and views communicated by the Holy See on 17 September 1971.

and slavery etc. The functions of this body may include direct action through constitutional methods by providing, through the United Nations assistance system, financial and material help, legal assistance to the victims, and patronization of the religious and cultural institutions, languages and other objects under destruction." 79/

490. In the Sub-Commission the view was expressed that a special body should be established to investigate allegations of acts of genocide and to report on them to the competent United Nations authorities. 80/ It was also suggested that the question of the establishment by the Commission of ad hoc groups to enquire into allegations of genocide should be studied in greater detail. In that connexion the Sub-Commission's system for dealing with communications alleging violations of human rights might prove useful. It was necessary, however, to ascertain the legal basis for giving such ad hoc groups investigatory powers. 81/

491. In a study communicated by the International Association of Penal Law, the opinion was expressed that if it was advisable to establish international bodies for the prevention of genocide, the establishment of such bodies would presuppose the prior setting up of an international Court. 82/

492. The second international congress of the Société internationale de prophylaxie criminelle held in Paris from 10 to 13 July 1967, decided to set up an observation, information and study centre on genocide, whose function inter alia would be to gather useful information in various countries so as to pick up the warning signs of impending genocide in time and alert world opinion, seeking out the truth in the midst of false reports. The aim of this centre was specified in article 2 of its regulations, as adopted by the executive committee at its meeting of 19 February 1968: "To obtain information on the conditions that breed genocide, group tensions and on all factors liable to promote genocide. The Centre will seek out and collect all kinds of information and may carry out investigations and fact-finding on the spot ...". 83/

493. The president of the centre, Professor Manuel López-Rey, has communicated the following:

"The organization of an international body entrusted with carrying out investigations, etc., is attractive but unrealistic, complicated and expensive. Yet the Commission [on Human Rights] may decide that an investigation should take place provided a government, the Secretariat or an international organization has requested it and sufficient evidence is submitted. The investigation should be conducted by an independent committee of persons nominated by Commission and appointed by the Economic and Social Council." 84/

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79/ Information furnished by the Government of Oman on 26 February 1973.

80/ E/CN.4/Sub.2/SR.658, p. 63.

81/ E/CN.4/Sub.2/SR.736, p. 203.

82/ Information and views communicated by the International Association of Penal Law on 7 February 1973.

83/ Etudes internationales de psycho-sociologie criminelle (Paris), Nos. 14-15, pp. 79 and 81.

84/ Views communicated on 7 March 1973.

494. At the Commission's twenty-seventh session "some members ... suggested that, in the light of the serious allegations made in many publications, the conclusion might be drawn that there was a prima facie case of genocide and other violations of the human rights of the Aché Indians in Paraguay, and that the Sub-Commission should recommend a formal and extensive investigation." 85/

495. As is well known, a number of allegations of genocide have been made since the adoption of the 1948 Convention. In the absence of a prompt investigation of these allegations by an impartial body, it has not been possible to determine whether they were well founded. Either they gave rise to sterile controversy or, because of the political circumstances, nothing further was heard about some of them.

496. For these reasons, the Special Rapporteur feels that it is necessary to consider the setting up by the Commission on Human Rights of ad hoc groups or committees to inquire into any allegation of genocide brought to the knowledge of the Commission by a Member State or an international organization and backed by sufficient evidence.

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85/ E/CN.4/1160, para. 148.

V. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS  
CONCERNING THE CRIME OF GENOCIDE

497. The information received from Governments, reproduced in the note by the Secretary-General (E/CN.4/Sub.2/303 and Add.1-8), 1/ and the information furnished with a view to the preparation of this study, reveals some diversity in the practice of States parties to the Convention with regard to the implementation of article V. In some countries, the provisions of their constitutions or general laws in force have been deemed sufficient to ensure the implementation of the Convention and no laws have been adopted relating especially to genocide. Others considered that the provisions of the genocide Convention or its main principles were incorporated in their constitutions. A number of States parties to the Convention have, however, adopted legislative measures relating especially to genocide. Some States which are not parties to the genocide Convention considered their legislation in force sufficient to prevent and punish the crime of genocide.

A. Information concerning States parties to the Convention  
which have not adopted legislative measures relating  
especially to genocide

498. The legislation in force was deemed sufficient to ensure the prevention and punishment of the crime of genocide in Belgium, 2/ Egypt, 3/ Ecuador, 4/ Finland, 5/ France, 6/ Greece, 7/ India, 8/ Iraq, 9/ Pakistan, 10/ Poland, 11/ the Ukrainian Soviet Socialist Republic, 12/ Turkey, 13/ and the Union of Soviet Socialist Republics. 14/

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1/ This note was prepared pursuant to Economic and Social Council resolution 1420 (XLVI) entitled "Genocide", adopted on 6 June 1969.

2/ Information furnished by the Government of Belgium on 15 May 1973.

3/ Information furnished by the Government of Egypt on 6 February 1973.

4/ Information furnished by the Government of Ecuador on 24 April 1974.

5/ Information furnished by the Government of Finland on 26 February 1973.

6/ E/CN.4/Sub.2/303/Add.8.

7/ E/CN.4/Sub.2/303/Add.5.

8/ E/CN.4/Sub.2/303/Add.8.

9/ Information furnished by the Government of Iraq on 21 March 1973.

10/ E/CN.4/Sub.2/303/Add.6.

11/ Information furnished by the Government of Poland on 30 April 1973.

12/ Information furnished by the Government of the Ukrainian Soviet Socialist Republic on 24 April 1973.

13/ E/CN.4/Sub.2/303/Add.1.

14/ Information furnished by the Government of the Union of Soviet Socialist Republics on 28 March 1973.

499. Generally speaking, States indicated that their penal legislation makes it possible to punish the different aspects of genocide under various charges, and that consequently it has not been considered necessary to adopt supplementary legislative measures. Moreover, Finland and Poland, among others, stated that the Convention had the force of a law in their countries.

500. The Egyptian Government, for example, communicated the following:

"Egypt acceded to the Convention on the Prevention and Punishment of the Crime of Genocide and deposited its instrument of accession with the United Nations on 8 February 1952. The decree providing for the ratification of the Convention, promulgated on 9 June 1952, was published on 3 July 1952 in Al-wagail' al-misriyya, No. 100. However, since no national, ethnic, racial or religious group exists in the structure of Egyptian society, making the crimes sanctioned by the Convention inconceivable, the Egyptian Government has not considered it useful to adopt special penal laws designed to prevent such crimes, regarding as sufficient the basic regulations laid down in the constitutional provisions relating to the principles of supremacy of the law, protection of freedoms, and equality of opportunity and equality of treatment without discrimination among citizens, together with the general provisions of penal legislation punishing all forms of attacks on individuals or individual freedom.

"Besides the equality of all citizens before the law, the Constitution declares that all citizens are equal in their public rights and obligations without distinction as to race, origin, language, religion or creed (article 40), and that the State guarantees equal opportunities for all citizens (article 8). It affirms the principles of individual freedom and in that respect provides the broadest guarantees, in order to avoid any possibility of the violation of such freedom. It states that individual freedom is a natural and inviolable right and that it is impermissible to arrest or to limit the freedom of any person by any means or to restrict the freedom of movement of any person except by a judicial order necessitated by an investigation or the protection of society; such an order must be issued by a competent judge or the public prosecution or in accordance with the rules of the law (article 41). The Constitution further provides that any person who has been arrested or imprisoned or whose freedom has been restricted in any way whatsoever, must be treated in a manner preserving his human dignity, and that it is impermissible to harm him physically or psychologically (article 42). The Constitution attaches particular importance to the protection of the private life of citizens and states that private life is sacred and protected by the law (article 45). In its interpretation of 'protection', the Constitution provides that any attack on personal freedom, the inviolability of private life or on any of the other rights and freedoms of a general nature which are guaranteed by the Constitution and the law is a crime in which a criminal or civil case cannot be prescribed; the Constitution further stipulates that the State guarantees fair compensation to the victim of such a crime (article 57). The Constitution also prohibits the conducting of any medical or scientific test on any person against his will (article 43) and states that it is impermissible to restrict the residence of any citizen to a fixed area or to force him to reside in a fixed area except under the conditions stated by law (article 50). The Constitution provides that the State will grant political asylum to any foreigner persecuted for defending the people's interests, human rights, peace or justice, and forbids the extradition of political refugees (article 53).

"In application of these constitutional principles, Egyptian penal law contains provisions guaranteeing the individual's right to the physical and psychological safety of his person and the protection of his freedom. The Penal Code devotes a special chapter to the crimes of homicide and assault (articles 230 to 251 bis) and prescribes the death penalty for any person who organizes a band which attacks a group from among the population or for any person who leads such a band or holds a position of command therein. Any person who has joined such a band without taking part in its organization or without holding a position of command therein is liable to a penalty of a term of hard labour or hard labour for life (article 89). A penalty of hard labour or imprisonment is imposed on any person who encourages the committing of such crimes, even if incitement did not lead to any consequences (article 95), and on anyone who takes part in a criminal conspiracy, whether for the purpose of committing one of these crimes or for the purpose of achieving a specific goal. Anyone who incites to such a conspiracy or is involved in directing its movement is liable to hard labour for life, and a term of hard labour or imprisonment is imposed on anyone who encourages the committing of this crime by aiding it physically or financially without having the intention of directly taking part in its commission (article 96). Under the Penal Code, anyone inciting others to join a conspiracy with a view to committing one of the above-mentioned crimes is liable to imprisonment when his proposal has not been accepted (article 98). The Penal Code also prohibits the arrest, imprisonment or detention of any person without an order issued by the competent authority or without due cause and also forbids the use of threat and torture (articles 230 and 282). Similarly, the Code of Criminal Procedure prohibits the arrest or imprisonment of any person without an order issued by the legally competent authorities and stipulates that any person arrested or imprisoned must be treated in a manner preserving his human dignity, and that no physical or psychological harm may be inflicted on him (article 40). Moreover, the same Code reiterates the constitutional provision which provides that attacks on personal freedom are crimes in which a criminal or civil case cannot be prescribed (articles 15 and 259)."

501. The Government of the Union of Soviet Socialist Republics has communicated the following information:

"The Soviet Union ratified the Convention on the Prevention and Punishment of the Crime of Genocide on 18 March 1954. That action did not require any changes in or additions to Soviet legislation, since a system of guarantees designed to ensure the free development of national, ethnic and religious groups existed in Soviet law long before the adoption by the United Nations of the Genocide Convention. Article 123 of the Constitution of the USSR states: 'Equality of rights of citizens of the USSR, irrespective of their nationality or race, in all spheres of economic, government, cultural, political and other public activity, is an indefeasible law.' The effectiveness of this provision is buttressed by the application of criminal law, and the propriety of such measures is established in the second part of article 123 of the Constitution: 'Any direct or indirect restriction of the rights of, or, conversely, the establishment of any direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, are punishable by law.'



"The system of legal guarantees of the equal rights of Soviet citizens is constantly being strengthened and improved. Soviet criminal law, stressing the importance of the principle which is being safeguarded - the equal rights of citizens of the USSR, irrespective of their nationality and race - and the special social danger implicit in any infringement of this principle, includes this type of criminal action in the category of State crimes. Article 11 of the 1958 Act on Crimes against the State provides that the following are punishable acts: (1) any propaganda or agitation aimed at inciting racial or national enmity or discord; (2) any direct or indirect restriction of the rights of, or (3) the establishment of any direct or indirect privileges for, citizens on account of their racial or national origin.

"The question of freedom of worship has been settled in an equally consistent manner. Freedom of conscience and the protection of this right are guaranteed by the separation of the church from the State and of the school from the church and by the establishment of freedom of religious worship and freedom of anti-religious propaganda. The Constitution of the USSR states: 'In order to ensure to citizens freedom of conscience, the church in the USSR is separated from the State, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens' (article 124 of the Constitution of the USSR). In practice this means that any citizen has the right to practise religion, attend church, perform religious rites and so forth, and, conversely, he has the right to be an atheist and to engage in anti-religious propaganda and agitation. One of the conditions for the practical implementation of the provisions on freedom of worship is the latter's protection under criminal law. All the penal codes of the Union Republics provide for penalties in the case of violation of the constitutional provisions on the separation of the church from the State and of the school from the church and in the case of interference with religious rites.

"Among the measures connected with the prevention of so-called national and cultural genocide (denial to a nation of the opportunity to develop its own national culture and language and to create broadly human values in a national form), an important role is played by the system of rules which makes it possible to ensure the development of the national culture of all the peoples living in the USSR. These rules consist chiefly of constitutional provisions which strengthen the State structure of the USSR. In accordance with article 13 of the Constitution of the USSR, the Soviet State is a federal State, formed on the basis of a voluntary union of equal Soviet Socialist Republics. Each Union Republic has its own constitution, which takes account of the specific features of the Republic and is drawn up in full conformity with the Constitution of the USSR. Among the spheres which are wholly regulated by the Union Republics is that of national culture. In each Union Republic the State language is the national language of that Republic, and this is appropriately confirmed in the constitutions of the Republics.

"The existence of Autonomous Republics, Autonomous Regions and National Districts within the Union Republics has required as one of the guarantees of the development of the culture and language of the different nationalities the confirmation in the Constitution of the right of citizens to instruction in schools in the native language (article 121 of the Constitution of the USSR). In addition, article 110 of the Constitution of the USSR states that judicial proceedings are conducted in the language of the Union Republic, Autonomous

Republic or Autonomous Region, persons not knowing this language being guaranteed the opportunity of fully acquainting themselves with the material of the case through an interpreter and likewise the right to use their own language in court. The latter provision was expanded further in the Fundamentals of Criminal Court Procedure and the Fundamentals of Civil Court Procedure for the USSR and the Union Republics and correspondingly in the Republican codes of criminal and civil procedure.

"At the same time, Soviet procedural law confirms the equality of citizens before the law. Thus, the Fundamentals of Criminal Court Procedure state (article 8): 'In criminal cases justice is administered on the principle that all citizens are equal before the court and before the law irrespective of their social, property or official status, nationality, race or religion.' The Fundamentals of Civil Court Procedure of the USSR and the Union Republics of 8 December 1961 contain a similar provision in article 7, which is also reproduced in the codes of the Union Republics.

"Thus, Soviet legislation provides all the necessary guarantees for fully implementing the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide."

502. The information furnished by the Governments of the Philippines and Austria included statements to the effect that the Genocide Convention or some of its provisions had acquired constitutional force.

503. The Government of the Philippines communicated the following information:

"The Republic of the Philippines, a party to the December 9, 1948 Convention on the Prevention and Punishment of the Crime of Genocide, has ratified the Convention's articles, although with some reservations. Its Senate has gone to the extent of proposing a bill (S. No. 529) which would give effect to the provisions of the Convention. However, the bill, first submitted to the body in March of 1967 and then in January of 1968, reached its untimely death in March of 1968 when it remained pending for second reading without having been debated on or discussed upon. Its passage and approval into law, had it taken place, would have given the Philippines a good example of a legislative material directly touching the question of genocide.

"In any event, the Philippine Constitution of 1935 as well as of 1973 are not bereft of provisions which are broad enough to declare the policies of the country which absorb the 'generally accepted principles of international law' and therefore, that of the Convention. <sup>15/</sup>

"Worthy of note are some legislative materials catering to the protection and improvement of the cultural minorities of the country.

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<sup>15/</sup> Article II, section 3, of the Constitution of 1973 reads as follows: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, co-operation and amity with all nations" (Text furnished by the Government of the Philippines on 14 February 1973).

Indirect though it may be, these materials show the positive aspect of the measures undertaken by the government to prevent the crime of genocide in whatever conceivable form it might be committed." 16/

504. The Government of Austria furnished the information that under the Austrian legal system, articles IV and VI of the Genocide Convention 17/ are constitutional provisions, but that a national law will nevertheless be adopted in the near future with a view to including in the Austrian Penal Code a provision providing for a penalty of life imprisonment for anyone who commits certain acts with the intention of exterminating or inflicting serious harm on specific groups of people or on any of their members as such. 13/

B. Information concerning legislative measures adopted by  
States parties to the Convention relating especially  
to genocide

505. Most of the legislative measures adopted by the States parties to the Convention relating especially to Genocide consist in defining in their penal legislation (penal codes or special penal laws) the constituent elements of this crime in terms identical or at least very similar to those used in the Convention and in establishing penalties. This process was followed in Brazil (by Act No. 2889 of 1 October 1956), 19/ Bulgaria (article 416 of the Penal Code, in the title headed "Crimes against Peace and Humanity"), 20/ Denmark (Act of 29 April 1955), 21/ Hungary (article 137 of the Penal Code) 22/ Israel (Act of 29 March 1950), 23/ the Netherlands (Act of 20 October 1970), 24/ the Federal Republic of Germany (article 220 (a) of the Penal Code), 25/ Romania (article 357 of the Penal Code, in the title headed "Crimes against Peace and Humanity"), 26/ Sweden (Act of 20 March 1963) 27/ and Czechoslovakia (article 259 of Act No. 140 of 29 November 1961). 28/ The Government of the United Kingdom also adopted a

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16/ Information furnished by the Government of the Philippines on 14 February 1973.

17/ The texts of these articles are reproduced in para. 42 above.

18/ Information furnished by the Government of Austria on 14 May 1973.

19/ E/CN.4/Sub.2/303/Add.2.

20/ Information furnished by the Government of Bulgaria on 21 February 1973.

21/ E/CN.4/Sub.2/303/Add.2.

22/ Information furnished by the Government of Hungary on 24 March 1974.

23/ Yearbook on Human Rights for 1950 (United Nations publication, Sales No. 1952.XIV.1), pp. 162-163.

24/ Information furnished by the Government of the Netherlands on 25 April 1973.

25/ E/CN.4/Sub.2/303/Add.2.

26/ Information furnished by the Government of Romania on 27 February 1973.

27/ E/CN.4/Sub.2/303.

28/ E/CN.4/Sub.2/303/Add.7.

special act on genocide with a view to its accession to the 1948 Convention. 29/ Before succeeding to the Convention and with a view to so succeeding, Fiji adopted a special act in 1969. 30/ In Tonga there was adopted the Genocide Act of 1969, to meet Tonga's obligation under the Convention. 31/

506. The Government of Romania, for example, furnished the following information:

"The new Penal Code of the Socialist Republic of Romania, which entered into force on 1 January 1969, deals with the crime of genocide in the chapter entitled 'Crimes against Peace and Humanity', article 357, which provides as follows:

'Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious community or group:

- (a) Killing members of the community or group,
- (b) Causing serious bodily or mental harm to members of the community or group,
- (c) Inflicting on the community or group conditions of life or treatment likely to bring about its physical destruction,
- (d) Imposing measures intended to prevent births within the community or group,
- (e) Forcibly transferring children of one community or group to another community or group

shall be punishable by death and by the confiscation of goods, or by rigorous imprisonment for 15 to 20 years, by the loss of certain rights and by the partial confiscation of goods.

If the act is carried out during wartime it shall be punishable by death and by the total confiscation of goods.

Conspiracy to commit the offence of genocide shall be punishable by rigorous imprisonment for five to 15 years, by the loss of certain rights and by the partial confiscation of goods.'

"Furthermore, the Romanian Penal Code provides in article 361, paragraph 1, that attempted genocide shall be punishable by rigorous imprisonment for seven and one half to 10 years (where the commission of the act would have been

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29/ Information furnished by the Government of the United Kingdom on 18 July 1973.

30/ Information furnished by the Government of Fiji on 26 January 1972.

31/ Information furnished by the Government of Tonga on 11 December 1972.

punishable by rigorous imprisonment) or for 10 to 20 years (where the commission of the act would have been punishable by death). Article 361, paragraph 2, provides that concealing or abetting the crime of genocide shall be punishable by rigorous imprisonment for a term of three to 10 years.

"With regard to incitement to commit genocide and complicity in genocide - acts punishable under article III of the Convention on the Prevention and Punishment of the Crime of Genocide, the general part of the Penal Code (article 27) stipulates that in the case of an offence punishable under penal law the instigator and his accomplice are both subject to the same penalty.

"The punishment of the crime of genocide provided for in penal legislation of the Socialist Republic of Romania is also based on the principles laid down in the Constitution; as an example, we may cite the following articles of the fundamental law of the country:

'Article 17. Citizens of the Socialist Republic of Romania, without distinction as to nationality, race, sex or religion, shall have equal rights in all fields of economic, political, legal, social and cultural activity.

The State shall guarantee the equal rights of citizens. No restriction of these rights and no discrimination in the exercise thereof on grounds of nationality, race, sex or religion shall be permitted.

Any manifestation aimed at establishing such restrictions, nationalist-chauvinist propaganda and incitement to racial or national hatred shall be punishable by law.'

"The constitutional guarantees, such as those described above, deriving from the very nature of the social and political régime of the Socialist Republic of Romania, make it practically impossible for the crime of genocide to be committed.

"Therefore, the penalty for this serious offence, provided by the Penal Code, was determined mainly by the need for international co-operation in the prevention and punishment of genocide - in view of the provisions of the Genocide Convention adopted by the United Nations - together with the need to provide the legal framework required to punish any such offenders who might take refuge or be arrested in Romanian territory.

'Art. 22. In the Socialist Republic of Romania, the co-inhabiting nationalities shall be guaranteed the free use of their mother tongue and books, newspapers, magazines, theatres and education at all levels in their own language. In districts inhabited also by a population of other than Romanian nationality, all organs and institutions shall also use the language of that nationality in speech and in writing and shall appoint officials from among that population or from among other citizens conversant with the language and way of life of the local population.'

'Art. 30. Freedom of conscience shall be guaranteed to all citizens of the Socialist Republic of Romania.'

507. In Italy, the Act of 9 October 1967 concerning the prevention and punishment of the crime of genocide seems to develop some of the provisions of the 1948 Convention. The information furnished by the Government of Italy on this topic reads as follows:

"Article 1 of the Act of 9 October 1967 deals with the most serious cases of genocide: 'Anyone who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, commits acts designed to cause serious bodily harm to members of the group shall be liable to rigorous imprisonment (reclusione) for ten to eighteen years. Anyone who, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, commits acts designed to cause the death of or very serious bodily harm to members of the group shall be liable to rigorous imprisonment for twenty-four to thirty years. The same penalty shall apply to anyone who, with the same intent, subjects members of the group to conditions of life calculated to bring about in whole or in part, the physical destruction of the group.'

"Article 2 provides a penalty of rigorous imprisonment for fifteen to twenty-four years for the deportation, with intent to commit genocide, of members of a national, ethnical, racial or religious group. The penalty of rigorous imprisonment for life (ergastolo) becomes applicable (article 3) if any of the acts mentioned in the two previous articles results in the death of one or more persons. Article 4 deals with the crime of genocide by the limitation of births within one of the aforementioned groups, which is punishable with rigorous imprisonment for twelve to twenty-one years. Genocide by the abduction of children under fourteen years of age belonging to one of the groups in question (article 5) is punishable with rigorous imprisonment for twelve to twenty-one years.

"Article 6 deals with the offence of compelling people to carry distinctive marks or signs indicating membership of the persecuted community, which is punishable with imprisonment for four to ten years, the penalty being increased to imprisonment for twelve to twenty-one years when the offence is committed with intent to bring about the destruction of the group in whole or in part. Lesser penalties (rigorous imprisonment for three months to one year) are applicable under article 7 to anyone who enters into a conspiracy to commit any of the crimes of genocide enumerated in the Act, even if the crime is not committed. The promoters of such a conspiracy are liable to heavier penalties. Under article 8, public incitement to commit the specified crimes of genocide and public defence of such crimes are punishable with rigorous imprisonment for three to twelve years. Jurisdiction to try the crimes enumerated in the Act (article 9), whether actually committed or only attempted, belongs to the Assize Court." 32/

508. Study of the provisions of the penal codes and special laws mentioned in paragraphs 505-507 above shows that the penalties established for the crime of

genocide may be qualified as severe and that they often reach the maximum provided for under the penal legislation of the countries concerned. 33/

509. Some countries have adopted legislative measures for the application of the Genocide Convention having certain specific characteristics.

510. Although it was considered in Canada at the time of ratification of the 1948 Convention that the legislation in force covered the criminal acts referred to in the Convention, in 1965 the Government established a special committee to study the problem of hate propaganda. This committee considered, inter alia, the Genocide Convention, and recommended in its report, submitted in 1966, that in order to demonstrate the country's attachment to the rights guaranteed by the Convention, it was necessary to adopt a new law providing for the punishment of the acts of advocating or promoting genocide which were not prohibited by the legislation then in force. 34/ Pursuant to this recommendation, an Act was adopted on 11 June 1970 of which the following provisions have been incorporated in the Criminal Code:

"267A. (1) Everyone who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section 'genocide' means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

(a) killing members of the group, or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney-General.

(4) In this section 'identifiable group' means any section of the public distinguished by colour, race, religion or ethnic origin." 35/

A generally similar modification of the Penal Code was made in Jamaica in 1968. 36/

511. The Genocide Act of 1973 was enacted by the Irish Parliament with a view to enabling Ireland to accede to the Genocide Convention. Article 2 of the Act reads as follows:

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33/ See also "Question of the punishment of war criminals and of persons who have committed crimes against humanity", study prepared by the Secretary-General pursuant to General Assembly resolution 2712 (XXV) (A/8345), para. 28.

34/ Information furnished by the Canadian Government on 27 February 1974.

35/ Acts of the Parliament of Canada, Second Session of the Twenty-Eighth Parliament, vol. 1 (Ottawa, Queen's Printer for Canada, 1971), p. 503.

36/ For text, see E/CN.4/Sub.2/303/Add.2.

"(1) A person commits an offence of genocide if he commits any act falling within the definition of 'genocide' in Article II of the Genocide Convention.

"(2) A person guilty of an offence of genocide shall on conviction on indictment -

- (a) in case the offence consists of the killing of any person, be sentenced to imprisonment for life, and
- (b) in any other case, be liable to imprisonment for a term not exceeding fourteen years.

"(3) Proceedings for an offence of genocide shall not be instituted except by or with the consent of the Attorney General.

"(4) A person charged with an offence of genocide or any attempt, conspiracy or incitement to commit genocide shall be tried by the Central Criminal Court." 37/

512. The Government of Argentina indicated that, following that country's accession to the Genocide Convention:

"The reform of the nation's Penal Code introduced in Act No. 17567, as amended by article 4 of Act No. 17812, included among the circumstances aggravating the crime of homicide the committing of the offence for reasons of pleasure, greed or racial or religious hatred.

"The relevant section of article 80 of the Argentine Penal Code is given below:

'Rigorous imprisonment for life or imprisonment for life shall be imposed, notwithstanding the application of the provisions of article 52, on any person who kills:

...

- 4. For reasons of pleasure, greed or racial or religious hatred.'" 38/

513. According to information furnished by the Governments of Austria (see para. 504 above) and Spain, 39/ these countries have taken steps to amend their penal codes to cover genocide. In Laos, the draft penal code which was to be submitted to the National Assembly in 1969 also contained a provision relating to

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37/ Information furnished by the Government of Ireland on 26 June 1974.

38/ Information furnished by the Government of Argentina on 25 April 1973.

39/ E/CN.4/303/Sub.2/Add.8.



genocide. 40/ Rwanda has stated that, with a view to confirming that country's succession to the Genocide Convention, "the question of legislative measures for the application of this Convention was studied on the occasion of the preparation of the new draft penal code". 41/

C. Information concerning the constitutional and legislative provisions of States which are not parties to the Genocide Convention

514. The States which are not parties to the Genocide Convention and which submitted information for the purpose of this study felt, in general, that their Constitutions or normal legislation contained provisions which could be used to prevent or punish this crime.

515. In information furnished on 12 January 1973, the Government of Cyprus selected as pertinent the following articles of the Penal Code:

"47. Any person who -

- (a) conspires with any other person or persons to do any act in furtherance of any seditious intention common to both or all of them; or
- (b) publishes any words or document or makes any visible representation whatsoever with a seditious intention,

is guilty of a felony and is liable to imprisonment for five years.

48. For the purposes of the last preceding section a seditious intention is an intention -

...

- (f) to promote feelings of ill will and hostility between different communities or classes of the population of Cyprus.

...

51. (1) Any person who prints, publishes or to any assembly makes any statement calculated or likely to -

- (i) encourage recourse to violence on the part of any of the inhabitants of Cyprus; or
- (ii) promote feelings of ill will between different classes or communities or persons in Cyprus,

is guilty of misdemeanour and is liable to imprisonment for twelve months:

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40/ Ibid.

41/ Information furnished by the Government of Rwanda on 17 January 1973.

Provided that no person shall be guilty of an offence under the provisions of this section if such statement was printed, published or made solely for any one or more of the following purposes, the proof whereof shall lie upon him, that is to say:

- (a) to endeavour in good faith to show that Her Majesty or Her Majesty's Government in the United Kingdom has been misled or mistaken in any of their measures; or
- (b) to point out in good faith errors or defects in the Government, or the policies thereof, or constitution of Cyprus as by law established, or any legislation, or in the administration of justice, with a view to the remedying of such errors or defects; or
- (c) to persuade in good faith any inhabitants of Cyprus to attempt to procure by lawful means the alteration of any matter in Cyprus as by law established other than that referred to in paragraph (b) of section 48; or
- (d) to point out in good faith with a view to their removal, any matters which are producing or have a tendency to produce discontent amongst any of the inhabitants of Cyprus or feelings of ill will and enmity between different communities or classes of persons in Cyprus."

516. On 23 February 1973, the Government of Malawi stated, inter alia, that, despite the fact that Malawi was not a party to the Genocide Convention and had thus not adopted any laws referring specifically to genocide, a large number of acts referred to in article II of the Convention constituted grave crimes under the country's existing law.

517. On 30 April 1973, the Government of Kuwait furnished the following information:

"Kuwaiti society is based on certain fundamental principles which ensure equality among all human beings and which protect the dignity and worth of the human person.

"Article 7 of the Constitution of Kuwait provides: 'Justice, Liberty and Equality are the pillars of Society. Co-operation and Mutual Help are the firmest bonds between citizens.'

"Article 29 of the Constitution provides: 'All people are equal in human dignity and in public rights and duties before the law, without discrimination as to race, origin, language or religion.'

"Article 31 of the Constitution provides: 'No person shall be subjected to torture or to degrading treatment.'

"Articles 35 and 36 of the Constitution of Kuwait protect freedom of belief, freedom of opinion and of scientific research.

"Kuwait is a party to the International Convention on the Elimination of All Forms of Racial Discrimination which was opened for signature and ratification by the United Nations General Assembly on December 21, 1965."

518. In information furnished on 14 May 1973 by the Government of the Congo, it was pointed out, inter alia, that this Government:

"[Has], for its part, adopted certain legislative measures designed to prevent the eruption within its territory of criminal acts of the nature of those referred to in article II of the Convention of 9 December 1948.

Chronologically speaking:

An Act of 28 July 1962 prohibited all procedures likely to indicate membership of a particular ethnic group. It has been found that all distinctive external signs making it possible to distinguish members of one ethnic group from those of another ethnic group tended to intensify the feeling of belonging to a specific group and to lead its members to perform acts which could, in extreme cases, lead them to attempt to harm members of other groups;

The Constitution of 31 December 1969, in the section concerning public freedoms and the human person, laid down the principle of equality of all Congolese citizens. It also specified in article 11 that:

'... Any act which confers privileges on nationals or which limits their rights by reason of ethnic, regional or religious differences shall be deemed contrary to the Constitution and shall be punished with the penalties provided by law.

'Any act of provocation or any attitude aimed at spreading hatred and discord among nationals shall be deemed contrary to the Constitution and shall be punished with the penalties provided by law.'

Article 12 provides that:

'Any act of racial discrimination, as well as any propaganda of a racist or regionalist nature, shall be punished by law.'

519. According to information furnished by the Government of Oman on 8 April 1974, there is no discrimination in that country between groups or sects, whatever their origin or religion, since the social and economic system is based on respect for the individual and his freedom and the legal system is founded on the principles of Islamic law, which ensure protection for human rights.

## VI. COURT DECISIONS ON GENOCIDE

520. In paragraphs 22 and 27 above, it has been shown that, in the trials of major Nazi war criminals by the International Military Tribunal at Nuremberg and the courts of the allied countries, some of those criminals were also accused and convicted of the crime of genocide.

521. In this section the Special Rapporteur proposes to examine the aspects of those trials and judgements, and of the Eichmann trial, which are relevant to his study.

### A. Cases tried by the courts of the allied countries after the Second World War

522. Explicit references to the crime of genocide are found in the trial of Josef Altostötter et al. by the United States Military Tribunal at Nuremberg from 17 February to 4 December 1947. 1/ All the accused had been judges, law officers or officials in the Ministry of Justice of the Nazi Government. All were accused of having committed war crimes and crimes against humanity, as those crimes were defined by Allied Control Council Law No. 10.

523. In its judgement, the Tribunal examined the crime of genocide in the context of the crimes against humanity which had been committed by the accused. Those crimes were defined in the indictment as follows:

"Between September, 1939 and April, 1945, all of the defendants herein unlawfully, wilfully, and knowingly committed Crimes against Humanity as defined by Control Council Law No.10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds, and ill-treatment of, and other inhumane acts against German civilians and nationals of occupied countries". 2/

524. As will be seen from this text and from the judgement, 3/ genocide was regarded as a type of crime against humanity which can be committed by a Government either against its nationals or against those of another State.

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1/ See Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission (London, H.M. Stationery Office, 1948), vol. VI, Case No. 35, pp.1-110.

2/ Ibid., vol. VI, p. 4.

3/ Ibid., pp. 32, 75 and 99.

525. The Tribunal even quoted, in terms of approval, General Assembly resolution 96 (I), 4/ observing that:

"The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact." 5/

526. With regard to one of the accused, the Tribunal concluded inter alia that:

"The defendant Lautz is guilty of participating in the national programme of racial extermination of Poles by means of the perversion of the law of high treason ... We have cited a few cases which are typical of the activities of the prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which we deem to be part of the established governmental plan for the extermination of those races. He was an accessory to and took a consenting part in the crime of genocide." 6/

527. Referring to the crimes committed by another of the accused, the Tribunal held that, in the three cases it had tried, the victims had been condemned and executed solely because they were Jews or Poles. The Tribunal emphasized in that connexion that:

"Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that programme of persecution and extermination. From the evidence it is clear that these trials lacked the essential elements of legality ... The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national programme of racial persecution. It is of the essence of the proof that he identified himself with this national programme and gave himself utterly to its accomplishment. He participated in the crime of genocide ..." 7/

528. In the trial of Hauptsturmführer Amon Goeth, who was tried by the Supreme National Tribunal of Poland at Cracow from 27 to 31 August and 2 to 5 September 1946, the prosecution described the crimes committed by the accused as genocide. In the light of the evidence assembled, the prosecution drew attention not only to the physical and biological aspects of the crime of genocide but also to its economic, social and cultural implications.

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4/ See text in para. 29 above.

5/ Law Reports of Trials of War Criminals, vol. XI, p. 48.

6/ Ibid., p. 75.

7/ Ibid., p. 9.

529. In this context the Tribunal, in its judgement concerning Amon Goeth, stated the following:

"His criminal activities originated from general directives that guided the criminal Fascist-Hitlerite organization, which under the leadership of Adolf Hitler aimed at the conquest of the world and at the extermination of those nations, which stood in the way of the consolidation of its power.

"The policy of extermination was in the first place directed against the Jewish and Polish nations.

"This criminal organization did not reject any means of furthering their aim at destroying the Jewish nation. The wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations.

"The letter of the Head of the Security Police in Berlin dated 21st September, 1939, and addressed to all the 'Einsatzgruppen der Polizei' and called 'Schnellbrief', which contained instructions how to deal with the Jews, constitutes one of the proofs in respect of the extermination campaign. The letter established as the final goal ('Endziel') which was to be kept secret, the complete extermination of the Jews. This end was to be achieved by stages." 8/

530. The crimes committed in the Auschwitz concentration camp, which were established from abundant evidence in the trial of Camp Commandant Franz Hoess (tried by the Supreme National Tribunal of Poland from 11 to 29 March 1947), also constitute genocide. In this connexion the prosecution, after describing the Nazi policy of extermination of the Jews, stated that the mass crimes committed in the concentration camps formed part of the Nazi plan aimed at the extermination of whole peoples. In this context the prosecution cited the evidence to the effect that shortly before the outbreak of the war Himmler had revealed a plan for the extermination of approximately 30 million of the Slav population. 9/

531. In its judgement, the Supreme National Tribunal declared that one of the Nazi Party's objectives had been the biological and cultural extermination of subject nations, particularly the Jewish and Slav nations, with a view to establishing German "Lebensraum" and the domination of the German race. The Tribunal described that programme and that practice of exterminating groups of human beings as a crime of genocide constituting an attack on the most organic bases of human relations, such as the right to life and to existence. 10/

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8/ Ibid., vol. VII, p. 9.

9/ Ibid., p. 24.

10/ Ibid.

532. At the Hoess trial, plentiful evidence was produced concerning the medical experiments to which men and women not of German origin, and Jews in particular, had been subjected at Auschwitz concentration camp. The following comments were made on the subject:

"Thus all these experiments violated general principles of criminal law as derived from the criminal laws of all civilized nations.

"But paramount importance should be attached to the political aspect of the crime. The general scheme of the wholesale experiments points out clearly to the real aim. They were obviously devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazi as standing in the way of the fulfilment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide.

"These conclusions seem justified not only by the experiments themselves. They were corroborated by the statements of the accused Hoess himself. He confirmed the existence of plans of wholesale destruction of the Slav nations, and of Poles and Czechs in particular. It is also known that Himmler entrusted Professor Clausberg with experiments which were nothing else but the application in reverse of his successes in the domain of the treatment of sterility. Clausberg himself recognized that his experiments could contribute very little to the progress of science.

"The defendant Hoess declared that the experiments of wholesale castration and sterilization were carried out in accordance with Himmler's plans and orders. These aimed at the biological destruction of the Slav nations in such a way that outside appearance of a natural extinction would have been preserved.

"...

"Thus in view of the political directives, issued by the Supreme German authorities, and the character of the experiments performed in Auschwitz on their orders, it seems obvious that they constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means." 11/

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11/ Ibid., pp. 25 and 26.

533. In the trial of Ulrich Greifelt et al. by the United States Military Tribunal at Nuremberg from 10 October 1947 to 10 March 1948, the first count of the indictment was formulated as follows:

"1. Between September, 1939, and April, 1945, all the defendants herein committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups connected with: atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, persecutions on political, racial and religious grounds, and other inhumane and criminal acts against civilian populations, including German civilians and nationals of other countries, and against prisoners of war.

"2. The acts, conduct, plans and enterprises charged in Paragraph 1 of this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called 'Aryan' race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom (such imposition being hereinafter called 'Germanization'); and by the extermination of 'undesirable' racial elements. This program was carried out in part by

- "(a) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of 'racial value';
- "(b) Encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labour and weakening Eastern nations;
- "(c) Taking away, for the purpose of exterminating of Germanization, infants born to Eastern workers in Germany;
- "(d) Executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning the Germans involved;
- "(e) Preventing marriages and hampering reproduction of enemy nationals;
- "(f) Evacuating enemy populations from their native lands by force and resettling so-called 'ethnic Germans' (Volksdeutsche) on such lands;
- "(g) Compelling nationals of other countries to perform work in Germany, to become members of the German community, to accept German citizenship, and to join the German Armed Forces, the Waffen-SS, the Reich Labour Service and similar organisations.



"(h) Plundering public and private property in Germany and in the incorporated and occupied territories, e.g., taking church property, real estate, hospital apartments, goods of all kinds, and even personal effects of concentration camp inmates, and

"(i) Participating in the persecution and extermination of Jews." 12/

534. The Tribunal condemned most of the accused for having committed the crimes mentioned above 13/ which, as was rightly emphasized in the commentary on the trial, came within the scope of article II of the Convention on the Crime of Genocide. 14/

535. The judgement of the Supreme National Tribunal of Poland in the trial of Gauleiter Artur Greiser (21 June to 7 July 1946) enumerated the following crimes which had been committed against the Polish population:

...

- "(a) illegal creation of an exceptional legal status for the Poles in respect of their rights of property, employment, education, use of their national language, and in respect of the special penal code enforced against them;
- "(b) Repression, genocidal in character, of the religion of the local population by mass murder and incarceration in concentration camps of Polish priests, including bishops; by restriction of religious practices to the minimum; and by destruction of churches, cemeteries and the property of the Church;
- "(c) Equally genocidal attacks on Polish culture and learning;
- "(d) Ruthless economic exploitation of the Polish population and of economic resources;
- "(e) Deportation of the Polish population in implementation of the programme that 'not an inch of the conquered territory will belong to a Pole';
- "(f) Debasing of the dignity of the nation (degradation of the Poles to citizens of a lower class, Schutzbefohlene, in accordance with the distinction drawn between German 'masters' and Polish 'servants');
- "(g) Crimes committed in places of torture and concentration camps like Fort VII, Zabikow and Inowroclaw and Radogoszcz;
- "(h) Arbitrary executions and summary sentences by special courts which condemned Poles to death for trivial reasons, or for none at all, and which were practically never mitigated;

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12/ Ibid., vol. XIII, pp. 2-3.

13/ Ibid., pp. 28-36.

14/ Ibid., p. 39.

"(i) Complete extermination of the Jewish population in special camps and crematoria." 15/

536. The Tribunal concluded that:

"Gauleiter and Reichstatthalter Artur Greiser, in accepting during September and October, 1939, from the hands of the leader of the great German conspiracy the posts of his deputy in the organization of Party and State in the so-called Wartheland, did not intend to be merely the trusted servant of his leader in the ordinary sense. Of the 'Wartheland' that was carved during the war out of the live body of Poland and annexed in violation of every law, he wished to make a 'German land,' a model 'Mustergau,' and at the same time criminally to turn it into a parade ground (Excercierplatz) for trying out methods of germanizing the country, not in the old fashion of the days before the First World War, but in the absolute sense of what he himself called Eindeutschung. There were three ways of arriving at such a germanization of the territory which, despite the methods applied during the invasion, and the war that continued to be waged, still had a population of four and a half million, of whom three and a half were Polish: by deportation of adult Poles and Jews, germanization of Polish children racially suited to it, the new method of mass extermination of the Polish and Jewish population, and complete destruction of Polish culture and political thought, in other words by physical and spiritual genocide. The facts concerning this genocide brought to light during the trial and later arranged and evaluated according to the different groups of accusations in section (c) of the Indictment prove that the supreme head of this Wartheland by no means simply blindly carried out the orders of his leader, Hitler, whom allegedly there was no possibility of opposing, but was an independent, ambitious and cunning instigator and organizer of the cruel methods which led to the mass extermination of the local populations with the aim of completely destroying their powers of national resistance and their physical strength, which was the ultimate objective .... Thus, the accused as the supreme authority in the Wartheland, acting with full powers granted to him by Hitler, in the opinion of this Tribunal committed crimes both from the point of view of the municipal, and international law. That is, he ordered, countenanced and facilitated, as is shown by the evidence, criminal attempts on the life, health and property of thousands of Polish inhabitants of the 'occupied' part of Poland in question, and at the same time was concerned in bringing about in that territory the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own." 16/

#### B. The Eichmann trial

537. Eichmann was tried by the District Court of Jerusalem under the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, of Israel. By its judgement of 12 December 1961, the Court found him guilty of the crimes covered by that Law and sentenced him to death. Eichmann appealed against the judgement of the District

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15/ Ibid., p. 112.

16/ Ibid., pp. 113-114.

Court to the Supreme Court of Israel which, by its decision of 29 May 1962, dismissed the appeal as to both conviction and sentence and affirmed the sentence of the District Court. 17/

538. Among the crimes of which Eichmann was convicted figured first and foremost, the crime against the Jewish people. This crime is defined in section I (b) of Israeli Law 5710/1950 as follows:

"In this section:

'Crime against the Jewish people' means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

- (1) killing Jews;
- (2) causing serious bodily or mental harm to Jews;
- (3) placing Jews in living conditions calculated to bring about their physical destruction;
- (4) imposing measures intended to prevent births among Jews." 18/

As the District Court emphasized, 19/ that provision reproduced, in defining the crime against the Jewish people, the language of article II of the Genocide Convention. 20/

539. The acts constituting the crime against the Jewish people of which Eichmann was convicted by the Court were the following:

"(1) that during the period from August 1941 to May 1945, in Germany, in the Axis States and in the areas which were subject to the authority of Germany and the Axis States, he, together with others, caused the killing of millions of Jews for the purpose of carrying out the plan known as 'the Final Solution of the Jewish Problem' with the intent to exterminate the Jewish People;

"(2) that during that period and in the same places he, together with others, placed millions of Jews in living conditions which were calculated to bring about their physical destruction, for the purpose of carrying out the plan above mentioned with the intent to exterminate the Jewish people;

"(3) that during the period and in the same places he, together with others, caused serious physical and mental harm to millions of Jews with the intent to exterminate the Jewish people;

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17/ For the sentence of the District Court and the decision of the Supreme Court, see International Law Reports, edited by E. Lauterpacht (London, Butterworths, 1968), vol. 36, pp. 18-342.

18/ Ibid., p. 30.

19/ Ibid.

20/ For this article, see paras. 43-106 above.

"(4) that during the years 1943 and 1944 he, together with others, devised measures the purpose of which was to prevent births among Jews by his instructions forbidding child bearing and ordering the interruption of pregnancies of Jewish women in the Theresin Ghetto with the intent to exterminate the Jewish People ." 21/

540. In its sentence the District Court emphasized inter alia that the crime against the Jewish people, which constitutes the crime of genocide, is the gravest type of crime against humanity. It noted that genocide, although committed by the killing of individuals, was nevertheless intended to exterminate the Jewish nation as a group for, in accordance with Hitler's murderous racial theory, the Nazis singled out Jews from the rest of the population in the territories under their domination and sent them to their death solely because of their racial affiliation. The Court further emphasized that between the crime of genocide and the individual crimes of homicide there is a distinction not only in respect of intention which, in the case of genocide, is general and total: the extermination of members of a group as such, i.e. a whole people or part of a people. The criminal act itself (actus reus) of genocide also differs in its nature from the combination of all the individual acts of murder and the other crimes committed during its execution. The people, in whole or in part, is the victim of the extermination which befalls it in consequence of the extermination of its sons and daughters. 22/

541. One writer states:

"The Eichmann judgement meets a fundamental ethical requirement which comes from the past and is addressed to the future. As to the past, it supplements the international justice meted out after the Second World War at Nuremberg, in occupied Germany and in the countries conquered by the Nazis. Its contribution in this respect is all the more important in that the Eichmann trial especially concerns one of the most terrible manifestations of the political criminality of contemporary totalitarianism which, despite its gravity, had not hitherto formed the subject of a separate trial in the course of international punitive justice. Through this trial, the genocide of twentieth-century Jews was finally brought to light in all its detail and, through his sentence, Eichmann paid the penalty for his share in that abominable crime. What is more, the impact of this trial in the world at large aroused in the peoples the consciousness of the need to punish those

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21/ See International Law Reports, vol. 36, p.277.

22/ Ibid., p.233.

criminals of the last war who had hitherto escaped retribution, and thus greatly contributed to the detection and prosecution of several Nazi criminals." 23/

542. The same writer adds that the Eichmann trial restored to prominence the ethical postulate of the punishment of genocide which, having been awakened in the peoples' consciousness during the Second World War, seemed to have gradually dimmed despite the fact that genocide still existed and there was even a danger that it might recur on a large scale. The trial revealed the obstacles and problems which the current international situation placed in the way of effective punishment of genocide, and it contributed to the international punishment of genocide through the solutions adopted by the courts of Israel. 24/ The writer concludes that, in the struggle for the primacy of law in the international community, "the Eichmann trial will have an important place as an achievement of justice and a step towards the advent of punitive international law". 25/

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23/ Pierre Papadatos, Le procès Eichmann (Geneva, Librairie Droz, 1964), p.104 (translated into English by the Secretariat).

24/ Ibid., pp. 104-105.

25/ Ibid., p. 109.

VII. OPINIONS ON THE EFFECTIVENESS OF NATIONAL LAWS ADOPTED WITH  
A VIEW TO THE PREVENTION AND PUNISHMENT OF GENOCIDE AND ON  
MEASURES CALCULATED TO INCREASE ~~THEIR EFFECTIVENESS~~

543. The Government of the Congo has expressed the view inter alia that preventive legal measures taken by States are likely to have salutary effects if the Governments ensure compliance with those measures and if the nationals, particularly the minority populations, who might suffer serious bodily or mental harm have recourse to the laws in force as soon as the first symptoms appear. 1/

544. The Government of the United Kingdom has communicated the following:

"The United Kingdom Government did not accede to the Genocide Convention until some 22 years after the adoption of the Convention by the General Assembly. This delay was not based on grounds of principle, but arose from the fact that virtually every aspect of genocide was already covered by the laws in force in the United Kingdom. The Genocide Act has simply reinforced and complemented the law previously in force. On the obvious test of the effectiveness of a law - whether any case of its breach is recorded - the law before and after the Act has been fully effective. The United Kingdom Government consider that the law as now in force should continue to prove so, both as to prevention and punishment." 2/

545. The Government of the Federal Republic of Germany "holds the view that threats of punishment consistent with articles II to V 3/ ensure the maximum preventive effect of penal law. It is therefore important that all States parties should meet their obligations under article V of the Convention." 4/

546. One writer states:

"To make acts of genocide punishable is obviously not sufficient per se to prevent these monstrous crimes. As with the prevention of criminality in general it is, in the last resort, the sum of political, social, educational and other measures - resulting from the domestic policy of States - which can be decisive in ensuring real prevention. However, since no means, however modest, of preventing and suppressing the crime of genocide should be neglected, we are of the opinion that making it an offence under the criminal law of all States is likely to contribute effectively to the attainment of this goal in the interest of all peoples. This consideration has led the Government of the Socialist Republic of Romania to make the crime of genocide punishable under its own legislation." 5/

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1/ Information and views communicated by the Government of the Congo on 14 May 1973.

2/ Information and views communicated by the Government of the United Kingdom on 18 July 1973.

3/ For the text of these articles, see para. 42 above.

4/ Information and views communicated by the Government of the Federal Republic of Germany on 17 December 1974.

5/ Ioan Ceterchi, "La répression du crime de génocide dans le droit de la République socialiste de Roumanie", Etudes internationales de Psycho-sociologie criminelle, No. 16-17, 1969, p.21 (translation into English by the Secretariat).

547. Another writer has stressed that the laws governing the crime of genocide should be backed up by political measures to ensure that they are obeyed under all circumstances; in this connexion he draws attention to the following:

"Jurists and criminologists should lead national and international assemblies into action in this field; they should create the doctrines best calculated to prevent genocide and, if prevention has proved impossible, should strive to apply the spirit of the laws against all offenders, in whatever countries they may be. They should imbue the public consciousness and legislative bodies with the moral obligation to accept not only the relevant law but its strict application." 6/

548. The same writer argues that genocide is concerned not only with a category of offences which are exceptionally serious in terms of magnitude, intensity or suffering, drastic methods and fatal consequences to the people victimized, but with offences different in nature from crimes. Genocide should be included in a new class of offences, to be called "monstrosities". Hence the writer expresses the opinion that the laws concerning genocide should be embodied in a special code, which would contain the specific principles corresponding to offences graver than the category of offences classified as crimes.

549. According to this view, a genocide code should include provisions designed in particular to ensure: the application of clearer principles of evidence than those commonly in force, in order to obviate acquittal of the accused for lack of evidence; the independence and responsibility of judges; universal punishment; and application of the severest penalty, with no statutory limitation or remission for good conduct in prison, no pardon, amnesty or rehabilitation. The code should also include provisions against any movement (national, racial, religious, etc.) which preaches hatred and provokes the unleashing of massacre or even violence against a group. 7/

550. Other specialists in international criminal law have taken the view that, in order to strengthen the preventive role of national laws on genocide, such laws should treat as crimes propaganda for genocide and acts preparatory to that crime. One of these writers suggested that the criminal codes of all countries should include a provision to the effect that incitement to genocide through the press, the radio or other media constitutes a crime, and that penalties should be prescribed. In systems of legislation under which preparatory acts are not punishable, they should be made crimes. 8/ Another writer emphasizes that the International Association of Penal Law has always been in favour of making it unlawful to engage in propaganda for hatred and for crimes against peace and humanity. 9/ In this connexion, attention should be drawn once again to article 4, subparagraph (a), of the International Convention of 1965 on the Elimination of

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6/ B. Mendelsohn, "Le rapport entre la victimologie et le problème du génocide (Schéma d'un code de génocide)", ibid., p. 58 (translation into English by the secretariat).

7/ Ibid., pp. 61-62.

8/ Stanislas Plawski, "La prophylaxie du génocide", ibid., p. 32.

9/ J.Y. Dautricourt, op. cit., pp. 9-12.

All Forms of Racial Discrimination 10/ and to the hope expressed at the second international congress of the Société internationale de prophylaxie criminelle on the prevention of genocide (Paris, 10-13 July 1967). 11/

551. Because few opinions have been communicated regarding the effectiveness of national laws adopted with a view to the prevention and punishment of genocide and because - except in the case of the punishment of Nazi criminals; to which reference was made in earlier paragraphs - national laws concerning genocide have not been applied, it is difficult to reach any conclusions on this subject. Moreover the presentation of constitutional and legislative provisions concerning the crime of genocide 12/ has shown that only some 12 States parties to the 1948 Convention had adopted legislative measures relating specifically to genocide and that most States consider their constitutions or the ordinary laws in force sufficient to prevent and punish genocide. Furthermore, in most cases, the laws dealing specifically with genocide merely reproduce the provisions of the Convention and prescribe penalties. 13/

552. In the circumstances the Special Rapporteur considers that all States need to adopt legislative measures dealing specifically with the crime of genocide and containing broader provisions of substantive criminal law and criminal procedure capable of ensuring effective prevention and punishment of that crime, with due regard to its specific nature. With a view to more effective prevention of that crime, the provisions in question should also make it a punishable offence to engage in propaganda in favour of genocide or to prepare for its commission.

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10/ See para.122 above.

11/ See para. 123 above.

12/ See paras. 497-519 above.

13/ See paras. 505-513 above.



VIII. MEASURES TAKEN BY STATES WHICH ARE NOT YET PARTIES  
TO THE CONVENTION ON GENOCIDE WITH A VIEW TO  
RATIFYING IT OR ACCEDING TO IT, AND DIFFICULTIES  
ENCOUNTERED IN THAT REGARD

A. Status of the Convention 1/

553. The Convention on Genocide entered into force on 12 January 1951 in accordance with its article XIII. On 31 December 1977, 82 States were parties to the Convention: Afghanistan, Albania, Algeria, Argentina, Australia, Austria, Bahamas, Belgium, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Democratic Kampuchea, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Mali, Mexico, Monaco, Mongolia, Morocco, Nepal, Netherlands, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Poland, Republic of Korea, [Republic of South Viet Nam], 2/ Romania, Rwanda, Saudi Arabia, Spain, Sri Lanka, Sweden, Syrian Arab Republic, Tonga, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, Upper Volta, Uruguay, Venezuela, Yugoslavia and Zaire.

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1/ See Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions. List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/11) (United Nations publication, Sales No. E.78.V. 6), pp. 77-79.

2/ The Democratic Republic of Viet Nam and the Republic of South Viet Nam (the latter of which replaced the Republic of Viet Nam) united on 2 July 1976 to constitute the Socialist Republic of Viet Nam; as at 1 January 1978 the Government of the Socialist Republic of Viet Nam had not indicated its position on the question of succession.

554. On the same date, six States were signatories of the Convention but had not yet ratified it: Bolivia, China, 3/ Dominican Republic, New Zealand, Paraguay, United States of America. Sixty-seven States do not come into either of the abovementioned categories: Angola, Bahrain, Bangladesh, Barbados, Benin, Bhutan, Botswana, Burundi, Cape Verde, Central African Empire, Chad, Comoros, Congo, Cyprus, Democratic Yemen, Djibouti, Equatorial Guinea, Gabon, Gambia, Grenada, Guinea, Guinea-Bissau, Guyana, Holy See, Indonesia, Ivory Coast, Japan, Kenya, Kuwait, Liechtenstein, Libyan Arab Jamahiriya, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Malta, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Oman, Papua New Guinea, Portugal, Qatar, Samoa, San Marino, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, South Africa, Sudan, Surinam, Switzerland, Thailand, Togo, Trinidad and Tobago, Uganda, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, Yemen, Zambia.

555. The situation described in paragraphs 553 and 554 above shows that only some 56 per cent of the States listed in document ST/LEG/SER.D/11 have become parties to the Convention on Genocide adopted almost 30 years ago.

B. Difficulties in ratifying the 1948 Convention, or in acceding to it, encountered by States which have not yet done so

556. The Special Rapporteur has no information from Governments on this subject. The only information yielded by his research relates to the difficulties encountered by the United States Senate in ratifying the Convention on Genocide.

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3/ Following the adoption of General Assembly resolution 2758 (XXVI) of 25 October 1971 ("Restoration of the lawful rights of the People's Republic of China in the United Nations"), the Minister for Foreign Affairs of the People's Republic of China, by a note dated 29 September 1972 addressed to the Secretary-General, stated that:

"1. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.

"2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of 'China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to".

The Convention on Genocide was signed on behalf of the Government of the Republic of China on 12 August 1949 and an instrument of ratification was deposited on 19 July 1951 (see Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977 (ST/LEG/SER.D/11), (United Nations publication, Sales No. E.78.V.6, pp. iii-iv and 81, foot-note 4a).

557. In a message dated 16 June 1949, President Truman requested the Senate to give its advice and consent to the ratification of the Genocide Convention by the United States. After a discussion in a Subcommittee of the Senate Committee on Foreign Relations, 4/ the Senate took no decision concerning ratification of the Genocide Convention.

558. During the discussion in the Subcommittee, the President of the American Bar Association raised several objections to ratification of the Genocide Convention by the United States.

559. Some of the objections were directed against the Convention as a whole, on the grounds that ratification of the Convention on Genocide would be contrary to the Constitution of the United States. In that connexion it was stated that:

"By reason of article VI of the Constitution of the United States, making ratified treaties the supreme law of the land, superior to all state laws, and co-ordinate with the Constitution itself and acts of Congress, one serious objection to the Genocide Convention is that it seeks to impose domestic law on the United States by the Treaty method and, takes away from the individual States of the United States the jurisdiction which under the Constitution they have always had". 5/

This constitutional obstacle to ratification of the Convention on Genocide could have been surmounted if the "federal clause" 6/ had been included in the Convention. In the absence of this clause, ratification of the Convention by Congress would become impossible.

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4/ See Hearings on Executive Order [The Genocide Convention] before a Subcommittee of the Foreign Relations Committee of the Senate, 81st Cong., 2d Sess., at 10-20, 22-52, 54-202, 205-208 (1950), the most important passages of which were reproduced in Louis B. Sohn and Thomas Burghenthal, op. cit., pp. 913-934.

5/ Ibid., p. 928.

6/ Article 41 of the Convention of 28 July 1951 relating to the Status of Refugees may be cited as an example of such a clause. It reads as follows:

"In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action".

560. An objection of the same nature referred to article I, section 8, clause 10, of the Constitution of the United States, which confers on Congress the power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations". From this provision it was inferred that for the President and Senate to bind the country to a treaty requiring the punishment of an offence under international law would be a usurpation of the legislative power, particularly if the treaty was self-executing, as the Convention would be. 7/

561. Other objections raised by the President of the American Bar Association related to certain clauses of the Convention on Genocide and, in the first place, to the provision of article III, subparagraph (c), of the Convention making incitement to commit genocide a punishable offence; in his opinion, that would be an infringement of the freedom of speech and of the press guaranteed by the United States Constitution. 8/

562. The American Bar Association regarded the Convention on Genocide as unacceptable to the United States on the further grounds that: "(a) government complicity was not included as an essential of the definition, thus leaving only a group of domestic common-law crimes ... and (b) 'political' groups were not included, and (c) national, ethnical, racial, and religious groups are merely included 'as such', and (d) 'mental harm' as well as 'bodily harm' is included. It also includes a part of a group which, of course, may embrace a single person ...". 9/

563. In the light of those considerations, the President of the American Bar Association asserted that ratification of the Convention would make it possible for an American citizen who had killed a person belonging to one of the groups defined by the Convention to be tried by an international court. 10/ On the other hand, the only important genocide now going on, viz., in those countries where dissident groups and persons were proceeded against on political grounds, would remain unpunished. 11/

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7/ Sohn and Burghenthal, op. cit., pp. 921-922.

8/ Ibid., p. 930.

9/ Ibid., p. 929.

10/ Ibid., pp. 930-931.

11/ Ibid., p. 929.

564. On 19 February 1970 President Nixon urged the Senate to consider anew the Convention on Genocide and to grant its advice and consent to ratification. The Senate Committee on Foreign Relations expressed an opinion in favour of ratification 12/ but, for lack of time, the Senate adjourned on the question without having discussed it. 13/

565. When President Carter addressed the representatives of States Members of the United Nations ~~in the~~ General Assembly Hall on 17 March 1977, he expressed his intention to work closely with the Congress to achieve ratification of the Convention on Genocide. 14/

566. The Special Rapporteur does not consider it appropriate in this study to appraise the arguments adduced against ratification of the Convention by the United States, particularly since, subsequent to the opposition of the American Bar Association, views favourable to ratification have been increasingly in evidence.

567. Although he has been unable to obtain precise information on the subject, the Special Rapporteur believes that, since acceding to independence, many countries previously under foreign domination have adopted very varied positions on the problem of succession in respect of the treaties concluded by the former metropolitan Powers. The problem is, therefore, much more political than legal in nature.

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12/ Senate Committee on Foreign Relations. International Convention on the Prevention and Punishment of the Crime of Genocide, 92nd Cong., 1st Sess. (4 May 1971), Sohn and Burghenthal, op. cit., pp. 979-989.

13/ 118 Cong. Rec. 16921-22 (daily ed., 5 Oct. 1972), ibid., pp. 989-991.

14/ United Nations Chronicle, vol. XIV, No. 4 (April 1977), p. 25.

IX. QUESTIONS CONCERNING THE PREVENTION OF GENOCIDE  
BY MEANS OTHER THAN JURIDICAL MEASURES

568. Under this heading the Special Rapporteur proposes to make a general survey of opinions on the causes of genocide and then on means of prevention other than those of a juridical nature. This survey is based mainly on the proceedings of the second international congress of the Société internationale de prophylaxie criminelle on the prevention of genocide, held at Paris from 10 to 13 July 1967. 1/ Nevertheless, since genocide represents in most cases an extreme form of racism, he will also draw upon data relating to race and racial discrimination 2/ and the pertinent resolutions of the General Assembly.

A. Views on the causes of genocide

569. Paragraphs 3-11 above review the most important factors which, in the course of history, helped to create a climate conducive to massacres of groups of human beings amounting to genocide. In that connexion the Special Rapporteur mentioned war, racism, colonialism and religious intolerance. He now proposes to present opinions on some of these acts and on other criminogenic factors in genocide.

570. In one of the papers submitted to the congress mentioned above 3/ it was stated that war, and the imperialism which engendered it, were a direct cause of genocide. It was added, however, that in modern wars it was often difficult to determine how far the destruction of the enemy remained a means to victory and how far genocide became one of the aims pursued. At all events, at the end of the fighting, it was perceived that one and even several peoples had suffered great loss of human life.

571. In the opinion of the author of that paper, imperialism and war, which might or might not be accompanied by genocide, did not explain what he termed "the purest forms of genocide". For the Hitlerites, genocide was no longer, or was not exclusively, a combat weapon. The causes of the genocide committed by the Nazis were to be sought partly in their ideology (see paragraphs 574-575 below) and in economic and social factors.

572. In this connexion it was contended 4/ that genocide served as a sort of safety valve for political leaders. They used it to relieve the pressure on certain economic and social structures which, at a particular stage in their development, proved incapable of providing the population with subsistence, either by not producing enough consumer goods or by causing under-consumption which provoked a relative overproduction.

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1/ The papers submitted to the congress were published in the journal Etudes internationales de psycho-sociologie criminelle, Nos. 11-12, 13, 1967, Nos. 14-15, 1968 and Nos. 16-17, 1969.

2/ UNESCO, Four Statements on the Race Question, Paris, 1969; Hernán Santa Cruz, Racial Discrimination (United Nations publication, Sales No.: E.71.XIV.2). For further details, see also: "Implementation of resolution VII of the International Conference on Human Rights, entitled 'Establishment of a new, additional United Nations programme on racial discrimination' - Review of studies of problems of race relations and of the creation and maintenance of racial attitudes" (E/CN.4/1105), paras. 57-90 and 94-125.

3/ Jacques d'Hondt, "Génocide et idéologie", Etudes internationales de psycho-sociologie criminelle, Nos. 14-15, 1968, pp. 39-46.

4/ d'Hondt, loc. cit., pp. 40 and 44.

573. Such, according to the author of the paper referred to in paragraph 59 above, was the situation in Germany when the Nazis seized power. The Nazis, he says,

"became the auxiliaries of an imperialism which coveted new outlets, the annexation of a vast living space. But that space, the prey of a Germany already suffering from so-called 'surplus population', had to be a depopulated space, otherwise it would only have worsened the economic and social difficulties of its competitor." 5/

574. Article 11 and subparagraph (a) of the UNESCO Statement of 1967 on Race and Racial Prejudice read as follows:

"The committee of experts agreed on the following conclusions about the social causes of race prejudice:

"(a) Social and economic causes of racial prejudice are particularly observed in settler societies wherein are found conditions of great disparity of power and property, in certain urban areas where there have emerged ghettos in which individuals are deprived of equal access to employment, housing, political participation, education, and the administration of justice, and in many societies where social and economic tasks which are deemed to be contrary to the ethics or beneath the dignity of its members are assigned to a group of different origins who are derided, blamed, and punished for taking on these tasks." 6/

575. With regard to ideology as a cause of the genocide committed by the Nazis, it was observed in a paper submitted to the congress mentioned in paragraph 568 above that criminal practice could be the outcome of a criminal and false theory, that of racism, and the consequence of the racist sentiments it aroused. In this connexion, in a commentary on the Hitlerite ideology, it has been said:

"That it was possible for such a doctrine not only to spread in the middle of Europe and in the twentieth century but, above all, to lead a nation of 60 million civilized men into crime for 10 years - this is the fact which should hold our attention." 7/

576. In the paper already referred to it was noted that there was some truth in the idea of regarding the action of the Hitlerites as a consequence of their ideology. It would, however, be difficult to explain the genocide committed by the Nazis from the sociological point of view, and as a collective action of such national and international scope, on the basis of their ideology alone. In the writer's opinion ideology, as a cause of genocide, had its limitations. Its function was rather to mask the real economic and social causes referred to above and, up to a certain point, to furnish a Machiavellian pseudo-justification for the crime. In the case of the Hitlerite genocide, the fanatics of their criminal ideology themselves felt

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5/ d'Hondt, loc.cit. (translation into English by the Secretariat).

6/ UNESCO, op.cit., pp. 54-55 (our underlining).

7/ Preface by F. de Menthon (French prosecutor to the Nuremberg Tribunal) to J. Billig's book, op.cit., p. 13 (translation into English by the Secretariat).

that the crime went much further than the ideology. Moreover the task of perpetrating the genocide was entrusted to depraved individuals for whom ideology would have played no role. 8/

577. In another paper 9/ submitted to the congress, a distinction was drawn between "frank" or "exemplary" genocide and disguised forms of genocide and racism.

578. According to the author of that paper, "frank" genocide was the result of relational deteriorations, some of which seemed to be associated with affective immaturity. However, since the phenomenon was more complex, such immaturity had more to do with lagging civilization or a retreat from humanitarianism. In the light of the history of Hitlerism, the author of the paper mentions as such relational deteriorations: insane pride; the need to dominate, into which the notion of the "scapegoat" closely fits; 10/ contempt for others, which turns into hatred mainly of Jews, yellow people and blacks; underestimation of others, which is at the root of all forms of segregation; the dominance of might over right and the deterioration of the sentimental and moral ethic which are basic components of personality. These psychological factors manifest themselves, not in isolation, but in combination with other social, economic and historical factors. 11/

579. According to the author of the same paper, disguised or insidious forms of racism and genocide which, psychologically speaking, are the result of contempt, degradation and moral disparagement fall within the context of racial discrimination and colonialism. In the same context, the author describes the socio-psychological phenomenon consisting in a recrudescence of racism in an unexpected form: the tendency of human beings to join groups, the need to be "in the group" taking extremely aggressive forms, as witness the clashes currently occurring between different ethnic groups. Unfortunately, he says, the internal cohesion of the group is a source of racism, and the need to belong to a group is a source of particularism, chauvinism and nationalism which, in their turn, determine national discriminations, prejudices and hatreds.

580. In other studies, reference has been made on the same subject to ethnocentrism or group centrism, consisting in the belief, which manifests itself particularly in the case of ethnic or national groups, that the folk-ways, customs, culture, ideas, manners and practical behaviour of the group in question are superior. 12/

581. Along the same lines, the following comments have been made:

"... The fundamental attitude underlying the use of prejudice as a group weapon is the deep-seated belief in the special value and quality of the dominant group. This belief serves the group in its effort to maintain

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8/ d'Hondt, loc.cit., pp. 41-42, 43 and 45.

9/ Pariente, loc.cit., pp. 17-30.

10/ In this connexion, the UNESCO Statement of 1967 on Race and Racial Prejudice refers in its paragraph 7 to "Jews being the chosen scapegoat to take the blame for problems and crises met by many societies". For other considerations relating to the notion of the "scapegoat", see document E/CN.4/1105, paras. 80-81.

11/ Pariente, loc.cit., pp. 22-25.

12/ E/CN.4/1105, para. 73; see also paras. 74 and 75.



its wealth and power. It is an expression of the aims and aspirations of the dominant group as a whole, and a reflection of the frustrations of the poor and powerless members of that group. The designation of inferior groups emanates from those on top as well as from the frustrated people near the bottom as an expression of their need for security. Those in power often use prejudice in an objective and calculated manner without necessarily sharing the attitude; frustrated people, on the other hand, devoid of power and influence, often make use of prejudice because they believe in it. In one case, prejudice is used to manipulate other people; in the other case, prejudice is used as an outlet for tensions and frustrations and must be believed in to be effective." 13/

582. According to another writer, who indicates the topics to be dealt with in a study of the psychological factors of genocide, the psychopathology of genocide should begin by analysing psychopathological deviations in the maturation of the individual. Among such deviations, the writer stresses the disturbance of relations with others, which may become apparent during childhood through fixations, where such fixations take shape in hatred and frustration that generate aggressiveness and the frenzy of "nihilization" (néantisation). In his opinion genocide, which bears the stamp of such disorders, is an "acting-out" of serious emotional infantilism, primitiveness and even retardation.

583. Regarding genocide as conceivable only in a situation of alienation, of a drastic perversion of human values, the same writer also mentions, among other pathological states leading to this crime, obsession and paranoia,

"a paranoiac system of thought serving to give practical effect to hysterical make-believe and acute inferiority complexes, overcompensated by megalomaniac needs for dignification".

In genocide there is an attempt

"to get rid of the collective shadow, in response to the puerile mental short-circuit 'let the other die so that I may live'",

thus aggravating the

"vicious circles of aggressiveness generating guilt which further strengthens the aggressiveness". 14/

584. The writer concludes that:

"In thus trampling, by alienation, the image of the anthropos which everyone carries within himself, an innate and unconscious image of man which is the individual and social substructure of life itself, such an attack on the most immediate and sacred foundations of the human condition can only set off dynamic revolts at the unconscious level which will increasingly tip over into bloody ravings and plain madness." 15/

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13/ Hernán Santa Cruz, op.cit., para. 76.

14/ Roland Cahen, "La psychanalyse face au génocide", Etudes internationales de psycho-sociologie criminelle, Nos. 14-15, 1968, pp. 70-71 (translation into English by the Secretariat).

15/ Ibid.

585. Article 11, subparagraph (b), of the UNESCO Statement on Race and Racial Prejudice states that:

"Individuals with certain personality troubles may be particularly inclined to adopt and manifest racial prejudice ...". 16/

The theory that the authoritarian personality is particularly prone to show racial prejudice seems to fit into this context. According to one writer:

"Like the frustration-aggression theory, the authoritarian personality approach is strongly anchored in psychoanalytical concepts. According to the authors of The Authoritarian Personality, a syndrome exists which predisposes certain persons to become prejudiced against members of ethnic and racial groups. Among the traits characteristic of the authoritarian personality are respect for force, submission towards superiors, aggression towards subordinates, lack of self-insight, acceptance of ready-made ideas, intolerance of deviance, destructiveness and cynicism, a tendency towards superstition, and an 'exaggerated' interest in sex. Presumably these traits develop in early childhood, largely as a consequence of the family environment. Persons exhibiting these traits ... also tend to score highly on scales ... designed to measure the degree of hostility towards out-groups such as Jews and Negroes." 17/

586. The author of another paper submitted to the congress referred to in paragraph 568 above notes that genocide is not entirely explained by mental illness.

"Not all the mentally sick dream of genocide, and would those who are obsessed by it prove capable of carrying it out with the method, perseverance, intelligence and sense of reality which it requires, and which we have witnessed? ... Genocide occurs during certain well-defined, often short, periods of history and, so far as is known, in a rhythm which does not correspond to statistical variations in mental sickness and general criminality. It is society which, in times of genocide, grants all power to depraved individuals and gives them the means of mass killing." 18/

587. According to another writer, 19/ the psych-sociological factors of genocide should be sought in the herd instinct which, in Freud's opinion, consists in a twofold hypnosis proceeding from the leader and passed on from individual to individual in the crowd. Freud described the crowd as being characterized by a lack of independence and initiative in the individual, a lowering of his individual activity, an exaggerated degree of affectivity, lack of self-control and

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16/ UNESCO, op.cit., p. 55.

17/ Pierre L. van den Berghe, Race and Racism: A Comparative Perspective (New York, John Wiley, 1967), p. 19. The reference made in the quotation is to the book The Authoritarian Personality by T.W. Adorno, Else Frenkel-Brunswik, Daniel J. Levinson 2nd and R. Nevitt Sanford (New York, Harper, 1950) (quoted in E/CN.4/1105, para. 78).

18/ Pariente, loc.cit., p. 40 (translation into English by the Secretariat).

19/ Dautricourt, loc.cit., pp. 23-24.

self-restraint, a tendency, in affective manifestations, to exceed all bounds and to find an outlet for such manifestations in action. 20/ According to the author of the paper, these considerations advanced by Freud explain the actions of those who perpetrate, those who approve and those who tolerate genocide. The perpetrators of genocide, he says, act in a secondary state of hypnosis, criminal compulsion and concomitant moral blindness which render them capable of anything. The author of the paper goes on to cite Freud's comments on dependence phenomena in human society, which result from reciprocal suggestion proceeding not only from leader to led but also from individual to individual. Fear and the loosening of moral relationships within the community, particularly in the event of war, also lead to a deterioration of individual morales, for this last originates in social distress and nothing else.

588. Another participant in the congress 21/ defined racist hatred as the feeling of pseudo-superiority of a self-styled superior race over a supposedly inferior race, and hence as a totally baseless superiority complex, a sense of descending hierarchy, the contempt of the colonizer for the colonized. He added that racism was mistrust, hatred, aggressiveness provoked merely by a difference in the other person's physical appearance.

589. Colonialism and slavery should also be mentioned as important sources of racial prejudice, and hence as factors creating conditions favourable to genocide. According to one writer:

"Colonialism itself played a significant role in the development of racial prejudice and discrimination. Initiated as an economic enterprise, aimed at creating sources of raw supplies as well as markets for the manufactured goods of the European countries, colonialism turned into a political game in which distant parts of Africa, Asia and America were arranged to reflect the ever-changing political power constellations in Europe. Political, economic, social and cultural factors combined to establish imperialism whereby - by force of arms, inequitable treaties and many other devices - oppressive measures were imposed and maintained by Europeans over 'native' peoples with a view to the exploitation of the resources of their land for the benefit of European 'mother countries'. All this was done under the umbrella of a 'civilizing' mission, whereby the assumed superiority of European culture was to replace 'primitive' backwardness in the process of 'civilizing' the 'native' peoples, who were characterized as childlike or mentally retarded and therefore unable to take care of themselves." 22/

The same author considers that slavery is to some extent bound up with the myth of racial inferiority, and at the same time strengthens it, giving rise to a process of dehumanization which has left an indelible mark. 23/

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20/ Sigmund Freud, L'instinct grégaire dans les essais de psychoanalyse, Paris, Petite bibliothèque Payot, 1963, pp. 142, 240, 241 (quoted by Dautricourt, ibid.).

21/ V. Jankélévitch, "L'antisémitisme n'est pas un racisme", Etudes internationales de psycho-sociologie criminelle, Nos. 11, 12 and 13, pp. 44-45.

22/ Hernán Santa Cruz, op.cit., para. 27.

23/ Ibid., paras. 23 and 24.

590. The Special Rapporteur considers that the aetiology of genocide in all its aspects requires more detailed disciplinary studies. Moreover one of the tasks which the congress on the prevention of genocide assigned to the international centre for information and studies on genocide was

"to continue the scientific research into genocide and its prevention started by the congress both in the field of the psychological, psychiatric and sociological sciences and in that of the legal and criminological sciences". 24/

B. Non-juridical means of preventing genocide

591. If genocide is considered to have its roots mainly in racism, mention should be made of the following measures to combat racism advocated in the UNESCO Statement on Race and Racial Prejudice:

"12. The major techniques for coping with racism involve changing those social situations which give rise to prejudice, preventing the prejudiced from acting in accordance with their beliefs, and combating the false beliefs themselves.

"13. It is recognized that the basically important changes in the social structure that may lead to the elimination of racial prejudice may require decisions of a political nature. It is also recognized, however, that certain agencies of enlightenment, such as education and other means of social and economic advancement, mass media, and law can be immediately and effectively mobilized for the elimination of racial prejudice.

"14. The school and other instruments for social and economic progress can be one of the most effective agents for the achievement of broadened understanding and the fulfilment of the potentialities of man. They can equally much be used for the perpetuation of discrimination and inequality. It is therefore essential that the resources for education and for social and economic action of all nations be employed in two ways:

"(a) The schools should ensure that their curricula contain scientific understandings about race and human unity, and that invidious distinctions about peoples are not made in texts and classrooms;

"(b) (i) Because the skills to be gained in formal and vocational education become increasingly important with the processes of technological development, the resources of the schools and other resources should be fully available to all parts of the population with neither restriction nor discrimination;

(ii) Furthermore, in cases where, for historical reasons, certain groups have a lower average education and economic standing, it is the responsibility of the society to take corrective measures. These measures should ensure, so far as possible, that the limitations of poor environments are not passed on to the children.

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24/ Etudes internationales de psycho-sociologie criminelle, Nos. 14-15, 1968, p. 79 (translation into English by the Secretariat).

In view of the importance of teachers in any educational programme, special attention should be given to their training. Teachers should be made conscious of the degree to which they reflect the prejudices which may be current in their society. They should be encouraged to avoid these prejudices." 25/

592. At the congress referred to in paragraph 563 above, special importance was attached to educational means of preventing genocide by preventing the formation of racial prejudice and combating it.

593. In this connexion it was shown that educational action to prevent racial prejudice could start with pre-school children two to six years old. In the light of experience gained in nursery schools in France it was noted that preparation for international understanding was possible and desirable as part of pre-school education, mainly through the inculcation of acceptance of others whoever they might be and however different they might be, as equals, companions and friends. In general such education was all the easier for being given at an age when mental structures were being formed and habits and reflexes of thought and behaviour acquired. 26/

594. So far as adolescents are concerned, educational action against racial prejudice has to tackle a whole series of problems relating to the content of the information they receive through the mass media and to the behaviour and judgements of the adults who influence them. The conclusions of a seminar of the liaison centre for educators against racial prejudice (France) which were submitted to the congress on the prevention of genocide emphasized that

"the experience of teachers is often that of civic education, which they try to render as lively as possible ... By making the school atmosphere freer, more democratic and more open to the outside, while at the same time encouraging thought, a real civic education is provided and the pupils are helped to change their attitudes ... We noted in conclusion that the general social and economic situation had such an influence on the development of racism that no real hope could be placed in isolated remedies, and that any genuine effort should aim at modifying social relationships above and beyond relationships with minorities." 27/

595. In another paper submitted to the congress it was stated that educational measures should be general and should be taken early, denouncing all racism, all tendencies towards domination. Particular attention should be paid to the problems of groups. Each group's special contribution should be preserved, but the groups should be integrated into wider cultural, artistic, scientific, mutual assistance and friendship groups. 28/

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25/ UNESCO, op.cit., pp. 55 and 56.

26/ Herbinière-Lebert, "Le rôle de l'école maternelle dans la prévention des préjugés sociaux", Etudes internationales de psycho-sociologie criminelle, Nos. 16-17, 1969, pp. 37 and 41.

27/ Viviane Isambert-Jamati, "Education et préjugés raciaux", ibid., pp. 43-48 (translation into English by the Secretariat).

28/ Pariente, loc.cit., p. 30.

596. According to the author of another paper, the real and most effective prevention of genocide lies at present in educating public opinion to respect the rules of humanity. 29/ The Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples (General Assembly resolution 2037 (XX) of 7 December 1965) proclaimed inter alia the following principles:

"Principle I

Young people shall be brought up in the spirit of peace, justice, freedom, mutual respect and understanding in order to promote equal rights for all human beings and all nations, economic and social progress, disarmament and the maintenance of international peace and security.

"Principle II

All means of education, including as of major importance the guidance given by parents or family, instruction and information intended for the young should foster among them the ideals of peace, humanity, liberty and international solidarity and all other ideals which help to bring peoples closer together, and acquaint them with the role entrusted to the United Nations as a means of preserving and maintaining peace and promoting international understanding and co-operation.

"Principle III

Young people shall be brought up in the knowledge of the dignity and equality of all men, without distinction as to race, colour, ethnic origins or beliefs, and in respect for fundamental human rights and for the right of peoples to self-determination."

597. The Declaration provided further that:

"Exchanges, travel, tourism, meetings, the study of foreign languages, the twinning of towns and universities without discrimination and similar activities should be encouraged and facilitated among young people of all countries in order to bring them together in educational, cultural and sporting activities in the spirit of this Declaration" (principle IV)

and that

"National and international associations of young people should be encouraged to promote the purposes of the United Nations, particularly international peace and security, friendly relations among nations based on respect for the equal sovereignty of States, the final abolition of colonialism and of racial discrimination and other violations of human rights" (principle V, first para.).

598. Article 16 of the UNESCO Statement of 1967 on Race and Racial Prejudice drew attention to the increasing importance of the mass media in understanding racial problems. A meeting of experts on the role of mass media in a multiracial society held by UNESCO in Paris in December 1969 felt that it was the responsibility of such

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29/ Dautricourt, loc.cit., p. 15.

such mass media to maintain an atmosphere of equality for all nations and for all people and to encourage the fight against racial prejudice. All minorities should have the chance to express themselves through mass media, and efforts should be made to eliminate racial attitudes and stereotypes from reporting. 30/

599. Emphasizing the importance of educating public opinion as a means of preventing genocide, one writer 31/ drew attention to the possibilities afforded by modern information media, particularly television, the image, with a view to a humanistic education imbued with high spirituality,

"to cure the psychopaths of collective vengeance ... the obsessed with race, the paranoiacs of power, the sadists of imperialism, all those responsible for the genocide which could be prepared for tomorrow with the means of destruction which mankind possesses today". 32/

600. Paragraph 1 of the resolutions of the second international congress of the Société internationale de prophylaxie criminelle on the prevention of genocide reads as follows:

"That, with a view to establishing a climate of mutual understanding favourable to a fruitful dialogue, a particular effort should be made in the field of education and information from earliest childhood, in the family and at school, to prevent the formation of prejudices, in accordance with the resolutions and decisions of the United Nations and UNESCO; that public and religious authorities should work to this end using the advances of modern electronic data processing, and that scientific data relating to the equal rights of all races, the irrationality of discrimination and the cultural and moral values of different peoples should be widely disseminated in order that the acceptance of the pluralism of values may correspond to the modern conception of the profound solidarity of the human race." 33/

601. Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination reads as follows:

"States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."

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30/ Final Report of the Meeting of Experts on the Role of Mass Media in a Multi-Racial Society, UNESCO, Paras, 3-12 December 1969 (quoted in E/CN.4/1105, para. 122).

31/ Jean Durtal, "Pour une prophylaxie d'un génocide par l'image et par les moyens informatifs modernes", Etudes internationales de psycho-sociologie criminelle, Nos. 16-17, 1969, pp. 33-36 (translation into English by the Secretariat).

32/ Ibid., p. 35.

33/ Etudes internationales de psycho-sociologie criminelle, Nos. 14-15, 1968, p. 78 (translation into English by the Secretariat).

602. The General Assembly has adopted several resolutions on measures to be taken against racism and other totalitarian ideologies and practices based on incitement to hatred and racial intolerance. 34/ In the fourth preambular paragraph of resolution 2839 (XXVI) the General Assembly declared itself:

"Firmly convinced that the best bulwark against nazism and racial discrimination is the establishment and maintenance of democratic institutions, that the existence of genuine political, social and economic democracy is an effective vaccine and an equally effective antidote against the formation or development of Nazi movements and that a political system which is based on freedom and effective participation by the people in the conduct of public affairs, and under which economic and social conditions are such as to ensure a decent standard of living for the population, makes it impossible for fascism, nazism or other ideologies based on terror to succeed."

The General Assembly called upon States to take steps to bring to light any evidence of the manifestation and dissemination of the ideology and practice of nazism and racial intolerance and to ensure that they were rigorously suppressed and prohibited. It decided to place the question of measures to be taken against ideologies and practices based on terror or on incitement to racial discrimination or any other form of group hatred on its agenda and under continuing review.

603. According to one writer:

"It is essential ... to expose and refute ideologies which encourage genocide: racism, Malthusianism and other theories which incite to the elimination of others because they are allegedly inferior or harmful, or simply because they are 'superfluous'." 35/

604. Another writer emphasized the importance, in preventing genocide, of social and economic measures aimed at establishing political and economic democracy. 36/

605. In the preamble to its resolutions, the second international congress of the Société internationale de prophylaxie criminelle on the prevention of genocide requests inter alia:

"that every effort should be made to put an end to all forms of genocide, unorganized or organized, violent or insidious, emphasizing that these are encouraged by certain criminogenic trends, ideologies and structures such as racism, slavery, colonization and racial discrimination ..." 37/

606. In paragraph 11 above, the Special Rapporteur referred to the relationship between religious intolerance and genocide. In this connexion it is appropriate to recall that in its resolution 1781 (XVII) of 7 December 1962 the General Assembly,

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34/ Resolutions 2331 (XXII) of 18 December 1967, 2438 (XXIII) of 19 December 1968, 2545 (XXIV) of 11 December 1969, 2713 (XXV) of 15 December 1970 and 2839 (XXVI) of 18 December 1971.

35/ d'Hondt, loc.cit., p. 46 (translation into English by the Secretariat).

36/ Pariente, loc.cit., p. 30.

37/ Etudes internationales de psycho-sociologie criminelle, Nos. 14-15, 1968, p. 78 (translation into English by the Secretariat).



deeply disturbed by the manifestations of discrimination based on differences of race, colour and religion still in evidence throughout the world, decided that a draft declaration and a draft international convention on the elimination of all forms of religious intolerance should be prepared. Obviously, any measure taken by States to prevent and eliminate religious intolerance is likely to contribute to the prevention of genocide.

607. As to psychological measures to prevent genocide, the Special Rapporteur wishes to draw attention to the incontrovertible role played by the educational and information media described in previous paragraphs.

608. At the same time it should be noted that at the congress referred to in paragraph 563 above the view was expressed that, in so far as such preventive measures were to be applied in the field of mental disorders or breakdowns of moral values, they would amount to,

"quite generally, prophylaxy for mental disorders, and particularly for (unconfined) neurotic patients, with the emphasis on aggressiveness and aggression fostered and strengthened by social, economic and political contexts". 38/

609. In the same context, attention was drawn to the important influence of a properly constituted and enlightened milieu, family or social group which could lead the person in difficulty to reflection and lucidity. Stress was laid on the need to promote a renewal in the life of man as an individual and in his life as a member of society, to strengthen conscious structures and at the same time defuse dangerous unconscious drives, to ensure the validity of human values, to strengthen the firmness of the ego and the person in face of dangers, contagions and mental epidemics, and to develop awareness, responsibility and personality. 39/ In essence, the need was revealed to create

"a new humanism ... born of acceptance of man's conscious values, revitalization and resurgence of the repressed archetype of the eternal anthropos". 40/

610. The foregoing suggests that the prevention of genocide by means other than juridical measures forms part of a very vast complex of actions concerned, on the one hand, with the education and information of the individual and his mental and moral development and, on the other, with society and its political, economic and social structures, and also involving relations between peoples, their mutual co-operation and understanding. The Special Rapporteur wishes, however, to lay stress on preventive measures of an educational and informative nature designed to combat prejudices, hatred and discrimination of any kind deriving from national, ethnic, racial or religious differences, and theories, ideologies and practices based on terror, racial incitement or any other form of collective hatred, and to promote a spirit of peace, understanding and mutual respect and comprehension between peoples and different human groups.

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38/ Cahen, loc.cit., p. 69 (translation into English by the Secretariat); see also pp. 71-72.

39/ Cahen, loc.cit., pp. 72-74.

40/ Cahen, loc.cit., p. 76 (translation into English by the Secretariat).

## X. CONCLUSIONS AND RECOMMENDATIONS

611. The purpose of the present chapter is not to recapitulate the conclusions reached earlier in the study as to disputed interpretations of provisions of the Genocide Convention of 1948. Its aim is to suggest conclusions which may be useful for future action and, where possible, to recommend such action.

612. The evidence provided earlier in the study shows that there is need for many more States to become parties to relevant Conventions. The General Assembly should therefore be recommended to urge all States not having done so to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968.

613. It is also worth recalling that States parties to the Genocide Convention are legally bound to adopt legislative measures dealing specifically with the crime of genocide and including provisions of criminal law and criminal procedure capable of ensuring effective prevention and punishment of that crime. With a view to more effective prevention of the crime, the provisions in question should also make it a punishable offence to engage in propaganda in favour of genocide or to prepare for its commission.

614. A number of allegations of genocide have been made since the adoption of the 1948 Convention. In the absence of a prompt investigation of these allegations by an impartial body, it has not been possible to determine whether they were well-founded. Either they have given rise to sterile controversy or, because of the political circumstances, nothing further has been heard about them. For these reasons, the Special Rapporteur feels that the Commission on Human Rights should consider the setting up of ad hoc committees to inquire into allegations of genocide brought to the knowledge of the Commission by a Member State or an international organization and supported by sufficient prima facie evidence.

615. The Special Rapporteur considers that the causes and the prevention of genocide in all its aspects require more detailed interdisciplinary study.

616. The connexion between genocide and nazism is clear. It was the crimes committed by the Nazis against millions in Germany and the territories occupied by the Nazis that, by arousing the indignation of mankind, were a decisive element leading to the adoption by the United Nations of international measures aimed at preventing the recurrence of such crimes and ensuring that they be punished. Despite the steps taken in many countries to prevent the rebirth of nazism, which engendered the extermination of millions of people, manifestation of nazism or neo-nazism continue to be reported in certain parts of the world. These developments constitute a danger to international peace and security and are incompatible with the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights. Therefore, groups and organizations which subscribe to nazism or Nazi-like ideologies or engage in

Nazi activities should be banned. It is recommended that the General Assembly call upon all competent United Nations organs, specialized agencies and other international or national organizations to increase public awareness of the danger of a re-emergence of nazism. All States should be urged to take without delay legislative and other effective measures with a view to the speedy and final eradication of nazism, including similar contemporary ideologies and practices based upon terror and racial intolerance.

617. In many instances in the past, religious intolerance has been one of the decisive causes of genocide. It is therefore proposed that the Sub-Commission on Prevention of Discrimination and Protection of Minorities should request the Commission on Human Rights to accelerate the drafting of a declaration on the elimination of all forms of religious intolerance, with a view also to the later elaborating of a convention on the subject.

618. The Genocide Convention has not been an obstacle to the perpetration of that crime; and, in the light of the views expressed by Governments and distinguished scholars on the question of the effectiveness of the Convention, the Special Rapporteur believes that the Convention can only be considered a point of departure in the adoption of effective international measures to prevent and punish genocide. He has expressed doubts and reservations as to the effectiveness of certain articles of the Convention, and has proposed that the possibility be examined of adopting new international measures for the effective prevention and punishment of genocide. The Special Rapporteur agrees with some members of the Sub-Commission<sup>1/</sup> that it would be a mistake to interpret the 1948 Convention in broader terms than those envisaged by the signatories, and that it would be better to adhere to the spirit and letter of the Convention and to prepare new instruments as appropriate; this would avoid raising any difficulties for the States parties. For instance, from the review of the problem of ecocide regarded as a war crime, in chapter IV of the present study, it follows that the question of ecocide has been placed by States in a context other than that of genocide. The Special Rapporteur believes that an exaggerated extension of the idea of genocide to cases of ecocide which have only a very distant connexion with that idea is liable to prejudice the effectiveness of the Genocide Convention.

619. The Special Rapporteur would wish to add that, if it is decided to adopt new international instruments, it will be necessary to ensure that such instruments should be open to all States, whether members of the United Nations or not.

620. There are certain topics which, it is recommended, should be excluded from any new instruments drafted.

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<sup>1/</sup> E/CN.4/Sub.2/SR.605, pp. 171 and 191; E/CN.4/Sub.2/SR.737, p.214.

621. Since the International Convention on the Suppression and Punishment of the Crime of Apartheid has been adopted and has entered into force, it will no longer be necessary to include provisions relating to apartheid in any new international instruments dealing with genocide.

622. Moreover, should the adoption of new international instruments be contemplated, the Special Rapporteur is of the opinion that it would not be desirable to provide protection for political and other groups not originally envisaged among the protected groups, since such inclusion would prevent some States from becoming parties to the new instruments. He also believes that other international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which has entered into force, effectively protect political groups, without jeopardizing the objectives pursued with regard to the prevention and punishment of the crime of genocide.

623. It is recommended that, if a decision should be taken to draft any new instruments for the prevention and punishment of genocide, article IV of the Convention, dealing with criminal responsibility, should be re-examined with a view to eliminating as far as possible the problems of interpretation which are expressed in chapter II, section D, of the present study.

624. The questions of the command of the law and superior orders need further study, taking into account the relevant rulings of national and international courts. The Special Rapporteur is not in a position to give an opinion on these questions. He has raised them in order that they may be considered should it be decided to adopt new international instruments on the prevention and punishment of genocide.

625. The Special Rapporteur believes that the compulsory jurisdiction of the International Court of Justice over disputes between contracting parties relating to the interpretation, application or fulfilment of the Genocide Convention might theoretically be of some importance for the application of the Convention, bearing in mind the non-existence of an international criminal court and the ineffectiveness of the provisions of article VI, on the competence of national courts in the territory where the crime was committed. Nevertheless, the fact that article IX, concerning the jurisdiction of the International Court of Justice, has not been applied, although acts of genocide have been alleged since the 1948 Convention came into force, casts doubts on the practical usefulness of this article.

626. In view of the considerations set out in chapter II, section F.3, of the present study, the Special Rapporteur feels that further thought will need to be given to the idea of establishing an international criminal court to try allegations of genocide. The Sub-Commission on Prevention of Discrimination and Protection of Minorities should request the Commission on Human Rights to ask the Economic and Social Council to recommend to the General Assembly that it resume consideration of the question of an international criminal jurisdiction,

which the General Assembly, by its resolution 898 (IX) of 14 December 1954, had decided to postpone until it had considered the report of the Special Committee on the Question of Defining Aggression and had taken up again the draft code of offences against the peace and security of mankind.

627. In the light of the discussion of the question of the courts competent to try crimes of genocide and of the principle of universal punishment, appearing in chapter II, section F, of the present study, the Special Rapporteur feels that, since no international criminal court has yet been established, the question of universal punishment should be considered again if it is decided to prepare new international instruments for the prevention and punishment of genocide, since in practice, even if a Government were to commit serious acts of genocide there would be, as there has always been, some doubt as to the possibility of indicting it, unless it were replaced by a régime that would take the necessary legal action. While recognizing the political implications of the application of the principle of universal punishment for the crime of genocide, the Special Rapporteur remains convinced that the adoption of this principle would help to make the Genocide Convention more effective. Moreover, the adoption of the principle should not automatically entail the obligation to prosecute persons guilty of genocide. It would merely be an option that could be used, particularly in the case of Governments, in the light of all the circumstances and of the advisability of taking appropriate action. Moreover, a new international instrument on genocide, establishing the principle of universal jurisdiction, would offer the choice between extradition and the punishment of the crime by the State on whose territory the guilty person was found.

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