UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/CN.4/984/Add.18
28 February 1969

ENGLISH
Original: ENGLISB/FRENCH

COMMISSION ON HUMAN RIGHTS
Twenty-fifth session
Item 7(b) of the agenda

Dual distribution

QUESTION OF' THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS INCLUDING POLICIES OF RACIAL DISCRIMINATION AND SEGREGATION .AND OF APARTHEID, IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES INCLUDING

• (b) REPORT OF THE AD HOC WORKING GROUP OF EXPERTS ESTABLISHED UNDER RESOLUTIONS 2 (XXIII) AND 2 (XXIV) OF THE COMMISSION

continued

CHAPTER VII

DO THE ELEMENTS OF THE CRIME OF GENOCIDE EXIST IN THE SYSTEM AT PRESENT PREVAILING IN THE REPUBLIC OF SOUTH AFRICA?

1. At various junctures during the inquiry into the treatment of prisoners in South African gaols it was alleged that the practices of apartheid also involved elements of the crime of genocide. The recommendations of the ad hoc working group therefore comprised the proposal to undertake a thorough study "to ascertain whether the elements of the crime of genocide exist in the system at present prevailing in South Africa" (para. 1151 of the group's 1967 report, E/CN.4/950). This proposal was approved by the Commission on Human Rights when it endorsed the conclusions and recommendations of the ad hoc working group in paragraph 1 of its resolution 2 (XXIV).

2. As far as this problem is concerned, the mandate of the ad hoc working group is therefore not restricted to conditions in prisons, but covers the broader aspects of apartheid policies in the Republic of South Africa. The study must begin with an enumeration of those practices of the apartheid system which have been said to involve the elements of genocide. For the subsumption of these under the Convention on the Prevention and Punishment of the Crime of Genocide only those practices will be taken into consideration which have been found, by the ad hoc working group or other United Nations bodies, to exist in actual fact in the Republic of South Africa. On the other hand the provisions of the Genocide Convention itself must undergo a thorough analysis, for there has been much scientific dispute about this Convention. Only after a careful interpretation of these provisions will the practices of apartheid be confronted with them.

Section A

Relevant practices

3. The allegation that the crime of genocide was inherent in some of the practices of apartheid did not come up in the United Nations before the creation of the ad hoc working group. In its resolution 2202 A (XXI), however, the General Assembly had condemned as a crime against humanity the policies of apartheid as a whole. This formulation had earlier appeared in resolutions concerning the South West African and Southern Rhodesian questions (General Assembly resolutions 2074 (XX) and 2022 (XX) respectively as well as ECOSOC resolution 1102 (XL) concerning both of these cases).

In 1967 the phrase was reiterated in General Assembly resolution 2307(XXII) concerning the racial policies of South Africa. There was no discussion of this particular item, the debate in the General Assembly and its subsidiary bodies centring heavily on other questions. Therefore, it was not specified which of its elements made apartheid a crime against humanity.

4. In the ad hoc working group the question as to whether apartheid contained the elements of genocide was put in a more specific way. Although this question sometimes was styled in general terms it always arose in certain particular contexts. These were:

(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.

5. In some instances, the suggestions put forward by members of the ad hoc working group went into even further detail. It appears from testimonies e.g., by Mr. Brutus that thousands of persons have died. Mr. Brutus in his testimony also spoke of electrodes, "carry on" as well as other forms of torture of the prisoners. He also spoke of mental torture of the prisoner, of the deliberate infliction on a group of non-white people of conditions of life calculated to bring about their physical destruction in whole or in part. He spoke of measures intended to bring about death within a group of non-white people (which would include the laws governing the movement of Africans in urban areas and preventing the wives from visiting their husbands in those areas). He further spoke of measures to transfer forcibly persons of one group to another group (those reaching the age of eighteen were obliged to leave their parents).

6. It should be noted that many of the witnesses did not unhesitatingly draw the conclusion that the acts described by them constituted genocide. Although it is true that they could not anyway be held to be competent to decide the legal question whether certain acts constitute the crime of genocide the witnesses nevertheless drew the attention of the ad hoc working group to certain factual circumstances which are certainly of relevance for the solution of the question whether apartheid includes genocide. These circumstances were lying in the field of subjective attitudes of those responsible for the apartheid policies. It was stated several times by different witnesses that, genocide being an intentional crime, although there was some intention behind the apartheid policies it was not that specified in the genocide Convention, namely to destroy, in whole or in part, a national, ethnical, racial or religious group. Mr. Brutus (1967 report, paragraph 267) made the distinction that the apartheid system was "not designed to kill off people" but did, "in fact, kill them off". Mr. Brutus also said, when comparing apartheid with the practices of Nazi Germany, that there was "no openly declared aim of exterminating people" as in the German case, and that it was rather South Africa's claim "that by forcing people into Bantustans it will be giving them a greater measure of freedom than they have now" (para. 281). Bantustan policies were based on the idea "to carve up the whole country into a series of what were called States within a State, so that there would be a series of black States and white States under the over-all control of the white State which would be 'the State'", but through another interpretation they could also be seen "as not merely to imply the destruction of the freedoms that the African people have or aspire to have, but to imply their physical destruction as well. But I am not prepared to go so far in my interpretation of this passage" (para. 231; this was an allusion to a New York Times article on Bantustan policies of South Africa). The same witness said very bluntly that it depended on one's definition of genocide whether apartheid could be subsumed under it. "If this is what genocide means, a political policy which attacks people and destroys their hope of living and the conditions under which they might live, then this is genocide. But, because I limit myself to a definition based on the policy of practice in Germany, under the Nazis, I, myself, am reluctant to use the term." (para.281). Another witness, who was a lawyer himself, said: "I would say that the combination of racial attitudes in South Africa, and the power that the

Government has, approaches the policies which led to genocide in Europe in recent decades. If by genocide one means the actual physical extermination of populations - that is, the extreme form of genocide - I would say that that stage has not yet been reached in South Africa ... If one uses the extended definition of genocide to include humiliation of populations on the grounds of race, deprivation of facilities, of the fundamental human rights on the grouds of race, then I would say that not only is genocide carried on, but it is part of the official policy of the Government in South Africa, as experienced in its legislation" (Sachs, para.648). When asked whether the separation of populations in urban areas was designed to destroy a people, the same witness said: "It (i.e., the so-called Ghetto Act) has been used in the most ruthless fashion to destroy the livelihood, in particular of members of the Indian community ... But the word 'destruction' can be understood in the physical sense and in a broader sense. As far as the physical sense is concerned, I think it would be inappropriate to refer to genocide in South Africa today. As regards the question of the ability to exercise elementary human rights in the fields of residence, work, education, movement, political rights, and so on, I would say that the policy of apartheid to that extent involves the destruction of the rights and spirits and amenities of whole populations on grounds of Race." (para.650). An Indian witness was asked if the South African authorities were making a concerted and systematic effort to annihilate any particular sectors of the population. He answered that he had no definite comment to make to the effect that the South African Government wants to annihilate any of the groups, but he said it was the policy and the purpose and the aim to make the non-white people virtually illiterate: hewers of wood and drawers of water. By forcing them into reserves with no means of production the South African Government forced the non-whites to work at below bread-level wages. Concerning the Indian group they had made an attempt not to annihilate it, but to remove it from South Africa completely. This was only an attempt. The purpose of apartheid policies was to subjugate and control the non-white populations. "I won't say that they want the population to waste away completely, because that would be suicide for the whites themselves, but they want to keep the non-whites at a subsistence level in order to do the necessary work for the whites." (Jassat, para.815). This economic argument was also put forward by other witnesses. Mrs. Altman said that the whole white population realized that the country's economy depended on non-white labour. She said "there was, however, a form of genocide by neglect and indifference because non-whites were

regarded merely as labour digits and, when they could no longer perform a useful function, were merely left to die in the camps" (E/CN.4/AC.22/RT.12). Also another witness did not agree that the South African Government's policy was wholly directed to the reduction of the non-white population, since the white South African Government was unlikely to destroy the source of cheap labour upon which its whole economy was based - rather, "it wished the non-white population to be able to work but have no privileges" (E/CN.4/AC.22/RT.10).

7. But there were also other opinions as to the intentions behind apartheid policies. An African witness who thought apartheid was tantamount to genocide had the impression that the non-white population were being subjected to a process calculated to reduce them. This was the only conclusion he could draw from the treatment of political prisoners and the conditions in resettlement camps which were contributing to the destruction of the native population, as well as the high infant mortality rate among Africans against which the State had taken no measures, although it was the highest in the world. But when asked if there was an intention to destroy a group of people the same witness said he considered it unwise to lay too much emphasis on the question of intention rather than on actual consequences for whether or not the intention was there, it was clear that the Government's policy was leading to the decimation of the non-white population. The Government could not be ignorant of these consequences, but, when challenged, would say that their intention was to allow the African population full rights in their own areas (Kgokong, E/CN.4/AC.22/RT.38). Another African witness said - without being asked the question of genocide - that the whole system in South Africa was a big, huge conspiracy on the part of the white minority in South Africa to commit genocide against the Africans. He spoke of a "calculated plot to ill-treat Africans in prisons so that they may die off" (Ngcobo, 1967 report, para.940). Not only the situation in the prisons, but the whole set-up in South Africa constituted the crime of genocide. There was an ideological basis of that. The elements were: deliberate malnutrition among Africans, which provoked a very high mortality rate ("And if that is not really killing, you would be dreaming"); child labour, with the result of stunted children; birth control directed against the Africans in South Africa (although the ministerial statements quoted in this context apply to all sectors of the population, it was only proposed to have birth control in South Africa). Against the argument of cheap labour Mr. Ngcobo said that it was not

valid because there were reservoirs of cheap labour on the border, in Mozambique, Lesotho, Botswana, Swaziland, Malawi and Angola. The motives of the white conspiracy to exterminate the black population in South Africa were clear. After that extermination the white group could pretend to be democratic and give everybody in the country democracy, because there would be whites only (1967 report, para. 950). Massacres such as Sharpeville and Langa were only symptomatic of the fact that the whites were keen on killing the members of the African group, that they were, indeed "concentrating all their efforts on exterminating another group" (para. 957). A similar statement was also made by a witness in 1968 (E/CN.4/AC.22/RT.9). He said the pattern of aggression was systematic, not haphazard. The non-white population, having no trade unions, were obliged to perform the most menial and lowest paid work. They would thus have a shorter life expactancy than the rest of the population. He had always felt that the ultimate aim of the authorities was to destroy the non-white Africans as a race. In times of plenty, vast quantities of food had been destroyed instead of being given to the needy non-white population. Another destructive practice was the "tot" system, whereby farm labourers were compelled to take part of their wages in wine "with long working hours and little food, these people remain in a perpetual state of intoxication." The application of the Group Areas and Ghettos Acts could ultimately, though not immediately, bring about the destruction of a group, through sickness, isolation, lack of amenities and lack of medical attention. Non-white groups were uprooted and moved to areas which were often disease-ridden, and which had no transport, no schools and no doctors.

8. The latter arguments recurred also in statements of witnesses who were less inclined to say that there was genocide being committed in South Africa. For example, a witness said he was not aware of specific cases of genocide in South Africa, "unless if genocide would also include the moving and channelling of the people into small, little areas ... incapable of keeping the vast number of people that are there" (E/CN.4/AC.22/RT.11). Many died early because there was not enough to live on in the rural areas. Over 7,500 people had been sent home from town as "redundant". As they had moved to the town to escape from starvation, they were being returned to starvation and death. Would that be genocide? The witness said there might be no genocide in the strict sense of the word, but the general policy of the Government

certainly contained elements of genocide, especially in the rural areas. The laws gave not only the Government and administrative officers but also the chiefs anh headmen powers of life and death over the native population. He had witnessed many instances of opponents to the political regime being shot dead or brutally assaulted, particularly during periods of crisis, and revolt ... If there was any opposition to the wholesale removal of villagers to native reserves and to other so-called betterment schemes, the police or the army was brought in and many pecpl were shot. Such conditions were in fact tantamount to genocide. The more so sine the Government could foresee the consequences of such wholesale movement of popule. (E/CN.4./AC.22/RT.4.2). Mr. Brutus, whose statements were quoted above, also said hi was satisfied that the South African regime was guilty of killing thousands of people, when the people die as farm labour, or as convict labour, whether they die in the prisons or whether they die, as thousands are still dying, of starvation, lack of food, because of the discriminatory practices and discriminatory legislat-io Still, he was "reluctant to use the term /genocide /" (1967 report, para. 267).

9. There was still another line of argumentation put forward by those who were sceptical about the question of genocide. Some witnesses said that if genocide was not actually perpetrated it was nevertheless to be expected in the future. .Mr. Sac statement quoted above in paragraph 6 is on that line. Mr. Sachs also said: "If the Government can get away -with torturing individuals now, it nay feel safe in massacring whole populations later" (1967 report, para.595). Later on he specified this statement by saying that prisoners and populations would have to be protected from extermination (para.666). Similar is the statement by Mr. Jassat, that there is the constant threat of some assault on the groups in the reserves, which were described as situated in strategic positions "where there are mountains on three sides and one opening, ... with the result that if there is any trouble or any mori they have only very limited space to guard, and they can virtually control, If new annihilate, the non-white people. ... The white Government is in a position where i can annihilate whatever groups it wants to", (para. 815). Mr. Turok, another witnes also remarked: "I did not lightly say that the lives of the prisoners are in danger (para. 935), while at the sane time upholding the opinion that this was known and tolerated by the South African authorities, who, however, had "a technique of self-justification" (para. 901).

10, What, now, has been taken for granted by the ad hoc working group when it drew its conclusions ? As to objective circumstances the conclusions x^ere, of course, restricted to conditions in prisons. It was stated, in paragraph 1132 of the 1967 report, that due to the generally bad conditions in prison, and the ill-treatment and torture administered to prisoners, many of them suffer incurable, chro nic diseases after leaving prison. But this applied to all prisoners, not to any specific groups . In paragraph 1131, however, it was pointed out, that the cruelest prison conditions affected African and other non-white prisoners imprisoned on Robben Island; in ' paragraph 1141 of the same report, discrimination in the field of torture, cruel, inhuman and degrading treatment to the disadvantage of non-white prisoners and detainees wa s mentioned. As to the subjective side - that is, the intention behind apartheid - the Marking Group.felt that "The intention of the Government of South Africa to destroy a racial group, in whole or in "part-, riot being established in_law, the evidence never-theless reveals certain elements which correspond to the acts described in article II (a), (b) and (c) of the United Nations Convention on the Prevention and Punishment of Genocide and which may, as such, establish the existence of the crime of genocide" (para. 1137 of the 1967 report).

Section _B

The crime of genocide

11. The history of the idea of genocide as an international crime begins with the drawing up of the charter of the International Military Tribunal of Nuremberg. Article 6 (c) of the London Charter, in' Its corrected version, counted as crimes against, humanity: "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". While these crimes were to be punished by the Tribunal- on the basis....of .individual., responsibility, there were-nevertheless restrictions on the jurisdiction of the Court. Crimes of this type came only under the jurisdiction of the Tribunal when they had been perpetrated "in execution of or in connexion with any crime within the jurisdiction of the Tribunal", i.e.'in connexion with crimes against peace (article 6 (a) of the London Charter) or with war crimes (article 6 (b)). This means that the scope of the concept of crimos against humanity was limited and that its greatest practical importance in peace time was seriously affected (Cf. History of the United Nations War Crimes Commission and the Development of the Laws of War, published

by the United Nations War Crimes Commission, London,, 194&, page 193). Nevertheless it is important to note that the concept was not limited to times of war even at "that time. The validity of the principle that the acts enumerated were also punishable under international law if committed during peace time and that only the Tribunal's jurisdiction was restricted in these cases is presumed.

12. The \rord "genocide" appeared for the first time in" an international document when it was used in the Indictment presented to the International Military Tribunal sitting at Berlin on 18th October. 194-5 (H.M. Stationery Office, Cmd.6696), page 14-: therein it ^lras said that the defendants had 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 ...". The terminology ("genocide") was taken from Professor Lemkin's book: Axis Rule in Occupied Europe (Carnegie Endowment, 1944, page 79 and following) Lemkin's conception of genocide included not only the immediate destruction of a nation or a national group, but rather a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of political and social institutions, of culture, language, national feelings, religion, and the econoraic existence of nationa l groups, the destruction of the personal security, liberty, health, dignity, ana even the lives of the individuals belonging to such groups. Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word "denationalization" was used in the past; the other, the imposition of the national,pattern of the oppressor. Lemkin believes, however, that the conception of denationalization is inadequate because: (a) it does not connote the destruction of the biological structure; (b) in connoting the destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor; and (c) denationalization is often used to mean only deprivation of citizenship (as summed up in History of the United Nations War Gr imes Commission, cited above, page 197). In the Indictment to the International Military Tribunal, luwever, the conception of genocide was not used in this broad sense the same source tells us; it was rather restricted to its direct and biological connotation.

13. The Judgement of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 1946, while not using the term and conception of genocide, nevertheless described the appalling atrocities committed by the Nazis against groups as such. The terms used were "extermination of Jews and Communist leaders and other sections of the population" as part of a "plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans" (page 50 and following). The Tribunal's findings were highly influential in the definition of the crime of genocide by various United Nations organs.

14. Especially, by a resolution of 11 December 1946, the General Assembly, recognizing its obligation under Article 13 of the United Nations Charter, directed the Committee on the codification of international law, which was simultaneously established and which became the forerunner of the International Law Commission, to treat as a matter of primary importance plans for the formulation "in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code", of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal. The action initiated by this resolution did not produce, in the long run, any useful results. But the mentioning of the principles of the Nuremberg Tribunal certainly influenced the action starting with the simultaneously adopted resolution on genocide [General Assembly resolution 96 (I)].

15. For the preparation of the Genocide Convention action was then taken by the following United Nations organs:

(a) The Economic and Social Council which asked the Secretary-General to prepare a draft after consultation with the Committee on the Development and Codification of International Law and with the Commission on Human Rights, and to communicate it to Member Governments in time to be submitted to the next Economic and Social Council session;

(b) Accordingly, the Secretariat;

(c) The Committee on the Development and Codification of International Law which did not deal with the draft substantially because it had not previously been communicated to States Members;

(d) The Economic and Social Council again, which then made proposals for further procedure;

(e) The General Assembly during its 1947 session which adopted a resolution, 180 (II), reaffirming the 1946 resolution and requesting co-ordination of the work concerning the Genocide Convention and the work concerning the codification of the Nuremberg principles;

(f) The Economic and Social Council at its sixth session in February 1948, which established an ad hoc Committee with the mandate to draft a new text;

(g) The ad hoc Committee on Genocide, which consulted also the Commission on Human Rights and the Commission on Narcotic Drugs;

(h) The Economic and Social Council at its seventh session in August 1948, which after a short but substantial debate referred the ad hoc Committee draft to the General Assembly (E/RES.153 (VII));

(i) The General Assembly at its third (1948) session, where the draft was debated by the Sixth (Legal) Committee and eventually adopted in plenary meeting on 9 December 1948.

16. The Union of South Africa was only a member of the General Assembly. Her position was the following: during the discussion of the draft resolution and draft convention in the Sixth Committee of the General Assembly, the Representative of the Union of South Africa, Mr. Egeland, took the floor several times but only twice in a substantial manner. In the 64th meeting of this Committee the Representative stated during the general debate inter alia:

> "His country was amongst those which abhorred genocide and wished to see it punished. Punishment should, however, be effected in accordance with the domestic laws of the various individual countries. A formulation and definition of genocide by the United Nations would be useful, but the draft convention was inadequate: in the first place genocide was nearly always committed by Governments themselves and the application of national laws would therefore be of little avail.
>
> "Existing legislation in most countries, including the Union of South Africa, provided for the punishment of individuals guilty of genocide. The Union of South Africa would not, therefore, be taking any new effective measures in adhering to the convention, nor would it thereby aid other States in combating that crime. With regard to cultural genocide, Mr. Egland felt that the definition, contained in article III broadened the meaning of the term and went too far in respect of the protection of minorities."

17. At the 83rd meeting of the Sixth Committee during which article III of the draft convention was discussed, the Representative of the Union of South Africa took once again the floor and spoke for the deletion of this article. He stated that his country wished to express the horror felt at any attempt to destroy the cultural heritage of a group or to prevent a group from making its specific contribution to the cultural heritage of mankind. The Representative wished to point to the danger

latent in the provision of article III where primitive or backward groups were concerned: "No one could, for example, approve the inclusion in the convention of provisions for the protection of such customs as cannibalism",

18. At the 179th plenary meeting a vote was taken on the genocide convention draft. The draft was voted upon by roll call. The Union of South Africa voted in favour of the convention.

19. Some statements by other delegations which seem to be relevant will be quoted below in the proper context. By this method of going into the materials the ratio legis can be illuminated appropriately. It must be noted that later discussions in theory and practice have centred heavily on implementation questions concerning the Genocide Convention, while there was relatively little attention paid to the substantial provisions, viz., the elements of the crime of genocide itself. The matter of implementation, however, is not very important in the present context, since the Union of South Africa and, later on, the Republic of South Africa, has remained outside the special obligations created by the Convention. Despite reiterated exhortations by various United Nations organs she never even signed it, nor did she ratify. This has, of course, been her full right. No State must assume the obligations created by any convention, for ratification has always been dependent on the free will of States. This does not mean, however, that the obligation to prevent and punish genocide in itself is not binding on South Africa. This obligation has, as a matter of fact, not been newly created by the Convention. Its existence as a binding rule of general international law was rather presupposed by the Convention. Although it has sometimes been said that the idea of an international criminal law binding upon States and directly upon individuals was a revolutionary innovation in international law it must be taken as a generally accepted rule that there exists such a law now, after the revolution of international law, so to speak. The arguments of retroactivity which have been brought forward by critics of the Nuremberg Trials are not valid in the case of apartheid policies which, if they constituted genocide, had taken place a long period after the conception of genocide had crystallized in several United Nations resolutions which had been supported by the overwhelming majority of States and which, therefore, must be regarded as the expression of the conviction of these States that there existed a rule of general international law to that effect...

20. It remains still to be seen whether the definition of genocide as it appears in articles I to III of the Convention is binding on South Africa, for it could be argueci that this definition described "genocide in the sense of the Convention" only, while the notion of "genocide" in general international law had a different meaning. It coul either be broader or more restricted than the definition used in the Convention. The argument in favour of the first alternative would be that as the Convention created onl obligations in the field of implementation whereas it presupposed the existence of genocide as an international crime the Convention introduced new special measures of implementation only in some, viz., the most serious, cases of genocide while it left other cases to be sanctioned by the normal measures open under International law. Cenocide could then, perhaps, be understood In the broad sense originally used by Prof, Lemkin (above para. 12). But such an interpretation would not make very much sense since the normal sanctions of international law could only be applied against States while it was the very idea inherent in the conception of genocide to punish individuals as well and in the first place. Furthermore, this line of argumentation was never used in practice. On the contrary, we have seen that the practice, in the case of the Nuremberg trials, tended to favour a strict interpretation of what was then known as crimes against humanity. It is therefore only reasonable to refute the attempt of such an interpretation which would merely complicate things. For by what criteria could the scope of the broader notion of genocide be determined? As has been shown the Nuremberg trials could not serve as a precedent, and there would be no practice at all which, coui be helpful. Now, there remains still the other possible alternative that "genocide in the sense of general international law" was more restricted than "genocide In the sense of the Convention". It could be argued that there must have been some reason in drawirm up the Convention, for if there existed already the obligation to prevent and punish the crime of genocide by reason of general international law there was little, left in the Convention. Of course,.the latter argument is not true, for there are some collateral

ii-5ns o;^ real value incorporated in the Convention, e.g. the obligation to enact the necessary legislation, the obligation not to consider genocide as a political crime for the purpose of extradition; and the obligatory jurisdiction o„ the International Court of Justice. But even if there had not been any new obligations incorporated in the Convention it would still make sense.if it was understood that the purpose of drawing it up had been to codify, i.e., to make explicit what formerly had been known only vaguely. The history of the Convention as outlined abo/e shows that this had actually been the ide a of those who worked it out. Furthermore, the definition of genocide in General Assembly resolution

96 (i) already" contained all the elements of the later definition in the Convention in a rudimentary form. It is therefore taken for granted that as a codification of existing general international law the Convention on the Prevention and Punishment of the Crime'of Genocide did neither extend nor restrain the notion of genocide, "but that it only defined it more precisely. 'Therefore, the definition contained in the Convention may also be used in regard to a State which is not a party to the Convention. But, this must be said once again, in contradistinction to States parties to the Convention, such a State would only be bound, "under the sanctions of general international law, to prevent and punish that crime, while any additional obligations which.might arise out of the Convention would not have a binding effect for that State.

21. Now.that it is known that the formula used in the Convention might eventually be applied to South Africa this formula can be analysed in detail. Articles I to·IV of the Genocide Convention read:

> "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.
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> "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:
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> (Ja) 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;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity to genocide.
>
> "Article XV. 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."

22. As can be seen from the text of these articles of the Convention there is a distinction made between "genocide" and other punishable acts (articles III.and IV). The question therefore arises if under general international law only the definition in article II is relevant, or if articles III and IV are also applicable. When we compare the text of resolution 96 (I) we find that it affirmed "that genocide is a crime under international law... for the commission of which principals and accomplices - whether private individuals, public officials or statesmen... - are punishable". This

would say that article IV is entirely applicable. As to article III the highly important problem arises whether only "accomp.Ii.ces" in a strict sense (ill (e)) or if also those who commit the acts enumerated under (b), (c) and (d) are punishable -under general'international law. The letter of the resolution excludes the latter solution, especially if the attention is drawn to the use of the word "commission". Conspiracy, incitement and attempt to commit genocide /are distinct elements under the Convention./ If it is further noted that the distinction is made and maintained in the Convention (cf. articles IV to IX) the conclusion can only he that the inclusion of the acts under III (b), (c) and (d) means the creation of new obligations by the Convention in addition to the pre-existent obligation under general international law, xjhich is only confirmed in article I of the Convention: namely to prevent and to punish the commi ssion, in tins cf peace or in time of war, as a principal or as an accomplice of genocide as a crime under international law. The term "commit" is also used in article I. That this means also commission of the crime as an accomplice must be deduced from the 194-6 resolution. Further support of this interpretation is the Judgment of the Nuremberg International Military Tribunal, as well as the Indictment brought before that Tribunal, which only incriminated the commission of genocide or of crimes against humanity. The fact that the Nuremberg trial was concerned only with the principal war criminals did not mean in itself that accomplices were not equally responsible under international law. Many of them were punished, in Germany, by the Military Tribunals established irnder Act, No. 10 of the Interallied Council of Control. Morally condemnable as they may be, therefore, conspiracy, Incitement and attempt to commit genocide are not crimes punishable under general international law."^ Complicity in genocide Is.

<23. The crime of genocide itself must now be analysed in terms of penal law. There are objective and there are subjective elements which must be fulfilled in order that an act may be qualified as genocide, The objective elements are either acts directed against the group as such or acts directed against individual members of the group. This varies according to the different types of genocide. But the subjective elements are always directed against the group as a whole. There is a general subjective elecer: which is common to all types of genocide, but some types require additional special subjective elements. It is useful to begin with the analysis of the general subjective element of genocide, because it is the only element which is common to all types of genocide.

1/ Under Article II of the Convention of the Non-Applicability of Statutory limitations to War Crimes and Crimes against Humanity (GA Resolution 2391(XXIII), *Annex)* the acts listed in.para, 22 fall within the purview of such convention as regards the non-applicability of statutory limitations, whether such acts are committed^by the State authorities or by private individuals. Consequently, the acts mentioned in para. 22 are punishable in international law.

24. When subjective elements are considered the first question which arises is who is the subject in whom these elements must be present. The subject can only be one or more individuals, but not a State. Criminals can only be persons, not institutions. It must therefore be stated here that, if South Africa is accused of genocide, this can only mean that responsible persons in South Africa are accused of that crime. This leads to the question whether the presence of the subjective elements can only be judged on an individual basis, or if it is allowed to assume some sort of "objectivation" of these elements, e.g., in an official doctrine. It would be contrary to all principles of criminal law to base oneself on the latter alternative. If liability is individual the action which leads to the liability must also be controllable by the individual (täterstrafrecht). This is especially true for the subjective elements. These must therefore be present in those persons who are accused of a crime, individually. If these elements have their objectivation in some doctrine or ideology this is irrelevant from the point of view of criminal law, unless the individual person concerned has made that doctrine or ideology his very own point of view, and bases his action on it.

25. The general subjective element in the crime of genocide is circumscribed in article II of the Convention, first clause: "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Genocide is therefore an intentional delict. There is no such thing as genocide by negligence. It cannot be decided easily, however, whether the term "intent" would also include dolus eventualis. As there is no indication to the contrary, and as the conception of dolus as it is used in the theory of penal law normally includes it, it must be assumed that dolus eventualis will suffice. That is to say the acts under (a) to (e) must not be specially designed to destroy the group, it is enough that the possibility of this result is foreseen and approved of.

26. The intention must be directed against the group as such, not against the individual affected by the crime. But it is enough that the intent to destroy is directed against a part of the group, as such; there is no indication whether any part of the group or only an essential part of the group can be the object of genocide. But it is certain that there is genocide if the intent is to destroy the leadership of the group, as such.

27. "Destruction" in this clause does not mean "physical destruction"; otherwise the use of the latter term in III (c) would make no sense. It must therefore suffice that the intention is to destroy the group as a group, to disperse it, so to speak, without any physical destruction of its members. To indicate this is also the function of the words "as such" at the end of the clause.

28. The intention must be directed against "national, ethnical, racial or religious" groups. It is assumed that it is not necessary to explain the meaning of these terms in the present context. But it must be stated very clearly that political groups are not protected. They had been included in the original draft of the Convention, but were then excluded because of the strong opposition of certain States. Acts directed against political groups as such may be contrary to human rights, but they are not acts of genocide.

29. Now that the general subjective element of the crime of genocide has been explained the acts enumerated in III (a) to III (e) must be scrutinized. It will be useful to proceed according to the litterae and to explain the objective and if need be also the additional special subjective elements of the various acts which may constitute genocide if committed with the intent described above.

(a) Killing members of the group. There are only objective elements In this clause. It is therefore irrelevant whether the act would have to be qualified as murder or as manslaughter or as another crime if directed against the individual as such. In other words, no additional dolus or culpa directed against the individual as such is required. What counts is only the result of killing. Persons must be actually killed as members of their national, ethnical, etc., group. The word "members" is in the plural. The killing of one person therefore cannot be considered as genocide even if committed with the intention described above. On the other hand there need not be an organized plan of mass destruction. It would suffice if several persons were killed by one criminal acting with the specific dolus of genocide. "Killing" means some direct form of killing.

(b) Causing serious bodily or mental harm to members of the group. In this case there are also only objective elements additional to the general subjective elements of dolus genocidii. As in the first case it is the result only that counts. The causing of bodily or mental harm need not be intentional, in regard to the individual affected, but there must be the general intention directed against the group. Several members of the group must be affected. "Serious bodily or mental harm" are very broad terms which can include a number of injuries. It is not necessary, however, that the acts be apt to lead, eventually to the death of the persons affected, nor that they be calculated to bring about that result. Also, they need not be apt to disperse or disrupt the group as such, if viewed from an objective point of view; it would, however, be required that they are inflicted on members of the group in the conviction that they will bring about that result. Otherwise the condition of the general subjective element would not be fulfilled.

(c) Deliberately inflicting on the group conditions of life calculated to' bring about its physical destruction in whole or in part. There are objective and additional subjective elements present in this case. The objective elements are certain conditions of life inflicted on the group as a whole. The imposition of these measures must actually have taken place. The planning of such measures would not suffice. The additional subjective elements are contained in the words "deliberately" and "calculated to bring about". The use of the word "deliberately" excludes the possibility of dolus eventualis. The direct aim of the measures must be the eventual physical destruction of the group in whole or in part. This interpretation is also confirmed by the use of the word "calculated". It is not necessary for the completion of the crime that the calculated result-has actually been brought about, whether this might be due to wrong planning or to any other circumstances. In other words: while it is absolutely necessary that some measures have been taken to change conditions of life of the group as a whole, these measures need not necessarily be apt to lead in fact to the intended result. But the direct intention must be there that these measures lead to the total or partial physical destruction of the group. The difference between the use of the words "destruction" and "physical destruction" has already been explained above. But it must be stressed here that it is enough that the physical destruction of the group or part of it is in the mind of the criminal, in the same way as it is enough that the "destruction" is in his mind in'the other cases of genocide. The intention to destroy the group physically is substituted for the intention, sufficient in all other cases of genocide, to destroy the group as such. Again, it must be stressed that while the imposition of those measures must have taken place in such a way as' to affect the whole group, the intention connected with the imposition of the measures need only be to destroy part of the"group physically.

(d) Imposing measures intended to prevent births within the group. The objective element in this case is the imposition of certain measures. Again it is not sufficient that these measures are planned they must actually be "imposed. But, as in the case of III (c), they need not have the intended result. The phrase "prevent births within the group" is on the subjective side of the crime. It is not necessary'that the measures are taken only in regard to the group in question. They might be extended to the whole population, including any other groups. On the other hand they need not be extended to the whole group. But it is necessary that

the measures are imposed, that they are forced upon the group, or its members, against their own will. If it is open to every member of the group to choose whether he participates or not in a programme of birth control this cannot be described as "imposition" of measures to prevent births. Of course the existence of the general subjective element is required. But in addition to that there must be the special intention (including dolus eventualis) to prevent births within the group. It would not suffice that this would be the accidental result of any measures which were imposed for a different aim, if that accidental result was not intended, at least by dolus eventualis, but rather not taken into account by negligence.

(e) Forcibly transferring children of the group to another group. This phrase only includes an objective element which must be added to the general subjective element of dolus genocidii. There is no physical destruction or even harm in it, neither in regard to the individual nor in regard to the group. But the forcible transfer of children to another group the group can be destroyed as a cultural entity, the group consciousness of the individual members of the group can be broken. The transfer must have taken place actually. It must have affected several children of the group, but not necessarily all of them (there might be the case of destruction of part of the group only). It need not even have been perpetrated on a mass scale. But it must have been done by force, that is, against the will of the members of the group, or of the group. The question might arise whether the transfer must be to a group of the same type. This question cannot be answered with the help of the text of the genocide Convention.

30. Some conclusions can be drawn from the analysis of the various instruments on the subject of genocide.

(a) Genocide is a crime under general international law;

(b) The definition of the crime of genocide which is contained in the Genocide Convention corresponds to the conception of genocide in general International law and may therefore be used in regard to States which are not parties to the Convention as well;

(c) But under general international law only the commission of genocide and complicity in it are a crime. Any preparatory actions leading to that crime are not forbidden under general international law;

(d) Nothing can be said about the sanctions against that crime under general international law, apart from that they must differ from the more specific sanctions applicable under the Convention;

(e) The Acts of State doctrine (article TV of the Convention) is also excluded under general international law;

(f) The crime can only be committed by individuals or groups of individuals, not by institutions such as a State;

(g) The subjective side of the crime must be judged on an individual basis. If some of the subjective elements are part of an ideology or doctrine this is irrelevant from the point of view of penal law. These elements of an ideology or doctrine must be adopted by the individual in question as his own opinion;

(h) The general subjective element is intent, including dolus eventualis;

(i) The intent must be to destroy, totally or partially, national, ethnical, racial or religious (no other) groups; destruction in this context does not mean physical destruction;

(j) The acts under article II (a), (b) and (e) must affect several members of the group. They are judged merely according to their result;

(k) The acts under article II (c) and (d) require special subjective elements. In (c) dolus eventualis is excluded;

(1) These acts are not judged according to their result. It is rather the intention that counts;

(m) In both cases some measures must have been imposed by force; in (c) these measures must have been imposed on the group as a whole;

(n) The Intended result, in (c), must not affect the whole group.

Section C

CONCLUSIONS

31. The Republic of South Africa is not a Party to the Genocide Convention of 1948. Nevertheless the Republic of South Africa, is bound by the generally recognized rule of international law concerning the prohibition of genocide.

32. The qualification of certain practices of the Apartheid policies as "elements of genocide" must be based on the findings of the ad hoc working group in 1967 and in 1968.

3.3. In every mentioned case the question of guilt of prison officials and other State authorities must be examined and investigated.

34. As regards the Genocide Convention, only such actions can be taken into consideratio which are directed against racial, national or ethnic groups as such. Actions against "political groups" cannot be taken into account. But it may be said that under the pretext of "communism", actions directed against political groups established along racial lines are continuously taken by the South African authorities.

35. In every case the real background of various actions of the government has to be examined before such actions could he considered as elements of genocide.

36. The Group considers that in the present state of South African legislation, the Group cannot say that the South African Government has expressed an intention to commit genocide. However, the members of political groups who have testified consider that certain elements of genocide exist in the practice of apartheid.

Section D

RECOMMENDATIONS

37. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (GA. res. 2391 (XXIII), annex) provided that Apartheid is a crime against humanity.

38. The Genocide Convention which was prepared bearing in mind the nazi crimes committed during the second world war, did not explicitly contemplate the Apartheid policies which were not fully developed at the time when the Genocide Convention was adopted and when it came into force.

39. The Group recommends that the Commission should request the General Assembly through the ECOSOC to take into account the development of the Apartheid policies and to revise the Genocide Convention with a view to making the Apartheid policies as they are practised by the South African authorities punishable under this ^Convention.

40. The Group recommends that the Commission on Human Rights should make specific proposals concerning this contemplated revision of the Genocide Convention.