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IN SOUTHERN AFRICA

Report of the Special Rapporteur

Addendum

PART THREE CHAPTER VIII

THE POSSIBILITY OF ESTABLISHING A GRAND JURY OF LEGAL EXPERTS FOR
NAMIBIA FOR THE PROTECTION OF LIFE, PERSONAL SAFETY AND RIGHTS OF
THE INHABITANTS OF THAT TERRITORY

The Secretary-General has received the attached report prepared in accordance with resolution 3 E (XXIV) of the Commission on Human Rights, by Mr. Manouchehr Ganji (Iran), the Commission's Special Rapporteur, and has the honour to communicate it herewith to the Commission.

The views expressed in this report are those of the author.

PART THREE

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CHAPTER VIII

THE POSSIBILITY OF ESTABLISHING A GRAND JURY OF LEGAL EXPERTS FOR NAMIBIA

SECTION A

INTRODUCTION

OUTLINE OF PROPOSAL TO ESTABLISH A JUDICIAL COMMITTEE FOR NAMIBIA

353. The assumption by the United Nations of direct responsibility for the Territory of Namibia, and the establishment of the Council for Namibia, have created a unique legal and moral relationship between the Organization and the inhabitants of the Territory. This legal relationship, which results from the termination of South Africa's mandate over the Territory, makes it possible for the United Nations to make investigations and identify the authors of crimes under international law perpetrated against the inhabitants of the Territory without infringing on the sovereign rights of any State or intervening in matters which are essentially within the domestic jurisdiction of any State.

354. The Commission could call upon the General Assembly, in discharge of the United Nations direct responsibility for inhabitants of the Territory of Namibia, to establish a Judicial Committee for Namibia. The Committee, composed of eminent jurists, would take measures for the detection, exposure and repression of crimes committed against inhabitants of the Territory and for fastening responsibility on the perpetrators of these crimes, thus protecting the lives, personal safety and rights of inhabitants of the Territory.

355. Considering the special functions contemplated for the judicial organ whose establishment is being studied, a descriptive nomenclature for this body would be preferable to the name of an institution existing under a particular legal system. The name of this body should reflect the fact that similar functions were performed by the United Nations War Crimes Commission and by the Committee for the Investigation and Prosecution of Major War Criminals. For reasons which are apparent in this study, the following descriptive name could be used:

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"Judicial Committee for Namibia for the Investigation of International Crime". It will be hereinafter referred to as "the Judicial Committee".

356. The authority of the Judicial Committee would be roughly similar to the authority bestowed on the United Nations War Crimes Commission set up by the Allied Powers in 1943 and on the Committee for the Investigation and Prosecution of Major War Criminals established under the Charter of the International Military Tribunal. The authority of the Judicial Committee would be limited, however, to international crimes perpetrated against inhabitants of the Territory, for whom the United Nations has assumed direct responsibility.

357. The principle that international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the present case, the law-breaking individuals and officials of the Government of the Republic of South Africa, now illegally occupying the Territory of Namibia, cannot in all probability be personally arrested at this time to answer charges. Even if such individuals were to remain free and escape trial, many of the principal objectives of the Judicial Committee would nevertheless be achieved.

358. Individuals and officials accused of committing crimes under international law against inhabitants of the Territory, who would fail voluntarily to submit to the jurisdiction of the United Nations, would bear the stigma of becoming internationally "wanted men". All States could be called upon to arrest them, should they happen to come within their jurisdiction, and to turn them over for trial under United Nations auspices. Refusal by suspected individuals to submit to the jurisdiction of the United Nations could lead to their effective exclusion from the community of nations. Since almost all States would have recognized United Nations responsibility for the Territory, their international movements would be significantly hampered. Many of the purposes of criminal justice would be achieved by the virtual outlawry that would follow the failure of suspected persons to surrender to United Nations jurisdiction for investigation and trial. Formal judicial proceedings could serve solemn notice on the international criminals concerned of the United Nations determination to repress their crimes and to bring them to the bar of justice. The Judicial Committee could serve, in other words, purposes similar to those served by the United Nations War Crimes

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Commission and the Commission for the Investigation and Prosecution of Major War Criminals. It would serve as a necessary preliminary to the eventual trial of those responsible under international law for crimes against the inhabitants of Namibia.

359. In the event that such persons were to be available for trial under United Nations auspices, an International Court for Namibia may well be established. The activation of such a Court would then not be an empty gesture. In this study, it is contemplated that the United Nations could take all judicial steps to investigate, and identify persons suspected of having committed international crimes, ex parte pending their arrest and eventual trial.

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SECTION B

OBJECTIVES OF THE JUDICIAL COMMITTEE

360. Criminal indictment proceedings in municipal law are but one stage in the process of criminal justice designed to bring about the trial, conviction and sentencing of guilty persons. The proposal to establish a Judicial Committee to investigate persons accused of committing international crimes in the Territory of Namibia would achieve some of its main objectives even if no accused persons are likely to be arrested and tried in the near future.

361. The investigation of individuals and officials accused of perpetrating crimes under international law against inhabitants of the Territory of Namibia would serve solemn notice that the United Nations are determined to repress their crimes and to bring them to the bar of justice despite the period of time which may elapse before their arrest and trial.

362. The investigation of the Republic of South Africa for international crimes in Namibia would further isolate the illegal administration in Namibia and the Government of South Africa itself and in effect create a quarantine limiting the movement of suspected government officials to within the area under the jurisdiction or illegal occupation of the South African Government itself.

363. The publicity of the investigations and hearings which would attend those cases in which accused persons would fail voluntarily to appear before investigating authorities and voluntarily to submit to criminal trial in the event evidence so required, would of itself constitute a severe punishment. The odium and disrepute resulting from an investigation and a public hearing leading to charges must not be underestimated. The usefulness of persons so charged to their own Government would be significantly jeopardized.

364. Moreover, investigation proceedings in such circumstances may actually deter South African government officials from imposing death sentences and taking other irreversible measures in violation of international law against inhabitants of the Territory.

365. Investigations by eminent jurists into charges of international criminal law violations would enable the accumulation and preservation of relevant evidence that might otherwise be lost. The prompt collection of documentary and

other evidence of international crimes and the prompt hearing of testimony would remove difficulties for their legal assessment long after the event.

366. Investigating evidence of international criminal law violations against persons unknown may enable responsibility to be fastened on guilty individuals who might otherwise escape responsibility and continue with impunity, and without fear of detection or exposure, to commit crimes against inhabitants of the Territory. Moreover, an indictment of accused persons could, in addition, offer some measure of moral reparation to the victims of those international crimes. The indictment of accused persons could also stop the period of limitations from running in favour of criminals who might otherwise escape punishment. It would, moreover, remove any uncertainty in the mind of the person so charged as to his obligation to stand trial. An indictment would also assist accused persons in the preparation of their defence in the event of their actually being brought to trial. Evidence and testimony for the defence may be hard to obtain when an accused person is obliged to look for such evidence and testimony many years after the acts which form the basis of the indictment.

367. The investigation of individuals may have a greater deterrent effect than the collection of evidence incriminating in general terms the policies and actions of the Government of the Republic of South Africa in the course of its illegal occupation of the Territory. The investigation of individuals for crimes under international law may prove more effective in deterring such crimes than mere condemnations of the policies and actions of an entire Government.

368. Moreover, the drama and interest awakened by public hearings in such circumstances may focus world public opinion on the crimes perpetrated against inhabitants of the Territory. Through such proceedings, world public opinion may be awakened to a greater extent than hitherto. Public opinion has always been more sensitive to accounts of individual tragedies and crimes than to accounts of mass violations of rights.

369. It should also be noted that the initiation of judicial proceedings would help prevent the erosion of the authority of General Assembly and Security Council resolutions on the question of Namibia. It would, moreover, underscore the readiness of the United Nations to resort to a broad range of enforcement measures.

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370. Evidence and testimony gathered in the course of these investigations would provide valuable information for other organs of the United Nations engaged in making decisions and recommendations bearing on the question of the Territory and the policies of the Government of the Republic of South Africa.

SECTION C

WHETHER THE JUDICIAL COMMITTEE WOULD DUPLICATE THE WORK OF OTHER BODIES ESTABLISHED BY THE UNITED NATIONS

371. A proposal to establish a new Committee in the United Nations requires careful scrutiny. The existing proliferation of organs raises the question whether the functions and objectives contemplated for the Judicial Committee may not be satisfactorily discharged by another body already in existence. It may be generally agreed that as presently constituted no other organ of the United Nations seems to be in a position to achieve the principal objectives of the Judicial Committee and to discharge its functions.

372. Since the United Nations has assumed direct responsibility for the inhabitants of the Territory of Namibia, their protection has been entrusted to political organs only. The accusations heard about the policies and actions of the South African authorities illegally occupying the Territory, have been political accusations made by diplomats in the service of their Governments.

373. The Judicial Committee would provide the means for making solid juridical accusations. Such accusations in addition to their primary function of facilitating essential judicial action, would establish concrete and persuasive foundations for political action involving the Territory which might be taken in the Security Council and the other principal organs of the United Nations. The accusations issuing from the Judicial Committee would be structured and reasoned documents. Charges would rest on the findings of judicially held investigations in which all parties would have had a fair opportunity to be heard and in which their rights would be protected by procedural safeguards. The facts alleged would be precise and investigated. The legal principles invoked would be authoritative. Written opinions would support the conclusions of fact and of law.

374. The weight and authority of investigations and findings would be enhanced by the independence and impartiality of the members of the Judicial Committee and their personal qualifications. It would also be secured by the judicial procedures and safeguards guiding the work of the Committee.

375. The Judicial Committee, as is the case with the highest judicial organs of Member States themselves, would be possessed of neither the power of the purse nor that of the sword. Its authority would be derived from the calibre of its

personnel and the quality of its work, guaranteed by the treble safeguards of independence, impartiality and due process.

376. The Judicial Committee would set the stage for the trial and punishment of those perpetrating crimes under international law against inhabitants of the Territory. It would serve, in other words, purposes similar to those served by the United Nations War Crimes Commission and the Committee for the Investigation and Prosecution of Major War Criminals. It would serve as a necessary preliminary to the eventual trial of those responsible under international law for crimes against the inhabitants of the Territory of Namibia. It would serve solemn notice on the international criminals concerned that the United Nations is determined to repress their crimes and eventually to bring them to the bar of justice, even though much time may elapse before their arrest.

377. The judicial functions of the Committee cannot be performed by any other body established by the United Nations. The direct responsibility for the Territory assumed by the United Nations requires performance of judicial functions in addition to the political functions entrusted by resolution 2248 (S-V) to the Council for South West Africa, now Council for Namibia, in the Territory itself.

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SECTION D

AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH A JUDICIAL COMMITTEE

378. On 18 July 1966, the International Court of Justice delivered a judgement on the contentious case brought before it by Ethiopia and Liberia wherein it had been charged that South Africa, the mandatory Power, having violated its mandate obligations with respect to the Territory of South West Africa, should be ordered to abolish apartheid in the Territory and to submit its administration of South West Africa to the United Nations.^{216/} In its judgement, the Court ruled that Ethiopia and Liberia could not be considered to have established any legal right in the subject-matter of the claim and that accordingly it could not decide on the merits of the case.

379. At its twenty-first session the General Assembly considered the question of South West Africa directly in plenary meetings, and on 27 October 1966, it adopted resolution 2145 (XXI), whereby it terminated South Africa's mandate over the Territory.

380. In resolution 2145 (XXI), the General Assembly reaffirmed that South West Africa was a Territory having an international status which would be maintain until it achieved independence. The Assembly decided that the mandate conferred upon the United Kingdom and exercised by the Government of the Republic of South Africa was terminated, that South Africa had no other rights to administer the Territory, and that henceforth South West Africa would come under the direct responsibility of the United Nations. It resolved, moreover, that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa.

381. Thus, by virtue of resolution 2145 (XXI), the United Nations stepped into the shoes, so to speak, of the mandatory Power, assuming the rights and duties of South Africa in respect of the Territory. In this connexion, it must be recalled that under the terms of Article 81 of the Charter, direct administration of territories by the Organization is indeed contemplated. (Under Article 81, such

^{216/} South West Africa, Second Phase, Judgement, International Court of Justice Reports, 1966, p. 6.

administration would have been exercised pursuant to the terms of a trusteeship agreement.)

382. In assuming responsibilities for the administration of the Territory of South West Africa, the United Nations replaced South Africa also with regard to "the sacred trust" creating obligations to promote to the utmost, within the system of international peace and security established by the Charter, the well-being of the inhabitants of the Territory, "to ensure their just treatment and their protection against abuses".

383. The obligations resting upon the United Nations flowing from resolution 2145 (XXI) and Article 73 of the Charter, were partly discharged by the establishment of the Council for South West Africa under the terms of resolution 2248 (S-V). Under the terms of this resolution, the General Assembly recognized that it had become incumbent upon the United Nations to give effect to its obligations by taking practical steps to transfer power to the people of South West Africa and entrusted to it the following powers and functions, to be discharged in the Territory:

"(a) to administer South West Africa until independence, with the maximum possible participation of the people of the Territory;

"(b) to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;

"(c) to take as an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government;

"(d) to take all the necessary measures for the maintenance of law and order in the Territory;

"(e) to transfer all powers to the people of the Territory upon the declaration of independence."

384. The General Assembly also decided that the Council should entrust such executive and administrative powers as it deemed necessary to a United Nations Commission for South West Africa. It is noteworthy that the resolution did not

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provide that this additional power be discharged only in the Territory. The resolution requested the Council to proceed to South West Africa with a view to assuming the administration of the Territory. The Council attempted to proceed to South West Africa and was refused entry by the South African authorities occupying the Territory.^{217/}

385. The Council thus took practical steps with respect to the transfer of power to the people of South West Africa. As a consequence however of South Africa's refusal to comply with the terms of resolution 2248 (S-V), the United Nations did not succeed in fully discharging its sacred trust ensuring the just treatment of the people of the Territory and their protection against abuses. The Organization now faces the obligation to take further practical steps for the protection of the inhabitants of the Territory. The Judicial Committee could thus be established in furtherance of the sacred trust and responsibilities assumed by the United Nations by virtue of resolution 2145 (XXI) and the provisions of Article 73 of the Charter.

386. A study of the authority of the General Assembly on a related subject has already been made. Its authority to establish an international criminal court was reviewed in the report of the 1953 Committee on International Criminal Jurisdiction.^{218/} It was there argued that the power of the General Assembly to establish an international criminal court by resolution rested on Article 22 of the Charter whereby the Assembly can establish subsidiary organs to assist it in performing its functions. Some argued, therefore, that nothing in the Charter prevented the General Assembly from creating an international criminal court as a subsidiary organ. Others argued that a more appropriate basis for such action can be found in Article 13, which gives the General Assembly the power to make studies and recommendations concerning the development of international law. The tribunals already established by the General Assembly which were considered by some members of the Committee to constitute useful precedents for an International Court - the Administrative Tribunal and the United Nations Tribunals in Libya and

^{217/} A/7088.

^{218/} A/AC.65/L.13.

Eritrea - were said by others to furnish no adequate precedents, since the creation of these tribunals had been based either on the Assembly's powers under the Charter with respect to Secretariat staff, or on the exceptional and broad powers given it by the Italian Peace Treaty.^{219/} Evidently, if the General Assembly could have established an international criminal court by a resolution, it must a fortiori be considered to have authority to establish a judicial committee for the investigation of international crimes.

387. The powers of the Assembly in this regard rest not merely on Article 22 of the Charter, but also on the obligations assumed with respect to the Territory under resolution 2145 (XX) and the provisions of Article 73, which outlines obligations that devolved, together with the other responsibilities of the mandate, on the United Nations itself.

388. Finally, it is not without significance that the International Conference on Human Rights, held in Teheran in 1968, adopted resolution (III), which

"Declares that the policy of apartheid or other similar evils are a crime against humanity punishable in accordance with the provisions of relevant international instruments dealing with such crimes." ^{220/}

^{219/} A/AC.65/L.13, paras. 31-34.

^{220/} A/CONF.32/41.

SECTION E

THE UNIQUE JURIDICAL CONTEXT OF THE QUESTION OF
ESTABLISHING A JUDICIAL COMMITTEE

389. The indictment, trial and punishment of criminals is one of the characteristic attributes of sovereignty. Neither the Organization nor any other State may violate the sovereignty of another State and intervene in a matter which is essentially within its domestic jurisdiction. The Government of the Republic of South Africa is not, however, in a position to invoke the principle of Article 2 (7) of the Charter in connexion with acts committed with regard to the Territory of Namibia over which it has no sovereignty, which it illegally occupies, and for whose inhabitants the United Nations have assumed direct responsibility.

390. In these three respects the juridical status of the Territory of Namibia is unique; actions taken by the Organization for the protection of the lives, personal safety and rights of the inhabitants of the Territory have no precedential value in situations in which a State has sovereignty over a Territory, the State is in lawful occupation of that Territory, and the United Nations has not assumed direct responsibility for the Territory's population. Any action that the United Nations takes, therefore, in connexion with the Territory of Namibia is sui generis and must, juridically speaking, be appraised exclusively in the context of the question of the Territory of Namibia and the authority of the Organization to act for the protection of the lives, personal safety and rights of the inhabitants of that Territory.

391. The question of establishing a judicial committee for the Territory of Namibia for the protection of the lives, personal safety and rights of the inhabitants of the Territory, is therefore in no way related to proposals for the creation of an international criminal court and the trial of crimes against peace, crimes against humanity and war crimes by an international criminal organ. The question of establishing a judicial committee has a purely territorial context: it arises in connexion with a Territory over which no State - and certainly not the Government of the Republic of South Africa - has a better claim than the United Nations to investigate, try and punish criminals committing atrocities against the population of the Territory.

392. The establishment of a judicial committee does not require the exercise of extraterritorial jurisdiction by any organ established by the United Nations. It merely provides for the exercise of jurisdiction by the international Organization which has assumed direct responsibility for the inhabitants of the Territory.

393. It would not contemplate the enactment of special laws for the Territory but only for the application of instruments purporting to codify and set forth rules of existing international criminal law.

394. It would not make any provision for the trial of persons investigated by the Judicial Committee. It would not involve such a trial by the United Nations, except in the event of voluntary submission by suspected persons to the authority of the United Nations or their arrest by the authorities of a State which would arrange for a trial under international criminal law. The refusal of suspected persons to submit to the lawful jurisdiction of a judicial organ of the United Nations should not entitle them to object to pre-trial proceedings which may then take place in their absence. Individuals cannot rely on their own refusal to appear before the Judicial Committee to prevent the Committee from functioning.

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SECTION F

POWERS OF THE JUDICIAL COMMITTEE

395. Accusatory criminal proceedings are characteristic of common law jurisdictions. This type of procedure draws its name from the fact that it is initiated by a complaint. It is both oral and public. It is moreover an adversary procedure - the accused and his prosecutor confront each other on a footing of equality while the magistrate or judge acts as an umpire. This procedure requires, however, the participation of both parties in the adjudication process.

396. Inquisitory criminal proceedings draw their name from the initial investigation. They are characteristic of civil law systems such as the French. This type of procedure requires the expert guidance of a judge who conducts the case himself rather than allowing the parties to do so, and whose investigation is designed to reveal the whole truth surrounding the case. The preliminary investigation (instruction préparatoire) bears a significance unknown in proceedings of the accusatorial type: the investigating judge questions defendants and witnesses, brings together witnesses as well as confronting accused and accuser with each other; he directs searches and other investigations and has the power necessary to bring them to a successful conclusion. The French investigating magistrate is thus authorized to investigate complaints against persons unknown, complaints designed to unmask criminal culprits. This type of procedure is more appropriate in situations in which no defendant participates in the case at hand. This was also the procedure adopted by the United Nations War Crimes Commission.

397. Although trials in absentia are not permissible in common law jurisdictions, pre-trial proceedings do not require the presence of the accused. In civil law systems, trials in absentia are exceptional, but pre-trial proceedings can be conducted ex parte.

398. The Judicial Committee could have powers roughly similar to those conferred on the United Nations War Crimes Commission established in 1942^{221/} and to those

^{221/} See United Nations War Crimes Commission, History of Development of the Laws of War (London, 1948).

conferred on the Committee for the Investigation and Prosecution of Major War Criminals established under the Charter of the International Military Tribunal.^{222/}
399. The functions of the United Nations Commission for Investigating War Crimes were:

"1. To investigate all cases referred to the Commission by any of the Governments of the United Nations of atrocities committed by, or by order of, the nationals of any of the countries at war with the United Nations against nationals of the United Nations;

"2. To collect, record and assess all available evidence, oral and written, upon such atrocities;

"3. To direct their attention in particular, in the first instance to those cases which appear to be atrocities organized and committed in pursuance of a deliberate policy;

"4. To report from time to time, and as early as possible to the Governments of the United Nations, cases in which the Commission is satisfied that an atrocity has been committed, naming where possible the person or persons whom they consider responsible;

"5. To investigate, consider and report on any other instances or classes of war crimes referred to them by the general consent of the Governments of the United Nations;

"6. To constitute panels for the taking and recording of evidence, and to sit, whether in panels or as a whole, in such places as the Commission may from time to time decide;

"7. To co-opt such expert and technical advisers for the purpose of particular investigations as the Commission may consider necessary;

"8. To make recommendations on the procedure by which war criminals should be dealt with after the war."

400. The Charter of the International Military Tribunal established a Committee for the Investigation and Prosecution of Major War Criminals. This Committee was established for a number of purposes set out in Article 14 of the Charter:

"Each signatory shall appoint a chief prosecutor for the investigation of the charges against and the prosecution of major war criminals.

^{222/} United Nations Treaty Series, vol. 82, p. 279.

"The Chief Prosecutors shall act as a Committee for the following purposes:

"(a) to agree upon a plan of the individual work or each of the Chief Prosecutors and his staff;

"(b) to settle the final designation of major war criminals to be tried by the Tribunal;

"(c) to approve the indictment and the documents to be submitted therewith;

"(d) to lodge the indictment and the accompanying documents with the Tribunal;

"(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by article 13 of the Charter. The Tribunal shall have the power to accept, with or without amendments, or to reject, the rules so recommended;

"(f) The Committee shall act in all the above by a majority vote and shall appoint a chairman as may be convenient and in accordance with the principles of rotation:..."

401. Under the provisions of Article 15, the Chief Prosecutors were also given the following duties:

"(a) Investigation, collection and production before or at the trial of all necessary evidence;

"(b) The preparation of the indictment for approval of the Committee in accordance with paragraph c of Article 14;

"(c) The preliminary examination of all necessary witnesses and of the defendants;

"(d) To act as prosecutors at the trials;

"(e) To appoint representatives to carry out such duties as may be assigned to them;

"(f) To undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the trial...."

402. The Judicial Committee could be entrusted with powers and duties similar to those bestowed on the United Nations War Crimes Commission and on the Committee for the Investigation and Prosecution of Major War Criminals.

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403. It may be deemed appropriate to provide the Committee with some of the powers entrusted by article 33 of the draft statute of the international criminal court to the "committing authority" contemplated by that statute, particularly the power to determine "that the evidence is sufficient to support the complaint". The Judicial Committee could thus be required to make a judicial determination that there is under international law sufficient evidence to support a complaint against individual defendants charging them with perpetrating crimes under international law. It could moreover be requested to publish in support of such determinations an opinion or opinions reviewing all available evidence and applicable provisions of law.

404. It might be advisable, in light of criticism of the Charter of the International Military Tribunal, to provide that members of the Judicial Committee not be allowed to serve as prosecutors in any eventual future trials involving investigated persons.

405. All powers conferred upon the Judicial Committee would be limited to cases in which crimes under international law are alleged to have been perpetrated against inhabitants of the Territory of Namibia. It may however be advisable to study the possibility of extending the authority of the Judicial Committee to deal with crimes committed under international law against other persons in southern Africa.

SECTION G

THE LAW TO BE APPLIED BY THE JUDICIAL COMMITTEE

406. As it has been noticed in our survey of "law" and practice in South West Africa, the legislation enforced by the Government of the Republic of South Africa in the Territory of Namibia, which it now illegally occupies, promotes the policy of apartheid both in law and in fact.^{223/} It would be unthinkable for the United Nations to charge persons with violations of the criminal laws enacted by the Republic of South Africa and now illegally applied by that Government in the Territory of Namibia.

407. International criminal law can however be applied in connexion with crimes committed against inhabitants of the Territory without infringing the protected rights of accused persons, including the right not to be charged and tried under retroactive criminal laws.

408. It has been recognized, in connexion with proposals for the establishment of an international criminal court, that the expression "crimes under international law" is rather vague. This is a problem which does not exist in connexion with proceedings against individuals under this proposal.

409. The General Assembly or the Council for Namibia acting on the Assembly's behalf could specify the instruments, resolutions, codes, draft codes and other sources which contain authoritative evidence of international criminal law accepted as law for the purpose of proceedings in the restricted context of the situation in Namibia. Such a directive of the General Assembly to an organ of the Organization, would in no way prejudice the wider question of the meaning to be given to the expression "crimes under international law" in other contexts and by other organs of the United Nations.

410. In its directive, the General Assembly could place reliance on the declarations, resolutions and conventions which it has itself adopted as well as on the codes and draft codes adopted by the other organs of the United Nations. While these instruments are not necessarily binding upon States that have declined to recognize or accept their authoritative character, organs of the United Nations can

^{223/} E/CN.4/949/Add.1 and 2.

nevertheless be directed to accept them as binding and to rely upon them for guidance. The legal effect of General Assembly resolutions on other organs of the United Nations, as distinct from their effect on Member States, requires no elaboration.

411. The General Assembly could thus expressly direct the indicting authorities to place reliance on:

- (1) The Principles of International Law Recognized by the Charter of the Nurnberg Tribunal and the Judgment of the Tribunal, unanimously affirmed by the General Assembly; 224/
- (2) The Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, formulated and adopted by the International Law Commission; 225/
- (3) The Draft Code of Offenses Against the Peace and Security of Mankind, adopted by the International Law Commission; 226/
- (4) The definition of war crimes and crimes against humanity formulated in article I of the Draft Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the General Assembly at its twenty-third session as well as the other provisions of that instrument; 227/
- (5) The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly, 228/ and
- (6) The Hague Convention of 1899 and 1907, 229/ the Geneva Protocol of 1925, 230/ and the Red Cross Geneva Conventions of 1929, 231/ and of 1949. 232/

412. The Judicial Committee could also be directed in general terms to apply international law within the meaning of article 38 of the Statute of International Court of Justice.

224/ General Assembly resolution 95 (I) of 11 December 1946.

225/ A/1316, pp. 11-14.

226/ A/2693, pp. 11-12.

227/ General Assembly resolution 2391 (XXIII) of 9 December 1968.

228/ General Assembly resolution 260 (III) of 9 December 1948.

229/ Texts in James B. Scott, The Hague Peace Conferences of 1899 and 1907, vol. II: Documents (Baltimore, 1909).

230/ Text in Manley O. Hudson, ed., International Legislation, vol. 2, pp. 1378 et seq. (Carnegie Endowment, New York, 1931).

231/ Actes de la Conference de Geneve de 1929 (Geneva, 1930).

232/ United Nations, Treaty Series, vol. 75 (1950), Nos. 970-973.

413. The General Assembly or the Council for Namibia acting on its behalf could therefore choose or combine two methods for rendering the expression "crimes under international law" more precise for the purpose of proceedings under United Nations auspices for crimes committed against inhabitants of the Territory of Namibia. It could direct in general terms that the applicable law be international law within the meaning of article 38 of the Statute of the International Court of Justice; it could also direct, in more specific terms, which declarations, resolutions, codes, draft codes and conventions adopted by appropriate United Nations organs must be applied in the course of contemplated proceedings. These two methods are evidently not mutually exclusive; they could be profitably combined.

SECTION H

COMPOSITION OF THE JUDICIAL COMMITTEE

414. Particular care must be taken to give the greatest possible weight and authority to the findings of the Committee. This can be done by providing for the appointment to the Committee of scholars and judges of the highest judicial reputation and by safeguarding their complete independence and impartiality.

415. Only thus can the abuses inherent in inquests by political bodies be checked. Particular care must be taken to guarantee the judicial character of the Committee not only in theory but in practice as well. All human institutions can be perverted and abused, but judicial safeguards render such misuse more difficult.

416. The authority of conclusions could be reinforced by requiring members of the Judicial Committee to write an opinion in support of their findings reviewing all the evidence available and the well-foundedness of the complaint in law and in fact. A closely-reasoned opinion by leading jurists who would have qualifications similar to those of members of the International Court of Justice, would carry weight in all countries.

417. It may be that the authority of the Judicial Committee would also be enhanced if it were composed of a sufficiently large number of jurists. The Committee would then have the weight of collegiality behind it. Such collegiality would be particularly telling if in that body the representation of the main forms of civilization and of the principal legal systems of the world were to be assured. To that end, the Judicial Committee might consist of six to nine members, for example, elected along the lines indicated in article 9 of the Statute of the International Court of Justice, which provides that:

"At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

418. Procedures can be designed to guarantee the independence, impartiality and professional standing of members of the Judicial Committee.

419. Like judges of the International Court of Justice, members of the Committee should not only be impartial, but also independent of control by their own countries and by the United Nations. As in the case of elections to the Court, this would not preclude the election of persons who at the time of their election were employed in the service of their own country.

420. The Statute of the International Court of Justice establishes a double general criterion which may be followed in elections to the Judicial Committee, namely professional qualifications in Article 2 and political qualifications concerning equitable geographical distribution in Article 9. Just as the Court is intended to be a world court applying universal international law, so the Judicial Committee could apply universal international criminal law.

421. The personal qualifications to be required of a member of the Judicial Committee should be similar to those demanded of a judge of the International Court of Justice. The Statute of the International Court of Justice lays down in general terms the qualifications required of judges. Article 2 provides that:

"The Court shall be composed of a body of independent judges, elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or of jurisconsults of recognized competence in international law."

422. With reference to the nomination of candidates, it should be possible to devise machinery simpler than that adopted for the nomination of candidates from which members of the Judicial Committee would be elected.

423. Once elected, members of the Judicial Committee should continue to hold their office until the expiration of their term and should not be subject to removal or recall. This would underscore their independence and the authority of their opinions.

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SECTION I

RIGHTS OF INDIVIDUALS IN PROCEEDINGS BEFORE
THE JUDICIAL COMMITTEE

424. While applying international law within the meaning of Article 38 of the Statute of the International Court of Justice, the Judicial Committee could also be directed to apply other instruments, resolutions, codes and draft codes adopted by the principal organs of the United Nations and by the International Law Commission which contain authoritative evidence of rules accepted as law. These applicable instruments contain numerous provisions bearing on the rights of persons in judicial proceedings. The civil rights of persons in proceedings before the Judicial Committee should in no way be jeopardized. Care must be taken to prevent extra-legal condemnations on prima facie evidence of guilt. No person should be burdened with the stigma of guilt in investigations without being given an opportunity for a full and fair trial.

425. Thus, the Universal Declaration of Human Rights contains provisions bearing on the rights of persons in judicial proceedings.^{233/} Particular attention should be given to the provisions of Articles 2, 6, 7, 8, 10 and 11.

426. The legal significance of the Universal Declaration of Human Rights has been reaffirmed by the International Conference of Human Rights held in Teheran in 1968. In the Proclamation of Teheran, the International Conference solemnly proclaimed that:

"The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." ^{234/}

427. The provisions of the Universal Declaration of Human Rights would therefore be mandatory for the Judicial Committee. The International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly in resolution 2200 (XXI) of 16 December 1966, defines in more precise fashion the rights listed in the Universal Declaration. Its provisions would therefore be equally mandatory for the Judicial Committee.

^{233/} General Assembly resolution 217 A (III) of 10 December 1948.

^{234/} A/Conf.32/41.

428. A number of articles of the Covenant have a special bearing on the rights of accused persons in criminal proceedings. They are articles 2, 3, 9, 14, 15 and 16.

429. Another authoritative source of international law governing the rights of accused persons is the Charter and Judgement of the International Military Tribunal and the principles contained in the Charter and Judgement of that Tribunal which were affirmed by the General Assembly.^{235/}

430. Article 16 of the Charter of the Tribunal provides

"In order to insure fair trial for the defendants, the following procedure shall be followed:

"(a) The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

"(b) During any preliminary examination or trial of the defendant he shall have the right to give any explanation relevant to the charges made against him.

"(c) A preliminary examination of a defendant and his trial shall be conducted in, or translated into a language which the defendant understands.

"(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.

"(e) A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution."

431. These provisions have been formulated also in principle V of the Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal as formulated by the International Law Commission.^{236/}

432. In addition, attention should be paid to article 38 of the draft statute for the international criminal court, which provides that:

^{235/} General Assembly resolution 95 (I) of 11 December 1946.

^{236/} A/1316, pp. 11-14.

"1. The accused shall be presumed innocent until proved guilty;

"2. The accused shall have a fair trial and, in particular:

"(a) the right to be present at all stages of the proceedings;

"(b) the right to conduct his own defense or to be defended by counsel of his own choice, and to have counsel present at all stages of the proceedings;

"(c) the right to have the expenses of his defense charged to the fund referred to in article 23 in case the Court is satisfied that the accused is financially unable to engage the services of counsel;

"(d) the right to have the proceedings of the Court, including documentary evidence, translated into his own language;

"(e) the right to interrogate in person or by counsel, any witness and to inspect any of the documents or other evidence introduced during the trials;

"(f) the right to introduce all other evidence in his defense;

"(g) the right to the assistance of the Court in obtaining access to any material which the Court is satisfied may be relevant to the issues before the Court.

"3. The accused shall have the right to be heard by the Court but shall not be compelled to speak. His refusal to speak shall not be relevant to the determination of his guilt. Should he elect to speak, he will be liable to questioning by the Court and by the counsel."

433. The Judicial Committee could therefore be guided by the rules and principles of international law formulated and adopted in the Charter and Judgement of the International Military Tribunal; the draft statute of the international criminal court and the principles and rules contained in the Universal Declaration of Human Rights, and in the Covenant on Civil and Political Rights. Attention should also be paid to the study of equality in the administration of justice which has been prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights.^{237/}

^{237/} E/CN.4/947; E/CN.4/Sub.2/286.

SECTION J

OTHER INVESTIGATIONS TO BE CONDUCTED BY
THE JUDICIAL COMMITTEE

434. In addition to its functions with respect to international crimes, the Judicial Committee may well be called upon to investigate and report on violations of the human rights of inhabitants of the Territory. The Judicial Committee could thus be used as a judicial fact-finding organ for the Territory of Namibia in so far as the human rights of inhabitants of the Territory are concerned.

435. In such investigations, the Judicial Committee may well be guided by the provisions of instruments bearing upon human rights adopted by the principal organs of the United Nations and the specialized agencies.
