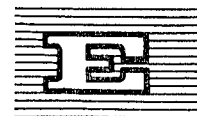


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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Thirty-eighth session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH
WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Revised and updated report on the question of the
prevention and punishment of the crime of genocide
prepared by Mr. B. Whitaker

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Foreword

" 'What I am is not important, whether I live or die -
it is the same for me, the same for you.

What we do is important. This is what I have learnt.
It is not what we are but what we do',

Says a child in exile, one of a family
Once happy in its size. Now there are four

Students of calamity, graduates of famine,
Those whom geography condemns to war ..."

- James Fenton: Children in Exile

INTRODUCTION: MANDATE AND PREPARATION OF THE REPORT

1. This draft report has been prepared pursuant to Economic and Social Council resolution 1983/33 of 27 May 1983 by which the Council requested the Sub-Commission "to appoint one of its members as Special Rapporteur with the mandate to revise, as a whole, and update the study on the question of the prevention and punishment of the crime of genocide, taking into consideration the views expressed by the members of the Sub-Commission and the Commission on Human Rights, as well as replies of Governments, specialized agencies and other organizations of the United Nations system, regional organizations and non-governmental organizations to a questionnaire to be prepared by the Special Rapporteur." In its decision 1983/2 the Sub-Commission decided to appoint Mr. Benjamin Whitaker to undertake the revised and updated study.

Background of the study on the question of the prevention and punishment of the crime of genocide (E/CN.4/Sub.2/416)

2. In the second part of its first session, the General Assembly affirmed in resolution 96 (I) of 11 December 1946, that genocide was a crime under international law which the civilized world condemned and that those guilty of it, whoever they were and for whatever reason they had committed it, were punishable. The Assembly invited Member States to enact the necessary legislation for the prevention and punishment of that crime and recommended that international co-operation should be organized for the purpose. The Assembly requested the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide. The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly, by resolution 260 A (III) of 9 December 1948, and entered into force on 12 January 1951.

3. In resolution 1420 (XLVI) of 6 June 1969, the Economic and Social Council approved the decision adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 8 (XX) to undertake a study of the question of the prevention and punishment of the crime of genocide. The Council authorized the Sub-Commission to designate a Special Rapporteur to carry out the study, and the Sub-Commission in resolution 7 (XXIV) of 18 August 1971, appointed Mr. Nicodème Ruhashyankiko, a national of Rwanda who was then a member of the Sub-Commission, as its Special Rapporteur.

4. Mr. Ruhashyankiko presented a preliminary report and three progress reports to the Sub-Commission in 1973, and his study to the Sub-Commission at its thirty-first session in 1978.

5. The Sub-Commission expressed its thanks to the Special Rapporteur and transmitted the study to the Commission on Human Rights with the recommendation that it should be given the widest possible distribution. The Commission, at its thirty-fifth session, in 1979, approved the decision of the Sub-Commission in decision 9 (XXXV) of 14 March 1979.

6. This earlier study, contained in document E/CN.4/Sub.2/416, dated 4 July 1978, is available for reference.

Mandate of the present Special Rapporteur

7. At its thirty-fifth session, in resolution 1982/2 of 7 September 1982, the Sub-Commission recommended, through the Commission on Human Rights, that the Economic and Social Council request the Sub-Commission to appoint one of its members as Special Rapporteur with the mandate to revise, as a whole, and update the study on the question of the prevention and punishment of the crime of genocide taking into consideration the views expressed by the members of the Sub-Commission and the Commission on Human Rights, as well as replies of Governments, specialized agencies and other organizations of the United Nations system, regional organizations and non-governmental organizations to a questionnaire to be prepared by the Special Rapporteur. In its resolution 1983/33 of 27 May 1983, the Economic and Social Council, mindful of Sub-Commission resolution 1982/2 and Commission resolution 1983/24, endorsed the recommendation and requested the Sub-Commission to consider and to submit the Commission at its fortieth session the revised and updated study.

8. In accordance with Economic and Social Council resolution 1983/33, the Sub-Commission, at its thirty-sixth session, unanimously decided to appoint Mr. Ben Whitaker as Special Rapporteur with the mandate to revise, as a whole, and update the study on the question of the prevention and punishment of the crime of genocide (decision 1983/2 of 18 August 1983).

Questionnaire

9. Pursuant to the mandate given to him, the Special Rapporteur prepared a questionnaire reproduced below and submitted it, on 4 January 1984, to Governments, specialized agencies and other organizations of the United Nations system, regional organizations and non-governmental organizations, inviting them to reply with the following items:

QUESTIONNAIRE

UPDATING OF THE STUDY OF THE QUESTION OF THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE (E/CN.4/Sub.2/416)

- I. Comments and suggestions regarding the revision and updating of the above-mentioned study (including suggestions for corrections or additions).
- II. Information on any national laws or constitutional and legislative provisions enacted since the elaboration of the previous study on the subject (1972). */
- III. Suggestions for more effective national measures for the prevention, control and punishment of genocide.
- IV. Suggestions for more effective international measures to prevent perpetration of genocide including the possibility of further international action, in particular by the adoption of new international instruments.

*/ This information should also include recent court rulings relating to cases of genocide and sentences handed down by the courts.

- V. Comments and suggestions on the possibility of establishing an international body entrusted with carrying out investigations, considering allegations of genocide and taking steps necessary to halt at its outset the deliberate destruction of national, racial, religious or ethnic groups.
- VI. Comments and suggestions on the possibility of preparing an additional protocol to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, conferring upon the courts of countries other than those in whose territory the crime of genocide was committed, competence to deal with that crime.
- VII. Comments and suggestions on the possibility of establishing an international criminal jurisdiction as proposed in article VI of the Genocide Convention. 1/

10. Up to 20 May 1985, replies have been received from the Governments of Argentina, Barbados, Belize, the Byelorussian Soviet Socialist Republic, the Central African Republic, Chad, Cyprus, El Salvador, the German Democratic Republic, the Federal Republic of Germany, Guatemala, Honduras, Iraq, Kuwait, Morocco, the Netherlands, the Philippines, Spain, Sri Lanka, Thailand, Tonga, Turkey, and the Union of Soviet Socialist Republics, as well as from the Holy See. The following specialized agencies also submitted information: International Labour Organisation, Food and Agriculture Organization of the United Nations, United Nations Educational, Scientific and Cultural Organization of the United Nations, the World Bank and World Health Organization. Furthermore, the Special Rapporteur received communications from the Organization of American States, and from the following non-governmental organizations: Anglo-Jewish Association, Anti-Slavery Society, Baha'i International Community, Commission of the Churches on International Affairs of the World Council of Churches, Institute of the International Conference on the

1/ Article VI of the Convention provides that:

"Persons charged with genocide or any of the other acts enumerated in article III 2/ shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

2/ Article III of the Convention provides that 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 in genocide."

Holocaust and Genocide, International Association of Democratic Lawyers, International Association of Penal Law, International Federation of University Women, International Union of Students, Inter-Parliamentary Union, The Minority Rights Group, Women's International Democratic Federation, Women's International League for Peace and Freedom, World Federation of United Nations Associations, the World Jewish Congress and the World Young Women's Christian Association. He has also received helpful comments and suggestions from a number of academic and other individuals (including, especially, Professor Leo Kuper, Dr. Toriguian and Mr. David Hawk), and is grateful both to these and to all those who have replied to the questionnaire.

11. Because of the small number of replies received by July 1984, only a preliminary report could be prepared for the thirty-seventh session of the Sub-Commission, and the Sub-Commission accordingly authorized the Special Rapporteur to present his draft report to its thirty-eighth session, which he is pleased to do herewith. At the thirty-seventh session of the Sub-Commission, the Special Rapporteur presented in his preliminary report (E/CN.4/Sub.2/1984/40) a review of the progress to date, and invited his fellow members of the Sub-Commission to express their views on the issues contained in that questionnaire, and to encourage further replies. The subject was discussed by the Sub-Commission at its 2nd, 3rd, 4th and 5th meetings on 7 and 8 August 1984.

12. This text has necessarily been compressed by the restrictions on space now enjoined upon United Nations reports. The Special Rapporteur would like, however, to state that while he alone is responsible for the opinions expressed in this report, he records his warm thanks to all those who helped in its preparation, including members of the Secretariat of the Centre for Human Rights (and especially Mr. Tardu, Mr. Cissé and Ms. de Groot).

13. To obviate the cost and space of unnecessarily duplicating paragraphs of the previous study (E/CN.4/Sub.2/416) such paragraphs are identified in this study by the initial R. followed by its original paragraph numbers.

PART I. HISTORICAL SURVEY

A. The crime of genocide and purpose of this study

14. Genocide is the ultimate crime and the gravest violation of human rights it is possible to commit. Consequently, it is difficult to conceive of a heavier responsibility for the international community and the Human Rights bodies of the United Nations than to undertake any effective steps possible to prevent and punish genocide in order to deter its recurrence.

15. It has rightly been said that those people who do not learn from history, are condemned to repeat it. This belief underpins much of the Human Rights work of the United Nations. In order to prescribe the optimal remedies to prevent future genocide, it can be of positive assistance to diagnose past cases in order to analyse their causation together with such lessons as the international community may learn from the history of these events.

16. Genocide is a constant threat to peace, and it is essential to exercise the greatest responsibility when discussing a subject so emotive. It is certainly not the intention of this Study in any way to comment on politics or to awaken bitterness or feelings of revenge. The purpose and hope of this Study is exactly the opposite: to deter future violence by strengthening collective international responsibility and remedies. It would undermine this purpose, besides violating historical truth as well as the integrity of United Nations Studies, were anybody guilty of genocide to believe that international concern might be averted or historical records changed because of political or other pressure. If such an attempt were to succeed, that would serve to encourage those in future who may be contemplating similar crimes. Equally, it is necessary to warn that nothing in these historical events should be used to provide an excuse for further violence or vendettas: this Study is a warning directed against violence. Its object is to deter terrorism or killing of whatever scale, and to encourage understanding and reconciliation. The scrutiny of world opinion and an honest recognition of the truth about painful past events have been the starting-point for a foundation of reconciliation, with for example post-war Germany, which will help to make the future more secure for humanity.

B. The concept of genocide

17. Amongst all human rights, the primacy of the right to life is unanimously agreed to be pre-eminent and essential: it is the sine qua non, for all other human rights (apart from that to one's posthumous reputation) depend for their potential existence on the preservation of human life. Every right can also only survive as a consequence of the exercise of responsibilities. The right of a person or people not to be killed or avoidably left to die depends upon the reciprocal duty of other people to render protection and help to avert this. The concept of this moral responsibility and interdependence in human society has in recent times received increasing international recognition and affirmation. In cases of famine in other countries, for example, the States parties to the International Covenant on Economic, Social and Cultural Rights in "recognizing the fundamental right of everyone to be free from hunger" have assumed responsibility to take "individually and through international co-operation" the measures required "to ensure an equitable distribution of world food supplies in relation to need". 1/ The core of the right not to

1/ Art.11.

starve to death is a corollary of the right not to be killed, concerning which the duty of safeguarding life is recognized to extend not just to the individual's or group's own Government but to the international community as well.

18. More serious problems arise when the body responsible for threatening and causing death is - or is in complicity with - a State itself. ^{2/} The potential victims in such cases need to turn individually and collectively for protection not to, but from, their own Government. Groups subject to extermination have a right to receive something more helpful than tears and condolences from the rest of the world. Action under the Charter of the United Nations is indeed specifically authorized by the Convention on the Prevention and Protection of the Crime of Genocide, and might as appropriate be directed for example to the introduction of United Nations trusteeship. States have an obligation, besides not to commit genocide, in addition to prevent and punish violations of the crime by others; and in cases of failure in this respect too, the 1948 Convention recognizes that intervention may be justified to prevent or suppress such acts and to punish those responsible "whether they are constitutionally responsible rulers, public officials or private individuals".

19. The Convention on Genocide was unanimously adopted by the United Nations General Assembly on 9 December 1948, and therefore preceded - albeit by one day - the Universal Declaration of Human Rights itself. While the word "genocide" is a comparatively recent neologism for an old crime, ^{3/} the Convention's preamble notes that "at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required".

20. Throughout recorded human history, war has been the predominant cause or pretext for massacres of national, ethnic, racial or religious groups. Wars in ancient and classical eras frequently aimed to exterminate if not enslave other peoples. Religious intolerance could also be a predisposing factor: in

^{2/} L.J. Macfarlane, The Theory and Practice of Human Rights (London, Temple Smith, 1985), pp.28-29; Leo Kuper, Genocide (London, Penguin Books, 1981); J.N. Porter, Genocide and Human Rights (Washington, University Press of America, 1982); Leo Kuper, The Prevention of Genocide (New Haven, Yale University Press, 1985); the United Nations Study on Human Rights and Mass Exodus by Sadruddin Aga Khan in 1981 (E/CN.4/1503), together with the consequent report in 1983 of the Secretary-General of the United Nations (A/38/538); the Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1985/15); and the Reports on Summary or Arbitrary Executions (E/CN.4/1984/29 and E/CN.4/1985/17).

^{3/} The word "genocide" was coined by the Polish jurist Professor Raphael Lemkin, from the Greek word "genos" (race, nation or tribe) and the Latin "cide" (killing): Axis Rule in Occupied Europe (Washington D.C., Carnegie Endowment for International Peace, 1944). Lemkin was the first main authority on the subject. Lately there has been considerable new interest in the study of genocide, and the Institute of the International Conference on the Holocaust and Genocide in Jerusalem in 1985 has begun to publish a newsletter on the subject.

religious wars of the Middle Ages as well as in places in the Old Testament, some genocide was sanctioned by Holy Writ. The twentieth century equally has seen examples of "total wars" involving the destruction of civilian populations 4/ and which the development of nuclear weapons makes an almost inevitable matrix for future major conflicts. In the nuclear era, indeed the logical conclusion of this may be "omnicide".

21. Genocide, particularly of indigenous peoples, has also often occurred as a consequence of colonialism, with racism and ethnic prejudice commonly being predisposing factors. In some cases occupying forces maintained their authority by the terror of a perpetual threat of massacre. 5/ Examples could occur either at home or overseas: the English for example massacred native populations in Ireland, Scotland and Wales in order to deter resistance and to "clear" land for seizure, and the British also almost wholly exterminated the indigenous people when colonizing Tasmania as late as the start of the nineteenth century. Africa, Australasia and the Americas witnessed numerous other examples. The effect of genocide can be achieved in different ways: today, insensitive economic exploitation can threaten the extinction of some surviving indigenous peoples.

22. But genocide, far from being only a matter of historical study, is an aberration which also is a modern danger to civilization. No stronger evidence that the problem of genocide has - far from receding - grown in contemporary relevance is required than the fact that the gravest documented example of this crime is among the most recent, and furthermore occurred in the so-called developed world. Successive advances in killing-power underline that the need for international action against genocide is now more urgent than ever. It has been estimated that the Nazi holocaust in Europe slaughtered some 6 million Jews, 5 million Protestants, 3 million Catholics and half a million Gypsies. This was the product not of international warfare, but a calculated State political policy of mass murder that has been termed "a structural and systematic destruction of innocent people by a State bureaucratic apparatus". 6/ The Nazi intention to destroy particular human nations, races, religions, sexual groups, classes and political opponents as a premeditated plan was manifested before the Second World War. The war later offered the Nazi German leaders an opportunity to extend this policy from their own country to the peoples of occupied Poland, parts of the Soviet Union and elsewhere, with an intention of Germanizing their territories. The "final solution" included (as evidenced at the Nuremberg trial), "delayed-action genocide" aimed at destroying groups' biological future through sterilization, castration, abortion, and the forcible transfer of their

4/ Antonio Planzer, Le crime du génocide (St. Gallen, F. Schwald A.G., 1956); Raphael Lemkin, "Le génocide", Revue Internationale du droit pénal, 1946, No.10.

5/ Jean-Paul Sartre, "On Genocide", in Richard A. Falk and others eds., Crimes of War (New York, Random House, 1971).

6/ Irving Horowitz, Taking Lives: Genocide and State Power (New Brunswick, Transaction Books, 1980). See also Helen Fein, Accounting for Genocide (New York, The Free Press, 1979), and Israel Charny ed., Towards the Understanding and Prevention of Genocide (Epping, United Kingdom, Bowker, and Boulder, United States of America, Westview Press, 1984).

children. 7/ The term genocide, with also its concept as an international crime, was first used officially at the subsequent International Tribunal at Nuremberg. The indictment of 8 October 1945 of the major German war criminals charged 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 ..." 8/

The concluding speech by the British Prosecutor stated that:

"Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, people of the Low countries and of Norway. The techniques varied from nation to nation, from people to people. The long-term aim was the same in all cases ..." 9/

23. The present two German Governments have been unflinching in their acknowledgement and condemnation of these guilty events, in their efforts to guard against any repetition of them or of Nazism. The Government of the Federal Republic of Germany has stated that official action will be taken, without the need for a complaint from any member of the public, to prosecute people who seek to deny the truth about the Nazi crimes. President von Weizsacker in a forthright recent speech to the Bundestag made clear his belief that his countrymen must have known during the war of the fate of the Jews:

"The genocide of the Jews is without example in history ... at the end of the war, the whole unspeakable truth of the holocaust emerged. Too many said they knew nothing, or had only an inkling of it. There is no guilt or innocence of a whole people because guilt, like innocence, is not collective but individual. All those who lived through that time with full awareness should ask themselves today, quietly, about their involvement." 10/

24. Toynbee stated that the distinguishing characteristics of the twentieth century in evolving the development of genocide "are that it is committed in cold blood by the deliberate fiat of holders of despotic political power, and that the perpetrators of genocide employ all the resources of present-day technology and organization to make their planned massacres systematic and

7/ J. Billig, L'Allemagne et le génocide (Paris, Editions du Centre, 1950); Raul Hilberg, The Destruction of the European Jews (Chicago, Quadrangle Books, 1961).

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

9/ Ibid., vol.XIX, pp.497-498 (concluding speech by Sir Hartley Shawcross). See also Ann Tusa and John Tusa, The Nuremberg Trial (London, MacMillan, 1983).

10/ Speech on the meaning of the fortieth anniversary of VE Day, 8 May 1985.

complete". 11/ The Nazi aberration has unfortunately not been the only case of genocide in the twentieth century. Among other examples which can be cited as qualifying are the German massacre of Hereros in 1904, 12/ the Ottoman massacre of Armenians in 1915-1916, 13/ the Ukrainian pogrom of Jews in 1919, 14/ the Tutsi massacre of Hutu in Burundi in 1965 and 1972, 15/ the Paraguayan massacre

11/ Arnold Toynbee, Experiences (London, Oxford University Press, 1969).

12/ General von Trotha issued an extermination order; water-holes were poisoned and the African peace emissaries were shot. In all, three quarters of the Herero Africans were killed by the Germans then colonizing present-day Namibia, and the Hereros were reduced from 80,000 to some 15,000 starving refugees. See P. Fraenk, The Namibians (London, Minority Rights Group, 1985).

13/ At least 1 million, and possibly well over half of the Armenian population, are reliably estimated to have been killed or death-marched by independent authorities and eye-witnesses. This is corroborated by reports in United States, German and British archives and of contemporary diplomats in the Ottoman Empire, including those of its ally Germany. The German Ambassador, Wangenheim, for example, on 7 July 1915 wrote "the government is indeed pursuing its goal of exterminating the Armenian race in the Ottoman Empire" (Wilhelmstrasse archives). Though the successor Turkish Government helped to institute trials of a few of those responsible for the massacres at which they were found guilty, the present official Turkish contention is that genocide did not take place although there were many casualties and dispersals in the fighting, and that all the evidence to the contrary is forged. See, inter alia, Viscount Bryce and A. Toynbee, The Treatment of Armenians in the Ottoman Empire 1915-16 (London, HMSO, 1916); G. Chaliand and Y. Ternon, Génocide des Arméniens (Brussels, Complexe, 1980); H. Morgenthau, Ambassador Morgenthau's Story (New York, Doubleday, 1918); J. Lepsius, Deutschland und Armenien (Potsdam, 1921; shortly to be published in French by Fayard, Paris); R.G. Hovanissian, Armenia on the road to independence (Berkeley, University of California, 1967); Permanent Peoples' Tribunal, A Crime of Silence (London, Zed Press, 1985); K. Gurun, Le Dossier arménien (Ankara, Turkish Historical Society, 1983); B. Simsir and others, Armenians in the Ottoman Empire (Istanbul, Bogazici University Press, 1984); T. Ataov, A Brief Glance at the "Armenian Question" (Ankara, University Press, 1984); V. Goekjiam, The Turks before the Court of History (New Jersey, Rosekeer Press, 1984); Commission of the Churches on International Affairs, Armenia, the Continuing Tragedy (Geneva, World Council of Churches, 1984); Foreign Policy Institute, The Armenian Issue (Ankara, F.P.I., 1982).

14/ Between 100,000-250,000 Jews were killed in 2,000 pogroms by Whites, Cossacks and Ukrainian nationalists. See Z. Katz ed., Handbook of Major Soviet Nationalities (New York, Free Press, 1975), p.362; A. Sachar, A History of the Jews (New York, Knopf, 1967).

15/ The Tutsi minority government first liquidated the Hutu leadership in 1965, and then slaughtered between 100,000 and 300,000 Hutu in 1972. See René Lemarchand, Selective Genocide in Burundi (London, Minority Rights Group, 1974) and Leo Kuper, The Pity of it All (London, Duckworth, 1977).

of Aché Indians prior to 1974, 16/ the Khmer Rouge massacre in Kampuchea between 1975 and 1978, 17/ and the contemporary Iranian killings of Baha'is. 18/ Apartheid is considered separately in paragraphs 43-46 below. A number of other cases may be suggested. It could seem pedantic to argue that some terrible mass-killings are legalistically not genocide, but on the other hand it could be counter-productive to devalue genocide through over-diluting its definition.

16/ In 1974 the International League for the Rights of Man together with the Inter-American Association for Democracy and Freedom, charging the Government of Paraguay with complicity in genocide against the Aché (Guayaki Indians), alleged that the latter had been enslaved, tortured and massacred; that food and medicine had been denied them; and their children removed and sold. See Norman Lewis and others in Richard Arens ed., Genocide in Paraguay (Philadelphia, Temple University Press, 1976); and R. Arens "The Aché of Paraguay" in J. Porter, Genocide and Human Rights (op.cit.).

17/ It is estimated that at least 2 million people were killed by Pol Pot's Khmer Rouge government of Democratic Kampuchea, out of a total population of 7 million. Even under the most restricted definition, this constituted genocide, since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks. See Izvestia, 2 November 1978; F. Ponchaud, Cambodia Year Zero (London, Penguin Books, 1978); W. Shawcross, Sideshow: Kissinger, Nixon and the Destruction of Cambodia (New York, Simon and Schuster, 1979); V. Can and others, Kampuchea Dossier: The Dark Years (Hanoi, Viet Nam Courier, 1979); D. Hawk, The Cambodia Documentation Commission (New York, Columbia University, 1983); L. Kuper, International Action against Genocide (London, Minority Rights Group, 1984).

18/ See evidence presented to United Nations Human Rights Commission and Sub-Commission, 1981-1984, and R. Cooper, The Baha'is of Iran (London, Minority Rights Group, 1985).

PART II. THE CONVENTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF
GENOCIDE

A. The Convention of 9 December 1948

25. In the wake of the Nazi atrocities, the Genocide Convention provided a permanent definition for part of the concept of "crimes against humanity" contained in the Nuremberg principles, which themselves were an extension of international criminal jurisdiction regarding war crimes. The Convention, which sought to codify a fundamental principle of civilization, in addition extended liability for such crimes to times of peace and not only to wartime. 19/

26. In its first session in 1946, the United Nations unanimously approved two resolutions. Resolution 95 (1) affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal. On 11 December 1946, the United Nations General Assembly also adopted resolution 96 (1) which reads as follows:

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

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

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

The General Assembly, therefore,

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

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

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

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

19/ E.A. Daes, "Protection of Minorities under the Genocide Convention", Xenion, Festschrift für Pan J. Zepos, Vol. II, (Athens, Katsikalis Verlag, 1973).

27. At the third session (first part) of the General Assembly, the draft convention prepared by an Ad Hoc Committee was referred to the Sixth Committee. The Sixth Committee examined the draft article by article, as well as the amendments submitted to it, at its 63rd to 69th meetings, its 71st to 81st meetings, its 91st to 110th meetings and its 128th to 134th meetings. The draft convention as revised by the Sixth Committee, together with certain amendments which had not been accepted by the Committee, was considered by the General Assembly at its 178th and 179th meetings. In resolution 260 A (III) of 9 December 1948, the Assembly, meeting in Paris, unanimously approved the Convention on the Prevention and Punishment of the Crime of Genocide which was annexed to the resolution, and proposed it for signature and ratification or accession by Member States in accordance with its article XI. It subsequently came into force on 12 January 1951, in accordance with its article XIII.

28. The full provisions in the Convention are as follows:

"The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (1) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I

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

Article II

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

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

Article III

The following acts shall be punishable:

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

Article IV

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

Article V

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

Article VI

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

Article VII

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

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

Article VIII

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

Article IX

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

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force."

B. Analysis of the Convention

1. The extent of destruction of a group:

29. Genocide need not involve the destruction of a whole group. Argument has occurred as to whether an attack affecting half of a small group more closely approximates to genocide than a massacre which affects only one tenth of a larger group of several million people. The relative proportionate scale of the actual or attempted destruction of a group, by any of the means listed in Articles II and III of the Convention, is certainly strong evidence to prove the necessary intent to destroy a group, in whole or in part. "In part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. On the other hand, it has been urged that, given the mens rea of such intent, the Convention should be interpreted as applying to cases of "individual genocide", where a single person was a victim of any of such acts, 20/ though strictly even such a minimalist interpretation requires evidence of more than one victim, since the plural is used consistently throughout Article II (a) to (e). In order that the gravity of the concept of genocide should not be devalued or diluted by the inflation of cases as a result of too broad an interpretation, the present Special Rapporteur suggests that considerations of both of proportionate scale and of total numbers are relevant. Other attacks and killings do, of course, remain heinous crimes, even if they fall outside the definition of genocide.

2. The groups protected:

30. The lack of clarity about which groups are, and are not, protected has made the Convention less effective and popularly understood than should be the case. The 1948 Convention enumerates groups protected as "a national, ethnical, racial or religious group", without defining such terms. 21/ Differing views have been expressed as to what extent the terms "national" or "ethnical" groups include minorities. The Nazi policy was also to exterminate the sexual minority group of homosexuals. It is recommended that the definition should be extended to include a sexual group such as women, men, or homosexuals. A victim group might in fact constitute either a numerical minority or a majority in a country, as the Hutu in Burundi. Some assistance may be forthcoming from the Sub-Commission, which has been mandated by the Commission on Human Rights to consider and propose a definition of minority.

31. It is noteworthy that the definition does not exclude cases where the victims are part of the violator's own group. The United Nations Rapporteur on the mass-killings in Kampuchea designated this slaughter as "auto-genocide", a term implying an internal mass destruction of a significant part of the members of one's own group (E/CN.4/SR.1510).

20/ See E/CN.4/Sub.2/416, paras. 50-53.

21/ For discussion of the definition of such terms, see E/CN.4/Sub.2/416, paras. 59-78.

3. Cultural genocide, ethnocide and ecocide

32. At least one expert has argued that the future preservation and existence of minorities is insufficiently protected by the Convention because its final text did not include any reference to "cultural genocide". ^{22/} The Ad Hoc Committee preparing the Convention had in fact proposed including such a provision in the draft of Article III, specifying the following acts as examples constituting cultural genocide:

"Any deliberate act committed with intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship." ^{23/}

The supporters of such a concept argued that a group could be suppressed by extinguishing their specific traits, as well as by physical destruction. In the course of the debates in the Sixth Committee, it was however decided not to include any provision concerning cultural genocide in the final text of the Convention, on the ground that such a provision was inescapably vague and would invite the risk of political interference in the domestic affairs of States, and that the protection of minorities' culture should be the responsibility of other international bodies.

33. Some members of the Sub-Commission have however proposed that the definition of genocide should be broadened to include cultural genocide or "ethnocide", and also "ecocide": adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence. ^{24/} Indigenous groups are too often the silent victims of such actions. The Study on Indigenous Populations (E/CN.4/Sub.2/1983) emphasized the need for special and urgent attention to "cases of physical destruction of indigenous communities (genocide) or destruction of indigenous cultures (ethnocide)". The case for the proposed additions has subsequently been reinforced by the increasing attention given by the United Nations bodies to the rights of indigenous peoples, including the establishment of the Working Group at the Sub-Commission. Other opinions have argued that cultural ethnocide and ecocide are crimes against humanity, rather than genocide. Further consideration should be given to this question, including if there is no consensus, the possibility of formulating an optional protocol.

^{22/} E.A. Daes, op. cit., in footnote 19 to this study.

^{23/} E/794, pp. 21, 27 and 28. See E/CN.4/Sub.2/416, paragraphs 441-461.

^{24/} E/CN.4/1101, E/CN.4/Sub.2/332; Provisional SR/E/CN.4/Sub.2/SR.2/SR.658. See E/CN.4/Sub.2/416, paragraphs 462-478.

4. Political groups

34. A considerable number of commentators on the Convention have also criticized its omission to protect political, economic, sexual or social groups, despite the inclusion in the examples of genocide cited in resolution 96/1 of the destruction of "racial, religious, political and other groups". 25/

35. After considerable debate, the Sixth Committee decided not to include political groups among those protected by the Convention. 26/ Opposition to the proposal was forcefully led by the Soviet Union's representative. The arguments advanced against the inclusion of political groups were, in essence, that: (a) a political group had no stable, permanent and clear-cut characteristics in that it did not constitute an inevitable and homogeneous grouping, being based on the will of its members and not on factors independent of that will; (b) the inclusion of political groups would preclude the acceptance of the Convention by the greatest possible number of States and the acceptance of an international criminal jurisdiction, because it would involve the United Nations in the internal political struggles of each country; (c) such inclusion would create difficulties for legally established Governments in their preventive actions against subversive elements; (d) the protection of political groups would raise the question of protection under the Convention for economic 27/ and professional groups; and (e) the protection of political and other groups should be ensured outside the Convention, under national legislation and the Universal Declaration of Human Rights.

36. In support of the inclusion of political groups it was and is argued that it is logical and right for them to be treated like religious groups, a distinguishing mark of both types of group being the common beliefs which unite their members. Specific examples culled from the recent history of Nazism prove that political groups are perfectly identifiable and, given the persecution to which they were subjected in an age of ideological conflict, their protection is essential. During the debate the French representative presciently argued that "whereas in the past crimes of genocide had been committed on racial or religious grounds, it was clear that in the future they would be committed mainly on political grounds", and this view received strong support from other representatives. In an era of ideology, people are killed for ideological reasons. 28/ Many observers find difficulty in understanding why the principles underlying the Convention should not be equally applicable in the case of mass killings intended to exterminate, for instance, communists or kulaks. In addition, in some cases of horrendous massacre it is not easy to determine which of overlapping political, economic, national, racial, ethnical or religious factors was the determinant one. Is, to take but two examples, the crime of apartheid primarily racial, political or economic? Or was the selective genocide

25/ See paragraph 26, supra. The critics include for example Stefan Glaser, Droit international pénal conventionnel (Brussels, Bruylant, 1970), and F. Laplaza, El delito de genocidio (Buenos Aires, Ediciones Arayu, 1953).

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

27/ The proposal (A/C.6/214) to include economic groups at the 69th meeting was withdrawn at the 75th meeting.

28/ United Nations Economic and Social Council, p. 723; and United Nations Legal Committee, 14 October 1948: Bolivia, Haiti, Cuba.

in Burundi intrinsically political or ethnic in its intent? Most genocide has at least some political tinge, and a considerable number of the Nazis' mass-killings were political. It has been argued that leaving political and other groups beyond the purported protection of the Convention offers a wide and dangerous loophole which permits any designated group to be exterminated, ostensibly under the excuse that this is for political reasons. 29/

37. One possible solution to the problem of killings of political and other groups which would be considered in the absence of consensus, would be to include this provision in an additional optional protocol.

5. Intent

38. It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide. An essential condition is provided by the words "as such" in Article II, which stipulates that, in order to be characterized as genocide, crimes against a number of individuals must be directed at their collectivity or at them in their collective character or capacity. Motive, on the other hand, is not mentioned as being relevant.

39. Evidence of this element of subjective intent is far harder to adduce than an objective test. Not all genocidal régimes are likely to be as thoroughly documented as the Nazi one was. It is suggested that a court should be able to infer the necessary intent from sufficient evidence, and that in certain cases this would include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of his conduct. The plea of superior orders is dealt with later infra, in paragraph 51 onwards.

29/ "By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loop-hole for any Government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state. If perhaps political reasons cannot be adduced as proper excuse for the genocidal measures against a group protected under Article II, then very likely such governmental policy will be defended on economic, social or cultural grounds. The national, ethnical, racial or religious character of the group in such case does not constitute the object of the alleged acts of destruction but the measures are said to be taken against the same persons as members of an economic, social or cultural, i.e. unprotected, group. ... the crime of genocide in its most serious form is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such." Pieter Drost, The Crime of State, II: Genocide (Leyden, A.W. Sythoff, 1959).

6. Acts punishable

40. The conduct listed in Articles II and III of the Convention as being punishable as genocide consists exclusively of the commission of certain actions. Similar results, to Article II (b) and (c) for example, however may be achieved by conscious acts of advertent omission. In certain cases, calculated neglect or negligence may be sufficient to destroy a designated group wholly or partially through, for instance, famine or disease.

41. The Special Rapporteur therefore proposes that there should be added at the end of Article II of the Convention words such as: "In any of the above conduct, a conscious act or acts of advertent omission may be as culpable as an act of commission". Provision for revision of the Convention is set out in Article XVI of the Convention.

42. In the consideration of whether to widen and revise the Convention in other respects, it has rightly been argued that it is necessary not to weaken the over-all governmental support for its central principle. On the one hand, "genocide" in popular modern usage covers many more cases of mass killings than those covered in the Convention. On the other hand, it has also been noted that Article II (b) "Causing serious bodily or mental harm to members of the group" is one wider interpretation than that either in popular usage or in the dictionary ^{30/}. However, in certain cases such as apartheid, the degree of mental and other suffering inflicted may be felt to constitute such a comparable crime; ^{31/} and apartheid generally is considered in more detail next.

7. Apartheid

43. Apartheid was examined in relation to the Genocide Convention by an Ad Hoc Working Group of Experts established under resolution 2 (XXIII) of the Commission on Human Rights. Their work produced the Study concerning the question of apartheid from the point of view of international penal law. ^{32/} The study listed examples of the practices of apartheid which they regarded as instances of genocide:

"(a) The institution of group areas ('Bantustan policies'), which affected the African population by crowding them together in small areas where they could not earn an adequate livelihood, or the Indian population by banning them to areas which were totally lacking the preconditions for the exercise of their traditional professions; (b) The regulations concerning the movement of Africans in urban areas and especially the forcible separation of Africans from their wives during long periods, thereby preventing African births; (c) The population policies in general, which were said to include deliberate malnutrition of large population sectors and birth control for the

^{30/} e.g. "Extermination of a race" in the Concise Oxford Dictionary.

^{31/} See E/CN.4/1985/14, paragraphs 22-26.

^{32/} E/CN.4/1075, Chapter VI(b).

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."

The study (E/CN.4/1074) also states that "In various documents the Ad Hoc Working Group has described how politicians in South Africa, Southern Rhodesia and Namibia commit the crime of genocide directly or indirectly and incite such crimes directly and publicly. Many examples of attempted genocide and of complicity in the crime have been described at length in documents E/CN.4/950; E/CN.4/984/Add.18; E/CN.4/1020; E/CN.4/1020/Add.2." Referring to article IV of the Convention, the study also stated that "Persons committing the crime of genocide in South Africa, Southern Rhodesia and Namibia are Heads of State, members of the various Governments, public officials, official agents and all other persons responsible for giving effect to the policies of apartheid". In paragraph 161 of the study the Group of Experts repeated its recommendation contained in document E/CN.4/984/Add.18 that the Commission on Human Rights should make specific proposals concerning a revision of the Genocide Convention, in particular to make "inhuman acts resulting from the policies of apartheid" punishable under that Convention. The Group further recommended (in paragraph 163) that acts of "cultural genocide" should be expressly declared crimes against humanity.

44. At its twenty-eighth session, the General Assembly by its resolution 3068 (XXVIII) of 30 November 1973, adopted and opened for signature and ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid. ^{33/} This Convention entered into force on 18 July 1976, in accordance with paragraph 1 of its article XV. The General Assembly in its resolution 31/80 of 13 December 1976 invited the Commission on Human Rights to undertake the functions set out in Article X of the Convention, in particular to prepare a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention. By the same resolution, the Assembly decided to consider annually, starting with its thirty-second session, the question entitled "Status of the International Convention on the Suppression and Punishment of the Crime of Apartheid". The fifth, sixth and seventh preambular paragraphs of the Convention read as follows:

"Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law, Observing that, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 'inhuman acts resulting from the policy of apartheid' are qualified as crimes against humanity, Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity".

^{33/} Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30 (A/9030), pp. 75-77.

According to article I, paragraph 1, of the Convention:

"1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, and in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security."

45. The previous Study on Genocide concluded that therefore apartheid should be considered more properly as a crime against humanity rather than as genocide. Its Special Rapporteur also stated that "since the International Convention on the Suppression and Punishment of the Crime of Apartheid has been adopted and has entered into force, it will no longer be necessary to include provisions relating to apartheid in any new international instruments dealing with genocide". 34/

46. Most recently, the subject together with further evidence about apartheid has been examined by an Ad Hoc Working Group of Experts on Violations of Human Rights in Southern Africa, pursuant to the Commission on Human Rights' resolution 1983/9 (paragraph 14). The Group considered in particular evidence of capital punishment, large-scale killings, physical and mental violations of non-whites, and apartheid's effects on the African family and the status of women and children. The experts concluded that "the South African racists want to destroy the Africans, sparing only those needed as a slave-labour force" (their paragraph 51); and that "The Working Group interprets the term genocide more broadly to mean any act calculated to destroy the individual or prevent him from participating fully in national life. The latter too should be understood in its more general sense, embracing political, economic and social life" (paragraph 57). The Group also concluded that the degree of mental genocide caused by apartheid was within article II(b) of the Convention (their paragraph 70); and that apartheid policies affecting black birth-rates are within articles II(c) and (d) of the Convention. They recommended, inter alia, that "The way in which the South African régime implements the policy of apartheid should henceforth be considered as a kind of genocide", and requested the Commission "to call on the General Assembly to seek an advisory opinion from the International Court of Justice on the extent to which apartheid as a policy entails criminal effects bordering on genocide." 35/

34/ E/CN.4/Sub.2/416, paragraphs 404-5.

35/ E/CN.4/1985/14. See also the Study on Implementation and International Jurisdiction to suppress and punish apartheid (E/CN.4/1426) of 19 January 1981.

8. Propaganda in favour of genocide

47. Certainly for the victims, the preventative measures (see Part III below) to avert or forestall genocide are more useful than lamentation or condemnation after it has occurred. As in all human rights work, the importance of the role to be played by public education cannot be over-estimated. It has been suggested that public propaganda aimed at promoting the commission of acts of genocide, or attempts to rewrite history so as either to falsify the truth about or to glorify its occurrence, of which there are examples in more than one country today, should be brought within the terms of the Convention.

48. It should be noted that "direct and public incitement to commit genocide" is already punishable under Article III(c) of the Convention. A number of nations' laws also ban propaganda or public statements that stir up racial, national or religious hatred. And it can be argued that propaganda for genocide should not be considered as any less grave than propaganda for war, prohibited by Article XX(1) of the Covenant on Civil and Political Rights, or propaganda in favour of racial superiority, prescribed by Article IV of the Convention on the Elimination of All Forms of Racial Discrimination.

49. Regarding attempts to falsify the historical truth about genocide, it has already been noted in paragraph 23 supra that the Government of the Federal Republic of Germany has pledged official action to prosecute any person who seeks to deny or minimize the truth about the Nazi crimes. Many Governments on the other hand believe strongly that there should be no constraint either on legitimate historical debate or upon freedom of expression. In certain other States however no such freedom of expression or scholarship is permitted. Sincere differences of opinion exist as to whether this problem is best dealt with by education and constant vigilance or by the influence of legislation. 36/

9. Culpability and superior orders

50. Concern has been expressed whether the exhaustive list of people stated to be those punishable for genocide in article IV of the Convention is adequate to cover leaders or rulers in de facto but unconstitutional control of a territory, for example after a coup d'état or during civil strife, since these might be considered to be neither "constitutionally responsible rulers" nor "private individuals". But the Special Rapporteur is of the opinion that such persons would be likely to be held by a court to be "public officials" or, if not, then to be "private individuals". However, if certainty is required, consideration could be given to inserting words as "whether de jure or de facto" in Article IV if and when the Convention comes to be revised.

51. Wider concern has been expressed as to whether a person who commits genocide under the command of a superior or to comply with a national law may escape punishment through a plea that they lacked the intent necessary under Article II, despite all-embracing list of culpability in Article IV.

52. In fact the international practice at least since the Second World War has consistently applied to the principle of individual criminal responsibility for crimes of international law, including those of genocide. Thus article 6

36/ See, inter alia, statement by Dr. Daniel Lack of the World Jewish Congress to the 1984 Sub-Commission E/CN.4/Sub.2/1984/SR.4.

of the Charter of the International Military Tribunal of Nuremberg gave the Tribunal the power to try and punish persons who, acting in the interests of the Axis countries, had committed any of the following crimes, as defined in the article: crimes against peace, war crimes and crimes against humanity. In applying these provisions, the Tribunal made pronouncements concerning the fundamental principle involved: the criminal responsibility of individuals under international law. 37/ In its judgement the Tribunal affirmed inter alia that individuals could be punished for violations of international law and continued: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 38/ The Charter of the International Military Tribunal for the Far East also provided, in its article 5, for individual criminal responsibility, 39/ and the judgement of that Tribunal applied the same principle. Principle I in the document Principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal adopted by the International Law Commission at its second session (1950) reads as follows:

"Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." 40/

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

"Offences against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished." 41/

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

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

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

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

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

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

"The Court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government." 42/

The 1953 Committee on International Criminal Jurisdiction, set up under General Assembly resolution 687 (VII) of 5 December 1952, in the revised draft statute for an international criminal court, adopted the following wording for the draft article 25:

"The Court shall be competent to judge natural persons, whether they are constitutionally responsible rulers, public officials or private individuals." 43/

In its report, the Committee stated that this text was based on article IV of the Convention on Genocide. 44/

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

"International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members or organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) Commit ... the acts mentioned in article II of the present Convention."

Article 8 of the Nuremberg Charter made clear that no defendant could claim the protection of having obeyed orders from a superior, though superior orders might be considered by the Tribunal as a mitigating factor in sentencing. The denial of the defence of superior orders has often been called the "Nuremberg Principle". It was not, however, new at the trial. It was perfectly familiar in national legal systems - and, indeed, it should have been even more familiar to the German military than to anyone, because every German soldier's paybook contained 'Ten Commandments', one of which stated that no soldier should obey an illegal order. 45/ Only in 1944 did the Americans and British clarify their military

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

43/ Report of the 1953 Committee on International Criminal Jurisdiction, 27 July - 20 August 1953 (A/2645), p. 25.

44/ Ibid., para. 87.

45/ Article 47 of the German Military provided that: "If the execution of a military order in the course of duty violates the criminal law, then the superior officer giving the order will bear the sole responsibility therefore. However, the obeying subordinate will share the punishment of the participant (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression".

legal manuals to emphasize that any soldier is personally responsible for the acts he commits. The defence of superior orders had also not been allowed by German judges in at least one of the Leipzig trials after the First World War, and this doctrine was therefore not one that was invented de novo by the victors at Nuremberg. 46/

53. There therefore should be little doubt that courts today would hold that the concept of individual responsibility will override any defence of superior orders. Nevertheless, since wider public education about this doctrine is highly crucial for the aversion of future genocide, the Special Rapporteur recommends that explicit wording should be added to the Convention, perhaps at the end of Article III, that "In judging culpability, a plea of superior orders is not an excusing defence". Similarly, wider publicity should be given to this principle in national codes governing armed forces, prison staffs, police officer, doctors and others, to advise and warn them that it is not only their right to disobey orders violating human rights, such as to carry out genocide or torture, but their legal duty so to disobey. Such precepts should also be taught in all schools, and the United Nations Educational, Scientific and Cultural Organization might be asked to encourage this internationally.

54. Individuals' responsibility however need not necessarily exclude in appropriate cases a State's collective responsibility also towards the victims, including sometimes liability for damages and restitution. The French representative argued in the debate preparing the Convention:

"The theoreticians of nazism and fascism, who had taught the doctrine of the superiority of certain races, could not have committed their crimes if they had not had the support of their rulers; similarly, pogroms had occurred frequently only in countries where no severe legal measures were taken against the perpetrators. Thus the experience of history showed the way; it was inconceivable that human groups should be exterminated while the Government remained indifferent; it was inadmissible that the central authority should be powerless to put a stop to mass assassination when homicide was the first of punishable crimes. When the crime of genocide was committed, it was committed either directly by the Governments themselves or at their behest; alternatively, they remained indifferent and failed to use the power which every Government should have in order to ensure public order. Thus, whether as perpetrator or as accomplice, the Government's responsibility was in all cases implicated. 47/

Germany has subsequently paid substantial reparations for genocidal crimes against the Jews. It is therefore recommended, to deter pour encourager les autres, that when the Convention is revised, consideration shall be given to including provision for a State's responsibility for genocide together with reparations.

46/ Ann Tusa and John Tusa, op.cit., pp. 87/8; A. Ruckerl, The Investigation of Nazi Crimes (Heidelberg, C.F. Muller, 1979).

47/ A/C.6/78, p. 146.

10. Enforcement

55. Although the Convention despite its title concentrates almost exclusively on the punishment rather than the prevention of Genocide, it is in the field of the former that its lack of effect has been most marked. As Professor Leo Kuper comments: "A major obstacle to effective enforcement arose from the unwillingness to accept any limitation ('infringement') of national sovereignty, or diminution in the scope of domestic jurisdiction, as well as from fear of outside interference in domestic affairs." 48/

56. The first draft of the Convention by the Secretariat incorporated the principle of universal enforcement, permitting a State whose authorities had arrested those charged with the crime, to exercise jurisdiction, regardless of the nationality of the accused or of the place where the offence was committed. There was also a provision that the contracting parties might call on the competent organs of the United Nations to take measures for the prevention and suppression of the crime in any part of the world, in which case the parties would do everything in their power to give full effect to the intervention of the United Nations. This latter provision was retained in the final text, but the principle of universal jurisdiction was eliminated, save to the extent that the United Nations may take action within its general competence. The Secretariat's draft also imposed on the parties the obligation to provide in their national laws for acts of genocide and their punishment, and to commit all persons guilty of genocide for trial by an international court, when (1) they are themselves unwilling to try such offenders or to grant extradition to another country, (2) if the acts of genocide were committed by individuals acting as organs of the State. The provision in regard to an international penal court aroused controversy, though the resolution was closely contested. Later, when political groups were denied the protection of the Convention, it became feasible to reinstate the jurisdiction of an international penal tribunal, though in an optional and conditional form. The Convention now provides for trial by a competent tribunal of the State in the territory of which the act was committed, "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." 49/ No international penal court has as yet been established. In the General Assembly, discussion of a Revised Draft Statute for an international tribunal was made contingent upon satisfactory drafting of the Code of Offences against the Peace and Security of Mankind, which in turn was made contingent upon a satisfactory definition of "aggression", which problem was assigned to a Special Committee in 1954, and to a further Committee of 35 States in 1967, which has met repeatedly since that time. A definition of aggression was finally arrived at in 1974, but the project for an international penal tribunal to try charges of genocide still remains in abeyance. In examining the problem of the enforceability of the Convention, it is necessary also to take account of reservations made by signatories when ratifying the Convention as, for example, reservations regarding

48/ L. Kuper, International Action Against Genocide (London, Minority Rights Group, 1984).

49/ See N. Robinson, The Genocide Convention (New York, Institute of Jewish Affairs, 1960); L. Kuper, Genocide (London, Penguin, 1981) chapter 2; and E/CN.4/Sub.2/416, paragraphs 190-249.

submissions to the International Court of Justice of disputes concerning interpretation, application or fulfilment of the Covenant. These may have the effect of further weakening its provisions. Acting in the opposite direction is the impact of the Convention on national legislation incorporating the crime of genocide in penal code or laws. It should also of course be noted that genocide remains a crime under international law, as is expressly stated at the start of the Convention, irrespective of a country's signature or not, though the Convention itself is binding only on Contracting Parties. Although 96 Member States have now ratified the Convention, among those which have not yet ratified are Burundi, Equatorial Guinea, Paraguay, South Africa, Uganda and the United States of America. (See paragraph 69 infra).

57. Some encouragement nevertheless may be drawn from the recent national prosecutions by Kampuchea and Equatorial Guinea. 50/ Another interesting analogous precedent has been set by the case of Filartiga versus Pena, where an action for \$10.4 million damages in a New York court was upheld against an alien torturer who was on a temporary visit within the jurisdiction. But it was partly the failure to make progress internationally that caused Israel to take unilateral measures to seize and try Eichmann.

58. During discussion by the Legal Committee in 1948, the subject of international penal jurisdiction was considered carefully. As a result, the idea is envisaged and provided for in Article VI of the Convention. Further, in addition to the Convention, the Assembly adopted a resolution which made three provisions:

First, it recognized that "in the course of development of the international community there will be an increasing need of an international judicial organ for the trial of certain crimes under international law".

Second, it invited the International Law Commission to study both the desirability and the possibility of establishing such an international judicial organ "for the trial of persons charged with genocide, or other crimes over which jurisdiction will be conferred upon that organ by international Conventions".

Third, it requested the International Law Commission, in carrying out its task, to give attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.

After studying that question, the International Law Commission concluded that an international criminal court was both possible and desirable but recommended it be a separate institution rather than a Criminal Chamber of the International Court.

59. In debates at the Sub-Commission it has been argued, in favour of setting up an international penal tribunal, that the perpetrators of acts of genocide are generally national authorities against whom national legislation is often least likely to be applied; and that the establishment of the International Court of Justice has shown that new international bodies to enforce respect for human rights, though not easy, was feasible. A State could, for example, take the

50/ There have also been non-governmental tribunals, such as the Permanent People's Tribunal held in Paris on the Armenians case in 1984, whose evidence and verdict is published as A Crime of Silence (London, Zed Press, 1985).

initiative of requesting the Court to investigate alleged cases of genocide in the territory of a State party to the Genocide Convention. Other experts doubted how realistic or likely this is, and point to the limited number of States which have accepted the compulsory jurisdiction. Some argued it would be better to set up an international investigatory body, to act not only on the basis of majority decisions by political organs of the United Nations but also on its own initiative, in cases where there was evidence that genocide was being or was about to be committed. 51/ In the 1984 Sub-Commission, an expert suggested there might be advantages in making the courts of all countries competent to judge the perpetrators of the crime of genocide who had taken refuge abroad. Since one of the obstacles is the problem of bringing such culprits before courts on a mandatory basis, it was argued that consideration should be given to amending the International Court of Justice's statutes to give it penal jurisdiction, because it was better to improve the use of existing international bodies rather than to proliferate new ones. Another expert went so far as to state that the Convention will be worthless unless positive action to implement it is taken, and proposed an additional protocol extending jurisdiction to courts other than those of the country where the crime of genocide has been committed. Another expert stated means of implementation of any resultant judgement were also important, to deal with the problem of a verdict being ignored, since those States and individuals most likely to commit genocide are the ones least likely to co-operate, whereas more civilized co-operators will probably not be in the dock. Some experts urged the establishment of international early-warning and fact-finding systems, and emphasized the part that accurate and impartial publicity could play in deterrence. Several experts commented on the problem of extradition, discussed in paragraphs 62-63 below. Renewed proposals were also made concerning the constructive role which a United Nations High Commissioner for Human Rights could contribute to preventing and investigating allegations of genocide, and in co-ordinating remedial work. Several commentators as well strongly emphasized the crucial task of wider public education in order to make the Convention more effective. 52/

11. The question of time-limitation

60. In 1965, the question arose in some countries of applying the statute of limitations provided for in their national laws to cut off the further prosecution of war crimes and of crimes against humanity after a certain time limit. The Commission on Human Rights requested the Secretary-General to undertake a study of the problems raised in international law by war crimes and crimes against humanity and a study of legal procedures to ensure that no period of limitation should apply to such crimes. On the basis of that study, the Commission began, in 1966, to prepare a draft Convention.

The matter was taken up in 1967 by the General Assembly, which on 26 November 1968 completed and adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Convention entered into force on 11 November 1970.

51/ E/CN.4/Sub.2/SR.658, 684 and 736.

52/ E/CN.4/Sub.2/1984/SR.3, SR.4, SR.5 and Corrigendum.

The text is as follows:

Convention on the Non-Applicability of Statutory Limitations
to War Crimes and Crimes against Humanity

PREAMBLE

"The States Parties to the present Convention,

Recalling resolutions of the General Assembly of the United Nations 3 (I) of 13 February 1946 and 170 (II) of 31 October 1947 on the extradition and punishment of war criminals, resolution 95 (I) of 11 December 1946 affirming the principles of international law recognized by the Charter of the International Military Tribunal, Nürnberg, and the judgement of the Tribunal, and resolutions 2184 (XXI) of 12 December 1966 and 2202 (XXI) of 16 December 1966 which expressly condemned as crimes against humanity the violation of the economic and political rights of the indigenous population on the one hand and the policies of apartheid on the other,

Recalling resolutions of the Economic and Social Council of the United Nations 1074 D (XXXIX) of 28 July 1965 and 1158 (XLI) of 5 August 1966 on the punishment of war criminals and of persons who have committed crimes against humanity,

Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation,

Considering, that war crimes and crimes against humanity are among the gravest crimes in international law,

Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security,

Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes,

Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application,

Have agreed as follows:

Article I

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article II

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

Article III

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

Article IV

The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished.

Article V

This Convention shall, until 31 December 1969, be open for signature by any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

Article VI

This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article VII

This Convention shall be open to accession by any State referred to in article V. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VIII

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its own instrument of ratification or accession.

Article IX

1. After the expiry of a period of ten years from the date on which this Convention enters into force, a request for the revision of the Convention may be made at any time by any contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article X

1. This Convention shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States referred to in article V.

3. The Secretary-General of the United Nations shall inform all States referred to in article V of the following particulars:

(a) Signatures of this Convention, and instruments of ratification and accession deposited under articles V, VI and VII;

(b) The date of entry into force of this Convention in accordance with article VIII;

(c) Communications received under article IX.

Article XI

This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 26 November 1968.

IN WITNESS WHEREOF the undersigned, being duly authorized for that purpose, have signed this Convention."

To date, the following 28 States have ratified or acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity: Afghanistan, Albania, Bolivia, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Gambia, German Democratic Republic, Guinea, Hungary, India, Kenya, Lao People's Democratic Republic, Mongolia, Nigeria, Philippines, Poland, Romania, Rwanda, Saint Vincent and the Grenadines, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, Republic of Cameroon, Vietnam and Yugoslavia. Mexico has signed the Convention but has not become a party to it.

61. In the first 20 years after the Second World War, the Federal Republic of Germany instituted legal proceedings against 67,716 persons suspected of complicity in Nazi and war crimes. 53/ All Nazi crimes were due to become statute-barred by then existing German law on 31 December 1979. Due to public protest in Germany and elsewhere, however, the statutory limitations were abolished for the crimes of genocide and murder in 1979. The prosecution of a number of remaining major Nazi leaders for genocide, if they are discovered, remains possible.

12. Extradition

62. On 3 December 1973 the General Assembly passed resolution 3074 (XXVIII), whose text is as follows:

"The General Assembly,

Recalling its resolutions 2583 (XXIV) of 15 December 1969, 2712 (XXV) of 15 December 1970, 2840 (XXVI) of 18 December 1971 and 3020 (XXVII) of 18 December 1972,

Taking into account the special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity,

Having considered the draft principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity,

Declares that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

53/ A. Ruchert, op. cit., p. 75; and see replies of the Federal Republic and the German Democratic Republic Governments to the Questionnaire for the present study. Elsewhere however it has been suggested that even if Josef Mengele, for example, had been discovered in Paraguay, his extradition would have been barred because of a 20 year time-limit in Paraguay for criminal prosecution.

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

2. Every State has the right to try its own nationals for war crimes or crimes against humanity.

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

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

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

7. In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

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

9. In co-operating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

63. A number of experts have pointed to what they see as basic flaws in Article VII of the Convention, because it allows each contracting State to interpret its own laws in a given case. Mass murderers, in recent experience, have taken care to seek refuge in sympathetic countries where all too often they have been hidden or safe. Many bilateral treaties and national laws fail to declare genocide to be an extraditable offence. Furthermore, most countries do not permit the extradition of their own nationals, so that the perpetrator of a crime, once he had returned to his own country, would not be extradited. To date, as far as is known, no extradition for genocide under the convention has occurred

at all. The Special Rapporteur therefore believes that countries or at least States parties should be required to amend their domestic laws to permit such extradition if they do not prosecute offenders themselves.

64. Genocide, alternatively, could be made a matter of universal jurisdiction: "aut dedere aut punire", as is the case for crimes of piracy. Article 8 of the new Convention against Torture of 10 December 1984 54/ reads as follows:

"1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

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

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

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1."

Since genocide may be held at least no less serious a matter than torture, the Special Rapporteur recommends that similar provision to the above be made for offences of genocide.

13. Calls upon the United Nations to take action

65. No use equally is known to have been made to date of Article VIII of the Genocide Convention, whereby:

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

66. Article VIII of the Convention, while adding nothing new to the United Nations Charter, is of some importance in that it states explicitly the right of States to call upon the United Nations with a view to preventing and suppressing genocide and the responsibility of the competent organs of the

54/ 36/46, Official Documents of the General Assembly, thirty-ninth session, supplement No. 51. See Appendix.

United Nations in the matter. Furthermore, it is the only article in the Convention for the Prevention and Punishment of Genocide which deals with prevention of that crime, referring to the possibility of preventive action by United Nations organs called upon by Parties to the Convention. It should be noted, further, that such action by United Nations organs is particularly of a humanitarian nature, the need and justification nobody should deny. It would be desirable for the organs of the United Nations, in pursuance of article VIII of the Convention, to exercise their powers in this field actively.

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

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

68. The value of an article specifying the role of the United Nations in the prevention and suppression of genocide is especially evident, because until some special agency is set up, there is no other international organization to see to the implementation of the Convention.

PART III: FUTURE PROGRESS: POSSIBLE WAYS FORWARD

A. Ratification

69. As of 1 May 1985, 96 States are parties to the Convention on Genocide: These are: Afghanistan, Albania, Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Brazil, Bulgaria, Burkina Faso, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic Kampuchea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Islamic Republic of Iran, Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Luxembourg, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Republic of Korea, Romania, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Spain, Sri Lanka, Sweden, Syrian Arab Republic, Togo, Tonga, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, Viet Nam, Yugoslavia and Zaire.

The following Member States have signed, but not yet ratified: Bolivia and the United States of America.

The following States have not yet signed or ratified: Angola, Antigua and Barbados, Bahrain, Bangladesh, Belize, Bhutan, Botswana, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Dominica, Equatorial Guinea, Ethiopia, Grenada, Guinea, Guinea Bissau, Guayana, Holy See, Indonesia, Ivory Coast, Kenya, Kiribati, Kuwait, Libyan Arab Jamahiriya, Liechtenstein, Madagascar, Malawi, Malaysia, Malta, Mauritania, Mauritius, Namibia, Nauru, Niger, Nigeria, Oman, Paraguay, Portugal, Qatar, St. Christopher and Nevis, Saint Lucia, Samoa, San Marino, Sao Tome and Principe, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sudan, Suriname, Swaziland, Switzerland, Thailand, Trinidad and Tobago, Tuvalu, Uganda, United Arab Emirates, Republic of Cameroon, United Republic of Tanzania, Vanuatu, Yemen, Zambia and Zimbabwe.

70. The Special Rapporteur strongly recommends that the United Nations should renew its efforts and take every feasible step to make ratification by the remaining Member States of the Convention universal as quickly as possible. A lead by the United States would be welcome (as Presidents Truman, Johnson, Nixon, Carter and Reagan urged). It is similarly recommended that those States who have not yet done so ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968.

B. Future options

71. The fact remains that although the Convention has been in force since 12 January 1951, any ascertainable effect of it is difficult to quantify, whereas all too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world. Certainly in its present form, the Convention therefore must be judged to be not enough. Further evolution of international measures against genocide are necessary and indeed overdue.

72. It is important that the historic momentum of the spirit of international unity against genocide displayed by Nuremberg and the Convention should not be allowed to falter or lapse. Failure to make effective international legal provisions is likely to threaten peace, to drive nations to desperate unilateral measures (such as the abduction of Adolf Eichmann in Argentina to bring him to trial in Israel for genocidal acts in 1961), or to open excuses for the deplorable violence of terrorist reprisals. ^{55/} For too many centuries war and violence have been the standard method of avenging grievances, or of creating new ones. Now in the era of atomic weapons, human society depends for its future survival upon establishing in time alternative international legal means to resolve such disputes peacefully. Despite the problems in doing so, the size of the risk permits little further time for any more delay.

73. In place of the law of the jungle of "vae victis" ("woe to the conquered") Hugo Grotius laid the foundation for international law during the terrible Thirty Years War in the Seventeenth Century with his work De Jure Belli ac Pacis (Concerning the Laws of War and Peace). Following the founding of the Red Cross two centuries later, a series of Geneva and Hague Conventions were ratified seeking to establish international norms of conduct even in warfare. There were however no agreed sanctions or procedure to deal with war criminals. After the First World War, the defeated Germans themselves held some war crime trials in Leipzig in 1922, but these were unsuccessfully organized and 888 people out of the 901 charged in them were acquitted. When in the Second World War awareness of the extraordinary scale of the Nazi crimes became widespread, a European advisory Commission on War Crimes was set up to consider, as it was told by the French "an enemy who has sought to annihilate whole nations, who has elevated murder to a political system, so that we no longer have the duty of punishing merely those who commit but also those who plan the crime". ^{56/} As early as January 1942 the representatives of nine occupied countries conferred in London and issued the St. James's Declaration that "international solidarity is necessary to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public and in order to satisfy the sense of justice of the civilized world". ^{57/}

"The Declaration announced that punishment for war crimes, whoever committed them, was now a principal war aim of the governments at the conference. It also made clear the intention to bring to justice not only those who themselves physically perpetrated such crimes, but those leaders who ordered them. The St. James's Declaration was approved by Britain, the United States and the USSR, and significantly, expressed disgust not only at atrocity but at the idea of mere vengeance: it implied a desire for some

^{55/} More than 50 Turkish diplomats, who certainly were innocent of any possible involvement in the Ottoman Empire's treatment of Armenians, have been assassinated by terrorists. The reform of legitimate international measures to deal with genocide would be a highly constructive way to cut support for terrorism.

^{56/} United Kingdom Lord Chancellor's Office, LCO 2.2978. See A. and J. Tusa, op.cit.

^{57/} Telford Taylor, International Conciliation, No. 450 (April 1949).

form of judicial proceeding to determine guilt and satisfy a sense of justice. The St. James's conference was followed by one practical step: the United Nations War Crimes Commission was set up in London in 1943 to collect and collate information on war crimes and criminals. 58/

At the Moscow Conference of Foreign Ministers in November 1943, Britain, the United States and the Soviet Union had issued a joint declaration condemning Nazi atrocities in occupied Europe. This stated that 'at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or who have taken part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein'."

74. Although a historic impetus of international agreement achieved the unprecedented establishment of the Nuremberg and Tokyo Tribunals, these were open to the accusation that they were set up ad hoc to enable victors to pass judgement on vanquished. It would be a preferable concept to have instead an impartial but respected international body with permanent authority. None the less the final Count in the Nuremberg Charter broke new ground by charging defendants with "Crimes against Humanity", 59/ a term used to cover the persecution of racial and religious groups and the wholesale exploitation of peoples. Doenitz suggested in his memoirs that the acts the Tribunal had examined were a purely German affair: Germans, he said, should have been allowed to "investigate and then bring to justice those who had been responsible for the inhuman enormities that had taken place". But what some of the international lawyers at Nuremberg hoped was that the trial would be the foundation of a new legal order. They wanted international law to be advanced and to govern the future conduct of nations. Robert Jackson reported to President Truman subsequently that the London agreement, prior to Nuremberg, had for the first time made explicit that:

"to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war; or to exterminate, enslave or deport civilian populations is an international crime and that for the commission of such crimes individuals are responsible." 60/

However once the International Military Tribunal at Nuremberg finished its work, there was no international criminal court. President Truman welcomed Biddle's recommendation that the United Nations be invited to draft a code of international criminal law. It has not yet been drafted. As historians of the Nuremberg cases observe, "it is in the broadest sense a political question whether nations prefer

58/ It was made up of representatives of 17 nations - but had no Russian member. Stalin would only join if every Soviet Republic were given separate representation. This was refused.

59/ A term coined by Professor Lauterpacht.

60/ 15 October 1946 (Jackson papers).

to have some objective body of law and an impartial institution to administer it or whether they prefer to settle disputes and fulfil their ambitions by force". 61/

75. It has equally been suggested that the influence of historical events also caused the character of the Convention to constitute more of a protest against immediate past crimes than to create an effective instrument for the prevention or repression of genocide. 62/ Critics have in fact alleged that the Convention represents at best almost a dead letter, and at worst has been perverted into a weapon of political warfare, 63/ instead of being an instrument to liberate, unite and reconcile mankind. What should, and can be done?

76. One basic difficulty is that although the Convention concentrates on punishment of the crime, this is nearly meaningless at the international level in the absence of an International Penal Tribunal. Hence, it is only the Governments of States in the territories of which the crime was committed, that can institute proceedings for its punishment. However, in the case of "domestic" genocides, these are generally committed by or with the complicity of Governments, with the bizarre consequence that the Governments would be required to prosecute themselves. In actual practice, mass murderers are protected by their own Governments, save in exceptional cases, where these Governments have been overthrown. Thus in Equatorial Guinea, Macias was found guilty of a number of crimes, including genocide, and executed. 64/ In Kampuchea, however, Pol Pot is still at large, protected by his own army, and presumably also in some measure, by the continued international recognition of his régime.

77. There exists support for a Supplementary Convention or Protocols to improve the Convention, through consensus would be hard to achieve amongst all Governments. 65/ It is possible, and indeed to be hoped, though improvable, that

61/ A. and J. Tusa, op.cit.

62/ Dr. Lack, statement for the World Jewish Congress to the Sub-Commission, E/CN.4/Sub.2/1984/SR.4.

63/ Leo Kuper, op.cit.

64/ In a report on The Trial of Macias in Equatorial Guinea (International Commission of Jurists, Geneva, 1979), the Legal Officer of the ICJ, Dr. Alejandro Artucio, concluded (i) that Macias was wrongly convicted of genocide, the Convention not having been signed or ratified by Equatorial Guinea, nor the crime of genocide incorporated in its laws, and (ii) that though mass murder was established, the intentional destruction of national, ethnic or religious groups, in terms of the Convention, was not proved. In an article on "The Human Rights Commission: The Equatorial Guinea Case", Human Rights Quarterly (Vol. 3, No. 1), Randall Fegley expressed the view that the action of the Macias régime against two ethnic groups, the Bubis and Fernandinos, did fall within the United Nations definition of genocide but the author did not address the specific issue of the validity of the charge of genocide under the laws of Equatorial Guinea. In February 1984 it was reported that two former leaders were being tried in absentia for genocide in Bolivia.

65/ Support for various additional protocols was received from the replies, inter alia, of the Governments of El Salvador and of Spain.

the existence of the Convention may have deterred more genocide from being committed. But as in attitudes to improving United Nations human rights' effectiveness generally, too often respect for State sovereignty, domestic jurisdiction and territorial integrity can, and does, take precedence over the wider human concern for protection against genocide. In these circumstances, there is a need for some new ideas or for institutions, relatively independent of the deliberations of the delegations of member States, such as an International Penal Court, and a High Commissioner for Human Rights, or else for forms of organized action outside the United Nations, by for example, the international non-governmental organizations. The recent United Nations support for the new Convention on Torture (reproduced as an appendix to this study) may afford fresh grounds for optimism, as well as some useful parallels. It is important to be practical and realistic, but also to work hard and without delay in view of the gravity of the subject.

C. Proposals

1. Prevention

78. Punishment after the event does not meet the priority problem of preventing great loss of life. Those personalities who are psychologically prepared to commit genocide are not always likely to be deterred by retribution, at least in this world. Perhaps, the Convention's most conspicuous weakness is that it insufficiently formulates preventive measures. Such international short-term and long-term action would need to relate to different stages in the evolution of a genocidal process - anticipation of its happening; early warning of its commencement; and action to be taken at the outset of or during a genocide itself to stop it.

79. Intelligent anticipation of potential cases could be based on a data bank of continuously updated information, which might enable remedial, deterrent or averting measures to be planned ahead. Reliable information is the essential oxygen for human rights: this could be facilitated by the development of a United Nations satellite communications network. Comparisons could be made with the lessons, both positive and negative, of previous cases. ^{66/} Experience international conciliators or mediators, from the United Nations and its agencies or other bodies such as the International Committee of the Red Cross, could serve to defuse tension. ^{67/}

80. H.G. Wells rightly stated that "Human history becomes more and more a race between education and catastrophe". Another highly important area of study is interdisciplinary research (to be co-ordinated perhaps by the United Nations University) into the psychological character and motivation of individuals and

^{66/} Prof. I. Charny of the Institute of the International Conference on the Holocaust and Genocide in Israel has proposed such a body, and a similar new non-governmental organization, International Alert and SIFEC, has in 1985 in fact been established in London with Martin Ennals as Secretary-General.

^{67/} See Sydney Bailey, "Non-official Mediation in Disputes" (International Affairs, Vol. 61, 1985).

groups who commit genocide or racism, or the psychopathic dehumanizing of vulnerable minorities or scapegoats. ^{68/} In all human rights work, it is essential to go beyond condemnation of violations to analysing their causation.

81. The results of such research could help form one part of a wide educational programme throughout the world against such aberrations, starting at an early age in schools. Without a strong basis of international public support, even the most perfectly redrafted Convention will be of little value. ^{69/} Conventions and good Governments can give a lead, but the mobilization of public awareness and vigilance is essential to guard against any recurrence of genocide and other crimes against humanity and human rights. There has recently occurred an encouraging change from preoccupation with particular genocides to wider concern for effective measures to deal with the general phenomenon itself.

82. As a further safeguard, public awareness should be developed internationally to reinforce the individual's responsibility, based on the knowledge that it is illegal to obey a superior order or law that violates human rights. Although some Governments may be reluctant to agree, such a concept has been an honoured tradition in many different parts of the world. Gandhi's and Martin Luther King's ideas on civil disobedience to unjust laws were developments of the earlier thinking of people such as Thoreau, who went to prison rather than acquiesce in the forced return of runaway slaves to their owners. (Thoreau in turn based his philosophy on the ideas of Granville Sharp who in the 1770's resigned from the London War Office rather than authorize arms to put down the American revolution; Sharp's ideas in turn helped to inspire Jefferson and others who drafted the Declaration of Independence.) All these people followed their conscience, at personal danger; the safeguarding of human rights in the final resort will always need to depend upon such integrity and courage.

2. Early warning

83. In cases where evidence appears of an impending genocidal conflict, mounting repression, increasing polarization or the first indications of an unexpected case, an effective early warning system could help save several thousands of lives. This requires an efficient co-ordinating network, maintained in a state of permanent readiness, which could possibly also watch for early indications of mass famine and exoduses of refugees in conjunction with bodies such as the Office of the United Nations Disaster Relief Co-ordinator and the International Committee of the Red Cross.

84. On an early warning alert being received, the steps to be taken could include: the investigation of allegations; activating different organs of the United Nations and related organizations, both directly and through national delegations, and making representations to national Governments and to interregional organizations for active involvement; seeking support of the

^{68/} See e.g. E. Fromm, The Anatomy of Human Destructiveness (London, Cape, 1974); T. Adorno, The Authoritarian Personality (New York, Harper, 1950).

^{69/} See J. Lieblein and others in I. Charny ed., Toward the Understanding and Prevention of Genocide, op.cit..

international press in providing information; enlisting the aid of other media to call public attention to the threat, or actuality, of genocidal massacre; asking relevant racial, communal and religious leaders, in appropriate cases, to intercede, and arranging the immediate involvement of suitable mediators and conciliators at the outset. Finally, there are the possibility of sanctions which could be applied with public support, by means of economic boycotts, the refusal to handle goods to or from offending States, and selective exclusion from participation in international activities and events. Representations would also be made to Governments to enlist their support in the application of sanctions. 70/

3. An international body to deal with genocide

85. Cogent support has been expressed for the establishment of a new impartial and respected international body whose special concern would be to deal over-all with genocide. Such a body could perhaps be created under the "competent organs" Article VIII of the Convention. Support for such a body has been expressed, inter alia, by the Government of Spain. 71/ A constructive possible formulation for such a body has been proposed by a non-governmental organization, the Baha'i International: 72/

"We believe that, at the present time, the most effective means of preventing and controlling genocide is through the establishment by the United Nations of a new international body dealing exclusively with genocide and charged with responsibility for considering allegations of genocide, carrying out investigations in connection with those allegations and taking urgent steps to put a stop to genocide wherever it is known to be taking place. Since secrecy is the greatest ally of any Government that seeks to engage in genocide, and international publicity and condemnation the greatest enemy, it might be expected that the opprobrium that would attach to any Government which was identified as a violator of the Convention by a high-level international body of known competence and impartiality would, on its own, act as a deterrent to that Government, quite apart from any action that the international body itself was able to generate. We accordingly suggest that consideration be given to revising the existing Convention by adding to it appropriate provisions for the creation of a Committee on Genocide whose existence would derive directly from the Convention and which would concern itself exclusively with the subject-matter contained in its parent Convention.

70/ L. Kuper, International Action against Genocide, op.cit.; I. Charny in J. Porter, ed., Genocide and Human Rights, op.cit..

71/ Reply to the present study's questionnaire. Sadruddin Aga Khan recommended in his Mass Exodus Study (op.cit. supra) that the United Nations should create a Special Representative for Humanitarian Questions (whose task would basically be to forewarn, monitor and depoliticize humanitarian problems), and also a corps of humanitarian observers.

72/ E/CN.4/Sub.2/1984/NGO/9. Most of the human rights instruments adopted subsequent to the Genocide Convention provide for a review committee of experts.

We envisaged that this Committee would concern itself primarily with questions of fact rather than with questions of law. It would, we envisage, hold a 'watching brief' on genocide: it would be the body to which any allegations of genocide were automatically referred and it would be responsible for investigating those allegations. In order to enable it to react effectively in cases where there were strong and reliable indications that genocide was, in fact, taking place, the Committee should, we suggest, be empowered to (a) invite the State party concerned to submit its observations with regard to the allegations of genocide; and (b) if it decided that the situation warranted it, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently. In short, we envisage the Committee being given powers in this regard similar to those proposed for the Torture Committee in the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

We envisage that the Committee on Genocide, in common with other bodies created under the provisions of international human rights instruments (which it would very closely resemble in membership and procedures), would report annually to the General Assembly, but we suggest that the Committee should also be empowered to bring any situations of urgency to the immediate attention of the Secretary-General of the United Nations. We believe that the advantages of establishing a Committee under the provisions of the Convention would be:

- (a) To remove the subject of genocide as far as possible from the political arena;
- (b) To attract a high-calibre 'independent expert' membership;
- (c) To speed the international response to genocidal situations by obviating the necessity for cases of genocide to proceed through the hierarchical mechanisms of the United Nations human rights system;
- (d) To provide the high-profile, international focus for genocide that is currently lacking.

We are, of course, aware that any proposed revision of the existing Convention must be requested by a State party and must then win the approval of the United Nations General Assembly and we are fully conscious of the difficulties attendant upon obtaining such approval. Nevertheless, we feel that it is appropriate to consider this course of action, bearing in mind the status of genocide as the major 'crime against humanity', the disturbing fact that genocide persists in the contemporary world, and the urgent need for determined international action to combat it. Failing agreement on the creation of a Committee on Genocide under the provisions of the Convention, we would suggest that a Working Group on Genocide be established under the aegis of the Commission on Human Rights."

4. An International Human Rights Tribunal or Court

86. Support has been expressed by, inter alia, the Government of El Salvador that:

"Regarding the possibility of setting up an international penal tribunal as proposed in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, the Government of El Salvador considers that, in view of the international importance of this crime, it would be appropriate to set up an international penal court competent to judge this and similar crimes. However, the binding and enforceable character of the decisions of such a court would require to be formally stated in the international instrument establishing it." 73/

The Government of Morocco also suggests "the establishment of a full-scale international court with a prosecutor's office and an investigating arm". 73/ The Government of Chad likewise supports the idea of an international penal tribunal and an international body entrusted with carrying out investigations. 73/ It might obviate much argument about which massacres technically are, or are not, genocide, if such a Tribunal or Court dealt with all major crimes against humanity.

87. Other opinion and replies indicate a preference for instituting universality of jurisdiction, or for both proposals to provide a "fail-safe" or double system of safeguard.

88. The previous study (E/CN.4/Sub.2/416) concluded with a recommendation for universal jurisdiction:

"... since no international criminal court has yet been established, the question of universal punishment should be considered again if it is decided to prepare new international instruments for the prevention and punishment of genocide, since in practice, even if a Government were to commit serious acts of genocide there would be, as there has always been, some doubt as to the possibility of indicting it, unless it were replaced by a régime that would take the necessary legal action. While recognizing the political implications of the application of the principle of universal punishment for the crime of genocide, the Special Rapporteur remains convinced that the adoption of this principle would help to make the Genocide Convention more effective. Moreover, the adoption of the principle should not automatically entail the obligation to prosecute persons guilty of genocide. It would merely be an option that could be used, particularly in the case of Governments, in the light of all the circumstances and of the advisability of taking appropriate action. Moreover, a new international instrument on genocide, establishing the principle of universal jurisdiction, would offer the choice between extradition and the punishment of the crime by the State on whose territory the guilty person was found." 74/

89. The one indefensible course would be to adopt neither option.

90. Such a reform would of course not preclude stronger measures in each nation's own laws against genocide, which should also be urged.

73/ Replies to questionnaire for the present study.

74/ E/CN.4/Sub.2/416, paragraph 627.

D. Conclusions

91. The reforms recommended will, like most things worthwhile in human progress, not be easy. They would however be the best living memorial to all the past victims of genocide. To do nothing, by contrast, would be to invite responsibility for helping cause future victims.

PART IV: LIST OF RECOMMENDATIONS

92. The principal recommendations of the present Special Rapporteur are contained in paragraphs 30, 33, 37, 41, 53, 54, 64, 70, 79, 80, 81, 82, 83-84, 85, 86-89, 90 and 91 supra.

Appendix

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN
OR DEGRADING TREATMENT OR PUNISHMENT */

(Adopted by the General Assembly on 10 December 1984)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights 1/ and article 7 of the International Covenant on Civil and Political Rights, 2/ both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, 3/

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has

*/ General Assembly resolution 39/46.

1/ Resolution 217 A (III).

2/ Resolution 2200 A (XXI), annex.

3/ Resolution 3452 (XXX), annex.

committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

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

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

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the Chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c) the Committee shall make available its goods offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report:

- (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
- (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and immunities of the United Nations. 4/

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications, and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.
