



**UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL**



Distr.
LIMITED

E/CN.4/Sub.2/L.583
25 June 1973
ENGLISH
ORIGINAL: FRENCH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Twenty-sixth session

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

Progress report by Mr. Nicodème Ruhashyankiko, Special Rapporteur

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
INTRODUCTION	1 - 14	3
I. HISTORICAL SURVEY	15 - 36	6
II. THE CONCEPT OF THE CRIME OF GENOCIDE IN THE 1948 CONVENTION	37 - 126	12
A. Preliminary observations	37 - 39	12
B. The definition of genocide (article II of the Convention)	40 - 103	13
1. The type of definition	40 - 42	13
2. Illustrative or exhaustive enumeration of acts of genocide	43 - 45	14
3. Genocide as the destruction of a national, ethnic, racial or religious group	46 - 84	14
(a) The extent of the destruction of a group	46 - 51	14
(b) The groups protected	52 - 75	16

CONTENTS (continued)

	<u>Paragraphs</u>	<u>Page</u>
(i) National group	56 - 65	17
National group and national origin	56 - 61	17
National group and national minorities	62 - 65	18
(ii) Ethnic group and racial group	66 - 73	19
(iii) Religious group	74 - 75	21
(c) The problem of political groups . .	76 - 84	21
4. Acts constituting the crime of genocide	85 - 92	24
5. The subjective element	93 - 103	25
(a) Intent	93 - 97	25
(b) Motive	98 - 103	27
C. Acts punishable under the Convention (article III)	104 - 120	28
1. Some problems concerning the text of article III	104 - 109	28
2. Preparatory acts	110 - 113	30
3. Public propaganda in favour of genocide	114 - 120	31
D. Command of the law or superior orders (question raised in relation to article IV of the Convention)	121 - 126	32
III. THE RELATIONSHIP BETWEEN GENOCIDE AND WAR CRIMES, CRIMES AGAINST HUMANITY AND <u>APARTHEID</u> .	127 - 149	35
A. War crimes	127 - 134	35
B. Crimes against humanity	135 - 143	37
C. <u>Apartheid</u>	144 - 149	40

ANNEX

PLAN FOR THE COLLECTION OF INFORMATION AND VIEWS

INTRODUCTION

1. In his preliminary report (E/CN.4/Sub.2/L.565) to the Sub-Commission at its twenty-fifth session, the Special Rapporteur stated the procedure he intended to follow for the preparation of the study, indicated the approach he proposed to adopt in the study and gave a historical outline of the origin of the concept of genocide and of United Nations activities for its prevention and punishment. The annex to the report contained the plan for the collection of information and views.
2. The Sub-Commission considered the preliminary report at its 658th and 659th meetings (E/CN.4/Sub.2/SR.658 and 659) and, in its resolution 4 (XXV), requested the Special Rapporteur to continue his study and to present to the Sub-Commission, at its twenty-sixth session, a progress report, taking into account the views expressed in the debate on this question during the twenty-fifth session of the Sub-Commission.
3. After the close of the twenty-fifth session of the Sub-Commission, the Special Rapporteur, taking into account the comments made by members of the Sub-Commission during the debate, modified and expanded the plan for the collection of information and views. The revised plan is annexed to the present report.
4. At the request of the Special Rapporteur, the Secretary-General addressed to Governments of States Members of the United Nations or members of specialized agencies, on 20 November 1972, a note verbale stating that he would be grateful for any help which the Governments consulted could give the Special Rapporteur in the preparation of his study and that the Special Rapporteur would particularly appreciate receiving information and views on each of the points mentioned in the plan for the collection of information and views which was annexed to the note. A list of the criteria applicable to the study (E/CN.4/Sub.2/L.565, para. 5) was also annexed to the note.
5. As at 31 May 1973, the Secretariat had received replies from the following countries: Argentina, Austria, Bulgaria, Central African Republic, Congo, Cyprus, Fiji, Finland, Germany, Federal Republic of, Iraq, Israel, Italy, Kuwait, Malawi, Netherlands, New Zealand, Philippines, Poland, Republic of Viet-Nam, Romania, Rwanda, Tonga, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics.
6. The Director of the Division of Human Rights also addressed a letter on 27 November 1972, on behalf of the Secretary-General, to the executive heads of the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) inviting them to make available to the Special Rapporteur any documentation they might consider relevant to the study, including information and views on each of the points mentioned in the plan for the collection of information and views. The Secretariat has received the replies of the ILO and UNESCO.

7. A similar letter was addressed on 27 November 1972 to the executive heads of the following intergovernmental regional organizations: Council of Europe, League of Arab States, Organization of African Unity, Organization of American States. As at 15 May 1973, the Secretariat had received the replies of the Organization of American States and the Organization of African Unity.

8. A similar letter was also addressed, on 13 November 1972, to a large number of non-governmental organizations in consultative status with the Economic and Social Council. As at 15 May 1973, the Secretariat had received the replies of the following non-governmental organizations: International Association for Educational and Vocational Guidance, International Association for Social Progress, International Association of Penal Law, International Bar Association, International Commission of Jurists, International Council on Social Welfare, International Federation of University Women, International Union for the Scientific Study of Population, Société internationale de prophylaxie criminelle, World Confederation of Organizations of the Teaching Profession, World Fellowship of Buddhists and World Young Women's Christian Association.

9. In view of the limited number of replies received, the Special Rapporteur has singled out, for the purposes of the present report, questions that can be studied in the absence of more comprehensive material from the Governments and organizations which had been approached for information. Accordingly, this report comprises only three chapters, the first containing a historical survey, the second dealing with the concept of the crime of genocide and the third dealing with the relationship between genocide, war crimes and crimes against humanity. The Special Rapporteur was guided in his choice by views expressed at the twenty-fifth session of the Sub-Commission, during the discussion on his preliminary report, when it was suggested that the study should include, inter alia, a historical part, 1/ a consideration in depth of the concept of genocide and of the 1948 Convention, 2/ and an analysis of the specific features which differentiate it from war crimes and from crimes against humanity generally. 3/ The Special Rapporteur felt that it would also be useful to include in chapter III a discussion of the relationship between genocide and apartheid, to which he referred briefly in the preliminary report (E/CN.4/Sub.2/L.565, paras. 69-72) and, in addition, to indicate the latest developments with regard to the elaboration of a draft convention on the elimination and punishment of the crime of apartheid, to which he alluded in paragraph 83 of that report.

1/ See the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights on its twenty-fifth session (E/CN.4/1101), para 134.

2/ Ibid., paras 139 and 140.

3/ Ibid., para. 139.

10. Where the historical survey is concerned, the Special Rapporteur appreciated that, as noted in comments made at the 658th and 659th meetings of the Sub-Commission, it is difficult to start with the modern concept of genocide and apply it to historical examples. A thorough and systematic study of the history of genocide would mean considering each case in depth, in the light of the original historical documents and against the economic, social and intellectual background of the age in which it occurred.

11. Because of its magnitude and the amount of time it would take such a study would clearly exceed the scope of the report. And unfortunately, so far as the Special Rapporteur is aware, no one has hitherto undertaken to inquire into whether the acts mentioned as examples of genocide in books and articles on the subject come within the definition of genocide. That being so, and bearing in mind the main purpose of the report, which is to study primarily questions relating to the prevention and punishment of genocide as a contemporary phenomenon occurring in conditions that are often different from those of ages past, the Special Rapporteur does not believe that he should take it upon himself to make a systematic in-depth inquiry into the history of genocide, unless the Sub-Commission should so decide.

12. Accordingly, the Special Rapporteur intends to confine himself to a brief historical survey, mentioning only the examples most referred to in the majority of the works on genocide that were available to him. Such references are entirely without prejudice to his position with respect to the historicity of the acts reported by the authors.

13. With regard to chapter II, the intention of the Special Rapporteur was to consider, in the content of an in-depth study of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, some problems which arose during the final elaboration of the text of articles II to IV. The purpose is not only to go more deeply into the problems noted in the preliminary report E/CN.4/Sub.2/L.565, paras. 37-46 (with the exception of the question of cultural genocide, which will be discussed in a forthcoming report), but also to deal with other problems, so that the study may be of use in connexion with the adoption of new international instruments as envisaged in paragraph 79 of the preliminary report.

14. Chapter III deals with the relationship between genocide, on the one hand, and war crimes, crimes against humanity and apartheid, on the other hand, with a view to enabling the specific features of genocide to be better identified.

I. HISTORICAL SURVEY

15. In the preamble of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, it is noted that "at all periods of history genocide has inflicted great losses on humanity".

16. While the concept of genocide is a recent one, the acts which it covers are as old as the history of mankind itself.

17. Without going back to the dawn of man, it can be seen from a number of historical facts that the course of human history has too often been marked by numerous cases where national, ethnic, racial or religious groups were destroyed; under the terms of the 1948 Convention, any such act constitutes an essential element of the crime of genocide. 4/

18. One writer states that:

"... since the days of prehistory, when a horde of hominids, coveting the hunting-ground of a rival horde, slaughtered them down to the last infant, countless dreadful cases of genocide have been committed, are being committed, and will continue to be committed until the human race becomes aware of its solidarity and its oneness and embodies them in institutions and laws which are elements of a world order...

"Without even dwelling on the exploits of the great slaughterers TAMERLANE, GENGHIS KHAN and ATTILA, let us simply note that, throughout antiquity, it was customary to destroy or enslave conquered peoples; that it was very rare for writers to be able to praise the clemency of monarchs and military commanders for sparing a few captives and freeing them; that, as late as the Middle Ages and the Crusades, the inhabitants of towns which had been besieged and taken by assault were put to the sword, and their women raped, merely for having defended themselves; that the Israelites, on express instructions from JEHOVAH, massacred the Philistines and the Midianites; that Carthage was destroyed; that NERO and other Roman emperors

4/ See paragraphs 46-84 below.

persecuted the Christians, the Crusaders put infidels to death, Protestants killed Catholics and Catholics Protestants...". 5/

19. While this is not the place to consider the train of massacres perpetrated throughout mankind's history, it is nevertheless desirable to recall the few most important factors which helped to create a climate in which this phenomenon emerged in its true light as a violation of the essential human right from which all others derive: the right to life.

20. Among these factors, war seems to occupy a predominant place. As has been noted, 6/ during antiquity war was often the only form of relations between certain peoples, even between peoples of common origin, and its purpose was generally to annihilate, exterminate or enslave another people. Thus, war opened the door to many excesses and massacres which history has recorded.

21. Although trends towards making war more humane appeared during the Middle Ages, "it required a long period of evolution in civilized society to mark the way from wars of extermination, which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and States". 7/ It is only in modern times that international law has

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

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

7/ Raphael Lemkin, op. cit., p. 80.

prohibited any war of aggression,^{8/} which the Charters of the International Military Tribunals declared to be a crime against peace and, as such, to be condemned. 9/

22. However, it should be noted that, since 1914, war has in fact been transformed more and more into "total war", "military operations having been extended from the purely military plane... to the economic, commercial, financial and even intellectual planes, to what has been called the 'potential' for war...". 10/

23. The relationship between genocide and total war is sufficiently illustrated by the fact that the crime of genocide was committed in the territories occupied by the Nazis, who were conducting such a war. 11/ The almost limitless destructive power of modern weapons tends to accentuate the exterminatory nature of war, which can lead to the destruction of human groups.

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

"... the colonial troops maintained their authority by terror - by perpetual massacre. These massacres were genocidal in character: they aimed at the destruction of 'a part of an ethnic, national or religious' group, in order to terrorize the remainder and to wrench apart the indigenous society...". 12/

25. The same writer also observes that the value of indigenous peoples as a work-force receiving almost no remuneration protects them to a certain extent from physical genocide. 13/

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

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

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

11/ Raphael Lemkin, loc. cit.

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

13/ Loc. cit.

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

"... 'exemplary' genocide, if one may use the term, must be distinguished from the concealed, more or less inconspicuous forms of genocide, the cunning and insidious aspects of racism, which prepare the ground for genocide. In short, genocide is only an extreme case of racism. At the same time, racism has many faces, which are sometimes masked and contradictory". 14/

27. As is clear from paragraph 18 above, there is a close relationship between religious intolerance and genocide. According to one writer:

"... after obtaining the tolerance they sought, the Christians quickly became extremely intolerant towards non-Christians. Some demanded the complete destruction of the heathen...". 15/

28. Another writer states:

"In the Middle Ages, the burning of heretics constituted religious genocide, as is illustrated by the history of the Spanish Inquisition". 16/

29. Along the same lines, the following examples are also given:

"Another example of Genocide: the destruction of such religious sects as the Albigenses and the Waldensians whose persecutions were carried to extreme cruelty in 1173. New born children were decapitated, women and old people accused of heresy were beheaded or mutilated (tongues cut, eyes put out). Women were forced to abortion under the pretext that they were possessed by demons. 17/

"With the Crusades began the pogroms against Jews who refused baptism. In 1065, a French expedition sent in pursuit of the Moors in Spain began by massacring Jews. However, it was primarily the first two Crusades that gave rise to cruel persecution on the Rhine and the Danube. Pierre DE CLUNY wrote to Louis VII: 'What is the use of pursuing the enemies of Christianity in distant countries while the Jews among us, who scorn Christianity and its sacraments, are left unpunished.'

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

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

16/ H. Baruk, "Le Congrès international contre le génocide", Etudes internationales de psycho-sociologie criminelle, No. 16-17 (1969), p. 5.

17/ Minerva Cervantes Rio, "Etude sur l'article 175 du Code pénal mexicain 'génocide'", Etudes internationales de psycho-sociologie criminelle, No. 16-17 (1969), p. 51.

.....

"Religious genocide was also perpetrated against the Huguenots on St. Bartholomew's Day (1572). This gave Pope Gregory XIII occasion to celebrate a Te Deum. The persecution of Protestants in Spain was also a case of genocide." 18/

30. Passing to the modern era, one may note the existence of relatively full documentation dealing with the massacres of Armenians, which have been described as "the first case of genocide in the twentieth century". 19/

31. Without undertaking a detailed analysis of the genocide committed by the Nazis 20/ - which would exceed the scope of this historical survey - it should be noted that the idea of genocide was an integral part of the racist ideology of national socialism and of its conception of war as a means of colonizing the occupied territories after their populations had been exterminated or decimated. The Nazi intention to destroy nations, races and religious groups in accordance with a pre-established plan was manifested well before the Second World War. 21/ However, as one writer has noted, it was the war which offered the Nazis the most appropriate occasion for carrying out their policy of genocide. 22/

32. In order to destroy national, ethnic, racial or religious groups, the Nazi occupying authorities drew up a veritable genocide plan which was adapted to specific situations in the various countries. 23/

18/ Dr. Bauer, loc. cit., p. 10.

19/ Victor Gardon, "Le premier génocide du XXème siècle", Etudes internationales de psycho-sociologie criminelle, No. 14-15, 1968, pp. 57-65. See also, inter alia, Prof. M. G. Nersisian ed., Genotsid armyan v osmanskoy imperii: Sbornik dokumentov i materialov, Izdatelstvo AN Armyanskoy SSR, Erevan, 1966; Dickran H. Boyajian, Armenia: The Case for a Forgotten Genocide, Educational Book Crafters, Westwood, New Jersey, 1972. Some of the documents reproduced in the above-mentioned works also relate to persecution and massacres of Armenians during the nineteenth century.

20/ See also the preliminary report (E/CN.4/Sub.2/L.565), paras. 12-22.

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

22/ R. Lemkin, op. cit., p. 81.

23/ Loc. cit.

33. On the basis of the evidence gathered for the Nuremberg trial, one writer has described the "delayed-action genocide" committed against the peoples of the Soviet Union and Poland, aimed at sapping their biological vitality, particularly through measures intended to prevent births among those peoples and through forcible transfers of children. He also described the genocide consisting of the extermination of six million Jews and of acts of mass destruction against the peoples of the Soviet Union, the Polish people and the gypsies. 24/

34. The preliminary report (paragraphs 18-21) indicated the references which were made to the crime of genocide at the Nuremberg trial, in the indictment, in the concluding speeches by the British and French Prosecutors and in the judgement. The trials of other Nazi war criminals by the courts of the allies also illustrate fully the acts of genocide and the methods used to commit them. 25/

35. For example, in the trial of Ulrich Greifelt and others, 26/ the accused were convicted, inter alia, of crimes against humanity carried out as part of a systematic programme of genocide aimed at the destruction of foreign nations and ethnic groups, in part by extermination and in part by elimination and suppression of national characteristics. In the trial of Gauleiter Artur Greiser, 27/ the defendant was found guilty, inter alia, of repression, genocidal in character, of the religion of the local population by mass murder and incarceration in concentration camps of Polish priests, by restriction of religious practices to a minimum, and by destruction of churches, cemeteries and the property of the Church.

36. Thus, the crime of genocide committed by the Nazis, which aroused the indignation of mankind, can be seen as a decisive element in the train of events which led to United Nations efforts to adopt international measures for preventing a repetition of that crime and ensuring that it was punished.

24/ See J. Billig, L'Allemagne et le génocide (Plans et réalisations nazis), éditions du Centre, Paris, 1950, pp. 32-85.

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

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

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

II. THE CONCEPT OF THE CRIME OF GENOCIDE IN THE 1948 CONVENTION

A. Preliminary observations

37. The Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide defines the essential elements of this crime in articles II to IV, which read as follows:

"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."

38. The most important problems raised during the final elaboration of these articles by the Sixth Committee of the General Assembly (third session, second part) will be examined with special reference to the amendments submitted to the text of the draft prepared by the Ad Hoc Committee on Genocide 28/ and to the arguments advanced for and against those amendments. A number of opinions expressed by writers on international penal law and relating to these articles will also be mentioned.

39. Reference will be made to other United Nations instruments and to the opinions of legal experts in order to clarify the meaning of certain terms used in the Convention.

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

1. The type of definition^{29/}

40. One of the questions raised during the debate in the Sixth Committee was whether the definition of the crime of genocide should enumerate acts of genocide or whether it should be of a general character. 30/ A general definition proposed in one amendment, which was withdrawn, read as follows: "Genocide is an attack on life directed against a human group, or against an individual as a member of a human group, on account of the nationality, race, religion or opinions of such group or individual" (A/C.6/224). 31/

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

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

28/ See document E/794.

29/ See also the preliminary report (E/CN.4/Sub.2/L.565), para. 39.

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

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

2. Illustrative or exhaustive enumeration of acts of genocide

43. Another question raised during the debate in the Sixth Committee concerning the definition of genocide was whether to adopt an illustrative or an exhaustive definition of acts of genocide. 32/ Two amendments aimed at the adoption of an illustrative definition (A/C.6/232/Rev.1 and A/C.6/223 and Corr.1) were proposed but, after being discussed, were not accepted.

44. Among the arguments advanced in favour of an illustrative enumeration were (a) that it was impossible to give a complete enumeration of acts of genocide because, genocide being a new concept, one could not foresee the means to which the perpetrators of that crime might resort, and (b) that a precedent could be found in the Charter of the Nuremberg Tribunal, 33/ which, in listing war crimes, used phraseology allowing for the punishment of perpetrators of crimes other than those set forth in the enumeration.

45. It was argued on the other hand that an exhaustive enumeration was necessitated by the principle nulla poena sine lege, which prevailed in national penal legislation, and that it would be impossible to provide for the punishment of crimes not specified in the criminal code. Moreover, an illustrative enumeration would leave each State free to define as genocide acts other than those enumerated, with the unfortunate result that one and the same act might be considered genocide in one country and not in another. It was also observed that an advantage of the exhaustive enumeration method would be that it allowed for the subsequent amendment of the Convention by the addition of further acts to the current enumeration.

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

(a) The extent of the destruction of a group

46. On the question of the extent to which a group must be destroyed before an act committed with that end in view can be termed genocide, it was generally agreed, during the debate in the Sixth Committee, that it was not necessary for the act to be aimed at a group in its entirety. It was sufficient that an act of genocide should have as its purpose the partial destruction of a group. Accordingly, an amendment (A/C.6/228) proposing the insertion of the words "in whole or in part" after the words "to destroy" in the draft of the Ad Hoc Committee on Genocide was adopted. The purpose of the amendment was to make it clear that it was not necessary to kill all the members of a group in order to commit genocide. 34/

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

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

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

47. However, the question was raised whether genocide existed when a single individual was the victim of an act aimed at the destruction of the group. During the elaboration of the Convention, 35/ it was argued that genocide existed as soon as an individual became the victim of an act of genocide; if there was intent to commit the crime, genocide existed even if only a single individual was the victim. The use of the expression "members of the group" in the second paragraph of the article (subparagraphs (a) and (b)) would indicate that genocide occurred as soon as a member of the group was attacked.

48. A number of writers also believe that the Convention should be interpreted as applying to cases of "individual genocide". One writer takes the view that the words "in part", with the confirmation supplied by the reference to "members of the group", would permit the theoretical inference that even an act of individual genocide would be covered by the Convention. Even if in actual cases it was not easy to establish an infallible criterion, since an act of individual genocide would also, of course, be a common crime, the principle should be accepted. The same writer notes that the question would arise only in rare and rather hypothetical border-line cases. 36/

49. Another writer believes that, even though the purpose of the Convention is the prevention and punishment of acts of genocide directed against large numbers of persons, nothing in the Convention would prohibit interpreting its provisions and applying them to individual cases of murder. Any such murder should be termed genocide if it was committed by reason of the fact that the victim was a member of one of the groups specified in the Convention and with the intent to commit similar acts in the future and in connexion with the first crime. The material consideration was that the mens rea of the culprit must be directed against the life of more than one member of the group, even though the result was limited to one casualty. 37/

50. It was argued on the other hand that, where a single individual was affected, it was a case of homicide, whatever the intention of the perpetrator of the crime might be, since the concept of genocide was characterized by the intention to attack a group. In addition, it was noted that, inasmuch as each individual was

35/ Ibid., 69th and 73rd meetings. See also the amendment reproduced in paragraph 40 above.

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

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

in fact a member of a group, it would be difficult to establish whether or not the murder of an individual was genocide. 38/

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

(b) The groups protected

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

53. During the elaboration of the Convention, it was observed that genocide should generally be regarded as a crime committed against a group of individuals permanently possessing certain common features. Such groups should be easily identifiable by racial or national features, because they constituted distinct, clearly determinable communities. 39/

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

"What characterizes a nation is not only a community of political destiny, but, above all, a community marked by distinct historical and cultural links or features. On the other hand, a 'territorial' or 'state' link (with the State) does not appear to me to be essential. 'Race' means a category of persons who are distinguished by common and constant, and therefore hereditary, features. The concept 'ethnic' has a wider meaning; it designates a community of persons linked by the same customs, the same language and the same race (from the Greek ethnos = people)." 40/

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

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

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

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

(i) National group

National group and national origin

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

57. During the elaboration of the final text of that article by the Third Committee, several proposals, which were not adopted, sought to specify the meaning of the words "national or ethnic origin". One proposal would have had the actual text of the Convention state that the expression "national origin" did not mean "nationality" or "citizenship". 41/ Another proposal sought to eliminate the word "national" and to insert, after the words "ethnic origin", a reference to nationalities in multinational States, by applying the term "nationalities" to citizens of different ethnic and cultural origins. 42/ Those proposals were intended to specify that the words "national origin" were used not in the politico-legal use of "nationality", but in a sociological sense.

58. It was argued on the other hand, that such specifications in the actual text of the Convention were not necessary. The words "national origin" and "nationality" had been widely used in international instruments and in literature as relating, not to persons who were citizens of or held passports issued by a given State, but to those having a certain culture, language and traditional way of life peculiar to a nation but living within another State. 43/ Furthermore, the opinion was expressed that "national origin" differed from "nationality" in that national origin related to the past - the previous nationality or geographical region of the individual - while nationality related to present status. "National origin" was narrower in scope than "ethnic origin"; the latter implied the existence of racial and cultural characteristics. 44/

59. Another opinion, however, was that "national origin" might also be equated with the term "nationality", which in many countries had a very specific legal meaning. 45/

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

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

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

44/ Ibid., para. 23.

45/ Ibid., para. 15.

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

"For the practical purposes of the interpretation of the Convention of 1965, the three terms 'descent', 'national origin' and 'ethnic origin' among them cover distinctions both on the ground of present or previous 'nationality' in the ethnographical sense and on the ground of previous nationality in the 'politico-legal' sense of citizenship." 46/

61. This distinction between "national origin" and "nationality" also seems evident from paragraphs 2 and 3 of article 1 of the 1965 Convention, 47/ which refer to "nationality" as a person's current political and legal status.

National group and national minorities

62. Another question which appears to warrant consideration is the relationship between the expressions "national group" and "national minorities". One opinion expressed during the elaboration of the Genocide Convention by the Sixth Committee was that "national group" meant the same as "national minorities". 48/ Similarities or analogies can be established between national groups and national minorities. A definition of "national minorities" could therefore serve to clarify the meaning of the expression "national group" used by the 1948 Convention.

63. There have been a number of attempts by the Sub-Commission to elaborate a definition of the term "minority", but the Commission on Human Rights has never taken a decision on the question. 49/

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

47/ Article 1, paragraph 2 reads as follows:

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

Paragraph 3 reads:

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

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

49/ The various attempts the Sub-Commission has made with a view to elaborating a definition of minorities are presented in the preliminary report on the study on the rights of persons belonging to ethnic, religious and linguistic minorities (E/CN.4/Sub.2/L.564), paras. 56-74.

64. According to one definition submitted by the Sub-Commission, 50/ the term "minority" includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.

65. For the purposes of the study on the rights of persons belonging to ethnic, religious and linguistic minorities, and in a manner which takes account of the viewpoints expressed during the Sub-Commission's debates, an ethnic, religious or linguistic minority is considered to be a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population. 51/

(ii) Ethnic group and racial group

66. During the elaboration of the Genocide Convention it was stated, inter alia, that the intended purpose of the addition of the ethnic group, which was mentioned in the draft convention produced by the Ad Hoc Committee on Genocide, was to protect groups not specifically included in the categories of national or racial group. One opinion was that an ethnic group was a subgroup of a national group, a smaller collectivity than the nation. Other members were of the opinion that the words "ethnic" and "racial" had the same meaning. 52/

67. Similar opinions on the difficulty of distinguishing between "ethnic" and "racial" were expressed during the consideration by the Sub-Commission of a draft resolution on the definition of minorities, in 1950. Some members felt that the word "ethnic" related to all the biological, cultural and historical characteristics of a group, while the word "racial" related only to hereditary and physical characteristics. In that connexion, it was argued that in the 1948 Genocide Convention the term "ethnic" was used to qualify the cultural, physical and historical characteristics of a group. 53/

68. Writers on legal topics have also argued that it is difficult to distinguish between ethnic and racial groups as referred to in article II of the Genocide 54/

50/ Ibid., para. 58.

51/ Ibid., para. 64. On the relationship between the prevention and punishment of genocide and the protection of minorities, see Erica-Irene A. Daes, "Protection of Minorities under the International Bill of Human Rights and the Genocide Convention", Enion, Festschrift für Pan J. Zepos, vol. II, Editions Katzikalis, Athens, 1973.

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

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

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

Convention or that the terms "ethnic" and "racial" are identical, 55/ or that the concept of an "ethnic" group includes that of a "racial" group. 56/

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

70. One writer states:

"By race we mean a group of persons with certain physical characteristics which are hereditarily transmissible. Ethnic groups are descent groups, differentiated by language, culture, style, national origin, kinship ties and religious belief". 57/

71. The concept of race was the subject of UNESCO-sponsored studies which resulted in several statements on the race question. 58/ According to the 1950 statement (para. 4), the term "race":

"... designates a group of population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and/or cultural isolation". 59/

72. However, it is further stated (para. 6) that:

"National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connexion with racial traits. Because serious errors of this kind are habitually committed when the term 'race' is used in popular parlance, it would be better when speaking of human races to drop the term 'race' altogether and speak of ethnic groups." 60/

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

56/ J. Y. Dautricourt, loc. cit., p. 22; Pieter N. Drost, op. cit., p. 62.

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

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

59/ Ibid., pp. 30-31.

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

73. It has, however, been observed that:

"Despite the emotional overtones which attach to the term 'race' and despite the difficulties involved in scientific racial classification, the fact also remains that groups differ in their possession of certain inherited physical characteristics". 61/

At the same time, note was taken of the tendency, especially in writings and publications on race relations, to equate "race" simply with descent from a common stock. Under the heading of "race relations" such works and publications deal not only with relations between groups of a different colour, but also, inter alia, with relations between tribes, between castes, between different ethnic, linguistic or religious groups and between nationalities (in the sense of not signifying citizenship, in which the word is used in the Soviet Union and certain countries of Eastern Europe). 62/

(iii) Religious group

74. In 1967, when it began its consideration of the draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Third Committee of the General Assembly adopted the text of article 1, which provides, inter alia, that "For the purpose of this Convention: (a) the expression 'religion or belief' shall include theistic, non-theistic and atheistic beliefs...". 63/

75. One writer states that religious groups as referred to in the 1948 Convention include "any religious community united by a single spiritual ideal". 64/

(c) The problem of political groups

76. As noted in the preliminary report (E/CN.4/Sub.2/L.565, paras. 37-38), the Sixth Committee decided not to include political groups among the groups protected by the Convention. This problem gave rise to a lengthy debate in the Sixth Committee. 65/

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

62/ Ibid., para. 56.

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

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

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

77. The arguments advanced against the inclusion of political groups were, in essence, the following: (a) a political group had no stable, permanent and clear-cut characteristics in that it did not constitute an inevitable and homogeneous grouping, being based on the will of its members and not on factors independent of that will; (b) the inclusion of political groups would preclude the acceptance of the Convention by the greatest possible number of States and the acceptance of an international criminal jurisdiction, because it would involve the United Nations in the internal political struggles of each country; (c) such inclusion would create difficulties for legally established Governments in their preventive actions against subversive elements; (d) the protection of political groups would raise the question of protection under the Convention for economic 66/ and professional groups; (e) the protection of political and other groups should be ensured outside the Convention, under national legislation and the Universal Declaration of Human Rights.

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

79. One non-governmental organization considered that "the definition of genocide should be extended to include acts done with the intent to destroy in whole or in part a political group as such, as well as national, ethnic, racial or religious groups. The massacre of unarmed political opponents is just as criminal as the massacre of these other groups, and should be recognized as such." 67/

80. In the view of another non-governmental organization, a serious omission in the 1948 Convention with regard to the concept of genocide was the fact that acts of aggression with intent to destroy political groups were not mentioned as constituting acts of genocide. 68/

81. A number of writers consider that political groups should have been included in article II of the 1948 Convention. 69/

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

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

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

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

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

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

"By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loop-hole for any Government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state. If perhaps political reasons cannot be adduced as proper excuse for the genocidal measures against a group protected under Article II, then very likely such governmental policy will be defended on economic, social or cultural grounds. The national, ethnical, racial or religious character of the group in such case does not constitute the object of the alleged acts of destruction but the measures are said to be taken against the same persons as members of an economic, social or cultural, i.e. unprotected, group." 70/

83. And he concludes that:

"... the crime of genocide in its most serious form is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such." 71/

84. Should the adoption of new international instruments on genocide be contemplated - a possibility mentioned in paragraph 79 of the preliminary report (E/CN.4/Sub.2/L.565) - the Special Rapporteur is of the opinion that it would not be desirable to include political and other groups among the protected groups, in that a consequence of such inclusion would be to prevent some States from becoming parties to the new instruments. He also believes that other international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, effectively protect political groups, without jeopardizing the objectives pursued with regard to the prevention and punishment of the crime of genocide.

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

71/ Ibid., p. 125.

4. Acts constituting the crime of genocide

85. The acts enumerated in subparagraphs (a) to (d) of article II (quoted in paragraph 37 above) are acts of physical genocide (killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part) and of biological genocide (imposing measures intended to prevent births within the group). 72/

86. With regard to the act of genocide referred to in subparagraph (e) - forcibly transferring children of the group to another group - it should be mentioned that, in the draft Convention prepared by the Secretary-General, this act was classified under the heading of cultural genocide. 73/

87. During the debate in the Sixth Committee 74/ it was argued, in support of an amendment (A/C.6/242) which was eventually accepted and which proposed the inclusion of that act in article II, that the forced transfer of children had physical and biological effects since it imposed on young persons conditions of life likely to cause them serious harm or even death. The forced transfer of children could be as effective a means of destroying a human group as that of imposing measures intended to prevent births or inflicting conditions of life likely to cause death. Since measures to prevent births had been condemned as an act of genocide, there was reason also to condemn measures intended to destroy a new generation, such action being connected with the destruction of a group - with physical genocide (or, according to the classification in the Secretary-General's draft with biological genocide). 75/

88. Some objections were raised to the inclusion of subparagraph (e), on the ground that it was justifiable neither from the historical nor from the legal point of view. In historical cases of the forced transfer of children, the aim had been to enslave the children for economic reasons. If the children later died in the performance of their labour, their deaths could not be directly attributed to their abduction, but would be covered by subparagraph (c) of the article. From the legal point of view, the inclusion of such transfers would go far beyond

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

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

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

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

the other provisions of article II, which was concerned exclusively with the physical destruction of groups. The forced transfer of individuals with a view to their assimilation into another group would constitute cultural genocide. 76/

89. One writer believes that forcibly transferring children of one group to another could constitute a crime against human or minority rights or, one might say, against humanity. The aim of such a transfer would not be the actual destruction of the generation. Consequently, it would not be a true case of genocide. 77/

90. During the debate in the Sixth Committee on acts constituting the crime of genocide, a proposal was made for the addition to the enumeration of such acts of the following: "Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" (A/C.6/234). That proposal was not accepted, on the ground that the act to which it referred did not fall within the definition of genocide. 78/

91. It should be mentioned that in article II (b), the words "or mental" did not appear in the draft of the Ad Hoc Committee on Genocide. They were added as the result of the adoption of a proposal for their insertion (A/C.6/244) in order to include acts of genocide committed through the use of narcotic drugs. 79/

92. According to one writer:

"The five acts of genocide enumerated in Article II do not cover all possible ways and means of intentionally destroying a human group as such. Deliberate destruction of a human group may well take the form of deportation or mass displacement, of internment and enslavement with forced labour, or denationalization by systematic terrorism, torture, inhuman treatment and physical intimidation measures." 80/

5. The subjective element

(a) Intent

93. During the debate in the Sixth Committee it was pointed out, inter alia, that what distinguished genocide from the common crime of murder was the

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

77/ Jean Graven, loc. cit., pp. 501-502.

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

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

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

intention to destroy a group. 81/ Genocide was characterized by the factor of particular intent (dolus specialis) to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the Convention, that act could still not be called genocide. 82/

94. According to one writer:

"... measures resulting in the partial or total destruction of a group but taken without the intention of such purpose and result do not fall under the definition and therefore do not constitute acts of genocide under the Convention. An act of destruction can be punished as genocide under the terms of Article II when the intent to destroy the human group involved can be proven regardless of the results of the deed." 83/

95. It should be pointed out in this context that a proposal to replace the words "committed with the intent to destroy" by the words "aimed at the physical destruction of" groups (A/C.6/223) was not accepted. It was explained that the proposal stemmed from the fact that the perpetrators of acts of genocide would in certain cases be able to claim that they were not guilty of genocide, having had no intent to destroy a given group, either wholly or partially. Accordingly, the purpose of the amendment was to guard against the possibility that the presence in the definition of the word "intent" might be used as a pretext, in the future, for pleading not guilty on the grounds of absence of intent. In the circumstances, the objective concept seemed to be more effective than the subjective concept. Acts of genocide should therefore be defined as acts "resulting in" the destruction of a group. In opposition to the proposal, it was observed that elimination of the intent to destroy a group would make it impossible to draw a distinction between genocide and ordinary murder. 84/

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

"... the legal definition of genocide given in the 1948 Convention is particularly deficient. An objective definition of genocide should have been given, not one based on the ascertainment of intent.... And it is my belief that the Genocide Convention, in failing to condemn in objective terms attempts against the life of human groups, has failed in its purpose and can never achieve the slightest impact or the slightest effectiveness." 85/

97. However, in the view of the Special Rapporteur, the elimination of the element of intent would efface any distinction between genocide and ordinary murder and also, as will be explained below (para. 134), between genocide and war crimes.

81/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th meeting.

82/ Ibid., 72nd meeting.

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

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

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

(b) Motive

98. The question whether the definition of genocide should cover not only the element of intent but also the motive of the crime 86/ was a subject of controversy during the elaboration of the Convention by the Sixth Committee. 87/

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

100. According to one writer, motive and intent are so linked in the case of genocide that it would be appropriate to refer to "intent-motive". In the special case of genocide, it would appear justifiable to depart from traditional criminal doctrine and to consider motive a constituent element of the crime. 88/

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

102. The words "as such" which were inserted in the text as the result of the adoption of an amendment (A/C.6/231), were considered by the sponsor of the amendment and some members of the Sixth Committee to include the motives for genocide. Other representatives stated, on the contrary, that those words stressed the element of intention but did include the motives. In view of that difference of opinion, it was decided that a statement should be included in the report of the Sixth Committee to the effect that the Committee, in taking a decision on any proposal, did not necessarily adopt the interpretation given by its author. 89/

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

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

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

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

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

"In the absence of any words to the contrary the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime. Whatever the ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected group, whenever the destruction of human life of members of the group as such takes place, the crime of genocide, is being committed." 90/

C. Acts punishable under the Convention (article III)

1. Some problems concerning the text of article III

104. According to subparagraph (a) of this article, it is the commission of acts of genocide which is punishable under the Convention. One writer argues that "in certain cases, particularly that of genocides by the infliction of inhuman conditions of life, the crime may be perpetrated by omission", 91/ Another writer regards "the absence of any express mention of omission" as a lacuna in the Convention. He goes on to say:

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

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

"Another case of omission is the act of an authority which, by virtue of its functions, should and could have known but nevertheless allowed subordinates to massacre and torture prisoners, claiming ignorance of the acts." 92/

90/ Pieter N. Drost, op. cit., p. 84; see also Antonio Planzer, op. cit., p. 95.

91/ Stanislas Plawski, op. cit., p. 115.

92/ J. Y. Dautricourt, loc. cit., pp. 22-23.

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

106. It was argued, on the other hand, that the Convention would lose its preventive effect if incitement was not made a punishable act. Freedom of speech could not in any way imply a right to incite people to commit a crime. A Convention the aim of which was to define, prevent and punish a crime such as genocide, the perpetration of which could in all cases be traced back to the reusing of racial, national or religious hatred, could not exclude from the enumeration of punishable acts direct incitement, which many national legal systems punished in the case of other crimes. 93/

107. One writer observes:

"The definition of direct and public incitement, however, may be somewhat vague. The implementary laws will have to spell it out in greater detail, otherwise the definition will have to be left to the courts." 94/

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

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

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

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

"I will not enter here into the details of Swedish legislation which, moreover, does not present too great difficulties in this respect, but I find it necessary to formulate, somewhere, my reservation on this subject." 95/

109. Several writers have made comments similar to the statement reproduced above. 96/

2. Preparatory acts

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

"The preparatory acts for committing genocide in the form of studies and research for the purpose of developing the technique of genocide: setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders and distributing tasks with a view to committing genocide." 97/

111. During the debate 98/ mention was made, in support of the adoption of this proposal, of the historical experience of Nazi crimes of genocide, the special nature of the crime, the search for the most effective prevention possible, and the fact that preparatory acts were punishable under the national legal systems of several countries.

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

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

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

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

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

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

"Covering such acts does not mean 'getting away from the crime itself'; on the contrary, it means getting nearer to it, grasping it more closely, going to the heart of it... There must be ways to lay hold of a crime and if possible prevent it as soon as it is embarked upon, without waiting for it to be committed." 99/

3. Public propaganda in favour of genocide

114. According to an amendment (A/C.6/215/Rev.1), which was not accepted, the text of article III should have included a subparagraph making punishable as acts of genocide "All forms of public propaganda (press, radio, cinema etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide." 100/

115. It was argued, 101/ in favour of this proposal, that such public propaganda was a cause of acts of genocide. The Convention would not fulfil its preventive function unless it declared public propaganda in favour of genocide to be punishable. The proposal to make propaganda punishable would not duplicate the provision concerning incitement to genocide, which covered incitement to a crime committed at a particular time and in a particular place, whereas the propaganda defined by the proposal took the form of popular education and of moulding public opinion with a view to developing racial, national or religious hatred. The prohibition of propaganda in favour of genocide would not endanger freedom of information, because information preaching hate should not be permitted; groups, like individuals, were entitled to protection against libel and slander. Mention was also made of the danger of public propaganda for hatred that might be sufficiently orchestrated and repeated to lead not only to genocide but to war.

116. In opposition to the proposal, it was argued that it would be difficult to imagine propaganda in favour of genocide which would not at the same time constitute incitement to that crime. The Genocide Convention could not provide for the suppression of the forms of public propaganda "aimed at inciting racial,

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

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

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

national or religious enmities or hatreds", as the intention to destroy a specific group, which was an essential part of the definition of genocide, would be absent. As for the other forms of propaganda covered by the amendment, their punishment would be ensured by subparagraph (c) of the article. Adoption of provisions relating to public propaganda in favour of genocide would endanger freedom of the press and freedom of speech.

117. One writer, in regretting the omission from the text of article III of propaganda in favour of genocide, endorses the arguments advanced in the Sixth Committee in favour of making it a punishable offence. 102/

118. Another writer takes the view that, since that kind of propaganda is punishable under the legislation of certain countries (and he mentions the penal codes of Denmark, Norway, Sweden, Poland and Brazil), "the inclusion of propaganda as an offence would have completed the provisions for the prevention of genocide". 103/

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

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

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

"... national penal laws will rigorously punish any incitement to hatred or contempt for a human group, any defamation of such a group, any propaganda in favour of racial, religious, social or other discrimination... within the national territory or abroad". 104/

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

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

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

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

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

122. During the debate in the Sixth Committee, 105/ the following objections were voiced to the proposal: (a) it could not be said that an individual was guilty if he had committed an act of genocide by complying with an order, because in that case the element of intent, which was an essential element of genocide, would be lacking; (b) few domestic legislations recognized the principle that compliance with superior orders did not relieve the person carrying out the orders of criminal responsibility; (c) accordingly, such a provision would prevent a very large number of States from accepting the Convention; (d) The Nuremberg Tribunal had given a restrictive interpretation to article 8 of its Charter, which embodied that principle; 106/ (e) it would be more satisfactory not to include such a provision in the Convention in order to leave the judge free to pronounce judgement in each individual case, taking the special circumstances into account; (f) the Convention should contain only general provisions, acceptable to all, and leave it to national legislation to determine the various methods of application.

123. It was argued in favour of the above-mentioned proposal that (a) if those who executed the crime were permitted to invoke command of the law or superior orders, most offenders would evade punishment since in the majority of cases genocide was committed with the participation of the government; (b) domestic legislation which did not admit responsibility in the case of compliance with the law or superior orders should not be allowed to infringe international law; (c) it was normal that the Genocide Convention should contain instructions to the judges responsible for applying it; (d) the proposal was based on the Nuremberg principles, the importance of which stemmed from the fact that if they had not been adopted Hitler alone would have been responsible for the crimes committed by the Nazis; (e) rejection of the principle would amount to accepting the system of so-called "official channels" thanks to which, in a modern State, every responsible person was covered by an order coming from a higher authority; (f) adoption of the proposal would constitute a solemn warning to all those who might be tempted to obey orders inciting to crime and would, in many instances, help to prevent the consummation of a crime.

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

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

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

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

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

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

"... cannot, in a specific case, have the effect of conferring impunity on criminals who might endeavour to plead command of the law or superior orders, for it seems inconceivable that it will be possible in the future to repudiate a principle which has found acceptance both in legal theory and in juridical practice." 107/

125. Another writer states:

"Ordinarily it would seem that no intent could be ascribed to persons merely fulfilling superior orders; intent implies initiative. However, superior orders would not be a justification in such cases where the guilty party was not only a tool of his superior but participated in the 'conspiracy to commit genocide'. Guilt could likewise be established in a case where, although acting under orders, the person was in a position to use his own initiative and thus act with the intent to destroy the group. The non-inclusion of a proviso relating to a superior's orders thus leaves the tribunals applying the Convention the freedom of interpreting it in accordance with the domestic legislation and the specific circumstances of the case". 108/

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

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

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

III. THE RELATIONSHIP BETWEEN GENOCIDE AND WAR CRIMES,
CRIMES AGAINST HUMANITY AND APARTHEID

A. War crimes

127. To clarify the concept of war crimes as international crimes to which statutory limitations are not applicable, article I (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted by the General Assembly by resolution 2391 (XXIII) of 26 November 1968) refers to war crimes "as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims".

128. Article 6 (b) of the Charter of the Nuremberg Tribunal defines war crimes as being:

"... violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

129. The grave breaches enumerated in the Geneva Conventions are: 109/ wilful killing; torture; inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health. 110/

109/ Article 50 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; article 51 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 130 of the Convention relative to the Treatment of Prisoners of War; article 147 of the Convention relative to the Protection of Civilian Persons in Time of War.

110/ In the first two Conventions the following was added to this enumeration: "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". The following was added in the third Convention: "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention". The following was added in the fourth Convention: "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

/...

130. According to article I of the 1948 Genocide Convention, "genocide, whether committed in time of peace or in time of war, is a crime under international law". Thus, genocide differs from war crimes in that it can be committed independently of any war.

131. Commenting on the difference between war crimes and genocide, one writer states:

"War crimes... are specific violations of the laws or customs of war, a more limited concept which presupposes the existence of hostilities and does not require motivation relating especially to the destruction of ethnic, religious or national communities.

"War crimes are committed between troops engaged in action, against prisoners, or by invaders against the invaded; whereas genocide can be committed against nationals or aliens, civilians or soldiers. Moreover, war could not be a justification, on grounds of necessity, for acts of genocide committed in time of war." 111/

132. In order to define more clearly the difference between war crimes and genocide committed in connexion with a war, the comment on article I of the draft convention on genocide prepared by the Secretary-General included the following observations:

"1. War is not normally directed at the destruction of the enemy: such destruction is only the means used by a belligerent to impose his will on the opponent. When that result has been achieved, peace is concluded. However harsh the conditions imposed on the defeated party may be, it retains the right to existence.

"2. The infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide.

"In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses.

"It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide.

"3. War may, however, be accompanied by the crime of genocide. This happens when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this are the execution of prisoners of war, the massacre of the populations of occupied territory and their gradual extermination. These are clearly cases of genocide." 112/

111/ Francisco P. Laplaza, op. cit., p. 78.

112/ E/447, p. 23.

133. One writer has argued that "the destruction of populous cities by techniques of total war can be regarded as genocide". 113/ This statement is clearly true only to the extent that the materiality of the acts is complemented by the element of intent, which has been regarded as essential.

134. Consequently, it appears to the Special Rapporteur that, taking into account the definition of genocide given in article II of the 1948 Convention, it is the element of intent that constitutes the criterion for differentiating between genocide and war crimes. Where there is conclusive evidence that the violations of the laws or customs of war or of the rules of international humanitarian law were committed - as in the case of the crimes perpetrated by the Nazis during the Second World War - with intent to destroy, in whole or in part, national, ethnic, racial or religious groups, that constitutes genocide.

B. Crimes against humanity

135. Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity refers to crimes against humanity "as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly...".

136. The Charter of the Nuremberg Tribunal (article 6(c)) had defined crimes against humanity as follows:

"Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

137. With respect to the relationship between genocide and crimes against humanity, in the light of the rulings of the courts of the allied countries which tried German war criminals after the Second World War, it was considered that:

"(viii) The crime of genocide, which received recognition by the Tribunal which conducted the Justice Trial, 3/ bears similarity to certain types of crimes against humanity but also certain dissimilarities; these have been discussed in previous volumes of this series, and the outcome seems to be that, while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown, 4/ and, on the other hand, genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are crimes

3/ See p. 122.

4/ See vol. XII, p. 41.

113/ Stanislas Plawski, op. cit., p. 114.

against humanity within the meaning of Law No. 10 114/ if the political, racial or religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background; but that it is not necessary that the wronged person belong to an organised or well-defined group. 5/

5/ See vol. VI, p. 83, note 3." 114a/

138. According to one writer:

"... genocide is the complete or partial... physical... and biological... destruction of a group. The Nuremberg Charter qualifies as crimes against humanity all persecutions on political, racial or religious grounds...

"Genocide can be committed against a human group, ethnic, racial or religious. The perpetrator directs his attack against the whole of the group that has the specified characteristic. Among the crimes against humanity enumerated in the Nuremberg Charter, a single individual can be a victim of this crime, provided that it is directed against him as a representative of a certain human group. The crime of genocide has a mass character." 115/

139. During the elaboration of the Genocide Convention by the Sixth Committee, an amendment to article I (A/C.6/211), which was not accepted, proposed that the article should begin with the words: "The crime against humanity known as genocide...". In support of that proposal, it was argued that it was essential that the definition of genocide should be related to the previous instances of that crime which already existed under international law. In reply, it was stated that to define genocide as a crime against humanity would present serious disadvantages and be open to misinterpretation in view of the technical meaning given to the latter expression in article 6 (c) of the Charter of the International Military Tribunal, Nuremberg, which had had jurisdiction only over crimes committed during the war or in connexion with preparation for war. 116/

114/ The reference is to Law No. 10 of the Allied Control Council for Germany, which was put into effect on 20 December 1945. Article II, paragraph 1 (c), of the Law defines crimes against humanity in a manner similar to article 6 (c) of the Charter of the Nuremberg Tribunal, namely, as:

"Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

114a/ George Brand, Law Reports of Trials of War Criminals, vol. XV; Digest of Laws and Cases, London, H. M. Stationery Office, 1949, p. 138.

115/ Stanislas Plawski, op. cit., p. 73.

116/ Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 67th meeting.

140. It was further stated that excluding from the Genocide Convention the concept of "crime against humanity" would prevent any confusion between genocide, which was a specific crime directed towards the extermination of human groups, and the crimes mentioned in the Charter of the Nuremberg Tribunal, which were connected only with war. 117/

141. In refutation of that view it was stated that the acts against which the Genocide Convention was aimed were identical with those which the Charter of the Nuremberg Tribunal qualified as crimes against humanity. The fact that the Charter of the Nuremberg Tribunal had linked crimes against humanity with other crimes was not conclusive. Having regard to the fact that the Genocide Convention was aimed against the commission of genocide both in war and in peace, it was clearly not permissible to qualify genocide as a crime against humanity when committed in connexion with a war, while refusing to do so when its commission was not connected with a war. 118/

142. With respect to that discussion, the Special Rapporteur would point out that article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, in referring to crimes against humanity, uses the words "whether committed in time of war or in time of peace", which is the same as the wording used in article I of the Genocide Convention. It would therefore seem that a distinction cannot be made between genocide and crimes against humanity from the standpoint of "time of war or time of peace".

143. One writer considers it indisputable that crimes against humanity and genocide:

"... fall within the same category, or, in other words, belong to one and the same class of acts... the essential difference between crimes against humanity and genocide is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act -- for example, murder -- may be, or rather may be described as, either a crime against humanity or an act of genocide, depending on the motives of the person committing it: if his aim is to eliminate the victim because of the latter's race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, whereas if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it will be qualified as genocide.

"It follows that genocide, too, is by its nature simply a crime against humanity, and indeed an aggravated crime against humanity. Accordingly, it would seem more correct from the standpoint both of logic and of method to regard genocide as simply an aggravated case of crimes against humanity. The

117/ Ibid., 109th meeting.

118/ Ibid., 109th meeting.

aggravation lies simply in the additional intent which is characteristic of genocide." 119/

C. Apartheid

144. As was mentioned in the preliminary report (E/CN.4/Sub.2/L.565, para. 70), the Ad Hoc Working Group of Experts established under resolution 2 (XXIII) of the Commission on Human Rights, in its study concerning the question of apartheid from the point of view of international penal law, stated, inter alia, 120/ that in one of its previous reports (E/CN.4/984/Add.18) it had summarized the elements of apartheid which in its view constituted the crime of genocide. That report lists, inter alia (ibid., para. 4), as practices of apartheid which are regarded as elements of genocide:

"(a) The institution of group areas ('Bantustan policies'), which affected the African population by crowding them together in small areas where they could not earn an adequate livelihood, or the Indian population by banning them to areas which were totally lacking the preconditions for the exercise of their traditional professions;

"(b) The regulations concerning the movement of Africans in urban areas and especially the forcible separation of Africans from their wives during long periods, thereby preventing African births;

"(c) The population policies in general, which were said to include deliberate malnutrition of large population sectors and birth control for the non-white sectors in order to reduce their numbers, while it was the official policy to favour white immigration;

"(d) The imprisonment and ill-treatment of non-white political (group) leaders and of non-white prisoners in general;

"(e) The killing of the non-white population through a system of slave or tied labour, especially in so-called transit camps."

145. At its fifty-fourth session, the Economic and Social Council adopted, on the recommendation of the Commission on Human Rights, resolution 1784 (LIV) of 18 May 1973 approving the draft Convention on the Suppression and Punishment of the Crime of Apartheid 121/ and recommending that the General Assembly, at its twenty-eighth session, should consider and approve the draft Convention.

119/ Stefan Glaser, op. cit., p. 109. Another author writes that "genocide is undoubtedly the most serious and the most typical of crimes against humanity" (Jean Graven, loc. cit., p. 478).

120/ E/CN.4/1075, para. 130.

121/ Commission on Human Rights, report on the twenty ninth session (26 February-6 April 1973) (E/5265), p. 76.

146. The fifth, sixth and seventh preambular paragraphs of the draft Convention on the Suppression and Punishment of the Crime of Apartheid 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 United Nations General Assembly has adopted a number of resolutions in which the policy and practices of apartheid are condemned as a crime against humanity".

147. According to article I, paragraph 1, of the draft Convention: 122/

"The States Parties to this 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 set out in article II of this 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."

148. It thus appears clear that there is a tendency to regard apartheid as a crime against humanity. Consequently, the observations presented above (paras. 135-143) concerning the relationship between genocide and crimes against humanity would also apply to apartheid.

149. It should moreover be pointed out that, if a convention on the suppression and punishment of the crimes of apartheid were to be adopted, it would no longer be necessary to include provisions relating to apartheid in any new international instruments dealing with genocide.

122/ Ibid., p. 76.

Annex

PLAN FOR THE COLLECTION OF INFORMATION AND VIEWS

A. From the national viewpoint

1. Information on constitutional and legislative provisions adopted by States parties to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide. a/
2. Information on constitutional and legislative provisions adopted before or after the adoption by the General Assembly of the Convention of 1948 by States which have not yet become parties to the Convention.
3. Information on court rulings relating to genocide, including the sentences handed down by the courts.
4. Views on the effectiveness of national laws adopted with a view to the prevention and punishment of genocide.
5. Information on measures taken by States which have not yet done so with a view to ratifying the Convention of 1948 or acceding to it, and the difficulties encountered in that regard.
6. Information on allegations of acts of genocide committed in various parts of the world.

B. From the international viewpoint

7. Views on the effectiveness of existing international measures concerning genocide and on the possibility of taking further international action, in particular by the adoption of new international instruments.
8. Views on the effectiveness of the substantive provisions of the Convention of 1948 with a view to the prevention and punishment of genocide.

a/ The text of articles II and III of the Convention is reproduced in paragraph 37 of the present report. Article V reads as follows:

"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 of any of the other acts enumerated in article III."

9. Views on the following problems relating to the implementation of the Convention of 1948: reservations to the Convention, question of the extension of the Convention to territories for the conduct of whose foreign relations States parties to the Convention are responsible (article XII of the Convention), b/ and invitations addressed by the General Assembly, in accordance with article XI, c/ to non-member States to become parties to the Convention.

10. Views on the possibility of establishing an international body entrusted with carrying out investigations, assessing allegations of genocide and taking the steps necessary to halt at its outset the deliberate destruction of a national, racial, religious or ethnic group as such.

11. Views on the possibility of preparing an additional protocol to the Genocide Convention, conferring upon the courts of countries other than those in whose territory the crime of genocide was committed, competence to deal with that crime.

12. Views on the possibility of preparing additional conventions in order to make punishable acts of genocide which were not included in the Convention of 1948. d/

b/ Article XII of the Convention provides that: "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".

c/ Article XI provides that:

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

"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."

d/ Suggestions have been made concerning, for example, "cultural genocide", "cultural ethocide" and "ecocide".

13. Views on the possibility of establishing an international criminal jurisdiction as proposed in article VI of the Genocide Convention. e/

e/ Article VI provides that:

"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."