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ELIMINATION OF RACIAL DISCRIMINATION

REPORT OF THE AD HOC WORKING GROUP OF EXPERTS UNDER COMMISSION RESOLUTION 8 (XXVII)

Study concerning the question of apartheid from the point of view of international penal law

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INTRODUCTION

Mandate and composition of the Ad Hoc Working Group of Experts

1. At its twenty-sixth session, the Commission on Human Rights, in resolution 8 (XXVI), 1/ requested the Ad Hoc Working Group of Experts established under resolution 2 (XXIII), 2/ which had been commissioned to investigate the consequences of the policies of apartheid, namely torture and ill-treatment of prisoners, detainees and persons in police custody in South Africa, to study, from the point of view of international penal law, the question of apartheid, a practice which has been declared a crime against humanity.

(a) The members of the Working Group appointed by the Chairman of the Commission on Human Rights in accordance with Commission resolutions 2 (XXIII), 2 (XXIV) and 7 (XXVII) are the following:

Ibrahima Boye (Senegal)

Felix Ermacora (Austria)

Branimir Janković (Yugoslavia)

Luis Marchand-Stens (Peru)

Mahmud Nasser Rattansey (United Republic of Tanzania)

(b) Mr. Ibrahima Boye continued to perform the functions of Chairman-Rapporteur, and Mr. Branimir Janković those of Vice-Chairman. Mr. Felix Ermacora was entrusted by the Group to prepare a draft study from the point of view of international penal law.

(c) The present report was drawn up by the Ad Hoc Working Group at a series of meetings held at the Headquarters of the United Nations from 28 June to 2 July 1971 (267th to 271st meetings) and from 24 January to 4 February 1972 (272nd to 285th meetings). The Group based its discussions on the draft study prepared by Mr. Felix Ermacora (E/CN.4/AC.22/R.22).

2. It will be noted that this is the first time in the history of the United Nations that the policies of a Member State have been the subject of a study of this nature. Although this problem was raised in the second report submitted by the Special Rapporteur, Mr. M. Ganji, to the Commission on Human Rights in 1968 (E/CN.4/979/Add.1, para. 206), the Commission has up to now taken no decision.

1/ See Official Records of the Economic and Social Council, Forty-sixth Session, document E/4816, chap. XXIII.

2/ Ibid., Forty-second Session, Supplement No. 6, chap. IV.

Resolutions on apartheid considered as a crime against humanity

3. Since the United Nations has been dealing with the policy of apartheid, various decisions have condemned the policy as "being incompatible with the principles of the Charter of the United Nations and constituting a crime against humanity". 3/ Thus, General Assembly resolutions 2202 A (XXI) of 16 December 1966, 2307 (XXII) of 13 December 1967, 2396 (XXIII) of 2 December 1968 and 2506 B (XXIV) of 21 November 1969 have condemned "the policies of apartheid practised by the Government of South Africa as a crime against humanity". Resolution III, adopted by the International Conference on Human Rights on 11 May 1968, in its paragraph 4 declared "that the policy of apartheid or other similar evils are a crime against humanity punishable in accordance with the provisions of relevant international instruments dealing with such crimes". Furthermore, the General Assembly adopted on 24 October 1970 the Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations (resolution 2627 (XXV)). Paragraph 7 of the Declaration states:

> "We strongly condemn the evil policy of apartheid, which is a crime against the conscience and dignity of mankind...".

4. The General Assembly during its twenty-sixth session adopted a number of resolutions which are relevant to the study:

(a) Resolution 2775 F (XXVI), entitled "Establishment of Bantustans", contains the following preambular paragraphs:

> "Recalling its resolutions 95 (I) of 11 December 1946, in which it affirmed the principles of international law recognized by the Charter of the International Military Tribunal, Nürnberg, and the judgement of the Tribunal,
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> "Bearing in mind the obligations of all States under international law, the Charter of the United Nations, the human rights principles and the Geneva Conventions,
>
> "Noting further that under the aforementioned resolution crimes against humanity are committed when enslavement, deportation and other inhuman acts are enforced against any civilian population on political, racial or religious grounds."

3/ The General Assembly in its resolutions 2022 (XX) of 5 November 1965 and 2262 (XXII) of 3 November 1967 condemned "the policies of oppression, racial discrimination and segregation practised in Southern Rhodesia, which constitute a crime against humanity;". The General Assembly in its resolutions 2074 (XX) of 17 December 1965 and 2145 (XXI) of 27 October 1966 condemned "the policies of apartheid and racial discrimination practised by the Government of South West Africa, which constitute a crime against humanity;". Furthermore the General Assembly in resolution 2184 (XXI) entitled "Question of Territories under Portuguese administration" adopted on 12 December 1966 (para. 3) condemned "as a crime against humanity, the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories and by the exporting of African workers to South Africa".

(b) Resolution 2784 (XXVI), entitled "Elimination of all forms of racial discrimination", adopted on 6 December 1971, in paragraph 1 of section II "Reaffirms that apartheid is a crime against humanity".

(c) Resolution 2786 (XXVI), entitled "Draft convention on the suppression and punishment of the crime of apartheid", adopted on 6 December 1971, contains the following preambular paragraph:

> "Firmly convinced that apartheid constitutes a total negation of the purposes and principles of the Charter of the United Nations and is a crime against humanity".

In the operative part, the Assembly recommended that the Commission on Human Rights and the Economic and Social Council should consider the Convention and should submit the text of the draft Convention on the suppression and punishment of the crime of apartheid to the General Assembly at its twenty-seventh session. The Ad Hoc Working Group of Experts draws the attention of the Commission on Human Rights to the importance of this draft Convention. 4/

Aim and plan of the study

5. It is incumbent upon the Group to find in the policy of apartheid those inhuman acts which might be constitutive elements of crimes against humanity and to say whether those crimes relate to international penal law and, if so, to what extent. The plan of the study is as follows: we shall deal, in the first part, with doctrinal views on the subject. The second part will be devoted to an analysis of the different international instruments relating to international penal law. We shall then take up those practices and manifestations of the policies of apartheid which may be considered as crimes under international law.

4/ For the text of the draft Convention submitted to the Third Committee of the General Assembly, see A/8542, paras. 32-34.

I. DOCTRINAL ASPECTS: THE CONCEPT OF INTERNATIONAL PENAL LAW IN DOCTRINE

(a) Introduction:

6. International penal law is an essential part of public international law. The idea of a penal sanction is the natural consequence of the idea that international law is a general legal order. 5/ According to classical opinions, every legal order must contain the possibility of prosecution and punishment for legal infractions. If there is no possibility to punish violations of rules of international law, respect for the provisions of that law would be merely a moral requirement.

7. According to Glaser, "International penal law is the discipline which, with a view to the defence of international order, defines crimes against the peace and security of mankind, provides for their punishment and lays down the rules governing the responsibility of individuals, States and other legal entities", or, "International penal law, in the sense in which it is currently understood, should be taken to mean the set of legal rules recognized in international relations which are aimed at protecting the international legal or social order... through the suppression of acts which threaten it, or, in other words, the set of rules laid down to suppress violations of the precepts of public international law". 6/

8. Penal law as part of a legal order supposes that culpability can be deduced immediately from rules pertaining to the same legal order. It is therefore an important criterion that penalties can be pronounced on the basis of public international law even if the international rules are not incorporated into the national legal system. Rules of penal international law may be enforced immediately by organs of the community of States if such international organs have been expressly created for this purpose.

(b) The history of international penal law

9. The origin of international penal law is to be found in particular in the law of war: the concept of justum bellum, the concept of aggressive war, the question of grave breaches of the law of war, the peace and security of mankind, all these fall within the context of the concept of international penal law. Thoughts about the punishment of grave breaches of international law are to be found in the

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5/ Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht (1952) 21.

6/ Glaser, Droit international pénal conventionnel (1970), p. 165. (Translated from French). See also: Pella, Le code des crimes contre la paix et la sécurité de l'humanité, Revue de droit international, sciences dipl. et pol, (1957), p. 35. See also Trifterer, Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg, Freiberg i.B. (1966), p. 76.

classical theories of public international law, inter alia, Grotius, 7/ Gentili, 8/ Vitoria. 9/ The victorious Power should be competent to punish the defeated Power. The victorious Power has been considered a mandatory of the world community. The fiction was advanced that the victorious community wanted to punish the State which had broken international law. This thinking is to be found in particular in the writings of Vattel. 10/

10. Also, the idea of humanitarian intervention in civil wars had a penal law background. The nature of such intervention is variously interpreted in doctrine (see the literature about intervention). 11/ The very first international conventions containing provisions about international penal law were the Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, signed on 22 August 1864, and The Hague Convention concerning the Law and Customs of War on Land (Convention 1899/1907). Then, during World War I, both sides demanded the punishment of war criminals. The Peace Treaty of Versailles contained penal provisions in its articles 227 to 230, but, as is well known, no penal procedure was established to carry these provisions into effect. Article 230 of the Peace Treaty of Sèvres provided for the punishment of crimes against humanity allegedly committed by Turkey. During the Second World War, the doctrine and politics of the Allied Powers demanded international proceedings against war crimes and crimes against humanity. After the end of hostilities in Europe and the Far East, the proceedings of Nuremberg and Tokyo took place on the basis of the London agreement of 8 August 1945 and of the declaration of the supreme commander of the Allied Forces (Far East) of 19 January 1946. 12/

11. The Nuremberg proceedings were the starting point from which doctrine took up on a wider scale the problem of international crimes and the basis on which the United Nations began to consider the problem in connexion with the implementation of Article 13, paragraph 1, of the Charter after the Nuremberg principles had been unanimously affirmed by the General Assembly in resolution 95 (I) of 11 December 1946. The task of formulating the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal was entrusted to the International Law Commission by General Assembly resolution 177 (II) of 21 November 1947. This Commission submitted, in 1950, the text of a formulation consisting of seven principles, in which principles VI and VII

7/ Grotius, De iure belli ac pacis (1625) lib. II, cap. XX, paragraph 40.

8/ Gentili, De iure belli libri tres (1588/89) lib. I, cap. XXV. Here for the first time the expression "crimes against humanity" is to be found.

9/ Vitoria, De indis, sive de iure belli hispanorum in Barbaros (1532), para. 46.

10/ De Vattel, Droit des gens (1758) liv. III, chap. XI, paragraph 185.

11/ About humanitarian intervention, see Ermacora, Human Rights and Domestic Jurisdiction, Recueil des Cours. La Haye, 1968 II, p. 377 sq.

12/ See the relevant provisions in document E/CN.4/906.

contained an enumeration of crimes punishable under international law (Yearbook of the International Law Commission 1950, page 11). These principles were not voted upon by the General Assembly.

12. In the same context fall the attempts of the International Law Commission, in accordance with General Assembly resolution 260 B (III) of 9 December 1948, "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions". The relevant report of the Commission was considered by the General Assembly at its fifth session and the whole problem was finally linked with the question of defining aggression and with the draft code of offences against the peace and security of mankind. This draft code contained important provisions regarding crimes deemed punishable under international law. But, as had been the case with the drafts proposed by Pella at the request of the International Law Association in 1935, the above-mentioned drafts were never adopted by the General Assembly.

13. The only instruments containing an enumeration of crimes punishable under international law which have come into force are the Geneva Conventions of 1949, the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 A (III) of 9 December 1948) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII) of 26 November 1968). This last Convention is the first international treaty to bring into focus the relationship between crimes under international law and apartheid.

(c) The origin of international penal law

14. In the light of doctrine, all sources of public international law can also be the basis for international penal law: 13/ international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of various nations as subsidiary means for the determination of rules of law. 14/ Graven wrote: 15/ "International penal law is... still a customary unwritten law, which

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13/ Dahm, Zur Problematik des Völkerstrafrechtes (1956), p. 62. See also Donnedieu de Vabres, Le procès de Nuremberg devant les principes modernes du droit pénal international, Recueil des Cours. La Haye, (1947) I, p. 485.

14/ See art. 38 of the Statute of the International Court of Justice.

15/ Graven, Les crimes contre l'humanité, Rec. 1950 I, p. 433 ss; Les principes de la légalité, de l'analogie et de l'interprétation, et leur application en droit pénal suisse, Schweizerische Zeitschrift für Strafrecht, LXVI (1951), S. 387.

is in process of formation, and which men strive to define and codify". The same opinion is expressed by Guggenheim 16/ and Verdross. 17/ However, Schwarzenberger expresses doubts whether the existence of international penal law can be affirmed in the absence of conventions. 18/ Modern doctrine - e.g. Jacquesmin - sees as a basis for the recognition of crimes against humanity "the nigher principles of humanity; the universal social conscience; and international ethics". 19/ He writes on this subject: "International ethics, i.e. the precepts of morality and the higher principles of humanity which govern certain types of behaviour decreed by the universal social conscience, that is to say a set of concepts rooted in the soul of every civilized being and related to eternal values, such as, in our climes at any rate, respect for human life, the special consideration given to children, the care given to the injured and the sick, the protection of the material heritage of civilization, such as artistic treasures, and so on.... Law arises out of the union of ethics and power".

15. The majority of writers considers that while elsewhere every national legal system recognizes the principle "mullum crimen, nulla poena sine lege", 20/ this principle is not necessarily applicable in international penal law. It is also generally accepted that for the purposes of international penal law, crimes need not be enumerated in conventions in order to be punishable, 21/ it is sufficient that universal conscience as reflected in customary international law considers given acts crimes under the law of nations. For an act to be punishable under international penal law it is necessary not only that the act be unlawful under international law but also that it be considered punishable.

(d) International penal law ratione materiae

16. As already mentioned, international penal law has its origin in breaches of the laws of war known as war crimes. After the Second World War crimes under international law came to include crimes against humanity, as formulated or indicated in the Nuremberg Principles, in the Genocide Convention and in the Geneva Conventions of 1949. The latter contain specific provisions against grave breaches of the rules prescribed therein. Such breaches are enumerated and refer to violations of elementary human rights. One justification for international penal law claiming jurisdiction over crimes against humanity is the reasoning that such

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16/ Guggenheim, Lehrbuch des Völkerrechts, II, 1951, p. 541.

17/ Verdross, Völkerrecht, ed. 5, 1964, p. 220.

18/ Schwarzenberger, The Problem of International Criminal Law, Current Legal Problems, III (1950), p. 275.

19/ Jacquesmin, Les infractions de mise en danger en droit pénal international, p. 945.

20/ This principle of the continental penal law means that every crime and any punishment must be stated in written law before the date of the commission of the crime. Glaser, ibid., p. 24: "for this principle presupposes the existence of legislation, whereas international penal law is merely customary law".

21/ Glaser, Droit international pénal conventionnel (1970), p. 24.

crimes are not directed against individuals as such but against human beings as members of social groups belonging to the world community itself and under its protection. Crimes against humanity may endanger international peace and security. 22/ This argumentation is based on the principles of the United Nations Charter.

17. International law declares punishable infractions of certain human rights, subject to two restrictions.

(a) Infractions against human rights must contain, due to their gravity, a political element (the French authors speak of "droit pénal public" and oppose it to "droit pénal privé"); this is comprehensible in view of the fact that many infringements have often been initiated or stimulated by Governments. 23/

(b) International penal law can only be regarded as a supplementary means for the protection of human rights in so far as human rights cannot be effectively guaranteed by national authorities or by other systems for the protection of human rights. This is particularly the case when States and State authorities are involved in the violation of these rights or when States refuse to try persons culpable of these violations of human rights which are considered crimes under international penal law.

18. The most significant United Nations document containing an enumeration of crimes under international law is the draft code of offences against the peace and security of mankind (see para. 65). This document enumerates those facts which are widely considered by the learned authorities to be crimes against humanity under international penal law. Among this enumeration can be found the acts which are indicated in certain instruments which are in force such as, for instance, the Convention on the Prevention and Punishment of the Crime of Genocide. 24/

19. Besides war crimes and crimes against humanity, the doctrine mentions other international instruments where crimes under international law have been declared punishable: for example, the Abolition of Forced Labour Convention (28 June 1930 and 25 June 1957), the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (2 December 1949), further on, the Convention on the Protection of Cultural Property in Armed Conflicts (14 May 1954) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (30 April 1956).

22/ Pilloud, La protection pénale des conventions humanitaires internationales, Revue internationale de droit pénal, 24 (1953), p. 661 ss.; Jescheck, art. Völkerstrafrecht, in Wörterbuch des Völkerrechts, 2. Aufl. (1962), III, p. 781 ss.

23/ Q. Wright, Proposal for an International Criminal Court, American Journal of International Law, XLVI, (1952), p. 71.

24/ See document A/CONF.32/4. Human Rights: A Compilation of International Instruments of the United Nations, or paragraph 37 below.

(e) International penal law ratione personae

20. Doctrine is divided on the responsibility of individuals under international penal law. But most writers recognize the responsibility of individuals under international penal law in so far as such persons are acting as agents or executors of State authorities. There seems to be unanimity concerning the responsibility of States as such under international penal law. 25/

(f) International and domestic jurisdiction in the procedure of international penal law

21. International penal law needs like all other branches of the law needs specific organs for its execution. Such organs can be States or bodies particularly created by international law or by international organizations under their constitution. In the latter case, it is essential if the constitution gives competence to an international organization to establish specific organs which can prosecute and punish crimes against humanity.

22. In regard to the doctrine of Article 2, paragraph 7, of the Charter, and in relation with the fact that specific international bodies conferred with the prosecution of crimes against humanity do not exist, the conclusion is necessary that in present international law the establishment of such bodies falls essentially within the domestic jurisdiction of the State. 26/

23. The greater part of the doctrine expressed the view that even the Nuremberg Tribunal was not created by the international community. 27/

24. Attempts by the United Nations to establish a statute of an international criminal jurisdiction have not come to a positive result. The Committee established by General Assembly resolution 489 (V) of 12 December 1950, for the purpose of preparing concrete proposals relating to the creation and the statute of an international criminal court drafted a report. The final report was, however, not considered by the General Assembly. Its resolution 898 (IX) of 14 December 1954, decided to postpone consideration of the report. 28/

25/ Eustathiades, Les sujets du droit international et la responsibilité internationale, Rec. des Cours, 1953 (III, p. 489 ss; Jescheck, Die Verantwortlichkei des Staatsorgane nach Völkerrecht, (1952); Pompe, Aggressive War and International Crime, Rec. des Cours, 1953, p. 290 ss; Triffterer, ibid., p. 172; Thiele, Völkerstrafrecht (1952), S. 32.

26/ Ermacora, Human Rights and Domestic Jurisdiction, Recueil des Cours, 1968 II, p. 377 ss.

27/ Brierly, in United Nations document A/CN.4/SR.42.

28/ Graven, Röling, Herzog, Jescheck, Quintano Ripolles, Glaser, Müller, Klein, Wilkes, Romaskin, Dautricourt: Les projets des Nations Unies pour l'institution d'une justice pénale internationale, Revue internationale de droit pénal, 35 (1964), p. 7 ss; Wikborg, La jurisdiction criminelle internationale, rapport de la sixième Commission à l'Assemblée Générale des Nations Unies, R.I.D.P., 23 (1952), p. 445 ss.

Furthermore, the General Assembly, in its resolutions 1187 (XII) of 11 December 1957, decided to defer consideration of the question of an international criminal jurisdiction until such time as the General Assembly takes up again the question of defining aggression, although the General Assembly has since taken up the question of defining aggression. It decided in 1968, again to defer consideration of the question of an international criminal jurisdiction until such time as progress would be achieved in the generally acceptable definition of aggression (A/7250, p. 10). As apartheid is declared in various resolutions of the General Assembly 29/ as a crime against humanity, a certain tendency exists to resume the question of an international criminal jurisdiction which would make possible the trial of the crime of apartheid.

25. As there does not exist an international body competent to deal with crimes under international law, the prosecution and punishment of such crimes remains essentially a matter for national bodies. This fact makes jurisdiction over States as such virtually impossible. It also raises strong doubts in regard to the effectiveness of international penal law in general 30/ and the possibility of the effective prosecution of crimes against humanity in particular. This is why some writers have proposed the establishment of an international penal court. Graven wrote:

> "International penal law will serve no useful purpose and will not be seriously carried into effect as long as an international criminal court, which is the necessary tool for its effectiveness, does not exist. A law without a judge is a dead law; or one may say that it is a moral law, not a penal one: penal law can solely be a law armed with a sanction which a duly constituted penal authority is capable of imposing irrevocably with all the legal consequences of res judicata and with effective means of enforcement. No doubt the establishment of such an international criminal court has been declared "desirable" and "possible", and the Convention on the Prevention and Punishment of the Crime of Genocide has opened the door to its realization." 31/

29/ See para. 3 above.

30/ Dahm, Zur Problematik des Völkerstrafrechts (1956); Cornil, Le possibilités du droit international pénal, R.I.D.P., 26 (1956), p. 9 ff.

31/ Jean Graven, Recueil des Cours, La Haye, 1950, and in Revue internationale de sciences diplomatiques et politiques (Sottile), Genève 1950 (tiré à part). p. 61 et suiv. (translated from French).

II. INTERNATIONAL INSTRUMENTS

26. The Second World War will be taken as starting point for the simple reason that since then, international penal law, although its roots go back into the distant past, has been dominated by new ideas. As V. Pella points out, 32/ the idea of punishment for acts committed either by States or by individuals against international peace "was often regarded as manifestation of a dangerous revolutionary sentiment... It was not until the Second World War, with its tragic lessons, that the rulers of States finally decided to cast off the old armour of prejudice which had led them to declare any international penal justice impossible".

27. A number of international instruments relating to human rights have been adopted most of which are currently in force. These international instruments are based on the United Nations Charter, in which the peoples of the United Nations reaffirmed their "faith in fumdamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", and determined "to promote social progress and better standards of life in larger freedom". All these documents follow the norms of Article 1 (3) of the United Nations Charter whose purpose is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". All these instruments contain Conventions, declarations, or recommendations relevant to the study, from the point of view of international penal law, of apartheid, a practice which has been declared a crime against humanity.

(a) General Assembly resolution 95 (I)

28. In resolution 95 (I) 33/ of 11 December 1946, the General Assembly affirmed the principles of international law recognized by the charter of the Nuremberg Tribunal and the Judgement of the Tribunal. These principles which were formulated by the International Law Commission at the request of the General Assembly (see para. 11 above) define penal responsibility in criminal matters, and specify the nature of crimes subject to punishment under international law. The provisions of the Nuremberg Tribunal are formulated in seven principles which all concern this study, except for principles VI (a) and (b).

> "Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

32/ V. Pella, La guerre - crime et les criminels de guerre, Geneva-Paris, 1946, p. 16.

33/ See Trifterer. Ibid., p. 75 s.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

(a) ...

(b) ...

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

(b) Universal Declaration of Human Rights

29. In resolution 217 (III) of 10 December 1948 the General Assembly of the United Nations codified the principles of human rights "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".

30. There are many provisions in the Declaration of 10 December 1948 which protect human beings against murder, extermination, enslavement, deportation... and persecutions on political, racial or religious grounds (see articles 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights).

31. The only rule relevant to international penal law is in article 11, paragraph 2. Under this paragraph the penalties under international penal law are the same as

those under national penal law. As in national law, the direct responsibility of the individual is a basic principle. Moreover it follows from the provisions of article 11, paragraph 2 that in international penal law customary law may be invoked to involve the responsibility of the individual. Article 11, paragraph 2, reads as follows: 34/

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

(c) Geneva Conventions of 12 August 1949

32. The Convention of 12 August 1949 relative to the protection of civilian persons in time of war, as established by the Diplomatic Conference of Geneva, constitutes a decisive step forward in the sphere of international law. It contains many provisions designed to ensure respect for the dignity and worth of the human person, by treating as inviolable his intrinsic rights and fundamental freedoms recognized under international law. The provisions of the various Geneva Conventions establish juridical norms which are important from the point of view of international penal law, and denounce - more specifically in articles 3, 49 to 52 of the first Convention, 50 to 53 of the second Convention, 129 to 131 of the third Convention, and 146 of the fourth Convention - violence to the life and person of human beings, and in particular torture, cruel treatment, deportation, outrages upon human dignity, humiliating and degrading treatment, discrimination based on differences in race, colour, nationality, religion or faith, sex, birth or wealth, and the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court with due regard to the judicial guarantees recognized under international law. The following articles of the Geneva Convention can be quoted in connexion with this study:

"ARTICLE 3

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

34/ See also paragraph 35 below.

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

"ARTICLE 49

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

"Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

"In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

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ARTICLE 50

"Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

ARTICLE 51

"No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 52

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

"If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

"Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay."

33. The same provisions can be found in articles 50 to 53 of the second Convention, 129 to 131 of the third Convention and 146 of the fourth Convention. The Geneva Conventions are applicable in cases of armed conflict. In South Africa these resolutions should apply since the situation there has the elements of an armed conflict. One should also take into consideration certain General Assembly resolutions, in particular resolution 2444 (XXIII) on respect for human rights in armed conflicts. 35/

(d) International Covenant on Civil and Political Rights 36/

34. Although the International Covenant on Civil and Political Rights adopted by the General Assembly at its twenty-first session has not yet come into force, it

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35/ Adopted at the 1748th plenary meeting on 19 December 1968.

36/ Resolution 2200 A (XXI) of 16 December 1966.

should be pointed out that several of its provisions are applicable to this study. It conforms to the norms of the United Nations Charter and recognizes "the inherent dignity and... the equal and inalienable rights of all members of the human family", which "is the foundation of freedom, justice and peace in the world . There are many passages which could be quoted (articles 2, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 22, 23, 26).

35. Article 15, paragraph 2 of the International Covenant on Civil and Political Rights contains substantively the same rule as article 11 of the Universal Declaration of Human Rights. It reads as follows:

"Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by the law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

36. The rule laid down in paragraph 2 of article 15 above contains the idea that international penal law may be based on customary international law.

(e) Convention on the Prevention and Punishment of the Crime of Genocide

37. By its resolution 260 (III) of 9 December 1948, the United Nations General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force on 12 January 1951. The Convention, several of whose articles apply to this study, condemns genocide as "a crime under international law" and contrary to the spirit and aims of the United Nations:

"ARTICLE I

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

"ARTICLE II

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

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group.

(e) Forcibly transferring children of the group to another group.

"ARTICLE III

"The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

"ARTICLE IV

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

"ARTICLE V

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

"ARTICLE VI

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

"ARTICLE VII

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

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

"ARTICLE VIII

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

38. This Convention of universal scope recognizes the existence of an international penal law based on the responsibility of the individual.

Glaser wrote:

"It follows that genocide, too, is by its nature only a crime against humanity, indeed an aggravated crime against humanity. It would thus seem correct, from a logical and methodological point of view, to regard genocide as only an aggravated case of a crime against humanity." 37/

39. As regards the Group's mandate, it seems necessary to analyse the history of the Convention on the Prevention and Punishment of the Crime of Genocide. The following extracts are from the Group's 1969 report (document E/CN.4/984/Add.18).

40. The history of the notion of genocide as an international crime begins with drawing up of the charter of the International Military Tribunal at Nuremberg. Article 6 (c) of the London Charter, in its corrected version, counted as crimes against humanity: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in

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37/ Glaser, ibid., p. 109.

connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". While these crimes were to be punished by the Tribunal on the basis of individual responsibility, there were nevertheless restrictions on the jurisdiction of the Court. Crimes of this type came only under the jurisdiction of the Tribunal when they had been perpetrated "in execution of or in connexion with any crime within the jurisdiction of the Tribunal", i.e., in connexion with crimes against peace (article 6 c of the London Charter) or with war crimes (article 6 b). This meant that the scope of the concept of crimes against humanity was limited and that its greatest practical importance in peace-time was seriously affected (cf. History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission, London, 1948, p. 193). Nevertheless it is important to note that the concept was not limited to times of war even at that time. The validity of the principle that the acts enumerated were also punishable under international law if committed during peace time and that only the Tribunal's jurisdiction was restricted in these cases is presumed. The word "genocide" appeared for the first time in an international document when it was used in the Indictment presented to the International Military Tribunal sitting at Berlin on 18 October 1945 (H.M. Stationery Office Cmd, 6696, p. 14). Therein it was said that the defendants had conducted "deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups...". The terminology ("genocide") was taken from Lemkin's book Axis Rule in Occupied Europe (Carnegie Endowment, 1944, pp. 79s). Lemkin's conception of genocide included not only the immediate destruction of a nation or a national group, but rather "a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word 'denationalization' was used in the past; the other, the imposition of the national pattern of the oppressor. Lemkin believes, however, that the conception of denationalization is inadequate because: (a) it does not connote the destruction of the biological structure; (b) in connoting the destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor; and (c) denationalization is often used to mean only deprivation of citizenship" (as summed up in History of the United Nations War Crimes Commission, cited above, p. 197). In the Indictment to the International Military Tribunal, however, the conception of genocide was not used in this broad sense. It was rather restricted to its direct and biological connotation (ibid.)

41. The Judgement of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 1946, while not using the term and conception of genocide, nevertheless described the appalling atrocities committed by the Nazis against groups as such. The terms used were "extermination of Jews and Communist leaders and other sections of the population" as part of a plan to get rid of

whole native populations by expulsion and annihilation "in order that their territory could be used for colonization by Germans" (pages 50s.). The Tribunal's findings were highly influential on the definition of the crime of genocide by various United Nations organs.

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

43. The text of this resolution is the following:

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

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

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

"THE GENERAL ASSEMBLY, THEREFORE,

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

"INVITES the Member States to enact the necessary legislation for the prevention and punishment of this crime;

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

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

44. For the preparation of the genocide convention, action was then taken by the following United Nations organs:

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

(b) Accordingly, the Secretariat;

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

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

(e) The General Assembly during its 1947 session which adopted resolution 180 (II) reaffirming the 1946 resolution and requesting co-ordination of the work concerning the genocide convention and the work concerning the codification of the Nuremberg principles:

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

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

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

(i) The General Assembly at its third (1948) session, where the draft was debated by the Sixth (Legal) Committee and eventually adopted at the plenary meeting of 9 December 1958.

45. During the discussion of the draft resolution and draft convention in the Sixth Committee of the General Assembly, the representative of the Union of South Africa, Mr. Egeland, took the floor several times but only twice on a matter of substance. Following is the statement of the representative of South Africa, according to the summary records of the Sixth Committee of the General Assembly during the 64th meeting held at the Palais de Chaillot, Paris, on 1 October 1948:

"Mr. EGELAND (Union of South Africa) stated that he had been impressed by the divergence of views expressed at the previous meeting. Two points of view regarding procedure had been put forward: the first was that the draft convention was sufficiently advanced for the Committee to consider it clause by clause. He could not agree with that view, because a number of provisions could not, despite painstaking drafting, be accepted by all countries unconditionally. Apart from such imperfections in the draft, which might be more appropriately dealt with elsewhere, he doubted whether a convention such as was contemplated would be practicable and effective, a view which he had previously maintained in 1947 at the International Conference on the Codification of Penal Law in Brussels.

"His country was amongst those which abhorred genocide and wished to see it punished. Punishment should, however, be effected in accordance with the domestic laws of the various individual countries. A formulation and definition of genocide by the United Nations would be useful, but the draft convention was inadequate: in the first place genocide was nearly always committed by Governments themselves and the application of national laws would therefore be of little avail.

"Existing legislation in most countries, including the Union of South Africa, provided for the punishment of individuals guilty of genocide. The Union of South Africa would not, therefore, be taking any new effective measures in adhering to the convention; nor would it thereby aid other States in combating that crime.

"With regard to cultural genocide, Mr. Egeland felt that the definition contained in article III broadened the meaning of the term and went too far in respect to the protection of minorities.

"In Mr. Egeland's opinion, the divergencies of views expressed were so great that the draft could not yet be considered sufficiently advanced to render useful a clause-by-clause study. He agreed with the Egyptian representative that the draft was too ambitious. He wondered how many Governments were likely to ratify the convention, even if the draft were endorsed by the Committee, embodying, as it did, such vague concepts of international jurisdiction.

"The second point of view already expressed in previous speeches, was that the Committee might be well advised to refer the matter to an expert body such as, for instance, the International Law Commission. By adopting that method, the Committee would avoid protracted discussion on specific provisions and, in the long run, save time."

46. Following is the statement of the representative of South Africa made at the 83rd meeting of the Committee on 25 October 1948:

"Mr. EGELAND (Union of South Africa) concurred in the arguments put forward by the representatives of Sweden, Denmark, Canada, Iran and New

Zealand in favour of deleting article III. He wished to express the horror his country felt at any attempt to destroy the cultural heritage of a group or to prevent a group from making its specific contribution to the cultural heritage of mankind. He agreed, however, with the representative of India that the protection of the cultural heritage of groups established within a community had no place in the convention on genocide.

"The population of the Union of South Africa was composed of a number of groups of varying origin and he wished to emphasize the fact that each was encouraged to make the largest possible contribution to the common culture. Like the representative of New Zealand, he wished to point to the danger latent in the provisions of article III where primitive or backward groups were concerned. No one could, for example, approve the inclusion in the convention of provisions for the protection of such customs as cannibalism.

"The delegation of the Union of South Africa would vote for the deletion of Article III."

47. At the 179th plenary meeting of the General Assembly, a vote was taken on the draft genccide convention. The draft was voted upon by roll-call. The Union of South Africa voted in favour of the convention.

48. Some statements by other delegations which seem to be relevant will be quoted below in the proper context. By this method of going into the materials, the ratio legis can be illuminated appropriately. It must be noted that later discussions in theory and practice have centred heavily on implementation questions concerning the genocide convention, while there was relatively little attention paid to the substantial provisions, viz., the elements of the crime of genocide itself. The matter of implementation, however, is not very important in the present context, since the Union of South Africa and, later on, the Republic of South Africa, have remained outside the special obligations created by the Convention. Despite reiterated exhortations by various United Nations organs, it never even signed it, nor did it ratify it.

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

49. In resolution 2391 (XXIII) of 26 November 1968, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which entered into force on 11 November 1970 and which includes provisions relevant to the present study concerning rules of municipal law and crimes against humanity. The Convention notes that the application to crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes; accordingly, it affirms the principle of the non-applicability of statutory limitations to war crimes and crimes against humanity in the following articles:

"ARTICLE I

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

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

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

"ARTICLE II

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

"ARTICLE III

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

"ARTICLE IV

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

50. In regard to the interpretation of the words "inhuman acts resulting from the policy of apartheid", these words may be understood ratione personae as meaning

inhuman acts perpetrated against blacks, Indians and coloured people on racial as well as political grounds and against white people primarily on political grounds.

51. In the process of the elaboration of the Convention the insertion of the term "inhuman acts resulting from the policy of apartheid" as crimes against humanity was the result of the work of a joint working group of the Third and Sixth Committees of the General Assembly established during the twenty-second session of the Assembly.

The first article, adopted on 30 November 1967, of the draft Convention was as follows:

"Article I

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

"(a) War crimes as they are defined in the Charter of the International Tribunal of 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 1949 for the protection of the victims of war;

"(b) Crimes against humanity which, for the purpose of the convention shall mean inhuman acts such as genocide, murder, extermination, enslavement, deportation, eviction by armed attack or occupation, or persecutions, including inhuman acts resulting from the policy of apartheid, committed in time of war or in peace-time against the civil population or certain elements of that population on social, political, economic, racial, religious or cultural grounds by the authorities of the State or by private individuals acting at the instigation or with the toleration of such authorities." 38/

In the final text and according to the genesis of the Convention "inhuman acts resulting from the policy of apartheid" are considered as a form of crime against humanity and crimes of international law. Article II of the Convention clearly indicates that the representatives of the State authority and private individuals are considered responsible for the crimes mentioned in the Convention.

52. There exists a series of drafts accompanied by substantial discussion, about the establishment of an international criminal jurisdiction on the one side and a draft code of offences against the peace and security of mankind on the other, although elements of international penal law can be found in customary international law such as in cases of humanitarian law. Only those drafts should be taken into consideration which were elaborated after the Second World War in different bodies of the United Nations; and the only passages of these drafts to be regarded as relevant for the purposes of this study are those which deal with the scope of the working group's mandate.

38/ A/C.3 and 6/SC.1/L.2, p. 31.

The main documents in question are the following:

(i) Draft proposal to define the principles recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal: draft proposal for the establishment of an international court of criminal jurisdiction: memorandum submitted by the representative of France (A/AC.10/21)

53. The above-mentioned document submitted by the delegate of France (Donnedieu de Vabres) to the Committee on the progressive development of international law and its codification contains draft proposals to define the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. The proposal of the delegate of France referred to the work which had been done by the International Association of Penal Law. 39/ The proposal made reference to the scope of an international jurisdiction which would deal "with indictments for crimes against humanity" which might be brought against a State or its rulers. Another proposal was that the Court might deal with "all common law offences connected with crimes against humanity committed by the rulers of a State". In this last proposal reference is made to the convention of 1937 regarding the international repression of terrorism. 40/

(ii) Report 41/ of the Committee on International Criminal Jurisdiction: Geneva report (A/2136) and report of the 1953 Committee on International Criminal Jurisdiction (A/2645)

54. The reports contain an indication of the problems which arose in the preparation of a draft statute for an international criminal court, including the modes of the creation of a court, its jruisdiction and functions, its character and organization, its procedure and the law it may apply.

In the Geneva Commission's report as well as in the report of the 1953 Committee on International Criminal Jurisdiction which was submitted as document A/2645 to the General Assembly on 24 August 1953, the question was discussed which kind of crimes should fall under the jurisdiction of an international court (see paragraph 28 et seq. of the Geneva report and paragraph 52ss of document A/2645).

55. In the course of the discussion of these questions some members of the 1953 Committee on International Criminal Jurisdiction expressed the opinion that "it would be improper to establish the Court before international criminal law has been defined in a generally adopted convention" (A/2645, paragraph 17).

39/ Revue international de droit pénal (1935), p. 366 ss.

40/ See League of Nations document C94,M.47.1938.V "Proceedings of the International Conference on the Repression of Terrorism".

41/ See also documents A/AC.48/1 and A/AC.48/1/SR.1 to 31, and document A/CN.4/7/Rev.1, Historical survey of the question of international criminal jurisdiction.

56. The Geneva report as well as the report of the 1953 Committee reveals that, in the context of the purpose of the court, a discussion took place regarding the crimes which States would become bound to recognize as within the jurisdiction of the court. The Geneva report (A/2136) gives the following indications to this problem:

"THE PURPOSE OF THE COURT
(Article 1 of the draft statute)

"28. There was some difference of opinion among members of the Committee as to the categories of crimes over which jurisdiction might be conferred upon the court. This question was taken up prior to any consideration of the method by which the court might be given jurisdiction over crimes; it was found that a preliminary question as to the scope of the function to be fulfilled by the court had to be settled before detailed rules on jurisdiction could be laid down. The answer to this preliminary question would have some bearing upon such rules, as it was evident that no jurisdiction could be given to the court with respect to crimes falling outside the broad categories determining the function of the court. On the other hand, the determination of these broad categories would not establish any jurisdiction. It would have to be determined subsequently how and in respect of what crimes States would become bound to recognize the jurisdiction of the court.

"29. There was general agreement that the court should be competent to judge crimes under international law. Without undertaking any profound analysis of this category of crimes, the Committee agreed that it was now a well-established fact that certain acts were criminal by virtue of international law, irrespective of whether they were criminal or not under any national legal system. The object of the study of an international criminal jurisdiction was to find out how a judicial organ could be established to deal with these crimes on the international level.

"30. The difference of opinion among members of the Committee related to the question whether this should be the sole function of the court, or whether the court should be called upon, in addition hereto, to judge certain other categories of crimes. The proposal was made that such crimes under national law as were of international concern also should come within the purview of the jurisdiction which might be assigned to the court.

"31. In favour of this proposal the following arguments were adduced. There were certain groups of crimes which affected the interest of several States, and for the punishment of which national courts might not always be impartial or adequate. Such crimes included counterfeiting of currencies, traffic in persons, traffic in narcotics, damaging of submarine cables, and also attacks upon foreign heads of State or government members and members of United Nations missions. As judges in most countries were not subject to government influence, a national judgement in such a case might be too lenient to satisfy the foreign party involved that justice has been rendered. Conversely, there might be situations, at time of international tension, in which a national tribunal, subject to the general psychological climate prevailing in a country, would judge a certain crime more severely than the

foreign nationals or the foreign Government concerned would find just. In such cases a Government might find it greatly to its advantage if the matter could be referred to an impartial international tribunal.

"32. Furthermore, it might be a good thing to determine the functions of the court in such a way that it would be unlikely to remain without occupation for long periods. It might be desirable, in this way, to accustom public opinion to the existence and operation of the international criminal tribunal. When new institutions were set up it was often useful to make them begin their activities rather modestly. Once they had affirmed their position and justified their existence in matters of less importance, they would have strengthened the foundation for their activities in matters of higher importance. The conception of a gradual growth was a sound one, also as applied to the problem of international criminal jurisdiction.

"33. Against these arguments it was stated that there was no need for establishing an international jurisdiction in such matters which are of minor importance compared to international crimes proper. There was furthermore a risk that the prestige of the court would be lowered if such minor crimes are brought before it. Their inclusion under the jurisdiction of the court would add unnecessary complications, for instance with respect to the qualifications to be required of judges. Doubts were also expressed whether it rightly belonged to the field of activities of the United Nations to set up organs for judging this type of crime. It was finally claimed that conferring jurisdiction over such crimes would be beyond the terms of reference of the Committee.

"34. At the beginning of its deliberations the Committee resolved, by 8 votes to 5, to proceed on the assumption that minor crimes should be included in the article defining the purpose of the court. Having examined the problem in relation to other problems involved in the establishment of an international criminal jurisdiction, the Committee decided ultimately not to include any mention of this category of crimes in the statute. The vote in favour of the deletion of such mention in article 1 was 6 to 3, with 4 abstentions.

"35. It was pointed out by some members that it was objectionable to give the court jurisdiction in general terms such as 'crimes under international law' because there were many different opinions as to what crimes were crimes under international law, and in fairness to an accused it was essential that he should know exactly what he was charged with and the conditions under which he was being tried. The way to deal with this problem was to provide that the court should have jurisdiction over only such crimes under international law as might be provided in separate conventions giving the court jurisdiction over such offences. In order to meet this point of view it was proposed that the introductory article stating the purpose of the court should make it clear that the court should be called upon to deal only with such crimes as might be provided in conventions or special agreements between States parties to the statute.

"36. This proposal was opposed by other members of the Committee on the ground that it might be construed as leaving outside the scope of the court a vast field of international crimes, which could then only be tried by special international tribunals.

"37. The drafting sub-committee having included the words 'as may be provided in conventions or special agreements among States parties to the present Statute' in article 1 of its proposals for a draft statute, the Committee voted upon the deletion of these words from the article. The vote was 5 to 5, with 3 abstentions, and the deletion was therefore not carried."

57. Similar passages can be found in paragraph 52 et seq of the report of the 1953 Committee.

58. The main problem discussed was whether crimes not solely of an international law character but of international concern, as provided in conventions or special agreements among States parties to the statute or by unilateral declarations, should fall under the scope of the envisaged court. Examples of the crimes in question were in no way mentioned during the deliberations. However, the report recognizes that there were different opinions as to what crimes were crimes under international law.

59. The Geneva Committee's draft annexed to the report states in article 1 of the draft statute for an international criminal court the following: "There is established an international court to try persons accused of crimes under international law as may be provided in conventions or special agreements among States parties, to the present Statute." In the draft of the 1953 Committee, however, article 1 reads as follows: "There is established an International Criminal Court to try natural persons accused of crimes generally recognized under international law."

60. It must be observed that individual persons and not States or State agencies are envisaged as subject to prosecution and punishment. Furthermore, the difference in wording and meaning between the purpose of the court in the two drafts is also clearly a difference in substance. The Geneva Committee's draft made reference to crimes being provided in conventions or special agreements, but the 1953 Committee draft made reference to crimes "generally recognized under international law". The latter is of a more general scope in substance, not depending on a special agreement.

61. States parties submitted comments on the Geneva report. These comments are to be found in document A/2186 and Add.1. The most substantial comments on the subject in question came from Chile, France, Netherlands and the United Kingdom. These comments are the following:

Chile:

"(1) According to article 25, 'the court shall be competent to judge natural persons only, including persons who have acted as Head of State or agent of government'. It seems almost unnecessary to state that only natural persons may be judged, because so-called legal persons or entities are mere

fictions, the purpose of which is to make certain aspects of the social structure more easily understandable. However, the explicit statement made in this article is desirable in order to avoid attempts by persons accused of offences to evade their responsibility on the pretext that they were acting as representatives of entities distinct from themselves and that, since it is impossible to establish the responsibility of these bodies because of their very nature, those who carry out their decisions are also not punishable or juridically accountable for those acts."

France:

"(4) Law to be applied by the court (article 2)

Article 2 is not felicitously drafted. The international criminal judicial authority will obviously apply international criminal law. It is unnecessary to mention this, and to mention it parenthetically seems almost odd.

It is also not desirable to refer to the court's possible application of national law, especially when the text does not specify in which cases. In fact, in applying international criminal law, the court will as a matter of course apply national law whenever the rules of international law, including the provisions of the court's statute, refer to national law or logically require its application."

Netherlands:

"The question arises whether in article 1 the term 'crimes under international law' is not too vague and whether reference should not be made to the code of offences against the peace and security of mankind. An argument in favour of mentioning the code would be the reference to a number of clearly defined offences, so that in that case there will be no uncertainty as to the question whether a particular case is or is not a crime under international law. An argument against the mentioning of the code is, however, that reference would be made to a document which is still in a stage of preparation. Weighing the advantages and disadvantages against each other, the Government comes to the conclusion that such a reference is not recommendable, also on the ground that this document as well as the principles of Nürnberg will constitute or already do constitute a part of international law.

The words 'as may be provided in conventions or special agreements among States parties to the present statute' should be deleted, because this clause contains an unnecessary limitation of the conception of crimes under international law; a limitation all the more unnecessary because article 26 regulates already the conferment of jurisdiction upon the court."

United Kingdom:

"In the second place the competence of the court, as proposed by the Committee, relates to the category of offences known as 'crimes under international law', i.e., (leaving aside such comparatively rare occurrences as piracy jure gentium) war crimes and the class of offences grouped under the head of 'crimes against peace and humanity', such as planning wars of aggression, genocide, etc. (see paragraphs 28 to 34, inclusive, of the report). It thus appears that the primary object of the court would be to provide an international forum for the trial of individual persons accused of war crimes and crimes against peace and humanity."

62. In respect of the mandate of the Ad Hoc Working Group of Experts it is worth citing the opinion of the Union of South Africa contained on page 11 of the English text of document A/2186:

"Moreover, there is, as yet, no general agreement as to what should be considered as international crimes. Until there is such agreement, there is in the Union Government's view no justification for setting up a court. Establishing crimes by separate conventions has little value unless the great majority of States become parties thereto.

The present state of the world is regrettably such that there is practically no likelihood of reaching general agreement on the working of the court.

Another consideration is that, since it is probable that most of the international crimes, still to be defined, will be committed by persons representing their Governments, it is also probable that efforts to bring such persons before the court will be resisted. It is difficult to see how this problem could be overcome in present circumstances.

Having regard to its view that the establishment of an international criminal court is not a practicable proposition in the immediate future, the Union Government wishes to refrain from commenting in detail on the draft constitution of the court."

63. The report of the 1953 Committee was discussed in the Sixth Committee of the General Assembly during its ninth session. The relevant report is to be found in document A/2827. Only those delegations which maintained that there was no need to establish the proposed international court declared that the "provisions in the revised draft statute that the proposed court was to try crimes generally recognized under international law (article 1) and that the court was to apply international law, including international criminal law, and where appropriate, national law (article 2) were vague and uncertain".

64. The General Assembly postponed further discussion on this question by resolution 898 (IX) "until the General assembly has taken up inter alia again the draft Code of offences against the peace and security of mankind".

(iii) Draft Code of Offences against the Peace and Security of Mankind (A/2693)

65. The draft Code of Offences against the Peace and Security of Mankind tries to give substantive definitions of international crimes. This draft took into account observations of Governments. The draft code was presented to the sixth session of the General Assembly and its article 1 and article 2, paragraph 11, are the most discussed provisions. They describe acts deemed crimes in international law and are the result of some modifications compared with the former draft code.

66. The modifications as well as the comments thereto are substantial. The wording of the text is the following:

"Article 1

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

Comment

The Commission decided to replace the words 'shall be punishable' in the previous text by the words 'shall be punished' in order to emphasize the obligation to punish the perpetrators of international crimes. Since the question of establishing an international criminal court is under consideration by the General Assembly, the Commission did not specify whether persons accused of crimes under international law should be tried by national courts or by an international tribunal.

In conformity with a decision taken by the Commission at its third session (see the Commission's report on that session, A/1858, paragraph 58 (c)) the article deals only with the criminal responsibility of individuals.

Article 2, paragraph 11
(previously paragraph 10)

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

Comment

The text previously adopted by the Commission read as follows:

'Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.'

This text corresponded in substance to article 6, paragraph (c), of the Charter of the International Military Tribunal at Nürnberg. It was, however, wider in scope than the said paragraph in two respects: it prohibited also inhuman acts committed on cultural grounds and, furthermore, it characterized as crimes under international law not only inhuman acts committed in connexion with crimes against peace or war crimes, as defined in that Charter, but also such acts committed in connexion with all other offences defined in article 2 of the draft code.

The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connexion with other offences defined in the draft code. On the other hand, in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State."

67. Articles 1 and 2 of the draft Code as adopted by the International Law Commission read as follows:

"Article 1

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

Article 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

/...

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife, in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article."

68. The commentaries to the draft articles of the Code of Offences against the Peace and Security of Mankind appear in the Yearbook of the International Law Commission, 1954, vol. II. The passages concerning article 2, paragraphs 9 and 10, are of particular significance for the mandate of the Ad Hoc Working Group. They read as follows:

"XI. Article 2 (9) and (10) of the draft Code

(a) Text adopted by the Commission

(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

(b) Comments by Governments

Professor Emanuel Duran P. (Bolivia) wishes the Commission to define as a crime 'the case where a group is subjected to living conditions which render its normal life within the national community impossible and which are incompatible with the free development of its activities and personality'.

The Government of the Netherlands requests the deletion of the words 'cultural grounds' from paragraph 10, so that the wording does not deviate from that of the Charter of Nürnberg.

In the view of the Government of Yugoslavia, the crimes against humanity listed in paragraph 10 should be punished regardless of whether they have or have not been committed in connexion with other offences defined in article 2, wherever they are committed in an organized manner.

(c) Comments by the Special Rapporteur

The comments of the Governments are mutually contradictory and the Special Rapporteur is not therefore in a position to suggest any specific changes in the text adopted by the Commission."

69. The draft Code of Offences against the Peace and Security of Mankind is based in substance - as far as the definition of crimes is concerned - on principle VI of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (see under B (a) of this study).

70. As was the case with the Geneva report and the report of the 1953 Committee, further discussion of the Draft Code of Offences against the Peace and Security of Mankind was also in fact postponed. 42/ In resolution 1186 (XII), the General Assembly requested the Secretary-General to transmit the text of the draft Code to Member States for comment and to submit their replies as the item might be placed on its provisional agenda.

42/ See resolution 897 (IX) of the General Assembly, adopted on 4 December 1954.

III. REMARKS OF THE WORKING GROUP ON THE BASIS OF DOCTRINE AND INTERNATIONAL INSTRUMENTS

71. (a) International penal law which is a branch of public international law is the sum of all international rules of a penal character connecting a certain behaviour-like grave infringement against international law - with certain legal consequences which overwhelmingly fall into the sphere of penal law and which as such are generally considered self-executing.

(b) Sources of penal international law are ennumerated in Article 38 of the Statute of the International Court of Justice and are international conventions, international customs and general principles of law recognized by civilized nations, judicial decisions and the teaching of the most highly qualified publicists of the various nations. There may also be rules of internal law in the framework of international penal law which execute international penal law in the national legal order.

(c) Competence to establish crimes under international penal law does not fall essentially in the jurisdiction of a State. However, in the absence of an international penal body the establishment of which is being envisaged, the establishment of bodies to prosecute crimes under international penal law remains essentially within domestic jurisdiction.

(d) International penal law must describe the pertinent crime clearly or, in the case of customary international law, it must be an offense deemed to be a crime.

(e) According to most doctrines, the principle "nulla poena nullum crimen sine lege" is, as long as international law is not exclusively conventional law, not strictly applicable in international penal law.

(f) The penalties for breaches of international penal law must be indicated in a general way. But the nature and the degree of the penalty need not to be foreseen.

(g) Responsibility under international penal law lies upon States as well as upon ordinary individuals.

(h) Culpability for war crimes and crimes against humanity is no more in dispute. The scope of culpability for crimes against humanity is however still arguable.

(i) A clear circumscription of crimes under international law depends on the development of public international law. The Geneva Conventions of 1949, the Genocide Convention and the documents mentioned in paragraph 2 of article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity indicate the most essential crimes against humanity.

(j) Since the convention on non-applicability classifies inhuman acts resulting from the policies of apartheid as a crime under international penal law, it is justifiable to conclude that at least acts such as murder, extermination, enslavement, deportation or persecution committed against any civilian population on political, racial, religious (social or cultural) grounds, the killing of members of a 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 physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group, are crimes under international penal law.

IV. ANALYSIS OF THE POLICIES OF APARTHEID WITH A VIEW TO DETERMINING THE ELEMENTS TO WHICH INTERNATIONAL PENAL LAW APPLIES

72. (a) In order to strengthen this study, the mandate of the Group does not imply that its purpose is to consider the problems of international penal law in abstracto but confines it to specific consequences of the apartheid policies. Since the practice of the United Nations is to concentrate its struggle against the apartheid policies in particular on the Republic of South Africa (and in practice Southern Rhodesia and Namibia), the scope of the study must take into consideration the apartheid policies as an element of international penal law in regard to the Republic of South Africa.

(b) First of all, it must be stressed that the Republic of South Africa is not a party to any of the international legal acts in force touching upon elements of crimes against humanity. The Republic of South Africa is, however, a party to the Geneva Conventions. It is also a party 43/ to the peace treaties concluded at the end of the Second World War with Bulgaria, Finland, Hungary, Italy and Romania, which contain identical provisions binding these countries to take the necessary measures to ensure the arrest and extradition to stand trial of persons guilty of war crimes and crimes against peace and humanity. In this way, South Africa has recognized facts pertaining to types of crimes known as crimes under international law.

(c) But even if the Republic of South Africa has not adhered to written instruments of this kind, the Republic of South Africa is not at all free from obligations under international penal law. No State is bound to assume the obligations created by any convention, for ratification has always been dependent on the free will of States. This does not mean, however, that the obligation to prevent and punish crimes committed under international law in itself is not binding on South Africa. This obligation has, as a matter of fact, not been newly created by the Conventions in question. 44/ Its existence must be regarded as a binding rule of general international law presupposed by the written instruments. Although it has sometimes been said that the idea of an international

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43/ With Bulgaria on 17 May 1948 (see Article 5, United Nations Treaty Series, vol. 41, p. 51); with Finland on 17 May 1948 (see Article 9, ibid., vol. 48, p. 229); with Hungary on 17 May 1948 (see Article 6, ibid., vol. 41, p. 169); with Italy on 4 November 1947 (see Article 45, ibid., vol. 49, p. 4); with Romania on 17 May 1948 (see Article 6, ibid., vol. 42, p. 35).

44/ In its advisory opinion of 28 May 1951 on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice pointed out that the principles which are at the basis of the Convention are principles recognized by civilized nations as binding States even in the absence of any conventional link (Réserves à la Convention pour la prévention et la répression du Crime de Génocide. Recueil de la Cour Internationale de Justice, 1951, p. 23).

criminal law binding upon States and directly upon individuals was a revolutionary innovation in international law it must be taken as a generally accepted rule that there exists such a law now, after the revolution of international law, so to speak. The arguments of retroactivity which have been brought forward by critics of the Nuremberg Trials are not valid in the case of apartheid policies which, if they constituted for instance genocide, had taken place during a long period after the conception of genocide had crystallized in several United Nations resolutions which had been supported by the overwhelming majority of States and which, therefore, must be regarded as the expression of the new conviction of these States that there existed a rule of general international law to that effect.

(d) However, it may be doubtful whether, morally condemnable as they may be, conspiracy, incitement and attempt to commit inhuman acts resulting from the policies of apartheid can be regarded as crimes punishable under general international law.

(e) Concerning the studies made by the Ad Hoc Working Group of Experts, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Genocide Convention contain important guidelines on how to consider from an international penal law point of view inhuman acts resulting from the policies of apartheid. This is because the former Convention refers expressly to apartheid policies and the latter is viewed more and more in its relationship with these policies (see, in particular, the study of the Ad Hoc Working Group in document E/CN.4/984/Add.18).

(f) The convention on non-applicability uses the phrase "inhuman acts resulting from the policies of apartheid". These acts are considered as a form of crimes against humanity and crimes under international law. Interpreting the expression "crimes against humanity", the Group is bound to apply at least resolution 95 (I) of the General Assembly of 11 December 1946 affirming the principles of international law recognized by the charter of the Nuremberg Tribunal and the Judgment of the Tribunal. The interpretation given by the International Law Commission to this expression is of great help (see Yearbook of the ILC 1950 II). A comparison of the principles mentioned above with the convention on non-applicability shows that "inhuman acts resulting of the politics of apartheid" means acts contrary to human rights as defined in the instruments of the United Nations and deriving from the policy of apartheid. That is to say that violations of human rights, in particular by such acts as are described in a paragraph above, are inhuman acts within the meaning of the convention on non-applicability.

(g) The other rules of international penal law which can be applied to the policy of apartheid are also those which apply to the crime of genocide. The Group, in its document E/CN.4/984/Add.18, has fully analysed the problem in this context (reference is made to paragraphs 23 to 29).

(h) In some resolutions of the Security Council the policies of apartheid are considered as a threat to peace within the meaning of the Charter. This problem must be stressed because principle VII of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of

the Tribunal recognizes also complicity in the commission of a crime against humanity (murder, extermination, enslavement, deportation, and other inhuman acts against any civilian population or persecution on policital, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace...) as a crime under international law. One may also interpret the said resolutions of the Security Council relating to the policies of apartheid that inhuman acts resulting from the policies of apartheid are crimes against humanity.

V. ELEMENTS OF THE POLICIES OF APARTHEID BROUGHT TO LIGHT IN THE WORK OF THE UNITED NATIONS, AND IN THAT OF THE AD HOC WORKING GROUP OF EXPERTS IN PARTICULAR, TO WHICH INTERNATIONAL PENAL LAW MIGHT BE APPLIED

73. If one takes into account the main elements of the apartheid policies which in the opinion of the Group, constitute infringements of human rights, in particular of those enumerated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, it is not self-evident that those infringements constitute at the same time crimes under international law. The only acts which may be considered crimes under international law in the context of apartheid are those which are mentioned as crimes against humanity in documents referring expressly to crimes under international law, such as extermination, slavery, persecutions on political, racial and religious grounds. Furthermore, acts fall under the category of crimes under international law when they can be considered "inhuman acts resulting from the policies of apartheid". The question to solve is what inhuman acts are considered crimes under international law. It is true that the General Assembly in different resolutions 45/ has condemned the policy of apartheid as a crime against humanity. These are not strictly legal texts and do not interpret which acts constitute inhuman acts resulting from the policy of apartheid. In this context, it is necessary to find the correct interpretation for the phrase "inhuman acts resulting from the policies of apartheid", which is contained in article 1, paragraph 2, of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

74. In the opinion of the Group, "inhuman acts resulting from the policies of apartheid" are acts creating fear and want and depriving Africans in the Republic of South Africa, in Southern Rhodesia and in Namibia of full development of personality and even of life by endangering the economic, social and cultural rights, as well as the civil and political rights of human beings belonging to a distinct racial group residing in the above-mentioned Territories; without the enjoyment of those rights, Africans would lose dignity and could not participate in social progress and in a better standard of life.

75. The Ad Hoc Working Group of Experts, in its reports of 1967, 46/ 1969, 47/ 1970, 48/ and 1971, 49/ has investigated very carefully different practices of apartheid, in particular the treatment inflicted upon prisoners, detainees and

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45/ See paragraph 3 above.

46/ E/CN.4/950.

47/ E/CN.4/984 and Add.1-18.

48/ E/CN.4/1020.

49/ E/CN.4/1050.

persons in police custody on racial grounds; it has further investigated practices of genocide, slavery-like practices and the problem of the deportation of persons on racial grounds.

(a) Treatment of civilians, prisoners, detainees and persons in police custody

76. There is no need to mention all the examples of such treatment in order to convince any well-informed person, and this study will simply include a few descriptions of typical cases borne out both by the testimony received and by South African legislation. The principal laws of the Republic of South Africa concerning the treatment of civilians, prisoners, detainees and persons in police custody were amply described in chapter VI of the first report of the Group. 50/ These laws are: the so-called "180-day law"; the Suppression of Communism Act; 51/ the General Law Amendment Act; 52/ the "Sobukwe Clause"; and the Terrorism Act. Attention should also be drawn to the matters dealt with by the Group in paragraphs 56 to 65 of document E/CN.4/479 and, in particular, to the fact that the Group noted when adopting its report (E/CN.4/984) on 19 February 1969 that those South African laws were still in force and had not been amended.

(b) Murder of Africans in South Africa and Southern Rhodesia

77. The following statistics show that the majority of the persons executed were Africans. It has been noted, in that connexion, that the non-white population outnumbers the white population in South Africa four or five to one (E/CN.4/AC.22/RT.58, p. 16).

Number of death sentences and executions, by administrative years (1 July-30 June)

	Number sentenced to death					Number executed				
Year	White	Coloured	Asiatic	Bantu	Total	White	Coloured	Asiatic	Bantu	Total
1959/60	2	18	-	98	118	1	11	-	70	82
1960/61	3	17	1	89	110	2	13	1	67	83
1961/62	2	20	1	152	175	2	15	-	120	137
1962/63	7	13	1	129	150	7	9	-	91	107
1963/64	4	16	-	138	158	4	14	-	91	109
1965/66	5	34	-	100	139	3	17	-	50	70
1966/67	8	16	1	102	127	2	14	-	81	97
1967/68	4	20	-	77	101	3	21	-	95	119

50/ E/CN.4/950, paragraphs 61-81 and annexes III and IV.

51/ No. 44, of 1950, as amended.

52/ "Sabotage Act", No. 76, of 1962.

It will be noted that no statistics are available from the Ministry of Justice for the administrative year 1964-1965. No official explanation was given as regards the discrepancy between the number of persons sentenced to death (101) and the number of persons executed (119) in 1967-1968. The reasons given for these excessive executions of Africans are ludicrous. According to the Landsdown Commission, which as a Government commission reflects official opinion, "the death penalty is inevitable in a society where a large part of the population is just emerging from barbarity". However, Mrs. Suzman, M.P., stated in the South African Parliament that "figures over a 10-year period show that whites commit murder and rape on non-whites at a rate four times greater than non-whites on whites". 53/

78. In paragraph 96 of document E/CN.4/1020, the Group stresses that it received information concerning the death of political prisoners under suspicious circumstances.

79. There is substantial and striking testimony concerning such murders in South Africa and Southern Rhodesia. In paragraph 96 of document E/CN.4/1020, the Ad Hoc Working Group of Experts stressed that it had received information concerning the death of political prisoners under suspicious circumstances. These persons included the following:

Mr. "Looksmart" Solwandle Ngudle, "found hanging in his cell" on 5 September 1963;

Mr. Suliman Salcojee, who died on 9 September 1964 after falling from the seventh floor of Security Headquarters at Pretoria where he was being interrogated;

Mr. James Tyitya, "found hanging in his cell" in January 1964;

Mr. Leong Yum Pin, the same official finding (19 November 1966);

Mr. James Hamakwayo, the same official finding (precise date unknown);

Mr. Ah Yan, the same official finding (5 January 1967);

Mr. Alpheus Maliba, the same official finding (1967, precise date unknown);

Mr. J.B. Tubakwe, the same official finding (11 September 1968);

Mr. Nichodimus Kgoathe, who died of "bronchial pneumonia" (4 February 1969);

Mr. Solomon Modibane, who died of "natural causes" (28 February 1969);

Mr. James Lenkoe (10 March 1969);

Mr. Caleb Mayekiso, same official finding (1 June 1969);

Mr. Sijso Ginenishe (July 1969);

Imam Hadj Abdullah Haron (27 September 1969).

53/ House of Assembly Debates (Hansard) 14 March 1969, cols. 2578-2579.

In section B, paragraphs 120-139 of the same document, the Ad Hoc Working Group of Experts recorded testimony indicating that Mr. Lenkoe's death was caused by an "electric shock", by "electrocution", or that he "took his life in circumstances where the legal responsibility for his death is attributable to the person or persons who administered the electric shock". This information comes from several organizations, including the African National Congress of South Africa, 54/ the American Committee on Africa, 55/ the International Commission of Jurists, 56/ and the World Campaign for the Release of South African Political Prisoners. 57/ The views expressed in those documents are consistent with those of Mrs. Lenkoe, Dr. Moritz, Mr. Carlson, Dr. Gluckman and others. In paragraphs 29, 30 and 31 of its report (E/CN.4/984/Add.8) the Ad Hoc Group referred to eye-witness evidence in camera that political prisoners were kicked, knocked down, slapped hard in the face and treated like animals until they died. The Group cited the cases of Alexander Mashawira, who died in the Salisbury police station, David from Seke area (Salisbury district), and Anton from Fort Victoria district. According to the testimony received by the Ad Hoc Working Group, prisoners were loaded into a helicopter, flown up, dangled from several feet above ground and then dropped down, sometimes to their death. This method is often used to dispose of captured guerrillas. In that connexion, the Group mentioned the plea by the Zapu leader, Mr. Nyandoro, 58/ for captured guerrillas to be treated as prisoners of war and recorded the guerrilla chief's summary of the methods of torture and degradation which had caused the death of several persons: (1) forcing through the urethra sharpened bicycle spokes; (2) "pincers" method of pulling testicles; (3) throwing live snakes into occupied detention cells; (4) beating to death during interrogations; (5) electric shock; (6) shooting to kill wounded captured guerrillas; (7) shooting villagers indiscriminately under the guise of "killing guerrillas".

(c) Extermination

80. In the course of its investigations the Ad Hoc Working Group gathered disturbing testimony concerning cases of extermination in South Africa and Southern Rhodesia and described them in its various reports, including the report in document E/CN.4/984/Add.18. It described the methods of extermination, as well as specific cases, which merit consideration:

54/ Letter of 30 July 1969, reproduced in A/AC.115/L.264.

55/ Letter of 26 June 1969.

56/ Letter of 17 July 1969, reproduced in Unit on Apartheid, Notes and Documents, No. 12/69.

57/ Letter of 9 July 1969.

58/ See Record of testimony taken at the 110th meeting of the Group in Lusaka on 27 August 1968 (E/CN.4/AC.22/RT.40), p. 8.

(1) 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 in the preconditions for the exercise of their traditional professions;

(2) 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;

(3) The population policies in general, which had as their purpose to cause the 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;

(4) The imprisonment and ill-treatment of non-white political (group) leaders and of non-white prisoners in general, who often die in suspicious circumstances, frequently were acts designed to eliminate part of the black population;

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

81. In some instances, the testimonies before members of the Ad Hoc Working Group go into detail; thus, a number of testimonies revealed that thousands of persons have died as a result of the aforementioned methods. One witness, Mr. Brutus, spoke in his testimony of electrodes, "carry on" as well as other forms of torture of the prisoners. He also spoke of mental torture of the prisoners and of the deliberate infliction on a group of non-white people of conditions of life calculated to bring about their physical destruction in whole or in part. Those methods of extermination were compared to nazi practices. Another witness, Mr. Sachs, said that the Ghetto Act "has been used in the most ruthless fashion to destroy the livelihood, in particular of members of the Indian community". Mrs. Altman reported that there was in South Africa a form of genocide by neglect and indifference whereby non-whites were regarded merely as labour digits; when they could no longer perform a useful function, they were merely left to die in the camps. 59/ It was also reported that the living conditions in resettlement camps and the high infant mortality rate among Africans against which no measures have been taken, actively contributed to the destruction of the native population. Many witnesses emphasized that the massacres at Sharpeville and Langa were plausible proof that one group was concentrating all its efforts on exterminating another group. The systematic application of the Group Areas and the Ghetto Acts could also ultimately, though not immediately, bring about the destruction of a population group, through sickness, isolation, lack of amenities and lack of medical attention. Non-white groups were uprooted and transplanted to areas which were often disease-ridden, and which had no doctors to provide the care needed. Many died early because there was not enough

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59/ See Record of testimony taken at the 82nd meeting held in London on 18 July 1968 (E/CN.4/AC.22/RT.12).

to live on in the rural areas. Mr. Brutus, whose statements were quoted earlier, also said that the South African régime was guilty of killing thousands of people and that farm and convict labourers were dying by the thousands of starvation, lack of food, and because of the discriminatory practices of South Arrican legislation.

82. Mr. Sachs and Mr. Jassat stated in their testimony, reported in paragraphs 595 and 815 of the report contained in document E/CN.4/950, that if there was any trouble, uprising, revolution or strike, the South African Government could "annihilate whatever groups it /wants/ to". According to the testimony heard by the Ad Hoc Group of Experts and related in its report, (E/CN.4/1020/Add.2) the death sentence was imposed on Africans accused of crimes of a political nature (paragraph 128); Mr. Shope even stated that "South Africa was not only a concentration camp for its 15 million non-whites, but also a slaughter-house for all those who opposed the fascist rule of the Government". Some witnesses pointed out that "the number of political prisoners who died in circumstances known only to authorities seemed to be increasing at an alarming rate", and that "the Government was not interested in whether these people live or die" (paragraphs 131-132).

83. Various witnesses stated that the South African authorities were resorting to capital punishment with increasing and alarming frequency. It was recalled that a recent United Nations survey of capital punishment around the world reflected the astonishing fact that South Africa alone accounted for over 40 per cent of all death sentences that have been carried out in the entire world. In his testimony, Mr. Houser emphasized that "the vast majority of those who were executed, out of all proportion to the population, /were/ Africans". 60/

84. According to Mr. Molotsi, "it can hardly be disputed that the South African Government, in addition to torturing its political opponents, eliminates them by legalized mass murder". 61/

85. Mr. Setai said that in South Africa "on the average, two persons /were executed/ per week in the last five years". He also said that the "undeclared policy of the Government /was/ to eliminate or reduce the number of Africans in South Africa to only the number /it/ will need for exploitation inside the country". 62/

86. A witness, Miss McAnally, spoke of dozens of children dying of malnutrition in the Transkei and of "endless lines of mothers who had walked for long miles, carrying starved children". Kwashiorkor, the African name for the disease of malnutrition, claimed 40,000 infant deaths in South Africa, in 1967. She then added that, although starvation and malnutrition were causing death in a "much

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60/ See E/CN.4/AC.22/RT.57.

61/ See E/CN.4/AC.22/RT.56, p. 11.

62/ See E/CN.4/AC.22/RT.58, p. 16.

less dramatic way than the nazi ovens of Germany", the situation created was "as tragic and as violent". 63/

87. It was also alleged that epidemics of typhoid and tuberculosis were decimating the African communities in the reserves and more particularly in the transit camps. Mr. Molotsi mentioned the case of Limehill where, as a consequence of the policy of mass removals, 26 people died in a three-week period from gastro-enteritis. 64/

88. Several witnesses spoke of the extremely high rate of infantile mortality among Africans. Miss McAnally stated that at the Tsolo Mission Medical Hospital, "countless children were dying from malnutrition and tuberculosis and countless mothers stood in line daily holding dying children in their arms". 65/ Dr. Conco referred to the "many children who had passed through my hands, puffed, swollen and miserable, dying and dead". He denounced the absence of official statistics as a "scheme". He said that "the official figures concerning infantile mortality was 24.1 per 1,000 for whites; for Asians, it was 54.7 per 1,000; for coloureds, 136.8 per 1,000". No figures for Africans were kept. "In 1967, in Port Elizabeth, infant mortality rates for whites dropped from 22.02 per 1,000 in 1965 to 13.69 in 1967. For Africans in Port Elizabeth it rose from 247.3 per 1,000 in 1965 to 269.8 in 1967. No official figures are available for rural areas. In Durban, they reported that the infantile mortality rate among Africans was about 250 per 1,000. In some areas in the reserves, the authority surmises that actually from 400 to 500 children died before the age of one year. Nearly half of those born died before the age of one year."

89. According to some witnesses, the South African Government was engaged in a policy intended to reduce births among the African population while at the same time, it encouraged the white population to be more fertile, and favoured large-scale immigration of white peoples.

90. Mr. Molotsi 66/ stated that in a New Year's message, the South African Prime Minister said that it "/was/ the duty of every white woman in the Republic to present the Republic with a boy". He then added: "... at the same time, the /Government/ encourages the African people to reduce births and has mounted a campaign among the African people to that end. The euphemistic way of putting it is that this is to defeat poverty. In 1966, at the same time, the /Government/ was encouraging immigration from the countries of Western Europe. Therefore this doub[le] standard is obviously intended to reduce the number of African people and to incr[ease] the number of people of European descent".

91. In their replies, some witnesses unhesitantly stated that in their view, the policy of apartheid, or at least certain aspects of that policy, involved elements of the crime of genocide. They felt that the South African authorities were inde[ed]

63/ See E/CN.4/AC.22/RT.52, p. 13.

64/ See E/CN.4/AC.22/RT.56, p. 12.

65/ See E/CN.4/AC.22/RT.52, p. 7.

66/ See E/CN.4/AC.22/RT.56, p. 27.

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perpetrating the crime of genocide when systematically, they had subjected the non-white ethnic groups of the population, in particular the Africans, to extreme forms of oppression, undermined their educational possibilities, prevented their economic development, taken measures calculated to reduce births among their members, and above all, forced millions of people to live under the appalling conditions that existed both in the reserves and in the transit camps. They felt that such measures threatened morally and physically the well-being of the entire group 67/ in many ways: they had the effect of increasing infantile mortality, the spread of nutritional diseases and tuberculosis, and the number of arrests, imprisonments and executions for a growing list of political offences.

92. Carstens, in response to a question, described apartheid as "an attempt on the part of the minority to at least reduce the proportion of non-whites in the country". 68/ Miss McAnally expressed the view: "... the apartheid régime has indeed in the past acted directly and indirectly to liquidate whole sections and portions of the African and non-white population of South Africa. Historically, this can be shown by distinct actions... but also indirect actions, such as providing a context within which Africans can no longer live...". She firmly believed that it is the intention /of the Government/ to liquidate sections of the population in the future. All apartheid legislation /was/ aimed, in her opinion "toward the elimination and extinction of the threat the whites /felt/ because of the presence of the black people in that country". The fact that many Africans died unnecessary deaths", in her estimation "constituted genocide". 69/ In replying to a question, Mr. Setai indicated that he thought "the Government /was/ planning to systematically eliminate /the black/ population". 70/

(d) Servitude through slavery-like practices 71/ such as those provided for by Masters and Servants Laws

93. In its various reports, the Ad Hoc Working Group of Experts has shown that the policy of apartheid and the legal techniques of South Africa threaten the fundamental right "to life, liberty and security of persons" which the Universal Declaration of Human Rights seeks to protect. Particularly in its report E/CN.4/1020/Add.2, the Working Group revealed how serious the problem of limitation of personal freedom, freedom of expression and freedom of assembly (paragraphs 33-34) was in South Africa. Many of the legislative provisions of apartheid have the effect of enslaving, without appeal, the black population of South Africa. There are laws which give the South African authorities absolute powers permitting them to transfer, without advance notice and in inhuman conditions, any African or any tribe to another district or province. Several articles of the Bantu Administration Act, for example, provide that any African who obstructs a chief, a headman or even an officer in the execution of his duty is guilty of an offence (articles 2 (9) and 5 (2)). Any person who promotes feelings of hostility between Bantu and Europeans is liable to imprisonment for a period not exceeding one year, or a fine, or both.

67/ See E/CN.4/AC.22/RT.51, pp. 47, 58, 51; RT.52, RT.56, RT.58, RT.70.

68/ See E/CN.4/AC.22/RT.51, p. 47.

69/ See E/CN.4/AC.22/RT.52, pp. 30-31.

70/ See E/CN.4/AC.22/RT.58, p. 22.

71/ See Glaser, Droit International conventionnel (Bruxelles, 1970), p. 120.

94. The practices used to enslave South African blacks under the Masters and Servants Laws, analysed by the Working Group in its report E/CN.4/1020/Add.2, paragraphs 37-48, are even more shameful. These laws govern labour matters in agricultural and domestic employment (E/4953, p. 79) and are designed chiefly to control the relationship between white employers and native employees. They come close to giving employers the power of life and death over their employees, who cannot in any circumstances break a contract without being subject to penal sanctions. The Master and Servants Act No. 50 of 1856, which is still in force, defines in detail the duties of servants, who in reality are no more than their employers' slaves. The Master and Servants Act (Natal) of 1850 contains clauses providing for punishment by flogging for servants guilty of impertinence, disobedience, neglect of duty and desertion. These clauses, which are still enforced, are an insult to modern civilization and a denial of human dignity.

95. During its investigations into Transkei legislation, the Working Group learned that some of the most serious infringements of the rule of law result from the extraordinary powers given to approved chiefs by the Government of South Africa (see written testimony of Mr. W.W. Tsotsi in document E/CN.4/AC.22/17/Add.1, annex VII). In most of the laws relating to the administration of blacks or to employers and employees, it was stipulated that chiefs were entitled to the loyalty, respect and obedience of all their subjects, and could take such steps as might be necessary, including corporal punishment and penal sanctions, to make themselves absolute masters. The Working Group was also told that chiefs often victimized tribesmen and ran their own police forces which used barbaric methods to subdue recalcitrant or rebellious subjects. Witnesses stated in evidence that the continued operation of Proclamation 400 had a serious inhibiting effect on personal liberty, by prohibiting all meetings of 10 or more people. Moreover, section 19 empowered a Bantu Commissioner or a commissioned or non-commissioned officer of the police to detain without warrant any person suspected of having committed an offence (see Mr. Tsotsi's evidence). 72/ During 1965-1966, 246 persons were held under the terms of the Proclamation for a total of 18,600 days.

96. Reliable evidence shows that the Africans, who are full citizens of South Africa, have not even the most rudimentary form of political power, and play absolutely no part in the drafting of the laws, which they must obey in every detail or suffer severe penalties. Any spontaneous attempt by the population to organize political groups or trade unions is thoroughly crushed by force, and the South African Government has no intention of changing this situation.

97. The system of recruiting African workers in South West Africa has no equivalent in any other country. The systematic way in which the odious laws are applied make them nothing more than a form of slavery. Workers are recruited without contract in the tribal areas by SWANLA, which divides the male population into three classes of workers, A, B and C, qualified to work, respectively, in mines, on the land and in European-owned agricultural and livestock farms. SWANLA whose system of contract is the only means of finding work and earning a wage, provides employers in mining and agricultural enterprises with the quantity and type of labour which they need. Once placed under contract, workers are not permitted to leave the area where they work or to cancel the contract. Workers do no participate in any form of collective bargaining, and strikes constitute

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72/ See E/CN.4/AC.22/RT.42, pp. 5-9.

criminal offences. The South African Government deprives more each day the people of South West Africa of their property, their rights and their ability to become a free, economically viable nation.

(e) Deportation and other inhuman acts committed against the civilian population

98. Deportation is a precise legal term, expressing the idea of a punishment which consists of exiling to a specific place political criminals or persons accused of political crimes. Everyone knows how Hitler applied deportation against the resistance fighters and all those whom the Third Reich wished to exterminate during the Second World War.

99. In the case of South Africa, the legislation has provided not only for the deportation of political criminals, but also, and especially, for the deportation of the African civilian population, who are innocent and indifferent to political activities. In its report E/CN.4/1020/Add.2, prepared in implementation of resolution 21 (XXV), the Ad Hoc Working Group traced the history of the "Native Reserves" and "transit camps", which, from the psychological and social point of view, are really concentration camps where human beings suffer from hunger and desperate poverty without any means of remedying the situation. They suffer from the harshness of the climate in certain seasons, from the sterility of the soil, from the lack of infrastructure and employment, nothing in the legislation allows them the freedom of movement, appeal before the courts or competent administrative authorities. Thus, the entire civilian population is subjected to laws similar to the old nazi laws.

100. In its reports particulary document E/CN.4/1020/Add.2, the Working Group stated that Africans were still being deported by the Government of South Africa. Chapter XI (paragraphs 65-105) of that document is devoted entirely to a study of this situation, and the information and evidence which the Working Group gathered shows that the following groups of persons are placed in the concentration camps known as "reserves", "transit camps" or "resettlement areas": (a) African political deportees, who are concentrated in regions known for their harsh climate and isolated from the entire civilian population so that they can be massacred more easily in case of rebellion; (b) Africans who have been ejected from white farms and judged too old or inform to work; (c) Africans who have been cleared from "black spots"; (d) landless African families from the reserves; (e) men, women and children removed from urban areas for being "unproductive"; (f) wives and families of men serving prison sentences; (g) former political prisoners who have completed their sentences and may commit further offences.

101. All these classes of persons are subjected to forced displacements, and the existence of concentration camps at Sada, near Queenstown, has been confirmed by the Ministry of the Interior, as well as by the evidence gathered by the Working Group. Other sources have also confirmed the existence of many camps. A report of the International Defence and Aid Fund 73/ dated 10 May 1967 and published in

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73/ See also: South Africa: Resettlement - The New Violence to Africans (London, August 1969).

United Nations document A/AC.115/L.200, the written information provided by Mr. Livingstone Mwretyana in document A/AC.115/L.209, and the reports of the Ad Hoc Working Group, especially document E/CN.4/950, paragraph 407, all note the existence in 1968 of about fifty-seven deportation towns and villages. The goal of the apartheid policy is to remove Africans from urban areas by force and to send them to reserves situated in arid and desolate areas. Most of the victims are retired persons and persons whom the authorities consider "undesirable elements" in the urban areas. They are herded into reserves, while political prisoners whose prison terms have expired are transported to areas or prisons near the reserves. "In my case, when I was released I was told to go to the chief magistrate - this happened also to many of the other political prisoners who were later released. The magistrate told me that I had in fact no choice; I had to accept the offer to go to Welcome Valley, to settle there and to be a labourer in the quarry at £8. 5. 0 a month. I was later to learn that I was being in fact banned and confined to that area." This is the testimony of Mr. Mwretyana, who experienced deportation to Welcome Valley, situated nine miles from the urban area of Queenstown. This witness adds that banned persons confined to Welcome Valley are not even allowed to go to Queenstown for shopping, but must go to Lady Frere, 37 miles away, even though transport is extremely poor. "This is a form of extra punishment that is meted out /to former political prisoners/ without recourse to a court of law."

102. In 1966, by the official count, there were 560 families (482 men, 718 women and 1,485 children) in the Sada resettlement area alone, living in prefabricated huts. On 21 February 1967, the South African Government itself sent its Parliament a list of 24 new settlements "similar to Sada". The list showed that there were a total of 2,956 men, 14,471 women and 31,804 children in the 24 concentration camps called "townships".

103. On 7 February 1969, the Ministry of Bantu Administration and Development stated, in reply to a question asked in Parliament, that there had been 399 "black spots" in 1948, and that since that time 119 of them had been "evacuated", which meant that of 83,619 Africans living on 85,216 morgen of land had been deported. These official figures are lower than estimates pointed out by opposition Members of Parliament. The latter, after visiting certain centres, told Parliament of the horrifying and inhuman spectacle they had seen at Limehill, Uitval, Vergelegen, Sada, Muggesha and Ilinge; they made the following specific criticisms: (a) they had noted that Africans were being displaced against their will and without psychological preparation; (b) the deported persons had been crowded into concentration centres long before the construction of housing and were living outdoors; (c) roads, sanitary facilities, water supply, health services, transportation, and so on were inadequate or non-existent; (d) in many villages there was a disproportionate number of elderly and infirm persons and children; and (e) there were practically no employment opportunities.

104. Mr. Winchester, the Member of Parliament for Port Natal, stated that "Removals that take place for political reasons only - and I emphasize political reasons only - become nothing else but inhuman experiments with people. When such removals, as the ones in Limehill, take place, then I submit that every South African must bow his head in shame."

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105. South African law includes legal provisions which can, without other formalities, force Africans to leave the place where they have lived all their lives and be deported elsewhere, in particular to transit camps.

106. The Bantu (Urban Areas) Consolidation Act No. 25 of 1945, as amended, contains detailed provisions for the disqualification of Africans who wish to live and work in urban areas and for their removal from these areas. The main provisions are in sections 10, 14, 28 and 29 of the Act, and are reproduced in document E/CN.4/AC.22/Add.1, annex VIII. Under sections 10 and 14, any Bantu who remains for more than 72 hours in an urban area without submitting proof that he has since birth resided continuously in such area, or that he has worked continuously there for one employer for 10 years at least, may be removed with his dependants to this home "or to a rural village, settlement, rehabilitation scheme, institution or other place indicated by the Minister for Bantu Administration and Development" (section 15 (1) of the Act).

107. The aged and unfit, widows, families and professional people may be disqualified under section 28 of the Act, "Removal of redundant Bantu from urban areas". The Minister, "on being satisfied... that the number of Bantu in that area is in excess of the reasonable labour requirements of that area... may determine which Bantu... shall be removed from the prescribed area". He then instructs the local authority to order such Africans and their dependants to move "to the place where accommodation has been provided...". Africans may forfeit the right to live in an urban area even though they qualify under section 10 of the Act if they are declared "idle" or "undesirable". Under section 29 of the Act, an elaborate procedure is established for dealing with "idle and undesirable Bantu", the definition of which is so comprehensive as to range from "a person who has been required under any law to depart from the area concerned and not to return to such area" to a person who has been convicted of a political offence under the Unlawful Organization Act, No. 34 of 1960, the Riotous Assemblies Act, No. 17 of 1956, the Criminal Law Amendment Act, No. 8 of 1953, or the General Law Amendment Act (Sabotage Act), No. 76 of 1962. If a Bantu Affairs Commissioner declares an African to be "idle" or "undesirable" he may "order that such Bantu be sent to any rural village, settlement, rehabilitation scheme, institution or any other place indicated by the Secretary... and be detained thereat for such period and perform such labour as may be prescribed under that law /i.e., the Bantu Trust and Land Act, 1936, or any other law establishing scheduled Bantu areas/".

108. The Bantu Trust and Land Act, 1936, as amended by the Bantu Laws Amendment Act, 1964, provides for the gradual elimination of African tenants and squatters on white farms. Two methods are used for this purpose. First, both owner and occupier are guilty of an offence if Africans who are not authorized to live in a rural area reserved for Europeans congregate or reside in such area. The courts may order the removal of the Africans and their dependants to any specified place. Failing a court order, the Bantu Affairs Commissioner may intervene and remove the Africans to their homes or to a rural village, settlement, rehabilitation scheme, institution or other specified place. Pending such removal, the Africans may be detained in prison or in a police cell (section 26 of the 1936 Act, as amended). Secondly, Africans may be removed by Bantu Labour Control Boards, which are empowed to determine the maximum number of Africans who may reside on white-owned farms (section 29 of the 1936 Act, as amended).

109. The Bantu (Prohibition of Interdicts) Act, No. 64 of 1956, empowers the Government to direct by Proclamation that no court may issue an interdict which would have the effect of suspending the execution of a removal order. On 12 February 1969, a general Proclamation was issued declaring that as from 11 April 1969 the provisions of the Prohibition of Interdicts Act would apply to:

(i) All orders made or issued, instructions given, authorities conferred and warrants issued under section 26 bis (1) and (2) of the Bantu Trust and Land Act, 1936;

(ii) All warrants issued under section 37 (3) of the Bantu Trust and Land Act, 1936;

(iii) All notices served under section 9 (3) of the Bantu (Urban Areas) Consolidation Act, 1945.

110. As was mentioned earlier, the Africans removed from urban areas or white farming areas are systematically deported to rural villages, concentration centres or other places known as "transit camps". These camps are under the control of the Chief of State or the Minister for Bantu Administration and Development, in accordance with the provisions of the Bantu Administration Act, No. 38 of 1927, and the Bantu Trust and Land Act, No. 18 of 1936. These authorities are given wide powers to establish, abolish, extend, curtail or redefine any rural village or township inhabited by Bantu. They may make regulations for the administration of these settlements; they have the power of life and death over those who live there.

VI. ELEMENTS OF THE POLICIES OF APARTHEID WITHIN INTERNATIONAL PENAL LAW

111. The Group has indicated those elements of the policies of apartheid which seem to bear some relationship to crimes under international penal law. In this chapter the Group relates these elements to the various international instruments to which international theory and practice look for the rules of international penal law.

(a) Nuremberg principles

Principle I and apartheid

112. Nuremberg Principle I provides that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. That the rules of international law may apply to individuals is beyond dispute for, as the Nuremberg Tribunal stated, it has long been recognized that international law imposes duties and responsibilities upon individuals. 74/ Crimes against international law are committed by men, not by abstract entities. 75/ Now, in South Africa, Southern Rhodesia and Namibia, it is individuals who implement the policies of apartheid; and all international bodies have condemned apartheid as a violation of international law and a serious threat to international peace and security. In addition to resolutions of the Commission on Human Rights and the Economic and Social Council, there are many General Assembly and Security Council resolutions roundly condemning, as crimes under international law, the inhuman policies of apartheid, characterized by unjust measures which are contrary to recognized international standards and under which human beings, both black and white, are degraded, subjected to harsh retroactive penalties, separated arbitrarily from their families and thus deprived of all human affection and of the possibility to procreate, deported, massacred and exterminated in defiance of the most elementary human rights. The most pertinent of the resolutions condemning apartheid are General Assembly resolutions 1761 (XVII), 2054 A and B (XX), 2144 A and B (XXI), 2202 A and B (XXII), 2307 (XXII), 2396 (XXIII) and 2506 (XXIV) and Security Council resolutions S/5386, S/5471, S/5761 and S/7773. 76/

74/ See Trifterer. Ibid., p. 148 s.

75/ See Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg, (1947), p. 235.

75/ See also paragraph 3 above.

Principle II and apartheid

113. Nuremberg Principle II stipulates that "the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law". This Principle is a corollary to Principle I and, since individuals are responsible for crimes under international law it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of their country.

114. South African legislation has promulgated the policies of apartheid but has not made provision for the punishment of these outrages; it does not follow therefrom, however, that individuals perpetrating the outrageous acts of apartheid are relieved from all responsibility under international law.

115. On the contrary according to the principle of the supremacy of international law over national law persons who have committed an international crime are responsible therefor and liable to punishment under international law, independently of the provisions of internal law. In fact, the Nuremberg Tribunal considered that international law can bind individuals even if national law does not direct them to observe the uules of international law: "... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State". 77/ It follows that persons responsible for implementing the policies of apartheid are not bound to implement their State's penal laws and those who do so are fully guilty.

Principle III and apartheid

116. This Principle is explicit: "The fact that a person who has committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".

117. The person mainly responsible for the laws of the policies of apartheid in South Africa is the Head of State, who has arrogated to himself the power of life and death over his citizens. Now, his status as Head of State does not guarantee him any privilege or immunity under international law. For, the Charter (Article 7) and judgement of the Nuremberg Tribunal do not relieve him from international responsibility even if he acted as Head of State or responsible government official. "The principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings." The overriding rule is that he who violates the rules of international law cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under

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77/ Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg, (1947), p. 223.

international law. Implementation of the policies of apartheid is unquestionably a misuse of power under international law.

Principle IV and apartheid

118. This Principle is as explicit as the one preceding it: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". Persons implementing the policies of apartheid receive orders from the Government and their superiors. 78/ Now the idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. Persons implementing the policies of apartheid have an even greater possibility of moral choice since they are generally chosen from among those with most common sense, reasoning power and the ability, given to every human being, to distinguish right from wrong. Their silent acceptance of inhuman laws, even if they disapprove of them in their conscience, does not cover them; as the Nuremberg Tribunal rightly pointed out in the provisions of article 6 of its Charter, an order to kill or torture in violation of the international law can never be recognized as a defence to such acts of brutality. Persons committing such atrocities under order can only urge the order in mitigation of the punishment. For, 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. 79/

Principle V and apartheid

119. The provisions of Principle V related to the trial of offenders: "Any person charged with a crime under international law has the right to a fair trial on the facts and law". It is obvious that persons committing the crime of apartheid will have the right to a fair trial, as provided by international law.

Principle VI and apartheid

120. The provisions of Principle VI which define crimes under international law make it easier to establish the nature of the responsibilities for the policies of apartheid and to determine the punishments to which those responsible for these policies are liable.

121. "The crimes hereinafter set out are punishable as crimes under international law:

78/ DINSTEIN, Yoram, the defence of "obedience to superior orders" in international law, Leyden A. Lijthoff. 1965; Furhrmann P, Der Hohere befehl als Rechtfertigung im Volkerrecht, München, 1963.

79/ See Trial of the Major War Criminals before the International Military Tribunal.

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)."

The first question to which consideration of this first paragraph, which defines crimes against peace, gives rise is whether those responsible for the policies of apartheid are waging a "war of aggression or a war in violation of international treaties, agreements or assurances". It is probably not a question here of an undisguised armed conflict between two parties. But this does not prevent apartheid from being a psychological war in violation of the Charter of the United Nations and international treaties, agreements and assurances. Are there not many jurists who agree that a "war of aggression" is all acts which justify their victims' resort to arms? There are many sociologists who, like H. Taine, 80/ insist that "the real aggressor is he who makes war inevitable". By their odious and inhuman practices, those responsible for the policies of apartheid are inciting the civilian population to rebellion, revolt and even civil war, the consequences of which could be disastrous for world peace and international order. Apartheid is a psychological "war of aggression" which destroys all man's spiritual and moral values. The reduction of human beings to the state of animals is worse than open war waged with armed forces and the atrocities such a war might unleash would plunge mankind as a whole, not merely a few nations, into mourning. Precedents for the practices of apartheid are to be found in the acts of the Third Reich for, as everyone knows, before the war the political adversaries of nazism were interned and murdered in concentration camps where régime was odious, and civilians presumed to be hostile to the Government were subjected to an unscrupulous policy of harassment, repression and murder. We are now witnessing the same acts, the same methods of harassment and persecution which, unless we are careful, could easily be a prelude to a world conflagration.

b. War crimes:

"Violations of the laws or customs of war which include, but are not 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, of 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". Since the policy of discrimination in South Africa contains the germs of war, those responsible for apartheid should observe the rules of war. They do nothing of the sort, however, and murder, ill-treatment and deportations in the most terrible conditions are frequent occurrences in South Africa, as was shown in this study.

80/ Letter to J. Durant on 7 September 1870.

c. Crimes against humanity:

"Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime". This subparagraph of Principle VI is very explicit in defining crimes against humanity as acts such as murder, extermination, enslavement, etc.... "done against any civilian population". This means that such acts may be crimes against humanity even if committed by a person against his own population. Furthermore, these crimes may be committed in time of peace as in time of war and have a correlation with crimes against peace.

122. The organs of the United Nations have repeatedly condemned the policies of apartheid as a crime against humanity. Throughout this study, mention was made of those criminal acts of the Government of South Africa, such as murder, extermination, enslavement, deportation, moral and physical degradation of human beings, which have driven all international organs formally and energetically to condemn the policies of apartheid. In its report (E/CN.4/984/Add.18), the Ad Hoc Working Group of Experts had already, following several inquiries into the matter, drawn attention to practices which constitute elements of the crime of genocide and in particular:

(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.

123. In some instances, the suggestions put forward during the Ad Hoc Working Group's discussions went into even further detail. It appears from testimonies, e.g., by Mr. Brutus, that thousands of persons have died. Mr. Brutus in his testimony also spoke of electrodes, "carry on" as well as other forms of torture of the prisoners. He also spoke of mental torture of the prisoners and of the deliberate infliction on a group of non-white people of conditions of life calculated to bring about their physical destruction in whole or in part. He spoke

of measures intended to bring about death within a group of non-white people (which would include the laws governing the movement of Africans in urban areas and preventing the wives from visiting their husbands in those areas). He further spoke of measures to transfer forcibly persons of one group to another group (those reaching the age of eighteen were obliged to leave their parents). The testimony of several other persons taken during the Ad Hoc Group's investigations could also be cited with regard to apartheid, those responsible for the policies of apartheid in South Africa, Southern Rhodesia and Namibia could be brought to justice for these policies.

Principle VII

124. "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law". In its reports, the Group has often referred to the complicity of certain civilian agents of the Government of South Africa who commit inhuman atrocities.

(b) Apartheid in relation to the Convention on the Prevention and Punishment of the Crime of Genocide.

125. In its resolution 96 (I), the General Assembly stated that genocide is "a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern."

126. General Assembly resolution 260 (III) of 9 December 1948 on the Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide is the result of the declarations in General Assembly resolution 96 (I), and it would be interesting to show the extent to which the provisions of resolution 260 (III) on genocide are applicable to the policies of apartheid.

127. Article I of the Convention on the Prevention and Punishment of the Crime of Genocide stipulates categorically that genocide is a crime, whether committed in time of peace or in time of war.

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

128. The odious acts of those responsible for apartheid are committed in time of peace but are not exempt from punishment; a fortiori, since they constitute a serious threat to international peace, they must be punished.

129. The acts which under resolution 260 (III) constitute genocide are defined in article II of the Convention in those terms:

"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."

130. In its various reports resulting from careful studies of the question, the Ad Hoc Working Group of Experts has defined the elements of apartheid which constitute the crime of genocide. It has summarized them in its report (E/CN.4/984/Add.18, paras. 4 and 5).

131. Article III lists punishable acts:

"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."

132. In various documents the Ad Hoc Working Group has described how politicians in South Africa, Southern Rhodesia and Namibia commit the crime of genocide directly or indirectly, and incite such crimes directly and publicly. Many examples of attempted genocide and of complicity in the crime have been described at length in documents E/CN.4/950 (paras. 82-1016, 1092-1093, 1107-1112); E/CN.4/984/Add.18 (paras. 4-10); E/CN.4/1020 paras. 71-217); E/CN.4/1020/Add.2 (paras. 1-105).

133. Like Nuremberg Principles III and IV, article IV of the Convention on the Prevention and Punishment of the Crime of Genocide states that persons committing genocide shall be punished whatever their official or social status. Under the terms of that article, there is no distinction between social classes in the matter of the crime of genocide.

"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."

134. Persons committing the crime of genocide in South Africa, Southern Rhodesia and Namibia are Heads of State, members of the various Governments, public officials, official agents and all other persons responsible for giving effect to the policies of apartheid.

135. The terms of article VI determine the courts by which persons committing the crime of genocide are to be tried, namely: (a) a competent tribunal of the State in the territory of which the act was committed and (b) an international penal tribunal:

"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."

(c) The Geneva Conventions and apartheid

136. International instruments currently in force which contain several provisions that are pertinent to the study of apartheid from the point of view of international penal law is the Geneva Conventions of 12 August 1949.

137. The Union of South Africa acceded to the Geneva Conventions of 12 August 1949 and ratified them on 31 May 1952. Thus the Republic of South Africa is bound by the provisions of these Conventions. It therefore recognizes the existence of an international penal law that binds it to observe the provisions of these Conventions, in particular those concerning the grave breaches that constitute offences under international penal law. In addition, General Assembly resolution 2674 (XXV) of 9 December 1970 on the question of respect for human rights in armed conflicts must be taken into consideration. This resolution reaffirmed that participants in liberation movements in southern Africa should be treated in case of their detention as prisoners of war in accordance with the Geneva Conventions of 12 August 1949.

138. The Geneva Conventions of 12 August 1949, in particular the Convention relative to the treatment of prisoners of war and that relative to the protection of civilian persons in time of war, which are both applicable in the Republic of South Africa, contain provisions relative to the High Contracting Parties' undertaking to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches, namely wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and so on (articles 129 and 130 of the third Convention and articles 146 and 147 of the fourth Convention).

139. In addition, the Conventions explicitly forbid the following:

"(a) Violence to life and person of human beings, in particular torture, and cruel treatment;

(b) Taking of hostages;

(c) Deportation;

(d) Outrages upon personal dignity, in particular, humiliating and degrading treatment and discriminatory treatment based on differences of race, colour, nationality, religion or faith, sex, birth or wealth;

(e) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

140. The Ad Hoc Working Group, in its various reports has already revealed the inhuman acts committed in the Republic of South Africa and which constitute grave breaches in the sense of the Geneva Conventions of 12 August 1949. In addition, articles 129, 130 and 131 of the third Convention, which are also contained in the other Conventions, refer to effective penal sanctions for violations of the Convention. Article 129 reads as follows:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention."

The provisions of this article are based on three essential obligations, under which each High Contracting Party undertakes to promulgate special legislation; to search for persons alleged to have violated the Convention; to bring such persons to trial or, if it prefers, to hand them over for trial to another State concerned. In principle, the Geneva Conventions apply to wars, occupations or

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civil wars. However, the provisions of article 129 can be implemented in peace time. The legislation recommended in that article should, it seems, fix the nature and extent of the penalty for each breach, bearing in mind the principle of keeping the penalty in proportion to the offence. The provisions of the article are explicit and the sanctions to be fixed apply to persons who have committed a grave breach or who have ordered one to be committed. This, therefore, establishes, as did Principle VII of the Nuremberg Principles, the joint responsibility of the person who commits an act and the person who gives the order or his accomplices. They can all be tried as though they had actually committed the act.

141. The obligation under which States are placed to promulgate the necessary legislation implies that this legislation applies to persons who have committed any of the grave breaches referred to in the Convention and applies to both nationals and aliens. The High Contracting Parties are also under the obligation to search for persons alleged to have committed grave breaches of the Convention. This requires the Parties to adopt an active attitude, namely, to arrest such persons on their territory and bring them speedily to trial. Searches must be conducted automatically and, not only in response to requests for extradition made by a State. All the accused - whatever their nationality - will be subject to the same jurisdiction, all will be subject to the same rules of procedure and will be judged by the same courts. Extradition comes under the provisions of internal law. Finally, the accused may be brought before an international court whose competence has been recognized by the High Contracting Parties.

142. Article 131 defines the responsibility of the High Contracting Parties:

> "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."

In fact, this article is not entirely clear and, in our opinion, is designed to place the burden for reparation on the State that is found guilty of a breach or violation of the Convention. For, as regards material reparation, no individual can institute proceedings directly against the State of which the person who committed the breach is a national, that is a matter of international law and only a State can institute proceedings against another State. This article therefore lays down the material responsibility of the State in whose name the persons who committed grave breaches acted. Thus the South African Government is responsible for the damages resulting from the application of the policies of apartheid.

(d) The "inhuman acts resulting from the policies of apartheid" in regard to other human rights instruments (the policies of apartheid as gross violations of human rights and as a crime against humanity)

143. The Group already has interpreted the concept of inhuman acts resulting from the policies of apartheid as constituting crimes under international penal

law. 81/ These acts can be deduced from international instruments like the Convention on the Prevention and Punishment of the Crime of Genocide, 82/ the principles of international law deduced from the Charter of Nuremberg, 83/ as well as from the Geneva Conventions 84/ and can be regarded as those inhuman acts which are referred to in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. 85/ But their qualification as "inhuman acts" is not sufficient to make clear their whole gravity in international penal law applied to human rights.

144. Any of those acts, such as murder, extermination, enslavement, deportation or persecution committed against any civilian population on political, racial or religious grounds, the killing of members of a group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring its physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group, also contravenes the basic instruments relating to human rights as they have been adopted by the United Nations. That is to say, they contravene the Universal Declaration of Human Rights, the International Convenant on Civil and Political Rights, the International Convenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

145. (a) The murder, extermination, killing of the victims of the policy of apartheid and of the opponents of the policy of apartheid has been established by different reports of the Working Group. 86/ These acts are in contradiction to article 3 of the Universal Declaration on Human Rights, to article 6 of the International Convenant on Civil and Political Rights and to article 5 (b) of the Convention on the Elimination of All Forms of Racial Discrimination.

(b) The enslavement and deportation of Africans, facts which the Ad Hoc Working Group of Experts in its previous reports has already established, are in contradiction to article 4 of the Universal Declaration of Human Rights and article 8 of the International Covenant on Civil and Political Rights.

(c) The arbitrary persecution, the causing of serious bodily and mental harm of the members of a group also has been established by the Ad Hoc Working Group of Experts and other United Nations bodies as a practice resulting from the apartheid policies. These acts violate article 5 of the Universal Declaration, article 7 of the International Covenant on Civil and Political Rights and article 5 (b) of the Convention on the Elimination of All Forms of Racial Discrimination.

81/ See paragraphs 50, 51, 72 and 74.

82/ See paragraphs 37-48 and 125-135.

83/ See paragraphs 28 and 112-124.

84/ See paragraphs 32-33 and 136-142.

85/ See paragraphs 49-51.

86/ See paragraph 75.

(d) The deliberate infliction of conditions of life calculated to bring about the physical destruction in whole or in part also has been established - at least partly - in different reports of the Ad Hoc Working Group of Experts, contradict the principle expressed in article 1 of the two Covenants, articles 10, 11, and 12 of the International Covenant on Economic, Social and Cultural Rights, and article 25 of the Universal Declaration of Human Rights.

(e) The family policies in regard to Africans caused by segregation, population transfer, living conditions, etc., the creation of transit camps prevents births within the group and are results of apartheid policies - facts which also have been established by the Ad Hoc Group. These acts also contravene the provisions of the above-mentioned instruments.

146. All these contraventions take place on a large scale. The continuous perpetration of these contraventions has been followed and established very closely by the Ad Hoc Working Group's work since 1967. These contraventions are typical elements of the policies of apartheid. The contraventions are committed against blacks, Indians and coloured people on racial as well as political grounds and against white people primarily on political grounds. The commitment of those acts by South African authorities constitutes a consistent pattern of discrimination in respect of the most essential human rights, which - in particular articles 6, 7 and 8 of the International Covenant on Civil and Political Rights - may not be abrogated in regard to the provision of article 4, paragraph 2 of the Coyenant even in case of emergency. All of these inhuman acts, constituting a system of discrimination in regard to the enjoyment of the most essential human rights established by United Nations instruments, are a gross violation of human rights within the meaning of various United Nations decisions.

147. This system which consists not only of inhuman acts taken in isolation but which should be taken as a whole, forming a consistent pattern of violation of human rights, may be considered as a crime against humanity. This consideration may be useful in the allocation of responsibility.

VII. THE RESPONSIBILITY UNDER INTERNATIONAL PENAL LAW IN REGARD TO THE POLICIES OF APARTHEID

148. The most important problem in ensuring the effectiveness of penal international law is the determination of responsibility for international crimes and ascertaining the competent jurisdiction. As regards the policies of apartheid, several questions have to be considered. It must be stressed that the Republic of South Africa is not party to any legal instrument regarding the most characteristic crimes of penal international law: it is not a party to the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, nor is it a party to the Genocide Convention; it has not ratified the Covenants or the Convention on the Elimination of All Forms of Racial Discrimination, and it did not participate in the vote on the Universal Declaration of Human Rights. In the context of those instruments, therefore, the rules governing responsibility for crimes under international law must be applied. The only conventions to which the Republic of South Africa has adhered are the Geneva Conventions of 12 August 1949. Thus this is the only case when the rules on responsibility to be applied are those which can be deduced from the convention itself.

149. If it is recognized that South Africa is under the obligation under customary international law not to commit genocide and if it is true, as the Group has established it in its report E/CN.4/984/Add.18, that the meaning of genocide in general international law is not more restricted than in the context of the Genocide Convention, and if the definition of genocide contained in the Convention may also be used in regard to a non-party State, then the Republic of South Africa is bound by the precepts of general international law to prevent and punish that crime. But under general international law the commission of genocide and complicity in it are a crime; concerning the preparatory acts, they are left to the discretion of the judge. The qualification of certain practices inherent in the apartheid policies as "elements of genocide" must be based on the findings of the Ad Hoc Working Group. In regard to practices which can be determined to fall within the wider expression "inhuman acts resulting from the policies of apartheid", the responsibility of the Republic of South Africa derives from general international law. The Republic of South Africa is also responsible for any such acts committed by organs of the State. The acts of State doctrine is excluded not only by article IV of the Convention on Genocide but also under general international law.

150. As regards sanctions against such crimes under the law of nations, the Republic of South Africa is legally not bound by article VI of the Convention on Genocide and therefore any possible sanctions must be based on rules of general international law. Such sanctions, however, leaving aside the situations envisaged in Chapter VII of the Charter of the United Nations simply do not exist. In particular, there does not exist any international penal tribunal with jurisdiction over crimes under international law.

151. As regards the Geneva Conventions of 12 August 1949, the general provisions provide for a system under which penal sanctions should be envisaged against

persons who have committed grave breaches of the Conventions with the State Party concerned conducting investigations into the activities of such persons and taking mandatory steps to put an end to all acts which the Conventions prescribe. If any State Party so requests, an investigation should be conducted into alleged violations of the given Convention; if no agreement can be reached on this point, the States Parties involved should agree upon a conciliator and decide on the procedure to be followed in regard to the investigation. As one can see, the system provided for in the Geneva Conventions only functions if the State Party in question is willing to take part in the procedure.

152. The statement that South Africa may be considered responsible under international law for crimes resulting from its policies of apartheid, is owing to the lack of any international or effective national machinery highly theoretical. The thoughts expressed by Glaser may well be cited to describe the ineffectiveness of penal international law in general and in respect of the apartheid policies in particular: "Now the establishment of an international criminal jurisdiction, in the true sense of the term, appears indispensable in order that the notion of offences under international law should not remain a purely theoretical concept. One must realize that, so long as no such jurisdiction exists and, consequently, jurisdictional power regarding international offences remains in the hands of the national jurisdictions, those who commit such offences - at least the most serious offences - will escape prosecution and, therefore, punishment. This is particularly true because those really responsible for international crimes are seldom individuals. These offences are, in fact, generally inspired or even ordered by the State, or more precisely by the Government in power." ... "It is truly inconceivable that States which have instigated such deeds, even if they remain behind the scenes, should give their consent to the trial and sentencing in their own courts of the executors of their orders." 87/

87/ Droit international penal conventionnel, 1970, p. 201.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

153. Penal international law is an essential part of public international law.

154. Crimes against humanity are not enumerated in any international convention binding all States, but it is the common understanding that the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva conventions of 12 August 1949 enumerate as crimes under international law acts which were already deemed criminal under general international law, at least since the Nuremberg and Tokyo proceedings and the confirmation by the General Assembly of the Nuremberg principles in its resolution 95 (I).

155. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity qualifies "inhuman acts resulting from the policies of apartheid" as a form of crimes against humanity and as crimes under international law.

156. In regard to the interpretation of the words "inhuman acts resulting from the policies of apartheid", these words should be understood ratione personae as meaning "inhuman acts perpetrated against blacks, Indians and coloured people on racial as well as political grounds and against white people primarily on political grounds".

157. The ill-treatment of political prisoners and the like on racial grounds, the extermination of, or the attempt to exterminate, members of a racial group the killing of persons, deportations, slavery-like practices and the ill-treatment inflicted upon freedom-fighters are acts resulting from the policies of apartheid and must be considered crimes under international law.

158. The Republic of South Africa is responsible for these acts either under international public law or under the Geneva Conventions and the peace treaties concluded at the end of the Second World War to which the Republic of South Africa is a party.

159. No effective international machinery exists, however, for the judicial determination of the penal responsibility of States and individuals.

160. Besides alarming world public opinion regarding the fact that the Republic of South Africa, by certain elements of its apartheid policies, is continuously committing crimes under international law, nothing can be done presently to bring the State authorities in question to book.

B. Recommendations

161. The Group repeats its recommendation contained in document E/CN.4/984/Add.18 that the Commission on Human Rights should make specific proposals concerning a revision of the Genocide Convention, in particular to make "inhuman acts resulting from the policies of apartheid" punishable under that Convention.

162. The General Assembly should be requested, through the Economic and Social Council, to define clearly the full meaning of "inhuman acts resulting from the policies of apartheid" mentioned in article 1, paragraph 2, of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

163. Acts of "cultural genocide" should be expressly declared crimes against humanity.

164. The Republic of South Africa should be asked to institute penal proceedings against persons who have allegedly committed crimes against humanity according to the findings of the Group.

165. The Republic of South Africa as a party to the Geneva Conventions of 12 August 1949 should be asked to apply in full the provisions of the third Geneva Convention with respect to captured freedom-fighters.

166. The General Assembly should be requested, through the Economic and Social Council, to renew its work on a code of offences against the peace and security of mankind, independently of the definition of aggression, and in the process to take into account inhuman acts resulting from the policies of apartheid.

167. For the speedy and effective punishment of crimes against humanity and especially crimes resulting from the policies of apartheid, the General Assembly should be requested, through the Economic and Social Council, to renew its efforts towards the establishment of an international criminal jurisdiction.

168. The Group recommends the organization of an international seminar to study in greater depth the present state of international penal law.

IX. ADOPTION OF THE REPORT

169. The present report was approved and signed by the members of the Ad Hoc Working Group of Experts as follows: 1/

Ibrahima Boye, Chairman-Rapporteur

Felix Ermacora

Branimir Janković

Mahmud Nasser Rattansey

1/ Mr. L. Marchand-Stens was unable to attend.