

UNITED NATIONS

GENERAL  
ASSEMBLY



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A/CN.4/L.193  
2 May 1973

ORIGINAL: ENGLISH

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INTERNATIONAL LAW COMMISSION  
Twenty-fifth session  
Geneva, 7 May - 13 July 1973

REQUEST FROM THE ECONOMIC AND SOCIAL COUNCIL FOR THE  
INTERNATIONAL LAW COMMISSION'S COMMENTS ON THE REPORT  
OF THE AD HOC WORKING GROUP OF EXPERTS OF THE COMMISSION  
ON HUMAN RIGHTS CONCERNING THE QUESTION OF APARTHEID  
FROM THE POINT OF VIEW OF INTERNATIONAL PENAL LAW

Note by the Secretariat

GE.73-45117

(7<sub>R</sub>)

Introduction.

1. By resolution 8 (XXVI) of 18 March 1970, the Commission on Human Rights requested its Ad Hoc Working Group of Experts<sup>1/</sup> to study from the point of view of international penal law the question of apartheid. On 15 February 1972 the Ad Hoc Working Group of Experts submitted a report entitled "Study concerning the question of apartheid from the point of view of international penal law" (Document E/CN.4/1075). After analyzing the doctrine on the matter, the report examines various international instruments to which international theory and practice look for the rules of international penal law. It then considers the applicability of these international instruments to various elements of the policies of apartheid. Finally, it deals with the question of the responsibility under international penal law in regard to the policies of apartheid and sets forth the conclusions and recommendations of the Ad Hoc Working Group.

2. The report was examined by the Commission on Human Rights at its twenty-eighth session in 1972 in connexion with the agenda item entitled "Elimination of racial discrimination", discussed at its 1142nd to 1157th and 1162nd and 1163rd meetings. The Commission, at its 1155th meeting on 17 March 1972 adopted resolution 2 (XXVIII) by which it, inter alia, requested "the Economic and Social Council to transmit to Member States, the Special Committee on Apartheid and the International Law Commission the report of the Ad Hoc Working Group of Experts concerning the question of apartheid from the point of view of international penal law (E/CN.4/1075 and Corr. 1), submitted under resolution 8 (XXVI) of the Commission on Human Rights, for their comments."

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<sup>1/</sup> The Ad Hoc Working Group, composed of experts appointed by the Chairman of the Commission on Human Rights was established by resolution 2 (XXIII) of 6 March 1967 of the Commission on Human Rights. Resolutions 2 (XXIV) of 16 February 1968, 21 (XXV) of 19 March 1969, 8 (XXVI) of 18 March 1970 and 7 (XXVII) of 8 March 1971 extended and enlarged the mandate of the Ad Hoc Working Group. At the time of the submission of the study, the following experts were members of the Ad Hoc Working Group: Ibrahima Boye (Senegal), Felix Ermacora (Austria), Branimir Jankovic (Yugoslavia), Luis Marchand-Stens (Peru) and Mahmud Nasser Rattansey (United Republic of Tanzania).

3. At its 1818th meeting on 2 June 1972, the Economic and Social Council, having considered the report of the Commission on Human Rights, endorsed the request of the Commission and "decided to transmit to Member States, the Special Committee on Apartheid and the International Law Commission the report of the Ad Hoc Working Group on Experts concerning the question of apartheid from the point of view of international penal law, submitted under resolution 8 (XXVI) of the Commission for their comments."
4. The foregoing decision of ECOSOC was officially communicated to the Secretariat of the International Law Commission after the conclusion of the Commission's twenty-fourth session.
5. The comments on the report so far received from Member States have been reproduced in document E/CN.4/L.1225 and Add.1<sup>2/</sup> No comments have been received from the Special Committee on Apartheid.
6. The Secretariat of the International Law Commission has been informed by the Deputy Director of the Division of Human Rights that "in resolution 19 (XXIX), adopted on 3 April 1973, the Commission [on Human Rights] reminded the Special Committee on Apartheid and the International Law Commission to 'expedite their comments and suggestions<sup>\*/</sup> on the study of the Ad Hoc Working Group of Experts concerning the question of apartheid (which has been declared a crime against humanity) from the point of view of international penal law.' Any comments received from additional Governments, from the Special Committee on Apartheid or from the International Law Commission will be transmitted to the Commission for its information as received. It will be for the Commission to decide when to place the matter on its agenda and to consider it further." It should also be noted that on 2 April 1973, the Commission on Human Rights approved a draft Convention on the suppression and punishment of the crime of apartheid (document E/CN.4/L.1252).
7. For the purpose of having a clearer understanding as to the scope of the task assigned to the Commission it seems useful to recall that, prior to the adoption of resolution 2 (XXVIII) (see para. 3 above), a draft resolution had been submitted to the Commission on Human Rights according to which the Economic and Social Council would request the General Assembly to recommend to the International Law Commission

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<sup>2/</sup> Document E/CN.4/L.1225 and Add.1 contain the comments received from the following nine Member States: Byelorussian Soviet Socialist Republic, Finland, Italy, Kuwait, Morocco, Romania, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and United Kingdom of Great Britain and Northern Ireland.

<sup>\*/</sup> The decision of ECOSOC referred only to comments.

to make a "detailed study", as matter of priority, of the "present state of the international penal law" and to report to the General Assembly at its twenty-ninth session. During the discussion of this draft resolution in the Commission on Human Rights "it was remarked that the International Law Commission, because of its heavy programme of work, might be unable to complete the study of the present state of international penal law within the time-limit proposed". Taking into account the various observations that had been made, the sponsors submitted a revised draft, which was the one adopted as resolution 2 (XXVIII) requesting the Economic and Social Council to transmit to the International Law Commission, for its "comments", the report of the Ad Hoc Committee of Experts concerning the question of Apartheid from the point of view of international penal law.<sup>3/</sup> It should be further noted that in paragraphs 5 and 72 (a) of the report, the Ad Hoc Working Group of Experts defines the aim and plan of the study undertaken therein. According to paragraph 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". Paragraph 72 (a) states that "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 ... as an element of international penal law in regard to the Republic of South Africa". The report is, therefore, intended to cover not only the various main aspects of international penal law in their application to the apartheid policies, but also the various elements of such policies in relation to a Member State of the United Nations.

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<sup>3/</sup> Commission on Human Rights, Report on the Twenty-eighth session, 6 March-7 April 1972, E/5113; E/CN.4/1097, para. 29-36.

8. As far as the procedure that the International Law Commission may wish to follow in order to carry out the task entrusted to it it may be useful to recall that, at its second and third sessions, in 1950 and 1951, the Commission was requested by the Economic and Social Council to deal with the subjects of nationality of married women<sup>4/</sup> and the elimination of statelessness.<sup>5/</sup> The Secretary of the Commission noted at the 83rd meeting of the Commission during its third session that the two requests submitted by ECOSOC "came within the framework of the

4/ Yearbook of the International Law Commission, 1950, vol.I, 71st mtg., paras. 1-96 and vol.II, document A/1316, paras. 19-20. ECOSOC resolution 304 D (XI) of 17 July 1950 states:

"The Economic and Social Council,

"Noting the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women (document E/1712, paragraph 37),

"Noting further that the International Law Commission, at its first session, included among the topics selected for study and codification 'nationality, including statelessness',

"Proposes to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women;

"Requests the International Law Commission to determine at its present session whether it deems it appropriate to proceed with this proposal and, if so, to inform the Economic and Social Council as to the appropriate time when the International Law Commission might proceed to initiate action on this problem; and

"Invites the Secretary-General to transmit this resolution to the International Law Commission together with the recommendation of the Commission on the Status of Women."

5/ Ibid., 1951, vol.I, 124th mtg., paras. 1-55 and vol.II, document A/1858, para. 85. Economic and Social Council resolution 319 B III (XI) of 11 August 1950, states, inter alia:

"The Economic and Social Council,

" ...

"Considering that statelessness entails serious problems both for the individual and for States; and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness,

"Considering that these different aims cannot be achieved except through the co-operation of each State and by the adoption of international conventions,

" ...

"Notes with satisfaction that the International Law Commission intends to initiate as soon as possible work on the subject of nationality, including statelessness, and urges that the International Law Commission prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness;

"Invites the Secretary-General to transmit this resolution to the International Law Commission."

Commission's programme of work since the Commission had listed nationality, including statelessness, among the fourteen subjects provisionally selected for codification".<sup>6/</sup> The Commission therefore did not deal with the two requests on an ad hoc basis, but rather in connexion with the topic of "nationality including statelessness", which had been previously selected for codification and decided to follow its established practice for topics relating to the progressive development of international law and its codification.<sup>7/</sup>

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6/ Ibid., 1951, vol. I, 83rd mtg., para. 56.

7/ At its third session in 1951, the Commission appointed Mr. Manley O. Hudson Special Rapporteur on "nationality, including statelessness" (ibid., 1951, vol. II. document A/1858, para. 85).

Concerning the question of the nationality of married women, the Special Rapporteur submitted a report to the Commission at its fourth session in 1952 which contained a draft of a convention on nationality of married persons, which followed very closely the terms proposed by the Commission on the Status of Women and approved by ECOSOC (ibid., 1952, vol. II, paras. 29-30). Although the Commission did not take further action with respect to the draft, the question of the nationality of married women continued to be under consideration by other organs of the United Nations. On the basis of drafts prepared by the Commission on the Status of Women and by the Third (Social) Committee of the General Assembly, the Assembly, by resolution 1040 (XI) of 29 January 1957, opened the Convention on the Nationality of Married Women for signature and ratification. The Convention came into force on 11 August 1958.

Concerning the question of the elimination of statelessness, the Special Rapporteur on the topic "nationality including statelessness", was replaced by Mr. Roberto Cordova at the end of the Commission's fourth session in 1952 (ibid., para. 34). On the basis of his reports and observations made by Governments the Commission prepared and submitted to the General Assembly two draft conventions, one on the elimination of future statelessness and another on the reduction of future statelessness. Using the latter draft convention as the basis for its discussion, the United Nations Conference on the Elimination or Reduction of Future Statelessness adopted the Convention on the Reduction of Statelessness of 30 August 1961, which is not yet in force.

9. It may also be useful to draw attention to the practice of the Commission regarding the procedure followed when the General Assembly has assigned a specific task to the Commission. This procedure is summarized as follows in the revised edition of The Work of the International Law Commission:

"The General Assembly has from time to time requested the International Law Commission to examine particular texts or to report on particular legal problems. The question has then arisen whether the Commission, in performing such tasks, should use the methods laid down in its Statute for carrying out its normal work of progressive development and codification, or whether it was free to decide on the methods to be used in such cases. The Commission has always decided that it was free to adopt special methods for special tasks, ..."8/

10. The Commission dealt with its first "special assignment" at its first session in 1949, in connexion with the request made by the General Assembly contained in resolution 178 (II) of 21 November 1947, to prepare a draft declaration on the rights and duties of States. In its report to the Assembly, the Commission states, inter alia, the following:

"The Commission gave careful consideration to the question of the procedure to be followed with respect to the draft Declaration, and in particular to the question whether or not the latter should be submitted immediately to the General Assembly ...

"The Commission, with Mr. Vladimir M. Koretsky dissenting, came to the conclusion that its function in relation to the draft Declaration fell within neither of the two principal duties laid upon it by its Statute, but constituted a special assignment from the General Assembly. It was within the competence of the Commission to adopt in relation to this task such a procedure as it might deem conducive to the effectiveness of its work. ..."9/

11. The topics which have been dealt with so far by the Commission as "special assignments" have all been topics referred to it by the General Assembly.10/

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8/ The Work of the International Law Commission, revised edition, Sales no.: E.72.I.17, p. 12.

9/ Yearbook of the International Law Commission, 1949, documents of the first session, report to the General Assembly, paras. 53-54. The debates may be found in ibid., 1949, summary records of the first session, 24th mtg., paras. 66-84 and 25th mtg., paras. 29-57.

10/ Among those topics are the following: the draft Declaration on the Rights and Duties of States (1949); the Formulation of the Nurnberg Principles (1950); the Question of International Criminal Jurisdiction (1950); the Question of Defining Aggression (1951); Reservations to Multilateral Conventions (1951); the Draft Code of Offences against the Peace and Security of Mankind (1951 and 1954); and Extended Participation in General Multilateral Treaties Concluded under the Auspices of the League of Nations (1962).