

E/AC.25/11
21 April 1948

ORIGINAL: ENGLISH

United Nations

Nations Unies

ECONOMIC
AND
SOCIAL COUNCILCONSEIL
ECONOMIQUE
ET SOCIAL

AD HOC COMMITTEE ON GENOCIDE

LIST OF SUBSTANTIVE ITEMS TO BE DISCUSSED IN THE REMAINING
STAGES OF THE COMMITTEE'S SESSION

Memorandum submitted by the Secretariat

The Ad Hoc Committee on Genocide has decided to take the draft articles suggested by the Chinese representative (document E/AC.25/9) as the basis for the work of drafting. The Ad Hoc Committee's attention is respectfully drawn to the following items which, in addition to the substantive items covered in the Chinese draft and in addition to the final clauses which will be dealt with on the basis of the Drafting Committee's report, it may wish to consider with a view to inserting the appropriate provisions in the operative part and in the preamble of the draft convention.

I. Relations between international law and municipal (domestic) law

The Secretariat draft (document E/447) provides in Article V that command of the law shall not justify genocide. The corresponding provision of the Charter of the International Military Tribunal concerning crimes against humanity (Article 6 (c)) provides that crimes against humanity are punishable "whether or not in violation of the domestic law of the country where perpetrated".

It is submitted that an express provision solving this problem should be inserted in this convention.

II. The legal relevance of superior orders

Until 1944, it was controversial in theory and practice whether and to what extent superior orders constituted a defence with regard to crimes of this kind. It may be recalled that, e.g. the United Kingdom and the United States of America's military manuals contained provisions recognizing this defence. In 1944, the respective parts of both manuals were amended and since 1945 it may be considered an established rule that the fact that the defendant acted pursuant to a superior order does not free him from responsibility (Article 8 of the Charter of the International Military Tribunal).

If the convention on genocide left out an express provision, doubt might again be thrown on the question.

Article 5 of the Secretariat draft provides that superior orders shall not justify genocide.

/III. Immunity of Heads

III. Immunity of Heads of State

During the inter-allied discussions which eventually led to the Charter of the International Military Tribunal it was a subject of doubt whether Heads of State could be held responsible for war crimes, crimes against humanity and crimes against peace. The question was decided by the express provision of Article 7 of the Charter of the International Military Tribunal and analogous provisions in other basic documents providing that the official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 4 of the Secretariat draft provides that those committing genocide should be punished, be they rulers (des gouvernants), public officials or private individuals.

The Committee may wish to consider whether the expression "public officials" used in Article 2 of the Chinese draft is sufficiently comprehensive to cover also Heads of State.

IV. Punishment

The chief legal and constitutional obstacle to the punishment of crimes against peace, war crimes, and crimes against humanity was, in the past, the opinion held by some that the rules against retroactive penal legislation, namely, the rules nulium crimen sine lege and nulla poena sine lege made the punishment impermissible. It is one of the purposes of the draft convention to dissipate any doubt as far as the crime of genocide is concerned. While the Chinese draft disposes for the future of any allegation that the punishment of genocide is contrary to the rule nulium crimen sine lege it does not provide for a specific punishment and does not therefore fully dispose of the objections which might be based on the second rule, nulla poena sine lege. The Committee may therefore wish to consider the insertion, in the draft convention, of an express provision concerning the kind of punishment to be meted out for genocide. The provision might be of a general nature e.g. a statement that genocide will be punished by death or any lesser punishment which might be provided for by international convention or which the court may find appropriate.

V. Relations between the crime of genocide and the Nurnberg principles

Resolution 180 (II) of the General Assembly has requested the Economic and Social Council to take into account that the International Law Commission has been charged with the formulation of the principles recognized in the Charter of the Nurnberg Tribunal. The relations between the crime of genocide and one of the Nurnberg concepts, the notion of crimes against humanity are also dealt with in Article 1 of the French draft (document E/623/Add.1). The Committee may wish to deal with this problem in the preamble.