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ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

MEASURES FOR EFFECTIVELY COMBATING RACIAL DISCRIMINATION AND THE  
POLICIES OF APARTHEID AND SEGREGATION IN SOUTHERN AFRICA

Report of the Secretary-General

Addendum

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REPLIES RECEIVED FROM GOVERNMENTS

ITALY

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The proposal for the establishment of a judicial committee for Namibia, put forward by the Special Rapporteur for the study of apartheid and racial discrimination in southern Africa, deserves, in the opinion of the Italian Government, careful examination. It stems, in fact, from the general condemnation by Member States of all forms of racial discrimination and from the recent trends in the international community in favour of the adoption of new forms of protection of human rights. At the same time, the proposal raises difficult problems of a legal nature which had already emerged before the Commission on Human Rights and which demand accurate study before the proposal is submitted to the General Assembly.

Italy voted in favour of resolution 2145 (XXI) and has been an active member of the Committee established by that resolution to search ways and means to carry out the decisions of the General Assembly with regard to Namibia. Italy is therefore deeply interested in the study of any measure which could ensure the respect of the rights of the Namibian people and achieve the decolonization of Namibia (South West Africa). In this spirit it has supported the recommendations of the General Assembly, contained in resolution 2547 B (XXIV), to seek the views of Member States on the proposal of the Special Rapporteur for the study of apartheid and racial discrimination in southern Africa for the establishment of a judicial committee for Namibia.

A preliminary study of the proposal suggests, in the view of the Government of Italy, the following considerations.

With regard to the problem of the law to be applied by the envisaged judicial committee, the report of the Special Rapporteur (E/CN.4/979/Add.3, para. 411) lists a number of sources. The possibility of relying on these sources seems, however, problematic. It seems doubtful, for instance, whether and to what extent the Charter and judgement of the Nuremberg Tribunal, which cover specific classes of crimes, could be considered applicable to situations arising in the

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course of the administration of Namibia by South Africa. In so far as the conventions listed in the relevant paragraph of the report are concerned, it seems uncertain whether the principles embodied therein could be considered as having the scope of general provisions of international law and more particularly of "international criminal law". One wonders, in particular, whether and to what extent reliance could be made on the draft Code of Offences against the Peace and Security of Mankind, as this text is still at the stage of a draft. On the whole, the sources indicated in the report appear to be too vaguely determined, at least at the present stage of elaboration of the subject, for the proposed committee to be enabled to perform the fundamental task of any judicial organ, namely to apply existing law.

Secondly, the report of the Special Rapporteur does not provide sufficiently clear indications with regard to the nature, functions and procedures of the proposed judicial committee. With regard to the nature of the committee, the report seems to hesitate between two different approaches. In paragraph 386 it seems to favour the pattern of an international subsidiary organ instituted by the General Assembly. Such a solution would raise the controversial issue of the power of the General Assembly to set up an international criminal court; on which power the same paragraph 386 of the report is not really exhaustive. In paragraph 377 as well as in paragraphs 353 et seq. and 389 et seq., the report seems to envisage the different pattern of a judicial body operating as such within the framework of the legal system of Namibia. The adoption of such a pattern would raise the question whether any individual could effectively be submitted to the jurisdiction of a committee created by the United Nations and operating outside the Territory, and whether third States would recognize such a jurisdiction, as assumed in paragraph 358 of the report.

With regard to the functions, the report seems to be inspired by two different conceptions. Paragraph 353 seems to envisage general tasks of "investigation" and "identification" with regard to crimes committed against the inhabitants of Namibia. Paragraph 354 refers to measures for the "detection, exposure and repression" of those crimes. Moreover, it is not clear in what sense the precedent of the United Nations War Crimes Commission and of the Committee for the Investigation and Prosecution of Major War Criminals - both recalled in paragraph 376 of the report - offer valid analogies for the proposed judicial committee, particularly in view of the developments contained in paragraph 394 of the report.

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With regard to procedure, the sources listed in paragraph 433 of the report do not seem adequate. It would be necessary to define in detail the powers of the committee, the rules to be applied with respect to evidence and a number of other matters. The references to the general principles of fair trial and due process made in paragraphs 424-432 of the report do not appear to be sufficient.

It should also be noted that the setting up of a judicial committee of the kind proposed by the Rapporteur would constitute a precedent which could not but open the way to unforeseeable developments of international law in the field of criminal jurisdiction. The matter should therefore be most carefully considered not only on its specific merits but also in the wider context of the general problem of international co-operation in the field of criminal law.

These are some of the doubts raised by the proposal of establishing a judicial committee for Namibia.

The comments offered by the Italian Government are intended to contribute to a further study of the subject. This study might be conducted with the assistance of the Office of Legal Affairs and/or other appropriate bodies such as the International Law Commission.

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