INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

THE GAMBIA
v.
MYANMAR

WRITTEN OBSERVATIONS OF THE GAMBIA ON THE PRELIMINARY OBJECTIONS RAISED BY MYANMAR

20 April 2021

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CHAPTER 1
INTRODUCTION

1.1 Pursuant to the Court's Order of 28 January 2021,[1] the Republic of The Gambia ("The Gambia") submits its written statement of its observations and submissions on the preliminary objections ("Preliminary Objections") raised by the Republic of the Union of Myanmar ("Myanmar") on 20 January 2021.

1.2 Myanmar asserts four Preliminary Objections, all of which it had also raised during the provisional measures hearings held before the Court on 10-12 December 2019. The four Preliminary Objections are as follows:

- First, "that the Court lacks jurisdiction, or alternatively that the application is inadmissible, on the ground that the real applicant in these proceedings is the Organisation of Islamic Cooperation (the 'OIC'), an international organization";[2]

- Second, "that The Gambia, as a non-injured Contracting Party to the Genocide Convention, lacks standing to bring the case against Myanmar under Article IX thereof, because the Convention does not provide for the concept of an *actio popularis.* Furthermore, The Gambia is also barred from bringing the case because Bangladesh, as the Contracting Party specially affected by the alleged violations of the Genocide Convention purportedly committed by Myanmar, has entered a reservation to Article IX and has thereby waived its right to settle disputes relating to the interpretation, application or fulfilment of the Convention by bringing a case before the Court under that provision";[3]

- Third, "that The Gambia, as a non-injured Contracting Party to the Genocide Convention, may not seise the Court with a case arising under that Convention since

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 28 January 2021 on fixing of time limit on the Written Statement of Observations and Submissions on Preliminary Objections*.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections of the Republic of the Union of Myanmar* (20 January 2021), para. 25 (emphasis omitted) [**hereinafter** POM].

[3] *Ibid.*, para. 27.

Myanmar, when acceding to the Convention, has entered a reservation to its Article VIII";[4] and

- Fourth, "that the Court lacks jurisdiction, or alternatively the application is inadmissible, as there was no dispute between The Gambia and Myanmar on the date of filing of the Application instituting proceedings".[5]

1.3 The following chapters address each of Myanmar's Preliminary Objections in turn. **Chapter 2** addresses the first preliminary objection and demonstrates that The Gambia is the true Applicant in this case. **Chapter 3** rebuts Myanmar's second preliminary objection and establishes that The Gambia has standing under the Genocide Convention to bring its claims. **Chapter 4** shows that Myanmar's third preliminary objection regarding its reservation to Article VIII of the Genocide Convention is baseless and that the reservation is irrelevant to the Court's seisin and jurisdiction. Finally, **Chapter 5** addresses Myanmar's fourth preliminary objection and establishes that there was a dispute between The Gambia and Myanmar prior to the filing of the Application.

1.4 As discussed in detail in the following chapters, none of the Preliminary Objections has any merit. The Court unanimously rejected all four of these arguments in its Order of 23 January 2020, in application of the standards pertaining to the provisional measures phase.[6] The Gambia respectfully submits that the Court should once again reject all of Myanmar's Preliminary Objections and proceed to adjudicate The Gambia's claims, as set forth in its Application and Memorial, on the merits.

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[4] *Ibid.*, para. 28.

[5] *Ibid.*, para. 29.

[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020* [**hereinafter** Provisional Measures Order].

CHAPTER 2
THE GAMBIA IS THE APPLICANT

2.1 Myanmar's first preliminary objection is that:

> "[T]he Court lacks jurisdiction, or alternatively that the application is inadmissible, on the ground that the real applicant in these proceedings is the Organisation of Islamic Cooperation (the 'OIC'), an international organization. Because Article 34, paragraph 1, of the Statute of the Court provides that 'only States may be parties in cases before the Court', it cannot deal with a case in its contentious jurisdiction that is in reality brought by an international organization. Furthermore, because only States can be parties to the Genocide Convention, the OIC as an international organization is not a party to that Convention, and therefore cannot invoke the compromissory clause in its Article IX. The determination of who is the real applicant in the case is a matter of substance, not a matter of form or procedure, and it is absolutely clear from the record that in substance the real party in this case is the OIC."[7]

2.2 Myanmar acknowledges that this objection replicates the objection it raised in opposition to The Gambia's request for provisional measures.[8] As the Court stated in its Order of 23 January 2020, Myanmar:

> "first argues that there is no dispute between the Parties in view of the fact that the proceedings before the Court were instituted by The Gambia, not on its own behalf, but rather as a 'proxy' and 'on behalf of' the OIC".[9]

2.3 The Court rejected Myanmar's objection on a *prima facie* basis. It held:

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[7] POM, para. 25 (emphasis omitted).

[8] *Ibid.*, para. 24.

[9] Provisional Measures Order, para. 23.

> "With regard to Myanmar's contention that, in bringing before the Court its claims based on alleged violations of the Genocide Convention, The Gambia acted as a 'proxy' for the OIC in circumvention of Article 34 of the Statute, the Court notes that the Applicant instituted proceedings in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Convention. In the view of the Court, the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention."[10]

2.4 Nothing in Myanmar's first preliminary objection calls into question the correctness of the Court's *prima facie* determination. As the Court previously noted, The Gambia brings the present case in its own name, in accordance with Article IX of the Genocide Convention, to resolve The Gambia's dispute with Myanmar concerning the interpretation, application and fulfilment of the Convention. Neither the fact that Myanmar's genocidal actions against the Rohingya have also been the subject of sustained attention from the wider international community, including the OIC, nor the fact that the OIC has supported The Gambia in connection with efforts to hold Myanmar responsible for its breaches of the Genocide Convention, vitiates The Gambia's right as a party to the Statute of the Court and the Genocide Convention to hold Myanmar accountable through the present proceedings. The Court should therefore reject Myanmar's objection and confirm its jurisdiction to adjudicate The Gambia's claims.

2.5 This Chapter is comprised of two sections. The Gambia shows in **Section I** that it satisfies the only relevant requirements for jurisdiction *ratione personae*, namely that The Gambia, as the Applicant, must be a Member of the United Nations and thus a party to the Statute of the Court. Moreover, The Gambia has a pending dispute with Myanmar, which

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[10] *Ibid.*, para. 25.

is reflected, *inter alia*, in direct bilateral exchanges that The Gambia carried out in its own name with Myanmar. The Gambia—not the OIC, nor anyone else—is responsible for all aspects of the control and direction of the case. The Gambia alone decided—and had the right to decide—all matters concerning the case's prosecution, including, among other things, whether and when to submit the Application; the claims set out therein; and the appointment of The Gambia's Agent and counsel. No other body or entity, including the OIC, did, or could, do so.

2.6 In **Section II**, The Gambia demonstrates that its claims are fully admissible and that, contrary to Myanmar's contentions, the proceedings are the antithesis of an abuse of process. Indeed, The Gambia's seisin of the Court—and the Court's subsequent indication of provisional measures—has been welcomed by the UN Secretary-General and the UN General Assembly, among many others, as a critical step for securing protection of the Rohingya group in Myanmar against further efforts by Myanmar's armed forces, the Tatmadaw, to destroy them in whole or in part.

I. The Gambia Satisfies the Requirements for Jurisdiction *Ratione Personae*

2.7 The Gambia satisfies the only requirements for jurisdiction *ratione personae* applicable here. Article 92 of the UN Charter, which establishes the Court as the principal judicial organ of the United Nations, provides that the Court "shall function in accordance with the annexed Statute". Chapter II of the Statute governs the Competence of the Court. Article 34(1) provides: "Only states may be parties in cases before the Court."[11] As Rosenne has observed, "[s]tatehood is the essential prerequisite for any entity to be a party in any contentious case in the Court", and Article 34(1) "declares in general terms the basic condition *ratione personae* to be met before the Court can exercise any jurisdiction

[11] Statute of the International Court of Justice, art. 34(1).

whatsoever".[12] It is beyond dispute that The Gambia, which attained independence in 1965, is a State and thus satisfies Article 34(1).

2.8 The only other requirement for jurisdiction *ratione personae* is that The Gambia must be linked to the Statute of the Court. For present purposes, the relevant provision of the Court's Statute is Article 35(1), which provides: "The Court shall be open to the states parties to the present Statute."[13] The Gambia satisfies that requirement because, under Article 93(1) of the UN Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". The Gambia has been a Member of the United Nations since 21 September 1965.[14] The Gambia is thus *ipso facto* a party to the Statute of the Court as well.

2.9 Myanmar acknowledges, as it must, that "The Gambia is formally named as the applicant in the Application instituting proceedings".[15] Indeed, Myanmar's Preliminary Objections do *not* contest *any* of the facts relevant to jurisdiction *rationae personae* that The Gambia set out in its Application. As The Gambia stated therein:

> "The Gambia and Myanmar are both Members of the United Nations and therefore bound by the Statute of the Court, including Article 36(1), which provides that the Court's jurisdiction 'comprises … all matters specially provided for … in treaties and conventions in force'.
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> The Gambia and Myanmar are also parties to the Genocide Convention. Myanmar signed the Genocide Convention on 30 December 1949 and deposited its instrument of

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[12] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff Publishers 2006), pp. 587-588. WOG, Annex 19.

[13] Statute of the International Court of Justice, art. 35(1).

[14] International Court of Justice, *States Entitled to Appear Before the* Court, *available at* https://www.icj-cij.org/en/states-entitled-to-appear.

[15] POM, para. 26.

> ratification on 14 March 1956. The Gambia deposited its instrument of accession on 29 December 1978. While the Genocide Convention entered into force on 12 January 1951, it became applicable between the Parties ninety days after 29 December 1978, pursuant to Article XIII of the Convention."[16]

2.10 These undisputed facts foreclose Myanmar's first preliminary objection. As Rosenne has observed: "Every State which is a party to the Statute has the right to … invoke the jurisdiction of the Court in accordance with the general conditions for the exercise of that jurisdiction".[17] The Gambia, as a party to the Statute of the Court, has availed itself of that right, in accordance with Myanmar's consent to the Court's jurisdiction contained in Article IX of the Genocide Convention. The requirements for jurisdiction *ratione persone* are therefore satisfied.

2.11 There is no merit whatsoever to Myanmar's contention that The Gambia is merely the "nominal applicant in [this] case", because, it argues, "as a matter of substance, the real applicant is the OIC".[18] Myanmar advances that argument on the ground that The Gambia filed the Application at the behest of the OIC. Leaving aside the fact that, as The Gambia shows below, Myanmar's contention has no basis in fact, it also fails to recognize the Court's long-established jurisprudence that a State's motivation for commencing litigation before the Court is irrelevant to matters of jurisdiction. In rejecting a challenge to its jurisdiction, the Court held in *Nicaragua v. Honduras*:

> "The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal

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[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures* (11 November 2019), paras. 16-17 [**hereinafter** Application].

[17] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff Publishers 2006), pp. 601-602. WOG, Annex 19.

[18] POM, para. 26.

> pronouncement, and it *cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement*."[19]

2.12 The Gambia, not the OIC, is the only Applicant here. It was The Gambia's Minister of Foreign Affairs who wrote to the Registrar of the Court on 11 November 2019 informing him that:

> "the Government of the Republic of The Gambia has appointed H.E. Mr. Abubacarr Marie Tambadou, Attorney General and Minister of Justice of the Republic of The Gambia, as its Agent for the purposes of filing an Application instituting proceedings against the Republic of the Union of Myanmar concerning the latter's violation of the Convention on the Prevention and Punishment of the Crime of Genocide, and of representing the Republic of The Gambia in all aspects of the aforementioned proceedings".[20]

2.13 Likewise, it was Minister Tambadou who, in his capacity as the Agent of The Gambia, notified the Court that, "[o]n behalf of the Republic of The Gambia", he was transmitting "two originals of an Application instituting proceedings" against Myanmar.[21] And, further, it was also Minister Tambadou who, as The Gambia's Agent, informed the Registrar of the Court that "[t]he undersigned, being duly authorized by the Government

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[19] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1998*, para. 52 (emphasis added). As one commentator has observed in regard to the Court's holding that "any possible 'political motivation' of an application is irrelevant for the discharge of its judicial function", this "would seem to be the final word of the ICJ on the issue", and "[t]he Court would emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance for the peace and security of the world". Christian Tomuschat, 'Competence of the Court, Article 36' in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019), p. 725. WOG, Annex 22.

[20] Letter *from* H.E. Dr. Mamadou Tangara, Minister of Foreign Affairs of The Gambia *to* Mr. Philippe Gautier, Registrar of the International Court of Justice (11 November 2019).

[21] Letter *from* H.E. Mr. Abubacarr Marie Tambadou, Agent of The Gambia *to* Mr. Philippe Gautier, Registrar of the International Court of Justice (11 November 2019).

of the Republic of The Gambia", has "the honour to submit this Application instituting proceedings *in the name of the Republic of The Gambia*".[22]

2.14 These actions by The Gambia to initiate proceedings against Myanmar reflect the fact that there was, and remains, an unresolved dispute between those parties to the Genocide Convention concerning Myanmar's violations of that instrument and, more broadly, The Gambia's longstanding and often expressed concerns about the gross human rights abuses that had been committed by Myanmar against the Rohingya.

2.15 The Gambia raised these concerns in a variety of international fora. For instance, on 25 September 2018, President of The Gambia stated to the UN General Assembly: "As the upcoming Chair of the next OIC Summit, *The Gambia* has undertaken, through a Resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book."[23]

2.16 The Gambia also raised its dispute with Myanmar bilaterally. In a Note Verbale dated 11 October 2019 from The Gambia's Permanent Mission to the United Nations to the Permanent Mission of Myanmar, The Gambia made clear that *The Gambia* was in dispute with Myanmar concerning Myanmar's obligations under the Genocide Convention. The Gambia's Note Verbale stated, among other things:

- "***The Republic of The Gambia*** is deeply troubled by the findings of the UN IIFFMM, and in particular its findings regarding the ongoing genocide against the Rohingya people of the Republic of the Union of Myanmar in violation of Myanmar's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide …."

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[22] Application, preamble and para. 1 (emphasis added).

[23] UN General Assembly, 73rd Session, 7th Plenary Meeting, *Address by Mr. Adama Barrow, President of the Republic of the Gambia*, UN Doc. A/73/PV.7 (25 September 2018), p. 6 (emphasis added). MG (23 October 2020), Vol. III, Annex 41.

- "***The Gambia*** considers those findings well-supported by the evidence and highly credible, and is disturbed by Myanmar's absolute denial of those findings and its refusal to acknowledge and remedy its responsibility for the ongoing genocide against the Rohingya population of Myanmar, as required under the Genocide Convention and customary international law."

- "***The Gambia*** fully endorses OIC Resolution No. 4/26-MM of 2 March 2019, which 'Calls upon the Government of Myanmar: (a) To honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of genocide against Rohingya Muslims'."

- "***The Gambia*** emphatically rejects Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention and customary international law."

- "With somber reflection on the goals of the Genocide Convention and its obligations on all States, ***The Gambia*** understands Myanmar to be in ongoing breach of those obligations under the Convention and under customary international law."

- "***The Gambia*** insists that Myanmar take all necessary actions to comply with these obligations, including but not limited to its obligations to make reparations to the vicitims and to provide guarantees and assurances of non-repetition."[24]

2.17 The Gambia makes no secret of the fact that, to secure protection of the Rohingya and hold Myanmar to account for its international crimes against them, it sought and obtained the support of the Organisation of Islamic Cooperation, whose Objectives and Principles include "safeguard[ing] the rights, dignity and religious and cultural identity of Muslim communities and minorities in non-Member States".[25]

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[24] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations (11 October 2019) (emphasis added). OG (2 December 2019), Annex 1.

[25] Charter of the Islamic Conference, 914 UNTS 110, art. 1(16), *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20914/volume-914-I-13039-English.pdf (emphasis omitted) [**hereinafter** OIC Charter].

2.18 To that end, The Gambia was instrumental in obtaining, in May 2018, at the Forty-Fifth Session of the OIC Council of Foreign Ministers, the establishment of an OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya. In recognition of The Gambia's leadership, it was appointed Chair of the Committee.[26]

2.19 The Ad Hoc Committee's mandate is to:

> (a) "Engage to ensure accountability and justice for gross violations of international human rights and humanitarian laws and principles;
>
> (b) Assist in information gathering and evidence collection for accountability purposes
>
> (c) Mobilize and coordinate international political support for accountability for the Human Rights Violations against the Rohingyas in Myanmar
>
> (d) Collaborate with international bodies, such as, [O]ffice of the United Nations High Commissioner for Human Rights, United Nations Security Council, and other international regional mechanisms."[27]

2.20 The Ad Hoc Ministerial Committee's mandate did not include instituting or participating in international (or other) dispute settlement procedures on behalf of the OIC. Under The Gambia's leadership, the Committee ultimately endorsed The Gambia's decision to initiate, on its own behalf, proceedings against Myanmar in the International

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[26] Organisation of Islamic Cooperation, 45th Session of the Council of Foreign Ministers of the Organisation of Islamic Cooperation, *Dhaka Declaration* (6 May 2018), para. 17. MG (23 October 2020), Vol. VII, Annex 203.

[27] Organisation of Islamic Cooperation, *Resolution No. 59/45-POL on The Establishment of an OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas*, OIC Doc. OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT2019/FINAL (May 2018). POM (20 January 2021), Vol. IV, Annex 91.

Court of Justice under the Genocide Convention.[28] The decision to file the case was The Gambia's alone, and The Gambia did so on its own behalf and in its own name, appointing its own Attorney General and Minister of Justice "*to represent The Gambia*" in the proceedings before the Court.[29]

2.21 The fact that the OIC supports The Gambia in its prosecution of the case cannot mean that the OIC somehow becomes the Applicant. The OIC itself does not consider that to be the case. This is clear, for instance, in the Ad Hoc Ministerial Committee's report on its meeting on 25 September 2019, where the Committee recommended adding to the agenda of the forthcoming session of the OIC Council of Foreign Ministers an "item on pledges for the *legal case undertaken by The Gambia*".[30] During the same meeting, the Committee also "acknowledged The Gambia's prerogative to select a legal firm to pursue the case in the ICJ and took note of The Gambia's choice of the legal firm".[31]

2.22 The Gambia's public statements upon the filing of the Application likewise make clear that its dispute with Myanmar is raised on The Gambia's own behalf and that the OIC's role is limited to providing support. In a press release issued on the day of the filing of its Application, The Gamia's Ministry of Justice stated:

> "*The Republic of The Gambia has filed* today before the International Court of Justice in The Hague a lawsuit alleging that the Republic of the Union of Myanmar has

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[28] Organisation of Islamic Cooperation, *Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya*, OIC Doc. OIC/ACM/AD-HOCACCOUNTABILITY/REPORT-2019/FINAL (25 September 2019), paras. 7-8. POM (20 January 2021), Vol. IV, Annex 97.

[29] The Gambia, Office of the President, *Press Release*: *Cabinet approves transformation of GTTI into University of Science, Technology and Engineering* (6 July 2019) (emphasis added). POM (20 January 2021), Vol. IV, Annex 120.

[30] Organisation of Islamic Cooperation, *Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya*, OIC Doc. OIC/ACM/AD-HOCACCOUNTABILITY/REPORT-2019/FINAL (25 September 2019), para. 12 (emphasis added). POM (20 January 2021), Vol. IV, Annex 97.

[31] *Ibid.*

> violated its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide for its genocidal actions against the Rohingya People, a Muslim minority that lives in Myanmar …. *The Gambia has stepped forward*, on behalf of the 57 Member States of the Organiation of Islamic Cooperation, and with the mandate of the Organization, to hold Myanmar accountable for its genocidal crimes against the Rohingya …. *The Gambia has also asked the ICJ* to impose Provisional Measures, as a matter of extreme urgency, to protect the Rohingya against further harm during the pendency of this case by ordering Myanmar to stop all of its genocidal conduct immediately. *The Gambia calls on the international community* to support its legal effort, and to redouble all diplomatic and political efforts to cause Myanmar to stop, and never to repeat, its genocide against the Rohingya, and to assist in efforts to ensure justice and accountability for the crimes committed against them."[32]

2.23 The Embassy of Bangladesh in The Hague, in a statement entitled *Bangladesh supports OIC backed initiative by The Gambia in the International Court of Justice*, reported the following statement by The Gambia's Agent upon the filing of the Application:

> "The Minister of Justice of The Gambia Abubakar Tambadou termed *the filing of the application by The Gambia* against Myanmar before the ICJ as a historic occasion and expressed his sincere *appreciation to the OIC for its support and endorsement to The Gambia* to ensure accountability for the human rights violations against the Rohingyas in Myanmar. Referring to his visit to R[o]hingya camps in Cox's Bazar in May 2018 as the leader of the Gambian delegation to the OIC Council of Foreign Minister's Meeting held in Bangladesh, The Gambian Minister shared his experience of discussion with the victims of atrocities and expressed his resolve that *The Gambia, with*

[32] The Republic of The Gambia, Ministry of Justice, *Press Release* (11 November 2019) (emphasis added). WOG, Annex 2.

> *the support of the OIC*, shall hold Myanmar accountable for its committing genocide against the Rohingyas. He sought political, diplomatic and moral support from the international community to ensure justice for the Rohingya genocide victims so that such genocide cannot be repeated in the Rakhine State or elsewhere."[33]

2.24 Resolutions of the OIC subsequent to the filing of The Gambia's Application confirm that the OIC's role is limited to supporting The Gambia's litigation efforts. For example, the OIC Council of Foreign Ministers resolved at its Forty-Seventh Session, in November 2020, that the Ad Hoc Committee would "[f]ollow up the case at the ICJ *in support of The Gambia* till a final verdict is issued".[34] The Council of Foreign Ministers similarly "[c]all[ed] upon all OIC Member states to stand firmly with The Gambia and provide all necessary support, including financial assistance for the Legal case, on a voluntary basis, in accordance with the principles of burden-sharing and shared responsibility, and in the spirit of Islamic solidarity".[35]

2.25 Indeed, the OIC has no institutional competence to direct The Gambia to undertake any actions, much less dictate where, when or how to litigate before the Court. Article 6 of the Charter of the OIC establishes the Islamic Summit as the organisation's "supreme authority".[36] Under Article 7, the competence of the Islamic Summit is limited to "deliberat[ing], tak[ing] policy decisions and provid[ing] guidance on all issues pertaining

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[33] Embassy of Bangladesh in the Netherlands, *Press Release: Bangladesh supports OIC backed initiative by The Gambia in the International Court of Justice (ICJ)* (12 November 2019) (emphasis added). POM (20 January 2021), Vol. IV, Annex 112.

[34] Organisation of Islamic Cooperation, *Resolution No. 59/47-POL on The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas*, OIC Doc. OIC/CFM-47/2020/POL/RES/FINAL (November 2020), para. 7(e) (emphasis added). POM (20 January 2021), Vol. IV, Annex 106.

[35] Organisation of Islamic Cooperation, *Resolution No. 4/47-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-47/ 20/MM/RES/FINAL (November 2020), para. 42 (emphasis omitted). POM (20 January 2021), Vol. IV, Annex 107.

[36] OIC Charter, art. 6.

to the realization of the objectives as provided for in the Charter and consider[ing] other issues of concern to the Member States and the Ummah".[37] Nor does the OIC's Council of Foreign Ministers have any authority to instruct The Gambia.[38]

2.26 In sum, The Gambia—a party to both the Statute of the Court and the Genocide Convention—has brought these proceedings in its own name and on its own behalf. All requirements for jurisdiction *ratione personae* are satisfied. The fact that The Gambia enjoys the support of the OIC—as well as that of many other States—can have no bearing on the Court's jurisdiction.

II. The Gambia's Claims are Admissible and Not an Abuse of Process

2.27 Myanmar is not helped by repackaging its argument on jurisdiction as a challenge to admissibility. It argues: "a claim or application should not be admissible if it amounts in practice to a direct circumvention of an express limitation on the Court's jurisdiction, even if the Court formally would have jurisdiction to deal with it".[39] Myanmar cites no authority in support of its admissibility objection, which bears no resemblance to any that the Court has recognized as a ground for declining to exercise otherwise well-founded jurisdiction,

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[37] *Ibid*., art. 7. Nor, obviously, is The Gambia one of the organs of the OIC. *See* International Law Commission, Draft Articles on the Responsibility of International Organizations (2011) reproduced in *Yearbook of the International Law Commission 2011*, Vol II(2), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf. Article 2(c) defines an organ of an international organisation as "any person or entity which has that status in accordance with the rules of the organization". As the commentary on draft Article 2(c) observes, "[s]ome constituent instruments contain a list of organs". The OIC is such an international organisation. The organisation's organs are enumerated in Article 5 of the OIC Charter.

[38] OIC Charter, art. 10 (establishing the functions of the OIC Council of Foreign Ministers).

[39] POM, para. 187.

such as the absence of an indispensable third party,[40] the hypothetical nature[41] or mootness of a case,[42] or an applicant's lack of legal interest in the matter.[43]

2.28 Rather, Myanmar's objection to admissibility appears to be based on the contention that The Gambia has somehow abused process by exercising its right under the Genocide Convention to seek to hold Myanmar to account for its breaches thereunder by invoking the Court's jurisdiction under Article IX.[44]

2.29 There is no merit whatsoever to this argument. As Myanmar itself recognizes, abuse of process is limited to those narrow circumstances where a State acts with:

> "fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted (*e.g.*, pure propaganda)".[45]

2.30 This plainly does not describe The Gambia's case. Indeed, The Gambia is deeply gratified by the reception with which the case has been received, and especially by the

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[40] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France and others), Preliminary Question, Judgment, I.C.J. Reports 1954*.

[41] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*.

[42] *Nuclear Tests (Australia/New Zealand v. France), Judgment, I.C.J. Reports 1974*.

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*.

[44] POM, paras. 190 *et seq.*

[45] *Ibid.*, para. 192, *quoting* Robert Kolb, 'General Principles of Procedural Law' in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019), pp. 998-999. POM (20 January 2021), Vol. II, Annex 25.

international community's recognition of the significant results that have been achieved by the Court's indication of provisional measures.

2.31 For example, on 23 January 2020, the UN Secretary-General released the following statement:

> "*The Secretary-General welcomes the Order of the International Court of Justice, indicating provisional measures in the case of The Gambia against Myanmar on the alleged breaches of the Convention on the Prevention and Punishment of the Crime of Genocide.*
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> The Secretary-General notes the Court's unanimous decision to order Myanmar, in accordance with its obligations under the Genocide Convention, 'to take all measures within its power' in relation to the members of the Rohingya group in its territory, to prevent the commission of acts within the scope of Article II of the Convention, including killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's destruction and imposing measures intended to prevent births.
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> He also notes the Court's instruction to Myanmar to ensure that its military, as well as any irregular armed units directed or supported by it and any organizations and persons subject to its control, do not commit such acts; also, that they do not conspire to commit genocide, do not directly and publicly incite the commission of genocide, do not attempt to commit genocide and are not complicit in genocide.
>
> Further, the Secretary-General notes the Court's order to Myanmar to ensure the preservation of evidence related to allegations of acts within the scope of the Genocide Convention, as well as to report to the Court on the implementation of all provisional measures on a regular basis.
>
> The Secretary-General strongly supports the use of peaceful means to settle international disputes. He further recalls that, pursuant to the Charter and to the Statute of the Court,

> decisions of the Court are binding and trusts that Myanmar will duly comply with the Order from the Court."[46]

2.32 On 31 December 2020, the UN General Assembly adopted a similar resolution:

> "*Welcoming the order of the International Court of Justice of 23 January 2020 indicating provisional measures in the case lodged by the Gambia against Myanmar on the application of the Convention on the Prevention and Punishment of the Crime of Genocide*, which concluded that, prima facie, the Court had jurisdiction to deal with the case, which found that the Rohingya in Myanmar appeared to constitute a 'protected group' within the meaning of article 2 of the Convention, and that there was a real and imminent risk of irreparable prejudice to the rights of the Rohingya in Myanmar, and taking note that Myanmar submitted its report in response to the Court's order on 22 May 2020, and measures adopted in this regard".[47]

2.33 Likewise, on 10 February 2021, the Deputy UN High Commissioner for Human Rights, at the UN Human Rights Council's Intersessional Meeting on the Prevention of Genocide, stated:

> "Two years ago, we celebrated the 70th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted on 9 December 1948 by the United Nations General Assembly, it was the first international treaty of a new era characterised by a vision of the world where the atrocities committed during the Second World War would never be tolerated again."[48]

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[46] United Nations, *Press Release: Secretary-General Welcomes International Court of Justice Order on The Gambia v. Myanmar Genocide Convention Case* (23 January 2020) (emphasis added). WOG, Annex 3.

[47] UN General Assembly, *Resolution adopted on 31 December 2020 on Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/RES/75/238 (4 January 2021), *available at* https://undocs.org/en/A/RES/75/238 (emphasis added).

[48] UN OHCHR, *Human Rights Council Intersessional Meeting on the Prevention of Genocide: Statement by Nada Al-Nashif, Deputy High Commissioner for Human Rights* (10 February 2021). WOG, Annex 17.

2.34 The Deputy Human Rights Commissioner continued:

> "*States should also consider how they can contribute to accountability for atrocity crimes committed in other States, including through supporting the work of the United Nations or exercising universal jurisdiction - as we saw with the landmark case brought by The Gambia against Myanmar before the IC[J] on the basis of alleged violations of the Genocide Convention*. [] It will certainly increase the understanding of the role that States must play in preventing and punishing acts of genocide committed beyond their frontiers."[49]

2.35 There is, accordingly, nothing abusive about The Gambia's initiation of these proceedings.

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For these reasons, Myanmar's first preliminary objection has no merit, and should be rejected by the Court.

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[49] *Ibid.* (emphasis added).

CHAPTER 3
THE GAMBIA HAS STANDING UNDER THE GENOCIDE CONVENTION

3.1 Myanmar's second preliminary objection is that:

> "The Gambia does not have standing to bring this case before the Court under Article IX of the Genocide Convention either because the Genocide Convention does not enshrine the concept of an *actio popularis* at all or because in the specific circumstances of the case at hand The Gambia is barred from so doing because Bangladesh, as the State specially affected by the alleged violations of the Genocide Convention, has entered a reservation to Article IX of the Convention".[50]

3.2 By its Order indicating provisional measures, the Court rejected this objection on a *prima facie* basis.[51]

3.3 In considering Myanmar's objection, the Court "recalled" that, in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it had observed that:

> "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention

[50] POM, para. 349.

[51] Provisional Measures Order, paras. 39, 42.

> provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[52]

3.4 The Court determined:

> "In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity."[53]

3.5 The Court then explained that this "common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention".[54] In that connection, the Court noted that, "[i]n its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*", it had "observed that the relevant provisions in the Convention against Torture" are "similar" to "those in the Genocide Convention" and that "these provisions generat[e] 'obligations [which] may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case'".[55]

3.6 The Court accordingly rejected Myanmar's objection because:

> "It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end."[56]

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[52] *Ibid.*, para. 41 *citing Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid. citing Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, I.C.J. Reports* 2012, p. 449, para. 68 (last brackets in original).

[56] *Ibid.*

3.7 The Gambia respectfully submits that the Court should once again reject Myanmar's objection, and confirm The Gambia's standing in these proceedings, which, as the Court observed in its Order of 23 January 2020, stems from its status as a party to the Genocide Convention and the *erga omnes partes* character of the obligations owed by Myanmar under the Convention.

I. The Gambia's Standing Stems from the *Erga Omnes Partes* Character of the Obligations under the Genocide Convention

3.8 Myanmar does not challenge directly the Court's *jurisprudence constante* on the *erga omnes partes* character of the obligations it owes under the Genocide Convention. Instead, Myanmar bases its second preliminary objection on a purported "crucial distinction" between "the right to invoke State responsibility under general international law and standing before the Court".[57] According to Myanmar, a State Party to the Genocide Convention, like The Gambia, may have the right to invoke Myanmar's responsibility under the Convention, but this does not mean that The Gambia has standing to commence proceedings before the Court under Article IX. Rather, Myanmar argues, "only States that are specially affected by an alleged breach of a treaty containing obligations *erga omnes partes* have standing to bring a claim before the Court".[58] In other words, according to Myanmar, notwithstanding the *erga omnes partes* obligations of the Convention, The Gambia can only invoke the Court's jurisdiction in regard to Myanmar's breaches of those obligations if The Gambia is specially affected by alleged breaches of the Convention, namely that it has suffered direct injury as a result of them.

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[57] POM, para. 215.

[58] *Ibid.*, para. 221.

3.9 The logical contradiction in Myanmar's approach, which would effectively deprive the Convention's obligations of their *erga omnes* character by requiring a special or direct injury to a party before it can seize the Court under Article IX, is obvious. Obligations are *erga omnes* when all treaty parties have a fundamental interest in their fulfilment, such that a breach necessarily constitutes an injury to those interests, without a showing that they have been specially affected by the breach. Accordingly, if the obligations under the Convention are *erga omnes partes*, which Myanmar appears to accept, then, logically, a breach of those obligations necessarily injures *omnes partes*, conferring on each party a standing to sue under Article IX. If it were otherwise, and only a State that is "specially affected"—which, to Myanmar, means "directly injured"—could have standing to sue, in what sense could the obligations under the Convention be truly said to be *erga omnes partes*?

3.10 Myanmar's attempt to separate standing before the Court from the right to invoke responsibility, in a case where responsibility arises from breach of *erga omnes partes* obligations, is thus artificial and flawed. If a State has the right—whether as a specially injured State or as a non-specially injured State—to invoke the responsibility of another State for breach of obligations that are *erga omnes partes*, then that State necessarily has *standing* to submit the dispute resulting from such breach to the Court because it has a legal interest in remedying the violation.

3.11 Myanmar argues that "the present case is fundamentally different both to previous cases dealt with by the Court under the Genocide Convention, as well as to the *Obligation to Prosecute or Extradite* case".[59]

[59] *Ibid.*, para. 211.

3.12 It may indeed be different, in the sense that all cases are different. It is not, however, fundamentally different.

3.13 It is a fact that this case is the first brought before the Court under the Genocide Convention by a State whose nationals are not the victims of the acts of genocide committed by the Respondent State. However, this difference with the Court's previous cases is irrelevant because its prior judgments do not contain any finding that limits the Court's jurisdiction to States that have been—to use Myanmar's terminology—"specially affected" by the Respondent State's breaches of the Genocide Convention.

3.14 Myanmar's attempt to distinguish *Belgium v. Senegal* is equally without merit. The fact that Belgium might have considered itself injured or specially affected is entirely irrelevant because, as Myanmar recognizes, the Court made no "positive finding as to the status of Belgium as a specially-affected State under the Convention Against Torture".[60] In that case, the Court found Belgium to have standing solely on the basis of the *erga omnes partes* character of the obligations allegedly breached. The Court stressed that this means "that each State party has an interest in compliance with them in any given case" and that "[i]n this respect, the relevant provisions of the Convention against Torture are similar to those of the [Genocide] Convention".[61] Each State party thus has an "entitlement … to make a claim concerning … an alleged breach by another State party" because of their "common interest in compliance with the relevant obligations".[62] Indeed, in rejecting the position Myanmar now advances, the Court stressed that, because the obligations were of

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[60] *Ibid.*, para. 246.

[61] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, I.C.J. Reports 2012*, p. 449, para. 68. *See also* Provisional Measures Order, para. 41.

[62] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, I.C.J. Reports 2012*, p. 450, para. 69.

such character, "[i]f a special interest were required" to have standing, "in many cases no State would be in the position to make such a claim".[63]

3.15 Despite the affirmation by the Court that the *erga omnes partes* obligations under the Convention against Torture are "similar" to those of the Genocide Convention,[64] Myanmar argues that the obligations of the Torture Convention "are critically different to those contained in the Genocide Convention".[65] According to Myanmar, this is because, unlike the Torture Convention, which "embodies the principle of universal jurisdiction",[66] the Genocide Convention only contains "an obligation to exercise territorial jurisdiction".[67] On the basis of this purported difference, Myanmar argues that because the Torture Convention "envisage[s] [a] form of enforcement by the Contracting Parties, other than by those on whose territory the acts in question were committed", that instrument "contain[s] an implied agreement to accept the standing of a non-injured State to bring cases before the Court" while the Genocide Convention does not.[68]

3.16 Myanmar's argument is contrived and erroneous. The alleged difference between the two conventions has no bearing whatsoever on The Gambia's standing in this case. Indeed, in contrast to the position of Belgium in relation to acts of torture committed in Chad, The Gambia does not request for itself "the ability to enforce the prohibition of acts of genocide arising under the Convention when committed on the territory of Myanmar".[69] Nor does The Gambia claim that it has the right under the Genocide Convention to

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[63] *Ibid*.

[64] *Ibid*., p. 449, para. 68. *See also* Provisional Measures Order, para. 41.

[65] POM, para. 241.

[66] *Ibid*., para. 245.

[67] *Ibid*., para. 248 (emphasis omitted).

[68] *Ibid*.

[69] *Ibid*., para. 249.

prosecute those responsible for acts of genocide against the Rohingya or that those perpetrators must be extradited to The Gambia. Rather, in regard to the obligation to punish genocide, The Gambia claims that Myanmar is internationally responsible for its continuing violation of its obligation under Article VI of the Genocide Convention to institute and exercise its *own* territorial criminal jurisdiction over acts of genocide committed on Myanmar's own territory. In order to be entitled to make this claim before the Court, The Gambia does not need to be authorized under the Convention to prosecute and punish, in its own courts, the acts of genocide that Myanmar is failing to punish. Myanmar has offered no rationale for that far-reaching conclusion.

II. Article IX of the Genocide Convention Allows The Gambia to Submit Its Dispute with Myanmar to the Court

3.17 Myanmar is equally wrong to read into Article IX of the Genocide Convention a non-existent "standing" requirement which would bar States that are not specially injured by a breach from invoking the Court's jurisdiction. There is nothing in the text of Article IX that imposes such a requirement. Instead, Article IX gives jurisdictional effect to the *erga omnes partes* character of the obligations under the Convention by extending the Court's jurisdiction to all disputes arising under the Convention that are submitted to it by the parties to such disputes, regardless of whether they are specially affected or not.

3.18 The ordinary meaning of the terms of Article IX, read in context and in light of the Convention's object and purpose, supports The Gambia's view that it has standing to seize the Court in regard to Myanmar's breaches.

A. Ordinary Meaning

3.19 Article IX provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present

> Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[70]

3.20 Myanmar purports to derive the exclusion of disputes brought by non-specially injured States from the jurisdiction of the Court from the fact that Article IX does not begin with the words "*all* disputes" or "*any* dispute".[71] Myanmar's reading of Article IX is strained and wrong.

3.21 Article IX begins with the word "Disputes" in the plural form. The provision requires only that such "disputes" must exist "between the Contracting Parties" and, in regard to *ratione materiae*, that they must relate to "the interpretation, application or fulfilment of the present Convention".[72] Article IX contains no further limitations on the scope of the Court's jurisdiction. The rest of the article confirms that the Contracting Parties' consent to jurisdiction encompasses disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III".[73]

3.22 The ordinary meaning of the words used in Article IX is that the provision encompasses *any* dispute existing between *any* of the contracting parties, provided that the dispute relates to the responsibility of a State for fulfilment of the Convention's obligations. The words of Article IX do not contain any *ratione personae* limitation on the disputes encompassed under it: the "disputes" falling under Article IX are any that have arisen "between the Contracting Parties". Nothing in Article IX suggests—let alone explicitly

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[70] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, art. IX. MG (23 October 2020), Vol. II, Annex 1 [**hereinafter** Genocide Convention (1951)].

[71] POM, para. 264 (emphasis in original).

[72] Genocide Convention (1951), art. IX. MG (23 October 2020), Vol. II, Annex 1.

[73] *Ibid.*

provides—that Contracting Parties who are not specially injured are precluded from invoking the responsibility of another Contracting State, or are barred from submitting to the Court the dispute resulting from such invocation. On the contrary, Article IX expressly states that "the responsibility *of a State* for genocide" can be the subject-matter of the "disputes between the Contracting Parties" that can be "submitted to the International Court of Justice at the request of *any* of the parties to the dispute".[74] The inclusion of disputes "relating to the responsibility *of a State* for genocide" among those that can be brought before the Court unmistakably means that responsibility for genocide can be the object of a dispute brought before the Court by *any* contracting party. According to Fitzmaurice, the text that became Article IX "was intended to impose upon *all States parties to the convention* the obligation to refer all disputes relating to cases of genocide to the International Court".[75] *All States parties to the convention* indisputably includes non-specially injured States.

3.23 Myanmar seeks to derive some advantage from the fact that the words "*any* Contracting Party" are used in Article VIII while "*the* Contracting Parties" appear in Article IX. It argues that this difference means that Article IX "close[s] the door to a *judicial actio popularis*"[76] and that the drafters of the Convention would have used "any" instead of "the" in Article IX if they meant to empower non-specially injured States to invoke the Court's jurisdiction.

3.24 Myanmar's effort to draw a meaningful distinction between the word "any" as used in Article VIII and "the"—as used in Article IX—is entirely without merit. *First*, the plural

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[74] *Ibid.* (emphasis added).

[75] *See* UN General Assembly, Third Session, Sixth Committee, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1762 (per Mr. Fitzmaurice) (emphasis added). WOG, Annex 10.

[76] POM, para. 269.

"Disputes between the Contracting Parties" in Article IX is no less broad than "any dispute between Contracting Parties" in Article VIII. "The" Contracting parties, in Article IX, must necessarily refer to *any* of them. The only other possible interpretation of "the" contracting parties, linguistically, is that it means *all* of them, but this is plainly inconsistent with Article IX and common sense. It could not have been the intention of the contracting parties, in agreeing to Article IX, to enable recourse to the Court only if *all* of them sought it. Accordingly, the only logical conclusion is that "*the* contracting parties" means *any one* of them.

3.25 *Second*, Myanmar fails to see that Articles VIII and IX serve different purposes, and that the procedure under Article VIII can be triggered even *before* a dispute under the Convention arises between the Contracting Parties, while the existence of such a dispute is the only condition for Article IX to apply. Moreover, under Article VIII, a Contracting Party may "call upon" the organs of the United Nations to act even if genocide is committed in or by a State that is *not* a party to the Convention.[77]

3.26 Myanmar contrasts Article IX with compromissory clauses in other conventions containing *erga omnes partes* obligations.[78] However, the comparison only serves to underscore the breadth of the consent to jurisdiction in Article IX, which "makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention"[79] *and on nothing else*.

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[77] *See* UN Economic and Social Council, Ad hoc Committee on Genocide, *Summary Record of the Twentieth Meeting on 26 April 1948*, E/AC.25/SR.20 (4 May 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 945 (per Mr. Rudzinski). WOG, Annex 7.

[78] POM, paras. 262 *et seq*.

[79] Provisional Measures Order, para. 20.

3.27 While the other jurisdictional clauses referred to by Myanmar contain additional preconditions of consent that must be fulfilled before a State may seize the Court,[80] the Court's jurisdiction under Article IX is only conditioned by the existence of a dispute. No other preconditions exist. Article IX thus gives effect to the *erga omnes partes* character of the Convention's obligations: because genocide "shocks the conscience of mankind",[81] it must be prevented, stopped forthwith and punished, by enabling the other contracting parties to hold the offending State accountable.

3.28 These fundamental characteristics of the Convention explain why no preconditions to the seizing of the Court are prescribed, and why no limitations are placed on which contracting parties may institute proceedings, as long as it is in dispute with the offending State in relation to its obligations under the Convention.[82] As the Court noted in its Order of 23 January 2020, "all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity".[83] That formulation plainly includes any individual State party.

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[80] POM, paras. 261-262. *See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, I.C.J. Reports 2012*; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment of 14 July 2020*.

[81] UN General Assembly, 55th Plenary Meeting, *96 (I). The Crime of Genocide*, UN Doc. A/Res/96(I) (11 December 1946). MG (23 October 2020), Vol. II, Annex 4; *see also* Provisional Measures Order, para. 69.

[82] In particular, the absence of a negotiation precondition in Article IX is thus an additional and very clear indication that non-specially injured States—who have no personal injury to negotiate about—are entitled to submit to the Court disputes resulting from their invocation of the responsibility of another contracting State for acts of genocide.

[83] Provisional Measures Order, para. 41.

B. OBJECT AND PURPOSE

3.29 This interpretation of Article IX is reinforced by the Genocide Convention's object and purpose. The Court has already emphasized the Convention's object and purpose, in its Order of 23 January 2020, as quoted above in paragraphs 3.3 and 3.4. The Convention's Preamble also addresses its object and purpose, in its reference to resolution 96(I) of the General Assembly, from which the Court quoted in its Order.[84] Resolution 96(I) underscores that genocide is "contrary to the spirit and aims of the United Nations and condemned by the civilized world",[85] "shocks the conscience of mankind" and "results in great losses to humanity".[86] The Preamble further emphasizes that "in order to liberate mankind from such an odious scourge, international co-operation is required". This object and purpose is irreconcilable with Myanmar's contention that Article IX should be interpreted as excluding from the Court's jurisdiction disputes brought to it by non-specially injured States.

3.30 Myanmar's contention that the Convention's preparatory works support its interpretation of Article IX fares no better. To begin with, Myanmar does not argue that the meaning of Article IX is ambiguous or obscure, or that The Gambia's interpretation of the provision is manifestly absurd or unreasonable. As Professor Kolb has observed, "Article IX of the Convention is … a model of clarity and simplicity, opening the seizing of the Court as largely as possible."[87] Consequently, resort to the *travaux* is not necessary.

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[84] *Ibid.*, para. 69.

[85] Genocide Convention (1951), Preamble. MG (23 October 2020), Vol. II, Annex 1.

[86] UN General Assembly, 55th Plenary Meeting, *96 (I). The Crime of Genocide*, UN Doc. A/Res/96(I) (11 December 1946). MG (23 October 2020), Vol. II, Annex 4.

[87] Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008), p. 420. WOG, Annex 21.

Regardless, the preparatory works fully support and confirm The Gambia's interpretation of Article IX.

3.31 On 26 June 1947, the UN Secretary-General distributed a draft "Convention on the crime of genocide"[88] in pursuance of the resolution of the Economic and Social Council, dated 28 March 1947, which was acting on the resolution of the General Assembly dated 11 December 1946. The draft convention was prepared with the assistance of three experts, Professor Donnedieu de Vabres, at the Paris Faculty of Law; Professor Pella, President of the International Association for Penal Law; and Professor Lemkin, who coined the word "genocide". Article XIV of the draft reads:

> "Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice."[89]

3.32 The comment for that provision states:

> "The International Court of Justice would appear to be the judicial authority best qualified to deal with such disputes.
>
> Since the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community, *any dispute is a matter affecting all the parties to the Convention*. Hence, such dispute should not be settled by an authority arbitrating between two or more States exclusively, for then its decision would lack any claim to be binding on other States.

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[88] UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, E/447 (26 June 1947), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 209. WOG, Annex 5.

[89] The words "between any of the High Contracting Parties" were inserted after the word "Disputes" because "[o]nly States may be parties to cases before the Court". *See* Draft Convention on the Crime of Genocide: communications received by the Secretary-General, *Communication received from the United States of America*, A/401 (30 September 1947), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 381. WOG, Annex 6.

> The International Court of Justice, on the contrary, is an organ of the United Nations established by virtue of the Charter itself; it is a court whose authority is recognized by all the Members of the United Nations, and should consequently be given jurisdiction to settle *the disputes* concerned."[90]

3.33 From its inception, the Genocide Convention's compromissory clause was thus conceived as giving effect to the fact that "any dispute is a matter affecting all the parties to the Convention".

3.34 The final draft submitted to the General Assembly confirmed this intention. The report of the Sixth Committee to the General Assembly prepared by Mr. J. Spiropoulos (Greece), dated 3 December 1948, summarized the history of the negotiations relating to the compromissory clause:

> "In article X of the draft Convention as drafted by the *ad hoc* Committee [on the basis of the UN Secretary-General draft], it was laid down that disputes relating to the interpretation or application of the Convention should be submitted to the International Court of Justice, provided that no dispute should be submitted to the Court involving an issue which had been referred to and was pending before, or had been passed upon by, a competent international criminal tribunal. At its 104th meeting the Committee adopted, however, in substitution for this article, a joint amendment submitted by the representatives of the United Kingdom and Belgium (A/C.6/258), and amended by the representative of India, according to which *any dispute between the Contracting*

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[90] UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, E/447 (26 June 1947), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), pp. 251-252 (emphasis added). WOG, Annex 5. Commenting on these two last sentences, Kolb writes: "By this statement, the Secretary-General did obviously not mean that a decision by the Court would be legally binding on non-parties to the dispute, contrary to Article 59 of the Statute. He rather underscored the enhanced value of precedents set by the main judicial body of the UN with regard to all member states of that organization." Robert Kolb, 'The Compromissory Clause of the Convention' *in* Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008), p. 409. WOG, Annex 21.

> *Parties* relating to the interpretation, application or fulfilment of the Convention, *including disputes relating to the responsibility of a State* for any of the acts enumerated in articles II and IV, should be submitted to the International Court of Justice, *at the request of any of the Contracting Parties*."[91]

3.35 Myanmar's discussion of the *travaux* fails to mention these events. Instead, it rests on an amendment presented by the Indian delegate, Mr. Sundaram, replacing, in the Belgian-British joint amendment, the words "at the request of any of the High Contracting Parties" with "at the request of any of the parties to the dispute".[92] But the only effect of the amendment was to require that the party invoking the Court's jurisdiction has raised a dispute with the State alleged to be in violation of its obligations under the Convention. In other words, the amendment simply ensures that if two States are in dispute in regard to obligations owed under the Genocide Convention, only those States may invoke the jurisdiction of the Court; a third State, which is not a party to the dispute, cannot.[93]

3.36 The revision was regarded as editorial in nature, and without substantive effects. The French delegate, Mr. Chaumont, so indicated when approving the Indian amendment; he observed that the change of wording "was merely a drafting matter".[94] The report of the

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[91] UN General Assembly, Sixth Committee, Third Session, *Genocide: Draft Convention and Report of the Economic and Social Council*, A/760 (3 December 1948), para. 15, reproduced in Abtahi & Webb, *The Genocide Convention. The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 2027 (emphasis added). WOG, Annex 13.

[92] POM, paras. 285-288.

[93] On the Indian amendment, the record states only that: "In the joint amendment of Belgium and the United Kingdom [*A/C.6/258*] it was provided that: 'Any dispute ... shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties'. The representative of India felt that that change of wording did not improve the text. It would be advisable, on the contrary, to replace that phrase by the words 'at the request of any of the parties to such dispute', as suggested by the Indian amendment [*A/C.6/260*]." *See* UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1771 (per Mr. Sundaram). WOG, Annex 10.

[94] UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus

Sixth Committee to the General Assembly prepared by Mr. J. Spiropoulos refers to the Belgian-British proposal as "amended by the representative of India" to stress that it allowed for the submission to the Court of "*any* dispute between the Contracting Parties".[95]

3.37 Myanmar recalls that Mr. Sundaram expressed concern about the scope of the compromissory clause. However, this was unrelated to his proposed amendment. According to the full record (as distinguished from the truncated version supplied by Myanmar):

> "The representative of India considered that the inclusion of all disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV would certainly give rise to serious difficulties. It would make it possible for an unfriendly State to charge, on vague and unsubstantial allegations, that another State was responsible for genocide within its territory."[96]

3.38 The record thus shows that the Indian representative's concern was not about potential suits by States that were not specially or directly injured, but by misuse of the compromissory clause by unfriendly States based on nothing more than "vague and insubstantial allegations". Neither India nor any other State proposed an amendment aimed

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Nijhoff 2008), p. 1763 (per Mr. Chaumont). WOG, Annex 10. Likewise, the deletion by the drafting committee of the word "any" before the inaugurating word "disputes" was purely editorial, and it is troubling to see Myanmar suggesting that a drafting committee would have the power to dramatically change the meaning of a provision. *See* POM, para. 289.

[95] UN General Assembly, Sixth Committee, Third Session, *Genocide: Draft Convention and Report of the Economic and Social Council*, A/760 (3 December 1948), para. 15, reproduced in Abtahi & Webb, *The Genocide Convention. The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 2027 (emphasis added). WOG, Annex 13.

[96] UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1771 (per Mr. Sundaram). WOG, Annex 10. This position was repeated by the Indian delegate in the 178th plenary session of the General Assembly. *See* UN General Assembly, 178th Plenary Meeting, *Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.178 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 2060 (per Mr. Sundaram). WOG, Annex 14.

at this issue, although other States, including the United States—as Myanmar points out—expressed similar concerns at various times.[97] What Myanmar fails to recall is that it is precisely because Article IX gives jurisdiction to the Court over disputes brought by non-specially injured States that the United States made a reservation to Article IX when acceding to the Convention.[98] Myanmar, on its part, did not limit its consent to the Court's jurisdiction, either by reservation to Article IX or in any other manner.

3.39 In fact, the Genocide Convention's preparatory works make clear that the delegates embraced the need to allow disputes to be referred to the Court by States that are not themselves specially injured. This is because they understood that imposing such a requirement would undermine the effectiveness of the Convention in regard to acts of genocide committed exclusively within a State's territory against a minority population:

- Mr. de Beus (Netherlands) referred to the "undue lenience on the part of national courts as a violation of the convention which could be brought before the International Court of Justice by any signatory State";[99]

- Mr. Spiropoulos (Greece), approving the joint Belgian-British amendment that provided that "[a]ny dispute" could be "submitted to the International Court of Justice at the request of any of the High Contracting Parties",[100] stated that "the

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[97] POM, paras. 292-293.

[98] "With reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case." United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Declarations and Reservations by the United States of America*. *See also* William A. Schabas, *Genocide in International Law* (Cambridge University Press 2000), p. 424. WOG, Annex 18.

[99] UN General Assembly, Sixth Committee, Third Session, 97th Meeting, A/C.6/SR.97 (9 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1675 (per Mr. de Beus). WOG, Annex 9.

[100] *See* UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1771 (per Mr. Sundaram). WOG, Annex 10.

State responsible for genocide would have to indemnify its own nationals"[101] and underscored that "[i]f a State ordered the destruction of a minority group which included aliens, the convention was superfluous, because the principles of international law would in any case have been violated. The nationals of the State itself needed protection, not the aliens."[102]

- Mr. Demesmin (Haiti) considered that the principle of reparation for the victims "applied if a State committed the crime of genocide against its own nationals".[103]

- Mr. Fitzmaurice (United Kingdom) "did not think that acts of genocide occurred suddenly; genocide was a process in which racial, religious or political groups were gradually destroyed. When it became clear that genocide was being committed, any party to the convention could refer the matter to the International Court of Justice … the United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide."[104]

- Mr. Alfaro (Panama) stated that "the International Court of Justice would be requested to consider any disputes between nations regarding the possible implementation of the draft convention".[105]

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[101] UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1765 (per Mr. Spiropoulos). WOG, Annex 10.

[102] UN General Assembly, Sixth Committee, Third Session, 104th Meeting, A/C.6/SR.104 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1781 (per Mr. Spiropoulos). WOG, Annex 11.

[103] UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1770 (per Mr. Demesmin). WOG, Annex 10.

[104] UN General Assembly, Sixth Committee, Third Session, 104th Meeting, A/C.6/SR.104 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1780 (per Mr. Fitzmaurice). WOG, Annex 11.

[105] UN General Assembly, 179th Plenary Meeting, *Continuation of the discussion on the draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.179 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 2067 (per Mr. Alfaro). WOG, Annex 15.

3.40 Myanmar's second preliminary objection asks: "Can it really be assumed that the drafters of the Genocide Convention wanted, as early as 1948, not only to provide in the Convention for obligations *erga omnes partes*, but also to invest all Contracting Parties with unlimited standing?"[106]

3.41 The Convention's preparatory works offer a clear answer to the question: Yes.

C. STATE RESPONSIBILITY

3.42 Myanmar seeks to interpret Article IX of the Convention by reference to the law of State responsibility.

3.43 According to Myanmar, the "taking of countermeasures in response to violations of obligations *erga omnes partes* on the one hand, and bringing of a case before the Court on the other, are simply two ways of vindicating *erga omnes* obligations".[107] Hence, Myanmar argues, because the enforcement of *erga omnes partes* obligations through countermeasures by non-specially injured States is, allegedly, prohibited under general international law, the enforcement of the same obligations through the Court at the request of a non-specially injured State is likewise impossible.

3.44 Myanmar's argument is misconceived. To bring a dispute to the Court is not a countermeasure. It cannot be a wrongful act as such. In contrast, a countermeasure is an act whose intrinsic wrongfulness is precluded by the wrongfulness of the prior act to which it purports to react.[108] There is therefore no basis for considering that "[b]oth enforcement

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[106] POM, para. 252.

[107] *Ibid.*, para. 302.

[108] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), reproduced in *Yearbook of the International Law Commission 2001*, Vol. II(2), art. 22. MG (23 October 2020), Vol. II, Annex 15 [**hereinafter** ILC Articles on State Responsibility (2001)].

mechanisms … simply constitute two sides of the same coin".[109] The rules on countermeasures cannot provide the basis for construing Article IX so as to prevent The Gambia from seizing the Court under it.

3.45 Indeed, the law of State responsibility confirms that non-injured States are entitled to invoke the responsibility of a State responsible for breaches of *erga omnes partes* obligations and to take lawful measures against it.[110] Myanmar knows this well, as many among its senior leadership, and the State itself, are the subjects of sanctions by the European Union and States that have not been specially affected by Myanmar's breaches of international law.[111]

III. Bangladesh's Reservation to Article IX Has No Effect on The Gambia's Right to Submit Its Dispute with Myanmar to the Court

3.46 The Parties are agreed that Bangladesh's reservation to Article IX prevents Bangladesh from suing Myanmar for violating its obligations under the Convention. Myanmar, however, argues that Bangladesh's reservation also prevents The Gambia from bringing proceedings against it.

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[109] POM, para. 302.

[110] ILC Articles on State Responsibility (2001), art. 54. MG (23 October 2020), Vol. II, Annex 15.

[111] *See, e.g.*, Council of the European Union, *Council Implementing Regulation (EU) 2018/898 of 25 June 2018 implementing Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma* (25 June 2018). MG (23 October 2020), Vol. VII, Annex 193; Council of the European Union, *Press Release: Myanmar/Burma: Council prolongs sanction* (29 April 2019). MG (23 October 2020), Vol. VII, Annex 196; US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG (23 October 2020), Vol. VII, Annex 198; United Kingdom Foreign Commonwealth Office, *UK announces first sanctions under new global human rights regime* (6 July 2020). MG (23 October 2020), Vol. VII, Annex 200; United Kingdom Foreign Commonwealth Office, *UK Sanctions List* (29 September 2020). MG (23 October 2020), Vol. VII, Annex 201.

3.47 This is not correct.

3.48 It is plain that the jurisdiction of the Court over a dispute between two States depends only on the consent of those two States, and not on that of a third State. Under the Convention, the lack of consent of any other Contracting Party is irrelevant to the jurisdiction of the Court over a case between The Gambia and Myanmar. The consent of other States is also irrelevant to the exercise of such jurisdiction when, as is the case here, the claims submitted to the Court can be adjudicated upon without ruling, as a legal and logical prerequisite, on the rights or obligations of any third State. Myanmar does not—and could not—claim that Bangladesh is an indispensable third party within the meaning of the *Monetary Gold* principle.

3.49 Myanmar argues, in regard to Bangladesh, that only it has been "specially affected by the alleged violations of the Genocide Convention purportedly committed by Myanmar", and that, by entering a reservation to Article IX, Bangladesh "has thereby waived its right to settle disputes relating to the interpretation, application or fulfilment of the Convention by bringing a case before the Court under that provision".[112] This may be true. But it has nothing to do with The Gambia's right to bring a case before the Court.

3.50 Myanmar's argument takes us back to its principal thesis that only "specially-affected" States may bring suits under Article IX. Pursuant to this misguided theory, the only State which has been "specially affected"—Bangladesh—has waived its right to sue, leaving no other State with such a right. The argument thus rests on the fallacy that The

[112] POM, para. 27; *see also* para. 310 ("such standing would still be subsidiary to, and dependent on, the ability of specially-affected States to bring a case under the same compromissory clause. The effect of this in the specific circumstances of the case now before the Court is that The Gambia lacks standing to bring this case against Myanmar under Article IX of the Genocide Convention.").

Gambia, as a non-specially affected State, is incapable of seizing the Court under Article IX.

3.51 Plainly, The Gambia has standing to sue Myanmar, and its standing is not, and cannot be, affected by Bangladesh's reservation. As explained above, the standing of The Gambia arises from the *erga omnes partes* character of the Convention's obligations, and the Court's jurisdiction is based on the provisions of Article IX which encompass all disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, which include disputes brought to the Court by non-specially injured States.

3.52 Myanmar has invented a so-called "primacy right of an injured Contracting Party to the Genocide Convention".[113] However, there is nothing in the Convention, or in its object and purpose or in its *travaux*, to suggest that a specially-injured party has a greater right to bring its dispute before the Court than a non-specially injured party, or that a waiver of its right automatically waives the purportedly lower-order rights of a non-specially injured party. In the first place, The Gambia rejects the suggestion that its rights in respect of bringing suit against Myanmar under Article IX are any less than those that Bangladesh would have had if it had not made its reservation. Second, The Gambia also rejects the idea that a waiver of rights by Bangladesh implies a waiver of its own rights. Indeed, commenting on Article 45 of the Articles on State Responsibility, from which Myanmar erroneously purports to draw support,[114] the International Law Commission stated:

> "The use of the term 'valid waiver' is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances. Of particular significance in this respect is the question of consent given by an injured

[113] *Ibid.*, para. 326.

[114] *Ibid.*, paras. 326-331.

> State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, *even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law*."[115]

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3.53 For all the above reasons, Myanmar's second preliminary objection is unsustainable and without merit. The Court must reject it.

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[115] UN General Assembly, *Report of the International Law Commission on the work of its fifty-third session (2001)*, UN Doc. A/56/10/Corr. 1 (24 October 2001), p. 122, para. 4, *available at* https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (emphasis added).

CHAPTER 4
MYANMAR'S RESERVATION TO ARTICLE VIII IS IRRELEVANT

4.1 Myanmar's third preliminary objection is that the Application is inadmissible because:

> "The Gambia, as a non-injured Contracting Party to the Genocide Convention, may not seise the Court with a case arising under that Convention since Myanmar, when acceding to the Convention, has entered a reservation to its Article VIII".[116]

4.2 In its Order of 23 January 2020, the Court rejected the same objection on a *prima facie* basis.[117] The Court considered that "although the terms 'competent organs of the United Nations' under Article VIII are broad and may be interpreted as encompassing the Court within their scope of application, other terms used in Article VIII suggest a different interpretation".[118] In particular, the Court noted that Article VIII "only addresses in general terms the possibility for any Contracting Party to 'call upon' the competent organs of the United Nations to take 'action' which is 'appropriate' for the prevention and suppression of acts of genocide".[119] The provision, however, "does not refer to the submission of disputes between Contracting Parties to the Genocide Convention to the Court for adjudication".[120] The latter is a "matter specifically addressed in Article IX of the Convention, to which Myanmar has not entered any reservation".[121] For these reasons, the Court found:

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[116] POM, para. 28.

[117] Provisional Measures Order, paras. 32-36.

[118] *Ibid.*, para. 35.

[119] *Ibid.*

[120] *Ibid.*

[121] *Ibid.*

> "Article VIII and Article IX of the Convention can therefore be said to have distinct areas of application. It is only Article IX of the Convention which is relevant to the seisin of the Court in the present case".[122]

4.3 The Court concluded:

> "In view of the above, Myanmar's reservation to Article VIII of the Genocide Convention does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention."[123]

4.4 For the same reasons, the Court should now reject Myanmar's third preliminary objection. Article VIII of the Genocide Convention does not concern the seisin of the Court, which is governed instead by the Convention's compromissory clause found in Article IX. Myanmar's reservation to Article VIII can have no bearing on the exercise of the Court's jurisdiction.

I. Article VIII Does Not Concern the Seisin of the Court

4.5 Myanmar's third preliminary objection is made in the alternative to, and predicated on, the Court's rejection of the second preliminary objection.[124] In particular, Myanmar argues that even if the present dispute is within the Court's jurisdiction *ratione materiae* and *ratione personae*, and even if The Gambia has standing to sue under Article IX, The Gambia still cannot seise the Court of its dispute with Myanmar. That is because, Myanmar argues, its reservation to Article VIII—a provision that does not mention the Court—

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[122] *Ibid.*, para. 35 *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 23, para. 47.

[123] *Ibid.*, para. 36.

[124] POM, paras. 352, 356 and 478.

somehow renders inoperative Myanmar's consent to jurisdiction under Article IX, a provision to which Myanmar has made no reservation.

4.6 Myanmar's objection is without foundation.[125] The ordinary meaning of Article VIII, interpreted in context and in light of the Genocide Convention's object and purpose, is clear that the provision is concerned solely with the right of Contracting Parties to call upon the political organs of the United Nations to take action in response to genocide and other acts prohibited by the Convention. Seisin of the Court to adjudicate disputes between Contracting Parties concerning the interpretation, application or fulfilment of the Genocide Convention is addressed separately in Article IX of the Convention. Myanmar's reservation to Article VIII is thus irrelevant to the exercise of the Court's jurisdiction.

A. The Ordinary Meaning of the Terms of Article VIII

4.7 Article VIII provides:

> "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."[126]

4.8 Upon Myanmar's accession to the Genocide Convention, Myanmar made a reservation to Article VIII. The reservation states:

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[125] Even more implausibly, Myanmar argues that its reservation to Article VIII has no effect on the seizing of the Court by specially-affected States. POM, paras. 352, 469. Indeed, there is no evidence that Myanmar intended its reservation to have the preclusive effect on seisin of the Court that forms the basis for its preliminary objection. Neither the text of Myanmar's reservation nor any statement made upon handing over its instrument of ratification contains any hint of such an intention. Nor is any such intention evident in the proceedings before the Burmese Parliament concerning ratification of the Genocide Convention.

[126] Genocide Convention (1951), art. VIII.

> "With reference to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union."[127]

4.9 Myanmar's argument that the reservation prevents the Court from exercising jurisdiction is irreconcilable with the Court's holding that Articles VIII and IX have "distinct areas of application" and that "only Article IX" is "relevant to the seisin of the Court in the present case".[128] This has been the Court's view since its 2007 Judgment in the *Bosnian Genocide* case, which held that Article VIII "may be seen as completing the system [of the Genocide Convention] by supporting both prevention and suppression, *in this case at the political level rather than as a matter of legal responsibility*".[129]

4.10 Myanmar nonetheless argues that Article VIII's reference to the "organs of the United Nations" encompasses both the UN's political organs and the Court. The argument is without merit. To begin with, Myanmar ignores the fact that the phrase "organs of the United Nations" is qualified by the word "*competent*". The UN organs that are competent for purposes of Article VIII are explained in the rest of the provision—they must be capable of taking 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 enumerated acts in article III".

4.11 The Court, a judicial institution, does not have such competencies under Chapter 2 of its Statute. The Court does not take "actions" under the UN Charter. Rather, when exercising jurisdiction in contentious cases, the Court renders legal judgments in

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[127] United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification with Reservations by Burma*, Reference C.N.25.1956.Treaties (29 March 1956). MG (23 October 2020), Vol. II, Annex 5.

[128] Provisional Measures Order, para. 35.

[129] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports* 2007, p. 109, para. 159 (emphasis added).

accordance with Article 38(1) of the Statute, which provides that the Court's "function is to decide in accordance with international law such disputes as are submitted to it".[130] Nor are the Court's Judgments based on what it considers "appropriate". Instead, they are rendered solely on the basis of international law. Indeed, the Court may only "decide a case *ex aequo et bono*, if the parties agree thereto".[131]

4.12 Other treaties confirm that the words "competent organs of the United Nations" refers to the UN's political organs, not the Court. For instance, the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention") references "competent organs of the United Nations" in a manner that can only refer to political organs. Article X(1) of the Apartheid Convention provides in pertinent part:

> "1. The States Parties to the present Convention empower the Commission on Human Rights …
>
> (b) [T]o prepare, on the basis of *reports from competent organs of the United Nations* and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;
>
> (c) [T]o *request information from the competent United Nations organs* concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who

[130] Statute of the International Court of Justice, art. 38(1).

[131] *Ibid.*, art. 38(2).

> are believed to be under their territorial and administrative jurisdiction."[132]

4.13 Plainly, only political organs are capable of furnishing States Parties with the reports and information referred to in Article X(1) of the Apartheid Convention.[133]

4.14 The Statute of the International Atomic Energy Agency ("IAEA Statute") and the UN Convention on the Law of the Sea ("UNCLOS") likewise indicate that "competent organs of the United Nations" refers to the UN's political organs. Article III(A)(6) of the IAEA Statute provides that the Agency is authorized:

> "To establish or adopt, in consultation and, where appropriate, *in collaboration with the competent organs of the United Nations* and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or

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[132] International Convention on the Suppresion and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976), 1015 UNTS 243, art. X (emphasis added). POM (20 January 2021), Vol. II, Annex 6.

[133] Article VIII of the Apartheid Convention, proposed as an amendment by the Soviet delegate, was explicitly modelled on the same provision from the Genocide Convention, further demonstrating the common meaning of the phrase "competent organs of the United Nations" between the treaties. UN General Assembly, Twenty-Eighth Session, Third Committee, 2004th Meeting, A/C.3/SR.2004 (23 October 1973), para. 29, *available at* https://undocs.org/en/A/C.3/SR.2004 ("Mr. SMIRNOV (Union of Soviet Socialist Republics) … In view of the importance of the Convention under consideration, and of the seriousness of the crime of *apartheid*, as defined in articles I and II, his delegation proposed that a provision analogous to article VIII of the Convention on genocide should be incorporated into the Convention under consideration. He did not think that such a provision would give rise to difficulties, and his delegation would submit a formal amendment along those lines at the Committee's next meeting.") (emphasis in original).

> multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy".[134]

4.15 Similarly, Article 163(13) of UNCLOS authorizes the Economic Planning and Legal and Technical Commissions established under the Council of the International Seabed Authority ("ISA") to "consult … *any competent organ of the United Nations* or of its specialized agencies or any international organizations with competence in the subject-matter of such consultation".[135]

4.16 Only the UN's political organs—not the Court—are capable of collaborating with the IAEA to develop the safety standards described in Article III(a)(6) of the IAEA Statute or of consulting with the ISA's Commissions in regard to economic planning or legal or technical matters, as contemplated by Article 163(13) of UNCLOS.[136]

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[134] International Atomic Energy Agency Statute (adopted 23 October 1956, entered into force 29 July 1957) 276 UNTS 3, art. III(A)(6) (emphasis added). *See also, e.g.*, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984), 1363 UNTS 3, art. 7(3) ("States Parties shall report to other States Parties and to the Secretary-General concerning areas of the moon having special scientific interest in order that, without prejudice to the rights of other States Parties, consideration may be given to the designation of such areas as international scientific preserves for which special protective arrangements are to be agreed upon *in consultation with the competent bodies of the United Nations*.") (emphasis added); Protocol relating to the Status of Refugees (adoped 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art. 2(2) ("In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to *make reports to the competent organs of the United Nations*, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form" concerning the "condition of refugees", the "implementation of the present Protocol", and "Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.") (emphasis added).

[135] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3, art. 163(13) (emphasis added).

[136] Language similar to Article VIII of the Genocide Convention is also found in the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia ("Cambodia Agreement"). Article 5(4) provides: "In the event of serious violations of human rights in Cambodia, they will call upon the competent organs of the United Nations to take such other steps as are appropriate for the prevention and suppression of such violations in accordance with the relevant international instruments." The Cambodia Agreement includes this provision even though the treaty does *not* contain a compromissory clause providing for jurisdiction with the Court, thereby excluding the possibility that the Court could be considered a competent organ of the UN for purposes of Article VIII of the Cambodia

4.17 The fact that Article VIII of the Genocide Convention does not address seisin of the Court is further confirmed by its use of "*call upon*" to describe the Contracting Parties' engagement with the "competent organs of the United Nations". This is not a formulation that describes the initiation of judicial proceedings, and Myanmar does not attempt to suggest otherwise. Nor could it, as the phrase is employed in connection with appeals to the exercise of discretion. The *Oxford English Dictionary* defines "call upon" as meaning "To appeal to (a person, organization, etc.) to do something; to require, urge, or demand that (a person, organization, etc.) do something."[137]

4.18 The ordinary meaning of "call upon" is how the phrase is routinely used in the UN system. Security Council and General Assembly resolutions, for instance, often "call upon" States or other international actors to take specified actions.[138] The Genocide Convention's use of the phrase in the same manner in Article VIII is confirmed by the UN Secretariat's 1947 draft text. The Preamble to the draft states, in regard to genocide, that "The High Contracting Parties … appeal to the feelings of solidarity of all members of the international community and *call upon them to oppose this odious crime*".[139]

Agreement. *See* Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia (23 October 1991), art. 5(4). WOG, Annex 1.

[137] Oxford English Dictionary, "to call upon" (last accessed 13 April 2021), p. 73. WOG, Annex 23.

[138] *See, e.g.*, UN Security Council, *Resolution 2510 (2014) adopted by the Security Council at its 7155th meeting on 16 April 2014*, UN Doc. S/RES/2150 (2014), *available at* https://undocs.org/en/S/RES/2150(2014) ("*Calls upon* States to recommit to prevent and fight against genocide, and other serious crimes under international law…".) (emphasis in original); UN General Assembly, *Resolution adopted on 31 December 2020 on Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/RES/75/238 (4 January 2021), *available at* https://undocs.org/en/A/RES/75/238 ("[C]alls upon the international community to continue to support the Government of Myanmar in the fulfilment of its international human rights obligations and commitments, the implementation of its democratic transition process, inclusive socioeconomic development and sustainable peace, as well as its national reconciliation process involving all relevant stakeholders".).

[139] UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, E/447 (26 June 1947), Preamble, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 214 (emphasis added). WOG, Annex 5.

4.19 Unable to challenge this obvious defect in its argument, Myanmar relies on the verbs used in the French and Spanish versions of the Genocide Convention—"*saisir*" and "*recurrir*", respectively.[140] The argument fares no better in these languages. While "*saisir*" and "*recurrir*" may sometimes be used in legal contexts, they are also employed in connection with appeals to political bodies. The Chinese equivalent, "*ti qing*", and Russian equivalent, "*obratitsia*", are no different.

B. OBJECT AND PURPOSE

4.20 Myanmar seeks to rescue its argument by appealing to the "object and purpose of Article VIII".[141] In that connection, Myanmar argues that because the seisin of the UN's political organs is already guaranteed by the UN Charter, Article VIII "must be understood as regulating the right of a non-injured Contracting Party to bring a case" to the Court "against another Contracting Party". Otherwise, Myanmar contends, Article VIII "would be devoid … of any meaningful object and purpose".[142] However, as Judge Gaja has explained in his commentary on Article VIII, the provision can "affect the exercise" of the Security Council's powers "in relation to the states parties to the treaty, especially when that exercise depends on the consent of the states concerned".[143] Article VIII thus clarifies that genocide is not to be considered a matter that is essentially "included in the domestic jurisdiction of a State" within the meaning of Article 2, paragraph 7, of the Charter.[144]

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[140] POM, paras. 384-385.

[141] *Ibid.*, Section III.C.2.d.

[142] *Ibid.*, para. 438.

[143] Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008), p. 399. WOG, Annex 20.

[144] *Ibid.*, p. 400 *citing* H.H. Jescheck, 'Genocide', in Bernhardt (ed), *Encyclopedia of Public International Law* (Amsterdam, Elsevier 1995), Vol. II, 541, p. 542 (the author underscored that genocide could not be considered as a matter within the domestic jurisdiction of a State).

Accordingly, by virtue of Article VIII, the Security Council can be engaged without needing to invoke the process for obtaining "enforcement measures under Chapter VII".[145]

4.21 Moreover, States may be Contracting Parties to the Genocide Convention without being Members of the United Nations.[146] Article VIII enables such States to bring acts of genocide to the UN's attention even in the absence of UN membership.[147] As has been observed in academic commentary, Article VIII "extends" to "non-member States" the right to call upon the competent organs of the United Nations.[148] Further, Article VIII permits UN Member States to raise with UN organs acts of genocide committed by States that are *not* Contracting Parties to the Genocide Convention and which are thus beyond the jurisdictional reach of Article IX.

4.22 These are not the only differences between Articles VIII and IX that give useful effect to the former. The other differences include:

- Unlike seisin of the Court under Article IX, which requires a dispute between the parties, the absence in Article VIII of a requirement that there be a "dispute" permits the Contracting Parties to call upon the competent UN organs even without a dispute having been crystallized under international law.

- Article VIII permits calling upon the UN's competent organs in circumstances where the alleged acts of genocide have been carried out by non-State actors, including those whose acts are not attributable to any State, unlike under Article

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[145] UN Charter, art. 2(7).

[146] UN Members list, *available at* https://www.un.org/en/member-states/index.html. For instance, South Korea ratified the Convention in 1950, but became a UN Member State in 1991 only. Likewise, Bulgaria (1950, 1955), Germany (1954, 1973), Hungary (1952, 1955), Italy (1952, 1955), North Korea (1989, 1991), Romania (1950, 1955), and Switzerland (2000, 2002) were for a certain number of years bound by the Convention while outside the United Nations.

[147] UN Charter, art. 35, para. 2. *See also* art. 32.

[148] William A. Schabas, *Genocide in International Law* (Cambridge University Press 2000), p. 75. WOG, Annex 18. *See also* Nehemiah Robinson, *The Genocide Convention - A Commentary* (Institute of Jewish Affairs 1960), p. 94. MG (23 October 2020), Vol. VIII, Annex 209.

IX, where the Court's jurisdiction is limited to adjudicating the international responsibility of States.[149]

C. *TRAVAUX PRÉPARATOIRES*

4.23 The Genocide Convention's preparatory works confirm that Article VIII's regulation of the right to call upon UN organs to take action in respect of acts of genocide is unrelated to seisin of the Court under Article IX. Reflecting this differentiation, the drafters addressed those matters in separate parts of the draft Convention throughout the negotiations.

4.24 In the 1947 draft text prepared by the UN Secretariat, engagement of the UN's organs was addressed in draft Article XII, the forerunner of what became Article VIII. The draft article, entitled "Action by the United Nations to Prevent or Stop Genocide", provided:

> "Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

[149] Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008), pp. 402-403 ("Article VIII does not make a distinction" with respect to "action taken by the political organs of the UN … directed towards states that … [are] considered in breach of their obligations and … towards individuals, deemed to be authors of the crimes".). WOG, Annex 20.

> In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations."[150]

4.25 The drafters elected to locate the compromissory clause in a different part of the draft Convention—draft Article XIV—which bore the title "Settlement of disputes on interpretation or application of the convention". It provided:

> "Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice."[151]

4.26 The Ad Hoc Committee of the Economic and Social Council that prepared the second draft text maintained this separation. Draft Article VIII, entitled "Action of the United Nations", provided:

> "1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.
>
> 2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention."[152]

4.27 The Report of the Ad Hoc Committee records that draft Article VIII was "discussed at length when the Committee considered questions of principle" and "again when the

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[150] UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, E/447 (26 June 1947), art. XII, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 218. WOG, Annex 5.

[151] *Ibid.*, p. 219.

[152] UN Economic and Social Council, Ad hoc Committee on Genocide, *Report of the Committee and Draft Convention drawn up by the Committee*, E/794 (24 May 1948), art. VIII, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1141. WOG, Annex 8.

Articles of the Convention were being drafted".[153] Disagreement centered on, in part, whether the article should refer specifically to the Security Council or should instead not mention any specific UN organ. Those advocating the latter view argued that:

> "although the Security Council appeared to be the organ to which governments would most frequently wish to apply, it was undesirabl[e] to rule out the General Assembly, the Economic and Social Council or the Trusteeship Council. In some cases it would be of advantage to call on the General Assembly because it directly expressed the opinion of all Members of the United Nations, and because its decisions were taken by a majority vote with no risk of the right of veto preventing a decision."[154]

4.28 The "advocates of naming the Security Council replied that they did not exclude the possibility of referring the question to the General Assembly or adopting any other measures which the Security Council may deem necessary".[155]

4.29 Significantly, the Ad Hoc Committee's report does not mention any participants as having suggested that the Court might also be encompassed by the draft Article VIII. Only political organs are mentioned: the Security Council, the General Assembly, the Economic and Social Council, and the Trusteeship Council.[156]

4.30 Like the Secretariat's earlier draft text, the one produced by the Ad Hoc Committee addressed the jurisdiction of the Court in separate provision: draft Article X (which later

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[153] *Ibid.*

[154] *Ibid.*, p. 1142.

[155] *Ibid.*

[156] *See also* Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008), p. 401 (observing that Article VIII is "meant to include" the Security Council as well as "the Trusteeship Council, the Economic and Social Council and the Secretariat".). WOG, Annex 20.

became Article IX). Entitled "Settlement of disputes by the International Court of Justice", it provided:

> "Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal."[157]

4.31 Myanmar is not assisted by relying on a part of the intervention of the Australian delegate that, Myanmar argues, suggests it was "understood that if the Court could not be validly seised under draft Article VIII, it would not be in a position to exercise its jurisdiction under draft Article X", *i.e.*, the compromissory clause.[158] The full text makes clear that the Australian delegate suggested nothing of the sort. His intervention came at a point in the negotiations when Article VIII had been deleted, which the Australian delegation considered to have been a mistake. In that context, the Australian delegation—as recorded in a part of the *travaux* that Myanmar omits—"considered that a clause should be inserted in article X [which ultimately became Article IX] concerning organs of the United Nations other than the International Court of Justice, which could take useful action in suppressing genocide".[159]

4.32 The Australian delegation thus confirmed that the rights and obligations established by the Genocide Convention could be enforced either through "organs of the United

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[157] UN Economic and Social Council, Ad hoc Committee on Genocide, *Report of the Committee and Draft Convention drawn up by the Committee*, E/794 (24 May 1948), art. X, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1144. WOG, Annex 8.

[158] POM, para. 427.

[159] UN General Assembly, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1760 (per Mr. Dignam). WOG, Annex 10.

Nations other than the International Court of Justice" or through the Court, and that those enforcement mechanisms should, consequently, be addressed separately.[160] The British delegate explained why the Convention ultimately treated them in separate articles, rather than as separate clauses within the same article, as the Australian delegate had proposed. He stated that "although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter", it voted in favour of the amendment that created Article VIII "in order that it might be clear, beyond any doubt", that the amendment "did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations".[161]

4.33 The drafting history of the Convention is thus clear about the respective provinces of Articles VIII and IX: the former concerns the UN's political organs; the latter the Court. The *travaux préparatoires* therefore provide no support for Myanmar's third preliminary objection.[162]

4.34 In short, Article VIII is irrelevant to seisin of the Court. Myanmar's reservation to that provision therefore cannot prevent the Court from adjudicating these proceedings in accordance with Myanmar's consent to jurisdiction under Article IX.

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For all the above reasons, the Court should once again reject Myanmar's third preliminary objection.

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[160] *Ibid.*

[161] UN General Assembly, Sixth Committee, Third Session, 105th Meeting, A/C.6/SR.105 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1797 (per Mr. Fiztmaurice). WOG, Annex 12.

[162] POM, para. 430.

CHAPTER 5
A DISPUTE EXISTS BETWEEN THE GAMBIA AND MYANMAR

5.1 Myanmar's fourth preliminary objection is that "the Court lacks jurisdiction, or alternatively the application is inadmissible, as there was no dispute between The Gambia and Myanmar on the date of filing of the Application instituting proceedings".[163]

5.2 Myanmar also raised this objection at the hearing on provisional measures. In its Order of 23 January 2020, the Court found that the "statements made by the Parties before the United Nations General Assembly suggest the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya".[164] The Court further observed that The Gambia's Note Verbale of 11 October 2019:

> "specifically referred to the reports of the Fact-Finding Mission and indicated The Gambia's opposition to the views of Myanmar, in particular as regards the latter's denial of its responsibility under the Convention. In light of the gravity of the allegations made therein, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties."[165]

5.3 The Court ruled that these "elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention".[166]

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[163] POM, para. 29.

[164] Provisional Measures Order, para. 27.

[165] *Ibid.*, para. 28.

[166] *Ibid.*, para. 31.

5.4 As discussed in this Chapter, the Court was correct in its conclusion: prior to the filing of The Gambia's Application, the evidence makes clear that there existed a dispute between The Gambia and Myanmar relating to Myanmar's fulfilment of its obligations under the Genocide Convention and customary international law.

I. The Applicable Law Regarding the Existence of a Dispute

5.5 The Court's standards for identifying the existence of a dispute as of the date of the filing of the Application are well established. "A dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations".[167] In applying this standard, the Court has stated that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant".[168] There is no single or preferred manner for such opposition to be manifested; rather, the "existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure".[169]

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[167] *Ibid.*, para. 20 *citing Application of the International Convention on the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 115, para. 22 (*citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)).

[168] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 849, para. 41.

[169] Provisional Measures Order, para. 26 *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 849, para. 38.

5.6 In deciding this issue, the Court "takes into account in particular any statements or documents exchanged between the Parties",[170] "as well as any exchanges made in multilateral settings".[171] When reviewing such exchanges, the Court "pays special attention to 'the author of the statement or document, their intended or actual addressee, and their content'".[172] The disagreement between the parties "need not necessarily be stated *expressis verbis* ... the position or the attitude of a party can be established by inference, whatever the professed view of that party".[173] Indeed, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[174] And in terms of the subject matter of the dispute:

> "While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court …, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification

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[170] *Ibid.*, para. 26 *citing Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Merits, Judgment, I.C.J. Reports 2012*, pp. 443-445, paras. 50-55.

[171] *Ibid.*, para. 26 *citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 94, para. 51 and p. 95, para. 53.

[172] *Ibid.*, para. 26 *citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 100, para. 63.

[173] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

[174] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 850, para. 40, *citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30 (*citing Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice."[175]

II. A Dispute between the Parties Existed Prior to the Filing of The Gambia's Application

5.7 The evidentiary record demonstrates that The Gambia and Myanmar held opposite views regarding Myanmar's compliance with its obligations under the Genocide Convention, that The Gambia positively opposed Myanmar's denials of its acts of genocide against the Rohingya group in Myanmar, and that Myanmar was aware that The Gambia positively opposed its views on the Rohingya genocide. This dispute was manifest through the Parties' exchanges at the United Nations and via The Gambia's Note Verbale of 11 October 2019.

A. The Parties' Exchanges at the United Nations Demonstrate the Existence of a Dispute between Them

5.8 As observed by the Court in its Order of 23 January 2020, the Parties' exchanges at the United Nations in 2019 demonstrate that they held clearly opposite views concerning the question of Myanmar's responsibility for acts of genocide against the Rohingya,[176] which relate directly to its fulfillment of its obligations under the Genocide Convention and customary international law. The existence of their opposed views is further supported by Myanmar's own statements demonstrating awareness and rejection of the allegations of its responsibility for the Rohingya genocide in both 2018 and 2019.

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[175] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 85, para. 30.

[176] Provisional Measures Order, para. 27.

5.9 Myanmar's awareness of The Gambia's views on its responsibility for acts of genocide against the Rohingya existed as of May 2018. After a meeting of the Member States of the OIC in Dhaka, Bangladesh from 5-6 May 2018, the Member States issued the Dhaka Declaration, which expressed their serious concerns over the "systematic brutal acts perpetrated by [Myanmar] security forces against the Rohingya ... which constitute a serious and blatant violation of international law".[177] The Declaration also stressed the importance of "the accountability issue for the violations ... against the Rohingyas in Myanmar through [the] formation of an ad hoc ministerial committee, to be chaired by [The] Gambia".[178] Myanmar responded to this declaration three days later and expressed a clearly opposite view concerning the characterization of its acts and fulfillment of its international obligations. In its statement, the Myanmar Ministry of Foreign Affairs "categorically reject[ed]" the description of "events in Rakhine State" as "State backed violence" and disclaimed any responsibility for violating applicable international obligations, by contending that "no violation of human rights will be condoned".[179] Thus, as of May 2018, Myanmar was not only aware of The Gambia's role in seeking accountability for violations against the Rohingya, but it also affirmatively denied the allegations of State-sponsored violence against the Rohingya in Rakhine State.

5.10 On 12 September 2018, the UN Independent International Fact-Finding Mission on Myanmar released its first of two reports in which it found evidence of genocidal acts and genocidal intent attributable to Myanmar in the context of its crimes against the Rohingya. The report found that "[t]he crimes in Rakhine State, and the manner in which they were

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[177] Organisation of Islamic Cooperation, 45th Session of the Council of Foreign Ministers of the Organisation of Islamic Cooperation, *Dhaka Declaration* (6 May 2018), para. 14. MG (23 October 2020), Vol. VII, Annex 203.

[178] *Ibid.*, para. 17.

[179] Republic of the Union of Myanmar, Ministry of Foreign Affairs, "#Myanmar rebuts Dhaka Declaration's reference on situation in Rakhine State and calls for Bangladesh's sincere cooperation to start early repatriation", *Twitter* (9 May 2018). MG (23 October 2020), Vol. VI, Annex 158.

perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts".[180] The Fact-Finding Mission had shared that report with Myanmar on 16 August 2018, with a request that Myanmar provide any corrections or reactions by 23 August 2018.[181] Myanmar did not provide a response.[182]

5.11 On 25 September 2018, H.E. Adama Barrow, President of The Gambia, referring to the UN report, stated that "The Gambia has undertaken, through a Resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book".[183] Three days later, Myanmar's Union Minister of the State Counsellor's Office, U Kyaw Tint Swe (its Co-Agent in these proceedings), dismissed the UN Mission's findings as "based on narratives and not on hard evidence".[184] These statements at the United Nations in 2018 indicate that The Gambia and Myanmar held clearly opposed views regarding the fact of international crimes having been committed against the Rohingya, and the need for international accountability measures to redress those crimes.

5.12 Myanmar's rejection of resolutions adopted by OIC Member States, including The Gambia, in March 2019, provide further evidence of Myanmar's awareness of The

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[180] UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018), para. 85. MG (23 October 2020), Vol. II, Annex 39.

[181] UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 September 2018), p. 144. MG (23 October 2020), Vol. II, Annex 40.

[182] UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018), para. 3. MG (23 October 2020), Vol. II, Annex 39.

[183] UN General Assembly, 73rd Session, 7th Plenary Meeting, *Address by Mr. Adama Barrow, President of the Republic of The Gambia*, UN Doc. A/73/PV.7 (25 September 2018), p. 6. MG (23 October 2020), Vol. III, Annex 41.

[184] Republic of the Union of Myanmar: State Counsellor Office, *Statement by H.E. U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Chairman of the Delegation of the Union of Myanmar at the General Debate of the 73rd Session of the United Nations General Assembly* (28 September 2018), p. 4. WOG, Annex 4.

Gambia's opposite views on the Rohingya genocide and Myanmar's responsibility. In one resolution, the Member States of the OIC emphasized that accountability was necessary for "preventing genocide" and endorsed the recommendation of the Ad Hoc Committee chaired by The Gambia to hold Myanmar accountable under the Genocide Convention.[185] In another text, the OIC Member States called upon Myanmar to "honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of … genocide … against Rohingya Muslims".[186] That resolution also noted:

> "the opening Statement of the Chairperson of the United Nations Independent International Fact-Finding Mission on Myanmar, at the UN Security Council on 24 October 2018, in which he stated that … '[t]he Mission … found sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw on charges of genocide. This means that we consider that genocidal intent, meaning the intent to destroy the Rohingya in whole or in part, can be reasonably inferred'".[187]

5.13 The spokesperson for Myanmar's Government reacted to these resolutions by declaring that if Myanmar is pressured "to do something by force, we will have to protect our sovereignty".[188] These comments demonstrate Myanmar's awareness of the views of

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[185] Organisation of Islamic Cooperation, *Resolution No. 61/46-POL on The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas*, OIC Doc. OIC/CFM-46/2019/POL/RES/FINAL (1-2 March 2019). POM (20 January 2021), Vol. IV, Annex 94.

[186] Organisation of Islamic Cooperation, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019), para. 11(a). MG (23 October 2020), Vol. VII, Annex 204.

[187] *Ibid.*, p. 15.

[188] "World Islamic Group Votes to Take Myanmar Rohingya Abuses to International Court of Justice", *Radio Free Asia* (5 March 2019). MG (23 October 2020), Vol. IX, Annex 304.

OIC Member States, including those of The Gambia as chair of the ad hoc committee responsible for these issues, and Myanmar's positive opposition to their views.

5.14 On 31 May 2019, at the 14th OIC Summit Conference, The Gambia, along with other OIC Member States, "condemned the inhumane situation in which the Rohingya Muslim community lives", "called for urgent action to end acts of violence and all brutal practices", and "emphasized that the Government of Myanmar is fully responsible" for the situation.[189] The same States also affirmed their support for "using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya" and "urged upon the ad hoc Ministerial Committee led by the Gambia to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC".[190]

5.15 The UN Fact-Finding Mission itself took notice of the OIC's statement of support for The Gambia to bring the present case against Myanmar under the Genocide Convention. On 8 August 2019, the Fact-Finding Mission submitted to the General Assembly a second report. It affirmed "that Myanmar incurs State responsibility under the prohibition against genocide",[191] and found that the evidence of Myanmar's intention to commit genocide had "strengthened" since its 2018 reports.[192] In these circumstances, the Mission expressly "welcome[d] the efforts of … the Gambia … to encourage and pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide".[193] A copy of this report was

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[189] Organisation of Islamic Cooperation, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc. OIC/SUM-14/2019/FC/FINAL (31 May 2019), para. 45. MG (23 October 2020), Vol. VII, Annex 205.

[190] *Ibid.*, para. 47.

[191] UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 August 2019), para. 18. MG (23 October 2020), Vol. III, Annex 47.

[192] *Ibid.*, para. 23.

[193] *Ibid.*, para. 107.

supplied to Myanmar on 31 July 2019, with a request for any corrections.[194] Myanmar provided no response.[195]

5.16 The UN Fact-Finding Mission formally delivered its Detailed Report of 2019 to Myanmar on 11 September 2019, and released it publicly on 16 September 2019. Again, Myanmar provided no response.[196] In that Detailed Report, the Fact-Finding Mission found that Myanmar "continues to harbour genocidal intent" and therefore that "the Rohingya remain under serious risk of genocide".[197] This Report again welcomed the efforts of "The Gambia … and the Organisation of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention".[198]

5.17 The August and September 2019 reports of the UN Fact-Finding Mission, and all of the developments since 2018 recounted above, confirm the existence of a dispute between The Gambia and Myanmar over the latter's fulfilment—or failure to fulfil—its obligations under the Genocide Convention in regard to its actions against the Rohingya group. The developments also provide context for the direct exchanges between The Gambia and Myanmar at the seventy-fourth session of UN General Assembly in late September 2019. At that session, on 26 September 2019, H.E. Mrs. Isatou Touray, Vice President of The Gambia, announced The Gambia's intention "to lead concerted efforts to

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[194] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019) (additional excerpts to MG, Vol. III, Annex 49), Annex 3, p. 189. WOG, Annex 16.

[195] *Ibid.*, para. 29.

[196] *Ibid.*, para. 29, Annex 4, p. 190.

[197] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar,* UN Doc. A/HRC/42/ CRP.5 (16 September 2019), para. 140. MG (23 October 2020), Vol. III, Annex 49; *see also ibid.*, para. 213.

[198] *Ibid.*, para. 40.

take the Rohingya issue to the International Court of Justice".[199] Two days later, on 28 September 2019, Myanmar's representative U Kyaw Tint Swe again dismissed the Fact-Finding Mission's reports as "biased and flawed, based not on facts but on narratives", and noted in particular that the "latest reports are even worse".[200]

5.18 This exchange at the United Nations in 2019 confirms that the Parties continued to hold clearly opposing views concerning the events that occurred in Rakhine State in relation to the Rohingya: The Gambia agreed with the Fact-Finding Mission that genocidal acts were committed by Myanmar against the Rohingya, in violation of its obligations under the Convention; whereas Myanmar rejected such "biased and flawed" conclusions. By specifically communicating its intention to bringing the matter to the Court, The Gambia made clear that its dispute with Myanmar was in relation to holding Myanmar accountable for genocide against the Rohingya, and its failure to fulfil its legal obligations under the Convention. The Gambia's statement in September 2019 thus removed any possible doubt about Myanmar's awareness of an impending legal case against it from The Gambia in relation to its accountability under the Convention for its genocidal acts against the Rohingya group.[201] Myanmar could not possibly have been unaware, as of that date—if not many months earlier—that The Gambia held views positively opposed to its own regarding its legal responsibility for the Rohingya genocide.

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[199] UN General Assembly, 74th Session, 8th Plenary Meeting, *Address by Mrs. Isatou Touray, Vice President of the Republic of The Gambia*, UN Doc. A/74/PV.8 (26 September 2019), p. 31. MG (23 October 2020), Vol. III, Annex 51.

[200] UN General Assembly, 74th Session, 12th Plenary Meeting, *Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar*, UN Doc. A/74/PV.12 (28 September 2019), p. 24. MG (23 October 2020), Vol. III, Annex 52.

[201] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30.

B. THE GAMBIA'S NOTE VERBALE, AND MYANMAR'S NON-RESPONSE TO IT, FURTHER DEMONSTRATE THE EXISTENCE OF A DISPUTE BETWEEN THE PARTIES

1. The Note Verbale Confirms the Existence of a Dispute

5.19 In addition to the exchanges at the United Nations, The Gambia also sent Myanmar a Note Verbale dated 11 October 2019 confirming their existing dispute over Myanmar's violations of the Genocide Convention and customary international law based on its acts of genocide against the Rohingya group. The Note Verbale reads as follows:

> "The Permanent Mission of the Republic of The Gambia to the United Nations presents its compliments to the Permanent Mission of the Republic of the Union of Myanmar and has the honour to refer to all of the reports of the United Nations Independent International Fact-Finding Mission on Myanmar ("UN IIFFMM"), including its report of 16 September 2019, UN Doc. A/HRC/42.CRP.5, as well as related resolutions of the Organization of Islamic Cooperation, including Resolution No. 4/46-MM of 2 March 2019 on the Situation of the Muslim Community in Myanmar.
>
> The Republic of The Gambia is deeply troubled by the findings of the UN IIFFMM, and in particular its findings regarding the ongoing genocide against the Rohingya people of the Republic of the Union of Myanmar in violation of Myanmar's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). The Gambia considers those findings well-supported by the evidence and highly credible, and is disturbed by Myanmar's absolute denial of those findings and its refusal to acknowledge and remedy its responsibility for the ongoing genocide against the Rohingya population of Myanmar, as required under the Genocide Convention and customary international law.
>
> The Gambia fully endorses OIC Resolution No. 4/26-MM of 2 March 2019, which 'Calls upon the Government of Myanmar: (a) To honor its obligations under International Law and Human Rights covenants, and to take all measures

> to immediately halt all vestiges and manifestations of the practice of genocide against Rohingya Muslims'.
>
> The Gambia emphatically rejects Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention and customary international law.
>
> With somber reflection on the goals of the Genocide Convention and its obligations on all States, The Gambia understands Myanmar to be in ongoing breach of those obligations under the Convention and under customary international law. The Gambia insists that Myanmar take all necessary actions to comply with these obligations, including but not limited to its obligations to make reparations to the victims and to provide guarantees and assurances of non-repetition."[202]

5.20 The Note Verbale on its face establishes that the Parties held clearly opposite views regarding Myanmar's fulfilment of its obligations under the Genocide Convention and customary international law in relation to Myanmar's responsibility for acts of genocide against the Rohingya.

5.21 Specifically, the Note Verbale invoked the reports and findings of the UN Fact-Finding Mission, "in particular its findings regarding the ongoing genocide against the Rohingya people of … Myanmar in violation of Myanmar's obligations under the … Genocide Convention", which The Gambia characterized as "well-supported by the evidence". The Gambia acknowledged "Myanmar's absolute denial of those findings",

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[202] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol. 1(LY) (11 October 2019). OG (2 December 2019), Annex 1.

which Myanmar called "biased and flawed"[203] in exchanges at the United Nations. The Note Verbale thus made plain the Parties' clearly opposed views as to the factual matter of Myanmar's acts of genocide against the Rohingya as reported by the UN Fact-Finding Mission.

5.22 Beyond this, the Note Verbale clearly set forth the legal nature of the dispute between the Parties. It noted that the Fact-Finding Mission's conclusions regarding the ongoing genocide of the Rohingya demonstrate that this is "in violation of Myanmar's obligations under the … Genocide Convention".[204] The Gambia then condemned Myanmar's "refusal to acknowledge and remedy its responsibility for the ongoing genocide against the Rohingya population of Myanmar, as required under the Genocide Convention and customary international law".[205] It further "reject[ed] Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention and customary international law".[206] Additionally, the Note Verbale reiterated the call on Myanmar—as expressed in earlier OIC resolutions—to honour its legal obligations and stop all acts of genocide against the Rohingya. The Gambia also made clear that, in its view, Myanmar is "in ongoing breach of those obligations under the Convention and under customary international law".[207] The Gambia concluded by "insist[ing] that Myanmar take all necessary actions to comply with

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[203] UN General Assembly, 74th Session, 12th Plenary Meeting, *Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar*, UN Doc. A/74/PV.12 (28 September 2019), p. 24. MG (23 October 2020), Vol. III, Annex 52.

[204] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol. 1(LY) (11 October 2019). OG (2 December 2019), Annex 1.

[205] *Ibid.*

[206] *Ibid.*

[207] *Ibid.*

these obligations, including but not limited to its obligations to make reparations to the victims and to provide guarantees and assurances of non-repetition".[208]

5.23 There can thus be no doubt that the Note Verbale confirmed that The Gambia and Myanmar held clearly opposite views concerning the question of Myanmar's fulfilment of its legal obligations in relation to its acts of genocide against the Rohingya group. The Gambia explicitly and emphatically opposed Myanmar's claims of non-responsibility for the Rohingya genocide, as well as its rejection of the findings of the UN Fact-Finding Mission in regard to Myanmar's genocidal acts against that group. The subject matter of the dispute, the relevant treaty at issue and legal remedies under customary international law were identified explicitly in the Note Verbale, going well beyond the minimum requirements for establishing a dispute under the Court's jurisprudence.

2. Myanmar's Lack of Response to the Note Verbale Further Confirms the Existence of a Dispute

5.24 Myanmar did not respond to the Note Verbale, even though the gravity of the communication and The Gambia's insistence on Myanmar desisting from acts of genocide clearly called for a response. As the Court observed in its Order of 23 January 2020, "[i]n light of the gravity of the allegations made therein, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties."[209]

5.25 Myanmar claims that it "was entitled to an appropriate period of time to give a considered reaction", including time to consider "all of the details of the FFM reports", noting that the 2019 Detailed Findings of the Fact-Finding Mission had "only been issued less than a month earlier, on 16 September 2019".[210] About this, Myanmar is factually

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[208] *Ibid.*

[209] Provisional Measures Order, para. 28.

[210] POM, para. 714.

incorrect. It had received the 2019 Detailed Findings report on 11 September 2019,[211] and thus had one full month to review that report in detail before it received The Gambia's Note Verbale. Moreover, Myanmar's representative had already provided Myanmar's reaction to the report, in his remarks to the UN General Assembly on 28 September 2019, declaring that, in Myanmar's view, the Fact-Finding Mission's "*latest reports* are even worse"[212] than prior ones. Those remarks clearly indicated that, as of 28 September 2019, Myanmar was already sufficiently aware of the contents of the 2019 Detailed Report to criticize it at the United Nations.

5.26 Indeed, Myanmar had the Fact-Finding Mission's August 2019 report since 31 July 2019,[213] and the 2018 reports for well over a year. The findings of those reports were thus well-known to Myanmar, and its responses to them were already a matter of public record, long before it received The Gambia's Note Verbale on 11 October 2019. In sum, The Gambia's Note did not raise any factual or legal issues of which Myanmar was unaware, or to which it had not already responded. It thus strains credulity for Myanmar to argue that it lacked sufficient time to formulate a response to The Gambia's assertions. Far more credible, in the circumstances, is the conclusion that its silence in the face of such grave allegations is further compelling evidence of a dispute between the two States.

5.27 Finally, Myanmar's silence cannot mean that it was unaware that The Gambia positively opposed its views on its responsibility for the Rohingya genocide. Five days

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[211] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019) (additional excerpts to MG, Vol. III, Annex 49), para. 29. WOG, Annex 16.

[212] UN General Assembly, 74th Session, 12th Plenary Meeting, *Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar*, UN Doc. A/74/PV.12 (28 September 2019), p. 24 (emphasis added). MG (23 October 2020), Vol. III, Annex 52.

[213] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019) (additional excerpts to MG, Vol. III, Annex 49), Annex 3, p. 189. WOG, Annex 16.

after the Application was filed, on 16 November 2019, the Spokesperson for Myanmar's Government admitted in a public statement that "the government had expected over a month before that Myanmar could face a suit at ICJ".[214] Myanmar cannot therefore deny that The Gambia's Note Verbale of 11 October 2019 (just "over a month before") gave it explicit notice of a factual and legal dispute over Myanmar's genocidal acts against the Rohingya group, a dispute in which the two States' views were positively opposed.

C. THIS CASE CONCERNS THE GAMBIA'S DISPUTE WITH MYANMAR

5.28 Myanmar argues that, "in substance, the dispute is between the OIC and Myanmar", not The Gambia.[215]

5.29 As demonstrated above, in Chapter 2 of these Written Observations, the dispute at the heart of this case is between The Gambia and Myanmar. Other States, including Member States of the OIC, may also have disputes with Myanmar. But all that matters here is that a dispute plainly exists between The Gambia and Myanmar.[216]

5.30 The remarks of The Gambia's Agent during the hearing on provisional measures are worth recalling:

> "The Gambia has been open about its dispute with Myanmar. We openly raised this dispute at successive sessions of the United Nations General Assembly. We have openly welcomed support for this effort from other States, including

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[214] Min Naing Soe, "Myanmar to respond to Gambia lawsuit at ICJ in line with international laws", *Eleven News* (16 November 2019). MG (23 October 2020), Vol. IX, Annex 316; Memorial of The Gambia (23 October 2020), para. 2.18. *See Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 851, para. 43 ("Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute".).

[215] POM, para. 728.

[216] *See East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22.

> member States of the Organisation of Islamic Cooperation. Indeed, it was, from beginning to end, The Gambia's initiative to table resolutions and form a committee and seek the broader support of the other 56 member States of the Organisation of Islamic Cooperation. The Gambia is proud to have the diplomatic and political support of the other 56 member States of the OIC — and of other supportive States, like Canada and the Netherlands — as The Gambia, in its sovereign capacity, pursues this case against Myanmar.
>
> It was The Gambia alone that sent the Note Verbale to Myanmar to clearly spell out the nature of this dispute and put Myanmar on notice. And it was The Gambia alone that has filed the Application and Request for provisional measures that is now before the Court."[217]

III. Myanmar's Attempt to Erect a Higher Bar for Establishing a Dispute Should be Rejected

5.31 Myanmar cannot challenge these facts, and it makes little effort to do so. Instead, it bypasses the Court's clearly established standards for identifying the existence of a dispute, and purports to invent new, heightened standards for purposes of this case. None of the new standards proposed by Myanmar has ever been applied by the Court, with good reason, and it should not apply them here.

5.32 First, contrary to the Court's decision in the *Nuclear Arms and Disarmament* cases, in which the Court held that the Respondent's awareness of *the Applicant's* clearly opposed views was sufficient to establish a dispute, Myanmar asserts that "the existence of a dispute in fact requires awareness *by both parties* of the positively opposed views of the respective

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[217] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/20 of Public Sitting held on 12 December 2019, p. 40, paras. 5-6 (Tambadou).

other side".[218] Myanmar argues that the Applicant must provide evidence both that the Respondent was aware of the Applicant's clearly opposed views, *and* that the Applicant was then made aware of Respondent's opposition to the Applicant's claim.[219]

5.33 Even under this hypothetical standard, a dispute would plainly exist in this case. The evidence establishes that The Gambia was well aware that Myanmar positively opposed its claims. Specifically, the claims asserted in The Gambia's Note Verbale of 11 October 2019 echoed the findings and conclusions of the UN Fact Finding Mission, in its reports of 2018 and 2019, which Myanmar had already rejected. The Gambia was thus well aware of Myanmar's positive opposition to the claims it asserted in its Note Verbale of 11 October 2019, which confirmed the existence of a dispute between the two States.

5.34 In raising a new standard for demonstrating the existence of a dispute, Myanmar seeks to create a one-way veto in which a Respondent's silence following an Applicant's legal claim could prevent a finding of positive opposition. Proposing such a standard can only be intended to impose a burden on the Applicant that it could not meet if the Respondent were to remain silent, as Myanmar did after receiving The Gambia's Note Verbale of 11 October 2019. Myanmar's attempt to fashion a new evidentiary burden to serve its own purposes in this case should be recognized for what it is, and rejected by the Court.

5.35 Myanmar defends its proposed new requirement as necessary to allow the Respondent "an opportunity to react to the claim of the applicant State before proceedings are brought before this Court".[220] As Myanmar would have it, a dispute "cannot exist until the respondent State has become aware of the claim of the applicant State in a way that

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[218] POM, para. 520 (emphasis added).

[219] *Ibid.*, para. 523.

[220] *Ibid.*, para. 526 (emphasis omitted).

enables the respondent State to give a reaction, and until the respondent State has had an appropriate opportunity to react".[221]

5.36 Myanmar does not specify how much time a Respondent State, such as itself, should be given to react to a claim, before a dispute can be said to crystallize. Apparently, it believes that the 30 days that elapsed between its receipt of The Gambia's Note Verbale and the filing of The Gambia's Application were insufficient. To be sure, the time within which it would be reasonable for a State to respond to a legal claim that has been made against it by another State will vary with the circumstances. Here, as described above, Myanmar had already reacted to the factual and legal claims asserted by The Gambia in its Note Verbale when it responded to the same factual and legal claims in the 2018 and 2019 reports by the UN Fact Finding Mission. Having rejected those claims already, a dispute with The Gambia already existed as of the time The Gambia sent its Note Verbale. The Note Verbale, which recited Myanmar's rejection of the claims set out by the Fact Finding Mission, confirmed the existence of the dispute. No further reaction by Myanmar was required. In any event, in the circumstances, 30 days was more than sufficient time for it to respond to The Gambia's Note. Its silence is further evidence of its positive opposition to The Gambia's claims.

5.37 Myanmar also proposes new and more exacting standards of specificity for demonstrating the existence of a dispute. Under its proposed test, "it will be necessary for the prospective respondent State to be made aware *of the facts* said to amount to a breach of international law, as well as of the *provisions of international law* said to have been thereby breached".[222] It also asserts that all claims made in the Application "must be

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[221] *Ibid.*

[222] *Ibid.*, para. 531 (emphasis added).

identifiably the same" as the "claims that were in dispute before the application was filed".[223]

5.38 Even that hypothetical standard is met here. The Gambia's factual and legal claims, communicated to Myanmar well in advance of its Application, were based on, and cited, the UN Fact Finding Mission's 2018 and 2019 reports. The Gambia made it crystal clear to Myanmar that it was accusing Myanmar of genocidal acts against the Rohingya group in violation of its international legal obligations, and that its legal claims were based on the facts set out in the Fact Finding Mission's reports. This plainly satisfies the standards for establishing the existence of a dispute set by the Court in its jurisprudence.

5.39 Myanmar, in contrast, seeks to impose a level of specificity in the assertion of claims that would, in essence, obligate the Applicant State to fully develop its factual and legal claims and share them with the Respondent before it seizes the Court. This would impose a major new burden on potential Applicant States and significantly restrict access to the Court. There is no justification for it in the Court's jurisprudence, in the decisions of other international courts or tribunals, or in any learned treatises. The issue is whether a dispute between two States exists. What is required is sufficient evidence that their views, on a matter of fact or law, are positively opposed.[224] That standard is plainly met here.

***

5.40 In sum, Myanmar's attempts to create and apply new standards for determining the existence of a dispute are baseless and prejudicial, and must be rejected. The Court's long-

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[223] *Ibid.*, para. 552.

[224] Provisional Measures Order, para. 20 *citing Application of the International Convention on the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 115, para. 22 (*citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

established standards on the existence of a dispute are controlling, and, as applied to this case, they clearly indicate the existence of a dispute between The Gambia and Myanmar relating to Myanmar's fulfilment of its obligations under the Genocide Convention. For the Court to accede to Myanmar's objection would undermine the effectiveness of the Genocide Convention. Accordingly, the Court should again reject Myanmar's fourth preliminary objection.

SUBMISSIONS

For the reasons set forth above, The Gambia respectfully requests that the Court:

1. Reject the Preliminary Objections presented by Myanmar;

2. Find that it has jurisdiction to hear the claims presented by The Gambia as set forth in its Application and Memorial, and that these claims are admissible; and

3. Proceed to hear those claims on the merits.

Respectfully submitted,

H.E. Dawda Jallow

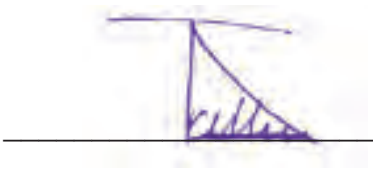
Attorney General and Minister of Justice

AGENT OF THE GAMBIA

20 April 2021

CERTIFICATION

I certify that all Annexes are true copies of the documents referred to.



H.E. Dawda Jallow

Attorney General and Minister of Justice

AGENT OF THE GAMBIA

20 April 2021

LIST OF ANNEXES

Annex 10 UN General Assembly, Sixth Committee, Third Session,103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 11 UN General Assembly, Sixth Committee, Third Session 104th Meeting, A/C.6/SR.104 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 12 UN General Assembly, Sixth Committee, Third Session, 105th Meeting, A/C.6/SR.105 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 13 UN General Assembly, Sixth Committee, Third Session, *Genocide: Draft Convention and Report of the Economic and Social Council*, A/760 (3 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention. The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 14 UN General Assembly, 178th Plenary Meeting, *Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.178 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 15 UN General Assembly, 179th Plenary Meeting, *Continuation of the discussion on the draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.179 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

Annex 16 UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/ CRP.5 (16 September 2019) (additional excerpts to MG, Vol. III, Annex 49)

Annex 17 UN OHCHR, *Human Rights Council Intersessional Meeting on the Prevention of Genocide: Statement by Nada Al-Nashif, Deputy High Commissioner for Human Rights* (10 February 2021)

Annex 18 William A. Schabas, *Genocide in International Law* (Cambridge University Press 2000)

Annex 19 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff Publishers 2006)

Annex 20 Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008)

Annex 21 Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008)

Annex 22 Christian Tomuschat, 'Competence of the Court, Article 36' in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019)

Annex 23 Oxford English Dictionary, "to call upon"

Annex 1

Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia (23 October 1991)

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Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia

Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Socialist Republic of Viet Nam and the Socialist Federal Republic of Yugoslavia,

In the presence of the Secretary-General of the United Nations,

Convinced that a comprehensive political settlement for Cambodia is essential for the long-term objective of maintaining peace and security in South-East Asia,

Recalling their obligations under the Charter of the United Nations and other rules of international law,

Considering that full observance of the principles of noninterference and non-intervention in the internal and external affairs of States is of the greatest importance for the maintenance of international peace and security,

Reaffirming the inalienable right of States freely to determine their own political, economic, cultural and social systems in accordance with the will of their peoples, without outside interference, subversion, coercion or threat in any form whatsoever,

Desiring to promote respect for and observance of human rights and fundamental freedoms in conformity with the Charter of the United Nations and other relevant international instruments,

Have agreed as follows:

Article 1

1. Cambodia hereby solemnly undertakes to maintain, preserve and defend its sovereignty, independence, territorial integrity and inviolability, neutrality, and national unity; the perpetual neutrality of Cambodia shall be proclaimed and enshrined in the Cambodian constitution to be adopted after free and fair elections.

2. To this end, Cambodia undertakes:

a. To refrain from any action that might impair the sovereignty, independence and territorial integrity and inviolability of other States;

b. To refrain from entering into any military alliances or other military agreements with other States that would be inconsistent with its neutrality, without prejudice to Cambodia's right to acquire the necessary military equipment, arms, munitions and assistance to enable it to exercise its inherent right of self-defence and to maintain law and order;

c. To refrain from interference in any form whatsoever, whether direct or indirect, in the internal affairs of other States;

d. To terminate treaties and agreements that are incompatible with its sovereignty, independence, territorial integrity and inviolability, neutrality, and national unity;

e. To refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

f. To settle all disputes with other States by peaceful means;

g. To refrain from using its territory or the territories of other States to impair the sovereignty, independence, and territorial integrity and inviolability of other States;

h. To refrain from permitting the introduction or stationing of foreign forces, including military personnel, in any form whatsoever, in Cambodia, and to prevent the establishment or maintenance of foreign military bases, strong points or facilities in Cambodia, except pursuant to United Nations authorization for the implementation of the comprehensive political settlement.

Article 2

1. The other parties to this Agreement hereby solemnly undertake to recognize and to respect in every way the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia.

2. To this end, they undertake:

    a. To refrain from entering into any military alliances or other military agreements with Cambodia that would be inconsistent with Cambodia's neutrality, without prejudice to Cambodia's right to acquire the necessary military equipment, arms, munitions and assistance to enable it to exercise its inherent right of self-defence and to maintain law and order;

    b. To refrain from interference in any form whatsoever, whether direct or indirect, in the internal affairs of Cambodia;

    c. To refrain from the threat or use of force against the territorial integrity or political independence of Cambodia, or in any other manner inconsistent with the purposes of the United Nations;

d. To settle all disputes with Cambodia by peaceful means;

e. To refrain from using their territories or the territories of other States to impair the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia;

f. To refrain from using the territory of Cambodia to impair the sovereignty, independence and territorial integrity and inviolability of other States;

g. To refrain from the introduction or stationing of foreign forces, including military personnel, in any form whatsoever, in Cambodia and from establishing or maintaining military bases, strong points or facilities in Cambodia, except pursuant to United Nations authorization for the implementation of the comprehensive political senlement.

Article 3

1. All persons in Cambodia shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.

2. To this end,

   a. Cambodia undertakes:

      - to ensure respect for and observance of human rights and fundamental freedoms in Cambodia;

      - to support the right of all Cambodian citizens to undertake activities that would promote and protect human rights and fundamental freedoms;

      - to take effective measures to ensure that the policies and practices of the past shall never be allowed to return:

      - to adhere to relevant international human rights instruments;

   b. The other parties to this Agreement undertake to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia as embodied in the relevant international instruments in order, in particular, to prevent the recurrence of human rights abuses.

3. The United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly.

Article 4

The parties to this Agreement call upon all other States to recognize and respect in every way the sovereignty, independence, territorial integrity and Inviolability, neutrality and national unity of

Cambodia and to refrain from any action inconsistent with these principles or with other provisions of this Agreement.

Article 5

1. In the event of a violation or threat of violation of the sovereignty, independence, territorial integrity and inviolability, neutrality or national unity of Cambodia, or of any of the other commitments herein, the parties to this agreement undertake to consult immediately with a view to adopting all appropriate steps to ensure respect for these commitments and resolving any such violations through peaceful means.

2. Such steps may include, *inter alia*, reference of the matter of the Security Council of the United Nations or recourse to the means for the peaceful settlement of disputes referred to in Article 33 of the Charter of the United Nations.

3. The parties to this Agreement may also call upon the assistance of the co-Chairmen of the Paris Conference on Cambodia.

4. In the event of serious violations of human rights in Cambodia, they will call upon the competent organs of the United Nations to take such other steps as are appropriate for the prevention and suppression of such violations in accordance with the relevant international instruments.

Article 6

This Agreement shall enter into force upon signature.

Article 7

This Agreement shall remain open for accession by all States. The instruments of accession shall be deposited with the Governments of the French Republic and the Republic of Indonesia. For each State acceding to this Agreement, it shall enter into force on the date of deposit of its instrument of accession.

Article 8

The original of this Agreement, of which the Chinese, English, French, Khmer and Russian texts are equally authentic, shall be deposited with the Governments of the French Republic and the Republic of Indonesia, which shall transmit certified true copies to the Governments of the other States participating in the Paris Conference on Cambodia and to the Secretary-General of the United Nations.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto, have signed this Agreement.

Done at Paris this twenty-third day of October, one thousand nine hundred and ninety-one.

Posted by USIP Library on: February 22 2000
Source Name: United Nations, Department of Public Information, Agreements on a Comprehensive Political Settlement of the Cambodia Conflict: Paris, 23 October 1991, January 1992, 7-40.

Annex 2

The Republic of The Gambia, Ministry of Justice, *Press Release* (11 November 2019)

Ministry of Justice
@Gambia_MOJ

Press Release on the filing of Case before @CIJ_ICJ against Myanmar.

Press Release

11 November 2019

8:14 AM · Nov 11, 2019 from Gambia

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Annex 2

THE REPUBLIC OF THE GAMBIA

ATTORNEY GENERAL'S CHAMBERS
MINISTRY OF JUSTICE
MARINA PARADE
BANJUL

Press Release

11 November 2019

The Republic of The Gambia has filed today before the International Court of Justice in The Hague a lawsuit alleging that the Republic of the Union of Myanmar has violated its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide for its genocidal actions against the Rohingya people, a Muslim minority that lives in Myanmar.

Genocide is a crime under international law, and all States have an obligation to prevent, to punish, and to not commit genocide. Myanmar has failed in adhering to its obligations on all counts in its brutal treatment of the Rohingya, who have been subjected to wanton acts of violence and malicious degradation with the specific intent of State actors to destroy the Rohingya as a group.

The Gambia has stepped forward, on behalf of the 57 Member States of the Organization of Islamic Cooperation, and with the mandate of the Organization, to hold Myanmar accountable for its genocidal crimes against the Rohingya. This action asks the ICJ to adjudge and declare Myanmar to have violated its obligations under the Genocide Convention, to order Myanmar to cease and desist from its genocidal acts, to punish the perpetrators, and to provide reparations for the Rohingya victims. The Gambia has also asked the ICJ to impose Provisional Measures, as a matter

of extreme urgency, to protect the Rohingya against further harm during the pendency of this case by ordering Myanmar to stop all of its genocidal conduct immediately.

The Gambia calls on the international community to support its legal effort, and to redouble all diplomatic and political efforts to cause Myanmar to stop, and never to repeat, its genocide against the Rohingya, and to assist in efforts to ensure justice and accountability for the crimes committed against them.

The Agent for The Gambia before the ICJ in this case, and head of its legal team, is H.E. Abubacarr Marie Tambadou, Attorney General and Minister of Justice of The Gambia. The Gambia has retained the services of Foley Hoag LLP, an international law firm with many years of experience representing States before the ICJ, as its counsel. The Gambia will also be represented by Professor Philippe Sands, of University College London, and Professor Payam Akhavan, of McGill University

<END>

Annex 3

United Nations, *Press Release: Secretary-General Welcomes International Court of Justice Order on The Gambia v. Myanmar Genocide Convention Case* (23 January 2020)

United Nations

PRESS RELEASE
SECRETARY-GENERAL »
STATEMENTS AND MESSAGES

SG/SM/19946
23 JANUARY 2020

Secretary-General Welcomes International Court of Justice Order on The Gambia v. Myanmar Genocide Convention Case

The following statement was issued today by the Spokesman for UN Secretary-General António Guterres on the Order of the International Court of Justice on the Request for the indication of provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar):

The Secretary-General welcomes the Order of the International Court of Justice, indicating provisional measures in the case of The Gambia against Myanmar on the alleged breaches of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Secretary-General notes the Court's unanimous decision to order Myanmar, in accordance with its obligations under the Genocide Convention, "to take all measures within its power" in relation to the members of the Rohingya group in its territory, to prevent the commission of acts within the scope of Article II of the Convention, including killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's destruction and imposing measures intended to prevent births.

He also notes the Court's instruction to Myanmar to ensure that its military, as well as any irregular armed units directed or supported by it and any organizations and persons subject to its control, do not commit such acts; also, that they do not conspire to commit genocide, do not directly and publicly incite the commission of genocide, do not attempt to commit genocide and are not complicit in genocide.

Further, the Secretary-General notes the Court's order to Myanmar to ensure the preservation of evidence related to allegations of acts within the scope of the Genocide

Convention, as well as to report to the Court on the implementation of all provisional measures on a regular basis.

The Secretary-General strongly supports the use of peaceful means to settle international disputes. He further recalls that, pursuant to the Charter and to the Statute of the Court, decisions of the Court are binding and trusts that Myanmar will duly comply with the Order from the Court.

In accordance with the Statute of the Court, the Secretary-General will promptly transmit the notice of the provisional measures ordered by the Court to the Security Council.

For information media. Not an official record.

Annex 4

Republic of the Union of Myanmar: State Counsellor Office, *Statement by H.E. U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Chairman of the Delegation of the Union of Myanmar at the General Debate of the 73rd Session of the United Nations General Assembly* (28 September 2018)

MYANMAR

Please check against delivery

STATEMENT BY

H.E. U KYAW TINT SWE

UNION MINISTER FOR THE OFFICE OF THE STATE COUNSELLOR AND

CHAIRMAN OF THE DELEGATION

OF THE REPUBLIC OF THE UNION OF MYANMAR

AT THE GENERAL DEBATE OF

THE 73RD SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

New York, 28 September 2018

PERMANENT MISSION OF THE REPUBLIC OF THE UNION OF MYANMAR TO THE UNITED NATIONS
10 EAST 77TH STREET, NEW YORK, N.Y. 10075 • TEL. (212) 744-1271 • FAX (212) 744-1290

Annex 4

STATEMENT BY H. E. U KYAW TINT SWE, UNION MINISTER FOR THE OFFICE OF THE STATE COUNSELLOR AND CHAIRMAN OF THE DELEGATION OF THE REPUBLIC OF THE UNION OF MYANMAR, AT THE GENERAL DEBATE OF THE 73RD SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Madame President,

I wish to extend sincere congratulations to you on your election as the President of the 73rdSession of the General Assembly. We firmly believe that under your able stewardship this session will be fruitful.

Madame President,

We live in challenging times. This year's theme, "Making the United Nations relevant to all people: global leadership and shared responsibilities for peaceful, equitable and sustainable societies" is, therefore, most appropriate. It serves to remind us of the need to strengthen the role of this important organization to overcome the complex challenges we face today. In this process, we must not forget the core principles of the UN Charter, including the principle of sovereign equality. It is also important to remember that, the promotion of economic, social, cultural and humanitarian interests, as well as the promotion and protection of human rights and fundamental freedoms, are to be attained through international cooperation. Nor should we forget the international character of the United Nations.

It is only through constructive and peaceful approaches that we will be able to create a better United Nations—one that is relevant to all nations. Only then can our hopes for global leadership of shared responsibilities become a reality.

Here, I wish to stress that Myanmar's view on the role of the United Nations remains unchanged. There are no suitable multilateral platform other than the United Nations for countries of the world to work together to find solutions to overcome global challenges.

Madame President,

Let me apprise this august assembly of our efforts to transform Myanmar from an authoritarian system to a democratic one; our effort to bring about sustainable development and to build a society where stability, peace, and harmony prevail.

A country without peace and stability cannot achieve economic development. This is our conviction. Accordingly, our democratically-elected government has given priority to national reconciliation and peace since we assumed office.

Madame President,

We are convinced that ethnic strife and armed conflicts in Myanmar can only be ended through political means. Lasting peace will become a reality only when the democratic federal union to which our people aspired is established.

We are, therefore, conducting negotiations at the Union Peace Conference – the 21st Century Panglong to reach agreement on the fundamental principles for a democratic federal union. The three Sessions of the conference held so far have adopted fifty-one fundamental principles which will become part of the Union Peace Accord. To ensure that the process is inclusive, we continue negotiations not only with the eight ethnic armed groups that have signed the Nationwide Ceasefire Agreement (NCA) but also with those that have yet to come on board.

During the past year, two more ethnic armed groups, namely the New Mon State Party and the Lahu Democratic Union, joined the peace process by signing the NCA. We will continue our endeavours to bring all ethnic armed organizations under the NCA umbrella and to the conference table.

Madame President,

Essential to our endeavours to bring peace and prosperity to the nation is the need to ensure balanced development in the economic, social and environmental spheres. To this end, the Government has laid down the Myanmar Sustainable Development Plan – MSDP 2018-2030 which is in accord with the United Nations' 2030 Sustainable Development Agenda. The MSDP recognizes three pillars— peace and stability, prosperity and partnership, and people and the planet. Among its important goals are peace, national reconciliation, security, and good governance. Sustainability in all its forms is considered cross-cutting and will be mainstreamed into all aspects of the MSDP implementation. The success of MSDP requires not only national endeavours but also the involvement and commitment of development partners and international organizations.

Madame President,

Human rights and inclusiveness are fundamental to the successful transformation of Myanmar into a democratic society. The Government has spared no effort in nurturing democratic norms and practices among all its citizens. These efforts include the promotion of the rule of law, good governance and protection of human rights, and the fostering of vibrant civil society. All these are essential for the emergence of a democratic federal Union in which the security and prosperity of all citizens are assured. It is a supremely challenging task, particularly for a fledgling democracy. However, Myanmar is strong in its resolution to build the democratic society to which our people aspire.

Madame President,

Resolving the issue in Rakhine is an important component of our democratic process. Our government has consistently exerted all efforts to bring peace and development to Rakhine. Within weeks of the assumption of the responsibilities of the state, the Government set up the Central Committee for Implementation of Peace, Stability, and Development of Rakhine State in May 2016 under the chairmanship of the State Counsellor, Daw Aung San Suu Kyi. This was followed by the establishment of the Advisory Commission

on Rakhine in September 2016, headed by the late Dr. Kofi Annan, former Secretary-General of the United Nations, to provide recommendations for bringing peace, stability, and development to Rakhine State.

I wish at this point to pay tribute to Dr. Kofi Annan who with his immense wisdom had provided us with recommendations in his desire for us to reach our goal of peace, prosperity, and security in Rakhine State.

Barely a month after the Advisory Commission was established, an extremist terrorist group, called AqaMul Mujahidin (later renamed the Arakan Rohingya Salvation Army – ARSA) launched attacks on three Border Police posts in Northern Rakhine State. The attacks were premeditated, well-organized and designed to invoke fear among the inhabitants, to incite violence and to attract international attention.

The Government, despite the attacks, continued with its efforts to seek sustainable solutions for Rakhine State. The Advisory Commission presented its final report to the Government of Myanmar in August 2017. It contains 88 recommendations towards achieving lasting peace and stability in Rakhine. We have set up an Implementation Committee, and I am happy to report that we are now implementing 81 out of 88 recommendations made by the Commission.

Within hours of the release of the Advisory Commission's final report, ARSA terrorists carried out simultaneous attacks on 30 police outposts and one army battalion headquarters. Here, it must be stressed that the ARSA attacks of 2017 were not only against the security forces but also against various communities inhabiting Rakhine State. The attacks opened a chapter of fear and instability that led to a large outflow of refugees to Bangladesh. International attention has been focussed on the outflow overlooked the broader picture of the various reasons, immediate as well as longstanding, that brought about the displacement. Nevertheless, the Government has persisted in its sincere efforts to address as a whole, the need for stability, reconciliation, and development to all communities in Rakhine.

Madame President,

We sympathize deeply with these displaced persons especially women and children and have taken steps to effect the early repatriation of all displaced persons from Rakhine, who are verified as residents of the State.

To this end, we have signed with Bangladesh three bilateral agreements, the Arrangement on Return of Displaced Persons from Rakhine State, Terms of Reference for the implementation, and its Physical Arrangement.

We have made necessary preparations in line with these bilateral agreements and have been ready to receive verified returnees from Bangladesh since 23 January of this year. We call on Bangladesh to fulfill its commitments in accordance with the bilateral agreements, to allow, without delay the return of verified persons under voluntary, safe and

dignified conditions. A number of people had returned of their own volition and under their own arrangement. They have been systematically registered, processed and are now with their own relatives and families in their own homes. However, not even a single displaced person has been repatriated by Bangladesh as part of the implementation of the bilateral agreement.

Madame President,

The only way to resolve the issue swiftly and peacefully is through the implementation of the bilateral agreements, working together in the spirit of good neighbourliness, refraining from activities that might be inimical to the national interests of either Myanmar or Bangladesh.

We recognize the crucial role of the United Nations in addressing the issue of Rakhine and the present humanitarian crisis in particular. Accordingly, the Government of Myanmar signed a MoU with the UNDP and the UNHCR for assisting the speedy and efficient resettlement and rehabilitation of returnees. Under the MOU, the implementation process begins with an assessment that will be conducted by the UNDP and UNHCR in the potential project areas. The UN Team has started this process, and we are looking forward to their feedback.

Madame President,

The Myanmar government has expressed its serious concerns over the report published on 27 August 2018 by the Human Rights Council's Fact Finding Mission on Myanmar. From the very beginning, Myanmar objected to the formation of the Fact-Finding Mission, due to our government's serious and genuine concerns about the advisability of its establishment, composition, and mandate. At a time when we are working hard to build harmony on the ground, we are concerned that the release of this report based on narratives and not on hard evidence will only serve to inflame tensions further and potentially hinder our efforts to create the much needed social cohesion in Rakhine State.

Here, I would like to stress what accountability should mean to all of us. Accountability should mean taking responsibility for one's actions. Accountability must apply equally to all. Individuals, organizations, national governments as well as multilateral organizations, must be held responsible for the consequences of their words and actions.

Madame President,

As you will also be aware, the government of Myanmar has resolutely rejected the ICC's ruling of 6 September 2018 in connection with Rakhine State. Our position here is clear: Myanmar is not a party to the Rome Statute, and the Court has no jurisdiction over Myanmar whatsoever. The ICC decision was made on dubious legal grounds and applied to a situation where domestic remedies have not yet been exhausted.

I speak to all Representatives here today when I say that we, the members of the international community, should be deeply concerned by the recent decision of the

Annex 4

International Criminal Court and the various precedents that the Court may be setting by this recent ruling as well as by the way in which it was made. Such action can only erode the moral and legal authority of the Court. We are heartened that we are not alone in having grave misgiving about the ICC.

Madame President,

Please also let me make it clear, whilst the government is unable to accept this legally dubious intervention by the International Criminal Court, we are fully committed to ensuring accountability where there is evidence of human rights violations committed in Rakhine State. We have recently established an Independent Commission of Enquiry. The Commission will investigate all violations of human rights and atrocities committed in Rakhine State as part of our efforts to address the issues of accountability, reconciliation, peace, stability, and development in our country. The Independent Commission of Enquiry is chaired by Madame Rosario Manalo, Former Deputy Foreign Minister of the Philippines, and comprises Ambassador Kenzo Oshima, former Japanese PR to the UN and Under-Secretary-General of the UN, and two Myanmar nationals, one of whom is the former Chairman of the Constitutional Tribunal and the other a former Senior Officials of UNICEF.

We hope that, alongside the Rakhine Advisory Commission's recommendations, the work of the Independent Commission of Enquiry will become an important guiding light for the resolution of long out reached problems in the Rakhine State.

Madame President,

The challenges facing Myanmar are complex and multifaceted. However, the people of Myanmar are resilient. We stand united to face all obstacles and to meet all challenges as we strive to bring peace, development and national harmony to our country that has suffered from decades of conflict, underdevelopment, and disharmony.

Thank You.

* * * * *

Annex 5

UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, E/447 (26 June 1947), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

MARTINUS
NIJHOFF
PUBLISHERS

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2008

United Nations
ECONOMIC
AND SOCIAL
COUNCIL

Nations Unies
CONSEIL
ECONOMIQUE
ET SOCIAL

UNRESTRICTED
E/447
26 June 1947
ENGLISH
ORIGINAL: FRENCH

DRAFT CONVENTION ON THE CRIME OF GENOCIDE

This draft convention was prepared by the Secretary-General of the United Nations in pursuance of the resolution of the Economic and Social Council dated 28 March 1947.

PART I

DRAFT CONVENTION FOR THE PREVENTION AND PUNISHMENT OF GENOCIDE

Preamble

The High Contracting Parties proclaim that Genocide, which is the intentional destruction of a group of human beings, defies universal conscience, inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed, and is in violent contradiction with the spirit and aims of the United Nations.

1. They appeal to the feelings of solidarity of all members of the international community and call upon them to oppose this odious crime.
2. They proclaim that the acts of genocide defined by the present Convention are crimes against the Law of Nations, and that the fundamental exigencies of civilization, international order and peace require their prevention and punishment.
3. They pledge themselves to prevent and to repress such acts wherever they may occur.

Article I

Definitions

(Protected Groups) I. The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.

(Acts qualified as Genocide) II. In this Convention, the word "genocide" means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.

Such acts consist of:

1. Causing the death of members of a group or injuring their health or physical integrity by:
   (a) group massacres or individual executions; or
   (b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
   (c) mutilations and biological experiments imposed for other than curative purposes; or
   (d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.
2. Restricting births by:
   (a) sterilization and/or compulsory abortion; or
   (b) segregation of the sexes; or
   (c) obstacles to marriage.
3. Destroying the specific characteristics of the group by:
   (a) forced transfer of children to another human group; or
   (b) forced and systematic exile of individuals representing the culture of a group; or
   (c) prohibition of the use of the national language even in private intercourse; or
   (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
   (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Article II

(Punishable Offences)

I. The following are likewise deemed to be crimes of genocide:
   1. any attempt to commit genocide;
   2. the following preparatory acts:
      (a) studies and research for the purpose of developing the technique of genocide;
      (b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;
      (c) issuing instructions or orders, and distributing tasks with a view to committing genocide.

II. The following shall likewise be punishable:
   1. wilful participation in acts of genocide of whatever description;
   2. direct public incitement to any act of genocide, whether the incitement be successful or not;
   3. conspiracy to commit acts of genocide.

Article III

(Punishment of a Particular Offence)

All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.

Article IV

(Persons Liable)

Those committing genocide shall be punished, be they rulers, public officials or private individuals

Article V

(Command of the Law and Superior Orders)

Command of the law or superior orders shall not justify genocide.

Article VI

(Provisions concerning Genocide in Municipal Criminal Law)

The High Contracting Parties shall make provision in their municipal law for acts of genocide as defined by Articles I, II, and III, above, and for their effective punishment.

Article VII

(Universal Enforcement of Municipal Criminal Law)

The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

Article VIII

(Extradition)

The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

The High Contracting Parties pledge themselves to grant extradition in cases of genocide.

Article IX

(Trial of Genocide by an International Court)

The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under Article VII or to grant their extradition under Article VIII.
2. If the acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

Article X

(International Court competent to try Genocide)

Two drafts are submitted for this section:

1st draft: The court of criminal jurisdiction under Article IX shall be the International Court having jurisdiction in all matters connected with international crimes.

2nd draft: An international court shall be set up to try crimes of genocide (vide Annexes).

Article XI

(Disbanding of Groups or Organizations Having Participated in Genocide)

The High Contracting Parties pledge themselves to disband any group or organization which has participated in any act of genocide mentioned in Articles I, II, and III, above.

Article XII

(Action by the United Nations to Prevent or to Stop Genocide)

Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.

Article XIII

(Reparations to Victims of Genocide)

When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.

Article XIV

(Settlement of Disputes on Interpretation or Application of the Convention)

Disputes relating to the interpretation or… [sic] application of this Convention shall be submitted to the International Court of Justice.

Article XV

(Language – Date of the Convention)

The present Convention, of which the……., ……., ……, ……. and……. texts are equally authentic, shall bear the date of…..

Article XVI

(First Draft)

(What States may become Parties to the Convention. Ways to become Party to it)

1. The present Convention shall be open to accession on behalf of any Member of the United Nations or any non-member State to which an invitation has been addressed by the Economic and Social Council.
2. The instruments of accession shall be transmitted to the Secretary-General of the United Nations.

(Second Draft)

1. The present Convention shall be open until 31…. 1948 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation has been addressed by the Economic and Social Council.

The present Convention shall be ratified, and the instruments of ratification shall be transmitted to the Secretary-General of the United Nations.

2. After 1…. 1948 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State that has received an invitation as aforesaid.

Instruments of accession shall be transmitted to the Secretary-General of the United Nations.

Article XVII

(Reservations)

No proposition is put forward for the moment.

Article XVIII

(Coming into Force)

1. The present Convention shall come into force on the ninetieth day following the receipt by the Secretary-General of the United Nations of the accession (or . . . ratifications and accession) of not less than . . . Contracting Parties.
2. Accessions received after the Convention has come into force shall become effective as from the ninetieth day following the date of receipt by the Secretary-General of the United Nations

Article XIX

(First Draft)

(Duration of the Convention)

1. The present Convention shall remain in effect for a period of five years dating from its entry into force.
2. It shall remain in force for further successive periods of five years for such Contracting Parties that have not denounced it at least six months before the expiration of the current period.
3. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

(Second Draft)

The present Convention may be denounced by a written notification addressed to the Secretary-General of the United Nations. Such notification shall take effect one year after the date of its receipt.

Article XX

(Abrogation of the Convention)

Should the number of Members of the United Nations and non-member States bound by this Convention become less than . . . . as a result of denunciations, the Convention shall cease to have effect as from the date on which the last of these denunciations shall become operative.

Article XXI

(Revision of the Convention)

A request for the revision of the present Convention may be made at any time by any State which is a party to this Convention by means of a written notification addressed to the Secretary-General.

The Economic and Social Council shall decide upon the measures to be taken in respect of such a request.

Article XXII

(Notifications by the Secretary-General)

The Secretary-General of the United Nations shall notify all Members of the United Nations and non-member States referred to in Article XVI of all accessions (or signatures, ratifications and accessions) received in accordance with Articles XVI and XVIII, of denunciations received in accordance with Article XIX, of the abrogation of the Convention effected as provided by Article XX and of requests for revision of the Convention made in accordance with Article XXI.

Article XXIII

(Deposit of the Original of the Convention and Transmission of Copies to Governments)

1. A copy of the Convention signed by the President of the General Assembly and the Secretary-General of the United Nations shall be deposited in the Archives of the Secretariat of the United Nations.
2. A certified copy shall be transmitted to all Members of the United Nations and to non-member States mentioned under Article.

Article XXIV

(Registration of the Convention)

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

PART II

COMMENTS ON THE DRAFT CONVENTION

SECTION I. INTRODUCTION

I. *Instructions to the Secretary-General*

The Economic and Social Council, acting on a resolution of the General Assembly dated 11 December 1946*, by a resolution dated 28 March 1947 instructed the Secretary-General to undertake studies and to prepare a draft convention on the international crime of genocide.

In pursuance of the above resolution of the Economic and Social Council, the Secretary-General asked the Director of the Division of Human Rights to prepare a draft convention with suitable comments and requested three experts, Mr. Donnedieu de Vabres, Professor at the Paris Faculty of Law, His Excellency, Professor Pella, President of the International Association for Penal Law, and Professor Lemkin, to give him the assistance of their valuable advice.

The experts discussed a preliminary draft of the Convention with Professor Humphrey, Director of the Division of Human Rights, Professor Giraud, Chief of the Research Section of the Division of Human Rights, and Mr. Kliava, representing the Legal Department.

On the basis of the comments of these experts, the Secretary-General amended and supplemented the preliminary draft which he had submitted to their consideration; this has now become the draft Convention reproduced above.

II. *How the present study was prepared*

The Secretary-General felt that he ought to define the notion of genocide in such a way as not to encroach on other notions which logically are and should be distinct.

In determining what should be included in the draft, he was guided by the Assembly resolution of 11 December 1946 concerning genocide, and he adopted the principles and methods of application established therein.

For the rest he considered that the first draft to be submitted to the competent organs of the United Nations ought, as far as possible, to embrace all the points likely to be adopted, it being left to these organs to eliminate what they wished.

In so doing the Secretary-General did not intend to recommend one political solution rather than another, but wished to offer a basis for full discussion and bring out all the points deserving of notice.

The organs of the United Nations, consisting of representatives of Governments, will be entirely free to decide the political question raised by the problem of the prevention and punishment of genocide.

III. *Definition of the notion of genocide*

Genocide is the deliberate destruction of a human group.

This literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.

Absence of a careful definition of the notion of genocide would present two disadvantages.

Firstly, there would be a tendency to include under genocide international crimes or abuses which, however reprehensible they may be, do not constitute genocide and cannot be regarded as such by any normal process of reasoning. International law must be built up on a rational and logical basis and exclude confusion and arbitrary opinions; each idea must be properly defined and not overlap others.

Secondly, if the notion of genocide were excessively wide, the success of the convention for the prevention and punishment of what is perhaps the most odious international crime would be jeopardized. If the convention on genocide were to include too many accessory reservations and implications whose significance was not always easy to discern at first sight, Governments might become suspicious and tend to abstain. A multiplicity of objectives might lead to the chief target being missed.

The law of war, the law of nationality, the protection of minorities, the general rights and obligations of States, the protection of human rights –

these are so many chapters of international law which should not completely, or even partially, coincide with the question of genocide, even though genocide may have many points of contact with them.

IV. *The chief problems involved in the international punishment of genocide*

The chief problems involved in the international punishment of genocide, which are governmental rather than technical problems, are the following:

1. *What human groups should be protected by the Convention*?

Human beings exist variously in racial, national, linguistic, religious and political groups, and even this list is not exhaustive.

Should the Convention on genocide protect all or only some of these? That is the first general question which will have to be settled.

The General Assembly's resolution speaks of "racial, religious, political and other groups" and we adopted this formula (see Article I).

2. *What is meant by genocide*?

Professor Lemkin distinguishes between "physical" genocide (destruction of individuals), "biological" genocide (prevention of births), and "cultural" genocide (brutal destruction of the specific characteristics of a group).

Should all these three notions be accepted or only the first and second? That is the second general question to be decided.

According to the method we have indicated, we have submitted formulas covering the three types of genocide so as to convey an exact idea of what they represent, and thus enable the United Nations organs to reach a decision. (See Article I).

3. *Will the Convention be universal or will its application be strictly limited to the States parties to the Convention?*

Obviously the obligations established by the Convention should apply only to the States parties to it, for otherwise States parties and States not parties to the Convention would be on an equal footing.

It is conceivable, however, that States might limit the application of the Convention strictly to acts committed in the territories of States parties thereto, or by nationals of such States or, on the contrary, that States

parties to the Convention might punish genocide wherever committed and regardless of the nationality of the criminals.

The Secretary-General and the experts were of the opinion that the draft Convention should adopt the last-mentioned point of view, firstly because that seems to be the intention of the Assembly resolution of 11 December 1946, and secondly, because genocide is by its nature an offence under international law; and if this were ignored the Convention would fail in its object. (See Preamble 1, 2, Articles VII, VIII, XII).

4. *Are the acts of genocide punishable under the Convention to be only acts committed by rulers or statesmen (i.e., persons having strictly political functions such as Ministers and members of legislative assemblies), or acts committed by rulers, officials properly so called, and private persons without distinction*?

Contrary to the opinion expressed by an expert (see below Article V and comments), the draft Convention has adopted the widest formula, firstly because this is in accordance with the general method followed, and secondly because the Assembly resolution of 11 December 1946 would seem to have endorsed that formula.

5. *Punishment of genocide by an international tribunal*

National courts will be called upon to play a part in the punishment of genocide, but in the more serious cases it would appear to be highly desirable that it should be punished by an international tribunal.

Such a tribunal might be an international criminal court with general jurisdiction; in the absence of such a court, a special court with jurisdiction limited to genocide would have to be provided for.

The question of the establishment of an international criminal court with general jurisdiction exceeds the scope of the question of genocide. It is not for us to deal with this question, but the bodies entrusted with the preparation of the Convention on the punishment of genocide may consider the question in liaison with the other bodies dealing with international criminal law and the codification of international law.

6. *Conditions of entry into force of the Convention*

In view of the fact that the Convention is to be of universal application, i.e. in some respects even to affect States not parties to the Convention,

the question of how many accessions will be needed before the Convention can come into force is of special importance.

V. *How the Convention was drafted*

In view both of the fact that the draft Convention is intended to form a basis of discussion and to facilitate such discussion and that genocide is a new subject, an effort has been made to deal with the questions in order and to isolate them in the draft. The earlier articles give a somewhat detailed classification and lists of acts which perhaps need not be maintained in the final text of the Convention. The method followed was that of induction; once agreement has been reached on what is to be included or excluded, shorter synthetic formulas might be substituted for the present analytical texts.

* 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 spirity [sic] 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.

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.

The resolution of the Economic and Social Council reads as follows:

The Economic and Social Council,

Taking cognizance of the General Assembly Resolution No. 96 of 11 December 1946, instructs the Secretary-General:

(a) to undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and
(b) after consultation with the General Assembly Committee on the Development and Codification of International Law and if feasible the Commission on Human Rights, and after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide.

SECTION II. COMMENTS ARTICLE BY ARTICLE

A. BODY OF THE CONVENTION

ARTICLE I

General Definitions

(Protected Groups)

I. The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.

(Acts qualified as Genocide)

II. In this Convention, the word "genocide" means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.

Such acts consist of:

1. Causing the death of members of a group or injuring their health or physical integrity by:
   (a) group massacres or individual executions; or
   (b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
   (c) mutilations and biological experiments imposed for other than curative purposes; or
   (d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.
2. Restricting births by:
   (a) sterilization and/or compulsory abortion; or
   (b) segregation of the sexes; or
   (c) obstacles to marriage.

libraries, universities, churches, etc. and compensation to the group for its collective needs).

* The modern view of liability as being based in part on the idea of risk does not exclude the idea of a wrong.

It can, of course, happen that the idea of risk, involving much more far-reaching liability than the idea of a wrong, makes it unnecessary to look for a wrong.

But the two ideas are often present together. Where liability is founded on the idea of risk, the idea of a wrong is not necessarily ignored. The wrong is taken into account in certain cases e.g. as a factor aggravating liability of the persons who in accepting the risk committed a serious wrong; or, if the person who suffered the injury himself committed a serious wrong, as a factor excluding or limiting the amount of damages.

B. FINAL PROVISIONS*

ARTICLE XIV

(Settlement of Disputes on Interpretation or Application of the Convention)

Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.

Comments on this article

1. Difficulties may arise regarding the operation of a Convention. A suitable method of settling them is to submit them to a third party who shall decide between the conflicting parties.

If a dispute arises regarding "the interpretation" of the Convention, i.e. regarding the meaning of its provisions, or "the application" of the Convention, i.e. if it is to be ascertained whether one of the parties has faithfully discharged his obligations, it is normal procedure for the dispute to be submitted to a judicial authority.

The International Court of Justice would appear to be the judicial authority best qualified to deal with such disputes.

Since the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community, any dispute is a matter affecting all the parties to the Convention. Hence, such dispute should not be settled by an authority arbitrating between two or more States exclusively, for then its decision would lack any claim to be binding on other States.

The International Court of Justice, on the contrary, is an organ of the United Nations established by virtue of the Charter itself; it is a court whose authority is recognized by all the Members of the United Nations, and should consequently be given jurisdiction to settle the disputes concerned.

* Articles XIV–XXIV concerning final arrangements were to be drafted after the experts had stated their opinion on the Convention as a whole. As the experts had not had sufficient time to deal with them, Mr. Pella proposed that the final provisions might confidently be entrusted to one of Prof. Giraud's experience.

ARTICLE XV

(Language – Date of the Convention)

The present Convention, of which the....., ..., ..., ... and..... texts are equally authentic, shall bear the date of.....

Comments on this article

The General Assembly, that is to say the Plenary Assembly (and its Committees) will play the part of a diplomatic Convention summoned to prepare and adopt a Convention.

When agreement has been reached within the General Assembly, the latter shall by passing a final resolution adopt the Convention and open it either for signature or accession by Members of the United Nations.**

* This will be the date when the General Assembly passes a resolution adopting the text of the Convention and opening it either for signature or for accession by the Members of the United Nations.

** Regarding the question of whether the Convention is to be open to signatures or accessions, see Article XVI below.

ARTICLE XVI

(First Draft)

(What States may become Parties to the Convention. Ways to become Party to it)

1. The present Convention shall be open to accession on behalf of any Member of the United Nations or any non-member State to which an invitation has been addressed by the Economic and Social Council.

Annex 6

Draft Convention on the Crime of Genocide: communications received by the Secretary-General, *Communication received from the United States of America*, A/401 (30 September 1947), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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Annex 6

ANNEX 3a

Draft convention on genocide
COMMUNICATIONS RECEIVED BY THE SECRETARY-GENERAL

Documents A/401, A/401/Add.1, A/401/Add.2, A/401/Add.3

27 September 1947

[*Original text: English*]

1. At its fifth session held on 6 August 1947, the Economic and Social Council adopted resolution 77(V) relating to the draft convention on the crime of genocide which had been prepared by the Secretariat. The resolution *inter alia* called upon the Member Governments, in view of the urgency of the matter, to submit to the Secretary-General, as soon as possible, their comments on the draft convention transmitted to them by the Secretary-General on 7 July 1947.

By the same resolution, the Secretary-General was requested to communicate to the General Assembly any comments received in time for transmittal.

2. In compliance with the request made by the Economic and Social Council, the Secretary General has the honour to transmit to the General Assembly the following communications received from Member States:

1. COMMUNICATION RECEIVED FROM INDIA

New Delhi, 27 August 1947

The Minister for External Affairs and Commonwealth Relations presents his compliments to the Secretary-General of the United Nations and has the honour to say that the Government of India has no comments to offer on the draft convention on the crime of genocide received with the Secretary-General's note No. 605-8-1-1 EG, dated 7 July 1947.

2. Communication received from haiti

Secretariat of State for Foreign Affairs
Port-au-Prince 12 September 1947

In reply to your communication No. 605-8-1-1 EG, dated 21 August 1947 last, I have the honour to send you herewith some comments and suggestions regarding the draft convention on genocide which this Department feels called upon to submit to the General Assembly of the United Nations.

The idea on which these changes are based is that the principal purpose of the United Nations is to maintain lasting peace in the world and to be a centre for harmonizing the actions of nations in the attainment of the common ends stated in Article 1 of the San Francisco Charter.

If none but the contracting parties are to report genocide committed by, or in complicity with one of them, the normal development of the Organization may be seriously prejudiced and the final establishment of international peace materially endangered.

There is also reason to believe that by granting greater freedom of intervention to the Secretary-General, who is directly responsible to the General Assembly, the purposes of the United Nations will more easily be achieved and the progress of the Organization better ensured.

With particular reference to the reporting of genocide, this Department therefore supports the opinion of Mr. Pella and Mr. Lemkin as stated on page 46 of document E/447.[1]

[1] Document E/447 was reproduced as document A/362 and constitutes the text of Annex 3 above.

Comments

Article IX. It is proposed to add the following paragraph to the two at present contained in this article:

> In both cases, in addition to the State on whose territory acts of genocide have been committed, any one of the High Contracting Parties or the Secretary-General acting on his own initiative, or in the name of members of the human group victims of such acts, may report the authors of such acts to the Economic and Social Council or the Security Council.

Article X. The Government of Haiti favours the first draft in order to avoid the difficulties inherent in the constitution of provisional tribunals. It also considers that the International Court of Justice should have jurisdiction in all matters connected with international crimes or coming within the scope of international law.

Article XII. The following wording is proposed:

> Irrespective of any provisions in the fore-going articles, should the crimes as defined in this convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the Contracting Parties *or the human groups affected* may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.
> In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.

Article XVI. The Government of Haiti favours the second draft as being more explicit and providing a shorter time limit for the entry into force of the convention as provided for by article XVIII.

Article XIX. The Government of Haiti agrees to the first draft.

Article XX. The Government of Haiti considers that the convention on genocide is essential to the normal development of the world and the defence of mankind. Accordingly it proposes that the following paragraph should be added to article XX as it now stands:

> In that event the Secretary-General of the United Nations shall submit a new convention to the vote of the General Assembly at its first subsequent session. Such new convention shall take into account the reasons given for each one of the denunciations of the earlier convention.

3. Communication received from the Philippines

Department of Foreign Affairs
Manila, 9 September 1942

The Secretary of Foreign Affairs of the Philippines presents his compliments to the Secretary-General of the United Nations and has the honour to acknowledge the receipt of the Secretariat's note (document 605-8-1-1/EG) of 21 August 1947, enclosing copy of the resolution adopted by the Economic and Social Council on 6 August 1947 on the draft convention on the crime of genocide, calling upon Member Governments to submit

as soon as possible to the Secretary-General their comments on the draft convention.

The delegation of the Philippines to the forthcoming General Assembly has been supplied with the materials on the subject and is believed to be in a position to present the views of its Government on the matter.

4. Communication received from Venezuela

Ministry of External Relations
Caracas, 12 September 1947

The Minister for External Relations presents his compliments to the Secretary-General of the United Nations and has the honour to acknowledge receipt of note No. 605-8-1-1/EG, dated 21 August last, to which was attached a copy of the resolution adopted by the Economic and Social Council relating to the draft convention on the crime of genocide which was transmitted to the Government with the Secretariat's communication number 605-8-1-1/EG dated 7 July 1947.

In accordance with the wishes expressed by the United Nations Secretariat, the Minister transmits herewith a report containing the comments of the Government of Venezuela regarding the said draft convention on the crime of genocide.

Report

Draft convention on the crime of genocide

With the assistance of experts in the field of international and criminal law and in compliance with the request expressed by the Economic and Social Council, the United Nations Secretariat prepared a draft convention on the crime of genocide and two annexes regarding the establishment of an international court for the punishment of this new form of crime. The Secretariat observes that it is only intended to provide a basis for discussion and asks for the comments of Governments.

The principal ideas of the main draft follow a most noble and generous international trend, born of the experience of the last war, and deserve unqualified support; as far as Venezuela is concerned, such fundamental concepts already constitute a national legal-political heritage, nurtured by those principles of individual equality, security and liberty which are a

tradition of the political system of the Republic. Indeed, the most recent National Constitution of 5 July this year (article 46, sub-paragraph (*b*)) prohibits racial discrimination and generally extends to all inhabitants of the country, whatever their origin, nationality, race or religion, the same fundamental individual guarantees based on the widest equality.

Consequently, Venezuela is fully prepared, by its political traditions and by the liberality of its constitutional principles, to co-operate with other countries in the suppression of a hateful crime which should be highly repugnant to civilized nations.

Nevertheless, the impression gained by the jurist from the United Nations draft convention is that it goes beyond the General Assembly's resolution 96(I) of 11 December 1946. The General Assembly affirmed that genocide is a crime under international law, invited the Member States to enact the necessary legislation for its prevention and punishment, and confined itself to recommending that international co-operation be organized for this purpose. It therefore appears that the spirit of this resolution was to ensure that Members should prevent and punish the hateful acts that constitute genocide and establish a principle of international co-operation with this object in view, without demanding from Members a grave sacrifice of their sovereignty and a surrender of the criminal jurisdiction they exercise in their territory.

The drafts of the Secretariat, on the other hand, appear to involve a partial surrender of these traditional principles of national and international law in favour of the establishment of an international repressive jurisdiction which may result in serious danger to Members and wound national feelings that are still over-sensitive. In the course of time, it is probable that future solutions of this type will be found; but they may be premature in the present phase of international life and politics and liable to cause friction, differences and disputes between States, which might be more dangerous to the cause of common peace and harmony than the very crimes which it is intended to suppress. Paragraph 3 of the preamble, and articles 7 and 12 of the draft convention are of this nature. The whole system envisaged for the establishment of international justice in regard to genocide also appears to be imbued with the same spirit, which seems clearly inconsistent with the principle laid down in paragraph 7 of Article 2 of the United Nations Charter.

The application of such extensive co-operation as that proposed by the instrument in question is also subject to technical difficulties which appear difficult to overcome. For example, many States, Venezuela among them, maintain as a fundamental principle the non-extradition of their nationals under any circumstances and, in return, undertake to try them in their own territory when the act is punishable under their own law. Such States could not accept the wording of article 8 under which extradition must be granted in all cases, nor could they surrender their nationals to international jurisdiction without violating the basic principles of their legal system. Even where foreigners are concerned, Venezuela does not grant extradition when the penalty of death or life-imprisonment may be imposed on the accused in the country applying for such extradition. Consequently, the provision contained in article 38 of the Annex does not appear to provide sufficient guarantee to a State in such a position for the safeguarding of its cardinal principles in criminal matters.

Without examining the drafts at length, it appears desirable from every point of view that they should first be submitted to a deeper and more extensive study by one of the legal bodies of the United Nations, so that they may be carefully sifted and made acceptable to the greatest possible number of States.

The Government of Venezuela gives its support in principle but, rather than the drafts prepared by the United Nations, would prefer a convention by which Member States undertook to adopt national criminal legislation ensuring the punishment of genocide and to apply the appropriate penalties themselves. Only when States do not fulfil such obligations would there be cause for claims by other members or by the United Nations. The establishment of international criminal jurisdiction to deal with these cases seems to be a step that should be reserved for the future, when the circumstances of international life are more favourable and the spirit of international co-operation in the legal sphere has, as is to be hoped, made further progress. If these views on the method of procedure are not accepted, Venezuela will study her possible final conclusions at greater length in the same spirit of full co-operation and defence of human integrity on which her political institutions are based.

5. Communication received from the United States of America

Washington, 30 September 1947

The Secretary of State of the United States of America presents his compliments to the Secretary-General of the United Nations and acknowledges the receipt of his note, dated 21 August 1947 referring to his earlier note of 7 July 1947, and has the honour to transmit, as therein requested, the comments of the Government of the United States on the draft convention on the prevention and punishment of the international crime of genocide.

Comments

Preamble. The Preamble, as drafted, is objectionable for the reasons that it is wordy, and that it contains material of a substantive character which should be treated of in the body of the convention.

Thus, the first sentence purports to define genocide, while articles I and II of the convention are also devoted to the definition of genocide. Attention is called to the fact that the important matter of "intent" is injected into the definition contained in the preamble by the inclusion of the phrase "intentional destruction", which in any event might better read "deliberate destruction or attempt to destroy." The latter change would bring the definition contained in the preamble more in harmony with the definition contained in the body of the convention. (See article II, dealing with "attempt to commit genocide".) It is obviously not intended that groups must be totally destroyed before the crime of genocide exists.

Another subject which appears to be inappropriately dealt with in the preamble is that of "jurisdiction", which might well be considered to be resolved by the sentence reading: "They pledge themselves to prevent and to repress such acts *wherever they may occur*." (Italics added). The jurisdictional problem should be dealt with in the body of the instrument.

Should the preamble as drafted by the Secretariat be insisted upon, the United States would also object to the inclusion of the words "by depriving it of the cultural and other contributions of the group so destroyed", language which tends to weaken the sentence in which it appears.

A simply worded preamble is favoured and the following substitute draft is suggested:

> The High Contracting Parties declare that genocide constitutes a crime under international law, which the civilized world condemns, and which the Parties to this Convention agree to prevent and repress as hereinafter provided.

The language of the proposed draft is taken, in part, from the resolution 96(I) of the General Assembly of December 11, 1946.

Article I. 1. Paragraphs I and II of article I, as drafted, overlap each other and are objectionable for this reason. Thus, each paragraph deals with both "purpose" and the nature of the "act". The two paragraphs should be consolidated. A text reading as follows is suggested:

> Genocide means any of the following criminal acts directed against a racial, national, religious, or political group of human beings, for the purpose of totally or partially destroying such group or of preventing its preservation or development.

In addition, the words "Such acts consist of:" should then be deleted as unnecessary, being replaced by the words "any of the following criminal acts" appearing near the beginning of the text just suggested.

2. The inclusion of "linguistic" groups is believed to be unnecessary, since it is not believed that genocide would be practiced upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics. Racial, national and religious groups are covered, and that should be sufficient.

3. Considerable question has been raised as to whether "political" groups should be included in the definition. The United States is able to agree to the inclusion of political groups on the understanding that genocide as to such groups is confined to physical destruction.

4. It is important that the words "for the purpose of totally or partially destroying it or of preventing its preservation or development", or some similar wording indicating "purpose" or "intent", be maintained in the draft.

5. The words "physical violence" should be inserted before the words "mutilations and biological experiments" in sub-paragraph (*c*) of paragraph II(1) of this article, and the words "imposed for other than curative purposes" should be deleted. The inclusion of the words "physical violence" broadens the definition, to take care of other possible forms of physical violence and the elimination of the words "imposed for other than

curative purposes" also broadens the definition. Biological experiments, however imposed, should be made criminal if they are part of a plan to destroy one of the groups herein referred to, in whole or in part The word "and" between "mutilations" and "biological experiments" should be changed to "or".

6. The word "all" in sub-paragraph (*d*) of paragraph II(1) should be deleted. The inclusion of the word "all" in the phrase reading "deprivation of all means of livelihood", would seem unduly to narrow the crime.

7. It is also considered that the word "compulsory", in paragraph II(2), now modifying the word "abortion" only, should be made to modify all crimes listed under paragraph II(2), the initial line of the text thus being made to read: "Compulsory restriction of births by:"

8. The United States is opposed to the inclusion of paragraph 3 of article I, relating to "destroying the specific characteristics of the group" by different means, except as to subparagraph (*a*) "forced transfer of children to another human group."

Sub-paragraph (*b*) might be interpreted as embracing forced transfers of minority groups such as have already been carried out by Members of the United Nations.

Sub-paragraphs (*c*), (*d*) and (*e*) relate generally to prohibition of the use of language, systematic destruction of books, and destruction or dispersion of documents and objects of historical or artistic value. The act of creating the new international crime of genocide is one of extreme gravity, and the United States feels that it should be confined to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject. The acts provided for in these sub-paragraphs are acts which should appropriately be dealt with in connection with the protection of minorities.

Consequently, sub-paragraph (*a*) of this paragraph should be substituted for the whole of paragraph 3.

Article II. Article II as drafted is in two parts, namely (I) other crimes of genocide and (II) other punishable acts. It is considered desirable that the definition of genocide should be treated in Article I and that other unlawful acts related to but distinguishable from genocide proper be treated in Article II.

The draft as submitted by the Secretary-General seems to assume that the acts described as genocide are punishable and unlawful. Thus the initial line of paragraph II as submitted reads: "The following shall likewise be punishable". The convention should contain a clear statement that the acts denominated as "genocide" are unlawful and punishable, as is done in the suggested draft.

The preceding suggestions may be effectuated by causing article II to read:

> It shall be unlawful and punishable to commit genocide or to wilfully participate in an act of genocide, or to…

The above suggested language also places "wilful participation" in the sentence which declares genocide to be unlawful. The other specifications contained in article II, paragraph I, as drafted should properly remain there. These include "attempts" and "preparatory acts" which appear to have the same relationship to genocide as "incitement" and "conspiracy" (contained in paragraph II) in that they are related to but distinguishable from genocide proper.

However, it is suggested that sub-paragraph (*a*) of paragraph I(2) as drafted "studies and research for the purpose of developing the technique of genocide", should be deleted for the reason that it is considered that these acts may be too far removed from what is generally regarded as the commission of the offense. The conjunction "or" should be inserted before the word "manufacturing" in sub-paragraph (*b*); "or" should also be inserted in place of "and" before the word "distribution" in sub-paragraph (*c*). Sub-paragraphs (*b*) and (*c*) would become sub-paragraphs (*a*) and (*b*) of paragraph 2:

Article II would then read:

It shall be unlawful and punishable to commit genocide or to wilfully participate in an act of genocide, or to engage in any:

1. Attempt to commit an act of genocide; or
2. Any of the following preparatory acts:
   (*a*) Setting up of installations, or manufacturing, obtaining, possessing or supplying of articles or substances, with the knowledge that they are intended for genocide; or
   (*b*) Issuing instructions or orders, or distributing tasks aimed to promote genocide; or

3. Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide; or
4. Conspiracy to commit an act of genocide.

Article III. The United States considers that article III should be deleted. Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others. The United States has proposed under the preceding article that the provision on "incitement" be qualified to this effect. When "propaganda" constitutes a clear and present danger it takes on the character of "incitement" and is covered in the preceding article.

Article IV. t is unnecessary here to provide that those committing genocide "shall be punished". Article II, as drafted above, makes it "unlawful and punishable" to commit genocide. Moreover, the present article as submitted makes only "genocide" punishable, while article II, above makes certain other acts "unlawful and punishable". Accordingly, it is suggested that this article be recast (and renumbered as article III, since it is recommended that article III of the draft submitted be incorporated into article II) to read as follows:

> Punishment under this Convention shall be meted out to the guilty be they rulers, public officials, private individuals, groups or organizations.

The text submitted above has the advantage or making it clear that the convention is applicable to "groups or organizations".

Article V. This article, as drafted, is also limited to "genocide" and does not include the other acts specified in article II as "unlawful and punishable". Therefore it is suggested that instead of referring to "genocide", the reference be to "the crimes set out in this Convention."

The Government of the United States also desires to incorporate the rule of the Nürnberg Charter (article 8) which, while providing that superior orders shall not free a defendant from responsibility, goes on to say that this "may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The article (renumbered article IV) would then read:

> Command of the law or superior orders shall be no defense for the crimes set out in this Convention, but may be considered in mitigation of punishment.

Article VI. Here again it is submitted that some such formula as "acts prohibited in this Convention" is broader and therefore more desirable than "genocide as defined by articles I, II, and III, above". It is suggested that the article (renumbered article V) be rephrased to read:

> The High Contracting Parties shall make provision in their laws for the effective punishment, as crimes, of the acts prohibited in this Convention, which laws shall take into account all of the provisions of this Convention and each such High Contracting Party shall, subject to articles VII and VIII, try and upon conviction punish offenses committed within its jurisdiction.

Article VII. This article contains a broad jurisdictional provision.

The United States agrees with the principle set forth in the draft convention, in article IX that where genocide is committed by or with the connivance of the State the accused individuals should be tried by an international court. All other cases would involve acts against the laws of the State where they are perpetrated.

A second reason for opposing this provision as submitted is that it is obviously liable to be abused. The broad scope of genocide would make it relatively easy for a State to claim jurisdiction of aliens on this ground when the real purpose is political retribution.

A third reason for opposing the provision is that it would apparently seek to establish a rule of law applicable to nationals of States which have not consented to it, namely, such States as may not ratify the convention.

A suggested text on jurisdiction is contained above under the comment on the preceding article. It is suggested that the following be added to this suggested article:

> Where such acts were committed outside its jurisdiction, the High Contracting Party having an offender within its jurisdiction may, subject to articles VI, VII and VIII, and with the express consent of the State where the act was committed, itself try and upon conviction punish such offender.

Article VIII. The United States accepts the principle that the crimes defined in this convention (not merely "genocide") shall not be deemed to be political offenses.

Because of the fact that extradition is a technical process, involving as it does, the safeguarding of human rights and the promotion of the administration of justice, with respect to which a large network of laws and treaties have been evolved, it is believed that instead of incorporating an entire extradition convention on the subject of the crimes covered by this agreement, it would be preferable to provide that each High Contracting Party pledges itself to grant extradition in these cases in accordance with its laws or treaties. The United States therefore suggests that this article (renumbered VI) be recast to read:

> The High Contracting Parties agree that the crimes defined in this Convention shall not be considered political crimes and shall be ground for extradition.
> Each High Contracting Party pledges itself to grant extradition in such cases, in accordance with its laws or treaties.

Article IX. It is submitted that the wording of the article, as drafted, is faulty. The person is apparently to be found "guilty" of the crime before he is delivered up for trial by the international tribunal. It is suggested that a better wording would be a text reading somewhat as follows (renumbered article VII):

> Each High Contracting Party pledges itself to commit to such permanent or *ad hoc* international penal tribunal as is established pursuant to article VII, persons charged with offenses under this Convention in the following cases:
> 1. Where the High Contracting Party is unwilling itself to try such alleged offenders, be they nationals or non-nationals in conformity with article V, or to grant their extradition in conformity with article VI.
> 2. Where the alleged acts have been committed by individuals acting as organs of the State or with its support or toleration.
>
> The provisions of the present Convention shall not prejudice such jurisdiction as may be conferred upon the permanent international penal tribunal herein referred to.

The final paragraph of this proposed article recognizes that it is desirable that the jurisdiction of the contemplated permanent international penal tribunal should not be prejudiced by provisions of the present Convention.

Article X. The provisions contained in the respective appendices with reference to the subject of conferring on an international tribunal jurisdiction "in all matters connected with international crimes", or jurisdiction "to try crimes of genocide" are extremely detailed. The task of drafting such a convention at least equals that of drafting a convention on genocide. That task should be undertaken as a task separate and apart from the drafting of a convention on genocide. The report of the Committee on the Progressive Development of International Law and its Codification draws attention to the possible desirability of an international penal authority. Moreover, the attachment of such a convention to the instant agreement might well provoke such controversy as to cause the failure of adoption of the convention on genocide. For these reasons, the position is taken that it would be preferable to provide for the establishment of *ad hoc* tribunals to be superseded by a permanent international penal tribunal with appropriate jurisdiction at such time as this may be possible. That this is feasible, is demonstrated by the fact that the Nürnberg Tribunal was an *ad hoc* tribunal. While it would probably have been preferable for the nations to have had a previously established international penal tribunal to which those cases could have been referred, it is submitted that the problem of the institution of such a tribunal, competent to try international crimes generally, is of such a magnitude as to necessitate a separate project, having the most careful consideration, and inviting the largest number of States possible to become party thereto.

So far as the establishment of a permanent international penal tribunal is concerned, consideration should be given in the first instance to the subject by the proposed international law commission. The international law commission might well give consideration, in this connexion, to the possible desirability of providing for injunctive relief and also of providing for recovery of damages on behalf of the victims or survivors of acts made unlawful by the present convention.

It is therefore suggested that an article be included in the convention, reading somewhat as follows (article VII):

> The High Contracting Parties agree to take steps, through negotiation or otherwise, looking to the establishment of a permanent international penal tribunal, having jurisdiction to deal with offenses under this Convention. Pending the establishment of such tribunal, and whenever a majority of the States party to this Convention agree that the jurisdiction under article VIII has been or should be invoked, they shall establish by agreement an *ad hoc* tribunal to deal with any such case or cases.

> Such an *ad hoc* tribunal shall be provided with the necessary authority to indict, to try, and to sentence persons or groups who shall be subject to its jurisdiction, and to summon witnesses and demand production of papers and documents, and shall be provided with such other authority as may be needed for the conduct of a fair trial and the punishment of the guilty.

Article XI. Because of the possibility that members of organizations may use the organizations as tools in their endeavour to commit genocide, and the organization may thus be used unwittingly in the commission of the crime it is thought that the draft should read (article IX):

> The High Contracting Parties pledge themselves to cause the disbandment of any group or organization which, by the judgment of any domestic or international tribunal acting pursuant to this Convention, has been found guilty of participating in any act prohibited by this Convention.

Article XII. This article involves the competence of the United Nations to take measures for the suppression or prevention of crimes failing within the scope of the convention. It is suggested that a more satisfactory wording of article XII would be (renumbered article X):

> The High Contracting Parties, who are also Members of the United Nations, agree to concert their action as such Members to assure that the United Nations takes such action as may be appropriate under the Charter for the prevention and suppression of genocide.

Article XIII. It is suggested that this article is not sufficiently precise to be of value. The formulation of satisfactory procedures on this point is a matter of difficulty since while the International Court of Justice is normally the proper organ to award damages against a State, any jurisdiction which it might exercise in this case might result in conflict with a decision of the penal tribunal. It is thought that attention should be given to the problem of damages by the international law commission in formulating plans for a permanent international penal tribunal. (See comment on article X.) Until such tribunal is formed it is proposed to vest the *ad hoc* tribunal referred to in the comment under article X with jurisdiction to award damages. This could be done by adding the following provision to the article already proposed at that point (new article VII):

> In addition, such an *ad hoc* tribunal shall also be authorized to assess damages on behalf of persons found to have sustained losses or injuries as a result of the violation of this Convention by any High Contracting Party. Prior to the assessment of any such damages any State alleged to have violated the Convention, shall be given an opportunity to be heard and to submit

> evidence on its behalf. Each High Contracting Party agrees to pay such damages, and costs, as may be assessed against it as a result of its failure to comply with the terms of the Convention. The *ad hoc* tribunal shall have authority to determine the method of distribution and payment of any amounts so awarded.

Article XIV. The words "between any of the High Contracting Parties" should be inserted after the word "Disputes". Only States may be parties to cases before the court.

Because of the jurisdiction which may be conferred upon an international tribunal, as indicated above, it seems desirable in order to prevent concurrent or conflicting jurisdiction, to add the following proviso to this article: "provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in article VII."

Article XV. No comment.

Article XVI. Insert the phrase "to accede" after the word "invitation" in paragraph 1 (first draft), if it is to be adopted.

The second draft is preferred. However, the phrase "to sign" should be inserted after the word "invitation" in paragraph 1, and the words "deposited with" should be inserted in the place of "transmitted to" in two instances, that is to say in the second and fourth unnumbered paragraphs. Whether the Economic and Social Council is the appropriate body to issue the invitations to sign the convention will need to be determined at the time of the drafting of the agreement. Possibly "the General Assembly" should be substituted for "the Economic and Social Council."

Article XVII. An article on the subject of "reservations" should be omitted.

Article XVIII. 1. In paragraph 1, delete the words "the accession or…" and insert instead "instruments of". Also change "and" to "or"; and delete "s" in the word "ratifications". It is believed that the convention should provide for its coming into force upon the deposit of ratifications by a substantial number of States. It is suggested that twenty might be an appropriate number.

2. In paragraph 2 insert the words "Ratifications or" before the word "Accessions" at the beginning of the paragraph. Also delete the words

"receipt by" and insert instead "their deposit with" before the words "the Secretary-General of the United Nations" at the close of the paragraph.

Article XIX. The first draft is preferred.

Article XX. It is suggested instead of the words "become less than…" the words "become fifteen or less" be inserted.

Article XXI. The following alternative text is submitted:

> Upon receipt by the Secretary-General of the United Nations of written communications from one-fourth of the number of High Contracting Parties, requesting consideration of the revision of the present convention and the transmission of the respective requests to the General Assembly, the Secretary-General shall transmit such communications to the General Assembly of the United Nations.
> The General Assembly shall decide upon the steps, if any, to be taken in respect of such requests.

Article XXII. The following text is submitted for insertion in the place of this article:

> The Secretary-General of the United Nations shall notify all Members of the United Nations and non-member States referred to in article XIII of all signatures, ratifications and accessions received in accordance with articles XIII and XIV, of the date upon which the present Convention has come into force, of denunciations received in accordance with article XV, of the abrogation of the Convention effected as provided by article XVI, and of requests for revision of the Convention made in accordance with article XVII.

Article XXIII. The United States suggests the following redraft of this article renumbered XIX):

1. The original of this Convention shall be deposited in the archives of the United Nations.
2. A certified copy thereof shall be transmitted to all Members of the United Nations and to non-member States referred to under article XIII.

Article XXIV. No comment.

> *Note*. The communication of 18 October 1947 from the Secretary of State of the United States of America (document A/401/Add. 2) appended a revised draft convention on genocide incorporating the suggested changes detailed above.

6. Communication received from France

Ministry of Foreign Affairs
Paris, 7 October 1947

The Secretariat of the United Nations, by letter No. 605-S-1-1/EG of 21 August 1947, requested the French Government to submit such observations or comments as it might wish to make on the draft convention on the crime of genocide prepared by the Secretariat.

The French Government has the honour to offer the following comments:

1. A country with liberal traditions like France, whose Constitution and institutions respect the equality of the human races cannot but support a measure designed to prevent the recurrence of the racial persecutions whereby the Nazi regime covered Europe with blood, and to make the commission of all similar crimes impossible.
2. Nevertheless, the French Government, anxious to make the said convention more effective by clarifying it and placing it in its proper framework, regrets that the question of genocide was not considered in correlation with the principles affirmed in the statute and sentences of the Nürnberg Tribunal, and as a parallel to the conception of crime against humanity, of which genocide is merely one of the aspects.

It considers that the draft convention submitted by the Secretariat is not so much a convention as a maximum programme from which future experts may draw the material for a convention; moreover, this draft is too much concerned with introducing anti-genocide clauses into the body of domestic law of each State – clauses which would seem to be of no more than relative value since this crime can be committed only with the complicity of Governments.

The French Government considers that the definition of genocide should be:

(*a*) Limited to physical and biological genocide, for to include cultural genocide invites the risk of political interference in the domestic affairs of States, and in respect of questions which, in fact, are connected with the protection of minorities;

(*b*) Conditional on some culpable act or omission by the State. According to the French conception, the punishment of this crime, as such, should therefore be restricted to rulers, the agents themselves to be prosecuted and punished by international courts (since the courts of their own countries take no action), but on a charge of murder and as common-law criminals.

It does without saying that the French Government is willing to participate without delay in any discussion likely to lead to the drafting of a convention based on the foregoing considerations. If it refrains from lengthy comment on a subject which it feels deserves the most careful attention of the United Nations it is because its representative on the Committee on the Progressive Development of International Law and its Codification has already submitted a memorandum on this subject, published by the Secretariat on 19 May last as document A/AC.10/29.

Annex 7

UN Economic and Social Council, Ad hoc Committee on Genocide, *Summary Record of the Twentieth Meeting on 26 April 1948*, E/AC.25/SR.20 (4 May 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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United Nations ECONOMIC AND SOCIAL COUNCIL | *Nations Unies* CONSEIL ECONOMIQUE ET SOCIAL | UNRESTRICTED E/AC.25/SR.20 4 May 1948 ORIGINAL: ENGLISH

AD HOC COMMITTEE ON GENOCIDE
SUMMARY RECORD OF THE TWENTIETH MEETING

Lake Success, New York
Monday, 26 April 1948 at 2.00 p.m.

Present:

Chairman:	Mr. J. MAKTOS	(United States of America)
Vice-Chairman:	Mr. Morozov	(Union of Soviet Socialist Republics)
Rapporteur:	Mr. Azkoul	(Lebanon)
Members:	China	Mr. Lin Mousheng
	France	Mr. Ordonneau
	Poland	Mr. Rudzinski
	Venezuela	Mr. Perez-Perozo
Secretariat:	Mr. E. Schwelb	(Assistant Director, Division of Human Rights)
	Mr. E. Giraud	(Committee Secretary)

NOTE: Corrections of this summary record provided for in the rules of procedure should be submitted in writing within the prescribed period to Mr. Delavenay, Director, Official Records Division, Room CC-119, Lake Success. Corrections should be accompanied by or incorporated in a letter written on headed notepaper and enclosed in an envelope marked "Urgent" and bearing the appropriate symbol number.

DRAFT ARTICLES FOR INCLUSION IN THE CONVENTION ON GENOCIDE PROPOSED BY THE DELEGATION OF CHINA ON 16 APRIL 1948 (Document E/AC.25/9) *Article III* (Document E/AC.25/9) (*Competent Courts*)

The CHAIRMAN opened the meeting by reading the amendment proposed by the United States of America to "Article III" of the Chinese proposal. With the exception of the word "genocide" which had been replaced by "*any of the acts enumerated in Article III*", and of the word "*act*" which had been substituted for "crime" the text was the same as that communicated to the Secretariat on 23 April 1948.

Mr. MOROZOV (Union of Soviet Socialist Republics) proposed that the text of the first paragraph of the United States proposal should read as follows: "The High Contracting Parties pledge themselves to prosecute the persons guilty of genocide, as defined in the present Convention, as responsible for criminal offences, submitting the cases of these crimes committed within the territory under their jurisdiction for trial by national courts in accordance with the national jurisdiction of that country". This stressed the obligation to prosecute, and that the crime should come up before the domestic court of the country in which it was committed. The Article should be taken as a whole instead of considering separately the paragraphs relative to domestic and international jurisdiction, as suggested by the CHAIRMAN.

The CHAIRMAN put the Soviet proposal to the vote, which resulted in an equal division of 3 to 3 with 1 abstention.

As the previous decision accepting reference to international jurisdiction was sustained by a vote of 4 to 3, the Chinese text continued to be taken as the basis for discussion with the amendment proposed by the United States of America.

It was decided by a vote of 5 with 2 abstentions to retain the word "shall" in the first sentence, as proposed by Mr. RUDZINSKI (Poland), in order to stress the obligation to punish.

Mr. LIN (China) believed that the words "…by a competent international tribunal" suggested that there were several international courts in existence, while actually no international criminal court had yet been established.

[p. 2-line 26] The CHAIRMAN proposed the substitution of the words "…or by such an international tribunal as may be established".

Mr. RUDZINSKI (Poland), although opposed to the principle of international jurisdiction, suggested the words "…or by such an international *criminal* tribunal as *may* be established", and made it clear that no obligation existed under the present Convention to create such a tribunal.

Mr. ORDONNEAU (France) thought the word "may" put doubt on the establishment of the international court. He proposed, supported by the CHAIRMAN, that the sentence should read: "…by such a competent international tribunal as will be established in the future". An explanation could be embodied in the Report.

Mr. MOROZOV (Union of Soviet Socialist Republics) said he objected to the establishment of international jurisdiction for this category of crimes.

Mr. AZKOUL (Lebanon) supported the CHAIRMAN'S proposal to divide the amendment of the United States of America into two parts.

It was decided to consider the part on domestic tribunals separately from that on international jurisdiction, for the convenience of those who had opposed the latter in principle.

Mr. AZKOUL (Lebanon) as Rapporteur, explained that the wording **[p. 3-line 7]** "as may be established" had been used to indicate that, although the majority was in favour of an international court, the details, such as date of establishment, had not yet been decided.

Mr. PEREZ-PEROZO (Venezuela), objecting to any reference to an International Court, opposed the whole Article. The Convention should contain only specific obligations on the part of States.

It was decided unanimously that the first part of the Article should read: "*Any of the acts enumerated in Article III shall be punished by any competent tribunal of the State in the territory of which the act is committed…*"

It was decided by a vote of 4 to 3 that the remaining part of **[p. 3-lines 18–19]** *the paragraph should read*: "*. . . or by such a competent international tribunal as may be established in the future*".

The proposal of Mr. AZKOUL (Lebanon) to reconsider the question of universal jurisdiction of national courts was rejected by a vote of 4 to 2 with one abstention.

The text of the first paragraph of the amendment of the United States of America as a whole was approved at first reading by a vote of 4 to 3.

Mr. ORDONNEAU (France) asked the Committee to reverse its previous decision on the principle of including the reference to international jurisdiction as embodied in the second paragraph of the amendment of **[p. 3-line 28]** the United States of America. The question had been decided prematurely. There should be no ruling at present on the scope of the International Court's jurisdiction. He opposed inclusion of the paragraph in the Convention although he would be in favour of mentioning the question in the Report.

It was decided by a vote of 6 with one abstention to reconsider the question of the scope of the international tribunal's jurisdiction.

Mr. AZKOUL (Lebanon) supported by the representative of China proposed that the paragraph should be included in the Report together with the views expressed, and should be deleted from the Convention.

Mr. PEREZ-PEROZO (Venezuela) was against any mention of the Court in either the Convention or the Report.

It was decided by a vote of 5 to 1 with 1 abstention not to include the paragraph in the convention, but by a vote of 4 to 3 to include it in the Report.

Article IV of the Draft Articles Proposed by China (document AC.25/9) (*Action by the United Nations*)

Mr. MOROZOV (Union of Soviet Socialist Republics) proposed an amendment to Article IV of the Chinese draft. It did not disagree in principle with the Chinese text, but stressed the obligation for the contracting parties to communicate to the Security Council every act of

genocide as well as every case of violation of the convention in order that the Council could take necessary measures in accordance with Chapter VI of the Charter.

The amendment proposed by the Union of Soviet Socialist Republics was rejected by a vote of 5 to 2.

Mr. PEREZ-PEROZO (Venezuela) proposed that the text should nevertheless mention the violation of the Convention as well as actual acts of genocide.

Mr. RUDZINSKI (Poland) said that a difficulty would arise if the amendment were adopted because violation of the Convention might have legal consequences which were not quite the same as suppression of genocide. He quoted Article 36 paragraph 2(c) of the Statutes [sic] of the International Court of Justice.

The CHAIRMAN proposed the following wording of the Chinese text: "Any Signatory to this Convention may bring to the attention of any competent organ of the United Nations cases of violation of the Convention, and may call upon such organ to take such action as may be appropriate. . . "

Mr. LIN (China) said his wording was broader in scope. Those who were signatories of the Convention could draw attention to acts by non-signatories.

Mr. RUDZINSKI (Poland) said there were two separate questions involved: 1. The right of Member States to request the United Nations organs to take action to suppress Genocide; 2. The violation of the Convention. Genocide might be committed in a State who had not become a Party to the Convention and would not be technically a violation of the Convention. A clause should be added to the effect that cases of violation of the Convention might be brought to an organ of the United Nations for appropriate action.

Mr. MOROZOV (Union of Soviet Socialist Republics) proposed that the words "*pledges itself*" should be substituted for "May bring".

Mr. RUDZINSKI (Poland) proposed the substitution of the words "Any member of the United Nations" for "Any Signatory. . . "

Mr. ORDONNEAU (France) pointed out that the Convention would not apply to all members of the United Nations.

Mr. LIN (China) supported by the CHAIRMAN, said non-members might ratify the Convention.

Mr. MOROZOV (Union of Soviet Socialist Republics) said the question was twofold: 1. The obligation of the member under the Convention to report acts of genocide; 2. What organ should be informed of the facts and circumstances.

The proposal to substitute a more obligatory term for "may bring" having been rejected by a vote of 3 to 2 with 2 abstentions and likewise the proposal to change "signatory" to "Member", by a vote of 5 to 1 with 1 abstention, the Chinese text of "Article IV" as amended by the representative of POLAND and supported by the representative of VENEZUELA, **[p. 5-lines 10-14]** *was adopted by a vote of 6 with 1 abstention, to read: "Any Signatory to this Convention may bring to the attention of any competent organ of the United Nations any cases of violation of the Convention to take such action as may be appropriate under the Charter for the prevention and suppression of genocide*". **[p. 5-lines 10-14 end]**

The meeting adjourned at 4.30 p.m. until 4.45 p.m.

THE POLISH PROPOSAL ON EXTRADITION

Mr. LIN (China) supported the Polish proposal.

The CHAIRMAN supported the text with the words "*a ground for*" substituted for "a cause", with the substitution of "*each High Contracting Party*" for "The High Contracting Parties…", "*The acts enumerated in Article III*" for "Genocide" in the first paragraph, and "*in such cases*" for in cases of genocide" in the second paragraph.

Mr. PEREZ-PEROZO (Venezuela) proposed that "the laws" should be amended to read "*its legislation*".

Mr. RUDZINSKI (Poland) agreed with the proposed amendments.

The text of the Polish proposal as amended by the United States of America and Venezuela was adopted unanimously to read as follows:

The High Contracting Parties declare that *the acts enumerated in Article III* shall not be considered as political crimes and therefore shall be *a ground for* extradition.

Each High Contracting Party pledges itself to grant extradition *in such cases* in accordance with *its legislation* and treaties in force.

SECRETARIAT DRAFT CONVENTION (documents E/447 and E/623)

Article XIV of the Secretariat Draft Convention

(*Settlement of disputes concerning the interpretation of the Convention by the International Court of Justice*)

The proposal to reconsider a previous decision regarding the banning of organizations was rejected by a vote of 3 to 2 with 2 abstentions.

The CHAIRMAN read the comments by the United States of America on **[p. 5-line 40]** page 27 of document E/623. a case should go before the International Court only after it had been disposed of by the domestic court. It would be more **[p. 6-line 1]** consistent to say "…passed upon by a competent national criminal tribunal". Conflict of jurisdiction was undesirable.

Mr. MOROZOV (Union of Soviet Socialist Republics) objected to the inclusion of Article XIV in the Convention. Matters concerning genocide should be handled by national courts. Defining genocide as something coming under international jurisdiction would be interfering with the sovereign rights of states.

Mr. RUDZINSKI (Poland) said that in the Statutes [sic] of the International Court the "interpretation" of a treaty was a ground for compromise and for referring to the International Court. It was therefore unnecessary to have it in the Convention. It might be charged that some tribunal had not applied the Convention properly, and that might be a ground for an appeal from a national court to an international court. The Article as it stood might raise some difficulties concerning the application of the Convention.

Mr. ORDONNEAU (France) believed there was no danger in saying that disputes could be submitted to the Court, and there was some advantage

in speaking of "interpretation". It was a question of interpretation only and did not reflect on how the provision was being applied.

It was decided by a vote of 5 to 2 to accept the original French text as amended by the United States of America, with the following wording:

> Disputes *between any of the High Contracting Parties* relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.

It was decided by a vote of 4 to 1 with 1 abstention to add the following provisio [sic] *as proposed by the United States of America*:

> . . . provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal

PREAMBLE AND ARTICLE I – Soviet and French Amendments.

Mr. ORDONNEAU (France) explained that he did not propose to substitute his Article for the present Article I, but that the latter should become Article II.

Mr. MOROZOV (Union of Soviet Socialist Republics) said, there were many proposals for Article I which were co-related to the preamble. Unless a decision were first taken on the preamble, he would reserve his right to discuss Article I at second reading. The preamble should state the motives leading to the creation of the Convention, the significance of the facts dealt with, decisions on the measures to be taken as a logical conclusion, It should be the basis of the Articles, and should emphasize that genocide was a crime against humanity and was bound up with the "superior-race" theory.

Mr. ORDONNEAU said the Article he proposed would have a certain influence on the future wording of the preamble. It must also be decided **[p. 7-line 5]** whether certain juridical questions should be in Articles II and III. **[p. 7-line 5 ends]** Genocide was a crime against *humanity* which could be perpetrated *in time of war or peace*. Connection should be established between laws – between the Convention and the future work of the International Commission. There was no danger of confusion with the Nürnberg Charter, as suggested by the Representative of the

LEBANON, The preamble should contain historical considerations and the motives which led the High Contracting Parties to sign the Convention. It should contain no definitions or decisions. It could be discussed at the same time as Article I.

[p. 7-Rudzinski remarks] Mr. RUDZINSKI (Poland) said although it was true that "the crime of genocide was a crime against humanity" that was not a sufficient reason for it to be included in the Convention. It over-reached the provisions of the General Assembly Resolution No. 180(II). The opinion of the International Law Commission had to be taken into account.

The words "one of the gravest crimes against mankind" would avoid confusion. He proposed, supported by the Representative of FRANCE, the inclusion of the words "*. . . in time of war and in time of peace*" in order to avoid the difficulty raised by the Nürnberg Charter.

Mr. PEREZ-PEROZO (Venezuela) believed no mistake could be made if the wording in the General Assembly Resolution No. 96(I) were used, namely **[p. 7-line 25]** "*genocide is a crime against international law*".

It was decided by a vote of 6 to 1 to amend the wording of the Chinese preamble to read "Genocide is a grave crime against mankind".

It was decided by a vote of 5 to 1 with 1 abstention that genocide **[p. 7-line 29]** *constituted a crime against international law.*

The meeting rose at 6.30 p.m.

Annex 8

UN Economic and Social Council, Ad hoc Committee on Genocide, *Report of the Committee and Draft Convention drawn up by the Committee*, E/794 (24 May 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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AD HOC COMMITTEE ON GENOCIDE
(5 April – 10 May 1948)

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REPORT OF THE COMMITTEE AND DRAFT CONVENTION DRAWN UP BY THE COMMITTEE

(Dr. Karim AZKOUL – Rapporteur)

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REPORT OF THE COMMITTEE

REJECTED PROPOSAL

THE PRINCIPLE OF UNIVERSAL REPRESSION

The principle of universal repression by a national court in respect to individuals who had committed genocide abroad was discussed when the Committee considered the fundamental principles of the Convention.

Those in favour of the principle of universal repression held that genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime. Obviously in this case the national courts of that State would not enforce repression of genocide. Therefore, whenever the authorities of another State had occasion to arrest the offenders they should turn them over to their own Courts. The supporters of the principle of universal repression added that, since genocide was a crime in international law, it was natural to apply the principle of universal repression. They quoted conventions on the repression of international offences such as traffic in women and children, counterfeiting currency, etc.

The opposite view held that universal repression was against the traditional principles of international law and that permitting the courts of one State to punish crimes committed abroad by foreigners was against the sovereignty of the State. They added, that, as genocide generally implied the responsibility of the State on the territory of which it was committed, the principle of universal repression would lead national courts to judge the acts of foreign governments. Dangerous international tension might result.

A member of the Committee, while he agreed that the right to prosecute should not be left exclusively to the courts of the country where genocide had been committed, declared himself opposed to the principle of universal repression in the case of genocide. It is a fact, he said, that the Courts of the various countries of the world do not offer the same guarantee. Moreover, genocide is distinguished from other crimes under International Conventions (traffic in women, traffic in narcotic drugs, counterfeiting currency) by the fact that, though in itself it is not a political crime, as stated in Article IX of the Draft Convention, it nevertheless has or may have political implications. Therefore, there is a danger that the principle of universal repression might lead national courts to exercise a biased and

arbitrary authority over foreigners. This representative therefore proposed that jurisdiction be given to an international court to which States would surrender the authors of genocide committed abroad whom they had arrested and whom they would be unwilling to extradite.

The principle of universal repression was rejected by the Committee by *four votes* (among which France, the United States of America and the Union of Soviet Socialist Republics) *against two with one abstention*. (Eighth meeting – Tuesday, 13 April 1948).

During the discussion of Article VII the proposal to reverse the foregoing decision was rejected by *four votes against two with one abstention*. (Twentieth meeting – Monday, 26 April 1948).

ARTICLE VIII

(Action of the United Nations)

1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.
2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.

Observations

This Article was discussed at length when the Committee considered questions of principle, and it was discussed again when the Articles of the Convention were being drafted.

The representative of the Union of Soviet Socialist Republics proposed the following text:

> The High Contracting Parties undertake to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter.

In this connection there was disagreement on two main points:

1. Should provision be made for the intervention of a specific organ of the United Nations, in this case the Security Council, or should no organ be mentioned?

It was urged in favour of naming the Security Council that the commission of genocide was a grave matter likely to endanger world peace and therefore one which justified intervention by the Security Council, and that only the Security Council was capable of taking effective action to remedy the situation, that is to say to stop the commission of genocide.

It was argued against this point of view that, although the Security Council appeared to be the organ to which governments would most frequently wish to apply, it was undesirably to rule out the General Assembly, the Economic and Social Council or the Trusteeship Council. In some cases it would be of advantage to call on the General Assembly because it directly expressed the opinion of all Members of the United Nations, and because its decisions were taken by a majority vote with no risk of the right of veto preventing a decision.

The advocates of naming the Security Council replied that they did not exclude the possibility of referring the question to the General Assembly or adopting any other measures which the Security Council may deem necessary.

2. Should it be made compulsory for parties to the Convention to lay the matter before the organs of the United Nations or should they be merely given the right to do so?

It was argued in favour of compulsion that the gravity of genocide justified compulsory reference to the Security Council which organ would be free to assess the importance of the cases submitted to it and to take the necessary steps for the prevention and suppression of genocide. It was further pointed out that in accordance with the Charter, Members of the United Nations were already entitled to refer questions to that Organization and that nothing would be gained by mentioning this right in Article VIII of the Convention.

It was argued against this view that if a serious case of genocide occurred, it would certainly be submitted to the United Nations and that it was unnecessary to make into an obligation a right the exercise of which should be left to the judgment of governments.

The principle of compulsory notification was rejected by *three votes to two with two abstentions*. (Twentieth meeting – Monday, 26 April 1948 – afternoon).

Having rejected by *five votes to two* (Twentieth meeting – Monday, 26 April 1948 – afternoon) the text submitted by the representative of the Union of Soviet Socialist Republics, the Committee had to consider the text submitted by the representative of China which had been adopted as the basis of discussion.

This text with some amendments was adopted by *five votes to one with one abstention*. (Twentieth meeting – Monday, 26 April 1948 – afternoon) and became the first paragraph of the Article.

A second paragraph, adopted by *six votes with one abstention* was added. (Twentieth meeting – Monday, 26 April 1948 – afternoon).

The Article as a whole was adopted by *five votes to one with one abstention*.

The representative of the Union of Soviet Socialist Republics made a declaration with regard to his negative vote.*

ARTICLE IX

(Extradition)

1. Genocide and the other acts enumerated in Article IV shall not be considered as political crimes and therefore shall be grounds for extradition.
2. Each party to this Convention pledges itself to grant extradition in such cases in accordance with its laws and treaties in force.

Observations

This Article was included in the Convention, at the request of the representative of Poland.

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* Declaration of the representative of the Union of Soviet Socialist Republics:

In order really to combat genocide it is essential that the signatories to the Convention should undertake the obligation to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention, so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter. An appeal precisely to the Security Council would be fully in accordance with the gravity of the question of genocide.

The representative of the Union of Soviet Socialist Republics considers that Article VIII should read as follows in the Convention:

'The High Contracting Parties undertake to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter.'

There was no opposition and it was *unanimously adopted by the* members of the Committee.

However, the United States representative made a declaration concerning this Article.*

ARTICLE X

(Settlement of disputes by the International Court of Justice)

Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.

Observations

A member of the Committee requested that Article XIV of the Secretariat's draft* regarding the settlement of disputes relating to the interpretation or application of the Convention be re-inserted.

The representative of the Union of Soviet Socialist Republics opposed this proposal, recalling his opposition in principle to the establishing of an international court which, in his opinion, would be an infringement of the sovereignty of States and would amount to intervention in the internal affairs of the State.

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* Declaration of the United States representative:

With respect to the Article on extradition, the representative of the United States desires to state that until the Congress of the United States shall have enacted the necessary legislation to implement the Convention, it will not be possible for the government of the United States to surrender a person accused of a crime not already extraditable under existing laws. Moreover, the provision in the Constitution of the United States regarding *ex post facto* laws would preclude the government from granting extradition of any person charged with the commission of the offence prior to the enactment of legislation defining the new crime.

* This Article read as follows:

Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.

Another representative, supporting the conferring of such competence on the International Court of Justice, pointed out that since the Convention elsewhere conferred competence on an international criminal tribunal (Article VII, last sentence), it was desirable to avoid any concurrent or conflicting jurisdiction.

He therefore proposed, in order to avoid disputes regarding competence, that the following formula be added to that proposed by the Secretariat:

> . . . provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international tribunal.

The first part of the Article conferring competence on the International Court of Justice was *accepted by five votes to two*.

The second part, including the proviso quoted, was *accepted by four votes to one with two abstentions*.

The Article as a whole was adopted by *four votes to three*.

The representative of Poland* and the representative of the Union of Soviet Socialist Republics** made a declaration with regard to their negative vote.

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* Declaration of the representative of Poland:

The inclusion in the Convention of the principle of an international criminal tribunal constitutes an obligation of the parties to this Convention, the contents of which are wholly unknown to them. The creation of an international criminal court whose jurisdiction could only be compulsory and not optional, is contrary to the principles on which the International Court of Justice and its Statute are based.

** Declaration of the representative of the Union of Soviet Socialist Republics:

Establishment of the system contemplated by Article X must inevitably lead to intervention by an international court in the trial of cases of genocide which should be heard by the national courts in accordance with their jurisdiction.

The representative of the Union of Soviet Socialist Republics bases his argument on the fact that the establishment of international jurisdiction for cases of genocide would constitute intervention in the internal affairs of States and be a violation of their sovereignty.

Consequently, in the opinion of the representative of the Union of Soviet Socialist Republics, Article X should be excluded.

Annex 9

UN General Assembly, Sixth Committee, Third Session, 97th Meeting, A/C.6/SR.97 (9 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

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Annex 9

NINETY-SEVENTH MEETING

Held at the Palais de Chaillot, Paris, on Tuesday, 9 November 1948, at 3.15 p.m.

Chairman: Mr. R.J. Alfaro (Panama).

46. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

Article VI (*conclusion*)

The Chairman called upon the Committee to settle the question of the drafting of article VI. He recalled that the representative of Australia had proposed (96th meeting) a text to replace the text of the *Ad Hoc* Committee as amended by the Soviet Union [*A/C.6/254*]. That text had been adopted by the Committee (93rd meeting), but its drafting was both ambiguous and incorrect. The representative of the USSR had approved the statement of the representative of Australia; the Committee was therefore faced with a simple question of drafting which could easily be settled.

Mr. Morozov (Union of Soviet Socialist Republics) expressed the view that, without a long discussion, the Committee should be able to adopt a satisfactory draft. He pointed out that the summary record of the 93rd meeting clearly indicated that the Chairman had put to the vote "the Soviet Union amendment to the effect that the words 'to provide criminal penalties for the authors of such crimes' should be inserted at the end of article VI". The Committee had adopted that proposal, which was in complete accord with the wishes of the USSR delegation. The English text of document A/C.6/254 was incorrect; it did not contain the word "effective" and did not correspond to the text upon which the Committee had agreed.

The delegation of the Soviet Union believed that the Committee should decide to restore the text of article VI which had been adopted at the 93rd meeting.

Mr. Zourek (Czechoslovakia) observed that the French text of article VI presented no difficulty; if the English text were incorrect, the procedure which had already been followed in similar cases should be adopted,

namely, the matter should be referred to the drafting committee which, on the basis of the French text, would ensure the concordance of the two texts.

Mr. DIGNAM (Australia) commented that both texts were vague in that they used the expression "the authors of such crimes" *(les auteurs de ces crimes)*. That was one of the reasons which had led him to propose a new text.

The CHAIRMAN thought that the question to be settled was very simple: the text of article VI, as it appeared in document A/C.6/254, was incorrect; the Australian delegation had proposed simple drafting amendments which would make it satisfactory. The Chairman proposed that the Australian text should be put to the vote immediately.

Mr. KAECKENBEECK (Belgium) recalled that at the 96th meeting he had stated that the text submitted by Australia changed the meaning of article VI, which had already been adopted, and that he therefore could not vote for that text. The USSR amendment to the text of the *Ad Hoc* Committee provided for the insertion of an additional provision for purposes of clarification. That addition should be included in such a way that the general meaning of the article remained unchanged.

The representative of Belgium stated that certain delegations had drafted a text which might prove satisfactory to the Committee; it would be advisable to consider it before voting on the text proposed by the Australian delegation.

Mr. DE BEUS (Netherlands) stated that he had no objection to the text proposed by the Australian delegation. Nevertheless, since that text had raised difficulties, some delegations had drafted a new text which seemed to correspond more closely to the text of the *Ad Hoc* Committee as amended by the Soviet Union.

The representative of the Netherlands read the new text which was distributed at the meeting.

Mr. FEDERSPIEL (Denmark) noted that the USSR amendment contained the word "effective"; that word was very important and it would be well to include it in the new text which had been submitted to the Committee.

Mr. Dignam (Australia) stated that the new text which had been submitted was completely acceptable to him and that he would approve it if the delegation of the Soviet Union also agreed to it.

Mr. Morozov (Union of Soviet Socialist Republics) stressed the fact that the Committee could decide only on the question of drafting, because the decision reached at the 93rd meeting on the principle of the Soviet Union amendment could not be changed except by a two-thirds majority.

Mr. Morozov pointed out that the word "effective" appeared in the USSR amendment and he requested the insertion of that word in the proposed text.

The Chairman put to the vote the text jointly drafted by several delegations, with the addition of the word "effective" [*A/C.6/254/Rev.1*].

The revised text of article VI was adopted by 36 votes to none, with 2 abstentions.

Article VII

The Chairman called for discussion of article VII of the draft convention.

He recalled that the Committee had before it various amendments to the text of the *Ad Hoc* Committee, submitted by the following delegations: Uruguay [*A/C.6/209*]; Union of Soviet Socialist Republics [*A/C.6/215/Rev.1*]; Belgium [*A/C.6/217*]; Iran [*A/C.6/218*]; United States of America [*A/C.6/235*]; United Kingdom [*A/C.6/236/Corr.1*].

In addition, the Committee had before it two draft resolutions presented respectively by the delegations of Iran [*A/C.6/218*] and the Netherlands [*A/C.6/248*].

Mr. Kaeckenbeeck (Belgium) recalled that his delegation had also presented an amendment to the United Kingdom amendment [*A/C.6/252*]; the Belgian amendment proposed a constructive solution of the entire problem of an international tribunal.

Mr. Spanien (France) recalled that France had submitted an alternative draft [*A/C.6/211*] which the Chairman had stated would be considered in the course of the discussion. In view of that statement by the

Chairman, the Committee did not have a formal French amendment for its consideration. Henceforth, the French delegation would follow the normal procedure and submit the amendments which it considered appropriate.

Nevertheless, Mr. Spanien requested that he should be allowed to submit an amendment [*A/C.6/255*] whereby the words "or by the international Criminal Court constitute as follows" would be substituted for the words "or by a competent international tribunal."

At the request of Mr. Correa (Ecuador), Mr. Kerno (Assistant Secretary-General in charge of the Legal Department) stated that, notwithstanding a number of technical difficulties, the Secretariat would try to submit a synopsis of the amendments to article VII at the next meeting of the Committee.

Mr. Morozov (Union of Soviet Socialist Republics) suggested that the Committee should consider the amendments by grouping those which had points in common. Thus several delegations had proposed the deletion of the final words of the text drafted by the *Ad Hoc* Committee, namely, "or by a competent international tribunal". It would be advisable to consider those amendments first and to reach a decision on them before examining the other proposals. If the principle of those amendments were adopted, there would be no need to consider any other amendments which proposed that the international tribunal should be mentioned in article VII.

Mr. Maktos (United States of America) supported the suggestion of the USSR representative. The Committee should first reach a decision on the principle of recourse to an international tribunal; it could perhaps consider next the drafts proposing the establishment of an international criminal court or reference of the question to the International Law Commission; finally it could consider the other amendments.

Mr. Kaeckenbeeck (Belgium) concurred in the opinion of the representatives of the Soviet Union and the United States. He stated that the amendments of the United Kingdom and Belgium should be considered together and independently of the other amendments. Their fate must not be prejudiced by the adoption of prior decisions.

Mr. Raafat (Egypt) expressed the view that the method which had been suggested was acceptable in that it proposed the grouping of the

amendments; first, however, there should be a general discussion which would enable all delegations to explain their views on the question as a whole.

Mr. Abdoh (Iran) supported the suggestion of the representative of the USSR. He observed that it would be advisable to consider the draft resolutions submitted by the Netherlands and Iran at the same time as the deletion of the final words of article VII; certain delegations, indeed, wished to have those words deleted because the question of the establishment of an international tribunal had not been settled; that question, however, was dealt with in the two draft resolutions.

The Chairman stated that the discussion would be devoted principally to the amendments proposing the deletion of the reference to an international tribunal, but that speakers could speak on other amendments which had been submitted.

Mr. Raafat (Egypt) was of the opinion that the amendments before the Committee could be placed in three categories.

In the first place, there were the amendments which restricted competence to national courts; some of those amendments recognized only the competence of the courts of the country in whose territory the act of genocide had been committed, while others advocated recognition of the competence of courts other than those of the country in whose territory the act had been committed, if extradition had not been requested.

In the second place, there were the amendments which restricted competence to an international tribunal, even if acts of genocide were committed by private individuals. That principle was difficult to accept, at least for the time being.

Between those two extremes, there were composite proposals for the recognition of the competence both of national courts and of an international tribunal. In that case two principal questions arose. What would be the competent international tribunal? How could a matter be referred from a national court to an international tribunal? To settle the first question, certain delegations proposed the establishment of an international criminal court, while others contemplated the establishment of a criminal division of the International Court of Justice. With regard to the second question, the United States proposed that the international tribunal should

be competent when national courts failed to act; the United Kingdom considered that national courts should be competent to deal with crimes committed by private individuals and the international tribunal with crimes committed by Governments.

Having considered the various categories of amendments in general, the representative of Egypt stated that his delegation would support the United Kingdom amendment.

Mr. DE BEUS (Netherlands) considered that the manner in which the punishment of genocide was to be organized was one of the most important questions which arose in connexion with the whole problem; unless that punishment was assured, the convention would have no real value.

The difficulty was that, when genocide was committed, encouraged or tolerated by a State, the national tribunals would obviously not be in a position to punish the guilty. How could that deficiency be remedied?

The Netherlands representative thought it necessary to distinguish between the responsibility of a State which violated a convention and the criminal responsibility of individuals who committed a crime. With respect to the first, there existed competent international tribunals, such as the International Court of Justice and international arbitration courts; with respect to the second, there was no international court with jurisdiction over individuals. The International Court of Justice, under Article 34 of its Statute, was not competent to try individuals. It could be seized only of disputes between States brought before it by a State; even in that case, its jurisdiction did not extend to the criminal field because the concept of the criminal responsibility of States was not yet generally accepted and because, even if it were accepted, there existed no supranational authority capable of enforcing judgments rendered against States.

Mr. de Beus further remarked that three methods had been proposed to ensure the punishment of genocide committed or tolerated by a State.

The first method was to leave such punishment entirely to national courts which would, of course, be competent to try only individuals who had committed the crime. The United Kingdom amendment approached the problem from the point of view of the responsibility of States, suggesting that the matter should be referred to the International Court of Justice; that suggestion fully took into account existing conditions. But the amendment was defective in two respects. Since individuals, under

the terms of that amendment, were to be tried by national courts, officials were ensured impunity, it being improbable that they would be prosecuted by the Government on whose orders they had acted; moreover, no provision was made in the amendment for cases where the penalties imposed by national courts upon those who were guilty of the crime were not sufficiently severe. The Uruguayan amendment made provision for the latter type of case by considering undue lenience on the part of national courts as a violation of the convention which could be brought before the International Court of Justice by any signatory State. The Netherlands delegation approved that amendment in principle, while reserving its position with respect to the procedure proposed.

The second method was to declare that only an international tribunal was competent to punish acts of genocide. That was the method advocated in the French amendment. In theory, that method was the most effective of all; in practice, however, it was offset by the fact that no international criminal court yet existed and by the difficulty of establishing one in the near future.

The third method, which fell between those two extremes, was that adopted in the draft of the *Ad Hoc* Committee; it included both kinds of punishment, by national and international tribunals. That system was usefully elaborated in the United States amendment, under which the jurisdiction of the international tribunal would be subject to a finding that national tribunals had failed in their duty.

The Netherlands delegation took the following position in regard to the various problems raised: it felt that the criminal responsibility of individuals and the international responsibility of States should be dealt with separately, either in two different articles or in two distinct paragraphs in article VII; it supported the United Kingdom amendment, provided it were inserted either in article VIII or in article X and supplemented by provisions for the punishment of individuals whose acts had been committed with the participation or tolerance of the State; it was in favour of a provision such as that contained in the draft of the *Ad Hoc* Committee concerning the punishment of individuals, together with a reference to an international tribunal; it was greatly interested in the proposal contained in the French amendment to set up a criminal division of the International Court of Justice. However, as the question of setting up an international criminal court required very thorough study, the Netherlands delegation

urged the Committee to adopt its draft resolution requesting the International Law Commission to undertake that study.

Mr. Inglés (Philippines) recalled having already stressed (95th meeting) that, if the convention were not to remain a dead letter, it was necessary to establish an international criminal court to ensure the punishment on an international level of those who might escape with impunity either because their national courts were not competent to deal with them owing to particular constitutional laws, or because they received favourable treatment thanks to the connivance or indifference of the national criminal courts.

He fully agreed with the point of view of the French delegation, namely, that genocide was a collective crime of such proportions that it could rarely be committed except with the participation or the tolerance of the State; it would be paradoxical to leave to that same State the duty of punishing the guilty.

It was true that no international criminal court as yet existed. Having duly noted that fact, the truly realistic approach would be to try to remedy that omission and thus to act in conformity with resolutions 96(I) and 180(II) of the General Assembly, which had declared genocide to be an international crime entailing not only national but international responsibility.

The Philippine delegation supported the principle enunciated in article VII of the draft convention, namely, that international as well as national tribunals should be competent to deal with genocide. It would vote against any amendment rejecting that principle and would support all amendments or resolutions which would develop it further.

Mr. Manini y Ríos (Uruguay) stated that the convention could not be effective unless it provided for an international tribunal to remedy any failure on the part of national courts to take punitive measures. It was in that spirit that his delegation had proposed its amendment offering a solution of the problem; it was, however, ready to accept any other satisfactory formula based on the same principle.

There was no country, apparently, which did not already provide, in its penal code, for the punishment of acts constituting genocide. The con-

vention would therefore be devoid of meaning if, terming genocide an international crime, it did not organize its punishment on an international level. The fact that there did not yet exist an international criminal court capable of ensuring such punishment did not justify even the temporary abandonment of the principle of such punishment; that principle should be proclaimed immediately. It would, of course, take some time to carry it out in practice, as a text had to be prepared defining the competence and the procedure of the future tribunal, but the International Law Commission should be able to do that within a reasonable period.

During the interval between the entry into force of the convention and the adoption of texts laying down the procedure of the international tribunal, article VII would serve as a warning to all those who contemplated committing genocide; they would know that they would not evade punishment, even though their trial might have to wait until the international machinery for that purpose had been set up.

Mr. Bammate (Afghanistan) would vote in favour of the amendments proposing the deletion of the final phrase of article VII, concerning the competence of the international tribunal; the wording was unsatisfactory, since it gave no indication as to the nature of the tribunal, its composition or its procedure. At the same time he would in no way oppose the principle of international punishment.

In theory, the setting up of an international tribunal seemed justified by the fact that genocide could not effectively be punished by national courts if it were committed – as was generally the case – with the connivance of the State. Moreover, it would be logical that an international crime should be punished on an international level.

But logic and theory must be subordinated to practical considerations. Punishment on an international level could not in fact be achieved, at least not in the most serious cases, since it was impossible to see how a sentence pronounced by an international tribunal could be carried out. In those circumstances the prestige of the tribunal would soon be lowered and the very principle that genocide must be punished would be discredited. Moreover, many States appeared to be so jealous of the prerogatives of their national sovereignty that they might refuse to ratify the convention if it infringed too seriously upon those prerogatives.

The representative of Afghanistan summed up his argument by stating that article VII placed the Committee on the horns of a dilemma. On the one hand, it could confine itself to providing for punishment on a national level; that principle was apparently recognized by all States, but such punishment would often prove ineffective or inadequate. On the other hand, it could adopt the principle of punishment on an international level; but however desirable that method might be, its complete implementation appeared impossible to achieve in practice in the current condition of international law; furthermore, it might prevent many States from ratifying the convention.

It was therefore necessary to find a compromise solution. Agreement appeared possible first, on the principle of punishment on a national level and, secondly, on the deletion of the final words of article VII, which lacked clarity. In addition, punishment should be carried to the international level, either by the adoption of a system of universal punishment, or by the conferment of jurisdiction upon an international tribunal, but in a manner which would not infringe upon the sovereignty of States and which would make possible, in practice, the execution of the sentences imposed.

The Afghanistan delegation would study with interest any suggestions to that effect.

Sardar Bahadur Khan (Pakistan) was of the opinion that the amendments aimed at deleting from article VII all reference to an international tribunal were not acceptable, as they would completely destroy the effectiveness of the convention.

National courts were already competent to punish all the acts covered by articles II and IV of the draft convention; there was no need for the convention to confirm that fact. Moreover, as genocide was almost always committed with the complicity or the tolerance of a State, it was obvious that the courts in that State would not only be unable to prosecute the rulers, they would not even be able to prosecute those who had committed the crime.

It was for that reason that the Pakistan delegation considered article VII of the draft convention of such importance. Provision for punishment on an international level was the only effective measure which would make it possible to punish the guilty and also, consequently, to prevent

the crime. The Pakistan representative pointed out that the preamble to the draft convention imposed on States the duty to prevent and punish genocide. That duty could not be fulfilled unless there existed an international criminal court which alone would be in a position to ensure the punishment of rulers.

The Pakistan delegation would have preferred that the international tribunal alone should have jurisdiction over all cases of genocide, to the exclusion of the competence of all national courts in that respect; however, taking into account the opinions of other delegations, it was willing to recognize that national courts should also have jurisdiction, as laid down in article VII of the draft convention. It suggested, nevertheless, that rulers should be subject only to the international tribunal and that the States Parties to the convention should always be able to appeal to that tribunal from the judgements pronounced by national courts against officials and private individuals.

Mr. Messina (Dominican Republic) recalled that his country, by concluding arbitration treaties and by signing the declarations provided for in Article 36 of the Statute of the International Court of Justice, had more than once demonstrated its conviction that recourse to an international tribunal was the best means of maintaining peace.

Nevertheless, the Constitution of the Dominican Republic recognized the jurisdiction of national tribunals alone with respect to crimes committed in the territory of the Republic, and was consequently opposed to the very principle of sharing that jurisdiction with an international tribunal.

Moreover, the delegation of the Dominican Republic feared that sentences pronounced by an international tribunal dealing with all the acts covered by articles II and IV of the draft convention might, in a number of cases, call forth or increase international tension.

For these reasons, it would vote in favour of the deletion of the final words of article VII.

Mr. Abdoh (Iran) explained that the amendment presented by his delegation provided, first, for the competence of national tribunals, secondly, for subsidiary universal punishment, and, finally, for the possibility of setting up an international criminal court after the International Law Commission had studied the modalities.

Until that criminal court came into being, the International Court of Justice might carry out, in the field of prevention and punishment of genocide, the part assigned to it in the United Kingdom and Belgian amendments. Measures taken by the International Court of Justice for the prevention of genocide could be even more effective than those of a criminal court, for fanatics of the type that usually committed genocide were not afraid of penalties under criminal law. Yet surely it was even more important to prevent genocide than to punish those guilty of it.

The Iranian delegation proposed the deletion of the final words of article VII only for practical reasons; it was impossible to enunciate the principle of the competence of an international tribunal without at the same time defining its nature, its procedure and its relation to national courts, all of which would require long preliminary study.

It should be remembered, moreover, that States were jealous of their national sovereignty and that they had readily recognized the jurisdiction of the International Court of Justice only because recourse to that Court was optional. It would probably be far more difficult to set up an international criminal court, because its jurisdiction would have to be compulsory.

Mr. Dihigo (Cuba) recalled that his delegation had always been in favour of an international tribunal to punish genocide. It was of the opinion that, when the responsibility of States was involved, punishment of genocide on the national level could only be inadequate or ineffective.

The *Ad Hoc* Committee on Genocide had recognized the principle of an international tribunal in article VII of its draft, but it had made no provision regarding the composition of that tribunal, its procedure and the laws it was to enforce. In those circumstances, the final words of article VII had no practical value and should be deleted. The deletion would not, however, rule out the possibility of an agreement on the principle of setting up an international criminal court, or on the principle of recourse to the International Court of Justice in cases where the responsibility of States was involved. The proposal of the Netherlands delegation to ask the International Law Commission to study the question of setting up an international tribunal, and the United Kingdom proposal to confer on the International Court of Justice competence to deal with certain types of cases, were both interesting and deserved attention.

In conclusion, the Cuban delegation would vote for the deletion of the final words of article VII, although it supported the principle of international jurisdiction.

Mr. Tarazi (Syria) emphasized that his delegation favoured the international punishment of genocide but considered that jurisdiction should not be conferred upon the International Court of Justice because, according to its Statute, the Court could not pass judgment in the field of criminal law and, in other fields, its jurisdiction extended only over States, not over individuals. If it were desired that the competence of the International Court of Justice in respect to genocide should be recognized in the convention, the Statute of the Court would first have to be amended; but that question was not on the Committee's agenda.

Moreover, a special convention would be necessary to establish an international criminal court; in those circumstances, the Syrian delegation thought the Committee could declare itself in favour of the principle of the creation of an international court and leave the elaboration of a plan for the establishment of such a court to the appropriate organs of the United Nations.

Mr. Demesmin (Haiti) pointed out that, since it has been recognized, in article I of the convention, that genocide was a crime under international law, it was unthinkable to leave the punishment of that crime to national courts alone.

The constitutional provisions of certain countries or the principle of the national sovereignty of States could not be adduced as an argument against the principle of the international punishment of genocide. The United Nations had, indeed, been established so that each State might realize its responsibilities and duties as a member of the community of nations. Member States would fail in their duty if, by taking an uncompromising stand on the provisions of their Constitutions or the principle of their national sovereignty, they opposed the adoption of measures which proved to be necessary in the general interest.

Nor could opposition to the establishment of an international criminal court be justified by the fact that such a court did not yet exist. If the text of article VII were maintained as it stood, the ratification of the convention would entail for the signatories the obligation to provide

for the establishment of such a court. Once the convention had been signed, the method of functioning of the court would be considered and its competence and powers decided. If, on the contrary, reference to an international tribunal in article VII were deleted, it would be necessary to amend the convention when a tribunal of that kind was established.

Mr. Demesmin stressed the fact that reference to an international tribunal in article VII would not fail to have a salutary effect on authorities who wished to commit acts of genocide and who, in the absence of such reference, would be ensured impunity.

Mr. Abdoh (Iran) pointed out to the representative of Haiti that there were other crimes, considered as crimes under international law, which were not, nevertheless, subject to international repression. He gave as examples, counterfeiting currency, the white slave traffic, and the circulation of obscene publications, which all came under the national jurisdiction of the States in whose territory the criminals were arrested. It might be concluded that genocide, like all those crimes, should be the object of subsidiary universal repression. Mr. Abdoh reserved the right to return to that question when the amendment which his delegation had proposed to article VII came up for discussion.

Mr. Iksel (Turkey) said his delegation was in favour of any amendment to delete the last words of article VII.

His delegation was of the opinion that national courts should be relied upon to try individuals who committed acts of genocide. The Turkish delegation realized that such punishment might be inadequate in cases where the crime was committed or tolerated by States or Governments, and it was disposed to consider the possibility of recognizing the jurisdiction of an international tribunal over such cases alone; but in cases where the crimes were committed by individuals, it insisted that national tribunals alone should have jurisdiction.

Mr. Petren (Sweden) associated himself with the views expressed by the Netherlands representative and favoured the retention of the last words of article VII.

He noted, however, an omission in the text of article VII. As it was drafted, that article did not seem to take into account cases where the national of a State committed an act of genocide on the territory of another State and

then returned to his own country. Under the provisions of article IX of the convention, the State of which the culprit was a citizen would not be obliged to extradite him. To guard against that possibility, the provisions of article VII of the convention should be supplemented.

Mr. Fitzmaurice (United Kingdom) noted that numerous delegations recognized how illusory was the idea of the punishment of genocide on a national level; but he could not understand why those same delegations had nevertheless opposed (96th meeting) the amendment submitted by his delegation to article V of the convention. In the opinion of the United Kingdom delegation, article VII was completely useless. With regard to national jurisdiction, there were already other provisions in the convention, such as the preamble, article V and article VI, which affirmed the obligation of States Parties to the convention to punish genocide on the national level; and as to international jurisdiction, the mention of a competent international tribunal – which could only be an international criminal court – was useless since such a tribunal did not exist. Even if it did exist, it would be of as little use as national courts, for it was to be anticipated that culprits would not be handed over to it and that unless armed force were used it would be impossible to bring the perpetrators of an act of genocide to trial by that court.

For that reason it was necessary to adopt a realistic approach and to have recourse, as the delegations of Belgium and the United Kingdom proposed, to the only existing international court in a position to enact measures capable of putting a stop to the criminal acts concerned and of awarding compensation for the damage caused to victims.

The delegation of the United Kingdom opposed the adoption of article VII of the convention and in particular of the last words of that article.

Mr. Amado (Brazil) recalled that even before the convention on genocide, certain crimes had been termed crimes under international law, either by conventions – as for example, in the case of the slave trade, traffic in women and children and traffic in narcotic drugs – or by custom, as in the case of piracy. For all those crimes, universal suppression was recognized and accepted. But, generally speaking, States still sought to reserve the right of judging their nationals, and it was unfortunately evident that the system of extradition still met with a variety of obstacles as a result of the anxiety of States to preserve their national sovereignty.

The organization of the international suppression of crimes developed *pari passu* with the organization of international co-operation and solidarity. Both were in a period of uncertainty. The time had not yet come to establish an international criminal court for, notwithstanding the contrary opinion of eminent jurists, there did not exist any international criminal law properly speaking; there existed, in each State, provisions of domestic law and it was by extension that it had become possible to speak of international criminal law. The doctrine of universal suppression was a very old one which had been formulated in the seventeenth century by Hugo Grotius, rightly called the father of international law; but it was far from having received general application in practice, for in practice the national jurisdiction of criminal law still obtained.

The last words of article VII expressed merely a wish, an aspiration, and the delegation of Brazil thought they should be deleted in order that the convention might remain within the confines of reality.

Mr. Medeiros (Bolivia) stated that his Government was in favour of an international court to deal not only with cases of genocide, but with every sphere of international law. It had given proof of that by signing the declaration provided for in Article 36 of the Statute of the International Court of Justice.

Since genocide had been defined as a crime under international law, it should logically be punished on an international level. It must, however, be admitted that the arguments advanced against the adoption of the last words of article VII had a certain weight.

The question of the repression of genocide was a field in which progress must be made slowly, without omitting to make use of the means available. If those considerations were borne in mind, the United Kingdom proposal was of undeniable utility, because it provided for recourse to the International Court of Justice in cases of genocide in which the responsibility of the State or Government could be established. It was inadequate, however, for it omitted cases of genocide committed by individuals and it should be supplemented in that respect. But as a result of the Committee's vote on the amendment to article V submitted by the United Kingdom delegation, that proposal did not seem to have much chance of being adopted; in those circumstances it was advisable to consider the proposal of the Netherlands delegation, which would retain

article VII in its present form, but recommended that the International Law Commission be requested to consider whether it was desirable and possible to establish an international judiciary body with jurisdiction over perpetrators of genocide.

The delegation of Bolivia would vote in favour of the United Kingdom proposal and, if that proposal were rejected, in favour of that of the Netherlands delegation.

Mr. Arancibia Lazo (Chile) recalled that the principle of the national sovereignty of States had been considered for centuries as absolute, but, as a result of the evolution of the world and the evolution of ideas, it had had to make way for another principle, that of international solidarity in view of universal harmony. That principle had given birth to the United Nations, whose Members, by signing the Charter, had assumed the obligation, or at least the moral obligation, to renounce part of their national sovereignty when the general interest so required.

The representative of Chile admitted that, in its present form, article VII had little practical significance, especially with regard to the competent international tribunal which was mentioned. It was obvious that in the absence of special provisions on the procedure to be followed and the law to be applied, such an international tribunal could not dispense justice. But that article contained the expression of a hope which must be realized sooner or later and, on that account, it deserved to be retained. Since its provisions were not incompatible with those of the Netherlands and United Kingdom proposals, there was no reason why both those proposals and article VII should not be adopted.

For its part, the Chilean delegation would vote in favour of the retention of article VII.

Mr. Sundaram (India) explained the reasons for which his delegation opposed the adoption of article VII which conferred jurisdiction, in the field of genocide, both upon the existing national courts and to a non-existent international tribunal.

The Government of India had already indicated that it could not subscribe to the establishment of an international criminal court without being in possession of details, in particular as to the composition of the court, the procedure to be followed before it, and the law to be applied.

Mr. Sundaram wished to make it clear that his delegation did not reject *a priori* the jurisdiction of an international court in cases an act of genocide was committed or tolerated by Governments; he observed, however, that, if two kinds of courts for the repression of the crime of genocide were envisaged, the cases when over which national courts would have jurisdiction and the cases which would have to be submitted to the international court must be clearly determined in advance.

The Indian delegation would vote in favour of the Belgian, USSR and Iranian delegations' proposal to delete the last words of article VII. It pointed out that if reference to a competent international tribunal were omitted, the provisions of article VII were useless, since States Parties to the convention had already, under the terms of the preamble and of article VI, assumed the obligation to suppress genocide on the national level.

Mr. Spanien (France) drew the Committee's attention to the danger there would be, once the principle of the responsibility of rulers had been admitted, in relying on national courts for the repression of genocide, a crime which was generally committed only by States or with their complicity.

Article VII of the draft convention provided that in case of default on the part of national organs, the punishment of genocide should be ensured by an international body. The French delegation, considering the form of article VII unsatisfactory, proposed that the words: "or by a competent international tribunal" should be replaced by the words: "or by the international criminal court constituted as follows", which would serve as an introduction to articles 4 to 10 of the French draft convention [*A/C.6/211*].

It was impossible to provide, as the Belgian and United Kingdom delegation proposed, that the International Court of Justice should pronounce judgment in cases of genocide committed by States or Government, for that Court had no jurisdiction whatsoever in the criminal field.

Genocide was committed only through the criminal intervention of public authorities; that was what distinguished it from murder pure and simple. The purpose of the convention which the Committee was drawing up was not to punish individual murders, but to ensure the prevention and punishment of crimes committed by rulers. To that end it was necessary to have recourse to effective means, namely, to an international criminal

court. As no such court yet existed, the necessary measures should be taken to establish one.

The French delegation was of the opinion that it was preferable for States to have their national sovereignty limited by law rather than by combined interests or by war. It appealed to members of the Committee not to confine themselves to words but to take appropriate action to ensure the effective punishment of genocide.

The Chairman read out the list of speakers and, with the Committee's assent, declared the list closed. He announced that voting would take place first on the amendments for the deletion of the last words of article VII, and explained that that vote would in no way prejudge the fate of the various amendments submitted. He suggested that the delegations of Belgium, the United States, France, the United Kingdom and Uruguay, which had all proposed amendments on the question of the international court, should meet unofficially to try and draft a single text.

The meeting rose at 6.5 p.m. [sic]

NINETY-EIGHTH MEETING

Held at the Palais de Chaillot, Paris, on Wednesday, 10 November 1948, at 10.30 a.m.

Chairman: Prince Wan Waithayakon (Siam).

47. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

Article VII (*continued*)

The Chairman announced that the discussion would be continued on the amendments submitted by the Union of Soviet Socialist Republics [*A/C.6/215/Rev.1*], Belgium [*A/C.6/217*] and Iran [*A/C.6/218*], which proposed the deletion of the words "or by a competent international tribunal" from article VII.

Mr. Correa (Ecuador) said that the question of the general scope of the convention was involved in article VII. The convention might either

Annex 10

UN General Assembly, Sixth Committee, Third Session,103rd Meeting, A/C.6/SR.103 (12 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

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HUNDRED AND THIRD MEETING

Held at the Palais de Chaillot, Paris, on Friday, 12 November 1948, at 3.15 p.m.

Chairman: Mr. R.J. Alfaro (Panama).

52. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

Article X

The Chairman opened the discussion on article X. He recalled that the following delegations had submitted amendments to the text of the *Ad Hoc* Committee: Union of Soviet Socialist Republics [*A/C.6/215/Rev.1*]; Belgium [*A/C.6/217*]; United Kingdom [*A/C.6/236*]; Belgium and United Kingdom [*A/C.6/258*]. Two amendments had been proposed by India [*A/C.6/260*][1] and Haiti [*A/C.6/263*][2] to the joint amendment submitted by Belgium and the United Kingdom.

[1] *Amendment submitted by India*: For the words "at the request of any of the High Contracting Parties" substitute the words "at the request of any of the parties to the dispute."

[2] *Amendment submitted by Haiti*: Add at the end of the text "or of any victims of the crime of genocide (groups or individuals)".

Mr. Fitzmaurice (United Kingdom) stated that he had withdrawn the original United Kingdom amendment [*A/C.6/236*], substituting for it the joint amendment [*A/C.6/258*]. In the absence of the representative of Belgium, it was impossible to say definitely whether the original Belgian amendment would be withdrawn, but Mr. Fitzmaurice thought that it had also been withdrawn in favour of the joint text.

Mr. Dignam (Australia) observed that the decision to delete article VIII of the convention (101st meeting) prejudged the fate of any provision based on the principle contained in that article, namely, action by organs of the United Nations. Article X dealt with the settlement of disputes by the International Court of Justice, which was one of the competent organs of the United Nations covered by article VIII. Strictly speaking, therefore, the Committee should not discuss article X. If it did so it

should be for the definite purpose of rectifying the mistake of having deleted article VIII.

The Australian delegation considered that a clause should be inserted in article X concerning organs of the United Nations other than the International Court of Justice, which could take useful action in suppressing genocide.

The CHAIRMAN stated that all ideas expressed during the discussions should be studied; and, moreover, that the rejection of a text did not imply that its substance could not be incorporated in another article. Nevertheless, the Committee must confine itself to the consideration of the text of article X proposed by the *Ad Hoc* Committee, and of the amendments submitted thereto in accordance with the rules of procedure.

Mr. SUNDARAM (India) thought that it would be better not to regard the original Belgian amendment [*A/C.6/217*] as withdrawn. The joint amendment submitted by Belgium and the United Kingdom constituted an addition to the matters likely to give rise to disputes which would be submitted to the International Court of Justice; that addition might lead certain delegations to reject the joint amendment. If the original Belgian amendment were withdrawn, the Committee would be obliged to adopt the text of the *Ad Hoc* Committee, whereas the Belgian text was preferable. Consequently, if the Belgian delegation withdrew its amendment, the Indian representative would reintroduce it on its own behalf in accordance with rule 73 of the rules of procedure.

After a discussion on the question as to whether the Committee was still seized of the Belgian amendment, in the course of which the CHAIRMAN, Mr. KERNO (Assistant Secretary-General in charge of the Legal Department), Mr. MAKTOS (United States of America), Mr. SPIROPOULOS (Greece) and Mr. RAAFAT (Egypt) expressed their views, Mr. ABDOH (Iran) stated that if the original Belgian amendment [*A/C.6/217*] had not been withdrawn by its author, the Committee should examine it and put it to the vote; if, however, it had been withdrawn, the delegation of Iran would reintroduce it on its own behalf in conformity with rule 73 of the rules of procedure.

The CHAIRMAN took note of the fact that the Belgian amendment had become an amendment submitted by Iran.

In reply to a question by Mr. DE BEUS (Netherlands), the CHAIRMAN stated that the second Belgian amendment [*A/C.6/252*] had been replaced by the joint amendment of the Belgian and United Kingdom delegations. He called upon the Committee to proceed to the general discussion of that joint amendment [*A/C.6/258*].

Mr. MAKTOS (United States of America) remarked that the joint amendment had been intended to replace the original amendments submitted by Belgium and the United Kingdom; it was, in principle, an improvement on those texts; it would therefore be better first to decide on the Belgian amendment.

The representative of the United States accordingly made a formal motion that that amendment should be discussed first.

The CHAIRMAN pointed out that the joint amendment was furthest removed in substance from the text of the *Ad Hoc* Committee; consequently, in conformity with rule 119 of the rules of procedure, the Committee should express its views on that amendment first.

The Chairman ruled that the point of order raised by the representative of the United States was not in order and that the joint amendment must be examined first.

Mr. MAKTOS (United States of America) appealed against the Chairman's ruling.

The CHAIRMAN put the appeal to the vote.

The Chairman's decision was upheld by 22, votes to 2, with 8 abstentions.

Mr. FITZMAURICE (United Kingdom) reviewed the history of the joint amendment of Belgium and the United Kingdom. He recalled that during the debate on article VII (97th meeting), the United Kingdom delegation had submitted an amendment [*A/C.6/236/Corr.1*]; an amendment to that amendment had been proposed by Belgium [*A/C.6/252*]. The debate had clearly shown the Committee's desire to confine the provisions of article VII to the responsibility of individuals. The United Kingdom and Belgium had therefore withdrawn their amendments to article VII and had worked out jointly a new text as an amendment to article X, which dealt with the jurisdiction of the International Court of Justice and which was thus a suitable point at which to insert the idea the two delegations had

in mind. The joint amendment [*A/C.6/258*] represented an attempt to combine the provisions of article X as it stood with the essential features of the Belgian and United Kingdom amendments to article VII, namely, the responsibility of States and an international court empowered to try them.

The delegations of Belgium and the United Kingdom had always maintained that the convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in articles II and IV. At the 102nd meeting, during the discussion on the competence of national courts and the reference of disputes to the Security Council, the representative of the United Kingdom had been impressed by the fact that all speakers had recognized that the responsibility of the State was almost always involved in all acts of genocide; the Committee, therefore, could not reject a text mentioning the responsibility of the State.

Mr. Fitzmaurice recalled the French representative's statement, at the 101st meeting, to the effect that it was incomprehensible that Belgium and the United Kingdom should oppose the joint amendment which the USSR and France had offered to article VIII, since the former delegations were offering a similar amendment to article X. There was a very clear difference, however, between the French and USSR text and the Belgian and United Kingdom text: the former had contemplated provisions of an optional nature wherein, moreover, rights were conferred which were already laid down in Articles 34, 35, 36 and 37 of the Charter; whereas the joint Belgian and United Kingdom amendment proposed that reference to the International Court of Justice should be obligatory. The Court's jurisdiction was compulsory only for a limited number of States which, in accordance with Article 36 of the Statute of the Court, had recognized it by an official declaration. The joint amendment to article X was intended to impose upon all States parties to the convention the obligation to refer all disputes relating to cases of genocide to the International Court.

Mr. Chaumont (France) said he was in favour of the joint Belgian and United Kingdom amendment which corresponded in spirit to the views expressed from the very beginning by the French delegation with regards to the need for and importance of international punishment of genocide.

It would certainly have been preferable to provide for such punishment on the direct basis of criminal law instead of confining its scope to States

alone on the basis of civil law; but, inadequate as it was, the joint amendment was preferable to the absence of any text confirming competence to an international court.

In reply to a remark by the representative of the United Kingdom, Mr. Chaumont recognized that the joint amendment made the competence of the International Court of Justice compulsory, whereas the amendment to article VIII, proposed jointly by France, Iran and the USSR, provided for optional reference only. Nevertheless, as the representative of Poland had indicated (101st meeting), the option in question led, in practice, to an obligation.

Mr. Chaumont felt that it would in any case be useful to reiterate, in the convention, a general provision of the Charter, such as Article 36, so as to make it applicable to the special case of genocide. While regretting the fact that the problem of the international punishment of genocide should be dealt with solely on the level of disputes between States, he hoped that the interpretation given on that matter by the International Court of Justice would interpret its functions in such a way as to enable it to extend its competence to all cases of genocide.

Moreover, the representative of France was in no way opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal, responsibility.

With regard to the amendments to the joint amendment, Mr. Chaumont could accept the one presented by India, which was merely a drafting matter, but not the text proposed by Haiti, which was incompatible with Article 34 of the Statute of the International Court of Justice.

Mr. Raafat (Egypt) shared the view of the representative of France concerning the Indian and Haitian amendments, but he could not agree with him with respect to the joint Belgian and United Kingdom amendment. The latter introduced two changes in article X of the *Ad Hoc* Committee's draft.

The first consisted in introducing into the article the notion of the civil responsibility of States which, in the absence of a general organization for international punishment, would be approved by the Egyptian delegation.

The second modification, however, which involved the deletion of the last section of article X of the draft, beginning with the words "provided

that", was less satisfactory. That deletion doubtless reflected the desire to omit from that provision, as well as from article VII, any reference to a competent international court. It left, however, a lacuna, the serious disadvantages of which would be felt on the establishment of the international criminal court referred to in the draft resolution which the Committee had adopted at its 99th meeting on the initiative of the Netherlands and Iran, requesting the International Law Commission to study the problem. The last part of that article merely endorsed the rule that "the civil court must await decision by the criminal court", which should also be applied in the field of international law.

It was therefore essential that that part of article X should be retained; for that reason the delegation of Egypt would abstain from voting on the joint amendment.

Mr. Chaumont (France) explained that he too opposed the deletion of that sentence, which he had not mentioned in his preceding remarks, thinking that it would not be discussed until the Committee came to the Belgian amendment [*A/C.6/217*], which had been reintroduced by Iran.

Mr. Guerreiro (Brazil) observed that there were no serious objections to the joint amendment.

Article VIII was unnecessary, as it merely proclaimed the rights already laid down in the United Nations Charter. Article X, on the other hand, introduced into the draft convention the compulsory jurisdiction of the International Court of Justice. That compulsory jurisdiction, in accordance with Article 36 of the Statute of the Court, applied only to the States which had signed a special declaration to that effect. Article X would thus supplement the provisions of the Statute in that respect.

The delegation of Brazil was prepared to accept the joint amendment, provided the second part of article X of the draft remained deleted, so that it would conform to article VII, from which mention of a competent international tribunal had been deleted. If the International Criminal Court, whose establishment was under consideration, were to be created, it would be an easy matter to revise the convention so as to adapt it to the new situation.

Referring to the amendments to the joint amendment, Mr. Guerreiro said that the Indian amendment related merely to a drafting point; the

amendment presented by Haiti, however, was contrary to the Statute of the International Court of Justice; consequently, in view of the express provisions in the Statute as to how and by whom the Court could be seized of a matter, he suggested to the authors of the joint amendment and to the Committee that they should simply delete the last phrase of the amendment, which would in no way alter its meaning.

Mr. Spiropoulos (Greece) approved, in general, the principle of the joint amendment. He wondered, however, whether there was a difference between the application and the fulfilment of a convention and whether, therefore, it was necessary to retain both words in the text.

Furthermore, the notion of the responsibility of a State did not seem to him very clear. What was meant was obviously not international responsibility for violation of the convention, which was already implicit in article I of the draft convention. The French delegation thought that the amendment related to the civil responsibility of the State; and that idea seemed to be confirmed by the original Belgian text [*A/C.6/252*] which referred to reparation for damage caused. If, however, that interpretation were accepted, the result would be that in a number of cases the State responsible for genocide would have to indemnify its own nationals. But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself.

In spite of the criticisms he had just made, Mr. Spiropoulos would vote for the joint amendment.

Mr. Pratt de María (Uruguay), while regretting that the principle of the establishment of an international criminal court had not been retained in the convention, favoured the joint amendment; he was, however, opposed to the Indian and Haitian amendments.

Mr. Demesmin (Haiti) approved the principle of the joint amendment, to which he had himself proposed an addition. He would explain later the reasons for his proposal.

Mr. Ingles (Philippines) recalled that during the discussion of article V (95th meeting), he had already stated that his delegation was opposed to any responsibility on the part of the State for acts of genocide, because under Philippine law a legal entity could have no criminal responsibility distinct from that of the various individuals of which it was composed.

True, the joint amendment did not specifically state that criminal responsibility was involved, but from the very nature of the convention, the purpose of which was the punishment of genocide, that idea could be inferred.

In those circumstances, and since the clause might make it difficult for certain countries to ratify the convention, Mr. Ingles asked the Belgian and United Kingdom delegations to withdraw their amendment, for when they, as well as other delegations, had pointed out that their Governments could not accept the convention if it involved the responsibility of their monarchs, the Committee had borne their remarks in mind and had excluded from article V rulers who were not constitutionally responsible (95th meeting). If it had been agreed, at their request, that a constitutional monarch could not be guilty of genocide, why should they not agree that a State could not be responsible for that crime either?

Moreover, it might be said that that question had already been settled when the Committee opposed introducing the idea of the responsibility of the State into article V (96th meeting).

The Philippine representative could not accept the idea that a whole State should be stigmatized for acts for which only its rulers or its officials were responsible. When it was maintained that genocide was always committed with the complicity or tolerance of a State, what was meant was the rulers and the officials, namely, the persons who composed the State and not the State itself, the responsibility of which was inconceivable.

For those reasons, the Philippine delegation would vote against the amendment, and, if it were adopted, would have to reserve its position in regard to the draft convention as a whole.

Mr. Tarazi (Syria) thought the rule that a decision by a civil court must await a decision by a criminal court, which the Egyptian representative wished to see retained in article X, would not have to be applied in that matter. The criminal court would try individuals – rulers, officials or private persons – while the International Court of Justice would try only States. The civil and criminal courts would therefore not be prosecuting the same persons and no conflict of jurisdiction would arise.

The Syrian delegation would therefore vote for the joint amendment as well as for the Haitian amendment, which it did not consider in any way

contrary to the Statute of the Court. There was in fact no reason why the signatory States should not, by means of a convention, also allow groups and individuals to bring before the International Court of Justice cases of genocide of which they had been the victims.

Mr. Abdoh (Iran) supported the joint amendment submitted by Belgium and the United Kingdom. His delegation had always hoped that the declaration provided for in Article 36 of the Statute of the International Court of Justice would be signed by as many States as possible, so that the jurisdiction of the Court would become obligatory for almost all members of the United Nations. That very result, namely, an extension of the compulsory jurisdiction of the Court, would be attained in the special matter of genocide by the adoption of the joint amendment.

The objections raised to the terms of the amendment were not serious. It was certain, for example, that the Court would have no difficulty in deciding in each specific case to whom the reparation for damage caused should be made.

On the other hand, the Haitian amendment could not be retained, for it would result in a modification of the Statute of the Court in disregard of the rules governing such action which were laid down in the Charter.

The representative of Iran associated himself with the suggestion of the Brazilian delegation, namely, that the last phrase of the joint amendment should be deleted. Thus a discussion on the Indian amendment would be avoided.

He further thought that the second part of the text of article X of the draft convention could not be restored after the joint amendment, for if the reference to a competent international tribunal had been deleted from article VII, there was all the more reason for its deletion from article X. When the international criminal court was set up, that text, as well as other provisions, could then be changed to conform to the new situation.

Mr. Maúrtua (Peru) thought it would be premature to include in the convention so loosely defined an idea as the responsibility of the State in regard to genocide. As the Greek representative had pointed out, if civil responsibility were meant, that would raise numerous problems, particularly the problem of the beneficiary of the indemnity. In those circumstances, before a decision was taken on such a delicate point,

it should be referred to specialists for study, and Governments should be given an opportunity to formulate their views after having taken all necessary advice.

The part of the joint amendment which could be retained was that relating to the jurisdiction of the International Court of Justice in respect to the interpretation of the convention by means of advisory opinions.

Speaking of the Haitian amendment, the representative of Peru held that it was incompatible with the Statute of the Court and should not be adopted.

Mr. Lachs (Poland) shared the doubts of the Greek, Philippine and Peruvian delegations about the principle of the responsibility of States.

Moreover, he objected to the joint amendment, on the one hand because it provided for the application of measures which in no way constituted direct means of international punishment of a crime such as genocide, and on the other hand because it conferred on the International Court of Justice competence in a field in which other United Nations organs could play a more effective role. The result of that amendment, as drafted, would be in effect that the Court had virtually exclusive jurisdiction in that field. It would be easy for a State guilty of genocide to invoke article X, thus amended, to contest the competence of the Security Council or of the General Assembly by alleging that the question raised constituted a dispute within the meaning of that article, and that it could be examined only by the Court.

It would be more logical to do what the Committee had done in connexion with article VIII (101st meeting) and to let the provisions of the Charter itself operate freely, especially Article 96, according to which it was for the General Assembly and the Security Council to refer to the International Court of Justice if they deemed it necessary. In that case, there would be no more reason to retain article X than article VIII, since it would merely repeat provisions already contained in the Charter.

In conclusion, the Polish representative considered the joint amendment submitted by Belgium and the United Kingdom amendment to be dangerous because it would confine international punishment to measures of uncertain efficacy and would constitute an obstacle to more forceful action by the Security Council and the General Assembly.

Mr. DE BEUS (Netherlands) observed that the objections made to the United Kingdom amendment during the discussion of article VII (97th meeting) were no longer valid. That amendment had been restored to its proper place, which was article X, and in its new form it envisaged also the indirect responsibility of the State resulting from the leniency of national courts towards individuals or groups guilty of genocide.

Referring to the argument advanced by the Philippine delegation, the Netherlands representative hoped that the delegation would not adhere to its position. That position could perhaps be maintained if the criminal responsibility of the State were involved, but it seemed exaggerated if civil responsibility were meant and if it resulted in a rejection of the jurisdiction of the International Court of Justice even in connexion with the violation of the convention by a State. That was tantamount to denying the Court any jurisdiction whatsoever; yet such an argument was advanced by a country which had at first proposed that the United Nations should be in the nature of a world Gouvernment [sic].

Furthermore, Mr. de Beus did not find the arguments of the Polish representative very convincing. The competence of the International Court of Justice in no way ruled out that of the other organs of the United Nations. If the joint amendment were adopted, article X of the draft convention would constitute a direct application of Article 33 of the Charter, which stipulated in the first place the judicial settlement of disputes. Only if the question could not be settled in that way, should it be submitted to the Security Council by virtue of Article 37 of the Charter. Such was the normal order of the relationship between the International Court of Justice and the Security Council; such was the order provided for in the joint amendment.

The Netherlands delegation would vote in favour of that amendment.

Mr. DEMESMIN (Haiti) referred to the fact that several representatives who had been opposed to his delegation's amendment had said that that amendment was inconsistent with the Statute of the International Court of Justice. But it was not a case of a dispute of an indeterminate nature, but of a special case calling for an exceptional law, and thus derogation from the ordinary law. The United Kingdom representative had himself declared that what was involved was an obligation not provided for in the Statute of the International Court of Justice as it stood. It seemed,

therefore, that if the Statute of the Court were inconsistent with the provisions of the Haitian amendment, it must also be inconsistent with the provisions contained in the joint amendment of Belgium and the United Kingdom.

The French representative had said he would support any text which gave jurisdiction to the International Court of Justice. The Haitian amendment satisfied him on that point. Article 38 of the Statute of the International Court of Justice provided that:

> The Court . . . shall apply:
>
> a. International conventions, whether general or particular . . .

The convention with which the Sixth Committee was dealing was a particular convention coming within the scope of the Statute of the Court.

The representative of Haiti pointed out that the joint amendment of Belgium and the United Kingdom envisaged State responsibility. The Committee, however, had rejected (93rd meeting) the principle of the criminal responsibility of the State. It was therefore a matter merely of civil responsibility. But there could be no civil responsibility before the culpability of the State was established. The Haitian delegation accepted the principle of civil responsibility because it regarded the convention as an exceptional law. The guilty State could be responsible under civil law only to the victims of the crime of genocide. It would be illogical for the plaintiff State to ask for damages unless the victims themselves benefited therefrom. The same principle applied if a State committed the crime of genocide against its own nationals.

The representative of Haiti added that the crime of genocide could be committed without world peace being imperilled. That was why it was advisable to contemplate putting the principles of the United Nations into effect. The United Nations Charter, unlike the Covenant of the League of Nations, provided not only for respect on an international plane for the rights of States, but also for respect for the rights of individuals. Respect for human life should be guaranteed and it was for the International Court of Justice, in pursuance of a particular convention, to ensure that guarantee. Finally, it was unquestionable that the victims were best qualified to lay the matter before the International Court of Justice.

Article 34 of the Statute of the Court provided that "The Court, subject to and in conformity with its rules, may request of public international

organizations information relevant to cases before it…" That Article proved that the Statute of the Court was not inconsistent with the provisions of the amendment submitted by the delegation of Haiti.

Mr. Sundaram (India) pointed out that in the first amendment submitted by the United Kingdom delegation [*A/C.6/236*], it was laid down that the matter should, "at the request of any party to the dispute," be referred to the International Court of Justice. In the joint amendment of Belgium and the United Kingdom [*A/C.6/258*] it was provided that: "Any dispute… shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties". The representative of India felt that that change of wording did not improve the text. It would be advisable, on the contrary, to replace that phrase by the words "at the request of any of the parties to such dispute", as suggested by the Indian amendment [*A/C.6/260*].

The Egyptian representative had said that if the Committee adopted the joint Belgian and United Kingdom amendment, the last part of the text of article X proposed by the *Ad Hoc* Committee should be added. The representative of India considered that since the reference to an international criminal court had been omitted from article VII, and since it would be a long time before such a court was established, it was useless at that stage to provide against such a contingency in article X.

Mr. Sundaram recalled, moreover, that the joint Belgian and United Kingdom amendment added the phrase "or fulfilment" and that the representative of Greece had said that there was no great difference between applying and fulfilling a convention. The representative of India felt, however, that the word "application" included the study of circumstances in which the convention should or should not apply, while the word "fulfilment" referred to the compliance or non-compliance of a party with the provisions of the convention. The word "fulfilment" therefore had a much wider meaning.

The representative of India considered that the inclusion of all disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV would certainly give rise to serious difficulties. It would make it possible for an unfriendly State to charge, on vague and unsubstantial allegations, that another State was responsible for genocide within its territory.

The representative of India said that those were the reasons why his delegation could not accept the joint Belgian and United Kingdom amendment.

Mr. Pescatore (Luxembourg) recalled that certain representatives had stated that the concept of responsibility in that field was still unclear and that it was not known who might claim rights to reparations following the perpetration of a crime of genocide. It seemed, however, that the principle that no action could be instituted save by a party concerned in a case should be applied in that connexion. Such responsibility would thus arise whenever genocide was committed by a State in the territory of another State. In that case, the State which had suffered damage would have a right to reparation. The joint Belgian and United Kingdom amendment gave the International Court of Justice the opportunity of deciding whether or not damages should be granted, and it would be for the plaintiff to prove the injury sustained.

Mr. Maktos (United States of America) called attention to the fact that, when he had spoken previously on a point of order, he had had in mind the second Belgian amendment [*A/C.6/252*]; he had therefore asked that that amendment should be discussed first. As it was in fact the first Belgian amendment [*A/C.6/217*] which the Iranian delegation had reintroduced, it had been perfectly logical to begin by discussing the joint amendment, in accordance with the Chairman's ruling.

Mr. Agha Shahi (Pakistan) considered that the joint Belgian and United Kingdom amendment aimed at reviving the principle of an international court to sentence those responsible for the crime of genocide, a principle which the Committee had recently rejected (98th meeting).

The representative of Pakistan considered, moreover, that that amendment had not been sufficiently clearly drafted. The expression "responsibility of a State", in particular, was too abstract for such a matter as criminal law, which called for accuracy and clarity. According to that amendment, the State would have to be given a fictitious legal character, a convenient procedure in civil or commercial matters but not in criminal law nor, *a fortiori*, in the convention.

The representative of France had said that it was difficult to interpret the expression "responsibility of a State", because article X did not provide for the conviction of a State, but dealt with damage caused by the crime of

genocide and reparation for such damage. The representative of Pakistan was doubtful as to the advisability of dealing with civil responsibility in a document which referred solely to a criminal matter. He would have preferred the words used in article V referring to the constitutionally responsible rulers (95th meeting) rather than the words "responsibility of a State". The former would make the text clearer and more accurate.

Mr. Lapointe (Canada) asked the United Kingdom representative what was meant by "responsibility of a State". Did it refer to civil or to criminal responsibility, or to both at the same time? He made that request because, when the Committee had discussed articles V and VII, the United Kingdom delegation had submitted an amendment [*A/C.6/236, A/C.6/236/Corr.1*] the purpose of which was to define the responsibility of States in respect to genocide. It then withdrew that amendment (100th meeting), on the ground that it would be more appropriate to submit it during the discussion of article X. If the United Kingdom delegation understood the responsibility of a State to mean criminal responsibility, it was reintroducing an idea that the Committee had rejected during the discussion of article V (93rd meeting). If not, it should be made clear that civil responsibility alone was intended.

Mr. Zourek (Czechoslovakia) said that the Committee was discussing guarantees for the application of the convention. Those guarantees should be appropriate to the object of the convention, which was to ensure the prevention and punishment of the crime of genocide.

Genocide was brought about by racial, national or religious hatred. That crime might be committed unexpectedly and on a large scale. Legal guarantees, however, seemed too slow to ensure the effective prevention of the perpetration of such a crime.

The representative of Czechoslovakia observed that there was every reason to think that the human group concerned would be massacred before the completion of proceedings instituted with the International Court of Justice. The Czechoslovak delegation asked that supervision of the implementation of the convention should be entrusted to the Security Council, which had appropriate means at its disposal for stopping, should occasion arise, the perpetration of the crime of genocide. In that connexion Mr. Zourek regretted that the Committee had not retained article VIII as proposed by France, the USSR, and Iran (102nd meeting).

He considered that the clause contained in the joint Belgian and United Kingdom amendment would be inoperative. As the Polish representative had said, it might even prove dangerous, since it would make it impossible to resort in time to the other organs of the United Nations and, in particular, to the Security Council, which alone could intervene with the necessary speed in very serious cases.

The Czechoslovak delegation would therefore vote against the amendment submitted by Belgium and the United Kingdom.

Mr. Medeiros (Bolivia) recalled that, during the discussion on article VII, he had explained (97th meeting) the reasons for which he would vote for the United Kingdom amendment. The joint Belgian and United Kingdom amendment was all the more necessary since the Committee had refused to accept the principle of an international tribunal.

The problem of the responsibility of individuals should be studied by the International Law Commission. The problem of the international responsibility of States should be submitted to the International Court of Justice. It would thus be possible to pass indirect sentence on individual acts. In accordance with Article 36 of its Statute, the Court would be able to decide whether the crime of genocide had been committed in the territory of a State. Once that fact had been established, the State concerned would have to punish the offenders. The international responsibility of States thus entailed practical results.

The Bolivian representative thought that the joint Belgian and United Kingdom amendment considerably improved article X. On the other hand, the amendment submitted by the delegation of Haiti seemed inconsistent with Article 34 of the Statute of the Court.

The Bolivian delegation would therefore vote against the Haitian amendment.

Mr. Fitzmaurice (United Kingdom), replying to the Canadian representative, said that the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility.

The meeting rose at 5.55 p.m.

Annex 11

UN General Assembly, Sixth Committee, Third Session 104th Meeting, A/C.6/SR.104 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

MARTINUS
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HUNDRED AND FOURTH MEETING

Held at the Palais de Chaillot, Paris, on Saturday, 13 November 1948, at 10.50 a.m.

Chairman: Mr. R.J. Alfaro (Panama).

53. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

Appointment of a drafting committee

The Chairman proposed the appointment of a drafting committee consisting of the following members: Belgium, China, Cuba, Egypt, France, Poland, Union of Soviet Socialist Republics, United Kingdom, United States of America.

It was so agreed.

Article X (*continued*)

Mr. Morozov (Union of Soviet Socialist Republics) stated that the joint United Kingdom and Belgian amendment [*A/C.6/258*] was not acceptable to the USSR delegation because its adoption would not prevent acts of genocide or violations of the convention. The purpose of the amendment seemed to be to prevent any country from submitting to the Security Council or to the General Assembly any complaint in regard to acts of genocide, thereby preventing the United Nations from taking quick action. The mass extermination of a human group could not be called a dispute between the parties to the convention and therefore could not be within the province of the International Court of Justice. Moreover, the Court was not the competent body to consider situations endangering the maintenance of international peace and security, since it did not have the means to prevent acts of genocide.

The question under discussion was not the criminal but the civil responsibility which provided for damages for acts of genocide. The obligation to provide for damages could exist only as a result of the admission of the offence by the State which had taken part in the crime, and not by the rulers of the State.

The proposed amendment of the United Kingdom and Belgium was only an attempt to submit, in another form, an amendment to article V in order to reintroduce the idea of the criminal responsibility of States for acts of genocide. That idea had been rejected by the Committee (93rd meeting). Mr. Morozov hoped that the Committee would again show its reluctance to include such a provision in the convention.

Mr. Messina (Dominican Republic) pointed out that when the Committee had discussed article V of the draft convention, the United Kingdom delegation had proposed [*A/C.6/236*] the addition of a paragraph providing that when crimes of genocide were committed by or on behalf of Governments, such acts should be considered a violation of the convention. He had opposed that amendment not only because it was contrary to the first part of article V, which had already been approved (95th meeting), but also because, according to the law of the Dominican Republic, a legal entity could not be considered guilty of a crime.

The joint amendment to article X submitted by the United Kingdom and Belgium provided that any dispute among contracting parties should be submitted to the International Court of Justice at the request of one of the parties.

That proposal appeared to reproduce the same views as were reflected in the United Kingdom addition to article V. The new joint amendment should not be included in the convention; even without its inclusion the International Court of Justice would be competent to deal with disputes among States and decide on violations or reparations. Since the States which would sign the convention were already parties to the Statute of the International Court of Justice, it would be sufficient for those which had not yet accepted the compulsory jurisdiction of the Court to accept it, in which case the jurisdiction of the Court would be even greater.

Mr. Messina concluded by stating that his delegation would not vote in favour of the joint amendment submitted by the United Kingdom and Belgium.

Mr. Ingles (Philippines) wished to reply to a direct allusion made at the 103rd meeting by the representative of the Netherlands. Article V had been amended by the Committee so as to exclude constitutional monarchs from its provisions, as some delegations had stated that their Governments would not be able to accept the convention if it included any provision

making constitutional monarchs responsible for acts of genocide. He wondered whether the Committee, having recognized in the convention the constitutional fiction that "the king can do no wrong", was also going to accept the constitutional principle that "the State can do no wrong." Some delegations might not be willing to be parties to the convention if it contained a provision holding States responsible for acts of genocide. The principle of State immunity would certainly be more justified than the fiction of monarchical irresponsibility if the purpose of the Committee in drafting the convention was to punish the real authors of genocide.

The Philippine delegation favoured the text of article X as drafted by the *Ad Hoc* Committee because it recognized the right of contracting parties to bring a dispute as to the interpretation or application of the convention before the International Court of Justice. It was, however, against the joint amendment of the United Kingdom and Belgium, which would extend the jurisdiction of the Court to disputes relating to the responsibility of States for acts of genocide. Article V excluded the criminal responsibility of States for acts of genocide, and Mr. Ingles recalled that the Committee had rejected (96th meeting) the United Kingdom amendment supporting the idea that genocide might be committed by or on behalf of a State.

The United Kingdom representative had implied at the 103rd meeting that his delegation had abandoned the concept of the criminal responsibility of States. It must be assumed, therefore, that the new joint amendment envisaged some sort of civil responsibility, the beneficiary of which was not specified. The fundamental purpose of the original text of article X was to provide for an agency for the settlement of disputes between States only with respect to the interpretation and application of the provisions of the convention. A breach of the convention by a signatory State would be an act of international delinquency but not a crime against international law.

Although private persons might be held primarily responsible, as individuals, for acts committed by the State, that did not necessarily mean that States should be held directly responsible for the acts of private individuals. As had been pointed out by the United Kingdom representative (64th meeting), when a State was provoked by acts of genocide committed against its nationals, the only remedy was to resort to war, and the stakes were therefore higher than the award of pecuniary damages.

For those reasons, the Philippine delegation had supported the punishment of individuals only, either by national or international criminal courts, An award of damages would not be an adequate substitute for the punishment of the individual criminal.

Mr. Lachs (Poland) said he was disturbed to notice how many delegations had shown readiness to accept the joint amendment. He had pointed out, at the 103rd meeting, the difficulty which would arise in the practical application of the suggested provision, which would not only not help but would constitute an obstacle to the prevention of genocide. Mr. Lachs disagreed with the reference made by the Netherlands representative (103rd meeting) to Article 33 of the Charter, inasmuch as that Article dealt with cases which might be settled by negotiation, mediation or other peaceful means.

In his statement at the 103rd meeting, the United Kingdom representative had explained what he meant by "responsibility of a State". Mr. Lachs pointed out that such responsibility implied the compensation due for a wrong committed, but that such questions should not be covered by a convention for the punishment of crimes. If genocide were committed, no restitution or compensation would redress the wrong. The convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation.

Mr. Raafat (Egypt) wished to reply to certain comments made on his statement at the 103rd meeting concerning the deletion of the last part of article X.

The Iranian representative had said that the last part of article X should be deleted; Mr. Raafat pointed out, however, that although no international criminal court existed as yet, it would be advisable not to preclude the possibility of establishing such a court at a later date. The Committee, therefore, should not adopt the Iranian proposal [*A/C.6/217*] for the deletion of the second part of article X.

Mr. Raafat requested that the joint amendment of Belgium and the United Kingdom should be divided into two parts and voted upon separately.

Mr. Abdoh (Iran), referring to the amendment submitted by the representative of Haiti (103rd meeting), said that in his opinion it was contrary

to the terms of Article 34 of the Statute of the International Court of Justice.

Turning to the question of the joint amendment submitted by Belgium and the United Kingdom, Mr. Abdoh said that it would not preclude the possible intervention of other competent organs of the United Nations, such as the Security Council or the General Assembly. When a case of genocide arose which was a threat to international peace and security, Chapters VI and VII of the Charter might be applied. Article 36 of the Statute of the Court permitted the intervention of that body in the cases referred to in the joint amendment.

The Iranian representative felt that the amendment did not clearly determine the civil responsibility of States with regard to the crime of genocide; he would therefore appreciate a clarification by the United Kingdom representative on various points.

When answering a question by the representative of Canada, the United Kingdom representative had said (103rd meeting) that he envisaged civil responsibility in his amendment. In international law, a State asked for reparation of damages inflicted on its nationals by another State; but in the case of genocide, it was a question of injuries inflicted on citizens by citizens of the same State. Mr. Abdoh wondered how the civil responsibility of the State would arise. Reparations could be paid to a State when its citizens had been the victims of an act of genocide in another State, but in some of the cases envisaged in the convention, it was difficult to determine which State would have the right to damages.

The representative of Iran would also like to have the views of the representative of the United Kingdom on the nature of the damages, if a State were not directly but indirectly concerned, merely as signatory to the convention. If each State party to the convention were entitled to reparations, such a provision would obviously lead to abuse.

The International Court of Justice could not inflict fines and, furthermore, Mr. Abdoh wished to know what would be the juridical basis for receiving such moneys.

Mr. Fitzmaurice (United Kingdom) expressed surprise that certain delegations had argued that provision to refer acts of genocide to the International Court of Justice might be a hindrance to the punishment of the crime.

In reply to statements made by the representatives of the USSR and Poland (103rd meeting), he stated that reference to the International Court could not prevent the submission of a case of genocide to the Security Council if it threatened international peace and security. The reference of disputes as to the responsibility of States under the convention, or as to the interpretation of the convention, could not in any way affect the submission of cases to any of the competent organs of the United Nations.

With regard to the questions put to him by the representative of Iran, Mr. Fitzmaurice wished to point out that he did not contemplate that a case of cash reparations would arise. The cases of reparation mentioned by the Iranian representative did not occur in acts of genocide, because the offences were generally committed by the State against its own nationals.

An argument which had been put forward in the Committee was that to refer cases to the International Court of Justice would be useless because any action on its part would be taken too late and would not repair injuries already committed. The United Kingdom representative did not think that acts of genocide occurred suddenly; genocide was a process in which racial, religious or political groups were gradually destroyed. When it became clear that genocide was being committed, any party to the convention could refer the matter to the International Court of Justice. Should the Court decide that a breach of the convention had been committed, it could order punishment. In accordance with Article 94 of the Charter, Member States were legally bound to comply with the decisions of the International Court. Furthermore, Article 94, paragraph 2 of the Charter provided that if a State failed to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party might have recourse to the Security Council.

The United Kingdom delegation had always taken into account the enormous practical difficulties of bringing rulers and heads of States to justice, except perhaps at the end of a war. In time of peace it was virtually impossible to exercise any effective international or national jurisdiction over rulers or heads of States. For that reason, the United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide.

Mr. Fitzmaurice accepted the amendment submitted by the representative of India (103rd meeting).

Mr. Spiropoulos (Greece) remarked that the Committee's confusion on the article under discussion was due in the first place to the sentence in the joint amendment referring to the responsibility of States for acts covered by article II and IV of the convention; and in the second place to the statement made by the representative of France (103rd meeting) which, for the first time, introduced a reference to the civil responsibility of States. Article X embodied provisions which were not new and could be found in almost any other convention established after the First World War.

As a general rule, the State was responsible for acts of genocide committed in its territory and that provision was covered by article I of the convention. If the crime were committed by private individuals, the State was not responsible unless it failed to take measures to punish the persons responsible. If public officials or rulers committed the crime, the State could not be held to be criminally responsible; it was responsible in cases of violation of international obligations.

Genocide could be committed against the nationals of the State itself, or against aliens. If a State ordered the destruction of a minority group which included aliens, the convention was superfluous, because the principles of international law would in any case have been violated. The nationals of the State itself needed protection, not the aliens. The signatory States undertook only to prevent and punish the crime of genocide and would not assume any obligation as to the nature or extent of the reparations to be made.

Mr. Demesmin (Haiti), replying to the arguments advanced by several representatives, to the effect that his amendment was contrary to the provisions of Article 34 of the Statute of the International Court of Justice, which proclaimed that only States could be parties in cases before the Court, cited Article 13 b of the United Nations Charter which mentioned the General Assembly's responsibility for assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. That was surely a more vital obligation than the one contained in Article 34 of the Statute of the International Court of Justice, especially as Article 103 of the Charter stated that obligations under the Charter should prevail over any other obligations. The victims

of the crime of genocide were the persons most likely to wish to bring the matter before the Court and they should be given the opportunity to do so.

The joint amendment submitted by the delegations of Belgium and the United Kingdom brought up the question of the responsibility of the State. The concept of the criminal responsibility of the State had already been rejected and without criminal responsibility there could be no civil responsibility. It had also been decided (100th meeting) that cases of genocide would be tried by national tribunals and no provision for establishing an international tribunal had been included in the convention. In those circumstances, the joint amendment was extremely weak and would not be very effective.

In order to facilitate agreement, however, the representative of Haiti withdrew his amendment.

Mr. Pratt de María (Uruguay), supported by Mr. Raafat (Egypt), requested that the joint amendment should be put to the vote in parts and that the phrase "including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV" should be put to the vote separately.

In reply to a question by the representative of El Salvador, the Chairman explained that the vote on the joint United Kingdom and Belgian amendment would not affect the issue as to the last part of article X as drafted by the *Ad Hoc* Committee. The original Belgian amendment [*A/C.6/217*] for the deletion of the last part of the article had been re-submitted by the representative of Iran (103rd meeting) and would be put to the vote afterwards whatever the result of the vote on the joint amendment.

Mr. Chaumont (France) suggested dividing the amendment into three parts for the purposes of the vote. The first vote would be taken on the question of inserting the word "fulfilment"; the second on the phrase "including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV", and the third vote on the rest of the amendment would at the same time settle the question as to the deletion or retention of the last part of article X as drafted by the *Ad Hoc* Committee.

Mr. Morozov (Union of Soviet Socialist Republics) did not agree to that method of voting. The first part of the joint amendment was exactly the

same as the first part of the original draft except for the addition of the word "fulfilment". That part could not, therefore, be considered as an amendment and the only point that should be put to the vote was the question of adding the word "fulfilment" to the first part of the basic text. The second vote should be taken on the part of the joint amendment starring with the words "including disputes". If any other procedure were followed, the Committee would be departing from its decision to take the *Ad Hoc* Committee's draft as its basic text.

Mr. Morozov reminded the Chairman that the Iranian amendment calling for the deletion of the whole of article X had not yet been discussed.

The Chairman replied that amendments could not be divided for the purpose of comparing parts of them with parts of the original text. The joint amendment as a whole differed substantially from the basic text and it was only being divided for the purpose of the vote.

In order to meet the point raised by the representative of the Soviet Union he ruled that a separate vote would be taken on the question of adding the word "fulfilment". The rest of the joint amendment would then be put to the vote in parts, as requested by the representatives of Uruguay and Egypt.

Mr. Morozov (Union of Soviet Socialist Republics) appealed against the Chairman's ruling.

The Chairman put the appeal to the vote.

The Chairman's ruling was upheld by 28 votes to 5, with 10 abstentions.

Replying to a question by the representative of Cuba, the Chairman said that the fact of putting the joint amendment to the vote in parts did not affect his earlier ruling (103rd meeting) concerning the Iranian amendment calling for the deletion of the second part of article X as drafted by the *Ad Hoc* Committee. That amendment would be put to the vote in due course.

He put to the vote the amendment submitted by the representative of India (103rd meeting) to the joint amendment of the United Kingdom and Belgium [*A/C.6/258*].

The Indian amendment was adopted by 30 votes to 9, with 8 abstentions.

The CHAIRMAN put to the vote the deletion of the word "fulfilment" from the joint amendment of the United Kingdom and Belgium.

The deletion was rejected by 27 votes to 10, with 8 abstentions.

The CHAIRMAN put to the vote the deletion of the words "including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV" from the joint amendment of the United Kingdom and Belgium.

The deletion was rejected by 19 votes to 17, with 9 abstentions.

The CHAIRMAN put to the vote the joint amendment of the United Kingdom and Belgium as a whole, as amended by India.

The amendment was adopted by 23 votes to 13, with 8 abstentions.

Mr. TSIEN (China) explained that he had abstained from voting because, although he approved of the idea of submitting disputes to the International Court of Justice, he did not think that the concept of the responsibility of the State should be included in the convention.

The CHAIRMAN put the Iranian amendment [*A/C.6/217*] before the Committee.

Mr. DEMESMIN (Haiti) said that, since the joint amendment had been proposed in substitution for article X as drafted by the *Ad Hoc* Committee, it would not be in order to put any further amendments to the vote. In his opinion, the Committee had adopted the final text of article X in adopting the joint amendment as a whole, and the Iranian amendment could no longer be considered.

Mr. CHAUMONT (France) did not agree with that interpretation of the vote. He had voted in favour of the joint amendment only on the understanding that a further vote would be taken concerning the last part of article X.

Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) said that it had been made quite clear before the vote that the result of that vote would not prevent the Committee from taking a further decision concerning the last part of article X. The adoption of the joint amendment naturally meant that the Iranian amendment could not be discussed in the form of a deletion, but it would be perfectly in order to

discuss the question if some representative were to propose the wording of the last part of article X as an addition to the adopted text.

The Chairman endorsed the explanation given by the Assistant Secretary-General.

Mr. Demesmin (Haiti), supported by Mr. Iksel (Turkey), maintained the view that no further amendments should be discussed since the joint amendment had been adopted in substitution for article X.

Mr. Morozov (Union of Soviet Socialist Republics) said that the rules of procedure had been systematically violated in the course of the voting in the Sixth Committee. When article VIII had been under discussion, the proposals for the deletion of that article had been put to the vote first, but that procedure had been abandoned in connexion with article X. He had challenged the Chairman's ruling earlier in the meeting because he had foreseen that it would lead to confusion if the Committee were to consider part of the basic text as an amendment.

He had voted against the joint amendment, but, since it had been adopted in substitution for the original text, there was nothing more to be done and no further amendments could be considered. The only way to rectify the matter would be to decide by a two-thirds majority to reverse the decision that had been taken and to recommence the voting in accordance with the rules of procedure.

The Chairman said that he had always acted in accordance with the will of the Committee. In order to avoid lengthy debates, whenever a question of procedure had arisen he had made a ruling immediately, so as to enable representatives to challenge that ruling if they so desired. Whenever his ruling had been challenged it had always been upheld by the vote of a large majority of the Committee. The questions of procedure had thus always been settled in accordance with the will of the Committee itself.

Mr. Spiropoulos (Greece), Rapporteur, said that the Committee had often had to deal with difficult texts giving rise to complicated questions of procedure and much time had been taken up in dealing with those points. In his opinion, the Chairman had followed the best possible course in dealing with questions of procedure.

The meeting rose at 1.00 p.m.

Annex 12

UN General Assembly, Sixth Committee, Third Session, 105th Meeting, A/C.6/SR.105 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

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HUNDRED AND FIFTH MEETING

Held at the Palais de Chaillot, Paris, on Saturday, 13 November 1948, at 3.25 p.m.

Chairman: Prince Wan Waithayakon (Siam).

54. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

Composition of the Drafting Committee

The Chairman proposed that the membership of the Drafting Committee should be increased from nine to eleven, and appointed the representatives of Australia and Brazil as members thereof.

At the request of Mr. Amado (Brazil) and Mr. Morozov (Union of Soviet Socialist Republics), who suggested, respectively, the appointment of the representatives of Iran and Czechoslovakia and were seconded by Mr. Spiropoulos (Greece), the Chairman agreed to increase the membership of the Committee to thirteen.

The representatives of Australia, Brazil, Czechoslovakia and Iran were appointed members of the Drafting Committee.

Article X (*conclusion*)

Mr. Morozov (Union of Soviet Socialist Republics) pointed out that at the 104th meeting the Committee had adopted a final text for article X, although some amendments to that article still remained to be considered.

Those amendments could not be discussed unless the Committee first acknowledged that an error in procedure had occurred and that, in voting upon the joint Belgian and United Kingdom amendment [*A/C.6/258*], it had in fact intended to vote on part only of the text of article X of the draft convention.

The USSR representative moved, therefore, on a point of order, that the votes on the joint amendment should be declared void and that a new vote should be taken; it would thus be possible to put to the vote the

other amendments to article X before proceeding to a vote on the article as a whole.

The Chairman pointed out that the joint amendment, which substituted a new text for article X of the draft prepared by the *Ad Hoc* Committee, had been considered as an amendment to that article, not as a proposal.

The Egyptian representative, when analysing the joint amendment (103rd meeting), had divided it into two parts, corresponding to the two parts of article X of the draft convention. First, that amendment involved a two-fold addition to the first part of the article: the addition of the word "fulfilment," and the addition concerning "disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV." Secondly, it implied the deletion of the second part of article X, beginning with the words "provided that no dispute". The representative of Egypt had requested (104th meeting) a separate vote on the principle of that deletion.

The Chairman had not given a ruling on that point, but when the representative of Iran had reintroduced (103rd meeting) the Belgian amendment [*A/C.6/217*], proposing the deletion of the second part of article X, the Chairman had ruled that a vote on the joint amendment would not prejudge the fate of the Iranian amendment nor the request of the Egyptian delegation. The issue before the Committee was whether the second part of article X should be deleted.

Mr. Raafat (Egypt) confirmed that he had proposed that the deletion of the last part of article X, a deletion which was implicit in the joint amendment, should be voted on separately. He entirely agreed with the Chairman's interpretation of the matter.

Mr. Maktos (United States of America) considered that if any member were at all uncertain as to the correctness of the Committee's decisions, it was preferable that such doubt should be disposed of. He therefore suggested that the USSR representative's request should be taken into consideration and his wishes met.

The Chairman pointed out that the delegation of the Soviet Union had not objected to a vote being taken on the joint amendment, and had raised no objection until after the first part of the amendment had been voted on. He therefore regarded the vote on that amendment as perfectly valid.

The Committee should take a decision upon the request submitted by the Egyptian representative concerning the last part of article X of the draft convention.

Mr. Morozov (Union of Soviet Socialist Republics) reminded the Committee that, after a vote had been taken on the separate parts of the joint amendment, the Chairman had put article X as a whole to the vote, and the Committee had adopted the final text (104th meeting). Hence the Committee could not possibly go on to vote on the second part of that article unless it first invalidated the entire earlier vote.

The only possible solution was to declare that vote void, to hold a fresh vote on the two parts of the joint amendment, proposing respectively the addition of the word "fulfilment" and the addition of the passage beginning "including disputes," and then, without voting on article X as a whole, to vote on the remaining amendments to the article.

If, however, the vote on article X were not declared void, the remaining amendments could not be put to the vote and the Committee would have to proceed immediately to consider another article.

In any case, to vote on the second part of article X would be a tacit admission that the earlier vote was not valid. Respect for the rules of procedure required that it should be expressly recorded that the vote was invalid, and that was the object of the motion on a point of order submitted by the delegation of the Soviet Union.

The Chairman said that after the representative of Haiti had spoken, the joint amendment as a whole had been put to the vote, not article X of the draft convention. As nobody had challenged that decision, the vote was valid, but it did not preclude a decision on the Egyptian request concerning a vote on the deletion of the second part of article X.

That procedure would presumably satisfy all members, since it gave the Committee an opportunity to take a decision on the full text of article X of the draft convention.

Mr. Fitzmaurice (United Kingdom) agreed with the Chairman that the last part of article X should be put to the vote. It had been understood that that part of the article would be considered, and some delegations, when voting upon the joint amendment, had certainly been influenced

by the fact that they would have an opportunity first to discuss, and later to vote upon, the deletion of that part of article X.

The United Kingdom delegation would not vote in favour of retaining that part of the article, because it had always intended that the text of the joint amendment should replace the whole of article X.

The USSR representative's motion was unjustified; Mr. Fitzmaurice could see no reason for holding a second vote on the various parts of the joint amendment.

Mr. Chaumont (France) said that after the vote on the two parts of the joint amendment, the Chairman had put the amendment as a whole to the vote, in pursuance of rule 118 of the rules of procedure. The French delegation, however, would not have agreed to that amendment if it had been intended as a substitute for the whole of article X; and the Chairman had expressly left it to be decided by a later vote whether or not the second part of the article should stand (104th meeting).

Mr. Dihigo (Cuba) confirmed the Chairman's statement, and recalled that before the vote, his delegation had been assured that the decision on the joint amendment would not preclude discussion on the second part of article X. No objection had been raised to the Chairman's ruling.

Mr. Spiropoulos (Greece), Rapporteur, concurred in the Chairman's interpretation and suggested that the discussion should be terminated by a ruling from the Chair.

Mr. Abdoh (Iran) proposed, as an alternative to the course suggested by the Rapporteur, that some member of the Committee should propose that the text of the second part of article X should constitute a separate article of the convention.

Mr. Feaver (Canada) asked for clarification on two points of procedure.

First, what exactly was a motion to delete an article? Was it a new proposal or an amendment?

Secondly, when an amendment reproduced a substantial part of the original text and omitted others, should the vote be taken on the amendment as a whole or solely on the new words which it introduced into the original text or the deletions which it entailed?

Mr. Feaver considered that if the second course had been taken, as the representative of the Soviet Union had suggested, the confusion resulting from the vote on the joint amendment of Belgium and the United Kingdom would have been avoided.

Mr. Kerno (Assistant Secretary-General in charge of the Legal Department) said the Committee's difficulties in the discussion of the draft convention on genocide were largely due to the fact that the rules of procedure were too narrow for a debate of that kind. The rules provided only for relatively short proposals and amendments, and not for a text of the magnitude of a draft convention. Was the draft convention on genocide to be regarded as a single proposal, or was each article to be taken as a separate proposal? The procedure so far had been based upon the latter assumption; that had seemed the most practicable course.

The answer to the Canadian representative's questions was that under that procedure, a motion to delete or replace an article was a proposal and not an amendment. Admittedly the distinction was sometimes difficult to make, as in the case of the joint amendment of Belgium and the United Kingdom. The fact that it was called an amendment did not mean that it actually was an amendment.

In any case, the priority which had been given it could be justified either under rule 119, if it were considered as the amendment furthest removed from the original text, or under rule 120, which authorized the consideration of proposals in the order in which they had been submitted. The Chairman's decision had not been challenged, and therefore the Committee as a whole had agreed that the amendment should be taken first.

It was true that the text of that amendment indicated that it was intended as a substitute for the whole of article X and, normally, once it had been adopted, the second part of the article could not be discussed. That, however, was not an absolute rule, because under rule 120 of the rules of procedure it was for the Committee to decide whether or not to vote on the next proposal.

It was unquestionable, in the first place, that in reply to the question of the Egyptian and Cuban delegations, the Chairman had stated that a vote on that amendment would certainly not preclude the discussion of the Iranian amendment relating to the second part of article X and, in the second place, that the Chairman's statement had not been challenged.

If that express reservation had not been made, it would probably have been correct to consider that the vote on the joint amendment had ruled out the other amendments. That vote had been valid and in order and could not be reconsidered by the Committee except in the circumstances provided for in rule 112 of the rules of procedure.

Mr. DE BEUS (Netherlands) wished to point out that, at the 104th meeting, the Chairman had asked the Committee to take a decision on the joint amendment submitted by Belgium and the United Kingdom and had stated that, in conformity with rule 118 of the rules of procedure, he was putting the whole "article" to the vote.

That must undoubtedly have been a slip of the tongue, since rule 118 referred to the division of proposals and since, moreover, the Chairman had always stated that, after consideration of the joint amendment of Belgium and the United Kingdom, the Committee would study the remaining amendments to article X. The Netherlands representative had not challenged the Chairman's ruling because he had felt sure the Chairman had simply made a slip.

Mr. MOROZOV (Union of Soviet Socialist Republics) thought that anything other than the results of the discussion was irrelevant. The Chairman's words should not be interpreted, particularly in his absence; only what he had actually said should be taken into consideration since it had led the USSR representative to think that he was voting on article X as a whole.

The Chairman, quite unintentionally no doubt, had made a mistake in procedure. No one, however, had challenged it. The alternatives were therefore either to agree that article X had been adopted and consideration of it was closed, or to admit that there had been a slight misunderstanding and that the vote on the joint amendment of Belgium and the United Kingdom was void.

The Sixth Committee, which dealt with legal questions, could not infringe the rules of procedure and set such an unfortunate precedent. On the contrary, its duty was to rectify the mistake in procedure which had been committed.

The CHAIRMAN ruled that the Committee should continue consideration of article X and come to a decision on the Iranian amendment which called for the deletion of the second part of the text proposed by the *Ad Hoc* Committee.

Mr. Morozov (Union of Soviet Socialist Republics) appealed against the ruling as contrary to the rules of procedure. Article X had been adopted as a whole; there was no sound reason for continuing to discuss it.

The Chairman put the appeal to the vote.

The Chairman's ruling was upheld by 19 votes to 7, with 9 abstentions.

The Chairman opened the discussion on the amendment submitted by the Iranian delegation [*A/C.6/217*]; the object of the amendment was to delete the second part of article X, beginning with the words "provided that".

Mr. Abdoh (Iran) stated that the second part of article X mentioned the reference of disputes to a competent international tribunal. That provision had been added to article X with the sole aim of avoiding possible clashes of jurisdiction between the International Court of Justice and the international criminal tribunal mentioned in Article VII. That was apparent from the Report of the *Ad Hoc* Committee on Genocide.[1] Since the Committee had decided to delete from article VII the reference to an international tribunal, the second part of article X was superfluous.

[1] See *Official Records of the Economic and Social Council*, third year, seventh session, supplement No. 6, page 14.

The convention as it stood contained no reference to the jurisdiction of an international criminal tribunal, nor did such a tribunal exist as yet. Its establishment, to which Iran looked forward, would call for a special convention in which provisions relating to the jurisdiction of the various tribunals could be inserted; the convention on genocide could also be amended to cover the same points.

The representative of Iran held that the Committee should concern itself primarily with the task of bringing the various articles of the draft convention into line with each other.

Mr. Aleman (Panama) moved the closure of the debate in pursuance of rule 106 of the rules of procedure, as the Committee had been enlightened on the scope of the amendment.

Mr. Morozov (Union of Soviet Socialist Republics), speaking on a point of order, drew the Committee's attention to the fact, that consideration of the second part of article X could not be allowed as it was out of order. When the Committee, in dealing with article VII, had taken a decision concerning an international criminal tribunal, it had prejudged the fate of all provisions relating to that tribunal. Since the jurisdiction of an international criminal tribunal had not been agreed to, there could be no question of any reference to it in another article of the convention.

The second part of article X should therefore not be discussed.

Mr. Maktos (United States of America), on the same point of order, agreed with the USSR representative; he did not think that the Iranian amendment should be put to a vote.

The Chairman ruled that the Iranian amendment had to be voted on since, by its earlier vote, the Committee had reached a decision to that effect.

He put the motion for closure to the vote.

The motion for closure was adopted by 21 votes to 1, with 8 abstentions.

The Chairman put to the vote the Iranian amendment [*A/C.6/217*] calling for the deletion of the second part of article X.

The amendment was adopted by 22 votes to 8, with 6 abstentions.

The Chairman opened the discussion on the Australian amendment [*A/C.6/265*], which provided for the addition of a second paragraph to article X, reading as follows:

> With respect to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.

Mr. Tarazi (Syria) thought the amendment was not in order, in view of the Committee's decision on article VIII relating to action by United Nations organs, and on the amendments to that article (101st meeting). The Australian amendment reintroduced the principle of article VIII. It

could not therefore be considered unless the Committee decided to do so by a two-thirds majority, in accordance with rule 112 of the rules of procedure.

The CHAIRMAN agreed with the Syrian representative; the Australian amendment would not be discussed unless, by a two-thirds majority, the Committee decided otherwise.

Mr. DIGNAM (Australia) said he had foreseen that his amendment would meet with that objection; he accepted the Chairman's ruling, but hoped that the Committee would decide in favour of considering an amendment on such an important question.

The discussion on articles VIII and X had shown that it was necessary to include in article X a provision relating to action by the United Nations, when it was remembered how the decision to delete article VIII had been secured. In the first place, two more votes would have been sufficient to constitute the two-thirds majority which would have made possible the resumption of the consideration of article VIII; moreover, several representatives had said they had voted against further consideration of the article solely for reasons of principle.

If the Committee agreed to consider the Australian amendment, no lengthy discussion would be necessary. If that amendment were adopted, a provision would be inserted in the convention which would be a proof of general confidence in the organs of the United Nations.

Mr. MAKTOS (United States of America) was quite ready to revise the position he had taken up at the time of the vote (102nd meeting) on the proposal to reconsider article VIII, as he did not wish to impede the study of a question involving a principle contained in the Charter.

Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) said rule 112 of the rules of procedure contained nothing expressly barring the reintroduction, in the course of the same session, of a proposal previously adopted or rejected. He drew the Committee's attention, however, to the gravity of the precedent it would set by voting twice, almost in succession, on whether a proposal should be considered afresh. Such a procedure might have very important consequences. Should the Committee consider, however, that the question before it was so important as to justify that procedure, there was nothing in the rules of procedure against it.

Mr. Kovalenko (Ukrainian Soviet Socialist Republic) appealed against the Chairman's ruling to the effect that the Australian amendment was not in order.

Mr. Lachs (Poland) pointed out that the situation differed from that which had confronted the Committee in connexion with article VIII. The issue was not whether to reconsider a proposal, but whether, to study an amendment occasioned by the new circumstances which had arisen following the Committee's decision on article X.

Mr. Chaumont (France) agreed with the Polish representative. The Committee, when discussing article VIII (101st meeting), had been dealing with the *Ad Hoc* Committee's text and the joint amendment submitted by the USSR and France. For article X, the Committee had adoptee a text fairly far removed from that of the *Ad Hoc* Committee. That new text placed a restrictive interpretation on the competence of certain international bodies. The case was therefore quite different from that of article VIII.

Mr. Chaumont held that it was not a question of reopening discussion on the principle of article VIII, but simply of relating the basic idea of the joint amendment of Belgium and the United Kingdom to another, more general idea, which was contained in the Australian amendment. The question was whether or not the Committee agreed with the Chairman's view. The appeal made by the representative of the Ukrainian Soviet Socialist Republic was fully warranted.

The Chairman was overruled by 24 votes to 8, with 5 abstentions.

Mr. Maktos (United States of America) explained that he had abstained because he was opposed to setting a dangerous precedent of the type mentioned by the Assistant Secretary-General. He felt, nevertheless, that the question under discussion was of fundamental importance.

Mr. Davin (New Zealand) explained that he had voted in favour of upholding the Chairman's ruling because he held that ruling to be correct. If, however, a vote had been taken on the question as to whether the item was to be reconsidered, he would have voted in favour of such reconsideration.

Mr. Feaver (Canada) said he had voted in favour of upholding the Chairman's ruling on the grounds that a dangerous precedent might be set by recognizing the possibility of reconsidering matters which had already

been decided by the Committee and renewed discussion of which had already been disallowed. He had no objection, however, to the Australian amendment, the substance of which was in keeping with certain provisions of the Charter.

Mr. Messina (Dominican Republic) said he had abstained for the same reasons as the United States representative. He would have voted in favour of reconsideration if the question had been put to the vote in that form.

Mr. Tarazi (Syria) explained that he had voted in favour of upholding the Chairman's ruling because the rules of procedure stipulated that a two-thirds majority of the Committee was required for the resumption of the consideration of a proposal. The Syrian delegation, however, was in favour of the Australian amendment, just as it had already voted in favour of the amendment to article VIII submitted by the USSR and France (102nd meeting).

The Chairman called upon the Committee to continue the discussion on the Australian amendment.

Mr. Ti-tsun Li (China) supported the Australian amendment. He did not share the point of view of delegations which might oppose that amendment on the grounds that it merely reproduced certain provisions of the Charter. The text proposed by Australia was not a mere repetition of the Charter, since it applied specifically to the case of genocide; in any case, it was sound practice to restate principles which could only strengthen the convention. Moreover, the adoption of the Australian amendment would preclude all possible doubts or disputes regarding the competence of the organs of the United Nations in cases of genocide.

The Chinese delegation would therefore give its full support to the amendment.

Mr. Aleman (Panama) moved the closure of the debate on the grounds that the theory underlying the Australian amendment had been discussed at length at the 101st meeting.

Mr. Fitzmaurice (United Kingdom) opposed the closure of the debate; he pointed out that some delegations which had voted against the *Ad Hoc* Committee's text for article VIII (101st meeting) and against the joint

amendment thereto submitted by the delegations of France, Iran and the USSR (102nd meeting), might wish nevertheless to vote in favour of the Australian amendment. They should be given an opportunity to state their position.

The Chairman put to the vote the motion submitted by the representative of Panama for the closure of the debate.

The motion was adopted by 20 votes to 9, with 9 abstentions.

The Chairman put the Australian amendment [*A/C.6/265*] to the vote.

The amendment was adopted by 29 votes to 4, with 5 abstentions.

Mr. Fitzmaurice (United Kingdom) said that although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter, he had voted in favour of the Australian amendment in order that it might be clear, beyond any doubt, that the joint amendment of Belgium and the United Kingdom [*A/C.6/258*] did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations.

Mr. Spiropoulos (Greece) said that, although he had voted in favour of the joint amendment submitted by France, Iran and the USSR he had abstained from voting because, the debate having been closed, he had been unable to obtain particulars as to the exact significance and scope of the Australian amendment, which seemed to conflict with the provisions of the first paragraph of article X.

Mr. Sundaram (India) said he voted against the Australian amendment for the same reasons as the representative of Greece.

Mr. Feaver (Canada) said he voted against the Australian amendment as he had voted against article VIII of the convention, which contained the same idea, because his delegation still believed that such provisions were mere repetitions.

Mr. Dignam (Australia) said that, despite the votes taken at the 102nd meeting on the text of article VIII and on the proposal to reconsider the

question, his delegation had submitted the amendment because it felt that the question was very important; it assumed full responsibility for its action.

The Australian delegation thought that rule 112 of the rules of procedure could be justifiably invoked whenever an important question was under discussion; it would not hesitate to exercise all the rights to which it was entitled under the rules of procedure.

Mr. Dihigo (Cuba) said that, notwithstanding his earlier opposition to article VIII of the draft convention (101st meeting), he had voted for the Australian amendment because it did not reproduce the provisions of article VIII, paragraph 2 which, in his delegation's opinion (102nd meeting), would have been likely to produce a clash of jurisdiction between the International Court of Justice and the other organs of the United Nations.

Mr. de Beus (Netherlands) explained that he had voted for the Australian amendment because his delegation was anxious that the convention on genocide should be acceptable to the greatest possible number of Member States. He had voted against article VIII because he considered it unnecessary. A number of delegations, however, had deplored the disappearance of that article as a result of the rejection of the joint amendment submitted to it by the delegations of France, Iran and USSR; and furthermore the United Kingdom representative had said that the Australian amendment made it clear beyond doubt that the provisions of the joint amendment of Belgium and the United Kingdom did not exclude appeal to competent organs of the United Nations other than the International Court of Justice. In those circumstances, he had voted in favour of the Australian amendment.

Mr. Maúrtua (Peru) explained that his delegation had voted against the Australian amendment as being unnecessary. Also, his delegation was reluctant to see the Committee set an unfortunate precedent by adopting a proposal on a question which it had formerly rejected.

Mr. Kerno (Assistant Secretary-General in charge of the Legal Department), answering Mr. Dignam, recalled that the rules of procedure had been adopted provisionally and that they had not been finally adopted until after they had been amended during the second session of the General Assembly. The rules of procedure were far from perfect, and the Secretariat

took note of any difficulties to which the application of their provisions gave rise, so that, if need be, the General Assembly might revise them.

Mr. Maktos (United States of America) pointed out that the application of the rules of procedure had not caused any difficulty in the case of the Australian amendment. The United States delegation realized that the provisions of rule 112 must not be resorted to save in cases of exceptional importance. Mr. Maktos wished to make it perfectly clear that he had been ready to vote for reconsideration of the question dealt with by article VIII in order not to stand in the way of the majority vote of the Committee.

At the request of Mr. Sundaram (India), the Chairman put to the vote article X of the draft convention, as amended by India (103rd meeting), by Australia and by Belgium and the United Kingdom [*A/C.6/258*].

Article X was adopted by 18 votes to 2, with 15 abstentions.

Mr. Sundaram (India) explained that he had voted against because the provisions of the joint amendment of Belgium and the United Kingdom, which constituted the first paragraph of article X, were capable of being interpreted in a much wider sense than the authors of the amendment had themselves intended. By virtue of that article, States parties to the convention could be called before the International Court of Justice on the basis of vague accusations, for instance, that they had not carried out the provisions of the convention or that they were implicated in the acts set forth in articles II and IV.

The Indian delegation would have been prepared to agree to the *Ad Hoc* Committee's text of article X if its last part, which had become superfluous, had been deleted; but it could not approve the text of article X as adopted by the Committee.

New article submitted by the USSR delegation

The Chairman opened the discussion on the proposal submitted by the USSR delegation [*A/C.6/215/Rev.1, paragraph 10*] calling for the insertion in the convention of an article relating to the disbandment of organizations which aimed at stirring up racial, national or religious hatred and inciting to commission of acts of genocide.

Mr. Morozov (Union of Soviet Socialist Republics) said his delegation wished to complete the convention on genocide by an article which it would be logical to insert after article X and before the final clauses, since it imposed an additional obligation on the signatory States.

His delegation's reasons for proposing the additional article were the same as those which had determined its attitude towards various other articles of the convention; the Soviet Union believed that the main purpose of the convention was to prevent genocide and that, consequently, all the measures necessary to attain that end must be taken. If in any of the States, parties to the convention, organizations existed which aimed at inciting to racial, national or religious hatred, or at encouraging the perpetration of crimes of genocide, it would indeed be strange if those States were not under the obligation to disband them and to disallow their existence in the future.

Mr. Morozov could not understand why the *Ad Hoc* Committee had rejected a similar proposal.[1] He hoped that the delegations which were anxious to see the convention become an effective weapon in the fight against genocide would not fail to support the USSR proposal.

[1] See *Official Records of the Economic and Social Council*, third year, seventh session, supplement No. 6, page 14.

Mr. Maktos (United States of America) emphasized the danger involved in the adoption of the proposal. The object of the proposal was to prohibit the existence of certain organizations. But who was to determine whether a particular organization was or was not pursuing the ends indicated in the proposal? Both that proposal, and the amendment relating to propaganda aimed at provoking acts of genocide [*A/C.6/215/Rev.1 paragraph 4 f*], could lead only to an increase in international tension, and would merely serve as pretexts to harass States parties to the convention.

The *Ad Hoc* Committee had rejected a similar proposal submitted by the Polish representative; for reasons stated in the report, it had also rejected the proposal to reconsider the question.

The convention contained the most far-reaching pledge by the signatories to prevent and prohibit the crime of genocide. Consequently, if a State

failed to perform its obligation, any other party to the convention could lay a complaint before the competent organ of the United Nations.

Mr. Maktos urged the Committee not to include anything in the convention which would render it unacceptable to many Governments. It must not be forgotten that what was important was not to draft a theoretically perfect document, but to secure the greatest number of accessions to the convention.

Mr. Davin (New Zealand) supported the views of the United States representative; his delegation opposed the article proposed by the delegation of the Soviet Union because it was very dangerous and likely to lead to many abuses.

Mr. Fitzmaurice (United Kingdom) also opposed the adoption of the USSR proposal for the two following reasons.

In the first place, it was not necessary to specify, as did the proposal, the measures which States must take in order to fulfil their general obligation to prevent and prohibit genocide, an obligation which they would have undertaken by signing the convention.

In the second place, an article of the kind proposed by the delegation of the Soviet Union for insertion in the convention, would create difficulties for the United Kingdom and other countries which recognized the right of any organization, whether political or not, to hold meetings and to express its opinions freely, unless it advocated the use of violence and unless its activities were subversive in relation to the Government. The United Kingdom delegation feared lest such an article might enable a State to ask another to disband certain political organizations on the pretext that their activities were directed against certain racial groups or that they might encourage the perpetration of acts of genocide. It went without saying that the United Kingdom would regard as unlawful and would punish any activity on the part of an organization established on its territory if such activity came within the scope of the acts enumerated in article IV of the convention.

Mr. Morozov (Union of Soviet Socialist Republics) countered the arguments advanced by the representatives of the United States and the United Kingdom by saying that his proposal, far from being dangerous, was designed to protect the most elementary human rights, the right to life and the right to liberty.

He expressed surprise that the domestic laws of certain States did not empower them to disband organizations aimed at inciting to the perpetration of genocide. States had no cause for alarm in respect to a provision of the type proposed by the USSR delegation; only criminal organizations, whose activities led to the commission of genocide, were likely to be endangered by the provision.

The general obligation to punish genocide, which States would assume in signing the convention, was not enough. History had shown that the Nazi Party had existed long before crimes of genocide were committed; it was permissible to assume that if the existence of that Party had not been tolerated, the mass exterminations which had shaken the conscience of the world would not have taken place.

Mr. Morozov urged the Committee to adopt the proposal submitted by his delegation and thus to render the convention more effective.

The meeting rose at 6 p.m.

HUNDRED AND SIXTH MEETING

Held at the Palais de Chaillot, Paris, on Monday, 15 November 1948, at 11.45 a.m.

Chairman: Mr. R.J. Alfaro (Panama).

55. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

New article submitted by the USSR delegation (*continued*)

The Chairman invited members to continue the discussion on the USSR proposal.

Mr. Khomousko (Byelorussian Soviet Socialist Republic), recalling that the main purpose of the convention was to prevent the perpetration of genocide, stressed the fact that the Soviet Union proposal was useful in that regard since it was designed to prevent acts of genocide by making their preparation impossible.

Recent history had shown that the horrible crimes committed by Hitlerite Germany between 1939 and 1945 had been made possible only by the

Annex 13

UN General Assembly, Sixth Committee, Third Session, *Genocide: Draft Convention and Report of the Economic and Social Council*, A/760 (3 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention. The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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Third session

GENOCIDE: DRAFT CONVENTION AND REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Report of the Sixth Committee

Rapporteur: Mr. J. Spiropoulos (Greece)

1. In resolution 96(I) of 11 December 1946, the General Assembly, at the second part of its first session, affirmed that genocide is a crime under international law which the civilized world condemns. At the same time the Assembly requested 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 second regular session of the General Assembly.
2. The Economic and Social Council, by resolution 47(IV) of 28 March 1947, instructed the Secretary-General to prepare, with the assistance of experts, a draft Convention on the crime of genocide.
3. In accordance with this instruction, the Secretary-General prepared a draft Convention which, on 7 July 1947, was transmitted to Member Governments for their comments and which, together with the comments received, was submitted to the second regular session of the General Assembly.
4. By resolution 180(II) adopted on 21 November 1947, the General Assembly, at its second session, reaffirmed its former resolution on the crime of genocide and requested the continuation of the work begun by the Economic and Social Council concerning the suppression of this crime, including the study of the draft Convention prepared by the Secretariat.
5. Accordingly, the Economic and Social Council, at its sixth session, established an ad hoc Committee, composed of the representatives of seven Member States, to draw up a draft Convention on genocide for consideration at the next session of the Council. The ad hoc Committee

met at the headquarters of the United Nations during the period from 5 April to 10 May 1948 and prepared a report containing a draft Convention on the prevention and punishment of the crime of genocide (E/794).

6. At its seventh session, the Economic and Social Council decided, by resolution 153(VII) of 26 August 1948, to transmit to the third session of the General Assembly the report of the ad hoc Committee and the draft Convention together with the records of the proceedings of the Council at its seventh session on this subject (E/SR.180, E/SR.201, E/SR.202, E/SR.218 and E/SR.219).
7. The General Assembly, at its 142nd plenary meeting held on 24 September 1948, decided to refer this matter to the Sixth Committee for consideration and report.
8. At its 63rd meeting, held on 30 September 1948, the Sixth Committee began the consideration of this item by a general discussion, after which it decided (1) to examine, article by article, the text of the draft Convention drawn up by the ad hoc Committee; (2) to begin with article I, leaving the preamble to be discussed last of all; and (3) to refer the decisions of the Committee with respect to the various articles and the preamble to a drafting committee charged with the preparation of a final draft.
9. The text of the draft Convention prepared by the ad hoc Committee was examined by the Sixth Committee from its 67th to 110th meetings, held between 5 October and 9 November 1948. The text revised by the Drafting Committee was examined by the Sixth Committee from its 128th to 134th meetings, held between 29 November and 1 December 1948. Several articles, especially those of a substantive character, gave rise to prolonged discussions and divergent opinions, and a considerable number of amendments was submitted to the Committee. In the present report, only those articles are referred to which to a special degree retained the attention of the Committee.
10. In dealing with article II of the draft Convention, which defines the acts of genocide, the Committee had, in particular, to resolve three important problems. In the first place, the question arose whether the acts of genocide should be explicitly enumerated in the article, as was done in the text prepared by the ad hoc Committee, or whether a general definition of genocide should be adopted, as proposed in an amendment submitted by the representative of France (A/C.6/211). The Committee, at its 72nd meeting, decided on the principle of

enumeration, the amendment submitted by the representative of France having been withdrawn. Secondly, the question arose whether political groups should be included in the groups to be protected by the Convention, as proposed by the ad hoc Committee, or whether these groups should be excluded from the article. At its 75th meeting, the Committee decided to retain political groups, the vote being 29 in favour to 13 against, with 9 abstentions.* Thirdly, the question arose whether, as motives of the acts of genocide, the Committee should retain the words "on grounds of the national or racial origin, religious belief, or political opinion of its members", proposed by the ad hoc Committee. This was settled when the Committee, at its 77th meeting, by 27 votes to 22, with 2 abstentions, adopted an amendment submitted by the representative of Venezuela (A/C.6/231) whereby the phrase in question was deleted and the words "as such" added after the word "group", whereafter the first part of article II came to read as follows:

> In this Convention genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, **[p. 3-para. 2-line 3]** ethnical, racial or religious group as such:.

During the discussion of the various categories of acts constituting genocide, the representative of China called the attention of the Committee to the desirability of including acts of genocide committed through the use of narcotics. This was made possible when the Committee, at its 81st meeting, decided to insert in sub-paragraph 2 the words "or mental", where by the text in question came to read: "Causing serious bodily or mental harm to members of the group."

At its 82nd meeting, the Committee adopted, by 20 votes to 13, with 13 abstentions, an amendment submitted by the representative of Greece (A/C.6/242) to include as point 5 in the acts of genocide the act of forcibly transferring children from one group to another.

* This decision was later reversed: see paragraph 21, below.

11. Article III of the draft Convention, which dealt with "cultural" genocide, gave rise to a discussion on the question whether this form of genocide should be covered by the Convention. At its 83rd meeting the Committee decided, by 25 votes to 16, with 4 abstentions, not to

include provisions relating to cultural genocide in the Convention. It was pointed out, however, by several representatives that, in expressing their views on the retention or suppression of article III, no position was taken on the principle of cultural genocide, and that action to protect against this form of genocide might more appropriately be taken within the sphere of human rights.

12. With respect to article IV of the draft Convention, which listed the different acts to be punished, prolonged debates took place, particularly on the question of the retention or suppression of sub-paragraph (c) providing that "direct incitement in public or in private to commit genocide shall be punishable whether such incitement be successful or not". At its 85th meeting, the Committee rejected, by 27 votes to 16, with 5 abstentions, an amendment submitted by the representative of the United States of America (A/C.6/214 to delete this sub-paragraph. On the other hand, the Committee decided at the same meeting to delete both the words "in private" and the words "whether such incitement be successful or not" from the original text.*

* The representative of Sweden made the following statement with regard to article IV:

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

13. At its 92nd meeting, the Committee took up article V, dealing with the authors of the crime of genocide. It examined in the first place the amendment submitted by the representative of the Union of Soviet Socialist Republics (A/C.6/215/Rev.1) to add to this article

a second paragraph to read as follows: "Command of the law or superior orders shall not justify genocide". This amendment was rejected by 28 votes to 15, with 6 abstentions. The Committee then discussed the terminology to be used in order to describe adequately the authors of the crime of genocide. Whereas the expression used in the original French text, "des gouvernants, des fonctionnaires ou des particuliers", was found satisfactory and consequently retained by the Committee, it was pointed out by several representatives that the expression "Heads of State" used in the English text went beyond the French expression "gouvernants" as it would appear to include Heads of State of constitutional monarchies who, according to the Constitution of their country, enjoyed immunity and could not, for that reason, be brought to trial before a national court. At its 95th meeting the Committee therefore adopted, by 31 votes to 1, with 11 abstentions, an amendment submitted by the representative of the Netherlands (A/C.6/253) and amended by the representative of Siam, whereby the English text came to read "*constitutionally responsible rulers*, public officials or private individuals".* Finally, the Committee rejected, at its 96th meeting, an amendment submitted by the representative of Syria (A/C.6/246) which would have included in the article as authors of genocide also de facto Heads of State and persons having usurped authority. It was felt that such persons already came within the scope of article V.

* The following statement was made by the representative of Sweden with regard to the question of responsibility of Members of Parliament: "I must point out that the discussion that has taken place has in no way clarified the position of Members of Parliament under the article we have just adopted. This question raised by the Swedish delegation consequently remains unanswered. For our part, we conclude that no absolute obligation could be imposed by article V in this regard."

14. Article VII of the draft Convention provoked a lengthy discussion. As drafted by the ad hoc Committee, this article provided that persons charged with genocide should be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal. At its 98th meeting the Committee, by 23 votes to 19, with 3 abstentions, decided to delete the reference in the text to trial before an international tribunal.** On

the other hand, the Committee, at its 99th meeting, adopted a joint draft resolution submitted by the representatives of the Netherlands and Iran (resolution B), by which resolution the International Law Commission is invited 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 would be conferred upon that organ by international conventions.

** Article VII, which became article VI in the final text, was later revised by the Committee: see paragraph 22 below.

15. In article X of the draft Convention as drafted by the ad hoc Committee, it was laid down that disputes relating to the interpretation or application of the Convention should be submitted to the International Court of Justice, provided that no dispute should be submitted to the Court involving an issue which had been referred to and was pending before, or had been passed upon by, a competent international criminal tribunal. At its 104th meeting the Committee adopted, however, in substitution for this article, a joint amendment submitted by the representatives of the United Kingdom and Belgium (A/C.6/258), and amended by the representative of India, according to which any dispute between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, should be submitted to the International Court of Justice, at the request of any of the Contracting Parties.

At its 105th meeting, the Committee adopted, as the second paragraph of article X,* an amendment submitted by the representative of Australia (A/C.6/265) providing that, with respect to the prevention and suppression of acts of genocide, a party to the Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.

* By the rearrangement and renumbering of the articles decided upon by the Drafting Committee, the second paragraph of article X became article VIII of the final text.

16. A new article dealing with the application of the Convention to dependent territories was proposed by the representative of the United Kingdom as well as by the representative of the Ukrainian Soviet Socialist Republic. The amendment of the United Kingdom (A/C.6/236) provided that the application of the Convention might, by a notification to the Secretary-General, be extended to all or any of the territories for the conduct of whose foreign relations the Party in question is responsible. The amendment of the Ukrainian Soviet Socialist Republic (A/C.6/264) provided that the Convention should apply equally to the territory of the Contracting Parties and to all territories in regard to which they perform the functions of the governing and administering authority (including Trust and other Non-Self-Governing Territories). At its 107th meeting, the Committee rejected the Ukrainian amendment by 19 votes to 10, with 14 abstentions, but adopted the United Kingdom amendment by 18 votes to 9, with 14 abstentions. The Committee also adopted, at its 108th meeting, a draft resolution presented by the representative of Iran (resolution C), recommending Members of the United Nations administering dependent territories to take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible.
17. After having disposed of the Final Clauses in the draft Convention of the ad hoc Committee (articles XI–XIX) the Committee, at its 110th meeting, took up the question of the preamble of the Convention and adopted, by 38 votes to 9, with 5 abstentions, a text proposed by the representative of Venezuela (A/C.6/261).
18. At its 104th meeting, hold on 13 November 1948, the Sixth Committee appointed a Drafting Committee consisting of the representatives of Belgium, China, Cuba, Egypt, France, Poland, Union of Soviet Socialist Republics, United Kingdom, and United States of America. The membership of the Committee was later increased from nine to thirteen by the addition of the representatives of Australia, Brazil, Czechoslovakia and Iran. As the representative of Cuba was unable to take part in the work, the Committee appointed the representative of Uruguay to take his place. To the Drafting Committee were referred the text of the articles of the draft Convention, the preamble, and the two resolutions dealing with the study of the question of an international jurisdiction and with the application of the Convention on genocide with respect to dependent territories.

19. The Drafting Committee submitted, on 23 November 1948, its report to the Sixth Committee (A/C.6/288). In this report the Drafting Committee recommended to the Sixth Committee the adoption of three draft resolutions: (A) a draft resolution recommending the adoption by the General Assembly of the draft Convention on genocide; (B) a draft resolution dealing with the study by the International Law Commission of the question of an international criminal jurisdiction (A/C.6/271); (C) a draft resolution dealing with the application of the Convention on genocide with respect to dependent territories (A/C.6/272).
20. The report of the Drafting Committee and the revised texts submitted by it were considered by the Sixth Committee from its 128th to its 134th meetings. Amendments to the revised text of the draft Convention were submitted by the representatives of the United States of America (articles III and VI, A/C.6/295) and India (articles II, VI, IX and XVII, A/C.6/299). Also, a joint amendment was introduced by the representatives of Belgium, United Kingdom and United States of America (article IX, A/C.6/305). In addition, several verbal amendments were made to the articles to which formal amendments had been presented.
21. At the 128th meeting of the Committee, a proposal was made by the representatives of Egypt, Iran and Uruguay to re-examine the question of excluding "political groups" in article II of the Convention. Having heard a statement by the representative of the United States of America in favour of such exclusion, the Committee decided by a two-thirds majority vote of 26 to 4, with 9 abstentions, to reconsider this question. Following this, the Committee, by a second vote of 22 to 6, with 12 abstentions, decided to exclude political groups from the groups protected by article II.
22. A redrafting of article VI, dealing with the question of jurisdiction, was discussed during the 129th and 130th meetings of the Committee. The Committee decided first by a two-thirds majority of 33 to 9, with 6 abstentions, to reconsider the article. It adopted next, by 29 votes to 9, with 5 abstentions, a revised text of the United States amendment to article VI, submitted by the representative of France and drawn up in consultation with the representatives of Belgium, France and the United States of America. By this text the following words were added at the end of article VI: "or by such international penal tribunal as may have jurisdiction with respect to

such Contracting Parties as shall have accepted the jurisdiction of such tribunal."

23. At its 133rd meeting the Committee proceeded to vote on the three draft resolutions contained in document A/C.6/289. By 30 votes to none, with 8 abstentions, the Committee adopted draft resolution A with the annexed draft Convention as amended by the Committee. By 27 votes to 5, with 6 abstentions, the Committee adopted draft resolution B. Finally, the Committee, by 29 votes to none, with 7 abstentions, adopted draft resolution C.

24. At its 131st meeting, the Committee had agreed to insert in its report to the General Assembly the substance of an amendment to article VI submitted by the representative of India, according to which nothing in the article should affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State. Following this, the representative of Sweden had requested that the report should also indicate that article VI did not deprive a State of jurisdiction in the case of crimes committed against its nationals outside national territory. After some discussion of the questions raised in this connexion, the Committee, at its 134th meeting, adopted, by 20 votes to 8, with 6 abstentions, an explanatory text* for insertion in the present report.**

* The text reads as follows:

> The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

** For reservations made by some representatives with respect to the draft Convention, see the summary records of the 132nd and 133rd meetings of the Committee.

25. The Committee therefore recommends for adoption by the General Assembly the following three resolutions:

Annex 14

UN General Assembly, 178th Plenary Meeting, *Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.178 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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HUNDRED AND SEVENTY-EIGHTH PLENARY MEETING

Held at the Palais de Chaillot, Paris, on Thursday, 9 December, 1948, at 10.55 a.m.

President: Mr. H.V. Evatt (Australia).

114. Draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760 and A/760/Corr.2)

Amendments proposed by the Union of Soviet Socialist Republics to the draft convention proposed by the Sixth Committee (A/766) and amendment proposed by Venezuela (A/770)

Mr. Spiropoulos (Greece), Rapporteur, presented the report of the Sixth Committee and the accompanying draft resolutions. Surveying the history of genocide, he recalled that it had during the past two years been debated by the General Assembly, the Economic and Social Council, the *ad hoc* Committee set up by the latter, and finally by the Sixth Committee. In its resolution 96(I) of 11 December 1946, the General Assembly had solemnly affirmed that genocide was a crime against human rights. The Sixth Committee had shown itself fully aware of the gravity of the matter, since it had devoted most of its work to that item during the present session. Mr. Spiropoulos expressed the hope that once the convention had come into force it would do good service to humanity, for it appealed for international co-operation in the elimination of a scourge which had existed not only in present times, but also throughout the history of mankind.

Mr. Spiropoulos read the three draft resolutions A, B and C relating to genocide, which had been adopted by the Sixth Committee. The first concerned the adoption of the Convention on genocide; it defined the crime of genocide and set forth measures for its prevention and punishment, designated tribunals competent to judge the crime and finally dealt with the means of enforcing the convention on genocide. The second resolution concerned the study by the International Law Commission of the question of an international penal court for the trial of persons charged with genocide. Finally, the third resolution concerned the application of the convention for the prevention and punishment of the crime of genocide in Non-Self-Governing Territories.

Mr. Morozov (Union of Soviet Socialist Republics) stressed that one of the worst crimes committed during the late war had been the organized mass destruction of racial and national groups, directed towards the complete elimination of certain races which had sprung up in the course of history. More than 12 million people had fallen victims to that abominable crime, not counting the victims of Japanese imperialism. It had aroused the indignation of all the civilized peoples of the world, and the United Nations had set itself the task of preventing it, and of ensuring that in future anyone guilty of such a crime should be punished.

The draft convention on genocide now before the Assembly was the outcome of work undertaken from the beginning of the first session of the General Assembly in 1946. From then onwards, the USSR delegation, aware of the special importance of the campaign against genocide, had submitted to the *ad hoc* Committee on genocide a series of proposals[1], some of which had been singled out for consideration and were now incorporated in the draft convention at present before the General Assembly. Thus the definition of genocide, the decision to punish acts of genocide, conspiracy to commit genocide, incitement to genocide and complicity in the crime were mentioned in the USSR proposal, as well as the punishment of the guilty parties, irrespective of status, an invitation to the States to provide the necessary measures to punish the crime of genocide in their national legislation, and the arrangements whereby the culprits could be brought before the courts of law of the countries in which the crimes of genocide were committed. Finally, it was thanks to a USSR proposal that the convention provided that the signatory States might appeal to the competent organs of the United Nations so that the necessary steps might be taken to ensure the prevention and punishment of acts of genocide.

[1] See *Official Records of the Economic and Social Council*. Third Year, Seventh Session, Supplement No. 6.

Nevertheless, the convention was not perfect, and the USSR delegation, aware that its country had had to bear the brunt of the struggle against the forces of fascism, considered itself entitled to point out the shortcomings of the convention, which detracted from its significance. To remedy those shortcomings, the USSR delegation had submitted various amendments

(A/C.6/215/Rev. 1) which unfortunately had not met with the approval of the members of the Sixth Committee. The USSR delegation had therefore found it necessary to place them before the General Assembly.

The USSR amendment to the preamble to the convention was intended to widen the definition of genocide. It was not sufficient to state that genocide had inflicted enormous losses upon humanity. It should also be pointed out that there was a connexion between genocide and the racial theories intended to develop racial and national hatreds, the domination of the so-called "higher races" and the extermination of the so-called "lower races". The crime of genocide formed an integral part of the plan for world domination of the supporters of racial ideologies. Mr. Morozov quoted some examples of the crime, based on the records of the Nurnberg Tribunal. All those quotations showed that the mass extermination of Slav or Jewish populations formed part of a plan the implementation of which was made possible by an intensive propaganda campaign for the enslavement or destruction of races regarded as inferior. That propaganda was responsible for millions of deaths in Eastern Europe as well as in other countries, particularly France.

Mr. Morozov expressed his astonishment that, while the General Assembly was being held in the very heart of France, some delegations, especially that of the United States, should nevertheless have raised objections to the organic connexion between fascism and racial theories and genocide being emphasized in the convention on genocide. Should the General Assembly accept that view, it would by that very fact demonstrate its refusal to condemn racial theories, or to admit that those theories inevitably led to genocide. It was clear that such theories were incompatible with the principles of the Charter. To say that the crime of genocide had no connexion with racial theories amounted, in fact, to a re-instatement of such theories. The USSR delegation strongly objected to such an attempt.

The Sixth Committee had also rejected, at its 107th meeting, the USSR's amendment requesting the signatory States to disband organizations whose aim was to incite racial or national hatred, and in future not to tolerate the existence of such organizations. Unless some such provision were adopted, it was clear that genocide might recur. Several delegations had opposed the amendment on the ground that it was in contradiction with the freedoms guaranteed by the Constitutions of a number of countries. Mr. Morozov wished to point out the dangers inherent in that attitude,

and observed that it would give rise to a situation permitting criminals full freedom of action, which was the more inadmissible when the crime under consideration was genocide.

Mr. Morozov next recalled the tenor of another USSR amendment dealing with the crime of cultural genocide, which was defined as the sum total of premeditated action to destroy the religion, culture, or language of a national, racial or religious group. It included, for example, such acts as prohibiting the use of a national language and the publication of books or newspapers in that language, the destruction of libraries, museums, schools, places of worship, and, generally speaking, the destruction of every building serving a cultural purpose. Even the delegations which had opposed that amendment had agreed that such acts should be suppressed, but they had claimed that they had no connexion with genocide and that they should be considered in connexion with the discussion of the rights of minorities. The delegation of the USSR could not agree with that view, for it regarded cultural genocide as an aspect of genocide, i. e. a premeditated act aimed at the destruction of a group of human beings. Mr. Morozov feared that unless some provision regarding cultural genocide were included in the convention, some rulers who oppressed minorities might take advantage of its absence to justify crimes of genocide.

The Venezuelan delegation had considered that aspect of the question and had proposed an amendment, which was, however, more limited in scope than that of the USSR and did not deal fully with the question. In addition, the term "systematic" was ambiguous. Mr. Morozov feared that it might enable certain criminals to evade their just punishment by giving them the opportunity to maintain that the destruction they had carried out was not systematic. For those reasons, the USSR delegation abided by the wording of its own amendment.

Mr. Morozov then drew attention to another shortcoming in the Convention: its application in Non-Self-Governing Territories was left to the discretion of the administering Powers. True, there was a resolution inviting those Powers to extend the application of the convention to the territories at the earliest opportunity; but the resolution was inadequate and for that reason the USSR delegation proposed that is should be replaced by a definite clause stipulating that the convention should apply not only to the signatory States, but also to territories under their administration including all Trust Territories and Non-Self-Governing Territories.

During the discussion in the Sixth Committee[1] the representative of the United Kingdom had objected to such a provision on the plea that it would represent interference on the part of the metropolitan Powers in local government activities. In the opinion of the USSR delegation, the reason why the colonial Powers had pressed so strongly for the omission of such a clause, which incidentally appeared in many other conventions, was because they intended to have a free hand to ensure that colonial territories were maintained in a position of inferiority. That was contrary to the principles of the Charter and therefore the USSR delegation pressed for the adoption of its amendment.

[1] See *Official records of the third session of the General Assembly*, Sixth Committee, 107th meeting.

The last amendment proposed by the USSR delegation dealt with article VI of the convention. The delegation agreed with the first part of the article, in which it was stated that those guilty of crimes of genocide should be arraigned before the relevant court of justice of the State in whose territory the crimes had been committed. It was unable, however, to accept the second part of the article, by the terms of which such criminals could be tried by an international criminal court. That second provision limited the action Governments might take for the punishment of genocide. Moreover, the establishment of such an international court would be equivalent to interference in the domestic affairs of States, thus infringing upon their sovereignty, which was contrary to paragraph 7 of Article 2 of the Charter. For those reasons, the USSR delegation requested that the second part of article VI of the convention should be deleted.

For the same reasons it objected to the draft resolution of the Sixth Committee requesting the International Law Commission to consider the question of an international criminal jurisdiction and the establishment of an international criminal court with powers to judge questions connected with genocide.

In conclusion, Mr. Morozov emphasized that consideration of the amendments submitted by the USSR showed that they were directed towards ensuring the most effective results in the work undertaken by the United Nations for the prevention and punishment of the crime of genocide. He asked the General Assembly to adopt the amendments, which would

make possible a more efficient campaign against genocide, the most horrible of all crimes.

Mr. Peréz Perozo (Venezuela) recalled that the former article III of the draft convention which had now become article II had been studied with particular attention by the Sixth Committee. The question had been whether the Convention would cover cultural genocide.

The Sixth Committee had not succeeded in finding a very satisfactory phrasing for article III. The article had been made up of very varied elements and had, moreover, been couched in terms likely to cause confusion. In such circumstances, some of the signatory States might subsequently have had to face serious difficulties. The Venezuelan delegation, for one, had had great hesitation in accepting that part of article III which had prohibited any ban on a group using its own language. Countries whose population was composed of immigrants, and for which the defence of their national language was a vital necessity, had felt similar doubts. Moreover, some of the provisions of that article belonged rather to the field of freedom of information or protection of minorities. The Venezuelan delegation shared the reservations of other delegations concerning those provisions and believed, furthermore, that such a vital problem should not be treated hastily if the groups enumerated in the convention were to be protected against all forms of genocide.

The General Assembly resolution 96(I) had stressed the fact that genocide resulted in great loss to the cultural and spiritual life of humanity. There had been a desire to punish all forms of the crime of genocide, not merely its physical aspect. A human group might, however, be destroyed not only by the physical extermination of its members, but also by acts which prevented it from maintaining its communal existence even if its members continued to exist physically. Thus the destruction of the place of worship of a religious group deprived that group of its reason for existence and led to its disappearance.

Mr. Pérez Perozo asked the Assembly to give full consideration to his delegation's amendment and to adopt it. The Venezuelan amendment was very simple: it retained three of the factors in the original article III and deleted all those which might lead to confusion. Those three factors were: religious edifices, schools and libraries of the group. The word "systematic", which had been criticized by the representative of the USSR, had been

purposely chosen in order to emphasize that not only isolated cases were envisaged, but cases of collective violence carried out on a deliberate plan aimed at destruction.

The amendment was the result of detailed study which had led to the conclusion that racial or religious hatred had always begun to show itself in the form of cultural genocide before it assumed the bloody aspect of mass murder. Such conclusions were of vital importance if the preventive nature of the convention were to be stressed.

The problem of cultural genocide was different from that of the protection of minorities. No legislation could refuse to take steps to condemn such atrocious crimes, which outraged the conscience of humanity. It was wrong to say that acts directed towards destruction of that kind were covered by existing legislation; that was true only of the criminal acts mentioned in articles II and III of the convention. Moreover, by recommending that a convention on genocide should be drawn up, the General Assembly had wished to draw attention to a new category of crimes, and had laid particular stress on the infamy of such crimes in order the better to ensure their prevention.

If the General Assembly refused to include in article III the factors mentioned in the Venezuelan amendment, it would disappoint the hopes of some delegations who wished to condemn all forms of genocide and, in particular, cultural genocide. Mr. Pérez Perozo recalled that at the beginning of the Committee's work, the Venezuelan delegation had received a message from Buenos Aires requesting it to insist that the convention should include a provision for the protection of religious edifices without distinction with regard to sect. That appeal reflected the true feelings of religious believers, and the Venezuelan delegation had been unable to ignore it.

Mr. Pérez Perozo pointed out that logically the Venezuelan amendment should go after the sub-paragraph on "forcibly transferring children of the group to another group". The forcible transfer of children was not physical genocide because the children were not destroyed but were torn from one group and incorporated in another. The amendment submitted by the Venezuelan delegation should, then, be inserted after sub-paragraph (*e*) in the form of a sub-paragraph (*f*).

Finally, Mr. Perez Perozo appealed to the General Assembly to accept his delegation's amendment, thus filling a gap which the Committee had left in the convention on genocide showing the world that it had not been unmindful of the highest interests of culture and had, been anxious to censure the protection of the religious sentiments of the whole of humanity.

Mrs. Ikramullah (Pakistan), after expressing her great satisfaction at the completion of the draft convention on the prevention and punishment of genocide, emphasized the contribution that had been made to the work by a number of countries, including the Latin-American countries and Egypt.

She expressed her regret however, that no mention had been made of crimes committed against the culture of a people or of a human group. It must be realized that very often a people did not differ from its neighbours by its racial characteristics but by its spiritual heritage. To deprive a human group of its separate culture could thus destroy its individuality as completely as physical annihilation. Moreover, those guilty of the crime of mass extermination committed that crime because the existence of a community endowed with a separate cultural life was intolerable to them. In other words, physical genocide was only the means; the end was the destruction of a people's spiritual individuality.

To safeguard the physical existence of a group human beings was a considerable achievement from a humanitarian point of view. But the mere physical existence of a group was of little value from the point of view of humanity, for a group deprived of the living springs of the spirit was only a body without a soul, unable to make any contribution to the world's heritage of art and science. It was an accepted principle that diversity of spiritual endowments was of great value to the human race and that every effort should be made to safeguard it.

It was obvious that the convention on genocide could not be restricted to safeguarding the physical existence of human groups, because Resolution 96(I) had declared that "denial of the right of existence of entire human groups . . . 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". It was clear that the resolution definitely envisaged the prevention of genocide in the cultural world, as in other fields.

The Pakistan delegation recognized that the final text of article III[1] had provided too wide a definition of cultural genocide and that it could therefore have been difficult to bring the offences enumerated in it before the courts. The delegation had, therefore, submitted[2] an amendment (A/C.6/229) which narrowed cultural genocide to two specific crimes – forcible mass conversion of persons and the destruction of religious edifices.

[1] See *Official Records of the Economic and Social Council*, Third Year, Seventh Session, Supplement No. 6, page 6.

[2] See *Official Records of the third session of the General Assembly*, Sixth Committee, 83rd meeting.

It had been argued that such acts, heinous though they might be, were not so outrageous as physical genocide. It might be that some people regarded the destruction of religious edifices as a thing of little importance, but, for the majority of Eastern peoples, such an act was a matter of grave concern. In that part of the world, a far greater value was placed upon things of the spirit than upon mere material existence. Religious monuments were a source of inspiration to those peoples and a symbol of their spiritual personality.

It was regrettable that the peoples who had most enriched world culture belonged, in general, to small groups, and were in most cases, of no political importance. As they could not defend their spiritual heritage by force of arms, they were obliged to appeal to the community of nations to preserve that precious heritage.

Of the two amendments submitted to the Assembly, the Pakistan delegation preferred that of the USSR. It hoped, however, that if the Assembly did not accept that amendment on account of its very broad scope, it would adopt the Venezuelan amendment. The criminal nature of cultural genocide having thus been recognized, there would be an opportunity to improve the convention in respect to that point, later on.

The Pakistan representative wished to reassure all those who feared that such a provision would prove to be an obstacle to the normal process of assimilation into the national community. There was no question of that, but rather of the forcible and systematic suppression of a national culture, which could not be covered by the euphemistic term of assimilation.

It had also been suggested that the problem should be dealt with either in the declaration of human rights or in a possible charter on the protection of minorities. Such a view showed a complete failure to understand the real aim of the convention on genocide. The convention was not designed to proclaim rights but to punish certain crimes. The purpose of the original text of article III was, in fact, to define a category of acts of violence and destruction which were undeniably criminal.

It seemed that at a certain stage of the discussion, the moral aspect of the problem had been overlooked in a welter of legal considerations. It was undoubtedly true that great legal difficulties were involved in the question of genocide. Once the gravity and heinousness of the crime of genocide had been recognized, however, efforts must be made to find a legal means of preventing it, and the difficulties which existed under the present legal systems must not be allowed to impede progress.

The Pakistan representative was gratified to note that the Sixth Committee had recommended the establishment of an international criminal court and a preliminary study of that matter by the International Law Commission.

The crime of genocide was no novelty. While it had always shocked the conscience of mankind nothing had ever been done to punish it. Scientific discoveries had made it possible for man to perpetrate the crime on a vast scale. It was therefore all the more urgent that the convention on the prevention and punishment of genocide should be adopted. The Pakistan representative hoped that all Member States would sign the convention and would see that it was applied.

Mr. Gross (United States of America) said that the unanimous vote of the General Assembly on Resolution 96(I) of 11 December 1946 reflected determination to ensure that the barbarous acts which had shocked the conscience of mankind in the preceding years would never again be repeated.

In a brief survey of the history of the preparation of the draft convention on the prevention and punishment of genocide, Mr. Gross drew attention to the important contribution that the current President of the General Assembly had made to the arduous and patient work involved. The draft convention was not perfect. Each delegation undoubtedly had the right

to present amendments during the plenary meeting and, as the President had said, it was the obligation of other Members to give such proposals their earnest consideration. He could not, however, help regretting that the USSR delegation had deemed it wise to propose a series of amendments to the Assembly, while it had objected to the motions to re-open discussions in the Sixth Committee. At the request of other delegations, among them the United States delegation, the Committee had reopened the debate in regard to certain clauses of the draft convention and had adopted some amendments during the last stages of its work. The USSR delegation, however, had not given the members of the Committee the opportunity to re-open the discussion on the amendments which it intended to propose again to the plenary meeting.

When the matter had been discussed at the 110th meeting of the Committee, only seven countries had supported the USSR amendment to the preamble, while 36 delegations, including that of the United States, had opposed it. The reason for that opposition was that the amendment in question would have a limiting effect on Convention, in that it declared genocide to be organically linked to certain doctrines. The Nürnberg tribunal had certainly recognized the organic link, but it had been concerned only with crimes committed during the last world war or during the period of preparation for the war. The Convention on genocide, however, should be applicable to all situations, in time of peace as in times of war.

Gross agreed that it was difficult to reply to the eloquent arguments of the representatives of the USSR, Venezuela and Pakistan on the subject of cultural genocide. Nevertheless, he did not think the character of the convention could be broadened in that way. Resolution 96(I) of the General Assembly defined the crime of genocide as the destruction of entire human groups, in contrast with homicide, which was the physical destruction of an individual. However barbarous and unpardonable it might be, the destruction of a church, a library or a school was in an entirely different category. That was a problem that concerned the fundamental human rights of the individual.

The USSR amendment was to add an article which would place among crimes punishable by international law such acts as the prohibition of the use of a certain language in schools or in daily intercourse, as also in publications. The amendment was not, however, designed to guarantee the free expression of thought, irrespective of the language employed. That

demonstrated how difficult it was to enter upon the field of fundamental human freedoms within the framework of the convention.

With regard to article VI, the USSR was opposed to the idea of the establishment of an international criminal court. In that connexion, it was sufficient to point out that the crimes with which the draft convention dealt could be perpetrated by a State, or by individuals who might be the representatives or agents of a State. If the punishment of such crimes was left to the State in question, the convention on genocide would be in the nature of a fraud.

The United States representative paid a tribute to the countries which had originally sponsored the convention, namely: Cuba, Panama and India,[1] as also to Mr. Alfaro, the Chairman of the Sixth Committee, Prince Wan Waithayakon, the Vice-Chairman, and Mr. Spiropoulos, the Rapporteur. The efforts of all those who had taken part in the work had resulted in the production of a draft convention which, once adopted, would constitute a milestone in the progress of international law.

[1] See *Official Records of the second part of the first session of the General Assembly*. Sixth Committee, annex 15, page 242.

Mr. Dignam (Australia) urgently requested the delegations to vote unanimously for the Sixth Committee's report, and thus give proof of the collective will of the Assembly to prevent and abolish the abominable crime of genocide.

Recalling the various phases through which the preparation of the draft Convention had passed, Mr. Dignam quoted the appeal made by Mr. Evatt at the 218th meeting of the Economic and Social Council in August 1948 that the draft should be submitted to the third session of the General Assembly. The representative of Australia paid tribute to all those who had contributed to the preparation of the draft convention, which represented the widest basis for understanding which was now to be found on the subject.

While full of sympathy for the peoples who had suffered directly from aggression and who wished the convention to cover as much ground as possible, Mr. Dignam considered that it was above all important to have a unanimous vote for a draft, the contents of which were acceptable to

all. By re-examining the draft convention later, it might be possible to amend it usefully, but at all costs the crime of genocide must be fought without delay. If the Assembly waited, in an endeavour to give entire satisfaction to the arguments of each one of the 58 Member States, that would be tantamount to postponing the completion of the instrument indefinitely.

The representative of Australia begged the delegations which had raised objections to certain points in the draft not to abstain from voting on the whole. Unanimous agreement could thus be reached on that very important instrument. He did not think that any Member State should be prevented by legal considerations from signing and ratifying the convention and putting it into operation.

Genocide was such a vile act that even savages and wild beasts were incapable of committing it. War-toughened soldiers had been struck with horror at the sight of the victims of genocide who were still alive. It was neither a crime of passion nor a vicious crime. In view of its indescribable character and the impossibility of justifying it in any way, it would be of value to re-affirm solemnly the two resolutions 96(I) and 180(II) that the General Assembly had adopted on the subject.

For the benefit of future generations, the Assembly should place on record the horror it felt at the inhuman and diabolical crimes which had been committed in recent times. It was to be hoped that it would never be necessary to invoke the provisions of the convention. The fact that the present generation had resolved to prevent such abominable practices must, however, be recorded in history.

Although the decisions of the international military tribunals of Nürneberg and Tokyo had served as a basis for the draft convention, Mr. Dignam felt that the convention should not be limited to a denunciation of the terrible crimes committed in the name of fascism and nazism. It was right that article I should state that the convention was applicable in peace-time as well as in war-time.

The Australian representative approved the wording of article VI, as also draft resolution B in the Sixth Committee's report which referred to the setting up of an international criminal Court. His country had always maintained that guarantees of human rights or fundamental freedoms were meaningless, whether written into a peace treaty or an international

convention, unless machinery was provided for their implementation. That was all the more true in the case of genocide, for history showed that the author of that crime was often the government of a State.

Article VIII gave every contracting party the right to invoke the competent organs of the United Nations. Just as the most humble citizen of a national community had the right to appeal to the supreme legislative and judicial organs of his country, so the smallest States that were victims of injustice should be given the right to have their grievances examined by the competent organs of the United Nations.

The signing of that convention would be an act of reparation to the innumerable victims of genocide, and at the same time a solemn guarantee that such bloodthirsty deeds would never again be repeated.

Mr. Abdoh (Iran) recalled that since the beginning of the Committee's work the Iranian delegation had warmly supported the initiative taken by certain delegations in preparing an international draft convention for the suppression and punishment of the crime of genocide. It had collaborated in the preparation of that convention and had submitted, among others, the compromise proposals (A/C.6/218) appearing in draft resolutions B and C submitted to the Assembly.

Genocide was not only the most odious crime which could be committed against the human race; it might also give rise to future wars. It was for that reason that the Iranian delegation expressed satisfaction not only at the fact that the Sixth Committee had succeeded, after two and a half month's difficult work, in submitting a draft convention which should receive the unanimous approval of the General Assembly but also at the fact that even in that Committee no delegation had opposed the principle of the convention. There was a difference of opinion only on the method of application of the principles unanimously agreed upon by the Members of the United Nations in the resolutions adopted in 1946 and 1947.

There had, however, been some abstentions in the final vote in the Sixth Committee[1]. Some delegations had given as a reason for their abstention the fact that the convention did not contain certain provisions which might have been more effective from the point of view of the suppression of genocide. Mr. Abdoh drew attention to the fact that the draft submitted to the General Assembly was a compromise text prepared in the hope that it would meet with unanimous approval without compromising the

principle that the existence of racial, religious or national groups was as sacred as the life of an individual.

[1] See *Official Records of the third session of the General Assembly*, Sixth Committee, 132nd meeting.

The draft convention was certainly far from perfect. For its part, the delegation of Iran regretted that the Committee had not adopted the principle of universal subsidiary punishment in the case of genocide. It understood, however, the reasons why some delegations had opposed its proposals and it would not press the point, as it did not wish to delay the work of the General Assembly, particularly at the final stage. The Iranian delegation likewise regretted that amendments, rejected by the Sixth Committee after lengthy discussion, had been submitted to the General Assembly.

Mr. Abdoh emphasized that the measures provided for in the draft convention for the prevention and punishment of genocide should not be under-estimated. Under the terms of the convention, States were obliged to have guilty parties punished by their own courts to deny them the right of asylum and to permit extradition. It also provided that the assistance of the United Nations organs might be invoked, that the International Court of Justice might pronounce an opinion on the violations of the convention, and that the International Law Commission should study the question of setting up an international criminal court.

Recalling the words of wisdom spoken by Mr. Evatt in the Economic and Social Council, Mr. Abdoh stressed that it would be better to proceed slowly and to include in the convention at the present time only those points on which agreement could be reached, reserving its completion for a future date. In preparing the convention, the United Nations had filled an international moral and humanitarian need and had hastened humanity's progress towards a better civilization.

The Iranian representative wished to pay a tribute to the delegations of India, Cuba and Panama, which had taken the initiative of proposing the first draft resolution on genocide in 1946. He also praised Professor Lemkin of Yale University, who had enriched legal science by establishing the character of genocide as a crime against human rights and by awakening public opinion to the necessity of combatting that world-wide scourge. In

conclusion, Mr. Abdoh hoped that Member States would sign and ratify the convention in the near future.

Mr. Parodi (France) recalled that his delegation had for two years taken part in all debates on the subject of genocide and in 1946 had submitted a draft resolution based on the idea that the crime could only be punished at an international level, since it was most often committed, if not with the complicity of a Government, at least with its tolerance. The French delegation's draft resolution had contained not only the principle of the setting up of an international criminal court but also detailed provisions regarding the functioning of that court.

That idea, which had appeared essential to the French delegation, had only been partly retained in the draft convention before the Committee. The French delegation saw, however, in that draft the result of many conciliatory efforts and it was for that reason that it had not again submitted to the General Assembly those of its amendments which had been rejected by the Sixth Committee. France had been able to adopt that conciliatory position because article VI of the convention provided for the setting up of an international criminal court. It was true that the competence of that court would only be optional at first, but owing to the fact that the convention mentioned it, it would pass into the sphere of positive law, which would be an important result. The convention provided that the International Law Commission should draw the necessary conclusions from the principle thus inscribed in the first draft convention, namely to prepare the statutes and rules of procedure of the international criminal court. The draft had thus considerable legal significance.

Its moral significance was of no less importance, for in spite of its imperfections the convention could not fail to have a preventive effect throughout the world inasmuch as it expressed the feelings of the conscience of mankind, aroused by the indignation caused by the odious crimes committed by a great country a few years ago. If that preventive action only saved a few human lives by suppressing forms of hatred and fanaticism which dated from the most barbarous periods of history, the work of the Sixth Committee would not have been in vain. It was for that reason that the French delegation would vote for the draft convention prepared by the Committee and against the amendments which had been submitted.

Mr. SUNDARAM (India) stated that his delegation, having been one of the sponsors of the resolution of 11 December 1946, could not help feeling some pride at the results accomplished. True, the draft convention, evolved after two years of study, represente a compromise solution, and as such could not be considered completely satisfactory. Nevertheless, Mr. Sundaram felt that it was likely to obtain the agreement of the majority. In order to be effective, a convention of that kind must be sure of the support of a large number of countries; that was why the Indian delegation was generally prepared to accept it in spite of its various shortcomings, for it represented a useful step towards the final goal.

The views of the Indian delegation with respect to the various articles of the convention were well-known. Mr. Sundaram would consequently confine himself to some comments on the amendments submitted to the General Assembly.

He stressed, first of all, that although a preamble might improve the form of a convention, it added nothing to its provisions. A preamble must therefore of necessity be brief and clear, and give no ground for controversy. The preamble proposed by the Sixth Committee satisfied those requirements, and the Indian delegation would consider any additions, such as those proposed by the USSR delegation, superfluous and even dangerous.

The Venezuelan delegation wished to add to the convention the following definition of cultural genocide: "Systematic destruction of religious edifices, schools or libraries of the group". Mr. Sundaram pointed out that under article II, genocide was defined in terms of acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Intent was closely linked to the act, but whatever the intent, the result must be the total or partial destruction of the group. It could not be asserted, however, that the group, as such, would be annihilated by the destruction of its religious edifices, schools or libraries. The Venezuelan amendment did not sufficiently indicate the connexion between the intention and the act, and could not be accepted.

The second amendment of the USSR also proposed to add an article on cultural genocide in the convention, and to that end, it repeated the text submitted by the *ad hoc* Committee. The Indian delegation had clearly stated its, position on that whole question both in the *ad hoc* Committee

and at the 83rd meeting of the Sixth Committee; it had stated explicitly that any attempt to destroy the language, the religion or the culture of a group within a State was wholly reprehensible and should not be tolerated by any civilized Government. It had pointed out that the Constitution of India contained adequate provisions for safeguarding the language, religion and culture of any minority group. It considered however that the protection of the cultural rights of groups should be assured by the declaration of human rights, which would shortly come before the General Assembly. The Indian delegation would therefore vote against the second USSR amendment.

It would, however, support the third USSR amendment, to delete from article VI the words "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". It must be remembered that the Sixth Committee itself had decided, at its 98th meeting, to delete that vague reference from the convention, and that it had adopted draft resolution B requesting the International Law Commission to study the possibility of setting up an international penal tribunal, which would be the only method of dealing with that complicated and difficult matter. The Indian delegation could not understand why the Sixth Committee had gone back on its original decision. Before the tribunal could begin to function, a host of complicated problems, such as jurisdictional conflicts between the national courts and the international tribunal, would have to be solved and a detailed convention drafted. Why prejudge the question by declaring there and then that persons committing genocide would be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction"? It would be simpler to include such a provision in the future convention that would set up the tribunal.

As regards the fourth USSR amendment, the Indian delegation believed that it was implicit in articles I and III of the draft convention, whereby the signatories generally undertook to punish genocide and the incitement to commit genocide. It seemed superfluous to specify the means of enforcement of that pledge.

Mr. Sundaram then drew the Assembly's attention to the text of article IX which had been considerably extended in comparison with the original text drafted by the *ad hoc* Committee[1]. The latter had provided for

the submission to the International Court of Justice of disputes relating solely to the interpretation, application or fulfilment of the convention on genocide. The present text mentioned, in addition, disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". The Indian delegation feared that such a provision might make it possible to bring before the International Court of Justice unsubstantiated or insufficiently substantiated cases under the pretext that a State had failed to carry out its obligations under the convention and that it was responsible for some act of genocide committed in its territory.

[1] See *Official Records of the Economic and Social Council*. Third Year, Seventh Session, Suppl. No. 6, article X.

In conclusion, Mr. Sundaram stated that the Indian delegation would vote for the draft resolutions recommended to the Assembly by the Sixth Committee. It would also vote for the third amendment submitted by the USSR delegation. Finally, although it would vote for the draft convention as a whole, it wished to make clear that the Indian Government might find it necessary to make some reservations in regard to articles VI and IX before signing or ratifying the convention.

Mr. Raafat (Egypt) recalled that in November 1947, the Egyptian delegation had toiled side by side with the delegations of Panama and Cuba in order to speed the drafting of an international convention on genocide. The draft which was then before the General Assembly had been adopted by a very small margin in the Sixth Committee, and that fact seemed to throw doubts on the necessity for, or utility of, such a convention.

Now, twelve months later, the General Assembly was called upon to take a decision on a draft convention to which the Sixth Committee had devoted most of its time and efforts during the current session. The draft, which was the result of numerous concessions, could obviously not satisfy everybody. Yet it pointed to the growing need which had been felt, at least by certain delegations, for an international convention to prevent and punish that abominable crime against humanity which was known as genocide. Without even speaking of the thousands of Moslems who had in the meantime fallen, victims of religious quarrels in certain parts of the world, it was enough to mention the sad events which had taken

place during the last months close to the Egyptian borders. In that connexion, Mr. Raafat stressed that the recent massacres committed in the Holy Land must inspire all nations of goodwill to redouble their efforts to prevent and punish genocide wherever it might occur. That was why the Egyptian delegation attached such immediate importance to the draft convention before the Assembly.

The draft certainly left much to be desired from many points of view. In particular, it contained gaps, such as the complete absence of any reference to cultural genocide or of any provision for an international penal tribunal competent to try those guilty of acts of genocide, especially in the case of responsible Governments or highly-placed officials. The question of international penal competence had not been totally set aside, since one of the two draft resolutions which accompanied and to a certain extent supplemented the draft convention invited the International Law Commission to study the matter. The Egyptian delegation welcomed that initiative, for, in its opinion, the punishment of a crime such as genocide could be effective and serve as a warning only if the most dangerous culprits were convinced that, while they might easily escape under the timid or indulgent judgment of national courts, they would not escape the judgment of the free, impartial and independent international tribunal.

Mr. Raafat concluded by stating that the Egyptian delegation would vote for the draft convention in spite of its shortcomings, and would make it its duty to recommend its ratification to the Egyptian Government. It would also support the concise and sensible amendment submitted by the Venezuelan delegation. It felt, however, that at the present stage of work it was too late to consider the various amendments proposed by the USSR delegation.

Mr. Khomussko (Byelorussian Soviet Socialist Republic) drew attention to the fact that the question which had occupied the Sixth Committee for two months and which was now before the General Assembly had first arisen during the Second World War. It was undeniable that the heinous crime of genocide was a child of fascism, the result of the fascist theory of the supremacy of the master race.

The representative of Byelorussia referred to the cases of genocide committed in the territory of his country. He mentioned specifically the instance of the ghettos and concentration camps set up by the Hitlerite occupation

forces in Minsk, where hundreds of Byelorussians, Poles and Jews died daily and where from August 1942 onwards the Germans had used gas chambers to hasten the extermination of the population.

Describing genocide as racial hatred in action, Mr. Khomussko pointed out that the amendment which the USSR delegation had proposed to the preamble of the draft convention was quite sound in that it stressed the organic relationship between genocide and the theories which preached racial hatred, domination by "superior" races and the extermination of "inferior" races. The Byelorussian delegation would consequently give it its wholehearted support.

The second USSR amendment, which proposed the insertion of a new article in the convention, had already been discussed at length in the Sixth Committee. Certain delegations, claiming that it was difficult to define cultural genocide accurately, had insisted on viewing it as part of the larger problem of human rights. Those arguments were neither logical nor convincing. The text suggested by the USSR delegation dealt with certain premeditated acts, undertaken with the purpose of destroying the language, religion or culture of a national, racial or religious group. Means must therefore be found to prevent and punish such crimes; it was not sufficient merely to refer the question to the Commission on Human Rights for study. It was important to define any step intended to suppress a language, a culture or a religion, or to destroy libraries, museums, schools or national monuments as a crime under common law. Experience of hitlerism had shown that such barbaric acts constituted some of the elements of racial or national persecution, aimed at the extermination of certain groups of the population, and were consequently a form of the crime of genocide.

For the Byelorussian people, genocide was not a theoretical or juridical issue. The Byelorussian people would never forget the crimes committed by the Nazis during their occupation of its territory. It knew that the destruction of cultural and national centres accompanied the mass destruction of people, cities and villages. The Germans had burned the Academy of Sciences, the State University, the State Library, the schools of medicine and law, the Ballet Theatre, the National Library, whose books had been plunderod or destroyed, and over one thousand school buildings in the region of Minsk alone. They had tried to destroy those cultural centres in order better to enslave the Byelorussian people. The

Annex 15

UN General Assembly, 179th Plenary Meeting, *Continuation of the discussion on the draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee*, A/PV.179 (9 December 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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crimes committed in the Union of Soviet Socialist Republics, in Poland, in Czechoslovakie [sic] and in the other occupied territories showed that everywhere the destruction of cultural centres had been one of the essential elements of nazi activity.

One of the objectives of the convention must be the prevention and punishment of such crimes. That was why the Byelorussian delegation would give its wholehearted support to the amendment proposed by the USSR delegation for the insertion of a new article in the convention. It would also vote for the USSR amendment proposing that a new article X should be inserted in the convention, providing that the contracting parties should undertake to disband organizations designed to incite racial, religious or national hatred and to provoke the commission of crimes of genocide.

The meeting rose at 1.20 p.m.

HUNDRED AND SEVENTY-NINTH PLENARY MEETING

Held at the Palais de Chaillot, Paris, on Thursday, 9 December 1948, at 3.30 p.m.

President: Mr. H.V. Evatt (Australia).

115. Continuation of the discussion on the draft convention on genocide: reports of the Economic and Social Council and of the Sixth Committee (A/760, A/760/Corr. 2)

Amendments proposed by the Union of Soviet Socialist Republics to the draft convention proposed by the Sixth Committee (A/766) and amendment proposed by Venezuela (A/770)

Mr. de Beus (Netherlands) stated that the draft convention on genocide and the questions which had again been brought up for discussion, had been examined at length and decided upon in the Sixth Committee. Although the Netherlands delegation was not satisfied in all respects with the draft in its final form, it would vote for the convention but would unfortunately be unable to vote for any of the amendments which had been submitted to the General Assembly.

Mr. de Beus said that he would limit his comments to one aspect of the convention which, in the opinion of his delegation, was the most important. In order that the convention might become an important and beneficial element in the development of international law, and in the international community, it was necessary that persons guilty of genocide, whatever their nationality, status or rank should be brought to impartial trial and subjected to adequate punishment. From the discussions in the Sixth Committee it was evident that most delegations considered that question to be the most crucial aspect in the application of the convention.

The Netherlands delegation had supported the point of view that the only method which would ultimately guarantee that perpetrators of the crime would be brought to justice on an impartial basis was trial by a competent international criminal court. Thus, Mr. de Beus had consistently upheld the view that the convention should contain the specific mention that persons charged with committing genocide should be tried by an international criminal court, if such a court were established. Therefore his delegation was glad that such a reference had been reinserted in article VI during the final revision of the convention in the Sixth Committee.

The Netherlands delegation, while realizing that no international court yet existed which was competent to try individuals charged with committing genocide, did not consider it to be a sufficient reason for excluding from the convention the possibility that cases of genocide might one day be referred to such a court. On the contrary, his delegation felt that the Assembly should not limit itself to a reference to an international court which might eventually be set up, but should take the first step towards the realization of that ideal. The matter was difficult and complicated, and an investigation should be undertaken first to decide on the advisability of creating such an international court. With that end in view, the Netherlands delegation had submitted a draft resolution the purpose of which was that the General Assembly should invite the International Law Commission to undertake such a study. During the discussion in the Sixth Committee, the Netherlands draft resolution had been combined with a similar proposal submitted by Iran and amended by Venezuela. The Netherlands delegation was grateful to both delegations for their co-operation and assistance. That joint proposal, which had been adopted by the Sixth Committee, was before the General Assembly. Yet the draft resolution, in its present form, was not limited to proposing the establishment of a court for the trial of acts of genocide only.

The problem had much wider aspects and Mr. de Beus reminded the Assembly that in recent times the question of creating an international criminal court had been discussed on several occasions. He referred to the draft convention for the establishment of an International Criminal Court for the trial of acts of terrorism which had been drawn up in 1937, but had never come into force. He also referred to the Nürnberg International Military Tribunal which, however, was only an *ad hoc* body established for a limited period of time and for a specific purpose.

In the opinion of the Netherlands delegation the need for an international criminal court might assume greater urgency as international contacts became more frequent and as the types of crimes requiring international action became more numerous. Mr. de Beus recalled that the Committee for the Progressive Development of International Law and its Codification had drawn the attention of the General Assembly, at its second session, to the desirability of establishing such an international court. The fact that a competent international criminal tribunal did not yet exist was no valid reason for not proceeding further with the matter. The text of the draft resolution inviting the International Law Commission to study the establishment of an international criminal court had been carefully worded so as to enable as many delegations as possible to vote for the resolution without, however, committing themselves to support the idea of establishing such a court before its desirability had been thoroughly studied.

Mr. de Beus wished to clarify one point in order to prevent any possible misunderstanding. In the opinion of his delegation, it would not be necessary to establish a permanent body. The International Law Commission might perhaps come to the conclusion that, in the early stages, it would be sufficient to establish a list of judges who could be convened in session when the need arose.

Mr. de Beus concluded by calling upon the General Assembly to take a preliminary step towards the establishment of an international criminal court. Such a step would be one of the most valuable practical contributions the United Nations could make to the development of international law.

Mr. Dihigo (Cuba) said that the motion of Cuba, India and Panama, stating that genocide was a crime against international law, and requesting the Economic and Social Council to prepare a draft convention, had been unanimously adopted by the General Assembly in its resolution 96(I)

of 11 December 1946. Later, at the second session in 1947, a motion submitted to the Assembly by Cuba, Panama and Egypt had reaaffirmed the original proposal and requested the Economic and Social Council to prepare a report and a draft convention. After two years of intensive work by a group of experts, the draft convention was now before the General Assembly. It was not perfect but from a legal point of view genocide being a new element, it was natural that there should be divergencies of opinion on the subject. The Sixth Committee had done excellent work in that connexion and Mr. Dihigo was convinced that the adoption of the convention would be considered one of the great achievements of the United Nations.

Mr. Alfaro (Panama) expressed the hope that the General Assembly would adopt the draft convention on genocide which, together with the International Declaration of Human Rights, could be regarded as the two most important achievements of the third session of the General Assembly.

The convention on genocide was the result of the universal dislike of a crime which had been perpetrated throughout history but had never reached the depths of premeditated cruelty to which it had sunk recently and during the years immediately before the Second World War. The crime had been committed systematically and as a government plan diabolically conceived and cold-bloodedly executed. A feeling of repulsion had again arisen before the spectacle of the crime still being committed. That feeling of horror had resulted in the General Assembly's resolution of December 1946, which had enabled the Sixth Committee to present a proposal to the General Assembly whereby a legal instrument would be placed at the service of humanity for the purpose not only of preventing the crime itself but also of punishing those committing it.

Mr. Alfaro recalled that the elaboration of the draft convention had not been an easy task. Legal experts of over fifty nations had endeavoured to find a formula which might not only satisfy the majority but would also produce an efficient and useful instrument. Naturally, complete unanimity had not been reached in the Committee; differences in political organization, in penal codification and in criteria existing between the different countries had given rise to prolonged and important discussions, but these discussions had been brought to a close thanks to the democratic system of accepting the views of the majority. The vote of the majority was based

not only on criteria based on legal techniques and usages, but also on considerations of a political nature which had eliminated items giving rise to widely divergent views. The draft convention had now become a common denominator of agreement between nations.

While the draft convention might contain certain deficiencies, there were no fundamental omissions. Genocide, whether perpetrated in peace or in war, was defined in the convention as a crime against international law which the signatory parties undertook to prevent and to punish. Genocide covered certain acts committed with the intent of destroying, in whole or in part, national, ethnical, racial or religious groups.

Mr. Alfaro enumerated those acts and added that punishment would be meted out to all people who committed the crime whether they were private individuals or public officials. Punishment under national legislation would also be covered but the door was left open to the possibility of establishing an international penal code. The draft convention specified that genocide would not be considered as a political crime au [sic] that extradition could be applied to those found guilty. Finally, the International Court of Justice would be requested to consider any disputes between nations regarding the possible implementation of the draft convention; those disputes would be submitted to the Court only if they concerned crimes involving international responsibility and if they were not punishable under civil or criminal codes.

Mr. Alfaro pointed out that the draft convention on genocide contained all the elements indispensable for the punishment, prevention and condemnation of the crime. If any delegation felt that the draft convention was not complete, that the text could be improved, or that a State could not adhere to it because of certain provisions in its national legislature, those difficulties could be overcome by means of reservations. He felt, however, that a delegation could not abstain from signing the convention in case the amendments were or were not accepted.

Mr. Alfaro concluded by making a strong appeal to the General Assembly to vote unanimously in favour of the draft convention on genocide.

Mr. Amado (Brazil) was pleased that the General Assembly was at last dealing with a subject which had been under discussion for over two years, and expressed appreciation of the work and untiring efforts of the legal experts who had helped to draw up the convention.

The Brazilian delegation had closely followed the question of genocide since 1946 when it was studied by the Committee for the Progressive Development of International Law and its Codification. The draft convention drawn up by the Sixth Committee had been the outcome of many compromises on the part of delegations and the results obtained, though not perfect, were gratifying. The concept of genocide had been clearly defined, and the parties to the convention would be called upon to punish genocide through their national tribunals whether the crime was committed in their own territories, by private individuals or by public officials. The application of the convention, however, was not inconsistent with the national legislation of individual States which in certain cases would give their own tribunals extra-territorial competence. The convention included the provision that genocide whould not be considered a political crime for purposes of extradition. After lengthy discussions, the members of the Committee had agreed to include in the convention the idea that genocide should be judged by an international court to be set up, and the jurisdiction of which would be recognized by the parties concerned.

The Brazilian delegation had been opposed to the mention of political groups in the convention because those groups were not sufficiently integrated to warrant their protection by the convention. It had also been opposed to the establishment of an international penal jurisdiction which it considered a vague and idealistic notion. However, the final drafting of the proposal was achieved by the introduction of the principle of non-compulsory jurisdiction, and a resolution was adopted entrusting the International Law Commission with a detailed study of the matter.

For all those reasons, Mr. Amado added that his delegation had reconsidered the question and had voted in favour of the insertion in the convention of a reference to the International Criminal Court.

In referring to the numerous compromises made by the different delegations: Mr. Amado made special mention of the co-operative attitude of the delegations of the United States, France, and the United Kingdom.

The Brazilian representative concluded by appealing to every Member to sign the convention which, if not fully satisfying their requirements, was at least a step in the right direction. All Member States should make use of the opportunity afforded to them to show their harmonious attitude in the establishment of an instrument which would greatly contribute to

diminishing the suffering and horrors which the crime of genocide had caused.

Mr. Fitzmaurice (United Kingdom) said that the members of the Sixth Committee would recall that his delegation had abstained from voting when the draft convention on genocide was adopted in that Committee. He was pleased to announce that the United Kingdom delegation was now in a position to vote in favour of the convention.

Although his country had always been in full accord with the suppression of genocide and with the view that genocide constituted an international crime of the most odious character, the United Kingdom Government had held certain doubts on the convention on genocide which were based on purely domestic reasons. However, a re-examination of the position had led his Government to the belief that the existing criminal law in the United Kingdom covered probably all, or at least most of the types of offences, contemplated by the draft convention. A further examination of the draft would be necessary by legal experts in the United Kingdom before that impression could be finally confirmed and, in the meantime, his delegation's vote in favour of the convention should not be taken as committing the United Kingdom Government to any detailed amendment of its national law. With that reservation, the United Kingdom delegation would support the convention. Its vote, however, should be considered as being without prejudice to the traditional and inalienable right to grant asylum, and, in that connexion, Mr. Fitzmaurice referred to the recognition of that principle clearly implied by article 12 of the draft declaration on human rights.

With regard to the amendments which had been proposed to the convention, the United Kingdom delegation shared the views expressed at the previous meeting by the United States representative, and would vote against those amendments for the same reasons that it had voted against the corresponding proposals which had been made in the Sixth Committee. Mr. Fitzmaurice added that his delegation fully sympathized with the motives which had inspired the Uruguayan amendment and that it echoed the sentiments which had been expressed on the subject by the representatives of Uruguay and Pakistan.

After careful consideration, however, the United Kingdom delegation still held the view that the whole field of cultural genocide was essentially

a matter of human rights and that the convention on genocide should be confined in the strict sense to the physical extermination of human groups.

With regard to the colonial clause, Mr. Fitzmaurice said that since the United Kingdom delegation would vote in favour of the convention, the question of retaining the colonial clause in its present form in the text assumed greater importance; the clause should not be amended as proposed by the USSR delegation. The application of the convention to the colonial territories might require legislation in many or in all those territories, and the United Kingdom Government could not commit those territories in advance without enacting such legislation. The argument put forward by the delegation of the Soviet Union that the Governments and authorities of those territories could not validly refuse to enact the necessary legislation, and that they would in any case not wish to refuse, however true it might be in substance, did not affect the technical constitutional position, nor did it do away with the need for the colonial clause from the point of view of the Powers which were internationally responsible for those territories. Mr. Fitzmaurice added that, although he was speaking only on behalf of his own country, he believed he was also presenting the views of all those countries which were also responsible for colonial territories.

Contrary to what the USSR representative had said at the previous meeting, the convention on genocide not only involved rights for peoples but also obligations on Governments, not only towards their own peoples but also towards other States. This, for instance, applied to the obligation to effect extradition for crimes of genocide. Therefore, however likely it might be that colonial territories would, in fact, accept those obligations, Governments and administrations of self-governing, or practically self-governing territories, could not be committed in advance to do so legally or constitutionally because they would have to pass the necessary legislation.

Mr. Fitzmaurice said that there was no foundation for the suggestion made by the delegation of the Soviet Union that the United Kingdom delegation had some sinister motive for wishing to maintain the colonial clause. The record of the United Kingdom with regard to its colonial peoples was sufficiently well known. The United Kingdom Government fully appreciated the principle of universality in relation to genocide and had merely

asked, on constitutional and technical grounds, for the inclusion of the usual colonial clause which was common to most treaties.

Mr. Fitzmaurice concluded by expressing his delegation's appreciation for the excellent work done and co-operation shown by the Chairman, the Vice-Chairman, and the Rapporteur of the Sixth Committee, and for the able assistance rendered by the Secretariat.

Mr. Kaeckenbeeck (Belgium) said that the Belgian delegation in the Sixth Committee had voted in favour of the draft convention since it had seemed to achieve whatever had been possible in the circumstances. It had been the result of many compromises which had been accepted in order to render it acceptable to the greatest possible number of States. His delegation had been fully aware that such compromises could not be absolutely satisfactory, either in logic or in practice. He had pointed out that the provisions concerning extradition might cause certain difficulties or delays in the acceptance and implementation of the convention by his country. The convention would require certain changes in national legislation and possibly the revision of certain treaties. It was essential, however, to accept the compromises, whatever their defects, because that seemed the only way by which a positive solution could be reached without endless revision. The Belgian delegation, therefore, would vote in favour of the convention and against all the amendments.

Mr. Katz-Suchy (Poland) pointed out that the Polish delegation had taken a very active part in examining the draft convention on genocide in the Sixth Committee, partly as a result of a specific appeal made by the Australian delegation to the Economic and Social Council, in Geneva, on 25 August 1948. Nazi Germany had inflicted on Poland some of the worst acts of genocide known to history. As a result, Poland had lost more that six million people and had suffered irreparable material, moral, spiritual and cultural damage. No country, therefore, had a greater interest than Poland in seeing genocide condemned and combated.

Unfortunately, the convention did not fulfil the most elementary requisites for the prevention and punishment of that crime. The preamble, when defining the crime of genocide and analysing its origin, omitted all reference to acts of genocide committed by fascist regimes, particularly by nazi Germany and Franco Spain. It failed to emphasize the fact that there was a direct connexion between such crimes and the propaganda

put out by the racialists sponsoring those regimes; yet such a declaration should have been the very foundation of the convention. Believing that the omission had been deliberate and had been made against the advice of countries such as Poland and the USSR, who had suffered most severely at the hands of those regimes, the Polish delegation could not accept the preamble.

He found it deeply disturbing that that omission had been made at the insistence of the United States delegation which had argued that to postulate an organic link in the preamble between the crime of genocide and fascist race theories would alienate Germany and Italy and would make it difficult for those countries to accede to the convention in the future. His delegation wished to make it quite clear that it did not desire to bar either Italy or Germany from international conventions. It believed, on the contrary, that their accession to the convention on genocide would be most desirable, providing that certain prerequisites were fulfilled. The most important was the understanding of their responsibility and the recognition of the close link existing between the crime of genocide and racial theories and other similar doctrines which had been the official ideology of those countries for many years and which unfortunately was still rooted in those countries. That was why the Polish delegation had wished the preamble to include such provisions.

In an attempt to find a compromise formula in order to counter the opposition of the United States delegation to a preamble specifically stating the responsibility of fascism and nazism for mass acts of genocide, the Polish delegation had made certain suggestions; they had, however, been rejected by a majority headed by the United States delegation.

In his view, it was essential that the preamble should mention the organic link existing between fascism and racial theories on the one hand, and the crime of genocide on the other. The conclusion to be drawn automatically was that the most decisive form of struggle against genocide lay, not in a vague general statement, but in the definite prohibition of incitement to national, racial and religious hatred and the stringent punishment of persons guilty of such incitement. The only successful method of combatting genocide was to attack its roots.

The Polish delegation had taken an active part in the work of the Sixth Committee in the hope that the convention would become a really active

instrument for the prevention and punishment of genocide and would, above all, be likely to prevent any repetition of the crime. His delegation had always maintained that the only way of preventing that crime would be to take adequate measures long before it was initiated. His country's own experience of mass destruction – committed not as the consequence of military operations, but want only – had been the obvious reason for its attitude.

In that connexion, Mr. Katz-Suchy emphasized hid delegation's disappointment with the methods and machinery applied to the prosecution of war criminals responsible for the crimes committed in Poland during the German occupation. Only a few thousand criminals had been brought to book. Even within those narrow limits, retribution had been clearly inadequate. War criminals guilty of the extermination of thousands of Poles and others were again prominent in the political life of the Western Zones of Germany; though traced by the Polish Government, they had not been handed over to Poland, despite demands for their extraditions. Mr. Katz-Suchy gave several examples.

It should not be surprising, therefore, in his opinion, that his delegation took a somewhat dubious view of the United States' opposition to postulating the connexion between fascism and the crime of genocide. His delegation could not agree with the idea that half-measures would be effective in the future, when so many cases of injustice in that field existed at present.

His delegation had therefore insisted that the convention should first of all provide for adequate prevention of the crime of genocide. It had desired the prohibition of propaganda against racial, religious and national groups because it knew very well that such propaganda led to crime and consequently to war. It had also demanded that the convention should include sanctions against preparatory acts. The convention, should also prohibit any organization the aim of which was genocide. Unfortunately, such provisions had not been fully implemented in the convention. His delegation had also submitted that the definition of genocide should include the destruction of a nation's art and culture, a crime which, like mass extermination, was the direct consequence of racial theories and of nazi and fascist doctrine.

The United States representative had attempted to merge the problems of genocide and of human rights. He had virtually contended that cultural

genocide and freedom of expression were the same thing. The representative of a country which had not experienced the horrors of war on its own territory might make such a confusion; he could easily oppose the demand that measures should be taken against cultural genocide under the pretext of concern for freedom of expression. Poland, however, had repeatedly and recently been the victim of that crime; its art and science had suffered terrible losses.

Mr. Katz-Suchy listed acts of cultural genocide committed by the Nazis in his country and pointed out that his delegation had introduced proposals that such crimes should be explicitly covered by the convention. He regretted that the Polish suggestions and the amendments which his delegation had supported had not been adopted. He was strongly in favour of re-drafting article III, as proposed by the USSR amendment, because the convention would only be fully effective if it covered cultural genocide which could be as destructive of the life of a nation as physical extermination.

He objected moreover to article VI which provided for the jurisdiction of an international penal tribunal to deal with genocide. Such a tribunal did not exist; it was problematical whether it would even be set up in the future. The inclusion of such a principle in the convention constituted at least a moral obligation on the parties to the convention, although they could not know precisely what had been meant. The creation of an effective international penal tribunal had to be based upon a compulsory, not on optional, jurisdiction. That implied that it would have to be based on principles contrary to those governing the Statute of the International Court of Justice. No decision had been taken as to the competence or the jurisdictional powers of the proposed tribunal and, in particular, whether it should supersede or merely supplement the competence and jurisdiction of national tribunals.

If Member States, therefore, accepted article VI in its present form, they would be assuming obligations, the scope of which they would not know. An international penal jurisdiction was possible in practice only when an international executive power existed having substantial means of enforcement at its disposal. The inclusion of the principle of an international penal tribunal, in article VI, might well constitute an intervention in the internal affairs of States and a violation of their sovereignty; perhaps that had been the intention. It was impossible to accept in advance an international penal

court which did not exist, which had not been formally proposed or even discussed, and which might never even come into being. The representative of the Netherlands had argued that such a tribunal would ensure justice. Unfortunately, another international tribunal had completely failed to do that. Important nazis like Hjalmar Schacht and General Hoder, for example, had recently been released by an international tribunal which had sat under the chairmanship of a United States judge.

Mr. Katz-Suchy said that he objected to the rejection of the article which provided that invocation of the law or superior orders should not justify genocide. His delegation could not take any responsibility for a convention which failed to contain such a provision; he would continue to fight for its inclusion. He pointed out that the charter of the Nürnberg Tribunal and the military statutes of several States already contained such a provision. Its rejection, therefore, was a serious step backward in the evolution of international law. Omission of that provision would prevent the application of article V, in the original draft, which stated that heads of State, public officials and private individuals should be punished for genocide. Since heads of State would always invoke the law and public officials and private individuals could always invoke superior orders, the convention would have no practical effect whatever and punishment would fall on a certain number of lesser individuals, leaving the main instigators of the crime unpunished.

The representative of Poland adduced the example of the sentence handed down by the Supreme National Tribunal of Poland condemning to death Josef Buehler, first deputy of the nazi Governor-General of Poland, on the charge of causing the death of thousands of Polish citizens by applying the principles of so-called German racial superiority. The accused had pleaded "not guilty", claiming that his actions had been based on superior orders. The Tribunal, however, found that the accused had committed murder "from behind his desk and by the pen".

The Polish delegation, therefore, had to protest in the strongest possible terms against the deletion of the provision that appeal to the law or superior orders should not justify genocide. The efficacy of the convention would depend upon including matter which would attract the greatest possible number of signatures and ratifications. It would depend upon the fact that it applied to all territories without distinction as to their juridical status. Weak and small nations were most seriously threatened

by genocide; Trust and other Non-Self-Governing Territories needed most protection from the convention. He appreciated the great concern shown by the representative of the United Kingdom for the local jurisdiction and the local parliaments of the dependent territories. He wondered, however, whether similar concern was being shown in any other cases. If the convention were to be effective, it had to apply to colonies. The metropolitan States had to be prepared to apply it. Genocide had often been committed in the colonies; the colonial peoples were always in danger from the metropolitan States in that respect, whether in the direct physical form or in the form of cultural genocide.

Despite such objections, the Polish delegation believed that the convention on genocide, however incomplete and defective, represented a great step forward. Prevention against future crimes of genocide should be established. The victory over nazism and fascism would only be complete if provisions were laid down to eliminate the crime once and for all.

He regretted that the draft submitted by the Sixth Committee was not satisfactory and appealed to the General Assembly to adopt the Convention in a form such as would permit general acceptance and to avoid everything which might be regarded as an attempt to make general application impossible. The USSR delegation had submitted a number of amendments. Most of those covered the points raised by the Polish delegation and met its objections. His delegation would therefore support them.

Mr. Augenthaler (Czechoslovakia) said that his country attached great importance to the convention on genocide. He wished to see a really effective convention based upon historical experience. He believed that it had been sufficiently demonstrated that crimes committed on the basis of the doctrine of race superiority all derived from the source which wass well expressed in the first amendment submitted by the delegation of the Soviet Union.

The General Assembly had an obligation towards all victims of the recent crimes of genocide to state clearly that nazism and fascism had been directly responsible; that statement should be included in the preamble to the convention. The USSR amendment would not limit the scope of the convention, but would make it more precise. He himself would even suggest that an annex might refer to Hitler's book *Mein Kampf*, Mussolini's book on fascism and the reports of the Nürnberg trials, showing clearly the cause and effect, the origins and result of genocide. There was no valid

reason for the toleration of the propagation of fascism. If steps were taken to suppress that in time, the crime of genocide would be discouraged.

He had appreciated the appeal made by the representative of Australia. He pointed out that, even before 1933, his own country had addressed urgent appeals to the whole world when it had seen the nazi danger in Germany. At that time those appeals had been deprecated; it had been said that nazism was harmless. The same had occurred with regard to Mussolini in Italy. The result of that blindness had been Munich. If the preamble did not state precisely the danger which had to be combatted, politicians and lawyers of the future might come to say that the convention did not apply to such cases and that there was no need to pay too much attention to them. His country no longer had any such fears since it had found solid alliances which it considered vital for its whole future; but there were others who might incur a fate similar to that which his country had suffered at Munich.

At the previous meeting the representative of the United States of America had regretted that the delegation of the Soviet Union had presented amendments. When on a former occasion it had been a question of eliminating a resolution on food wastage, no effort had been spared to introduce amendments. When, however, it was a question of denouncing nazism, the USSR delegation had been blamed for introducting an amendment.

An effective convention included the question of tribunals. He could not agree with arguments that only an international tribunal could mete out justice in such cases. It was true that if countries allowed criminal organizations to exist and propagate their doctrines, the tribunals of such countries might themselves be powerless or too tolerant, as had been the case in Italy and Germany at one period. If, however, that situation existed already, it would be hard to conceive that a country would place itself in the position of a criminal and accept an international tribunal. Therefore an international tribunal was not desirable; it might even become the refuge of all who feared the justice of their own country.

In conclusion, Mr. Augenthaler emphasized that, in his opinion, the convention would not become really effective unless the amendments submitted by the delegation of the Soviet Union were adopted.

Mr. Manini y Rios (Uruguay) stated that in the Sixth Committee, the delegation of Uruguay had sustained the point of view that the draft

convention on genocide should contain no reference to political groups and to cultural genocide. Both those points had been deleted.

On the other hand, the delegation of Uruguay had lent its support to the establishment of international jurisdiction to punish genocide, and hoped that resolution B which covered the point would be instrumental in achieving progress in international law.

He would vote in favour of the draft convention in the belief that although not in every respect perfect, the provisions marked a step forward. It was not appropriate at the present stage of the work to study the amendments of Venezuela and Sweden in detail; the delegation of Uruguay would therefore vote against them.

Mr. Tsien Tai (China) said that China had always been in favour of the condemnation of genocide as an international crime. His delegation had taken an active share in the work of the *ad hoc* Committee on Genocide and earnestly hoped that the convention as drafted by the Sixth Committee would soon become applicable and contribute to human progress and to universal peace.

The Chinese delegation regretted that the concept of cultural genocide had been set aside since, in certain aspects, it constituted a worse crime even than biological or physical genocide. It was less apparent and less brutal, but it was more extensive and more insidious since it was a means of depriving a whole people of its culture, its religion and even of its language.

The deletion of the mention of political groups in article II also weakened the convention. The impression was thus created that there was latent a desire to tolerate a crime committed against a political group; that was certainly contrary to the spirit of the convention.

Though regretting those omissions the Chinese delegation would vote in favour of the adoption of the convention. It would also vote in favour of the second USSR amendment; should that amendment be rejected, it would vote for the Venezuelan amendment.

The Chinese delegation would be obliged either to vote against the other USSR amendments or to abstain. It had to reserve the right of its Government to sign and ratify the convention with certain reservations in order to permit the appropriate national authorities to carry out a more detailed examination of the text.

The President stated that the discussion was closed and that he would put to the vote the six amendments proposed by the Soviet Union, and then the Venezuelan amendment.

Mr. Pérez Perozo (Venezuela) said that his delegation had submitted the amendment as a final appeal to the General Assembly to make an essential addition to the convention. It had, however, been made clear by the statements which had been made that other Members did not share that desire. In order not to hamper the work of the Assembly, the Venezuelan delegation would withdraw its amendment in the hope that, at some future occasion, the States parties to the convention would be prepared to be guided by experience and would support such an amendment, were it to be submitted again.

The President put to the vote the USSR amendment (A/766) to the preamble of the convention, consisting in the addition of the words "and recent events have shown that the crime of genocide is organically bound up with fascism-nazism and other similar race 'theories' which propagate racial and national hatred, the domination of the so-called 'higher' races and the extermination of the so-called 'lower' races" after thewords "had inflicted great losses on humanity".

The USSR amendment to the preamble was rejected by 34 votes to 7, with 10 abstentions.

The President then put to the vote the second USSR amendment consisting in the addition of a new article III to the draft convention reading as follows:

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin, or religious beliefs such as:
>
> (*a*) Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
> (*b*) Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

A vote was taken by roll-call, as follows.

Turkey, having been drawn by lot by the President, was called upon to vote first:

In favour: Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Haiti, Lebanon, Liberia, Pakistan, Philippines, Poland, Saudi Arabia, Syria.

Against: Turkey, United Kingdom, United States of America, Uruguay, Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Cuba, Denmark, Dominican Republic, France, Greece, Honduras, Iceland, India, Iran, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Siam, Sweden.

Abstaining: Union of South Africa, Venezuela, Yemen, Afghanistan, Burma, Egypt, Ethiopia, Guatemala.

The second USSR amendment was rejected by 31 votes to 14, with 10 abstentions.

The PRESIDENT then put to the vote the third USSR amendment consisting in the deletion from article VI of the words "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

A vote was taken by roll-call, as follows.

Ethiopia, having been drawn by lot by the President, was called upon to vote first.

In favour: India, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Byelorussian Soviet Socialist Republic, Czechoslovakia, Dominican Republic.

Against: Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, Iran, Lebanon, Liberia, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Philippines, Saudi Arabia, Siam, Sweden, Syria, United Kingdom, United States of America, Uruguay, Yemen, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Cuba, Denmark, Egypt.

Abstaining: Iraq, Mexico, Peru, Turkey, Union of South Africa, Venezuela, Afghanistan, Argentina.

The third USSR amendment was rejected by 39 votes to 8, with 8 abstentions.

The PRESIDENT then put to the vote the fourth USSR amendment consisting of the addition of the following new article X to the convention:

> The High Contracting Parties undertake to disband and to prohibit in future the existence of organizations aimed at the incitement of racial, national and religious hatred and at provoking the commission of crimes of genocide.

A vote was taken by roll-call, as follows,

Mexico, having been drawn by lot by the President, was called upon to vote first.

In favour: Pakistan, Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Burma, Byelorussian Soviet Socialist Republic, Czechoslovakia, Liberia.

Against: Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Siam, Sweden, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Egypt, Greece, Iceland, India, Iran, Luxembourg.

Abstaining: Mexico, Peru, Philippines, Syria, Union of South Africa, Yemen, Afghanistan, Ethiopia, France, Guatemala, Haiti, Honduras, Iraq, Lebanon.

The fourth USSR amendment was rejected by 31 votes to 10, with 14 abstentions.

The PRESIDENT then put to the vote the fifth USSR amendment which consisted in amending article XII to read as follows:

> The application of the present Convention shall extend equally to the territory of any Contracting Party and to all territories in regard to which such a State performs the functions of the governing and administering Authority (including Trust and other Non-Self-Governing Territories).

A vote was taken by roll-call as follows.

The Netherlands, having been drawn by lot by the President, was called upon to vote first.

In favour: Pakistan, Philippines, Poland, Saudi Arabia, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Yemen, Yugoslavia, Burma, Byelorussian Soviet Socialist Republic, Czechoslovakia, Guatemala, Haiti, Iraq, Lebanon, Liberia, Mexico.

Against: Netherlands, Nicaragua, Norway, Panama, Paraguay, Siam, Sweden, Turkey, Union of South Africa, United Kingdom, United States of America, Australia, Belgium, Bolivia, Brazil, Canada, Colombia, Denmark, Dominican Republic, France, Greece, Iceland, Luxembourg.

Abstaining: New Zealand, Peru, Uruguay, Afghanistan, Argentina, Chile, China, Cuba, Ecuador, Egypt, Ethiopia, Honduras, India, Iran.

The fifth USSR amendment was rejected by 23 votes to 19, with 14 abstentions.

The PRESIDENT stated that the sixth and last USSR amendment would not be put to the vote since it was consequential upon the inclusion of the two new articles which had been rejected by the preceding votes.

Mr. MOROZOV (Union of Soviet Socialist Republics) explaining the vote of his delegation on the draft convention, stated that in the opinion of the delegation of the Soviet Union genicode was one of the most serious crimes and was closely connected with fascism, nazism and doctrines of racial superiority. It was essential that the United Nations should insist on the strict punishment of anyone who committed the crime.

The Soviet Union, more than any other State, had the right to propose methods of defeating those fascist and nationalist doctrines which were at the root of genocide. Its proposals had not been approved by the majority and the draft convention still contained a number of substantial omissions which were the result of the rejection of the USSR amendment to the preamble. The point made in that amendment that genocide was closely linked to fascism and nazism was not stated in the draft convention. It was regrettable that there should remain loopholes which might prevent the punishment of those who perpetrated the crime of genocide or incited others to do so.

The delegation of the Soviet Union could not but regret that no article had been inserted making punishable any deliberate act committed with the intention of destroying any language, religion, culture or national belief. The proposal to include the conception of cultural genocide had also been rejected. That omission might be utilized by those who wished to carry out discrimination against national, cultural and racial minorities. Such discrimination did exist at the present time and prevailed in certain territories and colonies administered by countries who prided themselves on their civilization.

Article XII gave the colonial Powers discretion to extend or not to extend the provisions of the convention to their colonies. The rejection of the USSR amendment providing for the extension of the convention to all Non-Self-Governing Territories diminished the value of the present text.

The draft convention did however provide for the condemnation of genocide and rendered it punishable. The Soviet Union would consequently vote in favour of it. With regard to article IX where reference was made to the International Court of Justice and the international tribunal the USSR delegation had to maintain its position and insist that, in each case the submission of any dispute to the International Court of Justice could only be made with the consent of all the parties directly concerned in the matter.

Since the amendment of the Soviet Union to article XII had been rejected, his delegation would vote in favour of the resolution which recommended that States signatories of the convention and administering dependent territories should take such measures as were necessary and feasible to enable the provisions of the convention to be extended to those territories as soon as possible.

The PRESIDENT then put to the vote resolutions A, B, and C proposed by the Sixth Committee (A/760). A vote by roll-call was requested on resolution A.

A vote was taken by roll-call as follows:

India, having been drawn by lot by the President, was called upon to vote first.

In favour: India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland.

Resolution A was adopted by 56 votes to none.

Resolution B was adopted by 43 votes to 6, with 3 abstentions.

Resolution C was adopted by 50 votes, with 1 abstention.

The PRESIDENT stated that the adoption of those three resolutions and the approval given by the Assembly to the Convention on Genocide was an epoch-making event.

Wholesale or partial destruction of religious, racial and national groups had long shocked the conscience of mankind. Endeavours had been made in the past to preserve human groups from destruction through humanitarian intervention undertaken generally by one single State. Governments which carried out such interventions had frequently been accused of pursuing other than humanitarian ends.

Today international and collective safeguards had been established for the protection of human groups. Any action which would be undertaken in the future would be undertaken on behalf of the United Nations. The United Nations and other organs would be entrusted with the supervision of the application of the Convention on Genocide and their intervention would be made in accordance with international law and not on the basis of unilateral policies. Thus, in that field, the supremacy of international law had been proclaimed and a significant advance had been made in the development of international criminal law. Fundamental human rights had formerly been protected by international convention against piracy, the slave trade and the traffic in women and children. The Convention on Genocide protected the fundamental right of a human group to exist as a group; by approving it the General Assembly had, in accordance

with Article 13 of the Charter, promoted the "progressive development of international law and its codification".

The resolution on genocide adopted by the General Assembly on 11 December 1946 had been adopted unanimously and had proclaimed that the crime of genocide which shocked the conscience of mankind, was contrary to the aims and principles of the United Nations. The attitude of mind which had prompted the adoption of that resolution must continue to prevail in the counsels of the United Nations. The Convention should be signed by all States and ratified by all parliaments with the least possible delay in order that that basic human right should be put under the protection of international law.

The meeting rose at 5.50 p.m.

Annex 16

UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/ CRP.5 (16 September 2019) (additional excerpts to MG, Vol. III, Annex 49)

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Human rights situation that require the Council's attention

Detailed findings of the Independent International Fact-Finding Mission on Myanmar*

* Information complementary to that contained in the official report (A/HRC/42/50), submitted to the Human Rights Council pursuant to resolution 39/2. Reproduced as received, in the language of submission only.

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Contents

Acronyms

AA	Arakan Army
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EAO	Ethnic Armed Organization
FPNCC	Federal Political Negotiation and Consultation Committee
GAD	General Administration Department
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESC	International Covenant on Economic, Social, and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILO	International Labour Organization
KIA	Kachin Independence Army
LIB	Light Infantry Battalion
LID	Light Infantry Division
MNDAA	Myanmar National Democratic Alliance Army
NLD	National League for Democracy
OHCHR	Office of the United Nations High Commissioner for Human Rights
SGBV	Sexual and Gender Based Violence
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
SSA-N	Shan State Army North
SSA-S	Shan State Army South
TNLA	Ta'ang National Liberation Army
UDHR	Universal Declaration of Human Rights
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
UNOSAT	UNITAR's Operational Satellite Applications Programme
USDP	Union Solidarity and Development Party
UWSA	United Wa State Army
WFP	World Food Programme
MaBaTha	Association for the Protection of Race and Religion
MaHaNa	Sangha Maha Nayaka Committee
NaSaKa	Border Area Immigration Control Headquarters
NaTaLa	Ministry for Development of Border Areas and National Races "model villages"
SaYaPa	Myanmar Intelligence Office

a range of restrictions, including on humanitarian access, that have led to significant displacement of the civilian population.

24. While each of the situations of the ethnic minorities in Myanmar is distinct with its own facts and dimensions, a common thread underlies the situation of each of the ethnic groups. All ethnic groups highlighted in this report have suffered human rights violations and violations of international humanitarian law at the hands of the Tatmadaw. They have experienced the insecurity and hardship that prevail wherever the Tatmadaw operates. They have all been driven off their traditional lands and subjected to forms of marginalisation as a result of the Tatmadaw's policies.

25. All the ethnic minority communities that the Mission investigated have been deprived of justice for the serious human rights violations perpetrated against them. For this reason, the Mission found it necessary to highlight once again the situation of ethnic minorities in Myanmar, to provide an independent and impartial assessment of the violations committed against them, and to call on the Government of Myanmar and the international community to put a halt to these violations by finally breaking the cycle of impunity that protects the Tatmadaw and leads to further violence in the future.

II. Introduction

26. This report complements the Mission's report submitted to the Human Rights Council pursuant to resolution 39/2,[2] by which the Council extended the mandate of the Independent International Fact-Finding Mission on Myanmar ("the Mission"). The Council requested the Mission to present a final report on its activities to the Council at its forty-second session.

27. This report focuses on human rights developments since September 2018. It highlights the situation of ethnic groups in Rakhine, Chin, Kayin, Kachin and Shan States, focussing on conflict-related human rights violations and abuses and violations of international humanitarian law. It also provides a legal analysis of the situation of the Rohingya under the rules of State responsibility and the 1948 Genocide Convention, to which Myanmar is a party. The Mission further presents its findings on the situation of the conflict between the Tatmadaw and the Arakan Army since the beginning of 2019 and the latest developments in northern Myanmar.

28. The Mission comprised three experts: Marzuki Darusman (Indonesia, chair), Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia).

29. The Mission regrets the continuing lack of cooperation from the Government of Myanmar, despite the numerous appeals made by the Human Rights Council and the Mission. During the reporting period, the Mission requested to meet with the Permanent Representative of Myanmar in Geneva on two occasions and requested country access on 12 February 2019. It sent a detailed list of questions pertaining to the mandate of the Mission on 28 March 2019. The Mission received no official response to any of its communications. The Mission's draft main findings were shared with the Government prior to its public release, providing an opportunity to comment or make factual corrections. No response was received. This conference room paper, containing the detailed findings of the Mission in relation to conflict-related and other human rights violations, was also shared with the Government on 11 September 2019. No response was received. The Mission's letters are in annex 2.

[2] A/HRC/42/50.

3. Letter sent to the Permanent Mission of the Republic of the Union of Myanmar on 31 July 2019

UNITED NATIONS NATIONS UNIES

Independent International Fact-Finding Mission on Myanmar established by HRC resolution 34/22

PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ffmmyanmar.org • TEL: +41229179218 • FAX: +41 22 917 9008 • E-MAIL: myanmarffm@ohchr.org

REFERENCE: IIFFMMY/CG/ha/139

31 July 2019

Excellency,

With reference to resolutions 34/22/, 37/32 and 39/2 of the United Nations Human Rights Council, which respectively created and extended the Independent International Fact-Finding Mission on Myanmar (IIFFMM) and through the latter resolution requested it to report to the Council at its 42nd session, due to take place in September 2019, I have the honour to transmit an advance copy of our draft report (attached). In accordance with the standard practice, we invite the Government of the Republic of the Union of Myanmar to review our report and to communicate to us any corrections of a factual nature that it deems necessary, at latest by 18:00, 04 August 2019. We will consider any response carefully and submit the report for processing shortly thereafter.

Any questions regarding this letter and the official response may be directed to myanmarffm@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.

Marzuki Darusman
Chairperson
Independent International Fact-Finding
Mission on Myanmar established
pursuant to Human Rights Council resolution 34/22

H.E. Mr. Kyaw Moe Tun
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Republic of the Union of Myanmar
to the United Nations and other International Organizations
Avenue Blanc 47
1202 Geneva
Email: mission@myanmargeneva.org

4. Letter sent to the Permanent Mission of the Republic of the Union of Myanmar on 11 September 2019

UNITED NATIONS NATIONS UNIES

Independent International Fact-Finding Mission on Myanmar established by HRC resolution 34/22

PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

www.IIFFMMyanmar.org • TEL: +41229179218/ • FAX: +41 22 917 9008 • E-MAIL: myanmarIIFFMM@ohchr.org

REFERENCE: IIFFMM/CG/na/214

11 September 2019

Excellency,

With reference to resolutions 34/22/, 37/32 and 39/2 of the United Nations Human Rights Council, which respectively created and extended the Independent International Fact-Finding Mission on Myanmar (IIFFMM). In accordance with its mandate to establish "the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims."

The Mission has prepared the attached Conference Room Paper ahead of the 42nd session of the Human Rights Council, due to take place in September 2019 and is primarily based on investigation undertaken by the IIFFMM, following the extension of its mandate by the Human Rights Council in September 2019.

I have the honour to transmit an advance copy of this Conference Room Paper that will be released on 16 September 2019 in Geneva.

Any questions regarding this letter and the official response may be directed to myanmarffm@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.

Marzuki Darusman
Chairperson
Independent International Fact-Finding
Mission on Myanmar established
pursuant to Human Rights Council resolution 34/22

H.E. Mr. Kyaw Moe Tun
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Republic of the Union of Myanmar
to the United Nations and other International Organizations
Avenue Blanc 47
1202 Geneva
Email: mission@myanmargeneva.org

Annex 17

UN OHCHR, *Human Rights Council Intersessional Meeting on the Prevention of Genocide: Statement by Nada Al-Nashif, Deputy High Commissioner for Human Rights* (10 February 2021)

Human Rights Council Intersessional Meeting on the Prevention of Genocide
 Statement by Nada Al-Nashif, Deputy High Commissioner for Human Rights

ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx

10 February 2021, Geneva

Excellencies,
Colleagues and friends,

I am honoured to introduce this intersessional meeting and recognise the efforts of the Republic of Armenia and the other sponsors of resolution 43/29 to keep the prevention of genocide on the agenda of the Human Rights Council.

Two years ago, we celebrated the 70th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted on 9 December 1948 by the United Nations General Assembly, it was the first international treaty of a new era characterised by a vision of the world where the atrocities committed during the Second World War would never be tolerated again. It was followed the next day by the adoption of the Universal Declaration of Human Rights - ensuring the link between the prevention of genocide and the protection, respect and fulfilment of human rights.

The Secretary-General referred to the Universal Declaration of Human Rights last year when presenting his “Call to Action for Human Rights” saying “there is no better guarantee of prevention than for Member States to meet their human rights responsibilities”.

Sadly, experience – from Rwanda to Iraq and Myanmar– has shown that most mass atrocities find roots in long-standing civil and political violations, as well as discrimination, economic inequalities, social exclusion, and denial of economic, social and cultural rights. From Tutsis to Yazidis or Rohingyas, minorities have experienced severe and targeted denial of their most basic human rights.

Excellencies,

As the President of the Human Rights Council has just recalled, early signs of many of the recent mass atrocities, including genocide, have been detected and made public by Human Rights Council mechanisms, as well as by Treaty Bodies and the Office of the High Commissioner for Human Rights. No doubt that the human rights machinery has played a great early warning role.

Yet, sounding early warning remains insufficient. In this connection, the Secretary-General suggested in his last report on the prevention of genocide to this Council (A/HRC/41/24), , that greater use can be made of the Universal Periodic Review to enhance this. Last year, three rapporteurs also made recommendations to the Human Rights Council with a view to strengthening its preventive mandate, especially through increased cooperation with the Special Adviser on the Prevention of Genocide (A/HRC/43/37). To engage in building robust linkages between the New York based bodies and the various parts of the human rights machinery located in Geneva is certainly crucial, and should be explored.

However, as emphasized by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser on the Prevention of Genocide, in a joint study they presented in 2018 to the Council (A/HRC/37/65), it is important to move the focus of preventive work “upstream.” There needs to be a consistent, coherent approach that identifies and tackles the seeds of hatred before they can grow – or be cultivated – into the resentments and bitter divisions that can escalate into conflict.

In this respect, the United Nations human rights system contributes to long term prevention by identifying the root causes and accelerators of serious human rights violations, including in the socio-economic sphere; by collecting information on [human rights] violations; identifying alleged perpetrators; and by advocating for and supporting appropriate accountability and transitional justice solutions.

Excellencies,

Accountability is critical – not only because it provides justice for victims and punishment for perpetrators. A culture of accountability and the fair and equal administration of justice are catalysts for the rule of law and a culture of respect for human rights. They allow addressing grievances and facilitate solutions to their structural roots. Forcefully combating impunity in all its forms is thus central to ending genocide and other mass atrocities. Prevention and punishment – the explicitly stated twin aims of the Genocide Convention – can never be seen in isolation from each other. Punishment – with its functions of deterrence and the enforcement of rights - is key to prevention.

States have the primary responsibility to deliver justice and prevent human rights violations and atrocity crimes. The United Nations – in the first instance this Office – can support them through building cultures of accountability in practice. International human rights law underscores the need for States to conduct effective, prompt, thorough and impartial investigations as well as prosecutions; and to ensure access to justice and effective remedies for victims. The United Nations approach embraces all these steps from fact-finding exercises through to judicial processes.

In cases where a State is unwilling or unable to deliver justice, the International Criminal Court (ICC) can take over. In this sense, the Court is a central pillar of the work to punish, and therefore help prevent, the gravest of international crimes.

States that have not yet acceded to the Rome Statute should consider it. States should also consider how they can contribute to accountability for atrocity crimes committed in other States, including through supporting the work of the United Nations or exercising universal jurisdiction – as we saw with the landmark case brought by The Gambia against Myanmar before the ICC on the basis of alleged violations of the Genocide Convention. . It will certainly increase the understanding of the role that States must play in preventing and punishing acts of genocide committed beyond their frontiers.

Excellencies,

Effective accountability must encompass the need to acknowledge and take responsibility for the violations of victims' rights so that their rights can be restored and their entitlement to remedy satisfied. Victims have rights to truth, justice, reparation and a comprehensive package of guarantees of non-recurrence, which will assist in preventing future crimes.

There is a powerful link between prevention and truth-seeking, the role of memory and longer-term efforts of education, notably the teaching of history. A country's approach to past atrocities can be transformative – as we have seen repeatedly. Broader accountability measures can assist this transformation to an equitable and just future. It must reach to — but also beyond — the specific crimes committed, and address systemic deficiencies in State structures that have enabled serious human rights violations and abuses.

It is only by inscribing accountability in a broader transformative agenda that it can fully realize its preventive potential.

I thank you and look forward to your insightful deliberations.

Annex 18

William A. Schabas, *Genocide in International Law* (Cambridge University Press 2000)

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Genocide in International Law

The Crimes of Crimes

William A. Schabas
National University of Ireland, Galway

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Contents

2 Drafting of the Convention and subsequent normative developments

Early in 1947, the Secretary-General conveyed General Assembly Resolution 96(I), declaring genocide to be a crime under international law, to the Economic and Social Council (ECOSOC).[1] The resolution requested the ECOSOC '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'. The Secretary-General suggested that the ECOSOC might assign the task to the Commission on Human Rights or to a special committee of the Council.[2] The United Kingdom warned that the Commission on Human Rights already had a heavy programme, and proposed that the matter be returned to the Secretariat which would prepare a draft convention for subsequent review by a commission of ECOSOC.[3]

ECOSOC's Social Committee favoured returning the matter to the Secretary-General.[4] On 28 March 1947, ECOSOC adopted a resolution asking the Secretary-General:

(a) To undertake with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and (b) After consultation with the General Assembly Committee on the Progressive Development of International Law and its Codification and, if feasible, the Commission on Human Rights and, after reference to all Member Governments for

[1] Three scholars have published detailed reviews of the *travaux préparatoires* of the Convention: Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960; Pieter Nicolaas Drost, *Genocide, United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959; Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1; and Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temple International and Comparative Law Journal*, p. 1.

[2] UN Doc. E/330. Two draft resolutions were submitted, one by the United States proposing referral to the Commission on Human Rights (UN Doc. E/342), the other by Cuba proposing the creation of an *ad hoc* drafting committee.

[3] UN Doc. E/PV.70 (Mayhew, United Kingdom).

[4] UN Doc. E/AC.7/15; UN Doc. E/AC.7/15/Add.2; UN Doc. E/AC.7/W.14.

established a sub-committee to consider the convention, and briefly discussed it during a plenary session. It was, however, preoccupied with the draft international declaration of human rights, and gave the genocide convention only cursory attention. The Commission referred the matter back to ECOSOC, expressing the view that the draft convention represented 'an appropriate basis for urgent consideration and action by the ECOSOC and the General Assembly during their coming sessions'.[136]

The draft convention was also discussed at the third session of the Commission on Narcotic Drugs.[137] The Commission expressed its discontent at the fact that the report of the *Ad Hoc* Committee did not condemn the suppression of a people with narcotic drugs. It said it was 'profoundly shocked by the fact that the Japanese occupation authorities in North-eastern China utilized narcotic drugs . . . for the purpose of undermining the resistance and impairing the physical and mental well-being of the Chinese people'. The Commission warned that narcotic drugs might eventually constitute 'a powerful instrument of the most hideous crime against mankind' and urged ECOSOC to 'ensure that the use of narcotics as an instrument of committing a crime of this nature be covered by the proposed Convention on the Prevention and Punishment of Genocide'.[138]

ECOSOC discussed the draft convention only summarily at its August 1948 session before submitting it unchanged to the General Assembly.[139] As John Humphrey's diaries report: 'Partly because of Lemkin's lobbying and other efforts the public has become extremely interested in genocide and any postponement of the question now by Council would affect the latter's prestige.'[140]

The third session of the General Assembly

The United Nations General Assembly held its third session at the Palais de Chaillot in Paris. Two draft instruments of momentous importance for the era of human rights were on the agenda, the 'international declaration of human rights' and the convention on genocide. The declaration occupied the time of the General Assembly's Third Committee for several weeks, and was finally adopted on 10

[136] UN Doc. E/800, pp. 8–9. The Soviet Union included a dissenting statement in the Commission's report charging that the *Ad Hoc* Committee draft did not provide 'a sufficiently effective instrument to combat genocide'.

[137] UN Doc. E/799, para. 17.

[138] *Ibid.*

[139] UN Doc. E/SR.218–219.

[140] Hobbins, *On the Edge*, p. 30.

December 1948 as the Universal Declaration of Human Rights.[141] The eventual Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the plenary Assembly one day earlier, on 9 December 1948, following detailed debate in the Sixth Committee, accompanied by two related resolutions, one calling for the establishment of an international criminal court,[142] the other concerning the application of the Convention to dependent territories.[143]

At the beginning of the Assembly session, the report of the Economic and Social Council on the draft genocide convention, including the instrument prepared by the *Ad Hoc* Committee, was referred to its Sixth Committee.[144] The *Ad Hoc* Committee draft was debated by the Sixth Committee from 28 September 1948 to 2 December 1948.[145] After detailed article-by-article consideration, the Committee assigned its revised text of the convention to a drafting committee composed of representatives of Australia, Belgium, Brazil, China, Czechoslovakia, Egypt, France, Iran, Poland, the Soviet Union, the United Kingdom, the United States and Uruguay.[146] The drafting committee's text and the accompanying report[147] were then returned to the Sixth Committee for adoption.

Preliminary matters

At the outset of the debates in the Sixth Committee at the end of September 1948, some delegations proposed that the convention be referred for further study to the nascent International Law Commission.[148] They argued that the Commission was an expert body, best qualified to prepare legal documents. This was nothing more than a tactic aimed at delaying adoption.[149] Similarly, New Zealand said the draft convention had not been adequately studied, and proposed that it be examined further by member States, the Economic and Social

[141] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810.

[142] 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 216 B(III).

[143] 'Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 216 C(III).

[144] UN Doc. A/PV/142.

[145] See Drost, *Genocide*, pp. 54–136.

[146] Created at the 104th meeting. Australia, Brazil, Iran and Czechoslovakia were added at the 105th meeting. At the 108th meeting, Uruguay replaced Cuba, whose representative could no longer participate.

[147] UN Doc. A/C.6/288; UN Doc. A/C.6/289.

[148] UN Doc. A/C.6/SR.64 (Egeland, South Africa); UN Doc. A/C.6/SR.65 (Arancibia Lazo, Chile).

[149] See the comments of Raafat of Egypt, Chaumont of France and Spiropoulos of Greece: UN Doc. A/C.6/SR.63; and Pérez-Perozo of Venezuela, Kaeckenbeeck of Belgium and Paredes of the Philippines: UN Doc. A/C.6/SR.65.

Council, and the Commission on Human Rights.[150] Some delegations, such as Belgium, preferred that the General Assembly adopt only a declaration on genocide, a view supported by the Dominican Republic.[151] Sir Hartley Shawcross of the United Kingdom said he was not 'enthusiastic' about the draft convention, adding that member States would be deluded to think adoption of such a convention would give people a greater sense of security or would diminish dangers of persecution on racial, religious or national grounds. He noted that physical genocide was already punishable by law as murder, and that cultural genocide was a question of fundamental rights better addressed elsewhere.[152]

Initally, then, these efforts to block the convention had to be overcome. Leading the opposition to them, the United States urged negotiation and prompt adoption of the convention. 'Having regard to the troubled state of the world, it was essential that the convention should be adopted as soon as possible, before the memory of the barbarous crimes which had been committed faded from the minds of men', said Ernest A. Gross. The United States launched the debate in the Sixth Committee with an oddly phrased resolution: 'The Committee decides not to refer to the International Law Commission the preparation of the final text of the convention on genocide, and to proceed with the preparation of such said text for submission to this session of the Assembly.'[153] The Soviet Union, although quite critical of the *Ad Hoc* Committee draft, was also opposed to sending the draft to a committee or to the International Law Commission for further study, and eager to proceed with clause-by-clause study.[154] In the end, a proposal by South Africa,[155] supported by the United Kingdom,[156] to refer the draft convention to the International Law Commission was convincingly defeated.[157] Then the Committee agreed to article-by-article consideration of the *Ad Hoc* Committee draft.[158]

[150] UN Doc. A/C.6/SR.65 (Reid, New Zealand).
[151] *Ibid.* (Messina, Dominican Republic).
[152] UN Doc. A/C.6/SR.64 (Shawcross, United Kingdom).
[153] UN Doc. A/C.6/208. See also UN Doc. A/C.6/SR.63 (Dignam, Australia); UN Doc. A/C.6/SR.65 (Lapointe, Canada); and UN Doc. A/C.6/SR.66 (Abdoh, Iran).
[154] UN Doc. A/C.6/SR.64 (Morozov, Soviet Union). See also UN Doc. A/C.6/SR.66 (Prochazka, Czechoslovakia).
[155] UN Doc. A/C.6/SR.66 (Egeland, South Africa).
[156] *Ibid.* (Shawcross, United Kingdom).
[157] *Ibid.* (twenty-seven in favour, eleven against, with nine abstentions).
[158] The United States proposal (UN Doc. A/C.6/208) was adopted by thirty-eight to seven, with four abstentions: UN Doc. A/C.6/SR.66. A resolution, presented by the Philippines (UN Doc. A/C.6/213), calling for an article-by-article study of the draft, was adopted: UN Doc. A/C.6/SR.66 (forty-eight in favour, with one abstention).

Then disagreement arose regarding the order in which the draft would be discussed. The Soviet Union insisted this begin with the preamble, so as to clarify the basic principles involved,[159] while others preferred this be left to the end, as the preamble merely repeated the principles set out in the substantive provisions.[160] The Committee resolved to begin debate with article I of the *Ad Hoc* Committee draft, and leave the preamble for later.[161]

Article-by-article study

Article I of the convention, as eventually adopted is, in any case, somewhat 'preambular', and as a result many of the issues were debated twice.[162] One of them is the nature of the crime, that is, whether genocide is an autonomous infraction or a form of crime against humanity. France had prepared a rival draft convention, and article I of that text began by affirming that '[t]he crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group, particularly by reason of his nationality, race, religion or opinions'.[163] This was, of course, connected with the idea, included in the final version of article I, that genocide was a crime that could be committed in time of peace or of war.[164] Crimes against humanity were still widely believed to be crimes that could only be committed during armed conflict, a consequence of the Nuremberg jurisprudence. Some nations thought it important to affirm that geno-

[159] UN Doc. A/C.6/SR.66 (Morozov, Soviet Union). Supported by Haiti, Yugoslavia, Poland, Czechoslovakia and Venezuela.

[160] UN Doc. A/C.6/SR.66 (Spiropoulos, Greece). Supported by Egypt, Cuba and Australia.

[161] A Soviet proposal to discuss the preamble and art. I at the same time was rejected: UN Doc. A/C.6/SR.66 (thirty-two in favour, eleven against, with six abstentions). Then, Iran's proposal to begin with art. I was adopted (thirty-six in favour, four against, with seven abstentions).

[162] The Soviet Union (UN Doc. A/C.6/215/Rev.1) and Iran (UN Doc. A/C.6/218) felt that art. I was so 'preambular' that it ought to be left out altogether and incorporated in the preamble.

[163] UN Doc. A/C.6/211, art. I. See also UN Doc. A/C.6/SR.67 (Chaumont, France). France had been concerned that its own proposal would be forgotten if the Committee studied the *Ad Hoc* Committee draft. The chair assured the French representative that this was not the case: UN Doc. A/C.6/SR.66 (Alfaro (chair)).

[164] See the following comments: UN Doc. A/C.6/SR.67 (Amado, Brazil); *ibid.* (Morozov, Soviet Union); and UN Doc. A/C.6/SR.68 (de Beus, Netherlands). According to the Commission of Experts on Rwanda, prior to the adoption of art. I, 'genocide was not specifically prohibited by international law except in laws of war'. The Commission said that art. I of the Convention 'represented an advance in international law' for this reason: 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1995/1405, annex, para. 150.

cide was a crime under international law,[165] while others found this to be unnecessary.[166]

The basis of article I was not the *Ad Hoc* Committee draft, but rather an amendment proposed by the Netherlands: 'The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles.'[167] The Soviet Union unsuccessfully urged deletion of the phrase 'under international law'.[168] An amendment by the United Kingdom to insert 'whether committed in time of peace or of war' after the words 'under international law' was easily adopted.[169] The final text stated '[t]he High Contracting Parties confirm that genocide is a crime under international law whether committed in time of peace or of war, which they undertake to prevent and to punish',[170] although several delegations expressed reservations and indicated they wanted to come back to the point when the preamble was being reviewed.

Perhaps the most intriguing phrase in article I is the obligation upon States to prevent and punish genocide, added in the Sixth Committee upon proposals from Belgium[171] and Iran.[172] Belgium argued that article I, as drafted by the *Ad Hoc* Committee, did nothing more than reproduce the text of General Assembly Resolution 96(I). Because the purpose of a convention was to create obligations, 'it was preferable that the undertaking to prevent and suppress the crime of genocide which appeared at the end of the preamble, should constitute the text of article I of the convention'.[173] Yet, while the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means. Certainly, nothing in the debates about article I provides the slightest clue as to the scope of the obligation to prevent.

Articles II and III are the heart of the Convention.[174] They define the crime, as well as the modalities of its commission. In the Sixth Committee the debate returned to issues that had been bruited since the first days of the drafting: definition of the intentional element; inclusion of political groups among the victims of genocide; and treatment of

[165] UN Doc. A/C.6/SR.67 (Raafat, Egypt).
[166] *Ibid.* (Bartos, Yugoslavia); *ibid.* (Morozov, Soviet Union).
[167] UN Doc. A/C.6/220.
[168] UN Doc. A/C.6/SR.68 (thirty-six in favour, three against, with seven abstentions).
[169] *Ibid.* (thirty in favour, seven against, with six abstentions).
[170] UN Doc. A/C.6/256; UN Doc. A/C.6/SR.68 (thirty-seven in favour, three against, with two abstentions).
[171] UN Doc. A/C.6/217 [172] UN Doc. A/C.6/SR.68 (Abdoh, Iran).
[173] UN Doc. A/C.6/SR.67 (Kaeckenbeeck, Belgium).
[174] The drafting of art. II is considered in detail in chapters 3, 4 and 5 at pp. 114–46, 152–97 and 215–55 below respectively. For the drafting of art. III, see chapter 6, pp. 260–99 below.

cultural genocide as an act of genocide. Article II consists of an enumeration of 'acts of genocide', but actually begins by delimiting the intentional element of the crime: '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'. The Sixth Committee of the General Assembly made four changes to the *Ad Hoc* Committee draft: it eliminated the word 'deliberate' before 'acts'; it incorporated the qualification that genocide need not involve the total destruction of a group, but can also occur where destruction is only partial; it redefined the notion of protected 'groups', adding 'ethnical' and removing 'political'; and it replaced the suggestion that genocide was committed 'on grounds of the national or racial origin, religious belief, or political opinion of its members' with the enigmatic words 'as such'. The Sixth Committee agreed without difficulty to include a list of 'acts' of genocide and, after considerable debate, decided that this should be exhaustive and not indicative. It also voted to limit the punishable acts to physical and biological genocide, excluding cultural genocide, which several delegates said should be addressed elsewhere in the United Nations as a human rights issue.[175]

Article III of the Convention lists what the *Ad Hoc* Committee labelled 'punishable acts', and raises issues relating to criminal participation as well as incomplete or inchoate offences. It begins 'The following acts shall be punishable' and is followed by five paragraphs setting out the various acts. The first paragraph of article III consists of the word 'genocide', and in effect refers the interpreter back to article II, where genocide is defined. This did not give rise to any real difficulty in the Sixth Committee. The remaining four paragraphs are what the Convention refers to as 'other acts'. The debate in the Sixth Committee involved questions of comparative criminal law, with delegates searching for common ground as to the meaning of such terms as conspiracy, complicity and attempt. The third paragraph, dealing with direct and public incitement to commit genocide, was the most controversial of these provisions. Some delegations argued for its deletion, fearing it might encroach upon freedom of expression. The Soviet Union tried to push the incitement issue even further, with an additional act of genocide: 'All forms of public propaganda (Press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide.'[176] This obviously went well beyond 'direct incitement'. A similar proposal had been rejected by the

[175] UN Doc. A/C.6/SR.83. [176] UN Doc. A/C.6/215/Rev.1.

Ad Hoc Committee, and the Sixth Committee reacted no differently.[177] It should be borne in mind that, when the debate took place, the Committee had already agreed to include genocide of political groups within the text, a decision it later reversed. This context undoubtedly influenced attitudes towards the hate propaganda amendment. The fourth paragraph of article III defines 'attempt' as an act of genocide. In the Sixth Committee there was no debate whatsoever about the text, and there were no amendments. It was adopted unanimously.[178] But, as in the case of incitement, the Soviet delegation made a similar, unsuccessful effort to enlarge the scope of attempted genocide with an amendment concerning 'preparatory acts', which encompassed 'studies and research for the purpose of developing the technique of genocide; setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders and distributing tasks with a view to committing genocide'.[179]

Article IV concerns the defence of 'act of state', by which rulers or heads of government or armed forces attempt to avoid criminal liability.[180] The debate revealed sharply differing opinions about the Convention's purpose. Article IV vexed the drafting committee, and the chair reported that the wording 'had satisfied none of the members'.[181] The debate spilled over onto ancillary issues, notably the creation of an international criminal court susceptible of prosecuting such officials. The United Kingdom observed that article IV was predicated on the creation of an international penal tribunal. For France, this was 'the essential purpose of the convention on genocide'. According to Charles Chaumont, '[t]he convention would be a mere accumulation of entirely ineffective formulas, if such a court were not established within a reasonable period'.[182]

Article V imposes upon States parties an obligation to take the necessary legislative measures to give effect to the Convention.[183] As the Belgian Kaeckenbeeck explained, the article involved States in 'an obligation to introduce the definition of genocide and the penalties envisaged for it into their own penal codes, and also to determine the competent jurisdiction and the procedure to be followed'.[184] That this entailed penalties may have been obvious, but the Soviet Union insisted

[177] UN Doc. A/C.6/SR.87. [178] UN Doc. A/C.6/SR.85.
[179] UN Doc. A/C.6/215/Rev.1.
[180] The drafting of art. IV is discussed in detail in chapter 7, pp. 317–20 below.
[181] UN Doc. A/C.6/SR.128 (Amado, Brazil).
[182] UN Doc. A/C.6/SR.95 (Chaumont, France).
[183] The drafting of art. V is discussed in detail in chapter 8, pp. 347–8 below.
[184] UN Doc. A/C.6/SR.93 (Kaeckenbeeck, Belgium).

upon an explicit amendment to this effect.[185] The Committee adopted a revised text, but then reopened the debate a few days later in order to correct the impression that the provision pertained only to penal measures. The final version of article V makes it clear that criminal law is merely one of the areas in which States are required to enact necessary legislation.

Article VI deals with jurisdiction for the prosecution of genocide, from the standpoint of both domestic and international courts.[186] With respect to the former, the central issue was universal jurisdiction, already recognized in certain other treaties dealing with international crimes. The Sixth Committee rejected universal jurisdiction and opted for territorial jurisdiction. With respect to international courts, the major question was creation of an international jurisdiction. The original Secretariat draft included draft statutes for such a court. The *Ad Hoc* Committee had endorsed the idea of the creation of the international criminal court as an alternative to jurisdiction of the territorial state. Reference to an international court was eliminated in an initial vote of the Sixth Committee, but was successfully reintroduced by the United States.

Article VII concerns extradition, and was rendered particularly important in light of Article VI, which declared that as a general rule genocide suspects will be tried in the territory where the crime took place.[187] It was important to eliminate the possibility that offenders would invoke the political offence exception to extradition, which is widely recognized in extradition treaties as well as at customary law.[188] But the debates made it clear that States whose legislation did not provide for extradition of their own nationals would be under no obligation to grant this.[189]

Article VIII affirms the right of all States parties to 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.[190] In fact, it declares nothing more than something to which all Member States of the United Nations are entitled in any case, although theoretically it extends this right to a handful of non-member States, such as Switzerland. The Soviets had sought a provision requiring States to address the Security

[185] UN Doc. A/C.6/215/Rev.1; UN Doc. A/C.6/SR.93 (Morozov, Soviet Union).
[186] The drafting of art. VI is considered in detail in chapter 8, pp. 355–60 and 368–78 below.
[187] The drafting of art. VII is considered in detail in chapter 8, pp. 402–3 below.
[188] UN Doc. A/C.6/217. [189] UN Doc. A/C.6/SR.95 (Alfaro, chair).
[190] The drafting of art. VIII is considered in detail in chapter 10, pp. 448–51 below.

Council, but this met with opposition. The Sixth Committee actually voted to delete article VII,[191] but Australia successfully revived the provision in a subsequent debate.[192]

Article IX is a compromissory clause, conferring jurisdiction on the International Court of Justice in the case of disputes concerning the interpretation, application or fulfilment of the Convention.[193] The United Kingdom, which had not participated in the *Ad Hoc* Committee and which believed the convention really concerned State rather than individual liability, was particularly enthusiastic about this provision. Yet there appeared to be much confusion about what it really meant. France and Belgium presumed it dealt with State responsibility, while the Philippines thought it concerned State crimes.[194]

A Soviet Union amendment pledging States parties to disband and prohibit organizations that incite racial hatred or the commission of genocidal acts was defeated.[195] The *Ad Hoc* Committee had rejected a similar proposal. In the Sixth Committee, France had attempted to help the Soviet proposal with a friendly amendment, but the Soviets were not seduced and refused to accept it.[196]

After drafting the technical or 'protocolar' clauses,[197] the Sixth Committee turned to the question that logically belonged at the beginning but that it had agreed to leave for the end: the preamble. In its final version, the preamble consists of three succinct sentences. The first refers to General Assembly Resolution 96(I), observing that 'genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world'. The second recognizes that at all periods of history genocide has inflicted great losses on humanity. The final paragraph states that in order to liberate mankind from such an odious scourge, international co-operation is required.

Several States altogether opposed including a preamble.[198] The Sixth Committee set aside the *Ad Hoc* Committee draft and conducted its

[191] UN Doc. A/C.6/SR.101.
[192] UN Doc. A/C.6/265; UN Doc. A/C.6/SR.105 (Dignam, Australia).
[193] The drafting of art. IX is considered in detail in chapter 9, pp. 418–24 below.
[194] UN Doc. A/C.6/SR.105 (eighteen in favour, two against, with fifteen abstentions).
[195] UN Doc. A/C.6/215/Rev.1: 'The High Contracting Parties pledge themselves to disband and prohibit any organizations aimed at inciting racial, national or religious hatred or the commission of acts of genocide.'
[196] UN Doc. A/C.6/SR.107.
[197] The drafting of the protocolar clauses is discussed in detail in chapter 11, pp. 503–22 below.
[198] UN Doc. A/C.6/SR.109 (Manini y Ríos, Uruguay); *ibid.* (Dihigo, Cuba); *ibid.* (Abdoh, Iran); *ibid.* (Amado, Brazil).

debate around a new Venezuelan proposal,[199] described by John Maktos of the United States as 'a unified and highly satisfactory text, which was likely to rally a great number of votes'.[200] Venezuela explained that it had endeavoured to draft a preamble that would be as short as possible, that would have a historical basis, showing that genocide had existed long before the rise of fascism and Nazism, but that would omit any reference to the Nuremberg Tribunal, as genocide was distinct from crimes against humanity.[201] Because the chair had ruled that the Venezuelan proposal would be debated first,[202] the Soviets, who had a far more lengthy draft preamble of their own,[203] introduced amendments to the Venezuelan draft that they believed belonged within the preamble.[204] France too had proposals, of which the most significant was addition of a reference to the Nuremberg judgment.[205]

There was no real disagreement with reference to the historical basis of the crime of genocide, and recognition that it had existed long before the adoption of the Convention or of General Assembly Resolution 96(I). The Soviets, however, also believed it was important to refer to recent history or events,[206] and to indicate that genocide was 'organically bound up with fascism-nazism' and similar ideologies.[207] Venezuela refused to accept the amendment, explaining that the Convention was directed against genocide and not fascism-Nazism. 'The statement

[199] UN Doc. A/C.6/261: 'The High Contracting Parties, Considering that the General Assembly of the United Nations has declared in its resolution 96(I) of 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and which the civilized world condemns, Recognizing that at all periods of history genocide has inflicted great losses on humanity, and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required; Hereby agree as hereinafter provided . . .'

[200] UN Doc. A/C.6/SR.109 (Maktos, United States).

[201] *Ibid.* (Pérez-Perozo, Venezuela).

[202] UN Doc. A/C.6/SR.110 (Morozov, Soviet Union).

[203] UN Doc. A/C.6/215/Rev.1.

[204] UN Doc. A/C.6/273: '1. After the words "has inflicted great losses on humanity", insert a comma and add the words "while recent events provide evidence that genocide is organically bound up with fascism-nazism and other similar race 'theories' which preach racial and national hatred, the domination of the so-called higher races and the extermination of the so-called lower races". 2. After the words "from such an odious scourge", add the words "and to prevent and punish genocide".'

[205] UN Doc. A/C.6/267. '3. Substitute the following for the third sub-paragraph: "Having taken note of the legal precedent established by the judgment of the International Military Tribunal at Nürnberg of 30 September–1 October 1946".' The Soviet preamble, UN Doc. A/C.6/215/Rev.1, included a similar paragraph: 'Having taken note of the fact that the International Military Tribunal at Nürnberg in its judgments of 30 September–1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing.'

[206] UN Doc. A/C.6/SR.110 (Morozov, Soviet Union).

[207] UN Doc. A/C.6/273.

that genocide was organically bound up with fascism-nazism was not historically accurate, as acts of genocide had been committed as recently as the previous year without having any connection with such theories', said Victor M. Pérez-Perozo.[208] The United States agreed with Venezuela, adding that this might suggest that acts of genocide committed for other motives might not be punishable.[209] Egypt also opposed the Soviet amendment: 'instances of genocide were to be found in the far more distant past, instances which had no connexion at all with theories of racial superiority.'[210] On a roll-call vote, the Soviet proposal was decisively rejected.[211] The Soviets also proposed that reference to 'prevention and punishment' as purposes of the Convention be included in the preamble. The idea was hardly controversial, because it was also found in article I, already adopted by the Sixth Committee, but the Soviet suggestion was not taken up.[212]

A number of reasons were advanced for excluding any reference to the Nuremberg judgment. Several States feared this would confuse genocide with crimes against humanity, and consequently limit the concept, because crimes against humanity had received a relatively restrictive interpretation at Nuremberg, notably in the requirement that they be committed in relation to international armed conflict.[213] According to the United States, genocide was a new concept that originated in General Assembly Resolution 96(I) and 'did not need to be propped up by any precedents'.[214] Jean Spiropoulos explained, but to no avail, that this was a misunderstanding of the Nuremberg jurisprudence. 'That Tribunal had, in fact, dealt with crimes committed in peacetime, crimes committed in war-time and crimes against humanity whether committed in peace- or wartime, as article 6(c) of the Nurnberg Charter showed. In [his opinion], genocide belonged to the category of crimes against humanity, as defined by that article.'[215] The Chinese were unhappy with reference to the Nuremberg judgment because there was no corresponding mention of the Tokyo Tribunal, an objection that the

[208] UN Doc. A/C.6/SR.110 (Pérez-Perozo, Venezuela).
[209] *Ibid.* (Maktos, United States).
[210] *Ibid.* (Raafat, Egypt). See also *ibid.* (Abdoh, Iran).
[211] *Ibid.* The Soviets reintroduced the proposal in the General Assembly on 9 December 1948, where the amendment (UN Doc. A/766) was rejected by thirty-four to seven, with ten abstentions.
[212] UN Doc. A/C.6/SR.110 (twenty-three in favour, fifteen against, with six abstentions).
[213] UN Doc. A/C.6/SR.109 (Correa, Ecuador); *ibid.* (Azkoul, Lebanon); *ibid.* (Manini y Ríos, Uruguay); *ibid.* (Dihigo, Cuba); *ibid.* (Abdoh, Iran); UN Doc. A/C.6/SR.110 (Agha Shahi, Pakistan); *ibid.* (Pérez-Perozo, Venezuela).
[214] UN Doc. A/C.6/SR.109 (Maktos, United States).
[215] *Ibid.* (Spiropoulos, Greece).

United States considered reasonable.[216] It was also argued that the General Assembly had assigned the International Law Commission the task of drafting the 'Nuremberg Principles' and the genocide convention should not prejudice the process.[217] But the debate betrayed dissatisfaction with the Nuremberg judgment, particularly among Latin-American States. Peru said that: 'The trials had been an improvization, made necessary by exceptional circumstances resulting from the war, and had disregarded the rule *nullum crimen sine lege*, which meant that any penal sanction must be based on a law existing at the time of the perpetration of the crime to be punished.'[218] The issue never formally came to a vote. The chair ruled that the Venezuelan amendment as a whole should be decided, and its adoption[219] obviated the need to consider any other proposals.

The Sixth Committee completed its consideration of the draft convention on 2 December 1948. The draft resolution and the draft convention were adopted by thirty votes to none, with eight abstentions.[220] Following the vote, Gerald Fitzmaurice explained that the United Kingdom had abstained in order to indicate its reservations. The United Kingdom considered it preferable not to go beyond the scope of General Assembly Resolution 96(I), and for this reason had not participated in the *Ad Hoc* Committee. For the United Kingdom, the Convention approached genocide from the wrong angle, the responsibility of individuals, whereas it was really governments that had to be the focus.[221] Poland said that it had abstained because of the text's failure to prohibit hate propaganda and measures aimed against a nation's art and culture.[222] Yugoslavia made a similar intervention.[223] Czechoslovakia regretted the inability of the Convention to prevent genocide.[224] Finally, France expressed its reservations about certain provisions, adding that 'the principle of an international criminal court had, irreversibly,

[216] *Ibid.* (Maktos, United States). Syria agreed, urging a preambular reference to the Tokyo judgment: *ibid.* (Tarazi, Syria). This was indeed a curious suggestion, because, while evidence of grave crimes against humanity was presented to the Tokyo Tribunal, it was not seriously claimed that the Japanese engaged in genocide.

[217] UN Doc. A/C.6/SR.110 (Azkoul, Lebanon).

[218] UN Doc. A/C.6/SR.109 (Maurtua, Peru). See also UN Doc. A/C.6/SR.110 (Maurtua, Peru); UN Doc. A/C.6/SR.109 (Messina, Dominican Republic); UN Doc. A/C.6/SR.110 (Abdoh, Iran); and *ibid.* (Dihigo, Cuba).

[219] *Ibid.* (thirty-eight in favour, nine against, with five abstentions).

[220] UN Doc. A/C.6/SR.132. Iran subsequently apologized for its absence during the vote, but indicated its support: UN Doc. A/C.6/SR.133 (Abdoh, Iran).

[221] UN Doc. A/C.6/SR.132 (Fitzmaurice, United Kingdom).

[222] UN Doc. A/C.6/SR.133 (Litauer, Poland).

[223] *Ibid.* (Kacijan, Yugoslavia).

[224] *Ibid.* (Augenthaler, Czechoslovakia).

become part of statute law. It was because that principle had been introduced that France was able to sign the convention.'[225]

Two resolutions were adopted at the same time as the Convention. The first noted that the discussion of the Convention had 'raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal'. The resolution stated that there would be 'an increasing need of an international judicial organ for the trial of certain crimes under international law' and invited the International Law Commission '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 General Assembly requested the Commission to consider whether establishing a criminal chamber of the International Court of Justice might do this.[226] A second resolution recommended that States parties to the Convention which administer dependent territories 'take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible.'[227]

The Sixth Committee draft was submitted to the General Assembly on 9 December 1948, in the form of a resolution to which was annexed the text, as prepared by the drafting committee, and the two accompanying resolutions.[228] The Soviet Union proposed a series of amendments, in effect returning to the points it had unsuccessfully advanced in the sessions of the Sixth Committee: reference to racial hatred and Nazism in the preamble, disbanding of racist organizations, prohibition of cultural genocide, rejection of an international criminal jurisdiction, and automatic application to non-self-governing territories.[229] Venezuela also proposed an amendment prohibiting cultural genocide, adding a sixth paragraph to the list of punishable acts in article II.[230] Venezuela withdrew its amendment after determining it could not rally sufficient support. The Soviet amendments were all rejected.[231] The Convention itself was adopted on a roll-call vote, by fifty-six to none.

[225] *Ibid.* (Chaumont, France).

[226] 'Study by the International Law Commission of the Question of an International Criminal Jurisdicition', GA Res. 260 B(III) (twenty-seven in favour, five against, with six abstentions).

[227] 'Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 260 C(III) (twenty-nine in favour, with seven abstentions).

[228] UN Doc. A/C.6/289; UN Doc. A/760 and A/760/Corr.2.

[229] UN Doc. A/760. For Morozov's speech, see UN Doc. A/PV.178.

[230] UN Doc. A/770: 'Systematic destruction of religious edifices, schools or libraries of the group'.

[231] UN Doc. A/PV.178.

The resolution concerning the international criminal tribunal was adopted by forty-three to six, with three abstentions, and the resolution on non-self-governing territories was adopted by fifty votes, with one abstention.

Subsequent developments

There have been several efforts at the further development of the norms of the Convention. Four legal instruments are involved: the draft Code of Crimes Against the Peace and Security of Mankind, developed by the International Law Commission; the Rome Statute of the International Criminal Court, adopted by the 1998 Diplomatic Conference; and the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. The drafting of these instruments is of interest not only from the standpoint of interpretation of the texts in their own right, but also as an aid to construing the Convention itself.

The Draft Code of Crimes Against the Peace and Security of Mankind

At its second session in 1947, the General Assembly asked the International Law Commission to prepare a draft code of offences against the peace and security of mankind.[232] The Commission proceeded sporadically on the project, only completing it in 1996. In the final version, genocide is defined as one of the crimes against the peace and security of mankind. In the course of the half-century during which it studied the subject, the Commission periodically addressed issues relating to the law of genocide.

The initial 'draft code of offences against the peace and security of mankind' was prepared for the International Law Commission by Special Rapporteur Jean Spiropoulos in 1950. Crime No. VIII consisted of two components, genocide and crimes against humanity. Spiropoulos did not actually use the word genocide, but paragraph 1 of Crime No. VIII corresponded exactly to the text of article II of the Genocide Convention, while paragraph 2 of Crime No. VIII was taken from the crimes against humanity provision of the Charter of the International Military Tribunal.[233] Several members of the International Law Commission questioned whether to include genocide, as the crime could be committed in time of peace, and they believed that they were drafting a

[232] GA Res. 177(II), para. (b).
[233] 'Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/25, appendix.

9 State responsibility and the role of the International Court of Justice

The Genocide Convention is principally concerned with prosecution of individuals who perpetrate genocide. In articles II and III, the Convention defines the offence. In article IV, it eliminates the defence of act of State or head of State. In article V, the Convention requires States parties to adopt appropriate legislation within their domestic criminal law. Article VI establishes the jurisdictional bases for such prosecutions and article VII addresses extradition issues. The Convention imposes a number of obligations upon States, for which they can obviously be held accountable. However, it does not explicitly declare that States themselves may be guilty of genocide. Nevertheless, States have often been accused of committing genocide. In fact, given the nature of the crime, it is difficult to conceive of genocide without some form of State complicity or involvement.

According to article IX, disputes concerning 'the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice'. Article IX has been invoked in four applications, although the International Court of Justice has yet to render a final judgment establishing the scope of State responsibility for genocide, a matter about which great controversy persists.

Drafting of the Convention

During the drafting of the Convention, sharply differing views emerged about the possibility that States, in addition to individuals, could be held accountable for genocide. Three rather different conceptions of the role of the Convention were at work. Taking the middle path, the United States and the Soviet Union oriented their efforts to individual criminal responsibility. They agreed that the principal or exclusive vehicle for individual prosecutions should be national courts. While France and the United Kingdom believed national judicial systems could not be

counted upon to prosecute genocide, they drew different conclusions from this observation. France considered that the future genocide convention was directed exclusively at individual responsibility. Rejecting the prospect of national trials, France viewed an international court as a *sine qua non*. On the other hand, the United Kingdom saw the convention directed at States and not individuals. It had no real interest in the details of criminal prosecution, believing firmly in mechanisms to hold States accountable. The United Kingdom said it was impossible to blame any particular individual for actions for which whole governments or States were responsible.

Debate on article IV

These issues were initially aired within the Sixth Committee during the debate about article IV and the issue of head of State immunity. A United Kingdom amendment introduced the concept of State, and not just individual, responsibility for genocide: 'Criminal responsibility for any act of genocide as specified in articles II and IV shall extend not only to all private persons or associations, but also to States, governments, or organs or authorities of the State or government. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention.'[1] Gerald Fitzmaurice suggested the convention contain a direct reference to the type of genocide most likely to occur, namely, genocide committed by a State or government. He said it should be assumed that individuals acting on behalf of the State would not be punished by its courts.[2] The United Kingdom conceded that, under its somewhat ambiguous text, States and governments could not be made criminally responsible.[3] The International Court of Justice 'would not pronounce sentence but would order cessation of those acts', explained Fitzmaurice.[4]

Belgium supported the United Kingdom amendment, deeming it a valuable link with the International Court of Justice. 'The convention should provide for recourse to the International Court of Justice, which was the only international juridical body capable of rendering a mature, considered and impartial decision on the responsibility of the State', it said.[5] Noting that State liability obeyed different principles than crimi-

[1] UN Doc. A/C.6/236 and Corr.1.
[2] UN Doc. A/C.6/SR.95 (Fitzmaurice, United Kingdom).
[3] UN Doc. A/C.6/SR.96 (Fitzmaurice, United Kingdom).
[4] UN Doc. A/C.6/SR.92 (Fitzmaurice, United Kingdom).
[5] UN Doc. A/C.6/SR.95 (Kaeckenbeeck, Belgium). See also *ibid.* (Medeiros, Bolivia); UN Doc. A/C.6/SR.96 (Pescatore, Luxembourg); and UN Doc. A/C.6/SR.95 (Dihigo, Cuba).

nal responsibility, Syria said it was important to provide for State liability and recourse to the International Court of Justice.[6] Sweden observed that, while States could not be punished as such, a clause could be included on reparations to be paid to victims.[7]

France challenged applying the concept of criminal liability to States.[8] Venezuela agreed that States could not be punished, in the sense of criminal law, and that they could only be condemned to material reparations. This would not serve as an example 'because the State would not be touched as would a private individual in a similar situation, since the taxpayers would pay the required reparations'.[9] For Panama, the convention was intended as an instrument of criminal law, not civil law.[10] The United States said the convention's aim was to ensure repression of genocide and punishment of culprits. It should not get involved in payment of reparations, a question that belonged to another branch of the law.[11] Canada saw no point in affirming that States were breaching the convention it there was no intent to punish them.[12]

The United Kingdom amendment recognizing State responsibility for genocide was rejected by a margin of only two votes.[13] The numerous explanations of the vote indicate that it had failed to explain satisfactorily that the purpose was to integrate a concept of State civil liability into the convention. Several delegations may have agreed with the concept of State responsibility but found the formulation equivocal. Iran said it could not vote in favour because there was no clear distinction between criminal and civil liability.[14] The Dominican Republic had voted against the amendment because under its law, 'legal entities could not be held guilty of committing crimes'.[15] Brazil said the United Kingdom text was 'superfluous', giving 'the impression that a State could be held guilty of the commission of a crime'.[16] Egypt explained that '[i]f States and Governments were to be mentioned, the list should have been extended to include other corporate bodies'.[17] Peru described the provision as incomplete, because there was no international tribunal to judge such cases.[18] Given the closeness of the vote, the defeat of the United Kingdom amendment should not be taken as a rejection of the idea of State responsibility. The statements and the vote indicate widespread

[6] *Ibid.* (Tazari, Syria). [7] UN Doc. A/C.6/SR.92 (Petren, Sweden).
[8] UN Doc. A/C.6/SR.95 (Chaumont, France).
[9] *Ibid.* (Pérez-Perozo, Venezuela). [10] *Ibid.* (Aleman, Panama).
[11] *Ibid.*(Maktos, United States). [12] *Ibid.* (Feaver, Canada).
[13] UN Doc. A/C.6/SR.96 (twenty-four in favour, twenty-two against).
[14] *Ibid.* (Abdoh, Iran). [15] *Ibid.* (Messina, Dominican Republic).
[16] *Ibid.* (Amado, Brazil). Similarly UN Doc. A/C.6/SR.96 (Iksel, Turkey).
[17] *Ibid.* (Raafat, Egypt). [18] *Ibid.* (Maúrtua, Peru).

opposition to any concept of State responsibility in a criminal law sense but an equally widespread support for State civil liability.

Debate on article VI

The issue arose again when the Sixth Committee turned to article VI, dealing with jurisdiction over genocide prosecutions. The United Kingdom attempted to add a new sentence to the provision:

> Where the act of genocide as specified by articles II and IV is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.[19]

The United Kingdom charged that reference to a competent international tribunal in draft article VI was 'useless' since such a tribunal did not exist, and even if it did, it would be ineffectual because of State complicity in the crime. For that reason, the United Kingdom favoured recourse to the International Court of Justice, in order 'to enact measures capable of putting a stop to the criminal acts concerned and of awarding compensation for the damage caused to victims'.[20] Belgium proposed an amendment to the United Kingdom text:

> Any dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article IV [article III in the final version] may be referred to the International Court of Justice by any of the Parties to the present Convention. The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities.[21]

The United States opposed debate on the United Kingdom and Belgian proposals, arguing that the substance of the issue had already been debated and decided during consideration of article IV.[22] Belgium and the United Kingdom subsequently withdrew their amendments and developed a new proposal, to be discussed in conjunction with article IX.[23]

[19] UN Doc. A/C.6/236 and Corr.1. Indeed, the United Kingdom also wanted to delete reference to national courts, saying that this was already covered by article V.
[20] UN Doc. A/C.6/SR.97 (Fitzmaurice, United Kingdom).
[21] UN Doc. A/C.6/252.
[22] UN Doc. A/C.6/SR.99 (Maktos, United States). See also UN Doc. A/C.6/SR.99 (Morozov, Soviet Union).
[23] UN Doc. A/C.6/SR.100 (Kaeckenbeeck, Belgium).

Debate on article IX

The Secretariat draft contained a compromissory clause that is the ancestor of article IX: '[Settlement of Disputes on Interpretation or Application of the Convention] Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.'[24] According to the Secretariat, the Court would be the appropriate body in cases where 'it is to be ascertained whether one of the parties has faithfully discharged his obligations'.[25] The Secretariat considered it essential that disputes about the interpretation and application of the convention be settled by the International Court of Justice rather than by arbitration, 'for then its decision would lack any claim to be binding on other states'.[26] Over the objections of Poland and the Soviet Union, the *Ad Hoc* Committee adopted the following: 'Disputes between any of the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.'[27] An additional clause, proposed by the United States, was also adopted: '. . . provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal'.[28]

A modified version of the text withdrawn by the United Kingdom and Belgium during the debate on article VI was resubmitted: 'Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles [I] and [III], shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties.'[29] France supported the amendment. Although regretting that genocide should be dealt with solely on the level of disputes between States, France was not opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal, responsibility.[30]

Jean Spiropoulos of Greece felt that the notion of State responsibility

[24] UN Doc. E/447, art. XIV. [25] *Ibid.*, p. 50. [26] *Ibid.*

[27] UN Doc. E/AC.25/SR.20, p. 6 (five in favour, two against).

[28] *Ibid.* (four in favour, one against, with one abstention). It was derived from the United States draft of 30 September 1947, UN Doc. E/623: 'Article XI. Disputes between any of the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in Article VII.'

[29] UN Doc. A/C.6/258. [30] UN Doc. A/C.6/SR.103 (Chaumont, France).

was not very clear. 'What was meant was obviously not international responsibility for violation of the convention, which was already implicit in article I of the draft convention', he said. But Spiropoulos noted that the French delegation thought the amendment related to the civil responsibility of the State, something which seemed confirmed by the original Belgian text, which referred to reparation for damage caused. Spiropoulos said that, if this were the case, the State might well be required to indemnify its own nationals. 'But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself.' Spiropoulos had put his finger on the tautology implicit in all international human rights norms. In any case, Spiropoulos said he would vote in favour of the amendment.[31] Peru thought it difficult to see how victims could be compensated, but agreed that the Court might interpret the convention by means of advisory opinions.[32]

Indeed, there was confusion about what the article really meant. France and Belgium believed it dealt with civil liability. The Philippines thought it concerned criminal liability.[33] Haiti said the provision envisaged civil and not criminal liability, but wondered how there could be civil liability until criminal liability was established.[34] Canada noted that the Committee had earlier rejected the notion of criminal responsibility of a State, but wondered whether the United Kingdom was trying to reintroduce it.[35] In reply, the United Kingdom said that 'the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility.'[36]

The original *Ad Hoc* Committee draft established a rule of *lis pendens* in cases where the international criminal court was seised of the question, a text originally proposed by the United States. Many delegates now felt the issue was moot, because the Committee had already dismissed the concept of an international criminal court.[37] Accordingly, the Sixth Committee agreed to delete the reference to pending proceedings before the international criminal court.[38]

The joint amendment of Belgium and the United Kingdom, which had provoked some confusion but little controversy, was then

[31] *Ibid.* (Spiropoulos, Greece).
[32] *Ibid.* (Maurtua, Peru).
[33] *Ibid.* (Ingles, Philippines).
[34] *Ibid.* (Demesmin, Haiti).
[35] *Ibid.* (Lapointe, Canada).
[36] *Ibid.* (Fitzmaurice, United Kingdom).
[37] UN Doc. A/C.6/SR.104 (Morozov, Soviet Union). But see UN Doc. A/C.6/SR.103 (Raafat, Egypt).
[38] UN Doc. A/C.6/SR.105 (twenty-two in favour, eight against, with six abstentions).

adopted.[39] The United States later said it felt the text of article IX was ambiguous and unsatisfactory. It could not agree that 'responsibility' in article IX could refer to the civil responsibility of the State for injuries sustained by its nationals. Nor, according to the United States, could it be deemed to cover the State's criminal responsibility, a concept that the Committee had earlier rejected. Finally, if it referred to treaty violations, the United States said the word added nothing to the meaning of the article.[40] The United States later made a formal interpretative statement on article IX.[41]

Six months later, in presenting the Genocide Convention for advice and consent of the Senate, United States President Truman proposed an understanding 'that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals'. The understanding was recommended by a subcommittee of the Senate Committee on Foreign Relations although it would be nearly forty more years before the United States ratified the Convention. By then, the United States had decided to exclude entirely the application of article IX by means of a reservation.[42]

At the time of its ratification of the Convention, the Philippines said it did not consider article IX 'to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law'.

[39] UN Doc. A/C.6/SR.105 (eighteen in favour, two against, with fifteen abstentions). There were proposed amendments to the drafting committee text, but the Commission voted not to reconsider art. IX, and as a result these were never discussed: UN Doc. A/C.6/SR.131.

[40] UN Doc. A/C.6/SR.131 (Maktos, United States).

[41] UN Doc. A/C.6/SR.133 (Gross, United States): 'Article IX stipulated that disputes between the contracting parties relating to the interpretation, application or fulfilment of the convention "including those relating to the responsibility of a State for genocide of any of the other acts mentioned in article III" should be submitted to the International Court of Justice. If the words "responsibility of a State" were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of public international law, to the subjects of the plaintiff State; and if, similarly, the words "disputes . . . relating to the . . . fulfilment" referred to disputes concerning the interests of subjects of the plaintiff State, then those words would give rise to no objection. But if, on the other hand, the expression "responsibility of a State" were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision; and the United States Government would have reservations to make about that interpretation of the phrase.'

[42] For a discussion, see Lawrence J. Leblanc, 'The ICJ, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43 at p. 52.

Litigation pursuant to article IX of the Convention

Four cases have been filed before the International Court of Justice, pursuant to article IX. The first, by Pakistan in 1973, alleged that India was breaching the Convention because it proposed to transfer Pakistani prisoners of war to Bangladesh for trial. The case was discontinued following political negotiations. The second, by Bosnia and Herzegovina in 1993, charged the former Yugoslavia (Serbia and Montenegro) with genocide. Two provisional measures orders were granted by the Court. After failing to obtain the dismissal of the case based on preliminary objections, Yugoslavia filed a cross-demand charging Bosnia with genocide. At the time of writing, the case had yet to be argued before the Court. In 1999, a third application under Article IX was filed by Yugoslavia against several members of the North Atlantic Treaty Organization concerning their conduct during the Kosovo bombing campaign. Weeks later, on 2 July 1999, Croatia took a suit against Yugoslavia alleging its responsibility for genocide.

The Pakistani Prisoners Case

Article IX of the Convention was invoked for the first time before the International Court of Justice in 1973, following civil war in Pakistan leading to the separation of Bangladesh from Pakistan. During the conflict, troops from West Pakistan reportedly killed one million East Pakistanis, provoking the flight of ten million more to India. Invoking the doctrine of humanitarian intervention, India took military action, and the Pakistani army subsequently surrendered. India detained approximately 92,000 Pakistani troops. India, in co-operation with Bangladesh, contemplated trial of some of the Pakistani prisoners. For this purpose, Bangladesh adopted 'An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law'.[43]

Pakistan instituted proceedings against India on 11 May 1973, alleging that India intended to hand 195 Pakistani prisoners over to Bangladesh for trial for genocide and crimes against humanity.[44]

[43] Act No. XIX of 1973, *Bangladesh Gazette* 5987, 20 July 1973.

[44] *Trial of Pakistani Prisoners of War* (*Pakistan* v. *India*), *Pleadings, Oral Arguments, Documents*, pp. 3–7. Accusations of State responsibility for genocide are as old as the Convention itself. Even during the drafting of the Genocide Convention, during 1948, Pakistan accused India of genocide, notably by Sikhs and Hindus directed against Moslems: UN Doc. A/C.6/SR.63 (Ikramullah, Pakistan). See India's response (UN Doc. A/C.6/SR.64 (Sundaram, India)) and Pakistan's diplomatic refusal to reply (UN Doc. A/C.6/SR.65 (Bahadur Khan, Pakistan)).

Annex 19

Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*
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THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005

VOLUME I

THE COURT AND THE UNITED NATIONS

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Fourth Edition

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QUALIFICATION TO BE A PARTY IN A CASE: JURISDICTION *RATIONE PERSONAE*

II.163. Introductory. This chapter addresses the primary element in the Court's jurisdiction to determine any case, the Court's personal jurisdiction. The Court's jurisdiction *ratione materiae* follows from the interpretation and application of the title of jurisdiction in relation to the dispute before the Court. There are two distinct conditions for jurisdiction *ratione personae*. The first is that only States have access to the Court in a contentious case, in any capacity – as principals in litigation, as potential interveners, or for any other purpose. The second is that all the States concerned have given their consent to the exercise by the Court of jurisdiction in the particular case (consent *ad litem*).

Although the phrase 'access to the Court' does not appear in the Statute, it is used (instead of more abstract concepts such as 'capacity') to describe the matters regulated in Articles 34 and 35 of the Statute, that is the qualifications required of any 'party' in a contentious case and of other international persons to which the Court shall be 'open'.

Statehood is the essential prerequisite for any entity to be a party in any contentious case in the Court, and that precedes the consent that the Court should decide the particular case. Article 34, paragraph 1, of the Statute lays down the fundamental rule: 'Only States may be parties in

cases before the Court.'[1] It declares in general terms the basic condition *ratione personae* to be met before the Court can exercise any jurisdiction whatsoever.

Accordingly, capacity to be a party in a contentious case is reserved only to States (as the term is understood in the context and practice of the United Nations). This statehood has to be supplemented by formal conditions establishing a legal link of the State to the Statute of the Court. That link can be membership in the United Nations (of which the Court is a principal organ), participation in the Statute without membership in the United Nations, or if a State is not a party to the Statute some other ad hoc acceptance of the Statute and the collateral obligations of the Charter according to terms indicated by the Security Council. Only a State meeting one of these formal conditions has access to the Court for any purpose or in any capacity whatsoever. The Court cannot entertain a contentious case against a respondent State that is not similarly qualified. The Court cannot admit as an intervener in any capacity an entity that is not a State in the United Nations sense. The Court has the power to decide whether an entity is qualified to participate in any way in a contentious case The Court's duty to establish that this preliminary condition is met is independent of any expression of the will of either party. As the Court has said:

> [I]t is the view of the Court that a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* [italics in original] Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it

[1] Art. 34 of the Statute of the Permanent Court provided in its English text that only States 'can' be parties (*seul les Etats… ont qualité pour se présenter devant la Cour*). The change from 'can' to 'may' (the French text in this respect remaining unchanged) was made by the Drafting Committee of the Washington Committee of Jurists at a late stage of its work, to ensure better concordance with the French. 14 UNCIO 603, 666. The French expression *se presenter* is broader than the English *may be parties.* Practice has followed the more embracing French version and denies to any entity other than a State any right to appear before the Court in contentious cases, subject to Article 43, the Rules of Court (as amended in 2005), see ch. 26, §II.358. Slight relaxations are occasionally found in advisory cases. See ch. 30, §§ III.407, 411. No comment on possible discordance between the English and French texts appears in the discussion of Art. 34 in the *ILOAT* (UNESCO) adv. op. [1956] at 85. Art 34, paras. 2 and 3, address questions relating to the position of international organizations in litigation between States. See § II. 171 below.

> instituted the proceedings in these cases. Since the question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.[2]

And:

> [T]he question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of these proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.
>
> The Court can exercise its judicial function only in respect of those States which have access to it [*à l'égard des seuls Etats auxquels elle est ouverte*] under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it.
>
> It is the view of the Court that it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court.[3]

Article 35, paragraph 1, completes Article 34, paragraph 1, by providing that the Court shall be open (*est ouverte*) to the States parties to the Statute. Article 35 (read together with Article 93 of the Charter) goes on to particularize the application of the general rule regarding access to the Court for other States which are not members of the United Nations

[2] *Legality of Use of Force* cases, [2004] 15 December, case against Belgium (para. 36) and the equivalent paragraph in the other seven judgments. The Court here referred to an earlier pronouncement in the *Application of the Genocide Convention* (Prov. Meas.) case, [1993] 3, 11 (paras. 14 ff.). On the citation of the *Legality of Use of Force* cases in this volume, see ch. 9, § II.147 n. 1.

[3] Ibid. (para. 46).

(paragraphs 2 and 3). The fact that a State meets the conditions of Article 35 does not confer jurisdiction on the Court over that State in a particular case. For the Court to be able to exercise jurisdiction in a case in relation to a given State, Articles 36 and 37 apply, and they require an element of definite consent on the part of the States concerned that the Court should decide that particular case (consent *ad litem)*. It is that element of a State's express consent that finally constitutes jurisdiction *ratione materiae,* thus completing the personal requirements for the Court to exercise jurisdiction. The matters discussed in this chapter are firstly the pre-conditions and secondly the conditions for jurisdiction *ratione personae*.

From the general rule enunciated in Article 34, paragraph 1, of the Statute it follows that no international organization, whether intergovernmental or non-governmental, may be a party in a contentious case before the Court, or may directly intervene in a contentious case within the concept of either of those provisions of the Statute (see §§ II.171, 172 below). In the same way no individual, whether a natural person or a juridical person, may be a party or take any ancillary part in any contentious case in the Court (see § II.173 below). This means that in no case can the judgment of the Court be directly binding *qua* judgment on any legal person other than a State, so that no individual is in a position to take any steps, on the international level or on the national level, to secure compliance with a judgment in a contentious case.[4] That is not the same as saying that the Court has no competence in its judgment to give a construction of the legal position of a State, including its legal position in regard to entities other than States. In effect it frequently does this, particularly when dealing with an individual's claim espoused by a State in exercise of its right of diplomatic protection. However, thanks to the restrictive interpretation

[4] Cf. *Committee of United States Citizens Living in Nicaragua v Reagan* (1988), 85 ILR 249, 258 (United States Court of Appeals, District of Columbia Circuit). Fuller in ch. 4, § I.55. A judgment is of course binding on the State as such. If any of the organs of the State should adopt decisions that are incompatible with the State's obligations under the combined Charter and Statute, the international responsibility of that State could be engaged under the general rules of State responsibility. Art. 4 of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts states that the conduct of any State organ shall be considered an act of that State under international law whether the organ exercises legislative, executive, or judicial or any other functions. In para. (6) of its commentary on that proposal, the International Law Commission explained that the language of Art. 4 covers the principle of the separation of powers. 56 GAOR Sup. 10 (A/56/10) ch. V.

given to Article 34, paragraph 1, the individuals concerned in such cases have no right of direct access to or right of audience before the Court.[5] There are many who question whether this meets the needs of the good administration of international justice in current conditions.

The corresponding provision in Article 34 of the Statute of the Permanent Court referred to 'States or Members of the League of Nations'. In 1920 the international and constitutional status of the Dominions of the British Empire and of India was not settled, although they were parties to the Peace Treaties of 1919, were members of the League of Nations and signatories of the Protocol of Signature of the Statute of the Permanent Court. The wording of Article 34 assured their participation in that Statute. In fact, not one of those entities was ever a party in any case before that Court. The Committee of Jurists which prepared the Statute of the Permanent Court was careful to formulate what became Article 34 'without prejudice to any subsequent development'.[6] In 1945 the international status of several participants in the San Francisco Conference was ambiguous or anomalous. That included the Commonwealth of the Philippines (as it was then known), the Byelorussian SSR and the Ukrainian SSR, recognized as original members of the United Nations – their full and universally recognized independence came later, in 1991.[7]

It is in this aspect of the law relating to litigation in the International Court that the classic concepts of public international law have exerted their greatest influence. The result is that the provisions about to be addressed have for a long time been commonly regarded as the most out of tune with modern international requirements. According to the classic view,

[5] For discussion of the problem of the State as *dominus litis* in this type of case, see the *Lighthouses* arbitration (1956), XII RIAA 165; 23 ILR 669; Stuyt, *Survey* 412. And compare the distinction between negotiations by the individuals and negotiations by States for the settlement of a dispute out of Court, in the *Barcelona Traction* (New Application) (Prel. Objs.) case, [1964] 6, 22.

[6] PCIJ, *Procès-verbaux* 723 (1920). For a reading of Art. 34 of the present Statute as referring to 'States or United Nations members', see R. Russell and J.E. Muther, *A History of the United Nations Charter: The Role of the United States 1940-1945* 873 (1958).

[7] Ibid. at 351 n. 3. On the dissolution of the USSR and the subsequent independence of Belarus and Ukraine, Russia and these two former members of the Soviet Union automatically remained members of the United Nations. No formality of 'admission' was required. The other individual components of the Soviet Union and of other dissolved federal States of Eastern Europe, were admitted individually into the United Nations.

> International law is primarily concerned with the rights and duties of States and not with those of other persons;... States only possess full procedural capacity before international tribunals.[8]

However, the theory that there exist other international persons beside States has long been gaining ground. In 1949 the Court itself recognized that international organizations, and above all the United Nations, can and do possess international personality, so as to be capable of advancing international claims. As the Court said:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.[9]

This does not mean that these international organizations possess 'full procedural capacity before international tribunals' including the Court. They do not as far as the Court is concerned.

From the premise that only States enjoy full procedural capacity before international tribunals, for the International Court of Justice the application of Article 35 has led to further distinctions that have to be made. Current regulatory texts distinguish between States members of the United Nations, States not members of the United Nations that are parties to the Statute of the Court, and States not members of the United Nations that are not parties to the Statute of the Court. All these States have full procedural capacity, both as principals and as intervening parties. However, the conditions required for access to the Court by a State in each of these three categories are not identical. On

[8] L. Oppenheim, I *International Law* 20 (8th ed. by H. Lauterpacht, 1955). Contrast this with the following: 'International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law.' I *Oppenheim's International Law, Peace* 4 (9th edn. by R. Jennings and A. Watts, 1992).

[9] *Reparation* adv. op. [1949] 174, 178.

the other hand, the principle of the equality of States before the Court as regards the juridical consequences deriving from resort to the Court is fully applicable to States in all three categories. The main purpose of the different conditions that have been laid down for the different categories is to ensure this equality. In practice the equality of States before the Court refers, apart from the normal procedural equality, primarily to the obligations which the Charter imposes upon member States in regard to compliance with the decisions of the Court, and their rights of access to other organs of the United Nations in this connection, as explained in chapter 4.

Both in the time of the Permanent Court and in the period of the United Nations, Article 34, paragraph 1, has been interpreted as referring only to independent States. Nevertheless, the question arises whether peoples of territories enjoying a recognized international standing and possessing sufficient treaty-making capacity are not eligible to sustain proceedings before the Court. Even before the decolonization process had taken place, international practice did not absolutely deny them procedural capacity before international tribunals.[10] The emergence as a feature of the decolonization process of what are termed 'self-governing associated States', semi-independent States in free association with an independent State but with some measure of control over their foreign policy and enjoying some degree of treaty-making capacity points to the need for reconsideration of the type of entity eligible for recourse to the Court without necessarily being a party to the Statute.[11] This could be particularly relevant to the application of Article 35, paragraph 2, of the Statute (see § II.168 below). This provision does not limit the rights it gives only to independent States; though this has been the consistent practice hitherto.

[10] For example, the Levant States under French Mandate (Syria and Lebanon) together with Iraq, Palestine and Transjordan under British Mandate were parties to the *Ottoman Public Debt* arbitration (1925), held pursuant to Arts. 46 and 47 of the Treaty of Lausanne (1923). I RIAA 531; Stuyt, *Survey* 478; in the *Radio-Orient Company* arbitration (1940) the Levant States under French Mandate were parties against Egypt. III RIAA 1873; Stuyt, *Survey* 415.

[11] The question arises in an acute form under the United Nations Convention on the Law of the Sea of 1982. 1183 UNTS 3. Its participation clause, Art. 305, takes into account these new forms of semi-independence following the decolonization process on the basis of General Assembly Res. 1514 (XV), 14 December 1960. It is not clear, however, if those entities will enjoy access to the Court, whether as principal parties or as interveners, in accordance with the complicated provisions of Part XV (Arts. 279 to 299) of that Convention. See further University of Virginia, Center for Oceans Law and Policy, V *The United Nations Convention on the Law of the Sea: A Commentary* 177 (1989).

Four cases brought before the present Court illustrate the need for a new approach to this question. In each case a metropolitan State was a party to litigation partly on its own behalf and partly on behalf of a semi-independent political unit which, it is arguable, enjoys some recognizable international personality as a State even though not as an independent State. In the *U.S. Nationals in Morocco* case, the applicant government, France, specifically stated, in answer to a question from the Court, that the French Republic was proceeding in the case both on its own account and as Protecting Power in Morocco, the judgment of the Court to be 'binding upon France and Morocco'. In its judgment the Court recorded that 'Morocco, even under the Protectorate, has retained its personality as a State',[12] although it nowhere explicitly mentioned that the judgment was binding on Morocco, merely quoting its earlier order which recited the French declaration to that effect. In the *Minquiers and Ecrehos* case, the Government of the United Kingdom was espousing the claim of the Island of Jersey, and the Attorney-General of the Island of Jersey was one of the British counsel.[13] In the *Jan Mayen* case, the Greenland Home Rule Authority was represented in the Danish delegation, and its representative addressed the Court.[14] In the *Request for Examination* case the Government of New Zealand expressly stated that it was also representing the dependent territories of the Cook Islands, Niue and Tokelau, since 'New Zealand's acceptance of the Statute of the Court embraces these areas of the Pacific'.[15] Practice of States before the Permanent Court was similar.[16]

[12] [1952] 176, 185.

[13] [1953] 47. The judgment does not draw attention to this detail. And see the resolution of the States of Jersey of 14 September 1948 expressing agreement with the view of His Majesty's Government that the question should be referred to the Court. II Pleadings 20. And cf. the opening remarks of Mr Harrison, Attorney-General of Jersey, ibid. 146: 'I represent the Island of Jersey... and it is Jersey which is immediately and directly affected by these proceedings.'

[14] [1993] 38.

[15] See the statement of the representative of New Zealand in CR 95/19 at p. 24. The populations of the Cook Islands and Niue chose association with New Zealand as their preferred form of decolonization. The Cook Islands is a party to the Convention on the Law of the Sea, Niue is a signatory of that Convention, and as regards Tokelau, New Zealand now regards all treaty actions as extending to that territory as a non-self-governing territory of New Zealand. That Convention was one of the instruments invoked by New Zealand in that case.

[16] Cf. for instances in which metropolitan powers engaged in litigation in the Permanent Court in respect of dependent territories – colonies, protectorates, territories held under League of Nations mandate – the *Mavrommatis*, *Société Commerciale de Belgique*, *Oscar Chinn* and *Phosphates in Morocco* cases and the *Tunis and Morocco Nationality Decrees* adv. op.

Where the dependent territory does not possess adequate treaty-making capacity, any special agreement or any other formal instrument accepting the jurisdiction of the Court as applicant or as respondent, or as intervening party, on behalf of that territorial unit would have to be concluded with the metropolitan authorities. There seems to be no objection in principle to recognizing the procedural capacity of a dependent State before the International Court, at least to some degree where this is necessary to protect rights under a treaty to which the semi-independent State is a party – rights both of the territory concerned and of its people vis-à-vis other contracting parties, and to protect the rights of the other contracting parties vis-à-vis that territory.

Another consequence of the restriction of access to the Court to independent States has been the establishment of new tribunals in situations where a treaty grants rights to semi-independent States or to individuals, and a procedural standing to uphold those rights. This in turn requires access to the tribunal as part of the transaction recorded in the treaty. The outstanding examples are the new International Tribunal for the Law of the Sea, and especially (but not exclusively) its Sea-Bed Disputes Chamber, established under Annex VI of the United Nations Convention on the Law of the Sea of 1982 on the universal level,[17] and the European Court of Human Rights and the Inter-American Court of Human Rights on the regional level. Claims Tribunals are another example of this. These developments (other than the Human Rights bodies) are frequently viewed with disfavour, but are inevitable.

II.164. Members of the United Nations. By Article 93, paragraph 1, of the Charter, all members of the United Nations are *ipso facto* parties to the Statute of the Court. That was one of the major innovations on which the Dumbarton Oaks Proposals insisted and which was introduced at the San Francisco Conference (see chapter 2, § I.7). Members of the United Nations fall into two categories: original members under Article 3 of the Charter, and new members under Article 4.[18]

The qualifications required under Article 3 are either participation in the United Nations Conference on International Organization (UNCIO, San Francisco, 1945), or signature of the Declaration of the United

[17] See n. 11 above and the *Commentary* there mentioned, at 207. On ITLOS see ch. 3, § I.32.

[18] Cf. 17 UNCIO 329.

Nations of 1 January 1942 before the Conference.[19] By Article 3 of the Charter both types of members are States for all United Nations purposes. As stated, the international status of some of the original members of the United Nations was not unambiguously that of an independent State. The question whether an entity of this type is a 'State' from the point of view of general international law is irrelevant for the purposes of the Charter and the Statute. No organ of the United Nations, the Court included, is entitled to question such an entity's quality as a State, subject to the general principle of *rebus sic stantibus*.

Admission of new members into the United Nations is effected in accordance with the requirements and procedure of Article 4 of the Charter. The new member has to be a peace-loving state which 'accepts the obligations contained in the present Charter'. In addition, it has to be, in the judgment of the Organization, able and willing to carry out the obligations contained in the Charter. Its admission into the United Nations is effected by a decision of the General Assembly upon the recommendation of the Security Council.[20] Admission of a new member into the United Nations is determinative of its statehood for the purposes of the combined Charter and Statute. The Court's status of a principal organ of the United Nations is also relevant in this connection. In the *Application of the Genocide Convention* (Preliminary Objections) case, the Court relied on United Nations decisions – of the General Assembly, of the Security Council and of the Secretary-General (as depositary of a multilateral treaty) – regarding the status of the applicant, Bosnia-Herzegovina, as a State and the status of its Head of State.[21]

The effective date of membership in the United Nations of original members is the date of the entry into force of the Charter in accordance with Article 110, 24 October 1945, or, if the instrument of ratification was deposited after that date, the date of the deposit of the instrument of ratification. Deposit of instruments of ratification by all the signatories

[19] 204 LNTS 381.

[20] For the interpretation of Art. 4 see the *Admission* and the *Competence of the Assembly* advisory opinions. Admission into an international intergovernmental organization corresponds to accession in the case of a multilateral treaty.

[21] [1996-II] 595, 610, 611, 621 (paras. 18, 19, 44). This follows provisional decisions to the same effect in the Provisional Measures phase of the case, see n. 2 above. This has to be distinguished from the *Legality of Use of Force* cases where the main issue was whether the applicant State, Serbia & Montenegro (formerly Yugoslavia), was a party to the Statute at the date of the filing of the applications in those cases. Judgments of [2004] 15 December.

was completed by 27 December 1945.[22] As to new members admitted under Article 4, the effective date of membership is governed by the Rules of Procedure of the General Assembly and has varied. Originally these Rules provided that after the applicant had been informed of the decision of the General Assembly, its membership would become effective on the date upon which it presented to the Secretary-General an instrument of adherence to the obligations in the Charter.[23] By resolution 116 (II), 21 November 1947, the procedure was altered and now requires the application for membership to contain the necessary declaration, and membership becomes effective on the date upon which the General Assembly takes its favourable decision on the application. This is incorporated in Rule 138 of the General Assembly's Rules of Procedure currently in force.[24]

II.165. Non-Members of the United Nations as Parties to the Statute. Given the universality of the United Nations today, the question of participation in the Statute of States not members of the United Nations has lost the importance it once might have had. However, analytical questions have arisen and they may recur.

[22] 13 *Department of State Bulletin 679,* 1057 (1945). For the implications of Art. 110 of the Charter (on ratification and entry into force in respect of the original members), see *South West Africa* (Prel. Objs.) cases, [1962] 319, 335.

[23] This was Rule 107 of the Provisional Rules of Procedure for the General Assembly proposed by the Preparatory Commission (PC/20, 18), and Rule 116 of the Provisional Rules of Procedure adopted at the first part of the first session of the General Assembly in 1946.

[24] A/520/Rev.15 + Amends 1, 2. The acceptance of the obligations contained in the Charter is formally contained in a document emanating from the treaty-making authority of the new member. The deposit of the formal instrument has sometimes been effected after the decision of the General Assembly. This is because the political organs may take their decision on the basis of a declaration emanating from a proper authority but addressed to the Secretary-General by cable. For registration of these documents under Art. 102 of the Charter see ch. 14, § II.242. Before registering the instrument, the Secretary-General requires the presentation of the formal instrument in due form executed by the Head of State, Head of Government or Minister for Foreign Affairs; and if someone else executes the document, that person is required to produce properly executed full powers. In a few other instances the delay in registration was caused by the wish of several Governments to replace a declaration submitted several years earlier by a new declaration. See [1964] UNJYB 249. It is clear that the date of the decision of the General Assembly is the relevant date. The Court endorsed this practice in the *Right of Passage* (Prel. Objs.) case, where Portugal instituted the proceedings shortly after the decision of the General Assembly on 15 December 1955 admitting that country to the United Nations and before a fresh instrument was deposited on 21 February 1956. 229 UNTS 3. For the implications of Art. 110 of the Charter (on ratification and entry into force in respect of the original members) in relation to Art. 4, see *Aerial Incident of 27 July 1955* case, [1959] 127, 143.

At Dumbarton Oaks it was accepted that although the Court was to be a principal organ of the United Nations, a State which is not a member of the Organization could become a party to the Statute of the Court on conditions to be established in each case by the General Assembly upon recommendation of the Security Council (see chapter 2, § I.7). At the San Francisco Conference, Committee IV/1 explained that in approving that part of the Dumbarton Oaks Proposals (which now appears, with editorial changes, as Article 93, paragraph 2, of the Charter), it had 'taken into consideration the [then] existing international situation and the present circumstances of different states, which requires that the conditions must be determined in each case'. At the same time it pointed out that this would not preclude the adoption of uniform conditions as to a number of States.[25] Five States – Switzerland, Liechtenstein, Japan, San Marino and Nauru – became parties to the Statute under Article 92, paragraph 2, of the Charter.[26] Each one of them has since become a member of the United Nations. The conditions were initially elaborated by a Committee of Experts of the Security Council. The General Assembly adopted them without change in resolution 91 (I), 11 December 1946 in the case of Switzerland.[27] It followed this precedent in the other cases, with minor changes.

[25] 13 UNCIO 385. The expression 'in each case' apparently means in each instance of an application being made by a State wishing to become a party to the Statute, and does not refer to each case which such a State might desire to bring before the Court. During the 1960s there was discussion in the United Nations about what were called 'mini-States' and the possibility of their association with the United Nations, and the relationship of those States with the Court was also examined. See the Report of the Secretary-General, 21 GAOR Sup. 1A (A/6701/Add.1, para. 166) 1967. No decision was reached then. In 1990-1993 the European States in question – Andorra, Liechtenstein, Monaco, and San Marino – were admitted as full members of the United Nations. This was after several newly decolonized mini-States had been admitted to the United Nations.

[26] Resolutions 92 (I), 11 December 1946 (Switzerland), 363 (IV), 1 December 1949 (Liechtenstein), 805 (VIII), 9 December 1953 (Japan), 806 (VIII), 9 December 1953 (San Marino), 42/21, 18 November 1987 (Nauru). Admission as a party to the Statute corresponds to accession to a defined part of a multilateral treaty.

[27] See discussion at the 78th and 80th meetings of the Security Council on 30 October and 5 November 1946 and Res. 11 (1946), 15 November 1946. 1 SCOR 2nd series, No. 20 485, No. 22 501. For documentation see S/185, ibid. Sup. 7 157 and S/191, ibid. Sup. 8 1459 (report of the Committee of Experts). On the request of Hyderabad to become a party to the Statute, see doc. S/996, 11 September 1948 (mimeo). The Secretary-General attached to that document a note saying that he was not in a position to determine whether he was required by the rules of procedure to circulate the communication, and that he was bringing it to the attention of the Security Council 'for such action as the Council may desire to take'. No further action was taken on that matter.

The conditions called for the deposit with the Secretary-General of the United Nations of a duly ratified instrument, by which the State concerned accepted three specific requirements, namely: (*a*) general acceptance of the provisions of the Statute; (*b*) acceptance of all the obligations of a member of the United Nations under Article 94 of the Charter (see chapter 4), including the complementary obligations under Articles 25 and 103 in so far as relates to Article 94; and (*c*) an undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly might assess from time to time after consultation with the Government concerned (see chapter 8, § I.110).

Perusal of the debates in the Security Council and in the General Assembly discloses that, except in the case of Switzerland, the object of repeated discussion was not the conditions but whether the applicant was a State which should or could become a party to the Statute. Those debates all, with the exception of the admission of Nauru, took place in the context of the political and ideological tensions generated by the Cold War. Liechtenstein's application was opposed principally on the ground that that country does not itself conduct its foreign relations, from which it was argued that it was not an independent State. The Soviet Union opposed Japan's application because at the time it did not maintain diplomatic relations with that country; and that of San Marino on the ground that the country was a diminutive State. For those reasons (and others) the Soviet Union abstained in the Security Council. Nauru's application was accepted without debate. Discussion of this character represents the proper type of political control to be exercised by the Security Council and the General Assembly over applications under Article 93, paragraph 2, of the Charter.

The Statute makes no difference of substance between States that are parties to the Statute by virtue of their membership in the United Nations and States that are parties to the Statute without being members of the United Nations.[28]

None of these resolutions on admission of States not parties to the United Nations as parties to the Statute makes any provision for deciding questions concerning the validity or effect of declarations made under

[28] However, slight differences of a purely technical character existed. Certain communications required to be sent to all parties to the Statute were, in the case of members of the United Nations, sent through the Secretary-General. For other States parties to the Statute, the communications were sent direct by the Registrar in accordance with arrangements made with the State in question. See ch. 19, § III.294.

them. In accordance with general principles, now embodied in Article 77 of the Vienna Convention on the Law of Treaties of 1969,[29] the Secretary-General, as depositary, is empowered to make a summary and provisional decision on this aspect upon receipt of the instrument. Subsequently the Court will decide all such questions under its general jurisdiction.

The earlier remarks concerning the conclusiveness of membership in the United Nations for statehood for the purposes of the Charter and the Statute equally apply to the statehood of entities admitted to the Statute of the Court by the General Assembly on the recommendation of the Security Council. No organ of the United Nations, including the Court, may (*rebus sic stantibu*s) question that any such political unit is a State for the purposes of the Statute, regardless of its status under general international law.[30]

Three cases have concerned States parties to the Statute under Article 93, paragraph 2, of the Charter, *Nottebohm*, *Interhandel* and *Phosphate Lands in Nauru*. In each of those cases the applicant was a party to the Statute under Article 93, paragraph 2, and the respondent a member of the United Nations. The first two cases concerned the liquidation of economic consequences of the Second World War and the mutual rights of belligerents and neutrals. The third case related to the administration of the Trusteeship Agreement over Nauru.[31] There has been no case exclusively between States accessing the Court under Article 35, paragraph 2.

Admission of non-members of the United Nations as parties to the Statute has had further consequences from the point of view of the internal organization and administration of the United Nations. These consequences emphasize the political character of the decision to admit an entity as a party to the Statute of the Court. Participation in the Statute was regarded as evidence of a desire to advance international co-operation. For example, it became common for the participation clauses of treaties concluded under the auspices of the United Nations and the specialized agencies to include a provision to the effect that the competent organ set up by the treaty should invite non-member States to accede to that treaty, and in that context participation in the Statute of the Court was an acceptable criterion for such invitation as an indication of a desire to advance international co-operation. This pattern was set in the

[29] 1155 UNTS 335.

[30] See Sh. Rosenne, 'Recognition of States by the United Nations', 26 BYIL 440 (1949).

[31] For this settlement, see ch. 9, § II.152 n. 95.

General Assembly's decision regarding participation in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in resolution 368 (IV), 9 December 1948. This became an accepted formula both for the participation clause of treaties and for invitations to international conferences during the period of the Cold War until it was replaced by the easier 'all States' formula.

II.166. Consequences of being a party to the Statute. Parties to the Statute accept the entire jurisdiction which the Charter and the Statute establish. This includes the Court's jurisdiction to settle disputes as to its jurisdiction (Article 36, paragraph 6), its jurisdiction to indicate provisional measures of protection in a case of which it is duly seised (Article 41), its jurisdiction under Article 53 if a party fails to appear or to defend its case, its jurisdiction in matters of intervention under Articles 62 and 63, and its jurisdiction over requests for the interpretation and the revision of a judgment under Articles 60 and 61 of the Statute. Although neither the Charter nor the Statute embodies any provision for the compulsory mainline jurisdiction as such, a State which is a party to the Statute accepts the transfer of jurisdiction from the Permanent Court arising from Article 36, paragraph 5, and Article 37 of the Statute. This in turn imports the obligation of compliance as set out in Article 94 of the Charter in place of the corresponding obligation under Article 13 of the Covenant of the League of Nations. A party to the Statute also accepts the advisory competence of the Court under Article 65 of the Statute.[32]

Practice and the requirements of diplomacy have brought out other consequences. First of all, as appears clearly from the *Aerial Incident of 27 July 1955* case, the Charter and Statute are themselves an integral part of the title of jurisdiction in the broad sense. The Court itself, referring to the case of a State admitted to the United Nations, has explained that in seeking and obtaining such admission the State concerned accepts *all* (italics supplied) the provisions of the Statute, including Article 36.[33] Every State which is a party to the Statute has the right to participate in the nomination and election of the members of the Court and is included in the calculation of the absolute majority in the General Assembly required for election.[34] It has the right to take part in the work of the

[32] *Western Sahara* adv. op. [1975] 12, 24 (para. 30).
[33] *Aerial Incident of 27 July 1955* case, [1959] 127, 145.
[34] See ch. 6, § I.82 nn. 49, 50.

General Assembly concerned with amendments to the Statute and is included in the calculation of the number of ratifications required for an amendment to the Statute to enter into force; it has the right to be consulted over its share in meeting the expenses of the Court; and in the Court itself it has the right to invoke the jurisdiction of the Court in accordance with the general conditions for the exercise of that jurisdiction; and the rights deriving from Article 94 of the Charter. The right to apply to the Court has been described as 'by no means insubstantial' since it implies that whatever the outcome, all aspects of a matter can be discussed in the objective atmosphere of a court of justice.[35] This is so even if the judicial phase terminates in a judgment declining jurisdiction for one reason or another, since the acceptance of preliminary objections need not necessarily be regarded as the failure of judicial settlement. There is in these respects no substantial difference between the members of the United Nations and the other States which are parties to the Statute, between the practical implications of paragraph 1 and those of paragraph 2 of Article 93 of the Charter. On the other hand, no national of a State a party to the Statute but not a member of the United Nations has been elected as a member of the Court.

However, the case law contains a strong indication that substantive differences may exist between the original members of the United Nations under Article 3 of the Charter (now a minority of the members of the United Nations), and new members which have been admitted under Article 4, and that there may be relevance in the date upon which a State became a party to the Statute. In the *Aerial Incident of 27 July 1955* case the Court based its decision on the assumption that certain agreements and understandings had been reached between the States which participated in the San Francisco Conference, and that while these agreements could be binding between the signatories of the Charter, that is the original members, they could not impose obligations upon a State which had not taken part in the San Francisco Conference.[36] That

[35] *Northern Cameroons* case, [1963] 15, 29.

[36] *Aerial Incident of 27 July 1955* case, [1959] 127, particularly at 136-39. It seems to have been tacitly followed in the *South West Africa* (Prel. Objs.) cases, [1962] 319 at 334-35, where the Court stressed that certain obligations deriving from Art. 37 of the Statute were in that case effectively assumed by all three parties as original members of the United Nations. However, in the *Barcelona Traction* (New Application) (Prel. Objs.) case the Court warmed against arbitrary distinctions not warranted by the text of the Statute, and stated that in principle phrases such as 'The parties to the Statute' must apply equally and indifferently to cover all those States which at any given time are participants, whatever the date of their several ratifications, accessions or admissions. [1964] 6, 34.

distinction was first made in the interpretation and application of Article 36, paragraph 5, of the Statute, one of the transitional provisions introduced into the Statute in 1945 to implement the general decision to maintain continuity in the administration of international justice. This was followed in the *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) case. Here the Court distinguished between the position of a State which had participated in the San Francisco Conference and one which had not. In the particular case it found that Nicaragua's participation in the Conference and later ratification of the Charter had the effect of transferring to the regime of the present Statute an unratified acceptance of the optional clause of the Protocol of Signature of the Statute of the Permanent Court.[37] Although this interpretation is questionable, the fact that it could have been made is enough to indicate the possibility of differences in the legal rights and duties between States parties to the Statute according to whether a State is a party to the Statute under Article 3 or under Article 4 of the Charter. If it should be found to have any relevance to other provisions of the Statute, it would follow that a State which is a party to the Statute under Article 93, paragraph 2, of the Charter stands in a similar relationship to a State admitted into the Organization under Article 4.

II.167. Withdrawal from the United Nations, Suspension of Rights of Membership and Expulsion. The related questions of withdrawal, suspension of rights of membership and expulsion from membership in the United Nations were discussed at the San Francisco Conference in Committee I/2, on the basis of Chapter III of the Dumbarton Oaks Proposals. This Chapter simply stated that membership in the Organization should be open to all peace-loving States. Committee IV/1, which dealt with the Court, did not consider this topic.

On the question of withdrawal from the United Nations (or from participation in the Statute, a matter not considered by the San Francisco Conference), the Conference decided not to include any provision in the Charter either permitting or prohibiting withdrawal from membership in the United Nations. However, the report of Committee I/2 indicates that should a member 'because of exceptional circumstances' feel constrained to withdraw, it would not be the purpose of the Organization to compel it to continue its co-operation in the Organization. While the Committee did not attempt to spell out what would be the 'exceptional

[37] [1984] 392, 404 (para. 27). Fuller at ch. 12, § II.196.

Annex 20

Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008)

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Giorgio Gaja

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(p. 397) 19 The Role of the United Nations in Preventing and Suppressing Genocide

1. Introduction

Articles VIII and IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the 'Genocide Convention' or 'Convention') consider the key issue of ensuring compliance with the obligations set forth in the Convention. When acts of genocide are committed, the most likely scenario is that the state on whose territory the acts occur neither prevents them nor represses them. It was clear to the drafters of the Convention that the political circumstances that led to the trial of certain Nazi leaders at Nuremberg were unlikely to be replicated. Generally, the sovereignty of the state on whose territory acts of genocide are committed would act as a barrier with regard to prevention and repression, and some effective response from the international community would be required.

Although at the time when the Convention was adopted it was already clear that reliance on the UN could hardly provide a satisfactory solution, Articles VIII and IX were drafted as if the organs of the UN could provide that effective remedy. Not surprisingly, this has failed to occur. Only in recent years has (p. 398) the Security Council responded to certain acts of genocide, but also what has been done so far could not be described as an adequate way of preventing and repressing those acts.

2. The Legal Significance of Article VIII of the Genocide Convention

During the preparatory work of the Convention in the Sixth Committee of the General Assembly, the preliminary question was raised whether the Convention could add to the powers given to UN organs by the Charter. This is a more general issue that has arisen in several other contexts: for instance, with regard to the attribution to the Security Council by the Statute of the International Criminal Court (ICC) of the power to refer to the ICC prosecutor a situation in which crimes 'appear to have been committed' (Article 13(b)) or the power to defer investigation or prosecution (Article 16). Those powers cannot be easily related to the UN Charter, although both provisions consider that the Security Council would then act 'under Chapter VII of the Charter'.[1]

In the Sixth Committee the delegate of Poland, Mr. Lachs, maintained that a treaty like the forthcoming Genocide Convention could grant additional powers to the Security Council:

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> Since the Security Council had been set up, a number of international agreements had added considerably to the powers of the Council. Under the Peace Treaty with Italy, for example, the Security Council had been given extensive powers in the Free Territory of Trieste.[2]

This view was criticized by the delegate of the US, Mr. Maktos, according to whom:

> the convention could not include provisions involving amendments to the Charter. If the joint USSR and French amendment were to have the effect of enlarging the powers of the Security Council, that would involve amending the Charter and if it were not to have such an effect, it was unnecessary to mention the already existing powers of the Security Council.[3]

The delegate of Greece, Mr. Spiropoulos:

> admitted that there was some precedent for conferring new powers on the Security Council through international conventions, but stated that, in such cases, the Security Council would have to be asked whether it wished to accept the new functions.[4]

(p. 399) It would be difficult to consider that the procedure for amending the UN Charter set forth in Article 108 of the Charter could be circumvented by a treaty to which only some member States were parties. Even the acceptance of new powers on the part of the Security Council would not be sufficient. However, a treaty could do something short of increasing or restricting the powers of the Security Council: it could affect the exercise of those powers in relation to the states parties to the treaty, especially when that exercise depends on the consent of the states concerned. A treaty, like the Genocide Convention, could provide such consent.

Article VIII as finally adopted does not lend itself to the interpretation that it intends to extend or restrict the powers of the Security Council or other UN organs. It simply provides:

> 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.

In its first order on provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice (ICJ) noted that the applicant state had invoked Article VIII of the Genocide Convention and had called upon the Court ‘to act immediately and effectively to do whatever it can to prevent and suppress’ the acts of genocide complained of or threatened. The Court considered that:

> Article VIII, even assuming it to be applicable to the Court as one of the ‘competent organs of the United Nations’, appears not to confer on it any functions or competence additional to those provided for in its Statute.[5]

Similar conclusions could be reached with regard to the ‘functions or competence’ of any of the other UN organs. Moreover, the fact that, according to Article VIII, ‘action’ is to be taken by UN organs ‘under the Charter’ confirms that no addition is intended to the existing powers of those organs.

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Article VIII refers to ‘any Contracting Party’ without making a distinction between states that are members of the UN and those that are not. However, this cannot imply that, when a UN organ is called upon according to Article VIII, the status of member of the UN becomes irrelevant for the UN organ.[6]

(p. 400) In so far as the conditions for the exercise of the powers are concerned, Article VIII could be construed as implying that all the contracting states accept that a matter referred to under Article VIII of the Convention does not pertain to domestic jurisdiction, and therefore as removing the barrier raised by Article 2(7) of the UN Charter.[7] This possible effect of Article VIII is no longer significant, since the commission of acts of genocide has clearly become a matter of international concern and cannot be viewed as included in the domestic jurisdiction of a state, whether or not it is a party to the Convention.[8]

Given the fact that Article VIII of the Genocide Convention does not add to the powers of UN organs nor affects their exercise, the provision retains only an expository character.[9] When discussing Article VIII in the text that had been submitted by the *ad hoc* Committee,[10] the Sixth Committee had first come to the conclusion that the provision was superfluous.[11] On the basis of a joint amendment by Belgium and the UK,[12] the Sixth Committee had decided to delete it, albeit by a small majority.[13] However, the discussion on the provision continued, in view of the presence of some other amendments, although these did not lead to the adoption of any alternative text. The provision was reinstated only at a later meeting, on the basis of an Australian amendment to (p. 401) a subsequent article.[14] The amended text was quite similar to the one that had been previously deleted, but was adopted by a large majority.[15]

The delegate of the UK, Mr. Fitzmaurice, explained that:

> although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter, he had voted in favour of the Australian amendment in order that it might be clear, beyond any doubt, that the joint amendment of Belgium and the United Kingdom […] did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations.[16]

The Drafting Committee then reinstated as Article VIII the text that had been adopted on the basis of the Australian amendment.[17]

Although certain proposals had been made for considering in Article VIII only the role of the Security Council and the General Assembly, the final text refers to all the ‘competent organs’. This is meant to include also the Trusteeship Council, the Economic and Social Council and the Secretariat.

3. Genocide as a Threat to Peace within the Meaning of Article 39 of the UN Charter

It is clear that action by the Security Council under Chapter VII was going to be in most cases the only effective way for the UN to contribute to the prevention and repression of acts of genocide. Also in this respect, the Genocide Convention does not per se affect the exercise of powers under the Charter.

During the preparatory work the delegate of the Soviet Union, Mr. Morozov, had stated: ‘Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter.’[18] A French amendment envisaged calling ‘the attention of the Security Council to the cases of genocide and of

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other violations of the present Convention likely to constitute a threat to international peace and security'.[19]

(p. 402) In a later intervention Mr. Morozov modified his position and said that '[i] t was essential to state clearly that acts of genocide were likely to bring about threats to international peace and security'.[20] The following text was later presented by the delegations of France, Iran and the Soviet Union:

> The High Contracting Parties may call the attention of the Security Council or, if necessary, of the General Assembly to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat.[21]

This amendment was rejected by 27 votes to 13, with 5 abstentions,[22] the most probable reason being that the General Assembly appeared to be given only a minor role.[23] No criticism was expressed during the debate with regard to the statement, included in the above text, that genocide was 'likely to constitute a threat to international peace and security'. The only remark on this point was that of the delegate of the Philippines, Mr. Ingles, to the effect that 'the crime of genocide was reprehensible even when it did not involve a threat to international peace and security'.[24]

While one cannot read the Convention, also in the light of the preparatory work referred to above, as necessarily pointing to the conclusion that genocide represents a threat to peace within the meaning of Article 39 of the UN Charter, the issue has lost any practical importance. The concept of 'threat to peace' has acquired a wide meaning in the practice of the Security Council, so that its current meaning certainly includes gross violations of human rights such as acts of genocide.[25]

4. The Developing Practice of the Security Council with Regard to Acts of Genocide

With regard to genocide as well as to some other international crimes, action taken by the political organs of the UN has been directed towards states that (p. 403) were considered in breach of their obligations and also towards individuals, deemed to be authors of the crimes. Article VIII does not make a distinction in this respect.[26] This may be explained by the fact that repression of state conduct is likely to be complementary to the punishment of acts of individuals.

References to genocide have been less frequently made by the Security Council than by other political organs of the UN.[27] This is likely to be due to the difficulty in reaching the required majority for adopting a resolution in the Security Council.

Resolution 521 (1982) condemned 'the criminal massacre of Palestinian civilians in Beirut',[28] a massacre that GA resolution 37/123D, but not the Council, defined as an 'act of genocide'.

Resolution 688 (1991) relating to the Iraqi action against the Kurdish minority did not refer to genocide either, when condemning 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region'.[29] Moreover, the preamble of this resolution did not link the threat to peace to the repression *per se*, but rather to the 'massive flow of refugees towards and across international frontiers and to cross-border incursions'.[30]

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The first reference to genocide in a Security Council resolution was indirect. It was connected with the establishment of the first *ad hoc* International Criminal Tribunal. Resolution 827 (1993) determined the existence of a 'threat to international peace and security' in former Yugoslavia and established the International Criminal Tribunal for the former Yugoslavia (ICTY). Article 4(4), of the Statute, which was annexed to that resolution, stated that:

> The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 or committing any of the other acts enumerated in paragraph 3 of this article.

Article 2 of the International Criminal Tribunal for Rwanda (ICTR) Statute annexed to Resolution 955 (1994) contains the same text. A reference to (p. 404) genocide was made also in the operative part of that resolution,[31] and had already been made in two previous resolutions concerning Rwanda.[32]

The resolutions mentioned above do not contain a reference to the Genocide Convention, although the statutes of the *ad hoc* Tribunals take the definition of genocide from the Convention. The omission of a reference reflects the view that the basic obligations under the Convention are considered to be now part of general international law and that thus it is irrelevant to ascertain whether a state is a party to the Convention or not.[33]

One may find, however, a specific reference to the Genocide Convention in Resolution 1291 (2000), concerning the conflict in the Democratic Republic of the Congo.[34]

More recently, Resolution 1593 (2005) concerning Darfur provides an example of a new direction taken by the Security Council for repressing individual acts of genocide, although the Council refrained from using that term. After stating that 'the situation in Sudan continues to constitute a threat to international peace and security', the Council decided to 'refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'.[35]

In view of the developments concerning the repression of international crimes in recent years, the Security Council has increasingly devoted attention to the repression of individual acts of genocide rather than to the repression of state conduct. However, this approach is unlikely to lead to effective results so long as the individuals who are the alleged authors of acts of genocide continue to be leaders of the government of the state concerned.

5. (p. 405) The Impact of Obligations Relating to Genocide Imposed on UN Member States and the UN

States parties to the Genocide Convention are not relieved of their obligations under the Convention when they act as members of an international organization. Thus, a state party to the Convention would infringe its obligations if it did not, as far as possible, prevent or repress the commission of a genocide when acting as a member of an international organization. A similar conclusion would have to be reached with regard to obligations relating to genocide that exist under general international law.

International organizations are also under obligations to prevent and repress genocide that have their origin in general international law. Even if those obligations do not affect the powers of the organization or the conditions for their exercise, there arguably exist certain implications for the use, by the organs of the organization, of their discretion.[36] Should the organization be in a position to influence 'effectively the action of persons likely to commit, or already committing genocide', that organization would have to 'take all measures to prevent genocide which were within its power'.The quotation is taken from the judgment of the ICJ on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[37] The Court referred to the conduct

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of a state party to the Convention, but the same remark could reasonably be addressed to the conduct of an international organization in relation to general international law.

This implies that, since genocide is plainly regarded as representing a threat to peace, the Security Council would not only be entitled to take measures under Chapter VII of the UN Charter, but should do so with a view to ensuring compliance with the obligations to prevent and repress genocide that are imposed on the UN.

The question may be raised whether the conduct of the UN with regard to certain acts of genocide did not fall short of compliance with those obligations. For instance, the delayed response to genocide in Rwanda was not only (p. 406) politically criticizable but could also be viewed as an infringement of the UN's legal obligations.[38] In order to prevent the repetition of such failures,[39] a more effective system for responding to acts of genocide wherever committed should be put in place within the UN system.

Should the UN respond, this would not necessarily affect the obligations of state parties to the Convention. In the judgment quoted above, the ICJ, after referring to the fact that according to Article VIII of the Convention the competent organs of the UN could have been called upon, expressed the following reminder:

> Even if and when these organs have been called upon, this does not mean that the States parties are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the UN Charter and any decisions that may have been taken by its competent organs.[40]

Footnotes:

1 The view that neither provision adds to the powers of the Security Council was expressed by L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, 627, at 629 and 646.

2 UN Doc. A/C.6/SR.101.

3 *Ibid*.

4 *Ibid*.

5 Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 8 April 1993 ('1993 First Provisional Measures Order'), at 23, § 47.

6 According to J.L. Kunz, 'The United Nations Convention on Genocide', 43 *American Journal of Int'l Law* (1949) 738, at 746, when a non-member state invokes Article VIII the 'United Nations are called to intervene'. For a similar view, see N. Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960) 90. However, the condition set out in Article 35 (2) of the UN Charter would seem to apply.

7 Thus H.H. Jescheck, 'Genocide', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam etc.: North Holland/Elsevier, 1995), Vol. II, 541, at 542.

8 B. Conforti, *The Law and Practice of the United Nations* (2nd edn., The Hague/London/Boston: Kluwer Law International, 2000), at 143–4 and 174. The reference to Article 2 (7) of the Charter that appears in the second preambular paragraph of Security Council Resolution 688 (1991) may relate to the part of the resolution which concerns the opening of a dialogue between the Iraqi Government and the Kurdish minority. See G. Gaja, 'Genocidio dei curdi e dominio riservato', 74 *Rivista di Diritto Internazionale* (1991) 95.

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[9] It could not thus be correctly described as ‘senseless’, as was done by P.N. Drost, *Genocide. United Nations Legislation on International Criminal Law* (Leyden: Sijthoff, 1959), at 133.

[10] ‘Report of the *ad hoc* Committee on Genocide. 5 April to 10 May 1948’, UN Doc. E/794. The text of draft Article VIII ran as follows: ‘1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide. 2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.’

[11] This view was expressed by the delegates of the UK, Mr. Fitzmaurice (UN Doc.A/C.6/SR. 94 and SR.101), of Belgium, Mr. Kaeckenbeck (A/C.6/SR.94), of the Netherlands, Mr. de Beus (*ibid*.), of France, Mr. Chaumont (A/C.6/SR.101), of the US, Mr. Matkos (*ibid*.), of Ecuador, Mr. Correa (A/C.6/SR.102), of Luxembourg, Mr. Pescatore (*ibid*.), of India, Mr. Sundaram (*ibid*.), and of Canada, Mr. Feaver (A/C.6/SR.105).

[12] UN Doc. A/C.6/258. The joint amendment was based on two amendments that had been respectively presented by the delegations of Belgium (A/C.6/217) and the UK (A/C.6/236).

[13] By 21 votes to 18, with 1 abstention (UN Doc. A/C.6/SR.101).

[14] UN Doc. A/C.6/265. The text of the amendment ran as follows: ‘With regard to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.’

[15] By 29 votes to 4, with 5 abstentions (UN Doc. A/C.6/SR.105).

[16] UN Doc. A/C.6/SR.105.

[17] UN Doc. A/C.6/289 & Corr.1.

[18] UN Doc. A/C.6/SR.101.

[19] UN Doc. A/C.6/259. The amendment was illustrated by the delegate of France, Mr. Chaumont (A/C.6/SR.101).

[20] UN Doc. A/C.6/SR.101.

[21] UN Doc. A/C.6/SR.102.

[22] *Ibid*.

[23] See *ibid*. the interventions by the delegates of the US, Mr. Maktos, of Australia, Mr. Dignam, of the Philippines, Mr. Ingles, of Greece, Mr. Spiropoulos, and of Venezuela, Mr. Pérez Perozo.

[24] *Ibid*.

[25] I refer to my article ‘Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial’, 97 *Revue Générale de Droit Int’ l Public* (1993) 293, and to the wider analysis of M. Zambelli, *La constatation des situations de l’article 39 de la Charte des Nations Unies par le Conseil de Sécurité: le champ d’application des pouvoirs prévus au chapitre VII de la Charte des Nations Unies* (Genève: Helbing and Lichtenhahn, 2002).

[26] H. Kelsen, *The Law of the United Nations* (London: Stevens, 1950), at 50, expressed the view that enforcement action by the Security Council according to Article VIII would have to be ‘based on the principle of collective responsibility of the state guilty of the threat to, or breach of, the peace, and not on the principle of individual responsibility proclaimed by the Convention on Genocide’.

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27 A survey of practice of UN organs in this regard was provided by W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), at 453–79.

28 Resolution 521 (1982), § 1 of the operative part.

29 Resolution 688 (1991), § 1 of the operative part.

30 This was stated in the third preambular paragraph.

31 Resolution 955 (1994), § 1.

32 Security Council Resolution 925 (1994) had noted 'with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda'. Security Council Resolution 935 (1994) had then requested the Secretary-General to establish a commission of experts 'with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide'.

33 See K. Månsson, 'UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Human Rights Law', 26 *Netherlands Quarterly of Human Rights* (2008) 79, at 101.

34 In § 15 of the operative part of this resolution, the Security Council called 'on all the parties to the conflict in the Democratic Republic of the Congo to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948'.

35 In Security Council Resolution 1564 (2004), the Secretary-General had been requested to 'establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights in Darfur by all parts, to determine also whether or not acts of genocide have occurred […]'.

36 According to G. Ress and J. Bröhmer, 'Article 53', in B. Simma (ed.), *The Charter of the United Nations* (Oxford: Oxford University Press, 2002) 854, at 865, 'the Security Council's margin of discretion may, under certain circumstances, be reduced to a duty to authorize enforcement action'. This view was expressed when considering authorizations to regional organizations under Article 53 of the UN Charter.

37 Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 26 February 2007, ICS Reports (2007) (hereinafter '2007' Judgment), § 430.

38 See 'Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda', UN Doc. S/1999/1257, section III.5. The question of the existence of a breach of an international obligation was raised in my 'Third Report on Responsibility of International Organizations', UN Doc. A/CN.4/553, § 10.

39 See 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35', UN Doc. A/54/549, section XI.

40 2007 Judgment, *supra* note 37, § 427.

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Annex 21

Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press 2008)

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Robert Kolb

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(p. 407) 20 The Compromissory Clause of the Convention

1. Introduction

Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the 'Genocide Convention' or 'Convention') embodies a so-called 'compromissory clause' attributing compulsory jurisdiction to the International Court of Justice ('ICJ') under Article 36(1) of the Statute of the Court[1] for disputes arising under and with respect (p. 408) to the Convention. This chapter analyses what was the main aim and principal hope when the clause was inserted into the Convention and will deal with some general issues relating to the importance of the compromissory clause enshrined in Article IX of the Genocide Convention.

2. The Drafting History of Article IX

The preparatory works of the Genocide Convention[2] bear testimony to a somewhat tormented drafting history of Article IX, whose great importance was fully grasped:[3] it meant compulsory jurisdiction by an international judicial body on a question of relatively high-scale political sensitivity. The main controversial points[4] during the preparatory stage were the proper relationship of the ICJ with the international criminal court to be established (distinction of the respective jurisdictions);[5] and the extent to which the ICJ could handle claims on the responsibility of a state for improper conduct of its own organs in the context of a genocide (criminal law convention or also convention on the responsibility of states?). The first of these points gave rise to less debates, than the second.

The drafting process underwent different stages, which will be briefly examined in turn.

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2.1 The First Draft

In the first draft of the Secretary General (26 June 1947), draft Article XIV was brief and much less clear than the actual version of Article IX. It read as follows: 'Disputes relating to the interpretation or application of this (p. 409) Convention shall be submitted to the International Court of Justice'.[6] This clause left open the modalities through which the Court could be seized, i.e. unilaterally or through a special agreement. The commentary of the Secretary-General stressed only that the Court would be the most suitable organ to settle difficulties in the handling of the Convention, '[s]ince the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community' so that a dispute 'should not be settled by an authority arbitrating between two or more states exclusively, for then its decision would lack any claim to be binding on other States'.[7] By this statement, the Secretary-General did obviously not mean that a decision by the Court would be legally binding on non-parties to the dispute, contrary to Article 59 of the Statute.[8] He rather underscored the enhanced value of precedents set by the main judicial body of the UN with regard to all member states of that organization. In a communication dated 30 September 1947, the US suggested inserting the words 'between any of the High Contracting Parties' after the word 'dispute', since only states may be parties to cases before the Court.[9] Moreover, the US argued that it would be appropriate to avoid concurring jurisdiction of the ICJ with that of the international criminal court to be established. It thus proposed the insertion of the following proviso: ' … provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in Article VII'.

2.2 The Draft of the Ad Hoc Committee

In the *ad hoc* Committee[10] of the Economic and Social Council (ECOSOC), where the first draft was discussed by member states,[11] the compromissory clause was opposed by some states proving no sympathy for compulsory jurisdiction by an international tribunal.[12] However, by respectively 4 votes to (p. 410) 3, 5 votes to 2 and 4 votes to 1, it was first decided to maintain the clause and second to amend it according to the two aforementioned US proposals.[13] By virtue of a renumbering, this clause now became Article X of the draft. The main addition at this stage thus concerned the effort to avoid any concurrent jurisdiction between the ICJ and the criminal tribunals, national and international, charged with prosecuting the crime of genocide. In this context, no neat distinction was made between the substantive jurisdiction over the crime (criminal tribunals) and the adjunctive jurisdiction over the proper application of the Convention (ICJ).

2.3 The Sixth Committee Debate

The second draft was subjected to lengthy discussions in the Sixth Committee of the UN General Assembly. The discussion on Article X extends from the 103rd meeting to the 105th meeting.[14] The main debate was centered upon the joint Belgian/UK amendment which read as follows:

> Any dispute between the High Contracting Parties relating to the interpretation, application *or fulfilment* of the present Convention, *including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV*, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties.[15]

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Sir Gerald Gray Fitzmaurice (as he later became), on behalf of the UK, explained the thrust of the amendment.[16] The problem was that draft Article VII (on jurisdiction to try genocide, which later became current Article VI) (p. 411) had been confined to the criminal responsibility of individuals; the responsibility of states had been excluded. Some delegations felt that it was necessary, for the proper fulfillment of the duties assumed under the Convention, to complement this individual criminal responsibility with state responsibility. This aim of providing a supplementary set of 'teeth' to the Convention motivated the joint amendment. The ensuing discussion in the Committee revealed the great confusion prevailing on that aspect. Many delegations confused the 'criminal responsibility' aspect with the 'civil responsibility' aspect (states to be held criminally responsible or not?),[17] and further the responsibility for commission of the crime of genocide by the state itself with the responsibility for improper fulfillment of the duties to prevent and suppress genocide (primary or secondary responsibility).[18] Furthermore, the precise form of 'civil' responsibility prompted doubts, such as the choice between pecuniary reparation for damages done to foreign citizens or to local individuals, as opposed to more abstract remedies to control the proper application of the Convention. It cannot be said that these aspects were finally truly clarified. True, the UK representative clearly stated that only 'civil responsibility' was at stake;[19] but it is not certain that all delegations understood exactly what that meant, perhaps also because the law of state responsibility was in 1948 still in its doctrinal childhood. The scope of the Belgium/UK amendment seems to have been that—in the classical frame of a compromissory clause founding the jurisdiction of the ICJ—any state party could claim the responsibility of other states parties for violation of their obligations under the Convention.[20] What exactly these (p. 412) obligations were, depended upon the interpretation of the Convention; the positions could thus differ.

Overall, the prosecution of individuals by an ICC having been abandoned because that court was not at that time established, the jurisdictional clause of the ICJ became the sole way by which the obligations of states under the Convention could be internationally sanctioned through a tribunal.[21]

Some other minor points were further discussed, and sometimes led to an amendment.

First, the Haitian proposal to open access to the ICJ to individuals and groups claiming that genocide was committed upon them was rejected as being incompatible with Article 34 of the ICJ's Statute.[22] The statements of the Haitian delegate in defense of the proposed amendment, although benevolent by their humanitarian flavor, show disquietingly the extent to which some delegates, apparently not trained in international law, can misconceive technical aspects of a legal nature.[23]

Second, the USSR and the socialist states, who were opposed to any compulsory jurisdiction of an international tribunal, sought to make the UN Security Council the sole guardian of the proper fulfillment of the Convention.[24] Their argument was that in cases of commission of genocide, the great urgency of the matter does not allow for court proceedings. The argument, appealing as it might seem, was however besides the point: nowhere did the Genocide Convention preclude action by the Security Council;[25] it just added the possibility for the state parties to seize the Court if there was a legal dispute on the interpretation or application of the Convention. Action by the Court and the Council could then proceed in parallel. It can hardly be said that this addition weakened the Convention or was inadequate.[26] The result of these debates was (p. 413) the addition of a second paragraph to draft Article X (as it then was), reading as follows (Australian amendment):

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> With respect to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.[27]

At a later stage this paragraph was made autonomous by way of renumbering and became Article VIII of the Genocide Convention.[28]

Third, there was an Iranian amendment proposing to delete the last part of the draft of Article X, beginning with the words ‘provided that … ’.It was due to the fact that any reference to an international criminal tribunal had at that stage been deleted from Article VII, so that it also appeared superfluous in Article X. This amendment was carried by 22 votes to 8.[29]

Fourth, an Indian amendment was adopted. It proposed to replace the words according to which the Court could be seized ‘at the request of any of the High Contracting Parties’ with the words ‘at the request of any of the parties to such dispute’.[30] Conversely, a proposal to delete the word ‘fulfillment’ as being a superfluous doubling of the word ‘application’ was rejected. It was felt that this word went somewhat beyond simple application.[31] Finally, draft Article X was adopted by an overall vote of 18 to 2, with 15 abstentions.[32] The General Assembly made no substantive amendments to the compromissory clause.

3. Compromissory Clauses: General Remarks

Compromissory clauses pursue a double aim, that of strengthening a particular treaty by providing a means to better guarantee its proper application (legal security *inter partes*), and that of promoting the rule of law ininternational society in general (legal security *inter omnes*). Thus, with regards to the aim of providing teeth to a specific convention, a more general finality is added, namely that of securing progress with respect to the ideal of ‘peace and justice through law’. (p. 414) The first aim suggests a micro-analysis of a particular compromissory clause; the second aim suggests a macro-analysis of a compromissory clause seen as a web of engagements towards peaceful settlement of disputes.[33]

The creation of the Permanent Court of International Justice (PCIJ), and later the ICJ, greatly facilitated the blossoming of such compromissory clauses. In the earlier days, when only arbitration was available to judicially settle disputes among states, any special agreement of submission of a case to arbitration supposed a full-fledged spelling out of the composition of the tribunal, of the procedure to be followed, of the mandate given to the arbitrators, of the scope of litigation submitted to it, etc. The PCIJ was for the first time in history a standing body, with a pre-constituted judicial bench as well as rules of competence and procedure. Hence, a short clause inserted in any treaty could easily confer jurisdiction to it without having to solve all the other questions in each single agreement of *compromis* (special agreement). The Statute of the Court operated as one great bracket, in which these further questions were solved once and for all.[34]

Taking up this last point, it is important to observe that Article 36(1) of the ICJ Statute, by referring to ‘treaties and conventions in force’ is the controlling constitutional provision operating a form of *renvoi* to the special compromissory clause in the various treaties. This signifies, legally, that compromissory clauses do not in themselves create the jurisdiction of the Court. Their effect of attribution of competence to the ICJ is not autonomous but results from the necessary two-tier interplay between Article 36(1) of the ICJ Statute and the particular clauses. As the ICJ has often stressed, it is allowed to act only on the basis of its own Statute.[35] If the Statute did not, in one form or another, provide (p. 415) by *renvoi* for compromissory clauses, the Court could not act on their basis as its competence flows exclusively from the provisions of the Statute. Thus, in a sense, compromissory clauses are subordinated or auxiliary to the constitutional provision of the Statute which directs and completes them. Contrary to what happens under arbitration, the Court is not the agent of

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particular parties subjecting a case to it. Rather, the Court is an independent judicial body. It adjudicates exclusively on the basis of its constitutive instrument, i.e. according to the rules therein laid down not by the particular customers of a single case subjected to the Court, but by all the state parties to the Statute.[36] The Statute thus represents an objective law for the particular states wishing to make use of the Court; and the compromissory clause represents a subjective obligation linked to the objective law of the Statute.

However, the precise conditions under which the Court can be seized are laid down in the particular compromissory clause. The Statute limits itself to confer the ability of compromissory clause to create a jurisdictional bond; the clauses will spell out the concrete modalities under which this bond will be able to attach in a particular context. As the ICJ recalled in the *South West Africa* cases (second phase) (1966): 'The faculty of invoking a jurisdictional clause [of a treaty] depends upon what tests or conditions of the right to do so are laid down by the clause itself'.[37] There is thus a peculiar sharing of labour: the jurisdictional force of the compromissory clause flows from the Statute; the precise conditions of jurisdiction *ratione materiae*, *personae*, *loci* and *temporis* depend on the particular compromissory clause. In other words, the principle of the jurisdictional power is laid down in the Statute, the concrete scope (p. 416) of the power is spelled out in the compromissory clause. The interplay of both creates the concrete jurisdictional bond.

Interestingly, the compromissory clause contained in Article IX of the Genocide Convention has been the subject of scrutiny by the ICJ in the context of admissibility of reservations to it,[38] and has been invoked as a basis of contentious jurisdiction in four series of cases.[39] With this record, Article IX of the Genocide Convention is the most frequently invoked single compromissory clause. Moreover, it is probable that it will continue to be regularly brought to fore.

4. The Jurisdiction of the Court under Article IX

4.1 Mandatory but Subsidiary Jurisdiction

Article IX bestows the Court with the jurisdiction to adjudicate on the disputes included in the material scope of the jurisdictional grant. The attribution of jurisdiction is mandatory. The Court, if regularly seized, will have a mandatory jurisdiction to which all state parties to the Convention, not having inserted reservations to Article IX, are subjected.

On the other hand, this jurisdiction is subsidiary in the sense that a contracting party may, but must not, invoke it. The applicant or both parties together may prefer any other suitable organ of dispute settlement, ranging from direct negotiations, to mediation, conciliation, arbitration or involving an organ of an international organization. It is also possible that none of the state parties take action with respect to dispute settlement. Hence, a legal settlement of the dispute, and even a settlement at all, is not imposed and not guaranteed; it is only rendered possible. Contrary to what happened with the competence of the Council under Article 15 of the League of Nations Covenant, the jurisdiction of the Court is not made compulsory if the parties do not agree on any other (p. 417) method of settlement.[40] It not only remains dependent upon the formal seizing on the part of one contracting party, which may occur, but which may also not occur; moreover, this seizing remains optional. Thus, the dispute might be settled by any other means than the Court; by the Court itself; or it might not be settled at all. The point is simply that Article IX guarantees a forum to the party who wants a binding dispute mechanism. This subsidiarily compulsory forum is a judicial one (unlike Article 15 of the League Covenant, where this forum was a political one). It therefore applies the law and consequently the decisions delivered are binding.[41] The aim of this choice was to profit from both advantages of adjudication: (*i*) the relative de-politicization of the dispute by the application of legal rules; (*ii*) the corresponding bindingness of the decision, lending teeth to the Convention. In any case where the

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jurisdiction of the Court is disputed, the Court decides (Article 36, § 6). This is true also for contentions as to the regularity of the seizing.

The jurisdiction of the Court under the compromissory clause will only be ousted if the parties clearly made the choice of another forum. Such a choice of another forum will not be presumed; it will have to be established positively to the satisfaction of the Court. Thus, in the *Minority Schools of Upper Silesia* case, the PCIJ grappled with the partition of jurisdiction in minority cases between the Court and the Council of the League of Nations. The Court held that its jurisdiction could only be ousted 'in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority'.[42] It added that such a concurring jurisdiction was lacking in the present case, the Council's jurisdiction to hear individual petitions differing from the jurisdiction of the Court on inter-state disputes. In the case of a special agreement (e.g. for arbitration) concluded later than the compromissory clause, the Court might defer to it in consideration of the *lex posterior* rule. But it is not bound to give effect to it, since the titles of jurisdiction are concurrent and a new one does not annul the older one (see section 4.2 below). Furthermore, once a tribunal or another decisional body is seized, the ordinary rules of *litispendence* might apply. However, the Court will scrutinize to what extent this other body possesses comparable powers to settle (p. 418) the dispute. In the context of genocide, an arbitration tribunal may not have the same authority as the ICJ (which is the principal judicial organ of the organization that has adopted the Genocide Convention, namely the UN). The seizing of a political organ will not sterilize the applicability of the compromissory clause under Article IX of the Genocide Convention. Practice shows that the ICJ exercises a parallel jurisdiction to that of such organs, namely the Security Council of the UN. Each of the two organs acts in its sphere of competence (legal and political, respectively). Finally, it may be recalled that an appeal is possible from a first instance dispute settlement body if the treaty bearing the compromissory clause allows it. The *ICAO Council* case[43] illustrates the point. In the Genocide Convention, there is no similar provision.

4.2 The Jurisdiction of the Court under Article IX and Other Titles of Jurisdiction

In case of a plurality of titles of jurisdiction, the Court has stressed in its jurisprudence that each title is independent from the others and that the titles can be invoked alternatively or cumulatively.[44] Each title can be invoked in order to enlarge the jurisdiction of the Court with respect to an alternative title conferring narrower jurisdiction. Thus, for example, the optional declaration under Article 36(2) of the ICJ Statute can be invoked in order to broaden the scope of the compromissory clause jurisdiction, itself limited to a treaty. The reservations and limitations attached to one title apply only to it and do not affect the other titles. Thus, the reservations under the optional declaration cannot be transferred to the compromissory clause and vice versa. The principle *lex posterior derogat priori* is not applicable: a later, more restrictive optional declaration, is not considered as an expression of intention to subject oneself to the Court only to a reduced degree, so that previous compromissory (p. 419) clause would be held to be derogated by this later expression of will (and vice versa). Finally, the compromissory clauses are not a *lex specialis* to the optional declarations, derogating from them (or vice versa). Rather, the aggregate jurisdiction of the Court in a case flows from the addition of the proper scope of each applicable title. The presumption, according to the Court, is that a multiplicity of jurisdictional obligations by states shows their intention to open up new ways of access to the Court rather than to close old ways, or to allow them to cancel each other out. Hence the principles permeating the subject-matter are those of 'independence' and 'addition' of the respective titles. Furthermore, if two (or more) equally broad bases of jurisdiction exist, the Court may freely choose between them.[45] The principle of mutual independence also prevails between a contentious procedure on the basis of compromissory clause and the faculty of the

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appropriate UN organs to request an advisory opinion. In particular, the existence of a compromissory clause in a treaty does not indirectly exclude the request of an advisory opinion on questions covered by the treaty.[46]

4.3 The Advisory Jurisdiction of the Court and Article IX

In the *Interpretation of the Peace Treaties* case,[47] the three states concerned by the proceedings (Bulgaria, Hungary and Romania) were not members of the UN. However, since the Peace Treaties they had concluded gave the Secretary General of the UN certain functions with respect to the application of their compromissory clause, the General Assembly of the UN was considered to be empowered to request an advisory opinion on this subject-matter. The powers of the organization around the functioning of the compromissory clause created the necessary link *ratione materiae* allowing the UN General Assembly to request the opinion. The Genocide Convention having been concluded under the auspices of the UN and touching upon a matter of general interest, the power of the appropriate UN organs to request an advisory opinion can not, *a fortiori*, be doubted. Such a request has led to the Court's opinion of 1951.[48]

(p. 420) 5. The Seizing of the Court by a State Party

In general, there are three families of compromissory clauses: (*i*) those allowing unilateral seizing on the lines of Article IX of the Genocide Convention; (*ii*) those requiring a special agreement between the parties to a dispute, and which must therefore be analysed as *pacta de contrahendo*;[49] (*iii*) and those silent of this point, which are now customarily interpreted as allowing unilateral seizing by virtue of elementary considerations of *effet utile*.[50] The presumption is thus always in favor of unilateral seizability of the Court. However, in the case of Article IX of the Genocide Convention, this point is made clear in the text itself: Article IX allows a unilateral seizing of the ICJ by any party to a dispute.

Moreover, it must be noticed that the compromissory clause in Article IX of the Genocide Convention contains no further limitations, e.g. as to previous negotiations.[51] Such restrictive conditions may prompt delicate problems[52]—all of which are avoided in the Genocide Convention. Article IX of the Convention is in this respect a model of clarity and simplicity, opening the seizing of the Court as largely as possible.

(p. 421) 6. The Jurisdiction of the Court and the Tempus Regit Actum Principle

Problems may exist with regard to the compulsory jurisdiction of the Court over facts arising before the critical date of the entry into force of the Convention for the parties to the dispute. In principle, the jurisdictional titles under the optional clause system of Article 36(2) of the ICJ Statute are not temporally limited: it is considered that the parties wish a full adjudication of all their disputes, with no regard as to when the facts of the dispute originated. Thus, many optional declarations under Article 36(2) of the Statute contain explicit reservations limiting the competence of the Court to disputes arising after a certain date or excluding the competence as to disputes arising from facts, reasons or causes prior to the date of deposit of the declaration.[53]

As far as compromissory clauses are concerned, the general rule as to the non-retroactivity of treaties enshrined in Articles 4 and 28 of the 1969 Vienna Convention on the Law of Treaties, and specially recalled in certain conventions,[54] may be held to limit the temporal reach of jurisdiction without any necessity to invoke a specific reservation. Here too, then, the optional clause system appears to impose a closer knit of obligations (the presumption being against time limitation) than the compulsory clauses system (the presumption being in favor of time limitation). Thus, a retroactive application of the compromissory clause was not presumed in the *Ambatielos* case.[55] Article 32 of the applicable treaty stated that it shall come into force immediately upon ratification. The Court held that this must

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encompass all the clauses of the treaty, including the compromissory clause contained in Article 29—unless there is a 'special clause or any special object necessitating retroactive interpretation'.[56] However, that jurisprudence has not been confirmed in the (p. 422) *Bosnian Genocide* case.[57] The Federal Republic of Yugoslavia had claimed the benefit of non-retraoactivity of the compromissory clause contained in Article IX of the Genocide Convention, attempting to limit its reach to 'events subsequent to the different dates on which the Convention might have become applicable between the parties'.[58]

The Court answered thus:

> In this regard, the Court will confine itself to the observation that the Genocide Convention—and in particular Article IX—does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end.[59]

It therefore concluded that its jurisdiction extended to all the relevant facts which have occurred since the beginning of the conflict.

This pronouncement can be read at least in three different ways: (*i*) in the case of State succession, the successor state enters into the position of the predecessor so that there is legal continuity and no new critical date (if the Court intended to found its reasoning on this aspect, it seems odd that it did not say a word about it); (*ii*) the Genocide Convention is a special treaty, since it has a fundamentally humanitarian object and purpose requiring such a liberal interpretation (the Court mentions this aspect at the end of its aforementioned reasoning); (*iii*) the Court intended generally to bring the compromissory clause system in line with the optional clause system, establishing the general presumption of temporal non-limitation of the titles of jurisdiction, unless there is an apposite reservation. It is not easy to choose among the last two readings. The last interpretation would be the most desirable, and in line with the maxim '*boni judicis est ampliare jurisdictionem*' so often applied in the context of a compromissory clause. It is often artificial to uphold or even to require contrived temporal fact-constructions. Indeed, it is often easy to base new claims on old facts so that a new dispute is said to emerge. The Court would simplify the matters if no such temporal limitations applied at all. The non-retroactivity principle does not require such a limitation: it only requires that the compromissory clause does not apply itself before the treaty enters into force. Under the solution given in the *Genocide* case, the compromissory (p. 423) clause would then apply only from the moment the treaty enters into force and not retroactively; but the facts giving rise to disputes would not be temporally limited.

7. The Jurisdiction of the Court and the Termination or Suspension of the Convention

If a treaty is suspended or terminated on account of a material breach or a fundamental change of circumstances, or on any other ground, it cannot be argued that the compromissory clause is itself thenceforward inapplicable because of the suspension or termination of the instrument containing it. The compromissory clause has a special status within a treaty. In case of termination or suspension, it is severable from the other provisions for the purposes of dispute settlement, as Article 60(4) of the 1969 Vienna Convention on the Law of Treaties recalls. Its object and purpose is to provide a means of settlement of disputes on the interpretation or application of the treaty. Such disputes may arise out of claims purporting to suspend or terminate the treaty, if not undertaken consensually. It would be contrary to that object and purpose, granting a means to settle

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through the Court all disputes on the treaty, to leave open a gap in the context of suspension or termination. As the Court put it:

> [A merely unilateral suspension of a treaty could not] per se render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that [this] treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter.[60]

Thus, a challenge to the treaty does not annul the operation of the compromissory clause but rather calls it into action. This conclusion, of course, also applies to the Genocide Convention and Article IX.

In addition, if a treaty is validly denounced or otherwise validly terminated (any dispute as to termination may be brought to the Court under the compromissory clause), the compromissory clause will cease to apply as soon as termination occurs. However, if an application is brought to the Court before (p. 424) that critical date, the Court will retain jurisdiction over the case up to a final decision (principle of the *forum perpetuum*).[61]

The Genocide Convention may be denounced under Article XIV. Thus, the discussed principle may apply to it.

Conversely, the compromissory clause will operate only from the day the treaty enters into force for a particular state party or the day a provisional application under Article 25 of the 1969 Vienna Convention on the Law of Treaties is agreed upon.

Footnotes:

1 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations *or in treaties and conventions in force*' (italics added).

2 As to these *travaux*, see: N. Robinson, *The Genocide Convention, A Commentary* (New York: Institute of Jewish Affairs, 1960) 99ff; J. Quigley, *The Genocide Convention, An International Law Analysis* (Aldershot/Burlington: Ashgate, 2006), 227ff; Separate Opinion of Judge Tomka, ICJ, Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 27 February 2007, ICJ Reports (2007), §§ 50ff ('2007 Judgment').

3 Thus, Robinson, *supra* note 1, at 100, could write in 1960: 'Article IX may well be considered as one of the most important in the Convention'.

4 Other minor problems were easily solved, such as e.g. the proposal by Haiti to grant the right of recourse to the ICJ also to individuals and social groups (UN Doc. A/C.6/249). It was rightly rejected by the Sixth Committee as incompatible with the peremptory rule of the ICJ Statute according to which only states can be parties to a contentious case at the Court. See *infra*, Chapter 21 of this volume, section 2, 'Parties to Disputes before the ICJ and the *Erga Omnes* Nature of the Convention'.

5 See e.g. the suggestion of the US in Doc. A/401, at 243.

6 Doc. E/447, at 10.

7 *Ibid*., at 50.

8 Article 59 of the Statute of the ICJ reads as follows: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

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[9] Doc. A/401,at 243, reproduced in Doc. E/623, at 27. The draft proposed by the US is printed in E/623, at 38, as Art. XI.

[10] Established in E/621/Add.1, at 11–2.

[11] See Doc. E/AC.25/SR.7 *et seq.*

[12] The USSR and Poland, see Doc. E/AC.25, SR. 20, at 6; ECOSOC, Official Records, 3rd Year, 7th Session, Supplement no. 6,Doc. E/794,at 13–4. The USSR considered that only national courts should handle matters concerning genocide and that the compulsory jurisdiction of the ICJ was unduly interfering with the sovereign rights of states. Poland added that the Court could be seized by special agreements so that there was no need for a special clause in the Genocide Convention. Moreover, according to Poland, recourse from a national judgment to the ICJ with the charge that the Convention had not been properly applied was not acceptable. Generally, the attention was focussed during this stage on national and international criminal prosecution of genocide, especially through the international criminal court to be established.

[13] Thus, the clause now read (Article X): 'Disputes *between any of the High Contracting Parties* relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, *provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal*' (accepted amendments italicized). See ECOSOC, Official Records, 3rd Year, 7th Session, Supplement no. 6, Doc. E/794, at 19.

[14] Doc. A/C.6, SR. 103–105, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 428 *et seq.*

[15] Doc. A/C.6/258, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Annexes to the Summary Records of Meetings, at 28.

[16] Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings, 21 September–10 December 1948, at 430.

[17] E.g. *ibid.*, at 433, 438.

[18] E.g. *ibid.*, at 441–2.

[19] *Ibid.*, at 440.

[20] Some delegates here raised the point that the obligations at stake would concern in most cases the population of the state committing the injury, so that third states would have no legal standing to claim damages through some form of diplomatic protection, none of their citizens being involved. To this, the UK delegate responded that he had not thought of pecuniary reparations for injuries done to individuals (which implied that he had thought of an inter-state mechanism which was allowed to control the proper implementation of the Convention). The whole controversy shows one of the many misconceptions during the debates. See Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 443 (Mr. Abdoh, Iran), and at 444 (response by Mr. Fitzmaurice, as he then was). This point was still debated after the adoption of the Convention, e.g. in the 'advice and consent' procedure at the US Senate: see Robinson, *supra* note 1, at 103. The proper scope of the clause was to a large extent grasped by the Greek representative, Mr. Spiropoulos (a professor of international law), when he said that it was a reference to 'civil' responsibility of states found in innumerable clauses conferring jurisdiction to the ICJ (*ibid.*, at 445). As was stated by Robinson, *supra* note 1, at 101: 'Genocide could rarely be committed without the participation or tolerance of the State; if the Convention were not to provide against such

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action, it could not accomplish its purpose'. The state must be at least held accountable to the duties of prevention and punishment set out in the Convention.

21 As the French representative Mr. Chaumont (also a professor of international law) pointed out, this was regrettable: 'While regretting the fact that the problem of the international punishment of genocide should be dealt with solely on the level of disputes between States … ': *ibid*., at 431.

22 *Ibid*., at 431 (France), 432 (Brazil), 434 (Iran), 435 (Peru), 440 (Bolivia).

23 *Ibid*., at 436–7, 445; and Syria (Mr. Tarazi) in support: *ibid*., at 434. The point is that Article 34 of the Statute represents a form of peremptory law relative to the Court's functioning, which cannot be derogated from by other agreements unless the Statute itself is modified. The limitation to states is a mandatory and objective limitation of access to the Court in contentious cases, as it stands today. See R. Kolb, *Théorie du ius cogens international* (Paris: Presses Universitaires de France, 2001), at 343 *et seq.*

24 Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 435 (Poland), at 439 (Czechoslavakia), at 440 (USSR), Robinson, *supra* note 1.

25 *Ibid*., at 436 (Netherlands), at 443 (Iran), etc.

26 *Ibid*., at 444 (UK).

27 *Ibid*., at 454, 457.

28 Doc. A /760 & Corr. 2, GAOR, 1948, at 498.

29 Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 453–4.

30 *Ibid*., at 437, vote at 447. The UK had accepted that amendment: *ibid*., 444.

31 *Ibid*., at 447. According to the Indian delegate, the word 'application' included the study of circumstances in which the Convention should or should not apply, while the word 'fulfillment' referred to the compliance or non-compliance of a party with the provisions of the Convention: *ibid*., at 437.

32 *Ibid*., at 459.

33 As J.I. Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice', in 81 *American Journal of Int'l Law* (1987), at 860, points out under a slightly different perspective: 'The formal purpose of domestic and international adjudications is to resolve particular disputes by enforceable court orders. But the broader role of adjudication is the promotion of general adherence to legal obligations by members of the community'.

34 This facilitation of the compromissory clause was noted by many commentators. See e.g. M.O. Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise* (New York: Macmillan, 1943), 445: 'The establishment of a permanent judicial agency greatly facilitated the inclusion in international instruments of clauses concerning the settlement of disputes'; L. Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties', 150 *Recueil des cours* (1976-II), at 244: as the Statute of the ICJ contains all the necessary constitutional/procedural provisions, the compromissory clause can be limited to defining the scope of jurisdiction conferred.

35 ICJ, Judgment, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 27 June 1986, ICJ Reports (1986), at 59. Derogations to the Statute at the wish of particular parties have not been heeded by the Court: see PCIJ, Order, *Free Zones (France/ Switzerland)*, 19 August 1929, Ser. A., No. 22, at 12.

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36 See ICJ, Judgment (Preliminary Objections), *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, ICJ Reports (1953), at 119. In the words of E. Borel, *Les problèmes actuels dans le domaine du développement de la justice internationale* (Zürich, Leipzig: Orell Füssli, 1928), at 12: '[La juridiction permanente] n'est plus l'œuvre des Parties comparaissant devant elle; elle n'est plus un simple organe créé par les Etats en litige. Elle est, par excellence, le pouvoir judiciaire international institué par la communauté juridique des Etats réunis dans la Société des Nations… . Par sa constitution, elle est placée virtuellement en dehors des Parties'. A. Sanchez De Bustamente Y Sirven, *La Cour permanente de justice internationale* (Paris: Recueil Sirey, 1925), at 152. '[L]e juge ou le tribunal, établi d'avance, [est] soumis à des règles (…) antérieures et supérieures à la volonté dechaque plaideur (…). Le judiciaire n'est pas la création concrète et spéciale de tous les plaideurs, mais il existe avant eux et au-dessus d'eux et s'exerce de haut en bas … '. See also Dissenting opinion of Judge Pessôa, PCIJ, Judgment, *Serbian Loans* case *(France v. Kingdom of Serbs, Croats and Slovenes)*, 12 July 1929, Ser. A, No.14, at 65; Dissenting Opinion of Judge Novacovitch, *ibid*., at 80; Observation of Judge Pessôa, *Free Zones* case, *supra* note 35, at 49; Observation by Judge Kellogg, *Free Zones* case, *supra* note 35, at 32–3.

37 ICJ, Judgment (second phase), *South West Africa* cases *(Ethiopia v. South Africa; Liberia v. South Africa)*, 18 July 1966, ICJ Reports (1966), 37, § 60.

38 See ICJ, Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 28 May 1951, ICJ Reports (1951) 15.

39 Case concerning *Trial of Pakistani Prisoners of War* (*Pakistan v. India*); Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v. Federal Republic Yugoslavia (Serbia Montenegro)*; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*; *Cases concerning the Legality of the Use of Force*, Serbia-Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States, i.e. NATO-States responsible for the bombing of 1999, 2004); and *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Rwanda*).

40 Article 15 (1), at the beginning, reads as follows: 'If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council'.

41 A decision applying the law is binding precisely because it expresses the law as it stands: the law is binding upon the parties.

42 PCIJ, Judgment, *Minority Schools of Upper Silesia (Germany v. Poland)*, 26 April 1928, Ser. A, no. 15, pp 22–3. See Sohn, *supra* note 34, at 248.

43 ICJ, Judgment, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, 18 August 1972, ICJ Reports (1972) 46.

44 The Court recalled this settled principle in the Judgment (Preliminary Objections), *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), 13 December 2007, §§ 121ff. This principle of 'mutual independence' and 'additionality' was first stressed by the PCIJ in the Judgment (Preliminary Objections), *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria*), 4 April 1939, Ser. A/B, no. 77, 76. See H. Thirlway, 'The Law and Procedure of the ICJ (continued), Questions of Jurisdiction and Competence (continued)', 70 *British Year Book of Int'l Law* (1999) 11; see R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Dordrecht, Boston, London: M.Nijhoff, 1993) 33. A neat distinction between the respective scope of various titles of jurisdiction can be difficult, as a compromissory clause may reproduce or refer to the optional clause system: ICJ, Judgment

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(Jurisdiction and Admissibility), *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 20 December 1988, ICJ Reports (1988), at 84–5.

45 Jurisdiction, *Border and Transborder Armed Actions* case, *supra* note 44, at 90, § 48.

46 Advisory Opinion, *Reservations to the Genocide Convention*, *supra* note 38, at 19–20.

47 ICJ, Advisory Opinion (first phase), *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 30 March 1950, ICJ Reports (1950) 65, at 67 and 71. See G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris: A. Pedone, 1967), at 80; H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens and Sons, 1958), at 355, mentioning the point in passing.

48 Advisory Opinion, *Reservations to the Genocide Convention*, *supra* note 38.

49 E.g. Article 11(2) of the Antarctic Treaty of 1959 (UNTS, Vol. 402, at 80: 'Any dispute … shall, with the consent, in each case, of the parties to the dispute, be referred to the International Court of Justice for settlement').

50 Cf. C. Szafarz, *supra* note 44, at 30; V. Starace, *La competenza della Corte internazionale di Giustizia in materia contenziosa* (Naples: Jovene, 1970), at 93–7. In the case law of the Court, see the Judgment, *United States Diplomatic and Consular Staff (United States v. Iran)*, 24 May 1980, ICJ Reports (1980), 27, § 52; Judgment (Jurisdiction and Admissibility), *Maritime Delimitation and Territorial Questions* (*Qatar v. Bahrain*), 15 February 1995, ICJ Reports (1995) 15. As to the maximum of effectiveness thus conferred to compromissory clauses, see C. Tomuschat, 'Article 36', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006), at 623–4. The Court also stressed that aspect in the two mentioned cases, in the *Maritime Delimitation and Territorial Questions* (*Qatar v. Bahrain*), *ibid*., at 19, §§ 35–6.

51 On this question, see M.M. Ahi, *Les négociations diplomatiques préalables à la soumission d'un différend à une instance internationale*, Ph.D. thesis (Graduate Institute of International Studies: Genève, 1957); M. Bourquin, 'Dans quelle mesure le recours à des négociations diplomatiques est-il nécessaire avant qu'un différend puisse être soumis à la juridiction internationale', *Essays in Honor of J. Basdevant* (Paris: Pedone, 1960) 43; S. Torres Bernardez, 'Are Prior Negotiations a General Condition for Judicial Settlement by the ICJ ?', *Essays in Honor of J. M. Ruda* (The Hague: Kluwer Law International, 2000) 507.

52 See e.g. Jurisdiction, *Border and Transborder Armed Actions* case, *supra* note 44, 88–90; ICJ, Provisional Measures, *Lockerbie* (*Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom*), 14 April 1992, ICJ Reports (1992), 7 and 118, § 9.

53 See J.G. Merrills, 'The Optional Clause Today', 50 *British Year Book of Int'l Law* (1979) 96; J.G. Merrills, 'The Optional Clause Revisited', 64 *British Year Book of Int'l Law* (1993) 213; Tomuschat, *supra* note 50, at 634–6. The quite extensive case law is discussed, including the often subtle distinctions made by the Court.

54 See e.g. the European Convention on the Pacific Settlement of Disputes (1957), containing a compromissory clause in Article 1, but recalling in Article 27 that it will not apply to disputes concerning facts or situations prior to the entry into force of the Convention. The ICJ gave a contrived application to that clause in Judgment (Preliminary Objections), *Certain Property* (*Liechtenstein v. Germany*), 10 February 2005, ICJ Reports (2005), §§ 28ff.

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55 ICJ, Judgment (Preliminary Objections), *Ambatielos (Greece v. United Kingdom)*, 1 July 1952, ICJ Reports (1952), at 40–1.

56 *Ibid*.

57 ICJ, Judgment (Preliminary Objections), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), 11 July 1996 ('1996 Preliminary Objections Judgment') ICJ Reports (1996-II).

58 1996 Preliminary Objections Judgment, *supra* note 57, at 617, § 34.

59 *Ibid*.

60 Judgment, *Appeal Relating to the Jurisdiction of the ICAO Council*, *supra* note 43, at 53–4, § 15, letter *b*). See also, on the argument of fundamentally changed circumstances: Judgment (Jurisdiction), *Fisheries Jurisdiction (Germany v. Iceland; United Kingdom v. Iceland)*, 2 February 1973, ICJ Reports (1973) 21, at 65. See Tomuschat, *supra* note 50, at 622; Sohn, *supra* note 34, at 255.

61 See ICJ, Judgment (Preliminary Objections), *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, ICJ Reports (1953), at 123; ICJ, Judgment (Preliminary Objections), *Right of Passage over Indian Territory (Portugal v. India)*, 26 November 1957, ICJ Reports (1957), at 142; Judgment (Jurisdiction), *Armed Activities In and Against Nicaragua* (*Nicaragua v. United States*), 26 November 1984, ICJ Reports (1984), at 416, § 54; and Judgment (Merits), 27 June 1986, ICJ Reports (1986), at 28, § 36; ICJ, Judgment (Preliminary Objections), *Lockerbie* (*Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom*), 27 February 1998, ICJ Reports (1998), at 23–4, § 38. See R. Szafarz, *supra* note 44, at 39.

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Annex 22

Christian Tomuschat, 'Competence of the Court, Article 36' in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019)

Oxford Public International Law

Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 36

Christian Tomuschat

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Controversies have arisen concerning the question as to whether a dispute must exist at the time of the filing of the application or whether the requirement of a dispute can be understood in a more flexible way as being susceptible of crystallizing at a later stage during the course of the proceedings. In the *Marshall Islands* cases the ICJ determined that indeed the institution of proceedings is the relevant date;[36] on the contrary, in its preceding jurisprudence it had shown greater flexibility, holding that through the subsequent procedural acts of a party the issue in question may attain the character of an inter-State dispute.[37] Specifically on this matter the judges in the *Marshall Islands* cases were deeply divided.

10 Additionally, it is of no significance, according to the Court, whether the claims brought forward by the applicant party are asserted 'rightly or wrongly'.[38] No matter how self-evident this statement seems to be, inasmuch as at the stage of ruling on jurisdiction and admissibility the ICJ cannot pronounce on the merits of a case, it raises some problems if a State makes claims which are devoid of any substantiation. Thus, in the *Certain Property* case, Liechtenstein claimed compensation for the loss of assets that had been confiscated by Czechoslovakia at the end of the Second World War in 1945 and which had never been interfered with by Germany. It is doubtful whether in such circumstances, where a claim is predicated on an artificial legal construction unsupported by any facts, the refusal of the respondent to accede to the demands of the claimant is capable of engendering a true legal dispute.[39] Following the logic resorted to by the ICJ in the *Certain Property* case, a dispute could be 'invented' at any time against any State. Yet, the dispute requirement serves to protect States from having to answer frivolous claims brought against them. It should not be overlooked that conducting proceedings before the ICJ entails considerable expenditures.[40]

III. Difference of Opinion

11 In some compromissory clauses, the term 'difference of opinion' may be used. In its judgment in the *Certain German Interests* case, the PCIJ had to construe that expression, (p. 724) which defined its jurisdiction under a German–Polish convention of 1922. It found that 'a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views'.[41] Thus, the threshold is lower than that required for the existence of a dispute.[42] It suffices that one of the parties disagrees with a position taken by the other, there being no need for that disagreement to have been translated into an open conflict with the opponent.

IV. Legal Disputes

12 The jurisdiction of the ICJ is confined to legal disputes as opposed to political ones, although according to the text of Article 36 a difference seems to exist between para. 1 and para. 2: only the latter refers explicitly to 'legal disputes'. Such differentiation would, however, run counter to the philosophy of Article 36. In the high time of the sovereign State, before the outbreak of the First World War, great efforts were spent on distinguishing between the two classes of disputes.[43] A formula largely in use excluded from arbitration disputes affecting 'national honour, vital interests or independence'.[44] Still, in the 1920s and 1930s, the classification scheme gave rise to heated discussions. During that epoch, the debate was stimulated by the regime of the 1928 General Act for the Pacific Settlement of International Disputes. Under Article 28 of the Act,[45] non-legal disputes, *i.e.*, political disputes, were to be referred to an arbitration tribunal.

13 It is clear that the ICJ would be unable to adjudicate a case if the applicant did not invoke any legal rules in support of its submissions. This, however, is a remote eventuality that has never occurred. Rightly, therefore, legal doctrine has ceased focusing on the issue. In fact, the legal position has undergone dramatic changes since the coming into force of the Statute of the PCIJ. The network of rules of international law has become so tight in the contemporary world, in particular through the inclusion of human rights in the body of

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international law, that there exists hardly any matter to date that would be totally removed from the realm of international law.[46] Only once has the Court had the opportunity to state what it understands by a legal dispute, namely a dispute 'capable of being settled by the application of principles and rules of international law'.[47] In the *Aegean Sea Continental Shelf* case, the Court concluded that it was manifest that 'legal rights' lay at the root of the dispute that divided the two litigant parties, Greece and Turkey.[48]

(p. 725) V. Political Disputes

14 It is a different question altogether whether a dispute may become unsuitable for adjudication on account of the political context in which it is embedded. By their very essence, disputes between States are permeated by political considerations. Consequently, it would be fatal for the ICJ to deny its jurisdiction solely on the ground that inevitably its decision will contribute to shaping the political circumstances from which it arose. When in the Tehran hostage crisis, the request of the United States to indicate provisional measures was countered by Iran with the argument that the hostage issue formed 'only "a marginal and secondary aspect of an overall problem" involving the activities of the United States in Iran over a period of more than 25 years',[49] the Court emphasized that:

> no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.[50]

This statement was confirmed in the judgment on the merits:

> never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them.[51]

This was the basis on which the ICJ also rejected challenges against its jurisdiction in the *Nicaragua* case[52] and the case between Nicaragua and Honduras, where it also specified that any possible 'political motivation' of an application is irrelevant for the discharge of its judicial function.[53] This would seem to be the final word of the ICJ on the issue. The Court would emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance for the peace and security of the world. Concerning advisory proceedings, the Court has also firmly insisted that the political character of a question submitted to it does not affect its jurisdiction.[54] Rightly, the ICJ views itself as part and parcel of the machinery established by the UN Charter with the foremost task of promoting the purposes and principles of the Charter over their entire breadth. Neither any act-of-State doctrine nor any political-question doctrine[55] hampers the discharge of its functions.

15 During its time of existence, the PCIJ was rather reluctant to accept as coming within its jurisdictional mandate tasks of a substantially non-legal character which went beyond saying whether the conduct of one (or both) of the parties was lawful. Thus, in the *Free Zones* case, (p. 726) the Court denied that it could settle all the questions involved in the execution of Article 435, para. 2 of the Treaty of Versailles, a provision suggesting a new legal framework for the specific customs regime in the free zones in the vicinity of the city of Geneva inherited from the Vienna Peace Conference of 1815. It held that its adjudicatory competence was confined to legal issues and that it could not deal with questions that had to be decided on the basis of economic considerations.[56] A few years later, in the *Socobel* case,[57] it came to the conclusion that it could not compel the parties before it (Belgium and Greece) to enter into an arrangement which would be adjusted to the budgetary and monetary capacity of Greece.[58] Today, the Court would probably have fewer hesitations in making pronouncements on such issues that lie at the borderline between law and fact, given the much less hermetic separation between international and domestic law. In its time, the PCIJ also seems to have overlooked that in any event it was entitled, with the

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consent of the parties concerned, to render decisions *ex aequo et bono*. For such decisions, it is imperative not to limit the elements to be taken into account to legal grounds, but to assess the wider context that comprises both factual data and political considerations.

VI. The ICJ and the Security Council

16 The UN Charter does not contain any rules on the relationship between proceedings before the ICJ and parallel proceedings before the Security Council.[59] Only the relationship between the two main political organs, the General Assembly and the Security Council, has been regulated in Article 11, para. 2 and Article 12 UN Charter. According to these provisions, the Security Council enjoys precedence in matters of international peace and security. In the absence of any similar rule, the ICJ has denied any subordination to the Security Council.[60] In the *Nicaragua* case, it stressed that according to Article 24 UN Charter the Security Council is vested with primary, but not exclusive responsibility for the maintenance of international peace and security, adding:

> The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[61]

This proposition has been confirmed in all later cases, where alongside the Court the Security Council had also been seised of the same situation.[62] In particular, the adoption by the Council of resolutions on the same matter cannot deprive the Court of its (p. 727) jurisdiction once a dispute has been submitted to it.[63] From a political viewpoint, the underlying philosophy of cooperation between the ICJ and the Security Council should be unconditionally welcomed.[64]

17 Once the Security Council has made decisions under Chapter VII of the UN Charter, the obligations deriving therefrom prevail over any obligations which the parties concerned may bear under other international agreements (Article 103 UN Charter).[65] The legal effects produced by such Security Council decisions will hence also have to be taken into account by the ICJ.[66] The ICJ may not issue orders that contradict binding resolutions of the Security Council. However, in the *Lockerbie* cases, where the Court indeed showed such respect for the Security Council, the handling of the matter gave rise to serious doubts concerning whether SC Res. 748 (1992) had been adopted with a view to frustrating the pending proceedings before the Court.[67]

VII. Disputes Unsuitable for Judicial Settlement

18 Only in a single instance has the ICJ refused to entertain a dispute as being unsuitable for judicial settlement, namely in the *Northern Cameroons* case.[68] The Republic of Cameroon was of the view that the United Kingdom, as the Trusteeship Authority for the Northern Cameroons, had not complied with its obligations resulting from the Trusteeship Agreement of 1946 to separate the administration of that specific territorial unit from the administration of Nigeria. Because of that, the results of a plebiscite held on 11 and 12 February 1961, in which the population of Northern Cameroons had opted to become independent by joining Nigeria, had been vitiated. Cameroon sought a declaratory judgment from the Court, being aware of the fact that the General Assembly had approved the plebiscite and that just two days after the filing of the application (30 May 1961) Northern Cameroons had joined Nigeria (1 June 1961). Given these circumstances, the Court obviously felt that the developments as they had in fact taken place could not be reversed and that any adjudication would be ‘devoid of purpose’.[69] It held:

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Annex 23

Oxford English Dictionary, “to call upon”

Oxford English Dictionary | The definitive record of the English language

call, *v.*

Pronunciation: Brit. /kɔːl/, U.S. /kɔl/, /kɑl/

Forms: Old English **ceallian** (*rare*), Middle English **kal**, Middle English **kall** , Middle English **kalle**, Middle English **kaul**, Middle English **kawl**, Middle English **kelde** (*northern*, past participle, perhaps transmission error), Middle English–1500s **cale**, Middle English–1500s **caul**, Middle English–1500s **cawll**, Middle English–1600s **calle**, Middle English–1800s **cal**, Middle English– **call**, 1500s **caal**, 1500s **caill**, 1500s **ceall**, 1500s–1600s **caule**, 1800s **caulthe** (*Irish English* (*Wexford*), past tense); *English regional* (chiefly *northern* and *north midlands*) 1700s **caale** (*south-western*), 1800s **cawal**, 1800s **cawll**, 1800s **cawn** (past participle), 1800s **coa'in** (present participle), 1800s **coen** (present plural), 1800s **coll**, 1800s– **caa**, 1800s– **caal** (*south-western*), 1800s– **caan** (past participle), 1800s– **cal**, 1800s– **callen** (past participle), 1800s– **cally** (*south-western*), 1800s– **cawn** (present plural), 1800s– **co**, 1800s– **co'n** (present plural), 1800s– **cote** (past tense), 1800s– **kaa**, 1800s– **kal**, 1800s– **ko**, 1800s– **kone** (present plural), 1900s– **caall**; *Scottish* pre-1700 **cal**, pre-1700 **cale**, pre-1700 **calle**, pre-1700 **caul**, pre-1700 **chall** (perhaps transmission error), pre-1700 **coll**, pre-1700 **kaw**, pre-1700 1700s– **call**, pre-1700 1700s– **caw**, 1700s– **ca**, 1700s– **ca'**, 1700s– **caa**, 1800s– **kaa** (*Shetland*), 1900s– **caa'**, 1900s– **caal**.

Frequency (in current use):

Origin: Probably a borrowing from early Scandinavian.

Etymology: Probably (i) < early Scandinavian (compare forms in the Scandinavian languages cited below),

although in Old English (and possibly in later use) perhaps (ii) cognate with Old Frisian *kella* to name, be called, Middle Dutch *callen* to tell (Dutch *kallen* to speak, to babble, chatter), Middle Low German *kallen* to speak, to gossip, Old High German *kallōn* to talk, chatter, jabber, yell, brag, (Middle High German *kallen* to talk, to talk excessively or loudly, to summon in a loud voice), Old Icelandic *kalla* to cry, shout, say, to summon in a loud voice, to name, to claim, Norwegian *kalle* , Old Swedish *kalla* to cry out, to summon by calling, to urge, to say (Swedish *kalla*), Old Danish *kallæ* , *kalle* (Danish *kalde* to cry, to summon in a loud voice, to name) < the same Indo-European base as (with either a nominal or verbal suffix) Old Church Slavonic *glasŭ* voice, musical tone, Russian *golos* voice, and perhaps also classical Latin *gallus* cockerel (see GALLINE *adj.*); compare further < the same base (with different suffixation) Welsh *galw* (noun) call, shout, and (with reduplication) Old Church Slavonic *glagolŭ* word, speech (see GLAGOLITIC *adj.*).

Question of whether the word is a borrowing from early Scandinavian.

The origin of the Old English word and its continuity with the Middle English examples have both been disputed. The isolated attestation of Old English *ceallian* (see quot. OE at sense 1a(a)) apparently shows the breaking expected in West Saxon before geminate *ll* , which suggests that it is an inherited word. However, no reflex of such a West Saxon form *ceallian* (expected to show initial affricate, i.e. **challe*) appears to be attested in Middle English, and it has been argued that the Old English form merely reflects the influence of West Saxon orthography and that the verb itself is borrowed from early Scandinavian. The source of quot. OE at sense 1a(a) (*Battle of Maldon*) is of relatively late composition date, being an account of events of 991; it contains a small number of undisputed Scandinavian loanwords.

Compare, however, the following isolated attestation of the Old English poetic compound *hildecalla* battle herald, where the second element apparently shows an agent noun derived from the same Germanic base, in a form (without breaking) possibly influenced by Anglian, but probably not due to Scandinavian influence:

OE *Exodus* 252 Ahleop þa for hæleðum hildecalla, bald beohata, bord up ahof.

This compound is less likely to reflect borrowing of either the verb or a related noun from early Scandinavian, especially as the poem *Exodus* is usually assumed to be of early composition date. However, it does not indisputably imply currency of an inherited verb in Old English.

For the case for inheritance from Germanic see further E. G. Stanley ‘Old English *-calla*, *ceallian*’ in D. Pearsall & R. A. Waldron *Medieval Lit. & Civilization* (1969) 94–9; for the case for Scandinavian borrowing (now more generally accepted) see R. Dance in *Neuphilologische*

1917 O. Micheaux *Homesteader* II. iv. 177 'Now sit down, my daughter,' she said judiciously, 'and before the young man comes to call on you, tell me all about him.'

1970 J. Glassco *Mem. Montparnasse* xv. 137 But I now knew where she was living—in an ugly new building near the Place Magnan. Growing impatient, I called on her.

2011 M. C. Beaton *As Pig Turns* (2012) 283 Mrs. Ada Benson called on Mrs. Bloxby. The vicar's wife looked at her wearily. 'What now?' she asked.

†**4.** *intransitive*. To call into question the integrity or validity of; to challenge, accuse; = *to call upon* —— 6 at Phrasal verbs 2. *Obsolete*.

*a*1616 W. Shakespeare *Antony & Cleopatra* (1623) I. iv. 28 Full surfets, and the drinesse of his bones, Call on him for't.

1621 M. Wroth *Countesse of Mountgomeries Urania* 504 O Myra, thou art, and wert euer without compare, wherefore should thy honour bee calld on, but for Honours sake, thy deare breast being the richest tabernacle for it?

5. *transitive*. Originally and chiefly *North American*. To challenge or confront (a person) over his or her dishonesty or unacceptable behaviour. Cf. sense 20c(c).

1944 *Cedar Rapids (*Iowa*) Tribune* 9 Nov. 3/2 You could (and should) promptly 'call' him on it and ask him to prove it.

1983 W. Goldman *Adventures in Screen Trade* 18 If he saw a pen, he would put it in his bag. A watch, a pack of gum, anything. If a crew member called him on it, the star would make a joke, of course return the object, and the next day the crew member was gone.

1994 *St. Louis (*Missouri*) Post-Dispatch* (Nexis) 20 Nov. 2 The children had been served pizza because of the nature of the adult menu. Grandma thought that they should use forks, and called them on it at the table.

2006 'T. Reynolds' *Blood, Sweat & Tea* (2009) 5 This was made even more evident when he forgot what side of his neck the pain was on. When I called him on this he pretended not to know what I was talking about.

to call upon ——

1. *intransitive*.

†**a.** To call to (a person) with a request or entreaty; to address in a loud voice; = *to call on* —— 1b at Phrasal verbs 2. Also *figurative*. *Obsolete*.

*c*1405 (▸ *c*1390) G. Chaucer *Nun's Priest's Tale* (Hengwrt) (2003) l. 183 His felawe gan vp on hym calle.

1477 W. Caxton tr. R. Le Fèvre *Hist. Jason* (1913) 93 Whan he had so don he began to calle vpon the two knightes.

1553 J. Brende tr. Q. Curtius Rufus *Hist.* IV. f. 61^{v} He entered into the kynges logyng, and called vpon hym diuers tymes by his name, but when he could not awake hym with his voyce he stored hym with his hand.

1567 G. Fenton tr. M. Bandello *Certaine Tragicall Disc.* f. 165 Ardizzyno espied the basterde Pierro, whome he named and called vppon manye tymes, but all in vaine.

1613 A. Whitaker *Good Newes from Virginia* 6 How many idle persons haue we in the streetes of our Cities, in the High-wayes, and corners of our pathes, which day and night call vpon the passers by?

1718 J. Chamberlayne in tr. B. Nieuwentyt *Relig. Philosopher* I. Ded. p. iij The Texts..in which he does so often call upon Atheists and Infidels.

1836 *Tait's Edinb. Mag.* July 452/2 The faint voice called upon me again—'Lambert—Lambert!' and in a moment the recollection of my dear little sister rushed upon my mind!

1875 P. B. Marston *All in All* 105 As the living call upon the dead, Stretching their emptied arms across the bed Where lies what yesterday they called their own, So have I called on thee.

1903 *Lancet* 31 Dec. 300/1 When called upon loudly by name he opened his eyes.

b. To invoke or make supplication to (a god, saint, or other power); to pray to; = *to call on* —— 1a at Phrasal verbs 2.

1483 W. Caxton tr. J. de Voragine *Golden Legende* f. cclxxxvii/2 There ben many other myracles, whiche oure blessid lady hath shewed for them that calle vppon her.

1529 T. More *Dyaloge Dyuers Maters* II. f. lxiii/1 He had long called vppon god & our lady and all the holy company of heuyn and yet felte hym self neuer the better.

1564 tr. M. Flacius Illyricus *Godly Admon. Decrees Counsel of Trent* 56 It is wicked and idolatrous to call vpon saintes.

1611 *Bible (*King James*)* Gen. iv. 26 Then began men to call vpon the Name of the Lord.

1647 *Kingdomes Weekly Post* No. 6. sig. F3^{v} The Hangman pulling his cap over his eyes, Captain Burley called upon God, Lord preserve my soule.

1715 D. Defoe *Family Instructor* I. I. iii. 71 The Glory of a Christian, viz. To worship and call upon him that made him.

1817 Ld. Byron *Manfred* I. i. 35 I call upon ye by the written charm Which gives me power upon you.

1873 C. New *Life E. Afr.* xxvi. 513 The Arabs and Wasuahili were frantic with despair,..calling upon Allah and Muhammad.

1904 *Lutheran Q.* July 304 In his eucharist offerings he also called upon the saints in prayer.

1940 M. Beckwith *Hawaiian Mythol.* ii. 12 Others call upon the spirits of descendants and ancestors, praying toward the east to Hina-kua..and toward the west to Hina-alo.

2005 *16th Cent. Jrnl.* **36** 50 At least Razis had called upon God at the moment of his death.

†**2.** *intransitive*. To bring (a legal matter) before a court or other judicial authority. *Obsolete*.

1448 in S. A. Moore *Lett. & Papers J. Shillingford* (1871) I. 62 (*MED*) My Maister Recorder went to Westminster..and y with hym, and ther anon the mater was called upon yn comyn place.

1462 M. Paston in *Paston Lett. & Papers* (2004) I. 283 She schulde vp to London and calle vppon her matre there.

1573 J. Sanford tr. L. Guicciardini *Garden of Pleasure* f. 43 Demosthenes..became hir aduocate and spokesman and when the matter was called vppon, he aunswered him in this sort: [etc.].

3. *intransitive*.

a. Chiefly with infinitive or *for*. To appeal to (a person, organization, etc.) to do something; to require, urge, or demand that (a person, organization, etc.) do something. Also in *passive* with unexpressed agent: to be prompted by a duty, responsibility, or urge to do something. Cf. *to call on* —— 2a at Phrasal verbs 2.

*a*1450 in F. W. Willmore *Hist. Walsall* (1887) 168 The Mayer for the tyme beyng, shall truely call uppon the old Mayer, with alle the Wardens..to make their accompts.

*c*1475 (▸ *c*1450) *Elegy Tomb Cromwell* (Harl.) in C. Brown *Relig. Lyrics 15th Cent.* (1939) 245 Whene thou lest wenest thou shalt be calde vpone.

1530 J. Palsgrave *Lesclarcissement* 473/2 Call upon them to remember my mater.

1563 A. Golding tr. L. Bruni *Hist. Warres Imperialles & Gothes* II. vi. f. 73ᵛ The French kyng..being by Uitigis called vpon for ayde by vertue of the leage that was betwene them, had sent to Uraias ten thousand Burgonians.

*a*1616 W. Shakespeare *Measure for Measure* (1623) V. i. 283 Speake not you to him, till we call vpon you.

1698 J. Fryer *New Acct. E.-India & Persia* 3 Where the Trade-winds begin to offer themselves, the Mariner..is at more leisure to Repose; he not being so often called upon to shift his Course.

1750 S. Johnson *Rambler* No. 120. ¶2 He called for help upon the sages of physick.

1797 *Reasons against National Despondency* 188 I call upon the Country to act and think as if influenced by one common interest.

1814 *Lett. from Eng.* II. liii. 368 He called upon his congregation for horses.

1817 J. Mill *Hist. Brit. India* II. v. iv. 427 They would be called upon by parliament to produce their records.

1890 *Law Rep.: Chancery Div.* **44** 314 I am not really called upon to express an opinion with reference to this prospectus, because the Defendants have said that they do not intend to issue another prospectus.

1914 E. von Arnim *Pastor's Wife* viii. 83 Now they were called upon to endure the distressing spectacle of a hitherto reserved relative letting herself go to unbridledness.

1961 P. Marshall *Soul clap Hands & Sing* (1962) 20 He would be called upon to share a little of himself.

2002 *Outlook (*New Delhi*)* 9 Sept. 10/1 That awful blankness that grips so many of us when suddenly called upon to split a tab six-ways.

2013 *New Yorker* 11 Nov. 59/1 F.D.R. called upon the allied powers..to serve as the world's 'four policemen'.

b. To have recourse to (something); to draw upon; to utilize. Cf. *to call on* —— 2c at Phrasal verbs 2.

1477 Earl Rivers tr. *Dictes or Sayengis Philosophhres* (Caxton) (1877) lf. 43 That shalt thou finde whan thou callest vpon their seruise at thy nede.

1538 R. H. tr. H. Bullinger *Comm. 2nd Epist. Paul to Thessalonians* ii. f. 24 Thys good kynge called vpon the commune fydelite that men had promysed him.

1609 W. Shakespeare *Sonnets* lxxix. sig. F Whilst I alone did call vpon thy ayde.

1772 J.-N. de Sauseuil *Anal. French Orthogr.* 68 When an organ is affected with some kind of impediment, the nearest backward, or retrograde from the lips to the throat, is called upon to furnish an articulation.

1831 *New-Eng. Mag.* July 62 Miss Penelope was obliged to call upon her strength of mind for support under the slanders of an evil world.

1848 G. J. Guthrie *On Wounds & Injuries Chest* ii. 11/1 The other lung is called upon to make up the work of aërification of the blood.

1922 J. H. Hall *Steel Foundry* (ed. 2) viii. 261 As the heads are very much higher than the casting, they are called upon to feed metal only horizontally.

1963 *Connecticut Hist. Soc.* Jan. (back cover) He calls upon his long familiarity with Connecticut's traditions..to reveal how an eighteenth-century house..can bring the past home to us in ways that enrich the present.

1973 D. J. Hadley & L. Turner in G. D. Hobson *Mod. Petroleum Technol.* (ed. 4) xii. 441 The petroleum chemicals industry can call upon a variety of feedstocks, including natural gas and straight-run oil fractions.

2013 *Guardian* 31 Aug. (Guide Suppl.) 10/1 They called upon the production talents of Steve Albini.

c. To appeal to (something) as an authority or precedent; = *to call on* —— 2b at Phrasal verbs 2.

1536 R. Taverner tr. P. Melanchthon *Apol.* sig. J.vi^{v}, in *Confessyon Fayth Germaynes* Here we call vpon the iudgementes of all good & wyse men.

1579 G. Fenton tr. F. Guicciardini *Hist. Guicciardin* xvii. 999 In these actions we may truly call vpon the testimony of your excellencye.

1644 J. Doughty *Kings Cause rationally Debated* 28 Witnesse the many examples of Councells both ancient and moderne too, which might be called upon in attestation of these truths.

1702 *Clarendon's Hist. Rebellion* I. i. 43 His [*sc.* the Earl of Manchester's] Authority..was still call'd upon.

1853 H. P. Hedges *Hist. Excise Law N.Y.* 11 The rumselling system..pleaded time-honored usage; it called upon the example of the dead to hallow its deeds.

1948 *Q. Jrnl. Econ.* **62** 404 In insisting upon the inclusion of competitive factors we can call upon the authority of Marshall.

2005 R. J. DeSanto & D. A. Grano in B. K. Duffy & R. W. Leeman *Amer. Voices* 122/1 Dershowitz made a compelling argument in this legal context by calling upon precedent.

d. *Horse Racing*. Of a rider: to urge (a horse) to exert itself further; = *to call on* —— 2d at Phrasal verbs 2. Cf. ask *v.* Phrases 14.

1842 'Nimrod' *Horse & Hound* 308 The set-to is about to begin, or, in other words equally technical, he is about to 'call upon his horse'.

1892 F. T. Warburton *Race Horse* x. 159 He will soon come to understand what is required, and move off after the 'schoolmaster' when called upon.

1932 *New Castle (*Pa.*) News* 7 May 4/4 When you call upon a thoroughbred, he gives you all the speed, heart and sinew in him. When you call upon a Jackass, he kicks.

2011 *Sunday Age (*Melbourne*)* (Nexis) 18 Dec. (Sport section) 16 The More Than Ready filly..sat behind the speed on the rail in the 1000-metre straight race, but once called upon she dashed clear to win.

†**4.** *intransitive*. To make a claim for (money due); to demand payment of. *Obsolete*.

1472 M. Paston in *Paston Lett. & Papers* (2004) I. 364 I pray ȝow send me a kopy of þe dysse-charge..bothe fore my dyscharge and ȝowyr, wat sum euer þat be callyd vpon of eythere of vus here-aftere.

*a*1616 W. Shakespeare *Timon of Athens* (1623) ii. ii. 23 My Master is awak'd by great Occasion, To call vpon his owne.

1642 *Remonstr. Passages conc. Ireland* 26 His Majesties rents were purposely omitted, and not called upon in Easter-Term with that earnestnesse as formerly.

5. *intransitive*. To make a short visit to (a person); to pay a call on; = *to call on* —— 3 at Phrasal verbs 2.

1604 W. Shakespeare *Hamlet* iii. iii. 34 I'le call vpon you ere you goe to bed.

1748 S. Richardson *Clarissa* V. viii. 92 I have just now parted with this honest widow. She called upon me at my new lodgings.

1779 J. WARNER in J. H. Jesse *G. Selwyn & his Contemp.* (1844) IV. 259 Going through Chesterfield Street, I called upon the old duchess, who is 'sorely badly', as they say in Lincolnshire, with her old complaint.

1840 *Fraser's Mag.* **21** 404 I can..occupy myself..in calling upon some friends.

1888 A. K. GREEN *Behind Closed Doors* ii. 9 I was requested to call upon—Mrs. A., let us say, on business.

1942 *Charleston (*W. Va.*) Gaz.* 24 May 25 May I call upon you tomorrow? Since it is Sunday you will be at home, perhaps?

1954 F. G. PATTON *Good Morning, Miss Dove* 104 Though it was her custom to pay pastoral calls at the residences of her pupils, she had never called upon William's grandmother.

1993 T. MEDEIROS *Once Angel* xxxiii. 378 Penfeld..tilted his disapproving nose in the air and announced, 'A Mr. Saleri is here to call upon Miss Scarborough.'

†6. *intransitive*. To call into question the integrity or validity of; to challenge, accuse; = *to call on* —— 4 at Phrasal verbs 2. *Obsolete*.

1746 LD. CHESTERFIELD *Let.* 23 Mar. in *Lett. to Son* (1787) I. cix. 299 You call upon me for the partiality of an author to his own works.

1791 J. SMEATON *Narr. Edystone Lighthouse* §73 Supposing his character called upon, not only as a professional man, but as a man of veracity.

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