

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
APPLICATION OF THE CONVENTION ON
THE PREVENTION AND PUNISHMENT OF
THE CRIME OF GENOCIDE**

THE GAMBIA

v.

MYANMAR

**COUNTER-MEMORIAL OF
THE REPUBLIC OF THE UNION OF MYANMAR**

VOLUME II

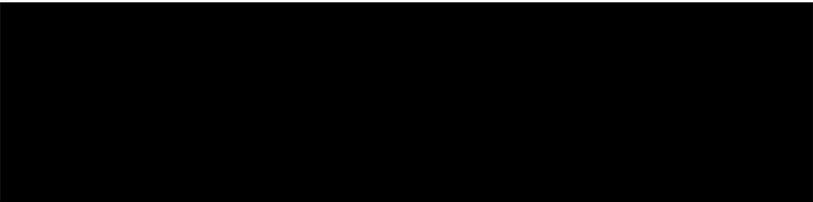
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24 AUGUST 2023

VOLUME II

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TREATIES AND INTER- GOVERNMENTAL ARRANGEMENTS

Annex 1

Convention for the Protection of Human Rights and Fundamental Freedoms
(European Convention on Human Rights), Rome, 4 November 1950 (as
amended)

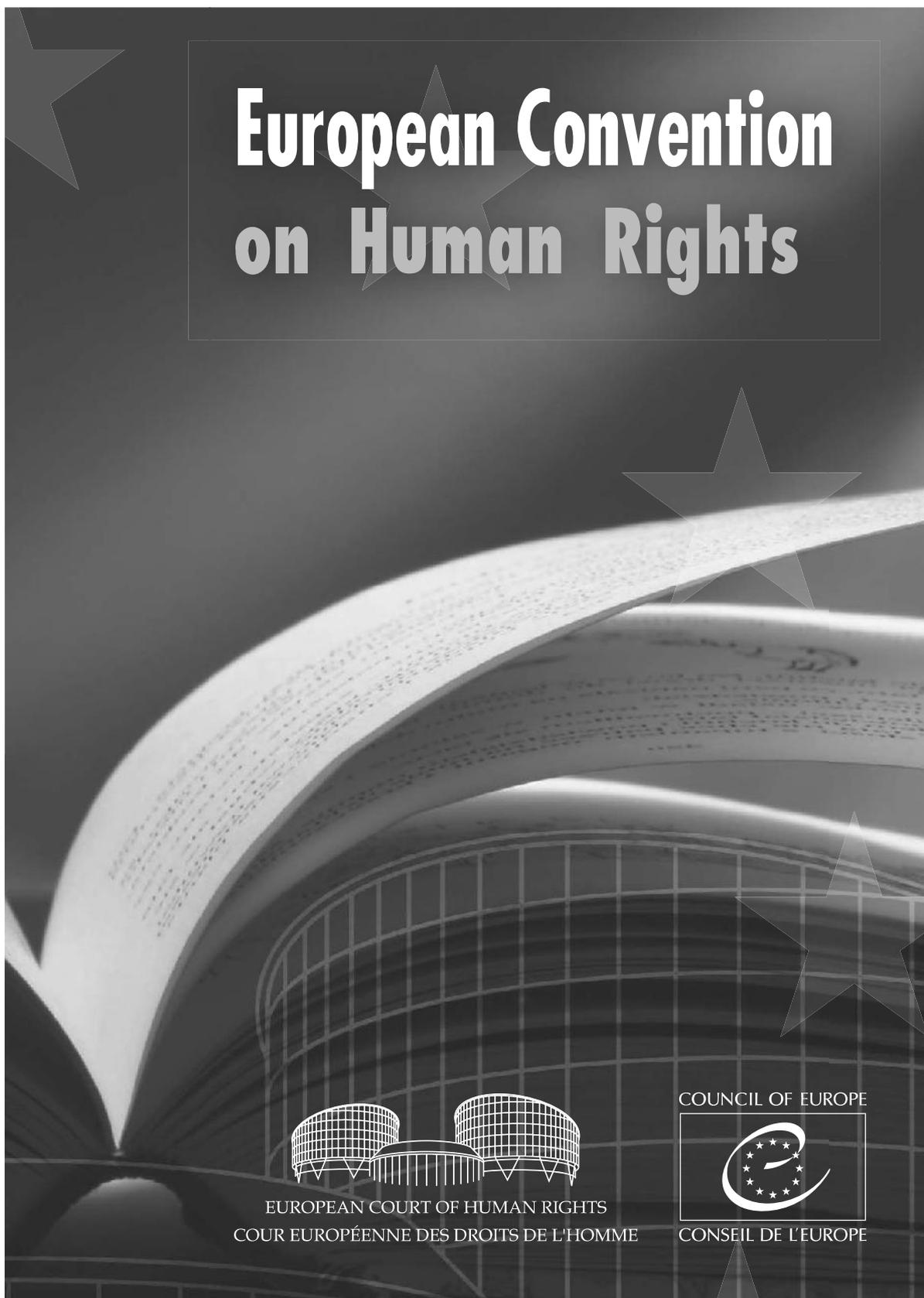
English version available at:

https://www.echr.coe.int/Documents/Convention_ENG.pdf

French version available at:

https://www.echr.coe.int/Documents/Convention_FRA.pdf

European Convention on Human Rights



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Annex 1

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

ARTICLE 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

ARTICLE 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Annex 2

International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, *United Nations Treaty Series*, vol. 660, p. 195

English version available at:

<https://www.refworld.org/docid/3ae6b3940.html>

French version available at:

<https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4c0f4fbd2>

Annex 2

No. 9464

MULTILATERAL

International Convention on the Elimination of All Forms of Racial Discrimination. Opened for signature at New York on 7 March 1966

Authentic texts: Chinese, English, French, Russian and Spanish.

Registered ex officio on 12 March 1969.

MULTILATÉRAL

Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Ouverte à la signature à New York le 7 mars 1966

Textes authentiques: chinois, anglais, français, russe et espagnol.

Enregistré d'office le 12 mars 1969.

Annex 2

in all its forms and promoting understanding among all races, and, to this end :

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination

Annex 2

and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia* :

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights :

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular :
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;

Annex 3

International Covenant on Civil and Political Rights, New York, 16 December 1966, *United Nations Treaty Series*, vol. 999, p. 171

English version available at:

<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

French version available at:

<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-French.pdf>

Annex 3

No. 14668

MULTILATERAL

**International Covenant on Civil and Political Rights.
Adopted by the General Assembly of the United
Nations on 19 December 1966**

**Optional Protocol to the above-mentioned Covenant.
Adopted by the General Assembly of the United
Nations on 19 December 1966**

*Authentic texts: English, French, Chinese, Russian and Spanish.
Registered ex officio on 23 March 1976.*

MULTILATÉRAL

**Pacte international relatif aux droits civils et politiques.
Adopté par l'Assemblée générale des Nations Unies le
19 décembre 1966**

**Protocole facultatif se rapportant au Pacte susmentionné.
Adopté par l'Assemblée générale des Nations Unies le
19 décembre 1966**

*Textes authentiques : anglais, français, chinois, russe et espagnol.
Enregistrés d'office le 23 mars 1976.*

Annex 3

Article 18. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19. 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20. 1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22. 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organize¹ to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

¹ United Nations, *Treaty Series*, vol. 68, p. 17.
Vol. 999, I-14668

Annex 4

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p. 331

English and French versions available at:

https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

VIENNA CONVENTION
ON THE LAW OF TREATIES



UNITED NATIONS
1970

Annex 4

15

Article 30

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3: INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Annex 4

16

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

Annex 5

American Convention on Human Rights, San José, 22 November 1969,
United Nations Treaty Series, vol. 1144, p. 123

Available at:

<https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>

Annex 5

No. 17955

MULTILATERAL

American Convention on Human Rights: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969

Authentic texts: Spanish, English, Portuguese and French.

Registered by the Organization of American States on 27 August 1979.

MULTILATÉRAL

**Convention américaine relative aux droits de l'homme :
« Pacte de San José de Costa Rica ». Signée à San José
(Costa Rica) le 22 novembre 1969**

Textes authentiques : espagnol, anglais, portugais et français.

Enregistrée par l'Organisation des États américains le 27 août 1979.

Vol. 1144, E-17955

by the States Parties to the Convention in the General Assembly by a two-thirds vote.

2. The Court shall appoint its own Secretary.

3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

Article 59. The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respect[s] not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

Article 60. The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

Section 2. JURISDICTION AND FUNCTIONS

Article 61. 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

Article 62. 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63. 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64. 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, *United Nations Treaty Series*, vol. 1465, p. 85

English version available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en

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Annex 6



اتفاقية لمناهضة التعذيب وغيره من ضروب المعاملة
أو العقوبة القاسية أو اللاإنسانية أو المهينة

禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约

**CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

**CONVENTION CONTRE LA TORTURE ET AUTRES PEINES
OU TRAITEMENTS CRUELS, INHUMAINS OU DÉGRADANTS**

**КОНВЕНЦИЯ ПРОТИВ ПЫТОК И ДРУГИХ ЖЕСТОКИХ,
БЕСЧЕЛОВЕЧНЫХ ИЛИ УНИЖАЮЩИХ ДОСТОИНСТВО
ВИДОВ ОБРАЩЕНИЯ И НАКАЗАНИЯ**

**CONVENCION CONTRA LA TORTURA Y OTROS TRATOS
O PENAS CRUELES, INHUMANOS O DEGRADANTES**



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third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

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2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

Annex 7

Rome Statute of the International Criminal Court, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, p. 3

English version available at:

<https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>

French version available at:

<https://www.icc-cpi.int/sites/default/files/Publications/Statut-de-Rome.pdf>



**Cour
Pénale
Internationale**

**International
Criminal
Court**

**Rome Statute
of the
International
Criminal
Court**

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Rome Statute of the International Criminal Court

Article 13 Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14 Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15 Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 15 *bis*⁵ Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

⁵ Inserted by resolution RC/Res.6 of 11 June 2010.

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Rome Statute of the International Criminal Court

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter*⁶

Exercise of jurisdiction over the crime of aggression (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

⁶ Inserted by resolution RC/Res.6 of 11 June 2010.

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Rome Statute of the International Criminal Court

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26 **Exclusion of jurisdiction over persons under eighteen**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27 **Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28 **Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29 **Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30 **Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;

Annex 8

International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, *United Nations Treaty Series*, vol. 2716, p. 3

English version available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=en

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https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=fr

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الاتفاقية الدولية لحماية جميع الأشخاص من الاختفاء القسري

保护所有人免遭强迫失踪国际公约

INTERNATIONAL CONVENTION FOR THE PROTECTION OF
ALL PERSONS FROM ENFORCED DISAPPEARANCE

CONVENTION INTERNATIONALE POUR LA PROTECTION DE
TOUTES LES PERSONNES CONTRE LES DISPARITIONS
FORCÉES

МЕЖДУНАРОДНАЯ КОНВЕНЦИЯ ДЛЯ ЗАЩИТЫ ВСЕХ ЛИЦ
ОТ НАСИЛЬСТВЕННЫХ ИСЧЕЗНОВЕНИЙ

CONVENCIÓN INTERNACIONAL PARA LA PROTECCIÓN DE
TODAS LAS PERSONAS CONTRA LAS DESAPARICIONES
FORZADAS



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2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and

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Annex 10

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Annex 11

European Court of Human Rights, *Jorgic v. Germany*, no. 74613/01,
ECHR 2007-III

English and French versions available at:

https://www.echr.coe.int/Documents/Reports_Recueil_2007-III.pdf

Annex 11

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



REPORTS
OF JUDGMENTS AND DECISIONS

RECUEIL
DES ARRÊTS ET DÉCISIONS

2007-III

REGISTRY OF THE COURT · GREFFE DE LA COUR
COUNCIL OF EUROPE · CONSEIL DE L'EUROPE
STRASBOURG

CARL HEYMANNS VERLAG · KÖLN · MÜNCHEN

Annex 11

JORGIC v. GERMANY
(Application no. 74613/01)

FIFTH SECTION

JUDGMENT OF 12 JULY 2007¹

1. English original.

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JORGIC v. GERMANY JUDGMENT

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SUMMARY¹

Jurisdiction of German courts to try the applicant for genocide committed in Bosnia and Herzegovina and their interpretation of the offence of genocide

Article 5 § 1 (a)

Lawful arrest or detention – After conviction – Competent court – Jurisdiction of German courts to try the applicant for genocide committed in Bosnia and Herzegovina

Article 6 § 1

Criminal proceedings – Tribunal established by law – Principle of universal jurisdiction – Convention on the Prevention and Punishment of the Crime of Genocide – Jurisdiction of German courts to try the applicant for genocide committed in Bosnia and Herzegovina

Article 7

Nullum crimen sine lege – Criminal offence – Interpretation by German courts of the crime of genocide – Interpretation consistent with the essence of the offence – Foreseeability – Convention on the Prevention and Punishment of the Crime of Genocide

*
* *

In December 1995 the applicant was arrested on returning to Germany from Bosnia and Herzegovina on suspicion of having committed acts of genocide there between May and September 1992. The accusations against him included setting up a paramilitary group that had ill-treated and killed Muslim villagers and personally executing villagers. He was ultimately convicted of, *inter alia*, genocide and murder and sentenced to life imprisonment. In his application to the Court, he complained in particular that the German courts had wrongly assumed jurisdiction to try him and that their interpretation of the crime of genocide had no basis in German or public international law. On the former point, the trial court ruled that it had jurisdiction to try the case despite the fact that the alleged offences had taken place in Bosnia and Herzegovina as there was a legitimate link with Germany's military and humanitarian missions there, and the applicant had resided in Germany for more than twenty years and had been arrested there. The trial court did not consider itself debarred by public international law from hearing the charges, especially as the International Criminal Tribunal for the former Yugoslavia (ICTY) had stated that it was not willing to take over the prosecution. The trial court's decision was upheld on appeal, notably under the principle of universal jurisdiction. As regards the definition of the offence of

1. This summary by the Registry does not bind the Court.

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20. Endorsing the reasons given by the Court of Appeal, it found that German criminal law was applicable to the case and that the German courts consequently had jurisdiction over it by virtue of Article 6 no. 1 of the Criminal Code. It found, in particular, that no rule of public international law prohibited the applicant's conviction by the German criminal courts in accordance with the principle of universal jurisdiction (*Universalitäts-/Weltrechtsprinzip*) enshrined in that Article. It conceded that the said principle had not been expressly laid down in Article VI of the Genocide Convention, despite earlier drafts of the Genocide Convention in which it had been proposed to do so. However, the said Article did not prohibit persons charged with genocide from being tried by national courts other than the tribunals of the State in the territory of which the act was committed. Any other interpretation would not be reconcilable with the *erga omnes* obligation undertaken by the Contracting States in Article I of the Genocide Convention to prevent and punish genocide (see paragraph 48 below). The aforesaid interpretation of the Genocide Convention was also confirmed by Article 9 § 1 of the ICTY Statute, which provided for concurrent jurisdiction of the ICTY and all other national courts.

21. Moreover, the Federal Court of Justice found that the German courts also had jurisdiction pursuant to Article 7 § 2 no. 2 of the Criminal Code (see paragraph 34 below).

22. The Federal Court of Justice did not expressly deal with the applicant's complaint that the Court of Appeal, in its decision of 18 August 1997, had refused to summon abroad any of the defence witnesses he had named on the basis of Article 244 § 5 of the Code of Criminal Procedure. However, it referred in general to the submissions of the Federal Public Prosecutor (*Generalbundesanwalt*), who had argued that the applicant's appeal was inadmissible in this respect, as he had failed to set out the relevant facts in sufficient detail. As regards the applicant's complaint that the Court of Appeal, in its decision of 12 September 1997, had refused to summon three further defence witnesses abroad, the Federal Court of Justice considered his complaint to be inadmissible, as he had not sufficiently set out the relevant facts and had not provided sufficient reasons in his appeal. The court further referred to the Federal Public Prosecutor's submissions regarding the applicant's complaint that the Court of Appeal had refused to have a topographical map drawn up. According to the Federal Public Prosecutor, the applicant's complaint was ill-founded in this respect, especially as the Court of Appeal already had a video of the relevant locality.

23. The Federal Court of Justice upheld the Court of Appeal's finding that the applicant had intended to commit genocide within the meaning of Article 220a of the Criminal Code, but found that his actions as a whole had to be considered as only one count of genocide. It referred to the

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wording of Article 220a § 1 no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) in support of its view that genocide did not necessitate an intent to destroy a group physically, but that it was sufficient to intend its destruction as a social unit.

4. Proceedings before the Federal Constitutional Court

24. On 12 December 2000 the Federal Constitutional Court declined to consider the applicant's constitutional complaint.

25. According to the Constitutional Court, the criminal courts had not violated any provision of the Basic Law by establishing their jurisdiction pursuant to Article 6 no. 1 of the Criminal Code taken in conjunction with Article VI of the Genocide Convention. The principle of universal jurisdiction afforded a reasonable link to deal with subject matter arising outside the territory of Germany, while observing the duty of non-intervention (*Interventionsverbot*) under public international law. The competent courts' reasoning, namely, that Article 6 no. 1 of the Criminal Code taken in conjunction with Article VI of the Genocide Convention entitled them to examine the applicant's case, was not arbitrary. It could properly be reasoned that the Genocide Convention, while not expressly regulating the principle of universal jurisdiction, provided that the Contracting Parties were not obliged to prosecute perpetrators of genocide, but had jurisdiction to do so. In fact, genocide was the classic subject matter to which the principle of universal jurisdiction applied. The criminal courts' reasoning did not interfere with Bosnia and Herzegovina's personal or territorial sovereignty, as that State had expressly refrained from requesting the applicant's extradition.

26. Pointing out that in the case of an admissible constitutional complaint it was entitled to examine the act complained of under all constitutional angles, the Federal Constitutional Court further found that the applicant's right to a fair trial as guaranteed by the Basic Law had not been violated. There was no doubt that Article 244 §§ 3 and 5 of the Code of Criminal Procedure were constitutional. The legislature was not obliged to set up specific rules of procedure for certain criminal offences. The right to a fair trial did not grant the applicant a right to have certain evidence taken, such as calling witnesses who had to be summoned abroad.

27. In respect of the interpretation of Article 220a of the Criminal Code, the Federal Constitutional Court found that there had been no violation of the principle that criminal law was not to be applied retroactively as guaranteed by Article 103 § 2 of the Basic Law. It stated that the way in which the Court of Appeal and the Federal Court of Justice

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no. 335-C; and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

101. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, *inter alia*, *S.W. v. the United Kingdom*, cited above, § 36; *C.R. v. the United Kingdom*, cited above, § 34; *Streletz, Kessler and Krenz*, cited above, § 50; and *K.-H.W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II).

102. As regards the interpretation and application of domestic law, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, *mutatis mutandis*, *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II, and *Streletz, Kessler and Krenz*, cited above, § 49). While the Court's duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *mutatis mutandis*, *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140, and *Streletz, Kessler and Krenz*, cited above, § 49).

(b) Application of the principles to the present case

103. In the light of the above principles, the Court therefore needs to decide whether the national courts' interpretation of the crime of genocide under German law, notably of the genocidal "intent to destroy", so as to cover the applicant's acts committed in the course of the ethnic cleansing in Bosnia and Herzegovina was consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time.

104. In determining, firstly, whether the German courts' interpretation was consistent with the essence of the offence of genocide, the Court observes that the domestic courts did not construe the scope of that offence narrowly. They considered that the "intent to destroy" a group within the meaning of Article 220a of the Criminal Code, as interpreted also in the light of Article II of the Genocide Convention, did

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not necessitate an intent to destroy that group in a physical or biological sense. It was sufficient that the perpetrator aimed at destroying the group in question as a social unit.

105. The Court notes that the domestic courts construed the “intent to destroy a group as such” systematically in the context of Article 220a § 1 of the Criminal Code as a whole, having regard notably to alternatives no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) of that provision, which did not necessitate a physical destruction of living members of the group in question. The Court finds that the domestic courts’ interpretation of “intent to destroy a group” as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars (see paragraphs 36 and 47 above), is therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code and does not appear unreasonable.

106. Furthermore, the Court, like the national courts, considers it necessary, in order to determine the essence of the offence of genocide, to take into consideration also the codification of the prohibition of genocide in Article II of the Genocide Convention, for the observance of which Article 220a had been incorporated into the Criminal Code and in the light of which the said Article was to be construed. As the wording of Article 220a of the Criminal Code corresponds to that of Article II of the Genocide Convention in so far as the definition of genocide is concerned, the above reasoning with respect to the scope of the prohibition of genocide equally applies.

107. Moreover, the German courts’ interpretation has not only been supported by a number of scholars at the relevant time of the commission of the crime (see paragraph 36 above), the United Nations General Assembly also agreed with the wider interpretation adopted by the German courts in the present case in its Resolution 47/121 of 18 December 1992, (see paragraph 41 above).

108. Consequently, the applicant’s acts, which he committed in the course of the ethnic cleansing in the Doboj region with intent to destroy the group of Muslims as a social unit, could reasonably be regarded as falling within the ambit of the offence of genocide.

109. In deciding, secondly, whether the domestic courts’ interpretation of the crime of genocide could reasonably be foreseen by the applicant at the material time, the Court notes that the applicant is the first person to be convicted of genocide by German courts under Article 220a since the incorporation of that Article into the Criminal Code in 1955. In these circumstances the Court finds that, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence which was – as in the present case – consistent with the essence of that offence must, as a rule, be considered as foreseeable. Despite this,

Annex 12

International Criminal Court, *Katanga*, ICC-01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475

English version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_02445.PDF

French version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_07859.PDF

Annex 12

ICC-01/04-01/07-475 13-05-2008 1/51 EO PT OA

1/51

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07 (OA)

Date: 13 May 2008

THE APPEALS CHAMBER

Before: Judge Philippe Kirsch, Presiding Judge
Judge Georgios M. Pikis
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA**

Public Document

Judgment

**on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled
“First Decision on the Prosecution Request for Authorisation to Redact Witness
Statements”**



n° ICC-01/04-01/07 (OA)

1/51

13 May 2008

REASONS

I. KEY FINDINGS

1. Rule 81(4) of the Rules of Procedure and Evidence should be read to include the words "persons at risk on account of the activities of the Court" so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.

2. While the non-disclosure of information for the protection of persons at risk on account of the activities of the Court is permissible in principle, pursuant to rule 81(4) of the Rules of Procedure and Evidence, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

3. Non-disclosure of information that is required to be recorded pursuant to rule 111(1) of the Rules of Procedure and Evidence may be authorised by a Pre-Trial Chamber. Requests for non-disclosure of such information require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

II. PROCEDURAL HISTORY

4. On 3 December 2007, Judge Sylvia Steiner, acting as the Single Judge of Pre-Trial Chamber I, rendered the "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (hereinafter "Impugned Decision").¹ That decision was issued under seal *ex parte*, only available to the Office of the Prosecutor (hereinafter "OTP"). A confidential, *ex parte* only available to the Office of the Prosecutor and the Defence, redacted version of the Impugned Decision was issued on 6 December 2007.² A public redacted version of the Impugned Decision was issued on 7 December 2007.³ Revised confidential and public versions of the Impugned Decision were issued on 22

¹ ICC-01/04-01/07-84-US-Exp.

² ICC-01/04-01/07-88-Conf-Exp.

³ ICC-01/04-01/07-90.

Annex 12

ICC-01/04-01/07-475-13-05-2008 37/51 EO/PT/OA

37/51

95. Having come to the above conclusion, in addressing the present issue on appeal the Appeals Chamber recalls its judgment entitled “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”¹³¹ (hereinafter “Judgment of 14 December 2006”) in which the Appeals Chamber explained that:

“[T]hree of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), last sentence, of the Statute).”¹³²

96. The Appeals Chamber went on to state that:

“As the Appeals Chamber has explained already in paragraph 37 of its “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’” of 13 October 2006 (ICC-01/04-01/06-568), “[t]he use of the word ‘necessary’ emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary.” Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.”¹³³

97. The above findings were made in relation to redactions sought pursuant to rule 81(4) of the Rules. However, the same considerations apply *mutatis mutandis* to redactions sought pursuant to rule 81(2) of the Rules. Accordingly, pursuant to that rule, it will be for the Prosecutor seeking redactions to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought “may prejudice further or ongoing investigations”.

98. The guidance set out at paragraphs 68 to 73 above should be taken into account. In this context, for redactions to be granted, the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public) and could be overcome or reduced by redactions. Dangers that cannot be overcome by redactions because they are inherent in the

¹³¹ ICC-01/04-01/06-773, OA5, 14 December 2006.

¹³² Judgment of 14 December 2006, paragraph 21.

¹³³ Judgment of 14 December 2006, paragraph 33.

Annex 13

International Criminal Court, ICC-01/09-4, Situation in the Republic of Kenya, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, Pre-Trial Chamber, 10 December 2009

English version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_09006.PDF

French version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02880.PDF

Annex 13

ICC-01/09-4 10-12-2009 1/6 IO PT

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09

Date: 10 December 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

Public Document

**Order to the Victims Participation and Reparations Section Concerning Victims'
Representations Pursuant to Article 15(3) of the Statute**

No. ICC-01/09

1/6

10 December 2009

Annex 13

ICC-01/09-4 10-12-2009 5/6 IO PT

9. The Chamber is duty bound to ensure that proceedings are carried out in an expeditious manner. Being mindful that victims' representations at this particular stage is a procedure of limited scope, which is merely confined to the Prosecutor's request for authorization of an investigation, the Chamber finds it appropriate to request the Victims Participation and Reparations Section (the "VPRS") to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.

10. The Chamber wishes to emphasize that the VPRS should clarify in all activities and contacts with community leaders of affected groups or victims as referred to in paragraph 9 the purely voluntary nature of such possible representations in the context of article 15(3) of the Statute, i.e. whether they wish to express their position on a possible investigation or not.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **orders** the VPRS to implement the procedure outlined in paragraph 9 of this order and to submit, by Monday 21 December 2009, a report outlining the steps undertaken with respect to victims' representations;
- b) **orders** that all victims' communications received by the Court in relation to this procedure be submitted directly to VPRS.

Annex 14

International Criminal Tribunal for the former Yugoslavia, *Blaškić*, IT-95-14-108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997

English version available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-95-14-108bis/MRA3419R0000028625.TIF>

French version available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Decision/NotIndexable/IT-95-14-108bis/MRA3419R0000028630.TIF>

Annex 14

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No: IT-95-14-AR108 *bis*
Date: 29 October 1997
Original: English and French

IN THE APPEALS CHAMBER

Before: Judge Antonio Cassese, Presiding
Judge Adolphus Karibi-Whyte
Judge Haopei Li
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 29 October 1997

PROSECUTOR
v.
TIHOMIR BLAŠKIĆ

JUDGEMENT ON THE REQUEST OF THE REPUBLIC OF CROATIA FOR REVIEW OF THE DECISION OF TRIAL CHAMBER II OF 18 JULY 1997

The Office of the Prosecutor

Ms. Louise Arbour, Prosecutor

Mr. Mark Harmon

The Republic of Croatia

Ambassador Ivan Šimonović
Mr. David B. Rivkin Jr.

Mr. Ivo Josipović
Mr. Lee A. Casey

Defence Counsel for Tihomir Blaškić

Mr. Russell Hayman
Mr. Anto Nobile

Case No. IT-95-14-AR108 *bis*

29 October 1997

or the President must be satisfied that the State has clearly failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal⁴⁹.

36. Furthermore, the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding.

As already mentioned, the International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter. Furthermore, as the Appeals Chamber has stated above (paragraph 26), every Member State of the United Nations has a legal interest in seeking compliance by any other Member State with the International Tribunal's orders and requests issued pursuant to Article 29. Faced with the situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each Member State of the United Nations may act upon the legal interest referred to; consequently it may request the State to terminate

⁴⁹ The significance of this judicial finding of the International Tribunal has been perceptively emphasised in the *amicus curiae* brief submitted by Luigi Condorelli, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, 11 Apr. 1997, ("*Condorelli Brief*"), para. 6.

its breach of Article 29. In addition to this possible unilateral action, a collective response through other intergovernmental organizations may be envisaged. The fundamental principles of the United Nations Charter and the spirit of the Statute of the International Tribunal aim to limit, as far as possible, the risks of arbitrariness and conflict. They therefore give pride of place to collective or joint action to be taken through an intergovernmental organization. It is appropriate to emphasise that this collective action:

- (i) may only be taken after a judicial finding has been made by the International Tribunal; and
- (ii) may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions.

In addition, collective action would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace.

37. It should be added that, apart from the cases provided for in Rule 7 *bis* (B), the President of the International Tribunal simply has the role of *nuncius*, that is to say, he or she shall simply transmit to the Security Council the judicial finding of the relevant Judge or Chamber.

C. Whether The International Tribunal Is Empowered To Issue Binding Orders To State Officials

1. Can the International Tribunal subpoena State officials?

38. The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the

Annex 15

International Criminal Tribunal for the former Yugoslavia, *Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998

English version available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-95-17%231/JUD7R0000216758.tif>

French version available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Judgement/NotIndexable/IT-95-17%231/JUD7R0000216760.tif>

Annex 15

IT-95-17/1-T
03168 - 03097
10 DECEMBER 1998

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-95-17/1-T
Date: 10 December 1998
Original: English

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Antonio Cassese
Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 10 December 1998

PROSECUTOR

v.

ANTO FURUNDŽIJA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Visser-Sellers
Ms. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misić
Mr. Sheldon Davidson

Case No.: IT-95-17/1-T

10 December 1998

contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The Prohibition Imposes Obligations *Erga Omnes*

151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of *Jus Cogens*

153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.¹⁷⁰ The most conspicuous consequence

¹⁷⁰ See also the General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to

Annex 16

International Criminal Tribunal for the former Yugoslavia, *Krstić*, IT-98-33-T, Trial Chamber Judgment, Trial Chamber, 2 August 2001

English version available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33/JUD20R0000020261.TIF>

French version available at:

<https://www.icty.org/x/cases/krstic/tjug/fr/010802f.pdf>

Annex 16

IT-98-33-T
① 9222 - ① 8931
02 AUGUST 2001

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-98-33-T
Date: 02 August 2001
Original: English

IN THE TRIAL CHAMBER

Before: Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mr. Hans Holthuis

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušić
Mr. Tomislav Višnjić

Annex 16

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survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail.¹³³⁵ The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potočari¹³³⁶ and the principal mosque in Srebrenica soon after the attack.¹³³⁷

596. Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified.

597. The strategic location of the enclave, situated between two Serb territories, may explain why the Bosnian Serb forces did not limit themselves to expelling the Bosnian Muslim population. By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.¹³³⁸

598. The Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide.

599. The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995. The Chamber now proceeds to consider the criminal responsibility of General Krstić for these crimes in accordance with the provisions of Article 7 of the Statute.

¹³³⁵ *Supra*, paras. 90-94.

¹³³⁶ *Supra*, paras. 41, 123, 153.

¹³³⁷ It was eventually turned into a parking lot. P4/4 to P4/6; Ruez, T. 542-543.

¹³³⁸ See Witness Halilović, *Supra* para. 94.

Annex 17

International Criminal Tribunal for the former Yugoslavia, *Krstić*, IT-98-33-A, Appeals Chamber Judgment, Appeals Chamber, 19 April 2004

Available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-33-A/JUD116R0000194333.tif>

Annex 17

UNITED
NATIONS

IT-98-33-A
A 5728 - A5593
19 APRIL 2004

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia Since 1991

Case No: IT-98-33-A
Date: 19 April 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Judgement: 19 April 2004

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

Staff would not have been able to implement its genocidal plan. Krstić knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstić is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator.²²⁶ This charge is fairly encompassed by the indictment, which alleged that Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.²²⁷

138. Krstić's responsibility is accurately characterized as aiding and abetting genocide under Article 7(1) of the Statute, not as complicity in genocide under Article 4(3)(e). The charge of complicity was also alleged in the indictment, as Count 2.²²⁸ The Trial Chamber did not enter a conviction on this count, concluding that Radislav Krstić's responsibility was that of a principal perpetrator.²²⁹ As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide.²³⁰ There is support for a position that Article 4(3) may be the more specific provision (*lex specialis*) in relation to Article 7(1).²³¹ There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal's Statute directs, into Article 4(3), and so the proper characterization of such individual's criminal liability would be that of aiding and abetting genocide.²³²

139. The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any "crime referred to in articles 2 to 5 of the present Statute," including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is

²²⁶ See *Krnjelac* Appeal Judgement, para. 52; *Vasiljević* Appeal Judgement, para. 102.

²²⁷ Indictment, paras. 18, 23.

²²⁸ Indictment, paras. 21 - 26. The Appeals Chamber notes that there was ample discussion on the issue of aiding and abetting versus complicity to genocide during the Appeals hearing, in response to questions posed by the bench. T 431-437.

²²⁹ Trial Judgement, paras. 642 - 644.

²³⁰ See *ibid.*, para. 640; see also *Semanza* Trial Judgement, paras. 394 - 395 & n. 655.

²³¹ See *Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 Bis Motion for Judgement of Acquittal, para. 47; *Semanza* Trial Judgement, paras. 394 - 395.

²³² See *Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 Bis Motion for Judgement of Acquittal, para. 47.

possible. In this case, the two provisions can be reconciled, because the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting.²³³ Given the Statute’s express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić’s responsibility is properly characterized as that of aiding and abetting genocide.²³⁴

140. This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator’s specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.²³⁵ This principle applies to the Statute’s prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator’s genocidal intent is permitted by the Statute and case-law of the Tribunal.

141. Many domestic jurisdictions, both common and civil law, take the same approach with respect to the *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of genocide. Under French law, for example, an aider and abettor need only be aware that he is aiding the principal perpetrator by his contribution,²³⁶ and this general requirement is applied to the specific prohibition of the crime of genocide.²³⁷ German law similarly requires that, in offences mandating a showing of a specific intent (*dolus specialis*), an aider and abettor need not possess the same degree of *mens rea* as the principal perpetrator, but only to be aware of the perpetrator’s intent.²³⁸ This general principle is applied to the prohibition of genocide in Section 6 of the German

²³³ See *Krnjelac* Appeal Judgement, para. 70 (“The Appeals Chamber notes first of all that, in the case-law of the Tribunal ... this term [*accomplice*] has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.”) (citing *Tadić* Appeal Judgement, paras. 220, 229).

²³⁴ In this Appeal, the Appeals Chamber is concerned solely with the application to Article 4(3) of only one mode of liability deriving from Article 7(1), that of aiding and abetting. The Appeals Chamber expresses no opinion regarding other modes of liability listed in Article 7(1).

²³⁵ See *Krnjelac* Appeal Judgement, para. 52 (“the aider and abettor in persecution, an offence with a specific intent, must be aware ... of the discriminatory intent of the perpetrators of that crime,” but “need not share th[at] intent”); *Vasiljević* Appeal Judgement, para. 142 (“In order to convict [the accused] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that [he] had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate”); see also *Tadić* Appeal Judgement, para. 229 (“In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.”).

²³⁶ *Code Pénal*, Art. 121-7 (“Est complice d’un crime ou d’un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation.”); see also Cour de Cassation, Chambre criminelle, 1st October 1984, summary 96.

²³⁷ *Code Pénal*, Art. 211-1.

²³⁸ See section 27(1) of the German Penal Code (*Strafgesetzbuch*). According to section 2 of the German Code of Crimes Against International Law (CCIL), section 27(1) of the German Penal Code is applicable to crimes of genocide.

such as extermination, form a part of a widespread or systematic attack against a civilian population.³⁶²

222. The intent requirement of genocide, however, contains none of the elements the Trial Chamber read into it. As the Trial Chamber correctly acknowledged, the intent requirement of genocide is the intent to destroy, in whole or in part, a group enumerated both in Article 4 and in the Genocide Convention.³⁶³ This intent differs in several ways from the intent required for a conviction for extermination.

223. The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship.³⁶⁴ These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population.³⁶⁵

224. In reasoning otherwise, the Trial Chamber relied on the definition of genocide in the Elements of Crimes adopted by the ICC. This definition, stated the Trial Chamber, "indicates clearly that genocide requires that 'the conduct took place in the context of a manifest pattern of similar conduct.'"³⁶⁶ The Trial Chamber's reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite. As already explained, the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention

³⁶² *Ibid.*

³⁶³ Trial Judgement, para. 544; see also *Jelisić* Appeal Judgement, para. 46 ("The specific intent [of genocide] requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.") (footnote omitted).

³⁶⁴ *Tadić* Appeal Judgement, para. 248; see also *Kunarac et al.* Appeal Judgement, paras. 85, 96, 102.

³⁶⁵ See, e.g., 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at p. 340 (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

³⁶⁶ Trial Judgement, n. 1455 (quoting Report of the Preparatory Commission for the International Criminal Court, 6 July 2000, PCNICC/2000/INF/3/Add.2). The Trial Chamber stated that this definition was present in the Statute of the ICC; the definition, of course, is given only in the Elements of Crimes. There is a difference between the two. The Elements of Crimes, adopted by the Assembly of States Parties to the ICC pursuant to Article 9(1) of the ICC Statute, are intended only to "assist the Court in the interpretation and application" of the substantive definitions of crimes given in the Statute itself. See Elements of Crimes, General Introduction, para. 1. Unlike the definitions present in the Statute, the definitions given in the Elements of Crimes are not binding rules, but only auxiliary means of interpretation. See 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at p. 348. Article 6 of the ICC Statute, which defines genocide, does not prescribe the requirement introduced in the Elements of Crimes. *Ibid.*, at p. 349.

and was not mandated by customary international law.³⁶⁷ Because the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber's conclusion.

225. The Trial Chamber also concluded that the definitions of intent for extermination and genocide "both require that the killings be part of an extensive plan to kill a substantial part of a civilian population."³⁶⁸ The Appeals Chamber has explained, however, that "the existence of a plan or policy is not a legal ingredient of the crime" of genocide.³⁶⁹ While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence.³⁷⁰ Similarly, the Appeals Chamber has rejected the argument that the legal elements of crimes against humanity (which include extermination) require a proof of the existence of a plan or policy to commit these crimes.³⁷¹ The presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic, but it is not a legal element of a crime against humanity. As neither extermination nor genocide requires the proof of a plan or policy to carry out the underlying act, this factor cannot support the Trial Chamber's conclusion that the offence of extermination is subsumed in genocide.

226. Finally, the intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator's genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide. As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law.³⁷² The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.

227. The Trial Chamber's conclusion that convictions for extermination under Article 5 and genocide under Article 4 are impermissibly cumulative was, accordingly, erroneous.

³⁶⁷ See 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds. 2002), at pp. 339 – 340, 348 – 350.

³⁶⁸ Trial Judgement, para. 685.

³⁶⁹ *Jelisić* Appeal Judgement, para. 48.

³⁷⁰ See *ibid.*

³⁷¹ *Kunarac et al.* Appeal Judgement, para. 98.

³⁷² *Ibid.*, para. 174.

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Annex 18

International Criminal Tribunal for the former Yugoslavia, *Martić*, IT-95-11-A, Appeals Chamber Judgment, Appeals Chamber, 8 October 2008

Available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-95-11-A/JUD194R0000231259.TIF>

Annex 18

IT-95-11-A
A1426-A1276
08 October 2008

IT-95-11-A p.1426

MC

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-95-11-A
Date: 8 October 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: Mr Hans Holthuis

Judgement of: 8 October 2008

PROSECUTOR

v.

MILAN MARTIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms Michelle Jarvis
Mr Paul Rogers
Ms Laurel Baig
Ms Kristina Carey
Ms Nicole Lewis
Ms Najwa Nabti

Counsel for Milan Martić:

Mr Predrag Milovančević
Mr Nikola Perović

5711

Annex 18

IT-95-11-A p.1398

61. As for Martić's claim that the standard of "beyond reasonable doubt" should be interpreted as a "high level of certainty",¹⁴⁵ the Appeals Chamber notes that it is unhelpful to try and explain the standard of proof other than by stating that the standard requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.¹⁴⁶

62. Concerning Martić's allegation that Judge Moloto's comment "that the Prosecution must proceed and prove its case as best it can" revealed the Trial Chamber's (mis)understanding of the "beyond reasonable doubt" standard,¹⁴⁷ the Appeals Chamber notes the following. As the parties had not reached an agreement on certain facts, the Presiding Judge simply remarked that the only way to proceed was to let the Prosecution prove its case "as best as it can".¹⁴⁸ In doing so, he did not articulate the standard of proof to be employed by the Trial Chamber, but simply recalled that the burden of proof rests on the Prosecution. As Martić has not demonstrated a discernible error by the Trial Chamber, the Appeals Chamber dismisses this argument.

63. Martić has therefore failed to show that the Trial Chamber committed a legal error that invalidates the Trial Judgement and this sub-ground of appeal is dismissed. However, this does not prevent Martić from alleging an error with regard to specific factual findings – the Appeals Chamber will consider any such arguments under other grounds of appeal.¹⁴⁹

2. Corroboration of witness testimony

64. The Trial Chamber stated that it took due regard of the fact that the Defence was not able to cross-examine Babić on the entirety of his evidence. In order to minimise prejudice accruing to Martić as a result of his inability to test all of Babić's evidence in chief, it granted the Defence the right to present further evidence.¹⁵⁰ The Trial Chamber also considered that Milan Babić had entered into a plea agreement with the Prosecution and that he pleaded guilty to having participated in a joint criminal enterprise together with Martić.¹⁵¹ Moreover, the Trial Chamber took into consideration that the Prosecution had given assistance to Witness MM-003 in his asylum case.¹⁵² For these reasons, the Trial Chamber cast "significant doubt" on the credibility of Babić and Witness MM-003 and held that their testimony needed to be corroborated.¹⁵³ However, it sufficed

¹⁴⁵ Defence Appeal Brief, para. 31.

¹⁴⁶ Cf. *Halilović* Appeal Judgement, para. 109.

¹⁴⁷ Defence Appeal Brief, paras 27-29.

¹⁴⁸ Judge Moloto, 16 Jan 2006, T. 342.

¹⁴⁹ See, *mutatis mutandis*, *Halilović* Appeal Judgement, para. 110.

¹⁵⁰ Trial Judgement, para. 33.

¹⁵¹ Trial Judgement, para. 34.

¹⁵² Trial Judgement, para. 36.

¹⁵³ Trial Judgement, paras 34, 38.

Annex 19

International Criminal Tribunal for the former Yugoslavia, *Milošević*, IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, Trial Chamber, 19 February 2002

Available at:

https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/20219PM517175.htm

Annex 19

Décision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar:
Mr. Hans Holthuis

Order of:
19 February 2002

PROSECUTOR

v.

SLOBODAN MILOSEVIC

PARTLY CONFIDENTIAL AND *EX PARTE*

**DECISION ON PROSECUTION MOTION FOR PROVISIONAL PROTECTIVE MEASURES PURSUANT
TO RULE 69**

The Office of the Prosecutor

Ms. Carla Del Ponte
Ms. Hildegard Uertz-Retzlaff
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Prof. Mischa Wladimiroff

I. BACKGROUND

1. The Office of the Prosecutor (“Prosecution”) filed a confidential and *ex parte* motion entitled “Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69” on 4 January 2002 (“First Motion”). The Motion concerning Indictment IT-01-51 (“Bosnia Indictment”) sought orders that (a) the Prosecution be permitted to redact identifying information from statements and documents disclosed pursuant to Rule 66 (A)(i), and (b) the accused be prohibited from making public any of the material received from the Prosecution pursuant to the same Rule. The measures sought were said to be necessary to safeguard the safety and privacy of the victims and witnesses and the integrity of the evidence and these proceedings.

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Annex 19

Décision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69

circumstances with respect to *each witness* for whom - or *each document* for which – it seeks redaction.²⁷ It is, after all, something only to be granted in “exceptional circumstances”, and the reason for this is that it goes to the heart of an accused’s right to a fair trial by enabling him to investigate the case against him.²⁸ The Prosecution cannot therefore simply redact the identifying information and say that it will apply for particular protective measures for *some* of these witnesses within an unspecified period of time. Its obligation is to disclose the statements in *unredacted* form *at the stage* of its duty to disclose under Rule 66 (A)(i). That duty arose in this case on 7 January 2002. It is at that time that the Prosecution, if it wished to redact identifying information of witnesses from the material, should have shown exceptional circumstances with respect to each such witness.

25. In contemplating the making of such applications for particular witnesses, the Trial Chamber reminds the Prosecution of the jurisprudence dealing with conditions for the granting of witness anonymity. In early considered decisions in the *Tadic*²⁹ and *Blaskic*³⁰ cases, the Trial Chambers set out five conditions that would have to be met for witness anonymity to be granted:

- (a) first and foremost, there must be real fear for the safety of the witness or his or her family;
- (b) secondly, the testimony of the particular witness must be important to the Prosecution case;
- (c) thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
- (d) fourthly, the ineffectiveness or non-existence of a witness protection programme is a matter that will have considerable bearing on any decision to grant anonymity ; and
- (e) fifthly, any measures taken should be strictly necessary.

26. Furthermore, Trial Chamber II in the Brdanin Decision recently set out three criteria which would need to be considered in respect of applications made under Rule 69 (A) for specific protective measures for witnesses. They are:

- (a) the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public ;
- (b) the extent to which the power to make protective orders can be used not only to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and
- (c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. (The Prosecution accepted in the Brdanin case that, although the shorter the time between disclosure and testifying the less the opportunity will be for interference with that witness, the time allowed for preparation must be time *before trial commences* rather than before the witness gives evidence. What time frame is reasonable will depend on the category of the witness .)

27. In respect of the third criterion raised in the Brdanin Decision, the Trial Chamber also notes a decision in the *Tadic* case concerning the period for disclosure pursuant to Rule 69 (C), in which it held that whilst there was a basis for non-disclosure of identifying information concerning a particular witness, exceptional circumstances under Rule 69 (A) having been made out, the name of the witness was to be “released not less than thirty (30) days *before the firm trial date* ”.³¹

28. The Trial Chamber notes with regret that the granting of such protective measures , which started out as an exceptional practice, has become almost the norm in proceedings before the Tribunal. Nonetheless, this practice has followed individual applications for protective measures, not for blanket orders suppressing the identity of witnesses from the accused. Whilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out

Annex 19

Décision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69

in the Statute and Rules of the Tribunal, and expanded in its jurisprudence. The Prosecution is under an obligation at this early stage of the proceedings to justify redaction of a witness's identifying information from statements disclosed pursuant to Rule 66 (A)(i) with respect to each such witness.

29. One of the arguments the Prosecution brings to justify its Motion is that the accused has stated that he does not recognise the Tribunal's authority and that in one incident a member of the accused's Socialist Party of Serbia ("SPS") made a threat on Belgrade television with respect to anyone planning to testify for the Prosecution against the accused.³² It is noted that this threat was not made by the accused and that there is no suggestion the accused prompted this threat. The Prosecution has indicated that it is investigating the threat and if further applications are brought with respect to this or other such matters then the Trial Chamber will consider them. Nonetheless, the Trial Chamber considers that this matter cannot be taken as a factor which would weigh so heavily as to persuade it to grant a blanket protection order of the nature being requested by the Prosecution. As to the accused's attitude towards the Tribunal, this is a matter the Trial Chamber is cognisant of and which it will take into consideration in determining individual motions for protective measures and, in particular, where the accused's attitude is likely to bear in a substantive way upon the particular witness.

30. The Trial Chamber therefore rejects the request of the Prosecution to simply redact all identifying information from the 203 witnesses identified in its Appendix A. What is required of the Prosecution is that it brings motions for protective measures for individual witnesses on the basis of the criteria set out above. It should in fact have done so prior to the time it was required to make disclosure to the accused under Rule 66 (A)(i). For these reasons, the Prosecution is required to comply with its obligation under Rule 66 (A)(i) to supply to the accused statements and documents in unredacted form within 14 days of the filing of this Decision. If, however, within that time, the Prosecution files a motion for protective measures for particular witnesses, it need not provide copies of those statements or documents relevant to that witness in unredacted form until such time as the Trial Chamber has disposed of such motion, and subject to the terms of any order made on that motion.

31. The Trial Chamber, however, accepts that where witnesses have already been granted protective measures in other proceedings before the Tribunal, those protections should continue and the Trial Chamber will have to consider appropriate orders with respect to those witnesses when entertaining other such future motions from the Prosecution.

32. Finally, on the second order sought by the Prosecution for limited non-disclosure by the accused to the public of material received from the Prosecution pursuant to Rule 66 (A)(i), the Trial Chamber notes that this was its practice in the Kosovo Decision and that it has been the practice of other Trial Chambers of the Tribunal. The considerations which attach to such an application are that, whilst an application under Rule 69 (A) goes to the heart of an accused's ability to prepare his defence, applications under Rule 53 (A) do not materially impede the preparation of an accused's defence so long as he is expressly allowed to make public such material for this strict purpose. Furthermore, applications under Rule 53 (A) go directly to concerns regarding the safety of victims and witnesses in proceedings before the Tribunal. It has been noted above that the correct balance must be achieved between the interests of the accused and the protection of victims and witnesses. The Trial Chamber is of the view that whilst the balance dictates clearly in favour of an accused's right to the identity of witnesses which the Prosecution intends to rely upon (subject to protective measures granted), it dictates against making public supporting material where such disclosure might lead to witness identification and therefore endanger such victims or witnesses. The reason for this distinction is primarily because the former goes to the ability of the accused to prepare his defence, whilst the latter does not. The Trial Chamber will make the order sought subject to limitations set out below in the disposition.

DISPOSITION

33. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:

(1) Those witnesses granted protective measures in other cases before the Tribunal shall continue to be protected in accordance with those measures. The names of these witnesses are set out in the confidential and *ex parte* Schedule A attached to this Decision;

(2) With respect to the remaining 167 of the 202 witnesses for whom protective measures are sought, the Prosecution

https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/20219PM517175.htm[04/05/2023 13:43:21]

Annex 20

International Criminal Tribunal for Rwanda, *Akayesu*, ICTR-96-4-T, Trial Judgment, Trial Chamber, 2 September 1998

Available at:

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MS15217R0000619817.PDF>

Annex 20

ICTR-96-4-T
2.9.1998
(2637-2344)



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR
CRIMINAL REGISTRY
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1998 SEP -2 A.II: 46

CHAMBER I - CHAMBRE I

OR : ENG

Before: Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

A handwritten signature in black ink, appearing to be the signature of Mr. Patrice Monthé.

478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered *infra* in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.

479. Therefore, as can be seen, the forms of participation referred to in Article 6 (1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6 (3) analyzed here below, which does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.

480. The first form of liability set forth in Article 6 (1) is **planning** of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.

481. The second form of liability is **'incitation'** (in the french version of the Statute) to commit a crime, reflected in the English version of Article 6 (1) by the word *instigated*. In English, it seems the words incitement and instigation are synonymous⁸². Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments⁸³. However, in certain

⁸² See, for example, the "Lexique Anglais-Français (principalement juridique) of the Council of Europe, Strasbourg, January 1997, which translates "incitement" by *incitation, instigation ou provocation* or the "Dictionnaire Français/ Anglais" Larousse, or the "Dictionnaire Français/ Anglais" Super Senior Robert Collins.

⁸³ Article 6 of the Nuremberg Charter, Article 7(1) of the ICTY Statute and Article 2(3)(b) of the Draft Code of Crimes Against the Peace and the Security of Mankind.

Annex 21

International Criminal Tribunal for Rwanda, *Bagaragaza*, ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* appeal, Appeals Chamber, 30 August 2006

Available at:

<https://cld.irmct.org/assets/filings/338-ICTR-05-86-0037-1-BAGARAGAZA-DECISION-ON-RULE-11BIS-APPEAL.pdf>

Annex 21

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ICTR REGISTRY

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

89/H

ICTR-05-86-AR11bis
30 August 2006
(89/H - 82/H)

IN THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

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2006 AUG 30 P 5

Registrar:

Mr. Adama Dieng

Decision of:

30 August 2006

ICTR Appeals Chamber
Date: 30 August 2006
Action: P.T.
Copied To: Sec. Prof. of Science,
CHS Building, APO SF 96341, AO,
Also of the Appeals Chamber,
Norwegian Authorities, LSS,
Bagaragaza, UNDO, UNAD,
[Signature]

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-05-86-AR11bis

Decision on Rule 11bis Appeal

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. James Stewart
Mr. Stephen Rapp
Mr. George Mugwanaya
Mr. Alex Obote-Odora
Ms. Inneke Onsea

Counsel for the Defence:

Mr. Geert Jan Alexander Knoops

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2006 AUG 30

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KBEEL... GUMELDA... A. AFANDE...
SIGNATURE: [Signature] DATE: 30 August 2006

Annex 21

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early ratification of the 1948 Genocide Convention, its cooperation with the Tribunal and the ICTY, and its ratification of the Rome Statute on the International Criminal Court.³²

13. Norway acknowledges that Norwegian criminal law does not explicitly contain the crime of genocide.³³ However, it submits that on ratifying the 1948 Genocide Convention, its Parliament considered it unnecessary to enact implementing legislation as all conduct prohibited under the convention was already criminal under existing provisions of its criminal law.³⁴ Norway explains that, according to its legal tradition, its laws are drafted in a general manner, but interpreted in light of both its international legal obligations as well as relevant legislative history.³⁵

14. In this respect, Norwegian law has a general provision providing jurisdiction over certain crimes, including homicide and serious bodily injury, when committed abroad by a foreigner provided that the prosecution is authorized by the King.³⁶ Norway submits that its provisions against homicide and bodily harm would cover the underlying acts alleged in the Indictment against Mr. Bagaragaza.³⁷ In addition, Norway submits that Mr. Bagaragaza's alleged genocidal intent, as well as the number of its victims, could be taken into account under provisions allowing for the most severe penalties in aggravating circumstances, thus fully reflecting the gravity of the crimes charged.³⁸ Norway states that "if an indicted person accused of acts amounting to genocide is tried before Norwegian courts on the basis of an agreement between the requesting international court and the Norwegian government, the indictment in the case will fully reflect the aggravating circumstances under which the alleged offences have been carried out."³⁹ The Prosecution supports the position of Norway, and it further claims that the maximum possible penalty of 21 years' imprisonment under Norwegian law would provide adequate punishment in light of the specific charges against Mr. Bagaragaza and his willingness to cooperate.⁴⁰

15. The Trial Chamber acknowledged that Norway could exercise jurisdiction over Mr. Bagaragaza's alleged criminal conduct committed in Rwanda in 1994.⁴¹ However, the Trial Chamber reasoned that Norway lacked jurisdiction within the meaning of Rule 11bis because it

³² *Id.* at paras 14-26. In addition, Norway refers to several domestic prosecutions of war criminals for international crimes after World War II which were based primarily on its existing criminal code with full reflection of the international gravity of the crimes.

³³ *Id.* at para. 12.

³⁴ *Id.* at paras 18, 20. Norway notes that it is presently considering whether to revise its criminal code to codify a more specific catalogue of international crimes. *Id.* at para. 24.

³⁵ *Id.* at paras 12, 34-37.

³⁶ *Id.* at para. 45.

³⁷ *Id.* at paras 27-32, 39-41.

³⁸ *Id.* at paras 28-32, 40-44.

³⁹ *Id.* at paras 29, 45.

⁴⁰ Prosecution Appeal Brief, paras 63-65; *Amicus Curiae* Brief, para. 28 (referring to maximum penalty).

⁴¹ Impugned Decision, para. 13.

Annex 22

International Criminal Tribunal for Rwanda, *Karemera and Ngirumpatse*,
ICTR-98-44-T, Trial Judgment and Sentence, Trial Chamber, 2 February 2012

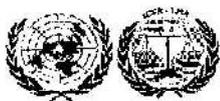
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NotIndexable/ICTR-98-44/MS22537R0000565275.PDF](https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Judgement/NotIndexable/ICTR-98-44/MS22537R0000565275.PDF)

Annex 22



ICTR-98-44-T
2-2-2012
(54949-54559)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

54949
MM

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Dennis C.M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 2 February 2012

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Édouard KAREMERA and
Matthieu NGIRUMPATSE

Case No. ICTR-98-44-T

JUDGEMENT AND SENTENCE

Office of the Prosecution:
Don Webster
Maria Wilson
Takeh Sendze
Sunkarie Ballah-Conteh
Jean-Baptiste Nsanzimfura

Defence Counsel for Édouard Karemera:
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Houkpatin and Frédéric Weyl

[Signature]

1596. The Chamber has found that a large, public meeting took place on 3 May 1994 at the Kibuye prefectural office, which was attended by Prime Minister Kambanda, Minister Niyitegeka, and Karemera – all members of the Interim Government. The meeting was broadcast over the radio and Kambanda spoke and urged the population to assist the military in the fight against the RPF. Karemera also spoke and paid tribute to the *Interahamwe*, calling on them to flush out, stop and combat the enemy.

1597. By not condemning, or even addressing, the recent massacre of more than 2,000 Tutsi civilians, which had taken place in the vicinity of the meeting venue, the speakers condoned the killings and instigated and incited the population to continue killing Tutsis.

1598. The Chamber finds that, in the context of the recent massacres, the speeches were understood by the audience as a direct call to continue killing of Tutsis in order to destroy the Tutsi population in Rwanda in whole or in part. The Chamber considers that Karemera and the other Interim Government speakers had the intent to incite the population to continue these killings.

1599. Accordingly, the Chamber finds Karemera guilty of committing direct and public incitement to commit genocide.

1600. The Chamber recalls that Karemera, Kambanda and Niyitegeka were members of the JCE and recalls that direct and public incitement to commit genocide was part of the common purpose of the enterprise (see para. 1455). Moreover, the Chamber recalls that Karemera and Ndirumpatse substantially contributed to the execution of the common purpose of the JCE (see paras. 1457, 1458). Further recalling that each JCE member is liable for the acts of other JCE members committed in furtherance of the common purpose, the Chamber finds that Ndirumpatse has incurred JCE liability in the basic form for direct and public incitement to commit genocide.

Kibuye Meeting on 16 May 1994

1601. The Chamber has found that President Sindikubwabo attended a “security meeting” in Kibuye on 16 May 1994, during which he thanked the army and the people of Kibuye for restoring the security of persons and property. The speech was broadcast over the radio and given one month after 2,000 civilian Tutsis had been massacred; thus the Chamber has found that Sindikubwabo condoned the killings and instigated and incited further killings of Tutsis.

1602. Considering the context of the recent massacres, the Chamber finds that the speeches were understood by the audience as a direct call to continue killing Tutsis in order to destroy the Tutsi population in Rwanda in whole or in part, and that Sindikubwabo had the intent to incite the population to do so.

1603. The Chamber recalls that Sindikubwabo was a member of the JCE to destroy the Tutsi population in Rwanda and finds that his acts furthered the common purpose of the enterprise.

1604. The Chamber further recalls that direct and public incitement to commit genocide was part of the common purpose of the JCE (see para. 1455). Moreover, the Chamber recalls that Karemera and Ndirumpatse substantially contributed to the execution of the common purpose of the JCE (see paras. 1457, 1458). Noting that each JCE member is liable for the acts of other JCE members committed in furtherance of the common purpose, the Chamber finds that Karemera and Ndirumpatse have incurred JCE liability in the basic

Annex 23

International Criminal Tribunal for Rwanda, *Karemera and Ngirumpatse*,
ICTR-98-44-A, Appeal Judgment, Appeals Chamber, 29 September 2014

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Annex 23



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1692/H

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ICTR-98-44-A

29th Sept. 2014

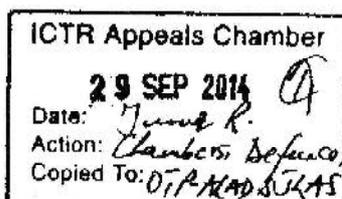
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IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Bakhtiyar Tuzmukhamedov
Judge Koffi Kumelio A. Afande

Registrar: Mr. Bongani Majola

Judgement of: 29 September 2014

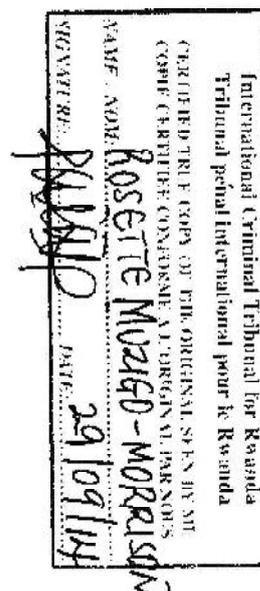


ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE

v.

THE PROSECUTOR

Case No. ICTR-98-44-A



JUDGEMENT

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(a) The Direct Nature of the Incitement

475. The Trial Chamber found that, during the course of his speech at the 3 May 1994 Meeting, Karemera paid tribute to the *Interahamwe* by reading an MRND announcement expressing support for their contribution in restoring peace, and called on them to continue flushing out, stopping, and combating the enemy.¹³³⁷ The Trial Chamber noted that: (i) 2,000 people had recently been massacred by the *Interahamwe* and the military in close vicinity of the meeting place; (ii) the mass graves for the victims had been completed only two days prior to the 3 May 1994 Meeting; and (iii) the stench of the dead bodies was still in the air at the time of the meeting.¹³³⁸ The Trial Chamber concluded that Karemera's words encouraged the audience to "fight the enemy" and physically attack and destroy Tutsis as a group.¹³³⁹ The Trial Chamber also found that the speeches delivered at the 3 May 1994 Meeting condoned the killings and incited the population to continue killing Tutsis.¹³⁴⁰ The Trial Chamber concluded that the speeches were understood by the audience as a direct call to continue killing Tutsis in order to destroy the Tutsi population in whole or in part.¹³⁴¹

476. The Trial Chamber considered the speeches of Karemera and others in the context of the massacres that had recently occurred in Kibuye.¹³⁴² In particular, an important consideration in the Trial Chamber's determination was that the speakers did not comment on the killings and did not urge the population to cease massacring civilians.¹³⁴³ The Trial Chamber, having considered that "[i]t would have been utterly impossible for the Interim Government officials to be unaware of the killings that had occurred",¹³⁴⁴ and having noted that the 3 May 1994 Meeting was part of a programme of "pacification" tours organized by the Interim Government,¹³⁴⁵ observed that "[n]o reasonable individual who sought peace and wished to end the killings would have squandered such an opportunity to immediately and resoundingly condemn the massacre of innocent civilians".¹³⁴⁶

477. The Trial Chamber noted that Karemera and other members of the Interim Government officials did not refer to those killings and had "only provided abstract rhetoric about restoring peace" in their speeches.¹³⁴⁷ With regard to Karemera's speech specifically, the Trial Chamber concluded that his paying tribute to the *Interahamwe* and calling upon them to flush out, stop, and

¹³³⁷ Trial Judgement, paras. 987, 992, 1596.

¹³³⁸ Trial Judgement, para. 989.

¹³³⁹ Trial Judgement, para. 991.

¹³⁴⁰ Trial Judgement, paras. 1597, 1598.

¹³⁴¹ Trial Judgement, para. 1598.

¹³⁴² Trial Judgement, paras. 989-991.

¹³⁴³ Trial Judgement, para. 990.

¹³⁴⁴ Trial Judgement, para. 989.

¹³⁴⁵ Trial Judgement, para. 943.

¹³⁴⁶ Trial Judgement, para. 990.

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combat the enemy, could only have been understood, given “such a backdrop”, as “an unequivocal endorsement of the killings” and, accordingly, as incitement to continue killing Tutsis.¹³⁴⁸

478. In reaching its findings on the 3 May 1994 Meeting, the Trial Chamber considered the evidence of witnesses who had heard the speeches,¹³⁴⁹ Karemera’s testimony,¹³⁵⁰ the minutes of the meeting (“Minutes of the Meeting”),¹³⁵¹ the transcripts of the broadcast of the meeting by Radio Rwanda (“Transcripts of the Broadcast of the Meeting”),¹³⁵² and the results of its site visit to Kibuye Prefecture.¹³⁵³

479. Karemera submits that nothing in his speech can be interpreted as a direct call to commit genocide.¹³⁵⁴ He claims that the Trial Chamber found him guilty of incitement by omission based on what was not said in the speeches, namely the absence of a clear condemnation of the killings.¹³⁵⁵ Karemera contends that the Indictment did not plead his responsibility for incitement by omission, thereby depriving him of the opportunity to defend himself.¹³⁵⁶ Ngirumpatse argues that the Trial Chamber introduced the new crime of “incitement by omission” and that its findings in this regard are inconsistent with the Tribunal’s jurisprudence.¹³⁵⁷

480. Karemera and Ngirumpatse further submit that the Trial Chamber distorted the speeches given at the 3 May 1994 Meeting and mischaracterized the evidence.¹³⁵⁸ In particular, they argue that, contrary to the Trial Chamber’s findings, the speakers addressed the killings, condemned them, did not characterize the Tutsis as an enemy, and warned against any confusion between the Tutsis and the enemy.¹³⁵⁹ Karemera and Ngirumpatse claim that the Trial Chamber ignored evidence to that effect, referring in particular to the Transcripts of the Broadcast of the Meeting, without providing any explanation.¹³⁶⁰ Karemera submits that the Trial Chamber erred in finding that

¹³⁴⁷ Trial Judgement, para. 991.

¹³⁴⁸ Trial Judgement, para. 991.

¹³⁴⁹ Trial Judgement, paras. 959-973.

¹³⁵⁰ Trial Judgement, paras. 974-979.

¹³⁵¹ Trial Judgement, paras. 951-955, 983, 984, referring to Prosecution Exhibit 82B (Minutes of the 3 May 1994 Kibuye Prefecture Security Meeting).

¹³⁵² Trial Judgement, paras. 956-958, referring to Nzirorera Defence Exhibits 289 (Transcript of speeches of MDR Secretariat Member and the Bourgmestres of Gisovu and Gishyita Communes, 3 May 1994 Kibuye Meeting), 290 (Transcript of speeches of Prime Minister Kambanda, Donat Murego, Eliézer Niyitegeka, and the Bourgmestre of Bwakira Commune, 3 May 1994 Kibuye Meeting).

¹³⁵³ Trial Judgement, para. 950.

¹³⁵⁴ Karemera Appeal Brief, para. 395.

¹³⁵⁵ Karemera Notice of Appeal, paras. 76, 152; Karemera Appeal Brief, paras. 148, 153, 156.

¹³⁵⁶ Karemera Appeal Brief, paras. 154, 165, 166.

¹³⁵⁷ Ngirumpatse Appeal Brief, paras. 523, 524, 743.

¹³⁵⁸ Karemera Notice of Appeal, para. 76; Karemera Appeal Brief, para. 156; Ngirumpatse Notice of Appeal, paras. 141, 286; Ngirumpatse Appeal Brief, para. 523. See also Karemera Response Brief, paras. 38-42.

¹³⁵⁹ Karemera Appeal Brief, paras. 149, 150, 156-161, 167, 395; Ngirumpatse Appeal Brief, para. 523. See also Karemera Response Brief, paras. 38, 51, 53; Ngirumpatse Response Brief, paras. 138-151, 155, 156.

¹³⁶⁰ Karemera Notice of Appeal, para. 77; Karemera Appeal Brief, paras. 156, 161-164, referring to Nzirorera Defence Exhibit 289 (Transcript of speeches of MDR Secretariat Member and the Bourgmestres of Gisovu and Gishyita

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Annex 23

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encouraging the *Interahamwe* who were fighting alongside the Rwandan Armed Forces was tantamount to incitement to physically attack and destroy Tutsis as a group.¹³⁶¹ Karemera further asserts that the evidence should be considered in the context of the war in which his call upon the “youth” to stop the enemy could not have been regarded as criminal because the “youth” were fighting against the RPF.¹³⁶²

481. Karemera and Ndirumputse also argue that the Trial Chamber failed to exercise the necessary caution in assessing the evidence of Witness GK who was the sole Prosecution witness to testify about the 3 May 1994 Meeting and who was detained for the same crimes as those for which Karemera and Ndirumputse were convicted.¹³⁶³ Karemera asserts that the Trial Chamber should have considered Witness GK’s evidence alongside his own testimony, as well as that of Defence Witnesses ETK, Mathias Hitiyaremwe, and LSP, and the Transcripts of the Broadcast of the Meeting.¹³⁶⁴ Karemera adds that the Trial Chamber erred in finding that Witness GK’s testimony was generally corroborated by the Minutes of the Meeting and the Transcripts of the Broadcast of the Meeting.¹³⁶⁵

482. The Prosecution responds that the Trial Chamber did not convict Karemera for direct and public incitement by omission, but on the basis of his public call on the *Interahamwe* to remain vigilant and to continue flushing out the enemy, meaning Tutsis.¹³⁶⁶ It further submits that Karemera and Ndirumputse fail to demonstrate how, based on the evidence on the trial record, the Trial Chamber erred in finding that Karemera and members of the Interim Government directly and publicly incited genocide given the context.¹³⁶⁷

483. The Appeals Chamber recalls that, in determining whether a speech constitutes a direct incitement to commit genocide, the principal consideration is the meaning of the words used in the specific context.¹³⁶⁸ The Appeals Chamber further recalls that a particular message may appear ambiguous on its face or to a given audience, or not contain an explicit appeal to commit genocide,

Communes, 3 May 1994 Kibuye Meeting); Ndirumputse Notice of Appeal, para. 286. *See also* Karemera Reply Brief, para. 37; Ndirumputse Response Brief, para. 158.

¹³⁶¹ Karemera Appeal Brief, para. 160.

¹³⁶² Karemera Reply Brief, para. 38.

¹³⁶³ Karemera Notice of Appeal, para. 104; Karemera Appeal Brief, paras. 232, 237-240. *See also* Karemera Appeal Brief, paras. 227, 231; Ndirumputse Response Brief, para. 134. Karemera further argues that the Prosecution did not disclose all of Witness GK’s prior statements and that the Trial Chamber failed to grant appropriate relief for this violation. *See* Karemera Appeal Brief, para. 243. This argument is addressed elsewhere in this Judgment. *See supra* Section III.A.7.

¹³⁶⁴ Karemera Appeal Brief, para. 240. *See also* Ndirumputse Response Brief, paras. 133, 158, 159. The Appeals Chamber notes that Karemera misspells Hitiyaremwe’s name in his Appeal Brief as “Habitaremwe”.

¹³⁶⁵ Karemera Appeal Brief, para. 241.

¹³⁶⁶ Prosecution Response Brief (Karemera), para. 94.

¹³⁶⁷ Prosecution Response Brief (Karemera), paras. 95-97; Prosecution Response Brief (Ndirumputse), para. 196. *See also* AT, 10 February 2014 pp. 45-47, 59.

¹³⁶⁸ *Nahimana et al. Appeal Judgment*, para. 701.

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and still, when viewed in its proper context, amount to direct incitement.¹³⁶⁹ Furthermore, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.¹³⁷⁰

484. Karemera's and Ndirumpatse's arguments that they were convicted for incitement by "omission" are unfounded. The Trial Chamber found that Karemera's speech amounted to direct incitement based on what he said at the 3 May 1994 Meeting.¹³⁷¹ In this respect, the Trial Chamber concluded that Karemera "paid tribute to the *Interahamwe* in his speech, calling on them to continue flushing out, stopping and combating the enemy, *thereby* inciting the audience to physically attack and destroy Tutsis as a group".¹³⁷² The Trial Chamber's analysis reflects that its assessment of "what was not said" at the meeting merely served to assist in the interpretation of the speeches, including that of Karemera, and in assessing them in the given context. The Appeals Chamber finds no error in this approach. The Appeals Chamber therefore need not address Karemera's contention that the Indictment was defective as it did not plead his responsibility for incitement by omission, and dismisses Ndirumpatse's claim that the Trial Chamber introduced a new crime of incitement by omission.

485. The Appeals Chamber is also not convinced that Karemera and Ndirumpatse have demonstrated that the Trial Chamber ignored evidence that the speakers condemned the killing of civilians and urged those present to distinguish between "*Inkotanyi*", who were assisting the RPF, and Tutsis. To illustrate his argument, Karemera points to a passage from Prime Minister Kambanda's speech as recorded in the Transcripts of the Broadcast of the Meeting and to Witness GK's testimony relating to Kambanda's and Karemera's speeches.¹³⁷³ Although the Trial Chamber did not discuss the particular passages cited by Karemera, this does not mean that it did not consider this particular evidence.¹³⁷⁴ specifically since it considered the relevant exhibit and witness in its deliberations on the 3 May 1994 Meeting.¹³⁷⁵ Moreover, the Trial Chamber expressly noted other evidence indicating that the speakers condemned killings in general and made attempts to distinguish between Tutsis and the *Inkotanyi*,¹³⁷⁶ which it ultimately described as "abstract rhetoric about restoring peace".¹³⁷⁷

¹³⁶⁹ *Nahimana et al.* Appeal Judgement, paras. 700, 701, 703.

¹³⁷⁰ *Nahimana et al.* Appeal Judgement, para. 701. See also *Nahimana et al.* Appeal Judgement, paras. 711, 713.

¹³⁷¹ Trial Judgement, para. 992.

¹³⁷² Trial Judgement, para. 992 (emphasis added). See also Trial Judgement, paras. 987, 991, 1450(5), 1596.

¹³⁷³ Karemera Appeal Brief, paras. 159 (referring to Ndirorera Defence Exhibit 290, p. K0235243), 167 (referring to Witness GK, T. 8 December 2006 p. 36).

¹³⁷⁴ See, e.g., *Muhimana* Appeal Judgement, para. 72.

¹³⁷⁵ Trial Judgement, paras. 956-968.

¹³⁷⁶ Trial Judgement, paras. 952, 956, 961, 966, 970, 972, 976.

¹³⁷⁷ Trial Judgement, para. 991.

486. The Appeals Chamber is also not satisfied that Karemera and Ndirumapatse have shown that, in view of this evidence, the Trial Chamber mischaracterized Karemera's speech as direct incitement to kill Tutsis. The Trial Chamber found that Karemera's tribute to the *Interahamwe* and his call on them to continue to be vigilant and flush out, stop, and combat the enemy occurred in the immediate aftermath of the *Interahamwe* having just participated in the massacre of 2,000 Tutsi civilians near the venue of the speeches.¹³⁷⁸ For the Trial Chamber, it was Karemera's and the other speakers' failure to condemn this specific and very recent massacre that rendered all of their other, more general statements about the restoration of peace hollow and abstract. None of the evidence highlighted by Karemera indicates any condemnation of this specific attack. In addition, the Trial Chamber considered evidence that those present understood the speeches as a call to kill Tutsi refugees, not just those purportedly fighting with the RPF.¹³⁷⁹

487. Moreover, the Appeals Chamber considers that the reasonableness of the Trial Chamber's interpretation of Karemera's speech as a direct call for the killing of Tutsis is confirmed when viewed in the context of other findings made in the Trial Judgement. Notably, the Trial Chamber found that other participants in the meeting, including Kayishema and Niyitegeka, ordered and instigated the *Interahamwe* to kill thousands of Tutsi civilians just days after their supposed condemnation of the killing of Tutsis.¹³⁸⁰ Karemera has therefore failed to show that, when his speech is placed in its proper context, his call for the *Interahamwe* to fight the enemy did not amount to direct incitement to kill members of the Tutsi group and that his general condemnation of killings was mere abstract and hollow rhetoric.

488. The Appeals Chamber turns to consider Karemera's and Ndirumapatse's arguments that the Trial Chamber erred in its assessment of Witness GK's credibility. The Appeals Chamber is not convinced that the Trial Chamber did not exercise the necessary caution in the assessment of the credibility of Witness GK.¹³⁸¹ The Trial Chamber noted that, at the time of his testimony, Witness GK was detained and awaiting trial on genocide charges.¹³⁸² As a result, the Trial Chamber expressly indicated that it would exercise caution when assessing his credibility and the weight to be given to his evidence, even if it considered that he was not a direct accomplice of Karemera or Ndirumapatse.¹³⁸³ Having considered that Witness GK's evidence was corroborated in several

¹³⁷⁸ Trial Judgement, paras. 989, 990.

¹³⁷⁹ Trial Judgement, paras. 961, 962, 964, 965, 966, 982.

¹³⁸⁰ Trial Judgement, para. 1649.

¹³⁸¹ Karemera Appeal Brief, paras. 237-239.

¹³⁸² Trial Judgement, paras. 959, 980.

¹³⁸³ Trial Judgement, para. 981. *See also* Trial Judgement, para. 108 (where the Trial Chamber indicates that it is reasonable for a trial chamber to employ a lesser degree of caution towards the testimony of witnesses charged with similar crimes as opposed to accomplices, as long as no special circumstances have been identified).

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respects, it concluded that he was generally credible.¹³⁸⁴ Karemera and Ngirumpatse have identified no error in this approach beyond stating that the Trial Chamber ought to have been mindful of Witness GK's status.¹³⁸⁵ Accordingly, their arguments are dismissed.

489. In relation to his assertion that the Trial Chamber erred in finding that Witness GK's evidence was corroborated, Karemera argues that the identity of the speakers and the order of the speeches was not in dispute but that the content of the speeches was and that the Minutes of the Meeting and the Transcripts of the Broadcast of the Meeting contradicted Witness GK's evidence in this respect.¹³⁸⁶ The Appeals Chamber identifies no error in the Trial Chamber's consideration that Witness GK's testimony was generally corroborated. The Trial Chamber found that the witness's evidence was corroborated by the Minutes of the Meeting and the Transcripts of the Broadcast of the Meeting in relation to the identity of the speakers, the order in which they spoke, and the fact that the speeches did not mention that killings had recently occurred in Kibuye.¹³⁸⁷ Moreover, the Appeals Chamber recalls that the Trial Chamber found Witness GK to be generally credible and did not find that his evidence had to be corroborated in all respects to be relied upon.¹³⁸⁸ To the extent that Karemera asserts that these documents contradict Witness GK's testimony regarding condemning the killings and urging a stop to the killing, the Appeals Chamber recalls that it has found no error in the Trial Chamber's finding that the speeches only provided abstract rhetoric about restoring peace.

490. The Appeals Chamber turns to consider Karemera's assertion that the Trial Chamber should have considered Witness GK's evidence alongside his own testimony, as well as that of Witnesses ETK, Hitiyaremye, and LSP and the Transcripts of the Broadcast of the Meeting.¹³⁸⁹ The Trial Chamber summarized the Transcripts of the Broadcast of the Meeting and the evidence of these witnesses in respect of the 3 May 1994 Meeting.¹³⁹⁰ However, the Appeals Chamber notes that the Trial Chamber neither engaged in a credibility assessment of Karemera and Witnesses ETK, Hitiyaremye, and LSP nor discussed any inconsistencies between their evidence and the evidence of Witness GK in relation to the 3 May 1994 Meeting.¹³⁹¹ Similarly, the Trial Chamber did not discuss inconsistencies between the Transcripts of the Broadcast of the Meeting and Witness GK's evidence.¹³⁹² While the Appeals Chamber recalls that a trial chamber need not

¹³⁸⁴ Trial Judgement, para. 982.

¹³⁸⁵ Karemera Appeal Brief, paras. 237-239.

¹³⁸⁶ Karemera Appeal Brief, para. 241.

¹³⁸⁷ Trial Judgement, para. 982.

¹³⁸⁸ Trial Judgement, para. 982.

¹³⁸⁹ Karemera Appeal Brief, para. 240. *See also* Ngirumpatse Response Brief, paras. 133, 158, 159.

¹³⁹⁰ Trial Judgement, paras. 956-958, 969-979.

¹³⁹¹ Trial Judgement, paras. 969-992.

¹³⁹² Trial Judgement, paras. 969-992.

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explain every step of its reasoning,¹³⁹³ the Trial Chamber should have at least addressed the Defence evidence in its deliberations and explained why it preferred Witness GK's evidence. Nonetheless, Karemera does not point to any specific aspect of these witnesses' evidence or the Transcripts of the Broadcast of the Meeting which he considers contradict that of Witness GK or undermines the Trial Chamber's assessment. Accordingly, this argument is dismissed.

491. In light of the foregoing, Karemera and Ngirumpatse have failed to demonstrate that the Trial Chamber erred in finding that Karemera's speech at the 3 May 1994 Meeting amounted to direct incitement to commit genocide.

(b) The Public Nature of the Incitement

492. The Trial Chamber stated that it was undisputed that the 3 May 1994 Meeting was public and found that it was large.¹³⁹⁴ The Trial Chamber also found that the meeting was broadcast over the radio.¹³⁹⁵

493. Karemera submits that the Trial Chamber failed to assess the public nature of the 3 May 1994 Meeting.¹³⁹⁶ Karemera argues that, since the meeting was held in a room, it was not open or directly addressed to the general public, but was a private, restricted meeting addressed to a limited group of invited prefecture-level officials.¹³⁹⁷ In this respect, Karemera points to the evidence of Witness GK, who testified that "the meeting was not a public meeting" and that it "was a meeting which gathered the people who had been invited, and it took place in the meeting room of the Kibuye *prefecture* office".¹³⁹⁸ He further argues that Witness GK testified that the room was not full.¹³⁹⁹ On this basis, Karemera contends that the public nature requirement of incitement was not met.¹⁴⁰⁰ Ngirumpatse generally submits that the Trial Chamber did not characterize the public nature of the incitement and that there was no evidence on the trial record from which it could have drawn such an inference.¹⁴⁰¹

¹³⁹³ *Kanyarukiga* Appeal Judgement, para. 114; *Renzaho* Appeal Judgement, para. 405; *Nchanuhigo* Appeal Judgement, paras. 165, 166.

¹³⁹⁴ Trial Judgement, paras. 949, 1596.

¹³⁹⁵ Trial Judgement, para. 1596.

¹³⁹⁶ Karemera Appeal Brief, para. 152.

¹³⁹⁷ Karemera Appeal Brief, paras. 242 (*referring to* Nzirorera Defence Exhibit 286), 395. *See also* Karemera Appeal Brief, para. 156; Karemera Response Brief, para. 35.

¹³⁹⁸ Karemera Appeal Brief, para. 152, *referring to* Witness GK, T. 11 December 2006 pp. 38, 39.

¹³⁹⁹ Karemera Appeal Brief, para. 242.

¹⁴⁰⁰ Karemera Appeal Brief, para. 395.

¹⁴⁰¹ *Ngirumpatse Notice of Appeal*, para. 288; *Ngirumpatse Appeal Brief*, para. 743.

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CASE LAW OF MUNICIPAL COURTS

Annex 24

Germany, Federal Constitutional Court, First Chamber of the Second Senate,
Order of 15 February 2006 – 2 BvR 1476/03

Available at:

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/
EN/2006/02/rk20060215_2bvr147603en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rk20060215_2bvr147603en.html)

Annex 24

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Bundesverfassungsgericht - Decisions - Claims against the Federal Republic of Germany for compensation concerning victi

The following abstract was prepared by the Federal Constitutional Court and submitted for publication to the CODICES database maintained by the Venice Commission. Abstracts published by the Venice Commission summarise the facts of the case and key legal considerations of the decision. For further information, please consult the CODICES database.

Please cite the abstract as follows:

Abstract of the Federal Constitutional Court's Order of 15 February 2006, 2 BvR 1476/03 [CODICES]

Abstract

First Chamber of the Second Senate
Order of 15 February 2006
2 BvR 1476/03

Headnotes (non official):

Under public international law, a state may claim immunity from the jurisdiction of another state with regard to sovereign acts – so-called *acta iure imperii*.

Article 3 of the Hague Convention (IV) does not give rise to any direct individual claim for compensation in the event of violations of international humanitarian law. Hence, it remains that if a state undertakes actions towards foreign nationals that are in violation of public international law, in principle only the home state is entitled to claim compensation.

With regard to Article 3.1 of the Basic Law, the legislature is also not barred from distinguishing between victims of general wartime events on the one hand and victims of persecution measures driven specifically by the ideology of the Nazi regime on the other.

Annex 24

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Bundesverfassungsgericht - Decisions - Claims against the Federal Republic of Germany for compensation concerning victi

Summary:

I.

The constitutional complaint relates to the question of whether the Federal Republic of Germany is obliged to provide compensation and damages for “acts of retaliation” perpetrated by members of the German armed forces during the occupation of Greece in the Second World War.

The complainants are Greek nationals. Their parents were shot dead in 1944 in an “act of retaliation” perpetrated against the residents of the Greek village of Distomo by members of an SS unit that was part of the German occupying forces. The complainants, who were minors at that time, only survived because of fortunate circumstances. In addition to material damage, they suffered psychological damage, as well as disadvantages in terms of their subsequent vocational training and professional advancement, as a result from losing their parents.

In 1995, the complainants filed an action to the Bonn Regional Court. They moved for a finding that the Federal Republic of Germany was obliged to provide compensation for the material damage that they suffered due the deployment of the SS troops in Distomo. The Regional Court, as well as the Cologne Higher Regional Court following an appeal on points of fact and law, rejected the action. The complainants’ appeal on points of law to the Federal Court of Justice was also unsuccessful. By contrast, in parallel proceedings conducted in Greece, to which the complainants amongst others were party, the Levadeia Court of First Instance ruled in 1997 that the compensation claims made in respect of the same factual circumstances were well-founded.

II.

The First Chamber of the First Senate of the Federal Constitutional Court did not admit the constitutional complaint for decision and concluded that, ultimately, the challenged court decisions are not constitutionally objectionable.

The Court’s decision is based in essence on the following considerations:

It is not constitutionally objectionable that the Federal Court of Justice rejected any binding effect of the judgment of the Greek Levadeia Court of First Instance. In accordance with public international law, a state may claim immunity from the jurisdiction of another state if and to the extent that the matters of adjudication constitutes sovereign acts – so-called *acta iure imperii*. Since the SS unit that was involved in the events in Distomo was part of the armed forces of the German *Reich*, the attacks must be categorised as sovereign acts. Hence, the Federal Court of Justice has rightly rejected any binding effect of the judgment of the Greek Court of First Instance.

To the extent that the complainants assert a violation of Article 14.1 of the Basic Law, claims for compensation and damages directed against the Federal Republic of Germany are recognised as falling within the scope of protection of the guarantee of ownership. The complainants, however, can neither invoke claims for compensation and damages under public international law, nor under the domestic law on official liability or on loss inflicted by public authority.

Article 3 of the Hague Convention (IV) does not give rise to any direct, individual compensation claims in the event of violations of the international humanitarian law. The genesis of the provision shows that it is intended to protect the individual, and hence indirectly to protect human rights. It does not follow from this, however, that the provision can be considered to form the basis of a direct, original compensation claim under international law on the part of the individual concerned against the state.

Firstly, according to the wording of this provision, a belligerent party which violates the provisions of the Convention is liable to pay compensation “if the case demands”. Since Article 3 of Convention (IV) is not self-executing regarding this restrictive qualifier, the provision cannot be regarded as a basis for individual claims because it is not directly applicable. Secondly, according to the traditional understanding of public international

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6/27/23, 4:22 PM Bundesverfassungsgericht - Decisions - Claims against the Federal Republic of Germany for compensation concerning victi

law, the individual was not qualified as a legal subject. Regardless of developments at the level of human rights protection which have led to the recognition of the individual being a subject of international law in some instances, as well as to the establishment of individual application proceedings under specific treaties, it remains that if a state undertakes actions towards foreign nationals that are in violation of public international law, in principle only the home state is entitled to claim compensation.

The complainants are also not entitled to claim compensation pursuant § 839 of the Civil Code in conjunction with Article 131 of the Weimar Constitution. Ultimately, the Federal Republic of Germany is not liable because of the lack of a guarantee of reciprocity in accordance with § 7 of the Reich Civil Servants' Liability Act, former version. In accordance with the version of the provision applicable until 1992, nationals of a foreign state only had a right to official liability against the Federal Republic of Germany if reciprocity was guaranteed by virtue of the legislation of the foreign state or a state treaty. Such a guarantee by Greece regarding German nationals was, however, only enacted after the end of the Second World War.

Article 25 of the Basic Law does not rule out the application of § 7 of the Reich Civil Servants' Liability Act, former version. There is no general rule of international law according which equal treatment of Germans and non-Germans was generally required. It is true that, it a conflict with the principles of international humanitarian law, as recognised under customary law, arises if an individual who has been unlawfully injured is denied any compensation whatsoever. This is, however, not the case here because § 7 of the Reich Civil Servants' Liability Act, former version, did not exclude official liability as such, but only the transfer of liability to the state in accordance with Article 34 of the Basic Law and Article 131 of the Weimar Constitution.

Invoking § 7 of the Reich Civil Servants' Liability Act, former version, is also not ruled out on the grounds that the provision applies to situations relating to the perpetration of war crimes. The provision was not intended to protect the German Reich against claims arising from atrocities that are specifically connected to the Nazi regime. While the events in Distomo are, however, subject to the international humanitarian law, they do not bear an inherent connection to the Nazi tyranny; they hence do not fall within separate framework governing compensation claims for the crimes of the Nazi regime.

The challenged decisions do not violate Article 3.1 of the Basic Law. With regard to Article 3.1 of the Basic Law, the legislature is also not barred from distinguishing between victims of general wartime events on the one hand and victims of persecution measures driven specifically by the ideology of the Nazi regime on the other. It hence does not contradict the right to equality if victims of persecution within the meaning of § 1.1 of the Federal Compensation Act, as well as forced labourers, are entitled to compensation in accordance with § 11.1 of the Law Creating a Foundation "Remembrance, Responsibility and the Future", , whereas the complainants are not included in the group of entitled parties.

Annex 25

United Kingdom, Supreme Court, *Bloomberg LP v ZXC*, Law Reports 2022, Appeal Cases, p. 1158, 16 February 2022

English online version available at:

<https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf>

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ZXC v Bloomberg LP (SC(E))

[2022] AC

Supreme Court

A

ZXC v Bloomberg LP

[2022] UKSC 5

2021 Nov 30;
Dec 1;
2022 Feb 16

Lord Reed PSC, Lord Sales, Lord Hamblen,
Lord Stephens JJSC, Lord Lloyd Jones

B

Confidential information *Misuse of private information* *Reasonable expectation of privacy* *Legal enforcement body sending confidential letter of request to foreign state as part of criminal investigation* *Letter of request detailing enforcement body's suspicions regarding claimant's possible criminal conduct* *Defendant acquiring letter of request and using information to publish article* *Whether claimant having reasonable expectation of privacy in relation to fact and details of criminal investigation* *Human Rights Act 1998 (c 42), Sch 1, Pt 1, arts 8, 10*

C

As part of a criminal investigation it was conducting into a company which operated overseas, a United Kingdom legal enforcement body (“the UKLEB”) sent a confidential letter of request to the competent authority of a foreign state seeking mutual legal assistance. The letter of request sought banking and business records in relation to the company and a number of named individuals, one of whom was the claimant, who worked for the company; stated that the investigation concerned a number of possible criminal offences, including corruption; and contained a detailed assessment of the evidence that the UKLEB had obtained so far together with its initial conclusions on the basis of that evidence. Subsequently the defendant media organisation, which had obtained a copy of the letter of request, published an article which identified the claimant and gave details of the criminal investigation derived almost exclusively from the letter of request. The claimant, who had not been charged with any criminal offence arising out of the UKLEB’s investigation, brought a claim against the defendant for misuse of private information. The judge allowed the claim, holding that the claimant had a reasonable expectation of privacy in relation to the confidential details of the UKLEB’s investigation, in particular the suspicions it had formed about his conduct, so as to engage his right to respect for his private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹, and that the claimant’s article 8 rights were not outweighed by the defendant’s right to freedom of expression under article 10. The Court of Appeal dismissed the defendant’s appeal, holding that there was a general rule or legitimate starting point, applicable in the present case, that prior to being charged a person under criminal investigation had a reasonable expectation of privacy in respect of information relating to that investigation.

D

E

F

On the defendant’s further appeal

G

Held, dismissing the appeal, that in respect of certain categories of information a consideration of all the circumstances of the case and the weight which had to be attached to a particular circumstance would generally result in a determination that a person had a reasonable expectation of privacy in relation to information within that category; that, in respect of those categories of information, it was appropriate to state that there was a legitimate starting point that there was an expectation of privacy in relation to that information; that information that a person who had not yet been charged was under criminal investigation was such a category of information, given the general practice by state investigatory bodies not to identify those under investigation prior to charge, the risk to such persons of unfair damage to

H

¹ Human Rights Act 1998, Sch 1, Pt 1, arts 8, 10: see post, para 43.

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[2022]AC

weight which must be attached to a particular circumstance will generally result in a determination that there is a reasonable expectation of privacy in relation to information within that category. In respect of those categories of information it is appropriate to state that there is a legitimate starting point that there is an expectation of privacy in relation to that information. We prefer the terminology of “a legitimate starting point” to emphasise the fact specific nature of the enquiry and to avoid any suggestion of a legal presumption, as noted above in para 67. We consider that the courts below were correct in articulating such a legitimate starting point to the information in this case. This means that once the claimant has set out and established the circumstances, the court should commence its analysis by applying the starting point.

(x) Does the legitimate starting point apply in the present case?

145 This case clearly falls into the category of information in which the legitimate starting point applies.

(xi) Conclusion in relation to this ground of appeal

146 The courts below were correct to hold that, as a legitimate starting point, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation and that in all the circumstances this is a case in which that applies and there is such an expectation. We would dismiss this ground of appeal.

7. Issue 2—Whether the Court of Appeal was wrong to hold that, in a case in which a claim for breach of confidence was not pursued, the fact that information published by Bloomberg about a criminal investigation originated from a confidential law enforcement document rendered the information private and/or undermined Bloomberg’s ability to rely on the public interest in its disclosure.

147 The short answer to this ground of appeal is that neither the judge nor the Court of Appeal held that the fact that the information originated from a confidential document rendered the information private or meant that Bloomberg could not rely on the public interest in its disclosure.

148 It is correct that the judge treated the confidentiality of the information as being a relevant and important factor at both stage one and stage two but he did not treat it as being determinative. The Court of Appeal rightly held that such an approach was justified and involved no error of law.

149 At stage one, it was common ground that the judge should consider the *Murray* factors, so far as applicable, and he did so at para 125. Factor (7) is “the circumstances in which and the purposes for which the information came into the hands of the publisher”. As the Court of Appeal held, the confidentiality of the letter of request was clearly a relevant circumstance in relation to factor (7)—see the judgment of Simon LJ at para 92 and that of Underhill LJ at para 148.

150 The recognition that the causes of action for misuse of private information and for breach of confidence are distinct means that there is no necessary overlap between them. Information may be private but not confidential, or confidential but not private. To prove that information is

BOOKS, ARTICLES AND ACADEMIC PAPERS

Annex 26

S. Ansari, “Subjects or Citizens?: India, Pakistan and the 1948 British Nationality Act”, *Journal of Imperial and Commonwealth History*, vol. 41 (2013), pp. 285-312

Available at:

<https://doi.org/10.1080/03086534.2013.768094>

Subjects or Citizens? India, Pakistan and the 1948 British Nationality Act

Sarah Ansari

Independence in the case of British India occurred at relatively short notice in August 1947, but tying up the loose ends of empire stretched over years. Under these circumstances, the realignment of subjecthood and citizenship necessitated by decolonisation was protracted, and raised complex questions about identity in both the new states of India and Pakistan and the former imperial power itself. This article thus takes as its focus the drawn-out process of disengagement that followed formal independence in relation to one case study: the various ways in which Britain sought to square the working of its 1948 Nationality Act with Indian and Pakistani citizenship legislation that took shape in the 1950s. India and Pakistan faced the common challenge of establishing who now belonged within their new borders. Britain likewise was forced to recalibrate its ideas about nationality and think afresh about the rights of its subjects in view of the new sets of relationships that now linked colonies, old dominions and the 'mother country' within the Commonwealth. In practice, applying the 1948 Act's provisions in relation to India and Pakistan became infused with anxieties about 'race', which surfaced repeatedly as British officials in London, Delhi, Karachi and consulates around the world sought to manage its operation to suit British interests.

It is now widely recognised that decolonisation, which picked up momentum from the mid-twentieth century onwards, was an extended affair.¹ In the case of British India, independence may have taken place at relatively short notice in August 1947, but tying up the loose ends of empire stretched over many years. In particular, the realignment of subjecthood and citizenship necessitated by decolonisation was protracted, and raised complex questions about identity in both the newly independent states and the former imperial power. Against this backdrop, the following article takes as its focus the drawn-out process of disengagement that followed formal independence in relation to one particular case study: namely the various ways in which Britain sought to square the working of its 1948 Nationality Act with Indian and Pakistani

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Hence, under this scheme devised to refashion British nationality on a new basis, all those who belonged to either the Commonwealth or the colonies would still be regarded as 'British subjects'. Their citizenship, however, would vary, with self-governing countries in the Commonwealth establishing their own, such as Australia and Canada (whose 1945 legislation had triggered the need for a rethink in the first place),⁹ while remaining colonies were covered by the introduction of a new category, that of citizenship of the United Kingdom and Colonies (UKC). The status of 'British subject without citizenship' was also created as a temporary measure for those people connected with countries that had not defined their citizenship laws by 1 January 1949. In practice, this category also extended potentially to British subjects resident in places outside the Commonwealth. Finally, as part of the process, when self-governing countries had passed citizenship legislation, this, at their request, would then be 'declared' by the secretary of state in London under Section 32[8] of the Act.¹⁰ Any British subject who did not acquire an alternative commonwealth citizenship under recognised legislation would automatically then become a UKC citizen. In this way, despite opposition from Conservative Party, the 1948 BNA intended for all British subjects to have one form of commonwealth attachment or another.¹¹ And it was framed on the assumption that the citizenship measures enacted by commonwealth countries would be reasonably comprehensive and so only a comparatively small number of people would become UKC citizens after recognition by the secretary of state.

But, while most commonwealth countries quickly enacted legislation that was duly declared by the British government for the purposes of the BNA,¹² this did not happen as far as India and Pakistan were concerned. India took until 1955 to introduce a specific citizenship act (though its 1950 constitution did contain certain provisions regarding citizenship) but London regarded this as too limited in scope to be recognised. Pakistan's equivalent legislation in 1951 and 1952 was likewise deemed by the British to be unacceptably obscure.¹³ Crucially, neither the Indian nor the Pakistani measures of the early 1950s provided for the acquisition of citizenship by many people of Indian or Pakistani origin (or, as it was articulated at the time, 'race') who, British officials argued, 'naturally' belonged to those countries. In addition to the many hundreds of thousands of former refugees living in India and Pakistan whose citizenship status remained unclear in the decade following Partition, there were large numbers of people of South Asian origin scattered around the world. Why this scenario worried London so much was that, in the event of the Indian or Pakistani measures being declared by the British government before their citizenship had been fixed, all of them as 'British subjects without citizenship', officials feared, would by default become UKC citizens despite very few obvious (that is ancestral) ties with the United Kingdom. By the mid-1950s, by which time pressure was building up for restrictions to be placed on new commonwealth immigration to Britain,¹⁴ the British authorities faced the dilemma of whether or not to recognise citizenship legislation that, from their perspective, threatened consequences 'so anomalous and so different from what reasonably have been expected to happen when the British Nationality Act was passed'. According to one Home Office official,

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into the 1950s British consulates around the world were charged with processing the passports and other travel documents belonging to Indians and Pakistanis in the absence of their own consular services. This last section therefore looks at a number of individual cases concerning 'potential Pakistanis' (in some instances 'would-be Indians') that highlight the complicated relationships trailing in the wake of the formal end of empire and the extent to which the day-to-day realities of decolonisation stretched on over many years. While available records do not necessarily provide details of their final outcome, taken *en masse* these cases reveal some of the challenges involved in working out in practice the citizenship of people of South Asian origin who lived outside its geographical boundaries. As in the subcontinent itself, issues of identity, allegiance and government responsibility were not amenable to water-tight legislation, and so the implementation of citizenship rules elsewhere in the world proved equally fraught with inconsistencies and anomalies.

The impact of imperial rule on undivided India had resulted, over decades if not centuries, in many ordinary people moving to live and work in other parts of the empire.⁸⁷ In addition, large numbers were drawn to opportunities for employment in places not under direct British control. In the period following independence, these expatriate communities were said to include as many as 200,000 in Burma, some 30,000 in South Africa, nearly 15,000 in Madagascar, 5,000 in what was still referred to as Siam, 2,500 in Iraq and thousands more in small groups scattered throughout the Middle East and Africa.⁸⁸ It was in British interests, therefore, for these people, where eligible, to register as soon as possible as 'potential Pakistanis' or 'would-be Indians', and in this way avoid the complications of subjecthood without citizenship. How to make this happen, however, was not straightforward as by the early 1950s both India and Pakistan had still not been able to establish the necessary diplomatic representation in many of the places where their likely citizens were living, and so British consuls instead frequently found themselves acting as a channel of communication on their behalf. In the meantime, in view of impending legislation supposedly soon to come out of Karachi and New Delhi, consulates were instructed to limit the validity of new passports granted to 'British subjects without citizenship', as general rule extending them only to 30 June 1952 at the latest.⁸⁹

A conversation between the high commissioner in Karachi and Pakistan's chief passport officer in December 1953 underlined the extent of the problems involved. As the high commissioner pointed out, if the Pakistani authorities wished British consuls to assist people of Pakistan origin to acquire Pakistan citizenship or to obtain Pakistan passports in countries where Pakistan had no representative, then the UK government urgently needed clarification on the relevant citizenship rules involved. In response, S. H. Firoz suggested that, where this was possible, such applications could be processed by the nearest Pakistan representative or by a Pakistani representative who would periodically visit the country in which an applicant was living. This was already what happened in relation to people of 'Pakistan origin' living in countries such as Italian Somaliland and Madagascar, who had been instructed to apply to the Pakistani commissioner stationed in Nairobi in British East Africa. Similarly, in the Persian Gulf, the Pakistani vice-consul for Basra would visit Kuwait and Bahrain

Annex 27

N. H. Anwar, “Negotiating new conjunctures of citizenship: experiences of ‘illegality’ in Burmese-Rohingya and Bangladeshi migrant enclaves in Karachi”, *Citizenship Studies*, vol. 17 (2013), pp. 414-428

Available at:

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Negotiating new conjunctures of citizenship: experiences of ‘illegality’ in Burmese-Rohingya and Bangladeshi migrant enclaves in Karachi

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In this article, I examine aspects of recent shifts in Pakistani citizenship norms and the implications for migrant populations. In doing so, I investigate how the coalescing of national security concerns with broader issues of immigration has brought ‘illegal’ migrants like the Burmese Rohingya and Bangladeshis into the state’s documented embrace. My purpose is threefold: to record the modalities of change through the discourse of ‘illegality’ which articulate the exigencies of the ‘war on terror’; to explore the implications of such change on certain Muslim migrant populations resident in Pakistan for several decades; and, through these discussions, to show how citizenship and belonging have played out in a very different way for them. The subject of immigration/migration and illegality in Pakistan, especially in the post 9/11 frame, has remained largely below the threshold of academic attention.

Keywords: citizenship; illegality; migrants; Pakistan; South Asia

We were sifted. (Muhammed Ismail, 45, Burmese Rohingya migrant)

Political parties have misused the Bengalis. NARA can give them much more. But when a Bengali registers with NARA he loses right to vote. Parties exploit this. Get citizenship get vote. The Bengalis will never get nationality because that would bring down the image of our nation. (Deputy Director General, National Alien Registration Authority, NARA)

Introduction

In 1996, Afzal Ali Shigri, the then Commandant of the Frontier Constabulary,¹ authored a report that disclosed key findings of an extensive survey on undocumented migrants. The report titled *Report on Illegal Immigrants and Afghan Refugees in Pakistan* instantly made visible the status of 3.35 million undocumented migrants including refugees from Myanmar and ‘new’ Bengali migrants from Bangladesh. By foregrounding these populations, Shigri’s objective was to formulate for the first time a comprehensive national policy on immigration. Similar surveys had been conducted but were considered limited in scope.² The report made its mark shortly after Benazir Bhutto’s second civilian regime (1993–1996) when state officials had expressed concern over the potential risk that undocumented Bangladeshi migrants posed not only to the nation’s economic prosperity but also to the demographic balance of its leading metropolis, Karachi, where Muhajjirs³ would soon be outnumbered by Bengalis.⁴ The Shigri Report, as it is now widely known, effectively catalyzed a discourse on the ‘increasing menace’ (Shigri 1996, p. 39) of illegal migrants in Pakistan. By charting a new blueprint on immigration reform, the report adeptly

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the supply of services. With the MQM's presence, a new generation of Pakistan born children of Burmese and Bangladeshi migrants is being coaxed into the party's political orbit, typically enrolling into the ranks of counselors, units in charge, community leaders and action committee heads. However, these new alliances that summon an alternate space for migrants to improve their material conditions embody certain contradictions, for instance a fear of coercion and violence associated with the MQM (Khan 2010, Verkaaik 2004). The Burmese and Bangladeshi migrants' uncertain status and weak economic positions combine to make them particularly vulnerable to both political parties and state authorities. How these migrants are negotiating new conjunctures of citizenship is a subject which I now turn to by examining narratives of displacement, of the desire to belong in a coveted Muslim homeland and of the heightened demands on citizenship as expressed through the state's new language of 'illegality' and identification.

We too have performed hijra. We too are muhajjirs

In September 1967, during General Ayub Khan's military regime (1958–1969), 18 year old Mohammad Zakaria purchased a ticket in Chittagong for Rs. 83 and boarded the *Safina e Arab*. The pilgrim ship was destined for Saudi Arabia and took eight days to navigate the Indian Ocean before reaching Karachi harbor where Zakaria disembarked. Having sold land inherited after his father's death in Arakan, Zakaria had felt materially secure. He had sufficient money to buy land in Karachi's Korangi Town, build a house, marry and settle down to a productive and safe life.¹² Presently in his 60s, Zakaria has married thrice and fathered 11 children, all of whom were born in Karachi. Zakaria has witnessed many transitions within his community of Burmese Rohingya migrants. Seeking clarification on the reasons for Rohingya migrations to Pakistan and the ensuing experiences of a first generation of arrivals in Karachi in the use of nationalist and religious discourses, I asked him about his decision to leave and the subsequent experiences within Karachi's local political economy. Zakaria told me:

In Subah Arakan we were scholars, fishermen and we tilled the land. We were land owners since before my father's time. After the army came everything changed. I ran away to come from there to here. There were two reasons for coming to Pakistan. First this country was made for Muslims. Second in Karachi I could enroll in the Darul Uloom for a premium scholarly Islamic education. Many others who came with me had similar goals. But despite our achievements we have never been accepted as part of this land. We too have performed *hijrah* and are *muhajjirs* but remain unacknowledged as such.

Zakaria's narrative represents the Pakistani nation state as a Muslim ideal and as an aspiration for educated Burmese Rohingya men like him. In using the terms *hijrah* and *muhajjir*, Zakaria is suggesting that as Muslims, the Burmese Rohingya migrants like the prophet Muhammed's followers interpret their migration to Pakistan as a pilgrimage to a Muslim homeland that held the promise for a new beginning. The term *muhajjir* is not meant to suggest ethnic affiliation but religious solidarity. In another conversation that took place in his home, Zakaria underscored the problem of erroneous territorial divisions and the significance of language:

Arakan was a part of Bengal. It was divided incorrectly when Pakistan was made. Arakan should have been a part of Pakistan. The majority there and here are the same. In 1948 Burma was made independent from the British but that is also the beginning of Arakan's subjugation. We were always proud of Urdu. My father used to tell me that he wept for Pakistan. When my father died I was 13 years old. By the time my father died I was fluent in Urdu. Urdu is our birth tongue. People used to go to India to become educated in madrassahs in Deoband and Lucknow. The books there were written in Urdu. These books were then brought back to

Arakan where they were used in madrassahs. We read in Arabic and learned translation and meaning in Urdu.

That Urdu was perceived as a desirable language was emphasized several times in conversations with other Burmese Rohingya men who belonged to Zakaria's age group, for instance AH. Notably, the importance attached to Urdu resonates with Rahman's (2002, p. 224) observation that in the 1930s Burmese Muslims were being educated in Urdu and their religious texts were also written in this language. While there was hesitation and a sense of regret in Zakaria's responses, there was also a strong intimation that Urdu and Islam had defined the Rohingya's relationship with the Pakistani state. Moreover, the madrassahs where Zakaria and his sons in law and a daughter work are spaces that appear to have accommodated the Burmese Rohingya migrants as equal citizens by giving them access to employment. Zakaria's explication of the erroneous division of Arakan resonates with the pre Partition educated minority Muslim community's desire to align itself with the expectant nation state. In the pre 1947 era, delegations representing the Jamat ul Ulema Islam in Arakan had journeyed to Karachi to discuss with the leaders of the Muslim League the possibility of incorporating certain townships in Western Burma into Pakistan. While these discursive encounters never catalyzed the incorporation of the frontier area of Western Burma into Pakistan, they nevertheless underscore the Arakanese Muslim minority's desire to attach itself in territorial and ideological terms to a nation state created ostensibly on the basis of Islamic ideals.

Borders/boundaries define identity and mark the distribution of population and the life of a nation. Borders are by definition lines of exclusion and inclusion that modern states establish. However, borders not only invoke in material terms the modern state's territorial limits but also, in a sociospatial sense, can seep through into local spaces impacting migrants' everyday lives. Bangladesh and Burma share a 200 km long land border that extends along the Naaf River. India and Pakistan share a 2900 km border that runs along five states. Both borders are heavily regulated. In the 1980s and 1990s, border crossings for Burmese and Bangladeshi migrants appear to have been complex but not impossible. At times, crossing a border was possible by simply walking across or using a boat on a river. Muhammad Yusuf's story exemplifies this process. Yusuf, who is now 56 years old and drives a rickshaw to supplement his family's joint income, recalled his multiple border crossings that began in the late 1970s when he left his village in Maungdaw Township in Arakan. With the assistance of a *dalaal* (middleman), Yusuf managed to arrive in Karachi via Ajmer Sharif and Umarkot. Yusuf fled from Myanmar with his parents and settled in a small village near Chittagong before embarking on a final passage to Pakistan. In Cox Bazaar and Chittagong, he witnessed the conditions in the local refugee camps and imagined a better life awaited him in Pakistan. When in 1985, during General Zia's regime (1979–1988), he crossed by foot the Indo Pak border into Umarkot in northeastern Sindh, Yusuf's wife and two small children accompanied him. When I asked Yusuf about the documents used to cross the Indo Pak border, he replied:

What documents? We had no documents. It was daytime. There was security patrolling the border and I asked the guards if we could drink some water as we were very thirsty after a long journey. He looked at us—me, my wife and children and three other families who were with us—and asked if we were Muslims. I said yes. Then he smiled and let us cross the border. In a few minutes we were in Pakistan and within a few days we were in Karachi.

This account of a border crossing underscores the flexibility shown to Muslim migrants during General Zia's tenure when a liberal policy was enacted toward migrants and

Annex 28

N. Arajärvi, “The Core Requirements of the International Rule of Law in the Practice of States”, *Hague Journal on the Rule of Law*, vol. 13 (2021), p. 173

Available at:

<http://www.qil-qdi.org/the-future-of-the-articles-on-state-responsibility-a-matter-of-form-or-of-substance/>



The Core Requirements of the International Rule of Law in the Practice of States

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Abstract

Is it possible to identify some foundational elements of international law that can be generally accepted by all States? Can such core elements reach a normative threshold to be considered requirements rather than “values” or “virtues”? And finally, what are these core requirements of the international rule of law? This contribution propositions that, indeed, such core elements exist, identifies them—non-arbitrariness, consistency and predictability—from the practice of States at the international level and conceptualises them as the minimum requirements of the international rule of law. It presents an empirical study of statements of governments at the United Nations (UN) during a five-year period (2012–2017), accompanying the relevant findings with references to decisions and opinions of the International Court of Justice (ICJ).

1 Introduction

‘In a divided world, the concept of the rule of law is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to come to a universal principle.’¹

International legal order—in a greater scale than its national counterparts—must constantly defend and reassert its foundational, structural, institutional and operative elements against external assailants and internal heretics. Some claim that during the past decade the contestations have ascended to a new level and may challenge the core integrity of the international legal order.² Similar claims pertaining to the

¹ President of Cyprus at the 2012 High-level Meeting on the Rule of Law at the National and International Levels, summary record A/67/PV.3, p. 9.

² H. Krieger and G. Nolte, ‘The International Rule of Law – Rise or Decline?—Points of Departure’, 1 *KFG Working Paper Series* (2016), available online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866940 (last visited 19 Feb 2021).

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Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of “arbitrary action” being “substituted for the rule of law” (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284).⁷⁰

ICJ then defined arbitrariness as a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.⁷¹ ICJ’s understanding of non-arbitrariness as an element of the international rule of law appears to demand that any relevant exercise of power under international law requires a sufficiently legitimate basis in order to be justified. In this sense, it can be said that the restriction of arbitrariness as a core element of the international rule of law is reflected in the jurisprudence of the ICJ.

4.2 Predictability and Consistency

Consistency bestows a certain conception of rationality to law and makes it more intelligible and thus predictable for the subjects.⁷² Therefore, consistency and predictability are interlinked and taken together for the purpose of the present analysis. In the words of Judge Sir Robert Jennings, ‘[I]aw develops by precedent, and it is that which gives it consistency and predictability’.⁷³

In the Sixth Committee, CELAC⁷⁴ and ASEAN⁷⁵ have put much emphasis on the predictability of rules of international law as an element of the international rule of

⁷⁰ *Elektronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 20 July 1989, ICJ Reports (1989) 15, at 76, para 128.

⁷¹ *Ibid.*

⁷² H.E. Judge Shunji Yanai, ‘Statement to the United Nations General Assembly on the occasion of the commemoration of the thirtieth anniversary of the opening for signature of the 1982 United Nations Convention on the Law of the Sea’, 10 December 2012, at 5: ‘The Tribunal must respond to the needs of the international community and do so by remaining consistent in its interpretation of the Convention so as to ensure the legal predictability counted on by the States Parties’, available at: https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/yanai/GA_Statement_30th_anniversary_101212_E_FINALE.pdf; M. Kumm, ‘International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model’, 44 *Virginia Journal of International Law* (2003) 19, at 25; N. McCormick, *Rhetoric and the Rule of Law—A Theory of Legal Reasoning* (2005), at 201; McCormick draws this connection between coherence and predictability and distinguishes between coherence and consistency. He interprets consistency as requiring non-contradiction, whereas coherence can be a matter of degree with some internal inconsistencies.

⁷³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, ICJ Reports (1984) 392, Separate opinion of Judge Sir Robert Jennings, at 547.

⁷⁴ Dominican Republic speaking on behalf of CELAC (A/C.6/71/SR.4, § 80); Ecuador on behalf of CELAC (A/C.6/70/SR.5, § 41); Costa Rica, on behalf of CELAC (A/C.6/69/SR.5, § 5), reiterated by Bolivarian Republic of Venezuela (A/C.6/72/SR.7, § 91); Barbados (A/C.6/70/SR.8, § 30), Mexico (A/C.6/69/SR.7, § 41).

⁷⁵ Cambodia on behalf of ASEAN (A/C.6/72/SR.5, § 48), (A/C.6/71/SR.5, § 10), reiterated by Thailand (A/C.6/72/SR.7, § 9), (A/C.6/70/SR.7, § 49), Philippines (A/C.6/71/SR.7, § 73), (6th Committee, 70th session, 15th October 2015, available at: <http://statements.unmeetings.org/media2/7653051/philippines.pdf>), (A/C.6/69/SR.6, § 28), Singapore (6th Committee, 70th session, 14th October 2015, available at: <http://statements.unmeetings.org/media2/7652815/singapore.pdf>); Indonesia (6th Committee, 70th session, 15th October 2015, available at: <http://statements.unmeetings.org/media2/7652930/indonesia.pdf>).

law. Additionally, Austria,⁷⁶ India,⁷⁷ Slovenia,⁷⁸ Kenya,⁷⁹ Japan,⁸⁰ Islamic Republic of Iran,⁸¹ Turkey,⁸² Belarus,⁸³ United States of America,⁸⁴ Republic of Korea,⁸⁵ Ukraine,⁸⁶ and Estonia⁸⁷ have made statements to the same effect. Similarly, Israel,⁸⁸ the African Group,⁸⁹ Canada, Australia and New Zealand,⁹⁰ and Bangladesh⁹¹ have associated legal certainty with the international rule of law. Likewise, the five Nordic Countries have stated that blurred legal situations would impede the international rule of law.⁹² Therefore, at least 117 States have expressed the view that predictability or certainty is an element of the international rule of law.

Other statements point to the importance of consistency in the application of legal rules for the international rule of law. Especially, the Movement of Non-Aligned States has stated on numerous occasions that selectivity in the application of international is incompatible with the international rule of law.⁹³ This view has been shared

⁷⁶ Austria (A/C.6/72/SR.5, § 62), (6th Committee, 71st session, 5th October 2016, available at: <http://statements.unmeetings.org/media2/7661270/austria.pdf>), (6th Committee, 70th Session, 14th October 2015, available at <http://statements.unmeetings.org/media2/7653014/austria.pdf>), (A/C.6/69/SR.7, § 24).

⁷⁷ (A/C.6/72/SR.6, § 14).

⁷⁸ (A/C.6/72/SR.6, § 49).

⁷⁹ (A/C.6/72/SR.8, § 28), (6th Committee, 71st session, 5th October 2016, available at: <http://statements.unmeetings.org/media2/7661337/kenya.pdf>).

⁸⁰ (6th Committee, 72nd session, 6th October 2017, available at: <http://statements.unmeetings.org/media2/16152858/japan.pdf>), (A/C.6/69/SR.5, § 85).

⁸¹ Islamic Republic of Iran (6th Committee, 72nd session, 5th October 2017, available at <http://statements.unmeetings.org/media2/16152832/iran-islamic-republic-of-.pdf>).

⁸² (6th Committee, 71st session, 5th October 2016, available at: <http://statements.unmeetings.org/media2/7661261/turkey.pdf>).

⁸³ (A/C.6/71/SR.8, § 5), (A/C.6/70/SR.6, § 1 and § 3).

⁸⁴ (A/C.6/70/SR.6, § 33).

⁸⁵ (A/C.6/70/SR.8, § 1).

⁸⁶ (A/C.6/69/SR.6, § 14).

⁸⁷ (A/C.6/69/SR.6, § 79).

⁸⁸ (A/C.6/72/SR.5, § 74), (6th Committee, 70th session, 15th October 2015, available at: <http://statements.unmeetings.org/media2/7652953/israel.pdf>).

⁸⁹ South Africa on behalf of the African Group (6th Committee, 71st session, 5th October 2016, available at: <http://statements.unmeetings.org/media2/7661218/south-africa.pdf>), reiterated by Mauritius (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152747/mauritius.pdf>), Senegal (A/C.6/71/SR.7, § 32),

⁹⁰ Canada on behalf of Canada, Australia and New Zealand [CANZ] (6th Committee, 70th session, 14th October 2015, available at <http://statements.unmeetings.org/media2/7652805/canada-on-behalf-of-canz.pdf>).

⁹¹ (6th Committee, 70th session, 14th October 2015, available at <http://statements.unmeetings.org/media2/7652817/bangladesh.pdf>), (A/C.6/69/SR.7, § 16).

⁹² (A/C.6/70/SR.5, § 61).

⁹³ Islamic Republic of Iran on behalf of NAM (A/C.6/72/SR.5, § 23), (A/C.6/71/SR.4, § 89), (A/C.6/70/SR.5, § 19), (A/C.6/69/SR.4, § 81), reiterated by ASEAN: Cambodia on behalf of ASEAN (A/C.6/72/SR.5, § 48), (A/C.6/71/SR.5, § 10), Syrian Arab Republic (A/C.6/72/SR.6, § 20 f.), (A/C.6/70/SR.7, § 43 f.), (A/C.6/69/SR.7, § 36); Libya (A/C.6/72/SR.6, § 40); Mauritius (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152747/mauritius.pdf>); Viet Nam (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152801/viet-nam.pdf>); Islamic Republic of Iran (A/C.6/70/SR.7, § 41), (A/C.6/69/SR.7, § 23), (A/C.6/69/SR.7, § 23); Lesotho (A/C.6/69/SR.5, § 60); Algeria (A/C.6/69/SR.6, § 92) and Saudi Arabia (A/C.6/69/SR.8, § 2).

by China⁹⁴ and Poland.⁹⁵ Double standards⁹⁶ and claims of exceptionalism⁹⁷ in the application of international law have been described as unacceptable and as promoting politicization of law.⁹⁸ Instead, a number of States have called for fairness⁹⁹ and equality¹⁰⁰ in international law. In this context, ASEAN¹⁰¹ and the African Group¹⁰² have described consistency as an element of the international rule of law.

The ICJ has discussed predictability and consistency together, as they may share similar identifiers and promote similar outcomes, without being the same, as conceptualised above. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the ICJ found that:

the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.¹⁰³

The requirements of ‘consistency and a degree of predictability’ are not deduced from ‘abstract justice’ (equity *contra legem*), but from a rule of (positive) international law, which requires the application of equity¹⁰⁴ (equity *intra*

⁹⁴ (A/C.6/72/SR.7, § 34), (A/C.6/70/SR.8, § 6).

⁹⁵ (6th Committee, 70th Session, 14th October 2015, available at: <http://statements.unmeetings.org/media2/7653004/poland-r1.pdf>).

⁹⁶ Cambodia on behalf of ASEAN (A/C.6/72/SR.5, § 48), Viet Nam (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152801/viet-nam.pdf>); Libya (A/C.6/72/SR.6, § 40); China (A/C.6/72/SR.7, § 34).

⁹⁷ Brazil (6th Committee, 72nd session, 5th October 2017, <http://statements.unmeetings.org/media2/16152817/brazil.pdf>), (A/C.6/71/SR.5, 74), Brazil (A/C.6/70/SR.8, § 24), (A/C.6/69/SR.6, § 50).

⁹⁸ Israel (A/C.6/72/SR.5, § 74), (A/C.6/70/SR.7, § 14); Syria (A/C.6/72/SR.6, § 21); Rwanda (A/C.6/72/SR.6, § 104); Indonesia (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152810/indonesia.pdf>), Kenya (A/C.6/72/SR.8, § 28).

⁹⁹ Senegal (A/C.6/71/SR.7, § 32); Canada on behalf of Canada, Australia and New Zealand [CANZ] (6th Committee, 70th session, 14th October 2015, available at <http://statements.unmeetings.org/media2/7652805/canada-on-behalf-of-can-z.pdf>); Pakistan (A/C.6/70/SR.7, § 95); Bangladesh (A/C.6/69/SR.7, § 16).

¹⁰⁰ Azerbaijan (A/C.6/72/SR.8, § 15); Estonia (A/C.6/70/SR.6, § 41); South Africa (A/C.6/69/SR.6, § 43); Austria (A/C.6/69/SR.7, § 24).

¹⁰¹ Cambodia on behalf of ASEAN (A/C.6/72/SR.5, § 48), (A/C.6/71/SR.5, § 13).

¹⁰² South Africa on behalf of the African Group (6th Committee, 70th session, 14th October 2015, available at: <http://statements.unmeetings.org/media2/7652800/south-africa-on-behalf-of-the-african-group.pdf>), reiterated by Maldives (6th Committee, 71st session, 5th October 2016, available at: <http://statements.unmeetings.org/media2/7661351/maldives.pdf>).

¹⁰³ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, at 39, para 45.

¹⁰⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, at 39, para 45: ‘As the Court also said in its 1982 Judgment: ‘Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.’ (I.C.J. Reports 1982, p. 60, para. 71.) Yet the ‘Application of equitable principles is to be distinguished from a decision *ex aequo et bono*’ and as the Court put it in its 1969 Judgment: ‘it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field’ (I.C.J. Reports 1969, p. 47, para. 85).

legem).¹⁰⁵ Unfortunately, the ICJ has not explained how it infers these requirements from that (positive) law.

In the *Armed Activities on the Territory of the Congo* case, Judge Elaraby issued a Separate Opinion, in which he explained that in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the ICJ had intended to emphasise that there is a ‘general desire for consistency and stability in the Court’s case-law when the Court is dealing with legal issues which have been before it in previous cases’.¹⁰⁶

Even though the ICJ is not obliged to adapt its own interpretation to that of another judicial body, it has considered that it should nonetheless ascribe great weight to the pronouncements of other bodies that were established specifically for the purpose of supervising the application of norm in question. Thus, in the *Ahmadou Sadio Diallo* case the ICJ took due account of the interpretations of the other bodies in order to achieve the essential consistency of international law.¹⁰⁷ Similarly, Vice-President Ranjeva, and Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, and Buergethal found in their joint declaration in the *Legality of Use of Force (Serbia and Montenegro v. Germany)* case that ‘[c]onsistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases.’ Any Court ‘must ensure consistency with its own past case law in order to provide predictability.’¹⁰⁸

In order to ensure predictability, the requirement of consistency commands that norms of international law should be given the same meaning in every given case as long as it is appropriate—even if different tribunals are called upon to interpret it.¹⁰⁹ This is a view shared also by other international courts. The International Criminal Tribunal for the former Yugoslavia has declared ‘that in the interests of certainty and predictability’, it ‘should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice’, such as when ‘the previous decision has been decided on the basis of a wrong legal principles.’¹¹⁰ Similarly, the European Court of Human Rights (ECtHR) found a court that failed to develop a mechanism to ensue legal consistency to violate the principle of legal certainty and thereby, to act contrary to the rule of law.¹¹¹ Accordingly, in the case law of international tribunals also

¹⁰⁵ G. I. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 67.

¹⁰⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 1995, ICJ Reports (2005) 168, Separate Opinion of Judge Elaraby, at 332, para 19.

¹⁰⁷ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Reports (2010) 639, at 664, paras 66 f.

¹⁰⁸ *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports (2004) 720, at 766.

¹⁰⁹ Cf. also: President of the ICJ, R. Higgins, *The ICJ and the Rule of Law* (2007), at 6 f. available at https://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf (last visited 27 February 2021).

¹¹⁰ ICTY, *Zlatko Aleksovski*, Appeal Judgement, 24.03.2000 (IT-95-14/1-A), para 107 f.

¹¹¹ *Beian v. Romania (no. 1)*, no. 30658/05, §§ 36–39, ECHR 2007-XI.

beyond the ICJ consistency and predictability are acknowledged as elements of the international rule of law.

Predictability has also a connection to non-arbitrariness. The Inter-American Court of Human Rights has repeatedly stated that rules of law interfering with the rights of other subjects must be so predictable as to provide an adequate protection against arbitrariness¹¹²—a view that can also be found in the practice of the ECtHR.¹¹³

It should be noted that outside of courts, international law sometimes evolves through deviations, a prime example of this being customary international law. Nonetheless, for such deviations to crystallise into legal rules, their practice must become consistent. In this sense, it is the rules of change and rules of interpretation, which convey a sense of predictability on the normative developments.¹¹⁴

4.3 Other Elements

At the UNGA, 76 States have identified accountability¹¹⁵ and 16 States the fight against impunity¹¹⁶ as an element of the international rule of law. Last but not least,

¹¹² IACtHR, *Case of López Mendoza v. Venezuela*, Judgment (Merits, Reparations and Costs), 1 September 2011, para 202; *Case of López Lone et al. v. Honduras*, Judgment (Preliminary objection, Merits, Reparations and Costs), 5 October 2015, para 264. All IACtHR decisions are available at <http://www.corteidh.or.cr/index.php/en/jurisprudencia>.

¹¹³ *Malone v. the United Kingdom*, no. 8691/79, § 68, [1984] ECHR 1984-X.

¹¹⁴ For rules on interpretation of customary international law, see P. Merkouris, N. Arajarvi and J. Kammerhoffer (eds.), *The Theory, Practice and Interpretation of Customary International Law* (2021).

¹¹⁵ Cambodia on behalf of ASEAN (A/C.6/72/SR.5, § 48), reiterated by Thailand (A/C.6/72/SR.7, § 10), Indonesia (6th Committee, 72nd session, 5 October 2017, available at: <http://statements.unmeetings.org/media2/16152810/indonesia.pdf>), Singapore (6th Committee, 70th session, 14th October 2015, available at (<http://statements.unmeetings.org/media2/7652815/singapore.pdf>); Denmark on behalf of the Nordic Countries (A/C.6/72/SR.5, § 60), (A/C.6/71/SR.5, § 27), Finland, speaking on behalf of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden (A/C.6/69/SR.5, § 18); South Africa on behalf of the African Group (6th Committee, 71st session, 5th October 2016; available at: <http://statements.unmeetings.org/media2/7661218/south-africa.pdf>), reiterated by Mauritius (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152747/mauritius.pdf>), South Africa (A/C.6/69/SR.6, § 43); Lebanon (A/C.6/72/SR.6, § 115), (A/C.6/71/SR.5, § 64); Islamic Republic of Iran (6th Committee, 72nd session, 5th October 2017, available at: <http://statements.unmeetings.org/media2/16152832/iran-islamic-republic-of-.pdf>); Belarus (A/C.6/72/SR.8, § 8); Mexico (A/C.6/72/SR.8, § 34); Bangladesh (6th Committee, 70th session, 14th October 2015, available at <http://statements.unmeetings.org/media2/7652817/bangladesh.pdf>), (A/C.6/69/SR.7, § 16); Estonia (A/C.6/70/SR.6, § 41), (A/C.6/69/SR.6, § 79); India (A/C.6/69/SR.7, § 55).

¹¹⁶ Switzerland (A/C.6/72/SR.5, § 78); Libya (A/C.6/72/SR.6, § 40); Trinidad and Tobago on behalf of the CARICOM (6th Committee, 71st session, 5th October 2015, available at: <http://statements.unmeetings.org/media2/7661235/caricom.pdf>), (6th Committee, 70th session, 14th October 2015, available at: <http://statements.unmeetings.org/media2/7652796/trinidad-and-tobago-on-behalf-of-caricom.pdf>), (A/C.6/69/SR.4, § 81); Denmark on behalf of the Nordic Countries (A/C.6/71/SR.5, § 27).

Annex 29

M. Arcari, “The future of the Articles on State Responsibility: A matter of form or of substance?”, *Questions of International Law, Zoom-in*, vol. 93 (2022), pp. 3-21

Available at:

<http://www.qil-qdi.org/the-future-of-the-articles-on-state-responsibility-a-matter-of-form-or-of-substance/>

Annex 29

The future of the Articles on State Responsibility: A matter of form or of substance?

*Maurizio Arcari**

1. *Introduction*

If one took a cursory look at the comments made by States on the Articles on the responsibility of States for internationally wrongful acts (ARSIWA or ‘the Articles’) adopted in 2001 by the UN International Law Commission (ILC),¹ one could hardly be surprised by the number of general statements underscoring the critical importance of this text for the international legal order. From time to time, the Articles as a whole and the secondary rules on international responsibility herein codified have been qualified as ‘the root of the international legal order and [...] the basis of the whole system of international law’;² ‘the most important aspect of international law’;³ or even ‘the third structuring pillar [together with the Charter of the United Nations and the Law of Treaties

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¹ The text of the ARSIWA is reprinted in ‘Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)’ UN Doc A/56/10 (2001) II/2 YB ILC 26-30 [hereinafter ILC Report 2001].

² See statement by the representative of Austria at the meeting of the Sixth Committee of the General Assembly held on 28 October 2004, UN Doc A/C.6/59/SR.15 (23 March 2005) at 14 para 92.

³ See statement by the representative of Greece at the meeting of the Sixth Committee of the GA held on 23 October 2007, UN Doc A/C.6/62/SR.13 (12 November 2007) at 2 para 2.



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The future of Articles on State Responsibility: A matter of form or of substance? 17

and on the cognate obligation not to assist the United Kingdom in maintaining this situation.⁵³ The reticence of the Court on this point is further evidenced if compared with GA resolution 73/295, adopted in the aftermath of the advisory opinion. This text seems to overcome the rather prudent conclusions of the ICJ, insofar as it not only reiterates the engagement of all Member States to cooperate with the United Nations to ensure the completion of decolonization of Mauritius as rapidly as possible, but it also calls upon the same States ‘to refrain from any action that will impede or delay the completion of the process of decolonisation of Mauritius in accordance with the advisory opinion of the Court and the present resolution’.⁵⁴ While the reasons for the Court’s reticence on the issue may be a matter for speculation, one cannot refrain from noting that the Chagos case stands as another indicator of the uncertainties surrounding the regime of special consequences of serious breaches of international law as enshrined in the ARSIWA.⁵⁵

3.3. Issues relating to part three of the ARSIWA (the ‘implementation’ of international responsibility)

Turning to part three of ARSIWA, concerning the implementation of international responsibility, it is not surprising that the provisions here included have found little application in case-law. This is especially so if one considers that the ILC itself was prominent in underscoring that some of the articles of that part (in particular, Article 48 concerning the invocation of responsibility by a State other than an injured State) involve a measure of progressive development of international law.⁵⁶

The lack of recognition in the case-law of international courts and tribunals is therefore even less surprising if one takes certain provisions

⁵³ This point is noted, with reference to arts 40 and 41 ARSIWA, in the separate opinions of Judges Sebutinde and Robinson appended to the opinion of 25 February 2019 [2019] ICJ Rep respectively 288-289 para 39 and 326 para 89.

⁵⁴ See GA Res 73/295 of 22 May 2019, UN Doc A/RES/73/295 (22 May 2019) para 5.

⁵⁵ See F Salerno, ‘The obligation not to recognise illegitimate territorial situations after the International Court of Justice’s opinion on the Chagos Islands’ (2019) 102 *Rivista di Diritto Internazionale* 729 ff 735-738, 740-742 and 750.

⁵⁶ See eg para 12 of the commentary to art 48 ARSIWA, ILC Report 2011 (n 1) 127. However, for a rare judicial application of the latter provision see the Advisory Opinion of 1 February 2011 by the Seabed Disputes Chamber of the ITLOS (n 43) para 180.



Annex 30

M. Abul Kalam Azad, *et al.*, “Family planning knowledge, attitude and practice among Rohingya women living in refugee camps in Bangladesh: a cross-sectional study”, *Reproductive Health*, vol. 19 (2022), pp. 1-12

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RESEARCH

Open Access



Family planning knowledge, attitude and practice among Rohingya women living in refugee camps in Bangladesh: a cross-sectional study

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Abstract

Background: Considering the high risk of maternal morbidity and mortality, increased risks of unintended pregnancy, and the unmet need for contraceptives prevalent among the Rohingya refugees, this study aims to explore the knowledge, attitude, and practice (KAP) of family planning (FP) and associated factors among Rohingya women living in refugee camps in Bangladesh.

Methods: Four hundred Rohingya women were interviewed. Data were collected using a structured and pretested questionnaire, which included study participants' socio-demographic characteristics, access to FP services, knowledge, attitude, and practice of FP. Linear regression analysis was performed to identify the influencing factors of FP-KAP.

Results: Of the 400 Rohingya refugee women, 60% were unaware that there was no physical harm brought by using a permanent method of birth control. Half of the women lack proper knowledge regarding whether a girl was eligible for marriage before the age of 18. More than two-thirds of the women thought family planning methods should not be used without the husband's permission. Moreover, 40% were ashamed and afraid to discuss family planning matters with their husbands. Of the study participants, 58% had the opinion that a couple should continue bearing children until a son is born. Linear regression analyses found that study participants' who have a profession, have less children, whose primary source of FP knowledge was through a physician/nurse, have had FP interventions in the camp, and talk with a health care provider on FP were found to have better FP-KAP.

Conclusion: The study showed that Rohingya refugee women are a marginalized population in terms of family planning and their comprehensive FP-KAP capability was low. Contraceptives among the Rohingyas were unpopular, mainly due to a lack of educational qualifications and family planning awareness. In addition, family planning initiatives among Rohingya refugees were limited by a conservative culture and religious beliefs. Therefore, strengthening FP interventions and increasing the accessibility to essential health services and education are indispensable to improving maternal health among Rohingya refugees.

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Plain Language Summary

Considering the high risk of maternal morbidity and mortality, increased risks of unintended pregnancy, and the unmet need for contraceptives prevalent among the Rohingya refugees, this study aims to explore the knowledge, attitude and practice (KAP) of family planning (FP) and associated factors among Rohingya women living in the refugee camps in Cox's Bazar, Bangladesh. Four hundred Rohingya women participated in the study. We found that Rohingya refugee women were a marginalized population in family planning and their comprehensive FP-KAP status was low. Contraceptive uptake among the Rohingya women was low due to a lack of education and family planning awareness. In addition, family planning initiatives among Rohingya refugees were limited by various traditional cultural and religious beliefs. Therefore, strengthening FP interventions and increasing accessibility to essential health services and education are indispensable to improving maternal health among refugees.

Keywords: Family planning knowledge, Family planning attitude, Family planning practice, Contraceptive use, Rohingya displaced women, Refugee camps

Background

Over the last few decades, the number of stateless people who are usually identified as refugees has grown exponentially around the world. The most recent focus is Myanmar's Rohingya diaspora, who have left their homes since 25 August, 2017 [1–3]. This influx of more than 700,000 Rohingya into Bangladesh has produced the fastest-growing refugee crisis in the world [1, 2, 4–6]. Bangladesh's total number of unregistered refugees was about 220,000 before the recent influx [2, 7]. However, as of 31 March 2021, approximately 884,000 Rohingya refugees who are Forcibly Displaced Myanmar Nationals (FDMN) resided in 34 camps in Ukhiya and Teknaf Upazilas (sub-districts) of Cox's Bazar District of Bangladesh [8], which have grown to become the largest and most densely populated camps in the world [9]. Among the refugees, women and children make up the majority [6, 10–12], which accounts for more than 50% [1, 13–15].

The Government of Bangladesh and development partners, including the United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA) and the World Health Organization (WHO) are working together to provide humanitarian relief to the Rohingya people [4]. The Rohingya, while living in Myanmar, were deprived of nationality and fundamental rights to education and health care. These restrictions have substantially affected their knowledge of contraception and family planning [16, 17], indicating that adverse health outcomes related to maternal health may be extremely high [18]. Evidence also suggests that worldwide, forcibly displaced women and adolescent girls are experiencing intensified sexual and reproductive health (SRH) concerns, including a high risk of maternal morbidity and mortality, increased risks of unintended pregnancy, and an unmet need for contraceptives [1, 14, 19]. For example, 179 mothers die from preventable causes related to pregnancy and childbirth for every 100,000 live births in

the camps [20]—nearly two-and-a-half times the global maternal mortality goal [21]. Save the Children estimated that 76,000 babies were born in the Rohingya camps in Bangladesh over the past 3 years [22]. Correspondingly, more than 60 babies were born every day in the refugee camps of Bangladesh [23].

In order to address reproductive and maternal health issues of Rohingya women and adolescent girls, humanitarian actors collaborated with the Ministry of Health and Family Welfare (MOHFW), providing basic health services including family planning (FP) programs, intra-uterine devices (IUD) and implants, as well as other short-acting modern methods of FP (condoms, oral contraceptive pills, injectables) [11, 14–16, 24, 25] to increase community awareness [1, 14]. Moreover, at the community level, health workers are implementing different interventions including FP counseling sessions and community meetings with the intended population at reproductive age [1, 4, 16].

According to estimations from recent studies, the Rohingya women's contraceptive prevalence rate (CPR) was higher than reported in 2018. A survey conducted by the International Center for Diarrhoeal Disease Research, Bangladesh (ICDDR,B) [3] exposed that contraceptive use amongst Rohingya refugees rose by 2.1 percentage points from 33.7% in 2018 to 35.8% in 2019. Increasing awareness of modern contraceptive methods among Rohingya refugees may contribute to these positive outcomes. However, challenges also exist due to cultural values, traditional misconceptions, and dogmatic beliefs towards contraceptive use among the majority of the Rohingya people [1, 4, 6, 14, 16, 17, 26–29]. The hindrances may include: the religion of Islam not permitting use of contraceptives [1, 4, 16], husbands' disapproval of contraceptive use [1, 14, 16, 29], actively trying to fall pregnant [28, 29], the belief that lessening the number of children is a sin [1, 4, 29], the belief that a child is a gift of Allah (God) [1, 4, 16, 29], considering children as

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M. C. Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions”,
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Annex 31

Appraising UN Justice-Related Fact-Finding Missions

M. Cherif Bassiouni*

Shakespeare wrote that a rose by any other name is still a rose. But in the United Nations (UN), a fact-finding mission, notwithstanding its name, is not necessarily a fact-finding mission.¹

The UN is a political organization consisting of several organs, bodies, and agencies that deal with different matters; exercise varying levels of authority and prerogatives; fulfill different or subordinate functions; operate with somewhat different methods; and—with the exception of the UN organs and bodies, the UN agencies, and treaty-bodies—have their own budgets.² All of them are process-driven, subject to the United Nations Charter (Charter) and the rules the different organizations may adopt. They rigidly observe the principle of coequal sovereignty from which flows the all important internal procedural rule of equitable geographic representation. What they have most in common, other than the political characteristics mentioned above, is the system's bureaucracy.

The UN system resembles a spaghetti bowl in which some

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1. With respect to human rights fact-finding, see HANS THOOLEN & B. VERSTAPPEN, *HUMAN RIGHTS MISSIONS: A STUDY OF THE FACT-FINDING PRACTICE OF NON-GOVERNMENTAL ORGANIZATIONS* (1987); Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980); David Weissbrodt & James McCarthy, *Fact-Finding by International Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981).

2. A critical observation whose implication goes far beyond what it appears is the resort by the United Nations to state-funding through voluntary trust funds and direct funding of projects, as well as indirect funding through NGOs and state-contributed personnel. These different funding techniques frequently become the tail that wags the dog in that they determine policies and priorities, but may have conflicting or counter-productive characteristics. Mostly, however, they are unnecessarily competitive, searching for public and media recognition, short-term, and limited in scope. The foregoing adds up to *ad hoc* practices that produce haphazard and limited results while giving the appearance of a significant contribution to the overall goals of justice-related fact-finding missions.

spaghetti may be long on mandate but thin on substance, while other may be short on mandate and thick on substance, with everything else somewhere in between. Some commentators attribute this condition to the nature of the beast; others blame it on the bureaucracy; and still others conclude that when you seek a synthesis of the diversities inherent in the world's governmental systems, you are likely to get the worst along with the best, though the latter is less frequent. To paraphrase Charles Dickens, it is, at once, the best of all things and the worst of all things.³

Whatever the diagnosis, and notwithstanding chronic symptoms of institutional and bureaucratic problems, some components of the system have on occasion accomplished extraordinary results, and others have made significant strides. The worst rightfully can be blamed on the political motive of the organization, its bureaucracy, management processes, and lack of resources due essentially to unpaid U.S. dues and assessments. Yet it is concerned governments and dedicated staffers that make up the best of what the UN system offers. As is frequently said, if the UN did not exist, we would need to invent it. But it can be improved, particularly when it comes to justice-related fact-finding missions.

The United Nations is a vast organization whose multiple processes bring about fact-finding missions.⁴ Some of these processes

3. CHARLES DICKENS, *A TALE OF TWO CITIES* (Norman Paige ed., Charles E. Tuttle 1994) (1859).

4. As stated by this writer:

The range and extent of violations of internationally and regionally protected human rights vary extensively. They may occur either on a sporadic individual basis or they may be more widespread. In some instances, they are the product of deliberate state policy and conducted with some degree of openness by agents of the state. In other instances they are condoned by state policy or its practices. Most of the time they appear to be spurred by the "abuse of power" of public officials which are carried out in a concealed or secret fashion as in the case of torture.

Experience indicates that whenever public opinion, both national and international, focuses on these policies and practices, enough pressure is brought to bear on governments to cause the cessation, or at least the significant reduction in the number of these violations or their intensity.

International and regional organizations do not have the machinery, personnel, and resources needed to monitor all suspected, reported or known incidences of such violations. Furthermore the deeply entrenched concepts of sovereignty and acute senses of national pride have only grudgingly permitted international intervention in the internal legal order. Even so, however, direct international intervention without the

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are established by norms; others by custom and practice, but many of the processes are ad hoc. The courses of these processes are not always linear, consistent, or predictable, and frequently they will take unexpected turns. Scholars, observers, and UN staffers provide explanations that frequently rationalize such unforeseen and sometimes unexplainable turns in order to preserve the system's appearance of legitimacy, even if it comes at the cost of truth and other fundamental values. These explanations provide a *leitmotif* of variations on the theme of *Marbury v. Madison*,⁵ whereby the critique is exercised on the implicit condition of legitimizing or rationalizing the processes' departure from the established or expected course.

Because the UN system is process-driven, not, to say, process-oriented, concentration is drawn to the processes while attention is deflected from their substantive outcomes. Indeed, the time-honored, though not always honorable, technique of substituting processes for outcomes and of using processes to generate outcomes contrary to those expected has been perfected within the UN system. This characteristic hinders substantive accountability. With respect to justice-related fact-finding missions, the contrast, and at times the conflict, between *realpolitik* and the values of justice is frequently at issue.

The UN was established as a political organization, and, as such, it is largely governed by political considerations. Unlike individuals who may be motivated by enduring values, governments are motivated by shifting interests. The political nature of the organization is evidenced by the allocation of prerogatives to the General Assembly and the Security Council. More particularly, it

consent of the affected state is not yet of international reality. Thus there are no established international or regional mechanisms for the identification and appraisal of human rights violations except for some modalities and procedures which permit complaints to reach certain international and regional bodies which can, in varying degrees of legal authority, hear, consider, or adjudicate these complaints. These structures vary. Within the United Nations there is no adjudicative system, only some opportunities for presentation of complaints by states or individuals and eventual finding by means of reports or resolutions are the outcome. The legal authority, competence, procedures, and processes of these structures differ.

M. Cherif Bassiouni, *Human Rights Mission A Study of the Fact-Finding Practice of Non-Governmental Organizations*, 6 N.Y.L. SCH. J. HUM. RTS. 469, 469-70 (1989) (book review).

5. 5 U.S. (1 Cranch) 137 (1803).

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fifty years the most elementary aspects of standardized organization, planning, documentation, and reporting have not been developed. Thus, each mission has to reinvent the wheel and, in an organizational sense, has to reinvent itself as a mission. The results are usually poor or mediocre performance, except where particularly competent persons are appointed to these missions, and in these rare cases it is their entrepreneurial and other qualities that bring about the mission's success. But the contributions of dedicated and hard-working UN staffers should not be overlooked in assessing the success of these missions. This situation also means that there is little consistency and predictability as to the methods and outcomes. Thus, there is no way of comparing the results of different, though substantively similar, missions. This principle applies equally well to ongoing missions that produce multiple reports, where it is at times difficult to compare working methods pursued during the mission and the results they produce.

The lack of standardized methods, particularly as to empirical research and field investigation, means that there is no basis to test the validity of the research in order to assess the plausibility of the conclusions. It is safe to say that no scientific research methodology would consider the above-described approach as anything but selective, insufficient, unreliable, and, at best, anecdotal. It should also be noted that portions of mandates issued by UN organs, bodies, and agencies are at times overlapping and almost always ad hoc. Among the results of these partially overlapping mandates are:

1. confusion as to the boundaries of the overlapping mandates;
2. potential contradictions in the conclusions; and
3. potential mutual reliance of these missions in reporting on the overlapping areas, thus creating a false impression of confirmation and reliability.

As a result of the ad hoc issuance of these mandates:

1. there is no predictability as to the situations that will warrant issuance of such mandates;
2. the decisions to issue, extend, amend and terminate these

mandates seem essentially contingent upon political and extraneous circumstances; and

3. there is infrequent continuity in follow-up on missions that have reached the end of the mandates.

These observations are evident in the workings of mandates issued by the Security Council, the General Assembly, the Commission on Human Rights, the Subcommittee on the Prevention of Discrimination and Protection of Minorities, and the Treaty-bodies. Each one of these appointing organs or bodies relies on a separate formula, uses a different label, provides for different operational methods, and offers different levels of support and resources. However, they have common powers: to establish and terminate the mandate; to define its scope and duration; to appoint its heads and other members; and to determine or condition its operational capabilities.

The Commission on Human Rights has rapporteurs and independent experts; the Subcommittee has special rapporteurs; the Security Council has Commissions, and the Secretary-General has Personal Representatives. Most of the Commission and Subcommittee fact-finding missions have limited resources, sometimes none at all, and are supported by one or, at best, two staffers, mostly on a part-time basis. These missions seldom have the resources or the ability to do effective field work or empirical research. Consequently, they rely heavily on the NGOs, government reports, and the media. Many rapporteurs, or whatever their actual designation may be, produce reports even though they never set foot in the territory where their investigation takes place. Thus, the experts who over the years had to investigate human rights violations in South Africa during the *apartheid* regime, Iran, Iraq, and Israel were not allowed into these countries, yet they still reported on them.

The Security Council may establish a Commission because it sees the need, at that time, for that issue to go through a particular process. The Rwanda Commission was one such case,⁷ whose mandate and duration were limited. It lasted three months and made a single one-

7. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/RES/935 (1994).

Indeed, to date the UN has not promulgated guidelines for accountability.²³

Probably the most significant fact-finding operation in UN history was the work of the Commission established by the Security Council pursuant to Resolution 780 in 1992 to investigate war crimes in the Former Yugoslavia.²⁴ The Commission worked for two years, during which it conducted thirty-five field investigations, established the most extensive database for gathering evidence and information about violations of international humanitarian law, identified over 800 places of detention, estimated 50,000 cases of torture and 200,000 deaths, estimated two million displaced persons as a result of ethnic cleansing that was documented in connection with some 2,000 towns and villages where the practices took place, and conducted the world's first and most extensive investigation into systematic rape. The latter produced over 500 affidavits of victims who identified their perpetrators. Interviews were conducted with 223 victims and witnesses; gathered information led to the identification of close to 1,500 cases; and other information revealed the possibility of an additional 4,500 or so victims.²⁵

Most significantly, the Commission, which received from the Security Council the broadest mandate since the establishment of the International Military Tribunal at Nuremberg, received no funding from the UN to conduct its investigations. The funding had to be raised from states' voluntary contributions, states' contributed personnel, private sources of funding, and ultimately the support of DePaul University, which gave this author the space, overhead costs, and staff to establish the database in Chicago. Over a period of two years, over 140 lawyers and law students worked at the database that produced close to 80,000 documents and 300 hours of videotapes. It was on that basis that the Commission was able to produce its Final

23. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9 (1996), reprinted in 14 NOUVELLES ÉTUDES PENALES 45-78 (1998).

24. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, Annex, U.N. Doc. S/1994/674 (1994).

25. M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994).

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Report and Annexes. The report exceeded 3,300 pages and was the longest report made by the Security Council. The history of the Commission was tormented and difficult, as it faced opposition by some governments and those in the UN bureaucracy who wanted to advance the political agendas of those governments. That explains the lack of resources that the UN allocated for the investigation, though it did provide the costs of some staff and some limited space at the UN Headquarters in Geneva.²⁶

Ultimately, however, it was the Commission's work that gave the Security Council the basis to establish the ICTY.²⁷ The politics of justice continued in the Security Council's selection of the ICTY prosecutor.²⁸ It was also reflected in the early administrative termination of the Commission, even though the Security Council never adopted a resolution to that effect.²⁹ Nevertheless, if it had not been for the work of the Commission, the ICTY Prosecutor who took office almost fourteen months after the establishment of the Tribunal would not have been able to start his work as fast and as efficiently.

The Commission's task was enormous. A war was going on; there was no precedent to guide its work; it had almost no resources available, and it lacked the political backing or the political will of a unified Security Council to which the UN bureaucracy is responsible. More importantly, at the time, the world was emerging from almost a half-century of the Cold War, punctured by many regional and internal conflicts of different dimensions and scope. The idea of impartial, effective, politically independent, and fair international criminal justice was not even on the radar screen of most governments. In a sense, there was a psychological iron curtain that prevented even the consideration of such a system of international criminal justice. The Commission's work tore down this psychological iron curtain. Since then, international criminal justice has become part of the values of the international community, though it is still confronted by the exigencies of *realpolitik*.³⁰

26. *Id.*

27. Res. 808, *supra* note 10, pmb1.

28. M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 210-12 (1996).

29. Bassiouni, *supra* note 25, at 336-38.

30. M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L.

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M. C. Bassiouni, “International Recognition of Victims’ Rights”, *Human Rights Law Review*, vol. 6 (2006), pp. 203-279

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International Recognition of Victims' Rights

M. Cherif Bassiouni*

Abstract

Since its inception, the United Nations has adopted two General Assembly resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The 2006 Principles are, for all practical purposes, an international bill of rights of victims. Their adoption has been hard fought, but their implementation both at the national and international levels is sure to still face many obstacles. Parallel to this historic development have been decisions by the European Court of Human Rights and the Inter American Court of Human Rights, as well as provisions in the statute of the International Criminal Court (ICC), giving standing to victims in ICC proceedings, but also certain rights of compensation. These parallel developments, as well as others within domestic legal systems, evidence a wide movement towards the recognition of the rights of victims of crime, whether domestic or international, or gross violations of human rights. This article re traces the historic origin of victims' rights in domestic and international legal systems, focusing particularly on the adoption of the two international instruments mentioned above, and more particularly on the negotiating history of the 2006 Principles. A detailed commentary of these Principles constitutes the centerpiece of this article.

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212 HRLR 6 (2006), 203 279

nationality to espouse their claims, and present them as a State claim against another State.³⁰ From the Peace at Westphalia in 1648 to WWII, the State has been the primary subject of international law. Individuals were deemed objects and not the subjects of rights and obligations that derived not from international law. But before national law the individuals were legal subjects. Individuals who were harmed by a State other than their State of nationality could only claim fulfilment of rights through their own State of nationality. This pre-supposed that the State of nationality would espouse its national's claim and pursue it through diplomatic channels or by judicial means.³¹ Such an assumption evidences the State-centric nature of international law, whereby injury to a State's citizens is deemed an indirect injury to the State itself.³² Vattel expressed this concept in the late 1700s in *Les Droits des Gens*, wherein he states: '*Quiconque maltraite un citoyen offense indirectement l'état qui doit protéger ce citoyen.*'³³ This is still the foundation of States' claims on behalf of their nationals. Indeed, a State that presents a claim against another State for injuries to its citizens, does so purely on a discretionary basis.³⁴

States, however, remain averse to committing themselves to accountability to individual victims for obvious political and economic reasons.³⁵ States that resort to the use of force are reluctant to acknowledge even the principle of civil liability for individual harm and property damage. These States argue legal technicalities about the differences of legal sources and their binding obligations, distinguishing between international humanitarian law, human rights law and

30 In 2001, the ILC adopted its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 31 May 2001, A/56/10 (2001) which, in Article 33(2), provide that the ILC's approach to the question of State responsibility does not prejudice 'any rights, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' Thus, although the Draft Articles primarily deal with reparations from States to other States or the international community as a whole, the inclusion of this language may evidence the possibility that an obligation may be owed to a non State entity a principle which is re affirmed in the ILC Commentary to Article 33. See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 209 10.

31 See, for example, Lillich, *International Claims: Their Adjudication by National Commissions, Volume VI* (Syracuse: Syracuse University Press, 1962).

32 See Jennings and Watts (eds), *supra* n. 18.

33 Vattel, *Le Droit des gens, Principes de la loi naturelle appliquée à la conduite des affaires des nations souveraines* (1773) at 289.

34 See, for example, *Mavrommatis Palestine Concession Case (Greece v UK)*, Jurisdiction, PCIJ Reports 1924, Series A No. 2, 12. But see the English Court of Appeal's judgment in *R (Abassi) v Secretary of State for Foreign Affairs* 2002 EWCA Civ 1598 and the South African Constitutional Court's judgment in *Kaunda v President of the Republic of South Africa* 10 BCLR 1009, in which some limits to a State's discretion were indicated.

35 *Mavrommatis Palestine Concession Case*, *ibid.* See also *infra* Section 7; Bassiouni, 'Combating Impunity for International Crimes', (2000) 71 *University of Colorado Law Review* 409; and Bassiouni, 'Searching for Justice in the World of Realpolitik', (2000) 12 *Pace International Law Review* 213.

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F. Buchanan, “A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire”, *Asiatic Researches*, vol. 5 (1799), pp. 219-240

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XVII.

A COMPARATIVE VOCABULARY

OF SOME OF THE LANGUAGES SPOKEN IN THE

BURMA EMPIRE.

By FRANCIS BUCHANAN, M. D.

TO judge from external appearance, that is to say, from shape, size, and feature, there is one very extensive nation that inhabits the east of *Asia*. It includes the eastern and western *Tartars* of the *Chinese* authors, the *Calucos*, the *Chinese*, the *Japponese*, the *Malays*, and other tribes inhabiting what is called the Peninsula of *India* beyond the *Ganges*; and the islands to the south and east of this, as far at least as *New Guinea*. This, however, is speaking in a very general sense, many foreign races being intermixed with the nation, and, perhaps, many tribes belonging to it being scattered beyond the limits I have mentioned.

This nation may be distinguished by a short, squat, robust, fleshy stature, and by features highly different from those of an *European*. The face is somewhat in shape of a lozenge, the forehead and chin being sharpened, whilst at the cheek bones it is very broad: unless this be what is meant by the conical head of the *Chinese*, I confess myself at a loss to understand what that is. The eyebrows, or superciliary ridges, in this nation project very little, and the eyes are very narrow, and placed rather obliquely in the head, the external angles being the highest. The nose is very small, but has not, like that of the negro, the appear-

O 2

ance

fight, and the language of one race is totally unintelligible to the others; yet I can perceive in them all some coincidences, and a knowledge of the languages, with their obsolete words, their phrases, their inflections of words; and elisions, *euphoniæ causa*, would, perhaps, shew many more. Those that have the greatest affinity are in Tab. I. IV. and V. Mr. GILCHRIST, whose knowledge of the common dialects in use on the banks of the *Ganges* is, I believe, exceeded by that of no *European*, was so obliging as to look over these vocabularies, but he could not trace the smallest relation between the languages.

I shall now add three dialects, spoken in the *Burma* empire, but evidently derived from the language of the *Hindu* nation.

The first is that spoken by the *Mohammedans*, who have been long settled in *Arakan*, and who call themselves *Rooinga*, or natives of *Arakan*.

The second dialect is that spoken by the *Hindus* of *Arakan*. I procured it from a *Bráhmén* and his attendants, who had been brought to *Amarapura* by the king's eldest son, on his return from the conquest of *Arakan*. They called themselves *Rossarwn*, and, for what reason I do not know, wanted to persuade me that theirs was the common language of *Arakan*. Both these tribes, by the real natives of *Arakan*, are called *Kularw Yakain*, or stranger *Arakan*.

The last dialect of the *Hindustanee* which I shall mention is, that of a people called by the *Burmas* *Aykobat*; many of whom are slaves at *Amarapura*. By one of them I was informed, that they called themselves *Banga*; that formerly they had kings of their own, but that, in his father's time, their kingdom had been overturned by the king of *Mumypura*, who carried away a great part of the inhabitants to his residence. When that

was taken last by the *Burmas*, which was about fifteen years ago, this man was one of the many captives who were brought to *Ava*. He said also, that *Banga* was seven days journey south west from *Munnypura*; it must, therefore, be on the frontiers of *Bengal*, and may, perhaps, be the country called in our maps *Cashar*.

Mr. *Gilchrist* has been so good as to examine particularly these two dialects, and to mark thus (*) those words, which come nearest the *Hindustanee* spoken on the *Ganges*; and thus (†) those not so evidently in connection with the same, but which shew resemblance by analogy.

<i>English.</i>	<i>Racinga.</i>	<i>Rossawon.</i>	<i>Banga.</i>
1 Sun	Bel	*Sooja	Bayllee
2 Moon	Sawn	Sundfa	Satkan
3 Stars	Tara	*Nokyoto	*Tara
4 Earth	Kool	Murtika	*Matee
5 Water	Pannæ	*Dfol	*Pannæ
6 Fire	Auin	*Aagance	Zee
7 Stone	Sheel	*Sheel	*Heel
8 Wind	Bau	*Pawun	*Bo
9 Rain	Jorail	†Biftee	*Booun
10 Man	Manush	†Moonufa	*Manoo
11 Woman	Meealaw	Stree	Zaylan
12 Child	Gourapa	*Balouk	Sogwo
13 Head	Mata	Muftok	Teekgo
14 Mouth	Gall	Bodon	Totohan
			15 Arm

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F. Buchanan-Hamilton, Papers of Francis Buchanan-Hamilton (1762-1829),
“Copy of a Journal of progress and observations during the continuance of the
Deputation from Bengal to Ava in 1795 in the Dominions of the Barma
Monarch”, British Library Ref. No. Mss Eur C13

MSS. Eur. C. 13.

Copy of a
Journal

of progress & observations
during the continuance of
the Deputation from Bengal
to Ava in 1795 in the
Dominions of the Burma
Monarch — by D. F. Buchanan.

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mistake to the Library & was
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Reading Library
from Exam. Office
4 Nov 1824

Recd. from Exam. Office
August 10th 1836.

no places of consequence to fill it up; and by some mistake he has placed Meguungre to the North of Patonago, and made the distance between Saingduayngye and Yamathayn too little. This is the draught marked N^o 1. He also gave me several routes, which are those in N^o 39 parts 1, 2, 3, 4 and 5. In this copy of the routes, the names for which I have not been able to procure the Burma orthography, are marked with an asterisk. It is to be observed, that he makes the whole of his distance between Muna and Saimmay to be 10 days journey, but the particulars only amount to 4 days and 40 leagues, which is 8 days in all. I suspect, that between Thanluayn and Thana ought in place of 7 leagues, have 2 days, a mistake I may readily have made. Amongst these take the Pabany of N^o 8.

For October 6. 7 & 8 see the end

October 9th. Having sent for some Arakan people in order to get a specimen of their language, 3 men were brought. They called themselves Ropawno, and said, that 2 of them were Barmans, and the other a Soodrie. Barmans it is to be observed, is the Bengala word, for what we call a Bramin. Their language was evidently the same with that of Bongan. They said that the Bongan name for Arakan is No. oing, a. They said, that they worshipped chiefly Veshnou, but that the King of Arakan worshipped Gustom, Godama or Boudde, and that his priests were called Puingree, or Puingye, as pronounced by the Burmas, the common appellation of their priests, signifies Great virtue. They said, that the natives of Arakan called themselves Rakain, their capital city Ropang, and the whole Kingdom Yaka-pura. I suspect these are by no means the real natives

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J. Crawford, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts”, in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), pp. 224–240

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CHAPTER

Responsibility for Breaches of Communitarian Norms: an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts

James Crawford

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Abstract

Nowadays it seems that international law develops more rapidly than international society does, seeking to serve as a tractor rather than a trailer, reversing Cicero's scheme of society and law. But where this happens, the developments may be fragile and called into question. A good illustration of this proposition can be seen in the debate as to the existence in international law of communitarian norms entailing obligations *erga omnes*, a debate carried on almost entirely in the abstract, with little or no reference to earlier instances of international adjudication or State practice. The idea was reflected, in the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) on first reading in 1996, in two unwieldy provisions, draft Article 19 (dealing with 'international crimes of States') and draft Article 40 (defining the 'injured State' to include, in the case of State crimes and in certain other cases, all States). On second reading, these proposals were radically changed. Draft Article 19 disappeared, being replaced by Articles 40 and 41 (dealing with consequences of serious breaches of peremptory norms). Draft Article 40 was transfigured, emerging as Articles 42 and 48 (distinguishing between the 'injured State' and other States entitled to invoke responsibility even though not individually injured by the breach). This chapter focuses on Article 48 and the accompanying notion of invocation of responsibility in the public interest.

Keywords: international law, responsibility, public interest, International Law Commission, international crimes international law, responsibility, public interest, International Law Commission, international crimes

Subject: Theory of International Law, Public International Law, History of Law

Ubi societas, ibi ius.

Cicero, *De Legibus* [1, 42]

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Introduction

It has been a commonplace since Roman times that it is society that requires and generates the law. This idea long raised questions on the international law plane, where the *jus gentium*—at least when unaided by natural law—was minimal and put to the test the existence of a *societas universalis*, an international society worthy of the name. Nowadays it seems that international law develops more rapidly than international society does, seeking to serve as a tractor rather than a trailer, reversing Cicero's scheme of society and law.¹ But where this happens, the developments may be fragile and called into question.

A good illustration of this proposition can be seen in the debate as to the existence in international law of communitarian norms entailing obligations *erga omnes*, a debate carried on almost entirely in the abstract, with little or no reference to earlier instances of international adjudication or State practice.² The idea was reflected, ^{p. 225} ↵ in the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) on first reading in 1996, in two unwieldy provisions, draft Article 19 (dealing with 'international crimes of States') and draft Article 40 (defining the 'injured State' to include, in the case of State crimes and in certain other cases, all States). On second reading, these proposals were radically changed. Draft Article 19 disappeared, being replaced by Articles 40 and 41 (dealing with consequences of serious breaches of peremptory norms). Draft Article 40 was transfigured, emerging as Articles 42 and 48 (distinguishing between the 'injured State' and other States entitled to invoke responsibility even though not individually injured by the breach). Much more attention has been paid in the literature to the debate over 'international crimes of State'.³ It is proposed here to focus on the other half of the equation, Article 48 and the accompanying notion of invocation of responsibility in the public interest.⁴

Article 48 was not adopted without criticism. Some governments expressed concern as to its breadth and potential for abuse, for 'opening the flood gates' of litigation,⁵ while some scholars⁶ complained that it is too weak compared with its predecessor, reflecting the notion of 'State crime'.

Subsequent practice gives no indication that these fears were substantiated. States do not seem inclined to bring international legal proceedings without good reason. If they choose to do so nevertheless, acting (or purporting to act) in the common interest of the international community, they should not be hindered by procedural technicalities. Better to give States standing in Court to protect what they perceive as global values than to leave them only with non-judicial means of dispute settlement, whether in the guise of countermeasures or under the rubric of 'responsibility to protect'. ^{p. 226} ↵

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Development of the Notion of Communitarian Norms in International Legal Doctrine

The concept of obligations owed to the international community as a whole is not new. Although there is no complete agreement on the enumeration of communitarian norms and although the law in this area is still developing, the principle that in certain cases any State had standing to protest against breaches of certain fundamental norms, and if necessary to institute proceedings to vindicate its interest as a member of the international community, has long been accepted.⁷

Sir Humphrey Waldock in his 1962 Hague Academy general course identified the 'beginnings of an organised international community',⁸ *inter alia*, in the establishment of the Permanent Court of International Justice in 1921 with the possibility of acceptance of its compulsory jurisdiction by a declaration and a 'widespread network of...dispute clauses in multilateral conventions'.⁹ Another sign of this emerging international community was the provisions aimed at making the well-being of individuals in certain respects a matter of international, as well as national, concern.¹⁰ These indicia could be seen translated into the law of State responsibility in the regimes of invocation and reaction to breaches of communitarian norms set out in Articles 48 and 54 of the ILC Articles on State Responsibility. The significance of these provisions is that they break the link between substantive rights and procedure which previously restricted the development of the law, giving rise to such implausibilities as draft Article 40. In the *Reparations* case, the Court said that 'only the party to whom an international obligation is due can bring a claim in respect of its breach'.¹¹ The problem with this proposition—unimpeachable in the context of bilateral norms, and indeed of the factual situation underlying that Opinion—is at least twofold. First, there is no collective entity with capacity to act, yet it seems extravagant to treat obligations, for example, in the environmental or human rights sphere, as owed individually to every State. The collective action problem in international law is not solved by prematurely turning collective obligations into bundles of bilateral obligations, in the manner of the early modern attempts at multilateral treaty-making.¹² Secondly, even though every State may have legitimate concerns at some breach of an international obligation, particular⁴ States may be particularly injured or affected by it, and their priority when it comes to reactions should be recognized.

In short, rather than reducing everything to the level of individually held substantive rights, Article 48 recognizes that certain communitarian norms are 'owed to the international community as a whole'.¹³ As a consequence every State has a procedural right, ie *locus standi* to invoke its application on behalf and for the benefit of the international community as a whole. This provision 'in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.¹⁴

The movement from bilateralism to a community-oriented approach in the work of the ILC can be traced back to Special Rapporteur Fitzmaurice's *Third Report on the Law of Treaties*.¹⁵ He proposed a distinction between 'interdependent' and 'integral' treaty obligations, affecting the capacity of States to derogate from them by a subsequent treaty and entailing their responsibility for doing so.¹⁶ Fitzmaurice gave as examples of interdependent obligations those whose violation by one party prejudices the treaty regime between all, for example, in the context of disarmament or of fishing moratoria.¹⁷ Integral obligations, on the other hand, were defined as 'self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others'; examples included obligations under the Genocide Convention, human rights conventions, the 1949 Geneva Conventions, International Labour Organization conventions, and treaties imposing the maintenance of a certain regime in a given area such as that of the Sounds and the Belts at the entrance of the Baltic Sea.¹⁸

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stand on the consequences of breaches of communitarian norms than the ILC. But such a possibility remains untested in judicial proceedings.

Future Prospects

Ever since the Court's dictum in *Barcelona Traction*, the concept of obligations *erga omnes* has been fascinating international lawyers,⁸³ despite Simma's telling observation that, to date, it remains in 'the world of the "ought" rather than that of the "is"'.⁸⁴ The same can be held true for the whole category of communitarian norms and the invocation of responsibility for their breaches on the international plane.

The ILC Articles on State Responsibility and the Draft Articles on Responsibility of International Organizations give teeth to communitarian norms with the potential to serve as a corrective tool for compliance with norms in the interest of all, for example, in the areas of the protection of human rights, of environmental law, and arms control. The will and power to make use of the communitarian vehicle remains at the discretion of each member of the international community. But, perhaps paradoxically, bilateralism remains the operational mode even in today's increasingly multilateral international affairs, bringing to mind Judge Simma's metaphor 'of planets and the Universe'.⁸⁵

The possibilities envisaged by the ILC and others put to the test whether the international State system has evolved into an international society, capable of protecting its avowedly shared values; or, to recast Cicero's phrase, whether one has good reason to assert *ibi ius gentium, ubi societas*.

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Notes

- * The author would like to thank Ms Rumiana Yotova of St Catharine's College, Cambridge, for her considerable assistance.
- 1 That this can happen is evidenced by the EU, which is very much 'law-led'. See, eg, Treaty of Lisbon [2007] OJ C306/01, 17 December 2007, entered into force on 1 December 2009, Art 1(1)(a).
 - 2 See J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 408; for some precursors of the idea see C Tams, *Enforcing Obligations 'Erga Omnes' in International Law* (Cambridge University Press, 2005) ch 5.
 - 3 Crawford, 'Multilateral Rights and Obligations' (n 2) 452–77; and see further J Crawford, 'International Crimes of States' in J Crawford, A Pellet, and S Olleson, *The Law of International Responsibility* (Oxford University Press, 2010) 405–15; A Ollivier, 'International Criminal Responsibility of the State' in *ibid*, 703–17.
 - 4 Bruno Simma has himself illuminated this field: see 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217. For my own critique of draft Art 40 see J Crawford, 'The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility' in M Andenas (ed), *Judicial Review in International Perspective. Liber Amicorum for Gordon Slynn* (Kluwer, 2000) 25.
 - 5 See J Crawford in ILC, *Fourth Report on State Responsibility*, Fifty-third session of the International Law Commission (23

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- April–1 June and 2 July–10 August 2001) A/CN.4/517, paras 39 and 41 for the comments of Japan and France. See also ILC, *Third Report on State Responsibility*, Fifty-second session of the ILC (1 May–9 June and 10 July–18 August 2000) A/CN.4/507, nn 141–3 referring to the comments of Italy (A/CN.4/488/Add.2,3); Venezuela (A/CN.4/504, para 62); Austria and the United States (A/CN.4/488 97 and 99).
- 6 A Cassese, *International Law* (2nd edn, Oxford University Press, 2005) 269–71.
 - 7 L Oppenheim et al, *Oppenheim's International Law* (9th edn, Longman, 1992) Vol I, 5.
 - 8 H Waldock, 'General Course on Public International Law' (1962) 106 *Recueil des Cours* 1, 5.
 - 9 *Ibid*, 11.
 - 10 *Ibid*, 13.
 - 11 *Reparations for Injuries suffered in the Service of the United Nations* (Advisory Opinion) [1994] ICJ Rep 149, 181–2.
 - 12 K Marek, 'Contribution à l'Étude de l'Histoire de Traité Multilateral' in E Diez and R Bindschedler (eds), *Festschrift für Rudolf Bindschedler* (Stämpfli, 1980) 17–39.
 - 13 See, in the context of international criminal responsibility, Rome Statute for the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 Art 5(1); see further ILC, 'Draft Statute for the International Criminal Court' [1994] II(1) Ybk ILC 21, 26, Preamble.
 - 14 J Crawford in ILC, *Fourth Report on State Responsibility* (n 5) para 42.
 - 15 Sir G Fitzmaurice in ILC, 'Third Report' [1958] II Ybk ILC 20, 44, Art 19 and commentary.
 - 16 ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] I(2) Ybk ILC 216, para 8.
 - 17 *Ibid*, n 117.
 - 18 *Ibid*, n 117.
 - 19 *Ibid*, 217, para 13.
 - 20 The *Wimbledon* was a British-flagged vessel demise-chartered to a French company, the demise charterer taking the risk of delay. In the event only France recovered damages: *Case of the SS 'Wimbledon' (Great Britain and others v Germany)* (Judgment of 17 August 1923) PCIJ Rep Series A No 1, 15, 33.
 - 21 *Ibid*, 20.
 - 22 *Ibid*, 28.
 - 23 H Grotius, *Mare Liberum* (1609, reprinted by Liberty Fund, 2004) ch I, 11 ('*qui iure humanae societatis aequissimo patere debebat*').
 - 24 Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question (October 1920) LONJ, Special Supplement No 3, 17.
 - 25 *Ibid*, 19 (emphasis added).
 - 26 *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 153 (Separate Opinion by Sir Arnold McNair).
 - 27 J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325, 344.
 - 28 M Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997) 17.
 - 29 See, to this effect, the conclusions of the ILC in its *Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Fifty-eighth Session of the ILC (1 May–9 June and 3 July–11 August 2006) A/CN.4/L.682, 193, para 381.
 - 30 *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, 32, para 33.
 - 31 *Ibid*, 32, para 34.
 - 32 *Case Concerning South West Africa, Second Phase (Ethiopia v South Africa and Liberia v South Africa)* [1966] ICJ Rep 6, 35, para 54.
 - 33 Judges Jessup and Tanaka appended Dissenting Opinions on this point.
 - 34 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Rep 6, 31 and 52, paras 64 and 125.
 - 35 Vienna Convention on the Law of Treaties (opened for signature 22 May 1969) 1155 UNTS 331, Arts 53 and 64.
 - 36 See, most recently, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 22 July 2010 (<http://www.icj-cij.org/docket/files/141/15987.pdf>) accessed 17 August 2010, para 81, referring to 'egregious violations of norms of general international law, particularly those of peremptory character (*jus cogens*)':
 - 37 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 56, para 126.
 - 38 *Case Concerning Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, 474, para 52.
 - 39 *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102, para 29.
 - 40 Judge Weeramantry appended a strong dissenting opinion on this point: *ibid*, 139–223.
 - 41 *Donoghue (or McAlister) v Stevenson* [1932] AC 562 (HL).
 - 42 *Underhill v Hernandez* 168 US 250 (1897).
 - 43 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Rep 6, 31 and 52, paras 64 and 125.
 - 44 *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 117–18.
 - 45 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Annual Report of the ILC on its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) A/56/10 ch IV, endorsed by UNGA Res 56/83 (12 December 2001) 116, n 664.
 - 46 ILC, *Responsibility of International Organizations*, Report of the Drafting Committee adopted on its Sixtieth session (5 May–

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J. Crawford, “The International Court of Justice and the Law of State Responsibility”, in C. Tams and J. Slone (eds.), *The Development of International Law by the International Court of Justice* (2013), pp. 71-86

5

The International Court of Justice and the Law of State Responsibility

James Crawford, AC SC

1. Introduction

Hersch Lauterpacht wrote *The Development of International Law by the Permanent Court of International Justice* in 1934; in 1958 he produced a second edition, bringing it up to date in relation to the International Court of Justice (ICJ).¹ Though the books are now dated, they are well written and still worth reading. In particular, the first offers a valuable perspective on the mind-set of international lawyers at the time when the process of the Permanent Court of International Justice (PCIJ) was still being formed. The international court system is often thought of as having been established for an extended period of time; but the fate of the PCIJ was unknown in 1923. By 1934, Lauterpacht had provided a canonical account of the judicial method in relation to the PCIJ, demonstrating the great capacity of the man. The following discussion will take a synoptic view of the relationship between the World Court, the phrase used to cover both the PCIJ and the ICJ, and the law of state responsibility, before turning to more recent events.

2. Contribution of the PCIJ to the law of state responsibility

The PCIJ and the ICJ – the most continuous of the various interwar bodies that were transmitted, and transmuted, in 1945 – share a number of common features. Both courts started their careers with an important adversarial state responsibility case: *Wimbledon*² was the first for the PCIJ; *Corfu Channel*³ for the ICJ. It is significant that in both of these cases the Court awarded damages, which was not

¹ H Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) and *The Development of International Law by the Permanent Court of International Justice* (London/New York/Toronto: Longmans Green and Co., 1934).

² *SS 'Wimbledon' (UK, France, Italy, Japan, Poland [Intervening] v Germany)*, (1923) PCIJ Ser A No 1.

³ *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4.

ILC and the ICJ in this field. This is fascinating because the tasks of these two bodies are completely different. The function of the ILC is to draft texts that can be adopted as treaties, thus becoming part of international law. But at the same time, the ILC is tasked with codifying international law and bestowing authority on its work to some extent independent of the happenstance of treaty ratification.¹⁷ It has been relatively successful in accomplishing this, certainly in the first phase of its operations (working on the law of the sea, the law of treaties, and the law of diplomatic and consular relations), and to a lesser extent in the second phase (working on water-courses, state immunity, state responsibility, among other subjects).

The function of the Court, on the other hand, is to decide cases. The Court's advisory opinions have been important in terms of establishing the institutional law of the UN as an international organization,¹⁸ but with certain rather limited exceptions they have not contributed much to the law of state responsibility. Instead, the contentious cases have informed this area of international law, the main exception being the *Wall* Opinion.¹⁹

What the Court needs when dealing with cases involving state responsibility is a measure of flexibility. Difficult inter-state cases cannot be decided according to a formula; the specific circumstances of the case need to be examined. The Court is very responsive to the factual context of cases. This feature of the Court's jurisprudence is evident in, for example, *Corfu Channel*, where the Court held that although the United Kingdom had violated international law by conducting a forcible mine-sweeping operation in Albanian waters, in the circumstances the declaration of illegality alone was sufficient reparation – a clearly discretionary and flexible finding.²⁰

The ILC in codifying the law of state responsibility had to lay down general rules, which to some extent involved inventing them. The rules of state responsibility have been derived from cases, from practice, and from often unarticulated instantiations of general legal ideas. This is demonstrated by Article 48 of the ILC Articles on State Responsibility which deals with the invocation of responsibility by a state other than an injured state.²¹ The rules in Article 48 were not part of international law before they were formulated in that article. Of course, the article was drafted from existing material, but that material did not predetermine the question.²² The difficulty in distinguishing between codification and progressive development is plainly visible from this example.

¹⁷ Art 1, para 1 of the Statute of the ILC (adopted in GA Res 174 (II) of 21 November 1947) provides that the 'Commission shall have for its object the promotion of the progressive development of international law and its codification'.

¹⁸ See further Sloan's and Hernández's contribution to this volume at Chapter 10.

¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 140–60.

²⁰ *Corfu Channel* (n 3) 36.

²¹ ILC Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Ybk* 2001/II(2), 26, 126.

²² On Art 48 see J Crawford, 'Responsibilities for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Wrongful Acts' in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: OUP, 2011) 224.

on the state which is responsible for the breach – the obligation of non-recognition, going back to the Stimson doctrine,⁶⁸ and the obligation not to assist that state in maintaining the unlawful situation.

Just as the concept of state crimes was highly controversial in the debate on the second reading, so too was the residue of this concept – the consequences of serious breaches of fundamental norms. There are those who regard international responsibility as functioning between two states on a level playing field (formally level, that is), and who consider alternative conceptions of responsibility that bring in third states as contrary to that basic idea. But responsibility can also operate as between states and non-states⁶⁹ and is not necessarily horizontal in the way in which the equality of states is presented as horizontal. Responsibility can involve third parties, up to and including the international community as a whole. There is debate about this proposition, because the international community as a whole is read by the 'horizontalists' as being limited to a community of states. This view is reflected in the definition of *jus cogens* in Article 53 of the VCLT: 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.⁷⁰

But the international community itself is no longer limited to states. The European Union, for example, which is not a state, is undoubtedly part of the international community. Palestine, which was granted 'non-member observer State status' in the UN on 29 November 2012⁷¹ and is recognized by around 130 states, has had some, indeterminate status since 1988. The International Committee of the Red Cross, an international person, a party to treaties, is very much part of the international system, but is of course not a state. Other examples, more or less contentious, can be added. The system of international responsibility is now diversified and the Articles reflect that. One of the ways in which that diversity is reflected is through the idea that serious breaches of *jus cogens* norms give rise to special consequences for third states. The opposite conclusion would imply that we are still in an atomic international system. If third states are not obliged to do anything when faced with apartheid then we are still in a Hobbesian world. This is a question of fundamental significance.

And it is of fundamental significance that some states are now advocating a diplomatic conference on the ILC Articles in order to remove Article 48 and the other articles that embody this idea. The problem is still there, having gone through several forms, and the Court has made it clear on which side of the line it stands in

⁶⁸ The Stimson doctrine is a policy of the US federal government of non-recognition of international territorial changes that were executed by force, an application of the principle of *ex injuria jus non oritur*. See eg Lord Arnold D McNair, 'The Stimson Doctrine of Non-Recognition' (1933) 14 *BYIL* 65; H Lauterpacht, *Recognition in International Law* (Cambridge: CUP, 1947); B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons Ltd, 1953, repr 1987 by Grotius Publications, and in 1994 and 2006 by CUP) 187.

⁶⁹ See eg R Ago, Second Report on State Responsibility, *ILC Ybk* 1970/II, 182–5.

⁷⁰ 22 May 1969, 1155 UNTS 331, Art 53 (emphasis added).

⁷¹ GA Res 67/19 of 29 November 2012.

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K. Dormann and R. Geis, “The Implementation of Grave Breaches into Domestic Legal Orders”, *Journal of International Criminal Justice*, vol. 7 (2009), pp. 703-721

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The Implementation of Grave Breaches into Domestic Legal Orders

Knut Dörmann* and Robin Geiß**

Abstract

States are required to implement grave breaches within their domestic criminal law. The obligation to enact legislation necessary to provide effective penal sanctions in relation to grave breaches lies at the heart of any meaningful prosecution of grave breaches of the Geneva Conventions. Knowing what is required of states and understanding the different models of implementation is essential. Yet, despite its importance, this specific obligation has led a somewhat shadowy existence, often neglected in state practice and academic research. It is against this background that the present contribution aims to bring into focus the scope and precise content of this somewhat ambiguously formulated obligation.

1. Introduction

In the 60 years that have passed since the adoption of the Geneva Conventions, the national implementation of the grave breaches regime has received relatively little attention.¹ To a large extent this may be attributed to the simple fact that almost all states politically endorsed the adoption of the grave

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1 M. Bothe, 'The Role of National Law in the Implementation of International Humanitarian Law', in E. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* (Dordrecht: Martinus Nijhoff, 1984), 301, at 307. But see E. Blenk Knocke, *Zu den soziologischen Bedingungen völkerrechtlicher Normenbefolgung* (Ebelsbach: Rolf Gremer, 1979), at 90; M. Bothe et al. (eds), *National Implementation of International Humanitarian Law* (London: Martinus Nijhoff, 1990); H. Fischer, C. Kreß, and S.R. Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Arno Spitz, 2001); H. Kreicker, 'Völkerstrafrecht im Ländervergleich', in A. Eser, U. Sieber, and H. Kreicker (eds), *National Prosecution of International Crimes* (Vol. 7, Berlin: Max Planck Institute, 2006).

national provision may refer to international provisions that are drafted in a language that is different from the official working language of the domestic criminal justice system in which the offence is to be prosecuted.⁴² Some of the pitfalls inherent in the translation and accommodation of international legal provisions into national criminal justice systems that national legislatures would have to cope with if an autonomous domestic legal basis (see below) was to be adopted, and that at first sight are seemingly omitted under the reference model, are merely transferred to the judiciary (individual judges) who have to implement these references in practice. Finally, the reference model — depending on its specific set up — may raise further concerns in view of the principle of legality if it does not provide for a differentiation in terms of the penalty in accordance with the gravity of the act.

B. Autonomous National Legal Basis

The alternative to a reference model is an autonomous national legal basis for the prosecution of grave breaches. Under this model, the national legal basis could be found either in the state's ordinary criminal law, in specific provisions that are nevertheless accommodated within the state's ordinary criminal law (code), or in a stand-alone national law specifically designed to prosecute grave breaches, war crimes or international crimes generally. Irrespective of whichever of these options is chosen, an autonomous national legal basis, when compared to the reference model, arguably lays down more clearly and predictably which types of conduct are considered criminal and punishable. The German '*Völkerstrafgesetzbuch*' adopted in 2002 exemplifies this methodology. Concerns over the adherence to the principle of legality may remain only in so far that even if the grave breaches definitions are transferred into specific criminal provisions on the domestic level, the terminologies these offences inevitably employ such as 'international armed conflict', 'persons or property protected' or 'prisoner of war' still need to be interpreted in light of definitions derived from relevant provisions of IHL.⁴³

1. Ordinary Criminal Law

A number of states still rely on an unmodified criminal code as a basis for incorporation of grave breaches into their domestic legal order. For example, Turkey,⁴⁴

42 See W. Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts', in this issue of the *Journal*.

43 See also ICRC Advisory Service in the Legal Division, National Enforcement of International Humanitarian Law Information Kit, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5XDJ4G/\\$FILE/Kit national enforcement.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5XDJ4G/$FILE/Kit%20national%20enforcement.pdf?OpenElement) (visited 20 July 2009).

44 S. Tellenbach, 'Turkey', in A. Eser, U. Sieber, and H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 6 (Berlin: Max Planck Institute, 2006) 393, at 401.

France,⁴⁵ Israel,⁴⁶ Austria,⁴⁷ and until recently (i.e. until the adoption of the *Völkerstrafgesetzbuch* in 2002), also Germany,⁴⁸ posit that their domestic criminal law is adequate to cover the various offences contemplated in the grave breaches regime.⁴⁹ In essence, this position amounts to a rejection of the need to implement specific legislation at all, in sharp contrast to the need felt by the majority of other states.

Modern penal codes provide for the punishment of a number of different types of conduct, they are often rather detailed, quite nuanced and therefore comprise various forms of behaviour. Certainly, most of the grave breaches, such as murder or wilfully causing great suffering or serious injury to body or health, can readily be subsumed under ordinary criminal law provisions. On the positive side of things, the clear advantage of this model is that national judicial bodies are well accustomed to apply these criminal provisions which are already well accommodated within the national criminal justice system. Evidently, for many states, this will beg the question why they should instigate a burdensome legislative process that will only increase the density of their criminal law provisions in ways that appear to duplicate pre-existing law. Specific legislation incorporating grave breaches soon becomes a low priority in comparison with other more pressing matters.

Yet, while some of the grave breaches can readily be subsumed under regular domestic offences, this is not necessarily the case in relation to the entire list of grave breaches. Even when it is possible to treat wilful killing as murder or pillage as theft, it is doubtful whether the specific injustice is adequately reflected by the domestic provision. Torture is a form of assault; coercion to serve in the enemies forces a form of criminal coercion in most civil law countries, but their gravity is not adequately conceptualized as simply assault or coercion. Other forms of prohibited behaviour may be so specific to the armed conflict context that they are even less readily subsumable under ordinary criminal law provisions. Which common penal provision, for example, could adequately reflect the specific injustice of transferrals by the occupying power of parts of its own civilian population into occupied territory? Ordinary criminal law offences, primarily designed to regulate behaviour during times of peace, do not grasp the specific war-nexus of the grave breaches and thus fail to fully capture the nature and dimension of the offence that establishes the particularity and gravity of these breaches. Theoretically, of course, this latter issue could be resolved by including aggravating or

45 J. Lelieur Fischer, 'France', in A. Eser, U. Sieber, and H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 4 (Berlin: Max Planck Institute, 2006) 222, at 255.

46 M. Kremnitzer and M.A. Cohen, 'Israel', in A. Eser, U. Sieber, and H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 5 (Berlin: Max Planck Institute, 2006) 317, at 347, who point out the exception of the Nazi and Nazi Collaborators (Punishment) Law, 1950.

47 I. Zerbes, 'Austria', in A. Eser, U. Sieber, and H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 3 (Berlin: Max Planck Institute, 2006) 85, at 96.

48 H. Gropengießer and H. Kreicker, 'Germany', in A. Eser and H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 1 (Berlin: Max Planck Institute, 2006) 21, at 61.

49 Kreicker, *supra* note 1, 30, at 31.

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K. S. Gleditsch, D. E. Cunningham and I. Salehyan, “Non-State Actor Data, Version 3.4”, 10 April 2013

Available at:

http://ksgleditsch.com/data/NSAEX_casedesc.pdf

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Non-State Actor Data: Version 3.4

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April 10, 2013

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Chapter 22

ID 25

ID 25

Incompatibility: Territory, Arakan

Myanmar (then Burma) gained independence in 1948 and immediately faced insurgency in many areas. One of these was in Arakan, a region of Myanmar that borders Bangladesh and that is dominated by two groups—the Rakhine, who are Buddhist, and the Rohingya, who are Muslim. The insurgency initially contained two main groups. The first was the Arakan People’s Liberation Party (APLP), a Buddhist organization that fought from 1948 until they accepted a general amnesty in 1958. The second was the Mujahid Party, which was made up of many Muslim World War II veterans. The Mujahid Party fought and controlled parts of northern Arakan, but lost control of most of it by 1954. The organization continued to launch some offensives, but its remaining members surrendered in 1961. In the 1960s, a number of small Arakan insurgent groups battled the government, but with little effectiveness. These organizations included the Communist Party of Arakan, the Arakan National Liberation Party (ANLP), the Rohingya Patriotic Front (RPF), and the Arakan Liberation Party (ALP).

Dyad 312: Burma/Myanmar vs. Rohingya Solidarity Organisation

Dyad 323: Burma/Myanmar vs. Arakan Rohingya Islamic Front

Dyad 794: Burma/Myanmar vs. RPF

Rebel Political Wing: No

The RPF was primarily a military organization.

Rebestimate: unclear

Rebstrength: much weaker

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UCDP provides no estimate for the number of troops possessed by the RPF. However, it is clear that the organization was much smaller than the Burmese army, although the Burmese army was torn because it faced insurgency across the country.

Central Control: Yes

Strength Central Control: Moderate

The RPF generally operated as a coherent organization.

Mobilization Capacity: Moderate

Arms Procurement Capacity: Low

Fighting Capacity: Low

The Rohingya were a majority in the area that the RPF operated and it had the potential to draw a lot of support from them. However, this was a small military organization that was outmatched by the Burmese army in its ability to fight or procure arms.

Territorial Control: No

The RPF did not appear to control territory in Arakan.

Conflict Type: Secessionist

Transnational Constituency Support: No

Rebel External Support: No

Rebel Presence in External States: No

Rebel Support: No

I could find no reference to support to the rebels in this period.

Government Support: No

Non-state military support to Government: No

The Burmese government did not appear to receive external support in this period.

Ended?: Yes

Type of Termination: Low Activity

This dyad did not reach 25 battledeaths after 1978.

Dyad 795: Myanmar vs. ALP

Rebel Political Wing: No

The ALP was primarily a military organization.

Rebestimate: unclear

Rebstrength: much weaker

UCDP provides no estimate for the number of troops possessed by the ALP. However, it is clear that the organization was much smaller than the Burmese army, although the Burmese army was

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torn because it faced insurgency across the country.

Central Control: Yes

Strength Central Control: Moderate

The ALP generally operated as a coherent organization.

Mobilization Capacity: Low

Arms Procurement Capacity: Low

Fighting Capacity: Low

The ALP was a very small organization with little popular support, weapons, or ability to fight.

Territorial Control: No

The ALP did not appear to control territory in Arakan.

Conflict Type: Secessionist

Transnational Constituency Support: No

Rebel External Support: No

Rebel Presence in External States: No

Rebel Support: No

I could find no reference to support to the rebels in this period.

Government Support: No

Non-state military support to Government: No

The Burmese government did not appear to receive external support in this period.

Ended?: Yes

Type of Termination: Victory

Victory Side: A

The ALP was wiped out in clashes with the Burmese army in 1977.

Dyad 800: Burma/Myanmar vs. Mujahid Party

Period 1: 1948-1954

Rebel Political Wing: No

The Mujahid Party was primarily a military organization.

Rebestimate: unclear

Rebstrength: weaker

I could find no estimate of the number of troops possessed by the Mujahid. The Burmese national army was quite small in this period, and was actually outnumbered by the total number of insurgents in the country, who were spread among many groups.

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Central Control: Yes

Strength Central Control: High

The group had a clear leadership in this period.

Mobilization Capacity: High

Arms Procurement Capacity: Moderate

Fighting Capacity: Moderate

The Mujahid had a lot of support in this area, particularly compared to the Burmese government. Many of the members of the Mujahid were veterans from World War II and so had combat experience.

Territorial Control: Yes

Name of Territory: Much of northern Arakan

Level of effective territorial control: moderate

The Mujahid controlled much of northern Arakan into 1954.

Conflict Type: Secessionist

Transnational Constituency Support: No

Rebel External Support: No

Rebel Presence in External States: No

Rebel Support: No

I could find no reference to support to the rebels in this period.

Government Support: No

Non-state military support to Government: No

The Burmese government did not appear to receive external support in this period.

Period 2: 1955-1961

Rebel Estimate: 500

Rebel Estimate (low): 500

Rebel Estimate (high): 500

Rebstrength: much weaker

Martin Smith (1999, p. 194) reports that "some 500 heavily-armed 'Rohingya' Mujahid guerrillas commanded by Rauschild Bullah and Mustafiz" surrendered in 1961. The numbers of fighters prior to 1961 were almost certainly higher, but no specific reference to this was found.

Territorial Control: No

The Mujahid Party's military leader was arrested in East Pakistan in 1954, and after his arrest the Burmese army recaptured most of northern Arakan.

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Ended?: Yes

Type of Termination: Victory

Victory Side: A

The conflict ended in 1961 when the remaining Rohingya fighters surrendered to the Burmese army.

Dyad 801: Burma/Myanmar vs. ANLP

Rebel Political Wing: No

The ANLP was primarily a military organization.

Rebel Estimate: 120

Rebel Estimate (low): 120

Rebel Estimate (high): 120

Rebstrength: much weaker

Smith (1988, p. 239) reports that the ANLP reached a maximum of 120 guerilla fighters in the mid-1970s. This number was clearly much lower than that possessed by the Burmese army.

Central Control: Yes

Strength Central Control: Moderate

The ANLP generally operated as a coherent organization.

Mobilization Capacity: Low

Arms Procurement Capacity: Low

Fighting Capacity: Low

The ANLP was a very small organization with little popular support, weapons, or ability to fight.

Territorial Control: No

The ANLP did not appear to control territory in Arakan.

Conflict Type: Secessionist

Transnational Constituency Support: No

Rebel External Support: No

Rebel Presence in External States: No

Rebel Support: No

I could find no reference to support to the rebels in this period.

Government Support: No

Non-state military support to Government: No

The Burmese government did not appear to receive external support in this period.

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Ended?: Yes

Type of Termination: Low Activity

This dyad did not reach 25 battledeaths again after 1972.

Sources:

- UCDP
- Smith, Martin (1988). *Burmas: Insurgency and the Politics of Ethnicity*. London: Zed Books.

Dyad 802: Burma/Myanmar vs. Communist Party of Arakan

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A. Hofer, “The Beliefs & Practice of Enforcing Collective Obligations Through Unilateral Sanctions”, doctoral thesis, Ghent University, 2019



**THE BELIEFS & PRACTICE OF ENFORCING
COLLECTIVE OBLIGATIONS THROUGH
UNILATERAL SANCTIONS**

A dissertation submitted to Ghent University by

Alexandra Hofer

Student number: 01413902

in partial fulfilment of the requirements for the degree of Doctor of Law

Supervisor: Prof. Dr. Tom Ruys

Guidance Committee: Prof. Dr. Frank Maes & Prof. Dr. Frédéric Dopagne

Academic year: 2018 - 2019



**THE BELIEFS & PRACTICE OF ENFORCING
COLLECTIVE OBLIGATIONS THROUGH
UNILATERAL SANCTIONS**

ALEXANDRA HOFER

A dissertation submitted to Ghent University in partial fulfilment of the
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Turning to third-party countermeasures' second gene pool, obligations *erga omnes* were officially introduced by the World Court in the *Barcelona Traction* case in the following, well known dictum:

... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (...); others are conferred by international instruments of a universal or quasi-universal character.¹¹²

As we noted above, the rules in ARSIWA Art. 48 were “invented” by the ILC while also giving expression to the *Barcelona Traction* dictum, albeit without using the term “obligations *erga omnes*”.¹¹³ According to Crawford, the Court’s introduction of obligations owed to the international community as a whole was a manifestation of Special Rapporteur

¹¹² Case Concerning the *Barcelona Traction, Light and Power Company, Limited* (Bel. v. Sp.), 1970 ICJ REP. 3 (Feb. 5), paras 33-34. Although discussions around the concept of multilateral obligations had started prior to the Court’s formulation in *Barcelona Traction*, discussed in TAMS (2005), note 9, chapter 2.

¹¹³ Tams at 298-299 in (Chinkin & Baetens, 2015) note 21. But see ARSIWA with commentaries, note 8, Art. 48, 127, para. 8. Further references by the Court to obligations *erga omnes* and their legal consequences after ARSIWA’s adoption in: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 159 (July 9); Questions Relating to the Obligation to Prosecute or Extradite (Bel. v. Sen.), Judgment, 2012 ICJ REP. 422, paras 68 to 70 (July 20). Individual opinion by Judge Simma, paras 38-40, to Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 ICJ REP. 168 (Dec. 19).

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T. Hoffmann, “The Crime of Genocide in Its (Nearly) Infinite Domestic Variety”, in M. Odello and P. Łubiński (eds.), *The Concept of Genocide in International Criminal Law—Developments after Lemkin* (2020), pp. 67-97

**The Concept of Genocide in
International Criminal Law**

Developments after Lemkin

Edited by Marco Odello and
Piotr Łubiński

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4 The crime of genocide in its (nearly) infinite domestic variety

*Tamás Hoffmann*¹

International unity and domestic fragmentation of the definition of the crime of genocide

Since the adoption of the Genocide Convention by the United Nations General Assembly on 9 December 1948, the crime of genocide has been universally regarded as the “crime of crimes”² in international criminal law.³ Article II of the Convention defined genocide as:

[a]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

In contrast to all other international crimes, the legal concept of genocide has remained unchanged ever since on the international plane. The Genocide Convention’s definition was adopted and reiterated verbatim in the statutes of all international and internationalized criminal fora whose material jurisdiction extended to genocide – thus it was followed by the International Criminal

¹ This publication is based on research supported by the Corvinus Institute for Advanced Studies. I would like to thank and acknowledge the assistance of Mirwais Janan with the translation of the relevant section of the Criminal Code of Afghanistan, and Guido Acquaviva and Kevin Jon Heller for their comments on the draft. The usual caveats apply.

² *Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16.

³ Convention on the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277.

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Tribunal for the Former Yugoslavia (ICTY),⁴ the International Criminal Tribunal for Rwanda (ICTR),⁵ the International Criminal Court (ICC),⁶ the Iraq High Tribunal,⁷ and the Extraordinary Chambers of the Courts of Cambodia.⁸ Such consensus and consistency might seem obvious since, after all, the prohibition of genocide has achieved *jus cogens* status,⁹ and as a peremptory norm of general international law it can only be modified by “the international community of States as a whole.”¹⁰

Given the general acceptance of this construction and the widespread ratification of the Genocide Convention¹¹ and the Rome Statute of the ICC,¹² one could reasonably expect that the domestic definitions of the crime of genocide would be identical to the international one. Until now, the scholarly literature only focused on a select number of jurisdictions and generally held that even though there are a few notable examples of changes in domestic criminal legislation, these can be seen as aberrations. However, after conducting for the first time a comprehensive review of the domestic criminal laws of 196 countries (all 193 UN member states and the Holy See, Kosovo, and Palestine) and the Special Administrative Region of Macao, I have found that the differences are actually much more significant than hitherto assumed, since 100 countries and the Special Administrative Region of Macao have opted to change through their national implementations at least some aspects of the internationally recognized definition of genocide, often significantly expanding or limiting the scope of application of the crime.¹³

4 Art. 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. UN Doc. S/RES/827 (1993).

5 Art. 2 of the Statute of the International Criminal Tribunal for Rwanda. UN Doc. S/RES/955 (1994).

6 Art. 6 of the Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90.

7 Art. 11 of Law No. (10) 2005 of the Iraqi Higher Criminal Court, 18 October 2005.

8 Art. 9 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea of 2003.

9 *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 64. International Law Commission, Peremptory norms of general international law (*jus cogens*). Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, 29 May 2009. Annex (b). UN Doc. A/CN.4/L.936.

10 Art. 53 of the Vienna Convention on the Law of Treaties (1980) 1155 U.N.T.S. 331.

11 The Genocide Convention currently has 152 States Parties. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdsg_no=IV-1&chapter=4 [downloaded on 8 September 2019].

12 A total of 122 countries are currently States Parties to the Rome Statute. See https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [downloaded on 8 September 2019].

13 During the research I have always used the original language of the domestic criminal law if it was in English, German, French, Hungarian, Italian, Spanish, or Portuguese. In all other

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This chapter first classifies the different ways domestic criminal legislation can restrict or expand the scope of application of the crime of genocide, and then explains the potential reasons for these changes. Finally, I speculate on the potential ramifications of the existence of these domestic varieties on the development of the international law of genocide.

Changing the scope of application of the crime of genocide through national implementation

Art. 5 of the Genocide Convention requires that states adopt “the necessary legislation to give full effect to [its] provisions,” but it does not create an international obligation to incorporate the precise definition of genocide in the member states’ criminal legislation. Similarly, Members of the Rome Statute undertake an obligation to avoid “the culture of impunity” by prosecuting the international crimes within the material jurisdiction of the ICC, but this does not include codifying the exact same terms. Even though the principle of complementarity promotes national implementation since states want to avoid being declared “unable to prosecute”¹⁴ and thus have to take measures to make their domestic legal systems compatible with the Statute, in practice states have often retained older and different definitions of international crimes.¹⁵

The application of international legal norms in domestic legal systems is dependent on the respective national constitutional framework, which is traditionally classified either as monist (if domestic law and international law constitute a single system) or dualist (if the domestic legal order is separate from international law).¹⁶ Even though theoretically courts could directly apply customary law norms and consequently prosecute international crimes in monist and even in some dualist countries, in practice most countries prefer to enact implementing legislation to avoid potential complications during domestic criminal proceedings. However, national implementation might result in either limiting or expanding the scope of application of the crime of genocide.

instances I had to rely on the available English translations, which could potentially result in mistakes.

14 Jan K. Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law” 1 (2003) *Journal of International Criminal Justice* 86–113, at 88.

15 Julio Bacio Terracino, “National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC” 5 (2007) *Journal of International Criminal Justice* 421–440, at 423.

16 For a thorough examination of the relationship between domestic and international law, see Dinah Shelton (ed.) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011).

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Limiting the scope of application of the crime of genocide

Limiting the scope of application of the crime of genocide by excluding specific protected groups

Currently nine states have chosen to omit specific protected groups from their domestic criminal legislation. Racial groups are not included in the definition of genocide in Bolivia,¹⁷ Ecuador,¹⁸ Guatemala,¹⁹ Paraguay,²⁰ and Peru²¹; and national groups are missing from the criminal code of Nicaragua,²² while ethnic groups are excluded from the criminal law frameworks of Costa Rica,²³ El Salvador,²⁴ and Oman.²⁵ It must be emphasized, however, that none of these states opted to exclude more than one protected group. This is potentially significant as the exact definition of protected groups is far from obvious. Even though the ICTR attempted to define them based on objective criteria and clearly delineated them,²⁶ that approach is not generally accepted. Raphael Lemkin himself originally described genocide as “the destruction of a nation or of an ethnic group,”²⁷ and Schabas convincingly argues that in practice it is often virtually impossible to differentiate between protected groups since these terms “not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection.”²⁸ Consequently, the absence of reference to a national, ethnic, or racial group from the domestic definition of genocide might not necessarily result in excluding a targeted group from protection. Moreover, most of these countries added social or political groups to their lists of protected groups, which counterbalances this omission.²⁹

17 Art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972.

18 Art. 79 of the Criminal Code of the Republic of Ecuador of 2014.

19 Art. 376 of the Criminal Code of the Republic of Guatemala of 1973.

20 Art. 319 of the Criminal Code of the Republic of Paraguay of 1997.

21 Art. 319 of the Criminal Code of the Republic of Peru of 1991.

22 Art. 484 of the Criminal Code of the Republic of Nicaragua of 2007.

23 Art. 382 of the Criminal Code of Costa Rica of 1998.

24 Art. 361 of the Criminal Code of the Republic of El Salvador of 1997.

25 Art. 88 of the Royal Decree No. 110 on the Military Jurisdiction Law of the Sultanate of Oman of 2011.

26 In the *Akayesu* case, the ICTR defined national groups as a collection of people sharing the same citizenship (para. 512), ethnic groups as people sharing a common language and culture (para. 513), and racial groups as people sharing “hereditary physical traits often identified with a geographical region” (para. 514), while religious groups were characterized by “the same religion, denomination or mode of worship” (para. 515). *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998.

27 Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944) 79.

28 William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2010) 129.

29 See “‘Over-definition’ of protected groups,” below.

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On the other hand, the Latvian approach is somewhat different as it did not specifically exclude religious groups but instead only included a smaller subset by protecting “defined religions.”³⁰ This is potentially problematic as it might not extend to smaller religious groups³¹ or people sharing common spiritual ideas.³² Similarly, the Dari language version of the Criminal Code of Afghanistan replaces *ethnic groups* with *tribal groups*. However, this seems to be a translation error as the Pashto language version retains the original international definition.³³

Limiting the scope of application of the crime of genocide by including the requirement of a genocidal plan

There has been a recurring debate in international scholarship concerning the necessity of including a “contextual element” to the definition of genocide; i.e. whether an individual genocidal act has to be committed in a broader context forming part of other similar acts against the protected groups, or can be committed without any cooperation with other perpetrators, possibly even by a “lone *génocidaire*.”

Lemkin’s original conception required “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”³⁴ The ICTY, however, rejected this notion. In the Jelisić Appeals Judgment the Tribunal emphasized that “the existence of a plan or policy is not a legal ingredient of the crime” although the existence of such a plan or policy may be important to proving the crime.³⁵ This view was also supported by the International Court of Justice in the Bosnia Genocide case.³⁶

Nevertheless, that authoritative statement failed to settle the debate. Though some scholars support the idea that even an isolated individual acting alone can

30 Art. 71 of the Criminal Code of the Republic of Latvia of 1998.

31 Daniel D. Ntanda Nsereko, “Genocide: A Crime against Mankind” in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts*, Vol. 1. (The Hague: Kluwer, 2000) 115–140, at 117.

32 Antonio Planzer, *Le Crime de Génocide* (St. Gallen: Schwald, 1956) 98.

33 Art. 333 of the Criminal Code of the Islamic Republic of Afghanistan of 2017.

34 Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944) 79.

35 *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement of 5 July 2005, para. 48.

36 “The specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.” ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro)*, Judgment of 26 February 2007, para. 373.

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commit genocide,³⁷ others have vehemently rejected this thesis.³⁸ The ICC Elements of Crimes tried to take a middle position by requiring that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”³⁹ While the ICTY held that this definition “was not mandated by customary international law,”⁴⁰ this approach was upheld in the Al Bashir arrest warrant decision, which did “not observe any irreconcilable contradiction between the definition of the crime of genocide provided for in article 6 of the Statute and the contextual element provided for in the Elements of Crimes with regard to the crime of genocide.”⁴¹

While the domestic criminal legislation of the majority of states does not explicitly require the existence of contextual elements, there are some notable exceptions. The existence of a “concerted plan” is explicitly spelt out in the criminal codes of Cabo Verde,⁴² the Central African Republic,⁴³ the Republic of Congo,⁴⁴ France,⁴⁵ and Niger.⁴⁶ Albania prosecutes the execution of a “premeditated plan,”⁴⁷ Andorra of a “preconceived plan,”⁴⁸ and Georgia of an “agreed plan,”⁴⁹ while Turkey punishes following a plan.⁵⁰ Other countries also allude to the necessity of following a plan—thus Angola prescribes the existence of a “concerted operation”⁵¹ and Ecuador criminalizes the commission of acts “in a systematic and generalized manner.”⁵²

37 See, for example, Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) 140–141; Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser, 2009) 271–273.

38 Schabas, for instance, acerbically stated that “The theory that an individual, acting alone, may commit genocide is little more than a sophomoric hypothèse d’école, and a distraction for judicial institutions.” William Schabas, “Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide,” 18 *Leiden Journal of International Law* (2005) 871–885, at 877.

39 Art. 6(a)(4), (b)(4), (c)(5), (d)(5), (e)(7), ICC Elements of Crimes.

40 *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment of 19 April 2004, para. 224.

41 *Al Bashir (Decision on Arrest Warrant)*, Case No. ICC-02/05-01/09, Decision of 4 March 2009, para. 132.

42 Art. 268 of the Criminal Code of the Republic of Cabo Verde of 2003 (*plano concertado*).

43 Art. 152 of the Criminal Code of the Central African Republic of 2007 (*plan concerté*).

44 Art. 1 of the Law 8/98 of 31 October 1998 on the Definition and Repression of Genocide, War Crimes, and Crimes against Humanity of the Republic of Congo (*plan concerté*).

45 Art. 211(1) of the Criminal Code of the Republic of France of 1992 (*plan concerté*).

46 Art. 208 of the Criminal Code of the Republic of Niger of 2003 (*plan concerté*).

47 Art. 73 of Criminal Code of the Republic of Albania of 1995.

48 Art. 456 of the Criminal Code of the Principality of Andorra of 2005 (*plan préconçu*).

49 Art. 407 of the Criminal Code of the Republic of Georgia of 1999.

50 Art. 76(1) Criminal Code of Turkey of 2004.

51 Art 367 of the Criminal Code of Angola of 2019 (*actuação concertada*).

52 Art. 79 of the Criminal Code of the Republic of Ecuador of 2014 (*de manera sistemática y generalizada*).

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These 11 countries clearly go beyond even the arguably more expansive interpretation of the ICC by clearly excluding the prosecution of “lone *génocidaires*,” or potentially refusing to try a perpetrator who committed the underlying offences with others who lacked genocidal intent.⁵³

Limiting the scope of application of the crime of genocide by omitting or restricting underlying offences

The overwhelming majority of states that have implemented the crime of genocide have criminalized all the five prohibited acts listed in the Genocide Convention. According to the survey of domestic criminal legislations, there are only nine countries and the Special Administrative Region of Macao that omitted or restricted underlying offences. Instead of prohibiting serious mental harm as set out in Art. II(b) of the Genocide Convention, Bulgaria criminalizes causing “permanent derangement of the consciousness of a person,”⁵⁴ which explicitly contravenes the established jurisprudence of the ad hoc tribunals.⁵⁵ In a similar fashion, the United States prohibits causing “the permanent impairment of the mental faculties of members of the group.”⁵⁶ On the other hand, the Czech Republic,⁵⁷ Georgia,⁵⁸ Guinea Bissau,⁵⁹ Poland,⁶⁰ and the Special Administrative Region of Macao⁶¹ have completely omitted the mental harm requirement by only criminalizing “serious bodily injury.”

Mexico changed the crime of “imposing measures intended to prevent births within the group” specified in Art. II(d) of the Genocide Convention to “imposing massive sterilizations with the aim to prevent the reproduction of the group.”⁶² Italy restricted the scope of application of Art. II(e) of the Convention (“Forcibly transferring children of the group to another group”) by

53 Valerie Oosterveld and Charles Garraway, “The Elements of Genocide” in Roy S.K. Lee and Hakan Friman (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational, 2001) 41–57, at 47–8.

54 Art. 416 of the Criminal Code of the Republic of Bulgaria of 1968.

55 *Prosecutor v. Krstić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 513. In the Seromba case the ICTR declared that “to support a conviction for genocide, the bodily or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.” *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgment of 12 March 2008, para. 46.

56 Section 1091(a)(3) of the US Code – 18. Crimes and Criminal Procedure of 1948.

57 Art. 400(1)(c) of the Criminal Code of the Czech Republic of 2009.

58 Art. 407 of the Criminal Code of Georgia of 1999.

59 Art. 101(1)(a) of the Criminal Code of Guinea-Bissau of 1993 (*Homicídio ou ofensa à integridade física grave de elementos do grupo*).

60 Art. 118(1) of the Criminal Code of the Republic of Poland of 1997.

61 Art. 230(b) of the Criminal Code of the Special Administrative Region of Macao of 1995 (*praticar ofensa grave à integridade física de membros do grupo*).

62 Art. 149-Bis of the Federal Criminal Code of the Republic of Mexico of 1931 (*impusiese la esterilización masiva*).

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specifying that it applies only to “minors until the age of 14.”⁶³ Finally, Mozambique defined genocide as “deliberate killing motivated by ethnic, national, racial or religious differences,”⁶⁴ which excludes every other underlying offence besides killing members of the group.

Alterations that do not necessarily expand or restrict the scope of application of the crime of genocide

‘Over-definition’ of protected groups

Some countries seemingly expand the list of protected groups, but these additions do not actually result in a different scope of application. The Austrian Criminal Code defines genocide as acts committed against a “group determined by belonging to a church or religious community, to a race, an ethnic group, a tribe or a state.”⁶⁵ Even though in this definition – and the identical definition in the Criminal Code of Liechtenstein⁶⁶ – the terms “church” and especially “tribe” seem to be expansive, they only serve to further specify the protected religious and ethnic groups.⁶⁷ Similarly, the terms “colour” and “nationality” in Ethiopian legislation only further emphasize the protection of racial and ethnic groups.⁶⁸

Finally, the US federal criminal law definition prosecuting perpetrators for committing acts “with the specific intent to destroy, in whole or in substantial part” conforms to customary international law standards.⁶⁹

63 Art. 5 of the Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 of the Republic of Italy (*minori degli anni quattordici*).

64 Art. 160(2)(j) of the Criminal Code of the Republic of Mozambique of 2014 (*genocídio, quando o agente pratica assassinato deliberado a pessoas motivada por diferenças étnicas, nacionalidades, raciais ou religiosas*).

65 Art. 321 of the Criminal Code of the Republic of Austria of 1974 (*Zugehörigkeit zu einer Kirche oder Religionsgesellschaft, zu einer Rasse, einem Volk, einem Volkstamm oder einem Staat*).

66 Art. 321 of the Criminal Code of the Principality of Liechtenstein of 1987.

67 Ferdinandusse, however, interpreted the inclusion of the term “tribe” as extending the category of protected groups. See Walt Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser, 2006) 24, fn. 118.

68 Art. 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia of 2004.

69 See, for example, Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6, 16, para. 29; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment of 21 May 1999, para. 97; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment of 7 June 2001, para. 64. Nevertheless, the actual determination of whether the intent was to destroy a “substantial” or “significant” part of the protected group inevitably depends on the circumstances as “the perpetrator’s genocidal intent will always be limited by the opportunity presented to him.” *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment of 19 April 2004., para. 13.

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Specifying the underlying offences

KILLING MEMBERS OF THE GROUP

Killing members of a protected group is the most obvious modality of genocide, which can be committed by intentionally causing death.⁷⁰ However, the plural form could potentially imply that the perpetrator has to kill at least two members of the protected group to be found responsible. This could theoretically result in the absurd outcome of genocide without *génocidaires*, i.e. if every killer takes only the life of a single victim. Accordingly, the consistent jurisprudence of the ICTR clearly proves that the requirement is fulfilled if a single member of the group is killed,⁷¹ and that view enjoys scholarly consensus.⁷² This approach is further reinforced by the ICC Elements of Crimes, which requires that “[T]he perpetrator (killed etc) one or more persons.”⁷³

Consequently, defining the prohibited act as the killing of even one individual which can be found in the domestic legislation of the Dominican Republic,⁷⁴ Fiji,⁷⁵ Germany,⁷⁶ Italy,⁷⁷ and Uruguay⁷⁸ is in line with the internationally supported interpretation of the offence. Moreover, Albania,⁷⁹ France,⁸⁰ and Uruguay⁸¹ prohibit “intentional killing.” This is also in conformity with the jurisprudence of the ICTY establishing that the act of killing has to be intentional, albeit not necessarily premeditated.⁸²

70 Art. 6(a)(1), fn. 2., ICC Elements of Crimes. The Kayishema Appeals Chamber emphasized that it is “intentional but not necessarily premeditated murder.” *Prosecutor v. Kayishema*, Case No. ICTR-95-A, Judgment of 1 June 2001, para. 151.

71 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 588.

72 See, for example, Werle, *supra* note 37, 265; Schabas, *Genocide in International Law*, *supra* note 28, 179. However, Ambos argues that the *lex stricta* rule of interpretation enshrined in Art. 22(2) of the ICC Statute calls for at least two victims. Kai Ambos, *Treatise on International Criminal Law – Vol. II: The Crimes and Sentencing* (Oxford: Oxford University Press, 2014) 10.

73 Art. 6(a)(1), ICC Elements of Crimes.

74 Art. 89(1) of the Criminal Code of the Dominican Republic of 2014 (killing of one or more members of the group).

75 Art. 77(a) of Crimes Decree of 2009 of the Republic of Fiji Islands (the perpetrator causes the death of one or more persons).

76 German Code of Crimes against International Law of 2002 (*ein Mitglied der Gruppe tötet*).

77 Art. 3 of Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 of the Republic of Italy (*la morte di una o più persone*).

78 Art. 16(A) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*homicidio intencional de una o más personas del grupo*).

79 Criminal Code of the Republic of Albania of 1995.

80 Art. 211(1) of the Criminal Code of the Republic of France of 1992 (*atteinte volontaire à la vie*).

81 Art. 16(A) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*homicidio intencional de una o más personas del grupo*).

82 See, for example, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 515.

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CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP

While genocide is clearly not confined only to killing members of a protected group, the exact acts which constitute the underlying offence of “causing serious bodily or mental harm” cannot be determined easily, even though the jurisprudence of the ad hoc tribunals has provided certain yardsticks. The ad hoc tribunals emphasized that the harm must go “beyond temporary unhappiness, embarrassment or humiliation,” and result “in a grave and long term disadvantage to a person’s ability to lead a normal and constructive life.”⁸³ While the harm “must be of such serious nature as to threaten [the group’s] destruction in whole or in part,” “it does not necessarily have to be permanent or irremediable, and ... it includes non mortal.”⁸⁴

Consequently, a wide range of acts could potentially fall under this category. Even though these acts could also constitute crimes against humanity and war crimes, if committed with genocidal intent against members of a protected group they would constitute genocide. The District Court of Jerusalem thus listed

enslavement, starvation, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps – all this under conditions intended to humiliate the Jews, to deny their rights as human beings, to suppress and torment them by inhuman suffering and torture.⁸⁵

The Karadžić Trial Chamber specified similar conduct, although emphasizing that the determination of these acts is context dependent. It included

torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to the external or internal organs of members of the group. While forcible transfer does not of itself constitute an act of genocide, depending on the circumstances of a given case it may cause such serious bodily or mental harm as to constitute an act of genocide under Article 4(2) (b).⁸⁶

⁸³ *Prosecutor v. Krstić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 513.

⁸⁴ *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment of 22 January 2004, paras. 633–634.

⁸⁵ *Israeli Government Prosecutor General v. Adolph Eichmann*, Jerusalem District Court, Criminal Case No. 40/61, Judgment of 12 December 1961, para. 199.

⁸⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgment of 24 March 2016, para. 545. The Stakić Trial Chamber underlined, however, that mere deportation cannot automatically qualify as genocide since “[A] clear distinction must be drawn between physical destruction and mere dissolution of a group.” *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 519.

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This approach was reaffirmed in the ICC Elements of Crimes, stating that “[T]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment,”⁸⁷ as well as the Bosnia Genocide Judgment of the International Court of Justice, which found that acts of sexual violence committed with the requisite specific intent could constitute serious bodily or mental harm.⁸⁸

In light of the above it is hardly surprising that national implementation of this particular *actus reus* displays remarkable variety. Three countries only made slight changes in the terminology. The Criminal Code of Russia⁸⁹ and Turkmenistan⁹⁰ contain identical provisions which criminalize “grave injury to health” but do not mention mental health specifically, while Mexican legislation prohibits “attacks against the bodily integrity or health.”⁹¹ On the other hand, 17 countries have introduced specific prohibited acts falling within the scope of “causing serious bodily and mental harm.”

Fourteen countries criminalize the forced removal of protected groups, including Andorra (“forced deportation”),⁹² Cabo Verde⁹³ and Italy⁹⁴ (“deportation”), Côte d’Ivoire (“displacement or forced dispersion of the population or children”),⁹⁵ Nicaragua⁹⁶ and Spain⁹⁷ (“forcible displacement”), the Dominican Republic⁹⁸ and Panama⁹⁹ (“forcible displacement and forcible transfer”), El Salvador (“violent displacement”),¹⁰⁰ Ethiopia (“compulsory movement or dispersion of people”),¹⁰¹

87 Art. 6(b)(1), fn. 3, ICC Elements of Crimes.

88 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Judgment of 26 February 2007, para. 319.

89 Art. 357 of the Criminal Code of the Russian Federation of 1996.

90 Art. 168(1) of the Criminal Code of Turkmenistan of 1997.

91 Art. 149-Bis of the Federal Criminal Code of the Republic of Mexico of 1931 (*ataques a la integridad corporal o a la salud*).

92 Art. 456(1)(c) of the Criminal Code of the Principality of Andorra of 2005 (*déportation forcée de tous ou d’une partie des membres du groupe en question*).

93 Art. 268(b) of the Criminal Code of the Republic of Cabo Verde of 2003 (*deportação*).

94 Art. 2 of the Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 (*deporta persone*).

95 Art. 137(3) of the Criminal Code of Côte d’Ivoire of 1981 (*le déplacement ou la dispersion forcés de populations ou d’enfants*).

96 Art. 484(d) of the Criminal Code of the Republic of Nicaragua of 2007 (*desplazamientos forzados*).

97 Art. 607(1)(4) of the Criminal Code of the Kingdom of Spain of 1995 (*desplazamientos forzados*).

98 Art. 89(6) of the Criminal Code of the Dominican Republic of 2004 (*llevar a cabo desplaza mientos forzados del grupo o de sus miembros, o trasladar por la fuerza a miembros de un grupo a otro*).

99 Art. 440(6–7) of the Criminal Code of the Republic of Panama of 2007 (*trasladar por la fuerza a los miembros de un grupo a otro; desplazar forzosamente al grupo o a sus miembros*).

100 Art. 361 of the Criminal Code of the Republic of El Salvador of 1997 (*realizarse el desplaza miento violento de personas hacia otros grupos*).

101 Art. 269(c) of the Criminal Code of the Federal Democratic Republic Ethiopia of 2004.

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Guinea Bissau (“violent separation of members of the group to another group”),¹⁰² Paraguay (“forcing the dispersion of the community”),¹⁰³ Russia (“forcible resettlement”),¹⁰⁴ and Timor Leste (“Violent separation of members of the group to another group”; “Acts that violently prevent a group to settle down or remain in a geographical area which it traditionally recognized as its own”).¹⁰⁵

Different forms of sexual violence are included in the criminal legislation of nine states: Andorra (“sexual aggression”),¹⁰⁶ the Dominican Republic¹⁰⁷ and Spain¹⁰⁸ (“sexual assault”), Colombia (“forced pregnancy”),¹⁰⁹ Fiji (“rape and sexual violence”),¹¹⁰ Nicaragua (“attack against sexual integrity”),¹¹¹ Panama (“abuse against sexual freedom”),¹¹² Timor Leste (“Rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of a comparable gravity”),¹¹³ and Uruguay (“sexual aggression and forced pregnancy”).¹¹⁴

Torture, inhuman and degrading treatment is criminalized by five countries: Cabo Verde,¹¹⁵ Andorra,¹¹⁶ Fiji,¹¹⁷ Lithuania,¹¹⁸ and Uruguay.¹¹⁹ Different

102 Art. 101(1)(c) of the Criminal Code of Guinea-Bissau of 1993 (*separação por meios violentos de elementos do grupo para outro grupo*).

103 Art. 319(6) of the Criminal Code of the Republic of Paraguay of 1997 (*forzara a la dispersión de la comunidad*).

104 Art. 357 of the Criminal Code of the Russian Federation of 1996.

105 Art. 123(1)(d-e) of the Criminal Code of the Republic of Timor-Leste of 2009 (*separação por meios violentos de elementos do grupo para outro grupo; Actos que por forma violenta impeçam o grupo de se instalar ou manter em espaço geográfico que por tradição ou historicamente lhe sejam reconhecidos*).

106 Art. 456(1)(g) of the Criminal Code of the Principality of Andorra of 2005 (*agresión sexual*).

107 Art. 89(6) of the Criminal Code of the Dominican Republic of 2004 (*agredir sexualmente a cualquiera de los miembros del grupo*).

108 Art. 607(1)(2) of the Criminal Code of the Kingdom of Spain of 1995 (*agredieran sexualmente*).

109 Art. 101(2) of the Criminal Code of Colombia of 2000 (*embarazo forzado*).

110 Art. 78(2) of the Crimes Decree of 2009 of the Republic of Fiji Islands.

111 Art. 484(a) of the Criminal Code of the Republic of Nicaragua of 2007 (*atentar contra la integridad sexual*).

112 Art. 440(4) of the Criminal Code of the Republic of Panama of 2007 (*abuso contra la libertad sexual*).

113 Art. 123(1)(c) of the Criminal Code of the Republic of Timor-Leste of 2009 (*violação, escravidão sexual, prostituição forçada, gravidez forçada, esterilização forçada ou qualquer outra forma de violência sexual de gravidade comparável*).

114 Art. 16(B) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*agresión sexual, embarazo forzoso*).

115 Art. 268(c) of the Criminal Code of the Republic of Cabo Verde of 2003 (*mações de tortura ou tratamentos cruéis, degradantes e desumanos*).

116 Art. 456(1)(f) of the Criminal Code of the Principality of Andorra of 2005 (*traitements inhumains ou dégradants*).

117 Art. 78(2) of the Crimes Decree of 2009 of the Republic of Fiji Islands.

118 Art. 99 of the Criminal Code of the Republic of Lithuania of 2000.

119 Art. 16(B) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006.

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forms of deprivation of liberty are criminalized by Andorra (“enslavement of the group in whole or in part”),¹²⁰ Cabo Verde (enslavement),¹²¹ Nicaragua (“attack against liberty”),¹²² and Uruguay (“deprivation of liberty”).¹²³

“Enforced disappearance” is listed in the criminal codes of Cabo Verde¹²⁴ and Andorra,¹²⁵ Guinea Bissau¹²⁶ and Timor Leste¹²⁷ criminalize “[D]issemination of an epidemic likely to cause death or serious harm to the physical integrity of the members of the group.” Finally, the Commonwealth of Dominica punishes “the use of any biological or microbial agent or toxin, or of any weapon, equipment or means of delivery designed to use biological or microbial agents, which has no justification for prophylactic protective or other peaceful purposes.”¹²⁸

DELIBERATELY INFLECTING ON THE GROUP CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS PHYSICAL DESTRUCTION IN WHOLE OR IN PART

The Akayesu Trial Chamber construed measures which aim to inflict on the group conditions of life calculated to bring about its physical destruction in whole or part as “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”¹²⁹ Such acts can

include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death, such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.¹³⁰

120 Art. 456(1)(f) of the Criminal Code of the Principality of Andorra of 2005 (*réduction de la totalité ou de partie du groupe à l'esclavage*).

121 Art. 268(b) of the Criminal Code of the Republic of Cabo Verde of 2003 (*redução à escravidão*).

122 Art. 484(b) of the Criminal Code of the Republic of Nicaragua of 2007 (*atentar contra la libertad*).

123 Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*privación de libertad*).

124 Art. 268(b) of the Criminal Code of the Republic of Cabo Verde of 2003 (*sequestro seguido de desaparecimento*).

125 Art. 456(1)(b) (*séquestration de membres du groupe en question, suivie de leur disparition*).

126 Art. 101(1)(g) of the Criminal Code of Guinea-Bissau of 1993 (*difusão de epidemia susceptível de causar a morte ou ofensas graves à integridade física de elementos do grupo*).

127 Art. 123(1)(i) of the Criminal Code of the Republic of Timor-Leste of 2009 (*difusão de epidemia susceptível de causar a morte ou ofensas a integridade física de elementos do grupo*).

128 Act 20 of 1969 to Give Effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

129 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 518.

130 *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgement of 24 March 2016, para. 547.

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Depending on the circumstances, deportation¹³¹ or forcible transfer of civilians could also fall into this category.¹³² The ICC Elements of Crimes restates this approach by stating that the “term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”¹³³

Numerous countries follow this approach. Fiji implemented almost verbatim the ICC Elements of Crimes definition (“‘conditions of life’ includes, but is not limited to, intentional deprivation of resources indispensable for survival, such as deprivation of food or medical services, or systematic expulsion from homes.”);¹³⁴ Panama,¹³⁵ Spain,¹³⁶ and Uruguay¹³⁷ include conditions that “seriously affect health”; Bolivia includes “inhuman survival conditions”;¹³⁸ and Uruguay also includes “systematic expulsion from their homes.”¹³⁹ Finally, Guinea Bissau¹⁴⁰ and Timor Leste¹⁴¹ add the “[p]rohibition, omission or impediment by any means of the provision of humanitarian assistance to the members of the group required to combat situations of epidemic or serious food shortage.”

IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP

The aim of measures intended to prevent birth within the protected group is “denying the group the means of self propagation.”¹⁴² Such measures might include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages” or forced impregnation “in

131 International Law Commission, Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/332 (1996), 126.

132 *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment of 6 April 2015, para. 209.

133 Art. 6(c), fn. 4, ICC Elements of Crimes.

134 Art. 79(2) of the Crimes Decree of 2009 of the Republic of Fiji Islands.

135 Art. 440 of the Criminal Code of the Republic of Panama of 2007 (*perturben gravemente la salud*).

136 Art. 607(1)(3) of the Criminal Code of the Kingdom of Spain of 1995 (*perturben gravemente su salud*).

137 Art. 16(C) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*una perturbación grave de salud*).

138 Art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972 (*condiciones de inhumana subsistencia*).

139 Art. 16(C) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*la expulsión sistemática de sus hogares*).

140 Art. 101(1)(h) of the Criminal Code of Guinea-Bissau of 1993 (*proibição, omissão ou impedimento por qualquer meio a que seja prestada assistência humanitária aos elementos do grupo, adequada a combater situações de epidemia ou de grave carência alimentar*).

141 Art. 123(1)(j) of the Criminal Code of the Republic of Timor-Leste of 2009 (*proibição, omissão ou impedimento por qualquer meio a que seja prestada aos elementos do grupo assistência humanitária adequada a combater situações de epidemia ou de grave carência alimentar*).

142 Ambos, *Treatise on International Criminal Law* Vol. II, *supra* note 72, 14.

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patriarchal societies, where membership of a group is determined by the identity of the father.”¹⁴³ Other measures which prevent birth through their psychological effects could also fall into this category. The Akayesu judgment stressed that

rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.¹⁴⁴

Based on the above, depending on the circumstances most acts causing the serious bodily or mental harm specified in the section “Causing serious bodily or mental harm to members of the group” above could potentially be classified as measures intended to prevent birth, especially forms of sexual violence and torture, and inhuman and degrading treatment. Still, the Criminal Code of Afghanistan specifically complements the underlying offence with measures preventing procreation, which does not seem to change the scope of application of the *actus reus*.¹⁴⁵

FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP

The aim of the crime of forcibly transferring children of a protected group to another group is to eradicate the children’s attachment to their original group and thus the long term destruction of the group in a non physical form. The ICC Elements of Crimes defines the term “children” as persons under the age of 18 years¹⁴⁶ and indicates that the term “forcibly” is

not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.¹⁴⁷

Accordingly, the Criminal Code of Austria¹⁴⁸ and Liechtenstein¹⁴⁹ both stipulate that this form of genocide can be committed “with violence or with threat of violence.”

143 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 507–508. As regards sterilization and castration as forms of genocide, see *Poland v. Hoess* (Supreme National Tribunal of Poland), 7 *Law Reports of Trials of War Criminals* 11 (1948) 25.

144 *Ibid.*

145 Afghanistan, Art. 333 of the Criminal Code of the Islamic Republic of Afghanistan of 2017. In both the Dari and Pashto language versions.

146 Art. 6(e)(5), ICC Elements of Crimes.

147 Art. 6(e)(1), fn. 5, ICC Elements of Crimes.

148 Art. 321(1) of the Criminal Code of the Republic of Austria of 1974 (*mit Gewalt oder durch Drohung mit Gewalt*).

149 Art. 321(1) of the Criminal Code of the Principality of Liechtenstein of 1987.

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In their domestic legislation, Mexico¹⁵⁰ and Chile¹⁵¹ explicitly stipulate that the crime can be committed against “minors under the age of 18,” with Chile adding also the crime of “preventing them from returning.”¹⁵² Nicaragua implemented in its act “displacing with violence the boys, girls and adolescents of the group.”¹⁵³

Bolivia,¹⁵⁴ Ecuador,¹⁵⁵ Guatemala,¹⁵⁶ and Paraguay¹⁵⁷ all prohibit the forcible transfer of both “children and adults,” and Paraguay also criminalizes transferring children and adults “to places different from their habitual residence,”¹⁵⁸ while Uruguay punishes “displacement of the group from the place it is located.”¹⁵⁹ These latter regulations clearly go beyond the scope of the underlying offence of forcibly transferring children of a group to another group. However, depending on the circumstances they can still constitute “causing serious bodily or mental harm to members of the group” or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” so these regulations do not necessarily have to be viewed as expanding the scope of application of the crime of genocide in domestic law.

Expanding the scope of application of the crime of genocide

Expanding the scope of application of the crime of genocide by including additional protected groups

The closed list of groups of people protected by the Genocide Convention has been a source of contention ever since the adoption of the Convention. Already during the drafting process numerous countries suggested the inclusion of other groups, especially political and social ones, but these proposals were ultimately

150 Art. 149-Bis of the Federal Criminal Code of the Republic of Mexico of 1931 (*se traslada ren de ellas a otros grupos menores de dieciocho años*).

151 Art. 11 (5) of the Law No. 20.357 of 18 July 2009 (*trasladar por fuerza a menores de 18 años del grupo a otro grupo*).

152 Ibid. (*se les impida regresar a aquél*).

153 Art. 484(d) of the Criminal Code of the Republic of Nicaragua of 2007 (*desplazar con violencia a los niños, niñas o adolescentes del grupo*).

154 Art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972 (*realizarse con violencia el desplazamiento de niños o adultos hacia otros grupos*).

155 Art. 79(5) of the Criminal Code of the Republic of Ecuador of 2014 (*traslado forzado de niñas, niños o adolescentes, de un grupo a otro*).

156 Art. 376(4) of the Criminal Code of the Republic of Guatemala of 1973 (*desplazamiento compulsivo de niños o adultos del grupo, a otro grupo*).

157 Art. 319(3) of the Criminal Code of the Republic of Paraguay of 1997 (*trasladara, por fuerza o intimidación a niños o adultos hacia otros grupos*).

158 Ibid. (*lugares ajenos a los de su domicilio habitual*).

159 Art. 16(e) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*el desplazamiento del grupo del lugar donde está asentado*).

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rejected.¹⁶⁰ Nevertheless, the expansion of the list of protected groups enjoys considerable academic support.¹⁶¹

A significant part of the international community i.e. 34 countries have decided to expand the scope of their domestic genocide legislation beyond the enumerated groups by incorporating specific groups beyond the closed enumeration of the Genocide Convention. The most common addition is to include political groups, with 13 countries belonging to this category, including: Colombia,¹⁶² Bangladesh,¹⁶³ Costa Rica,¹⁶⁴ Côte d'Ivoire,¹⁶⁵ Ecuador,¹⁶⁶ Ethiopia,¹⁶⁷ Lithuania,¹⁶⁸ Nicaragua,¹⁶⁹ Panama,¹⁷⁰ Poland,¹⁷¹ Switzerland,¹⁷² Togo,¹⁷³ and Uruguay.¹⁷⁴ Social groups are included in the criminal legislation of Paraguay,¹⁷⁵ Estonia,¹⁷⁶ São Tomé and Príncipe,¹⁷⁷ Switzerland,¹⁷⁸ Peru,¹⁷⁹ and the Philippines.¹⁸⁰

Besides political and social groups, some states have opted to introduce other specific protected groups as well. Thus the Czech Republic criminalizes underlying offences against people belonging to a class,¹⁸¹ Estonia prosecutes crimes

160 See Schabas, *Genocide in International Law*, *supra* note 28, 153–171.

161 See, for example, Pieter N. Drost, *The Crime of State: Genocide* (The Hague: A.W. Sythoff, 1950) 62; Beth van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot” 106 (1997) *The Yale Law Journal* 2259–2291; Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016).

162 Art. 101 of the Criminal Code of the Republic of Colombia of 2000.

163 Art. 3(2)(c) of International Crimes (Tribunals) Act 1973 (Bangladesh).

164 Art. 382 of the Criminal Code of Costa Rica of 1998.

165 Art. 137 of the Criminal Code of Côte d'Ivoire of 1981.

166 Art. 79 of the Criminal Code of the Republic of Ecuador of 2014.

167 Art. 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia of 2004.

168 Art. 99 of the Criminal Code of the Republic of Lithuania.

169 Art. 484 of the Criminal Code of the Republic of Nicaragua of 2007.

170 Art. 440 of the Criminal Code of the Republic of Panama of 2007. Interestingly, the Code simply lists it as one of the Crimes against the International Law of Human Rights (*Delitos contra el Derecho Internacional de los Derechos Humanos*) without specifying the term “genocide.”

171 Art. 118 of the Criminal Code of the Republic of Poland of 1997.

172 Art. 264 of the Criminal Code of the Swiss Confederation of 1937.

173 Art. 143 of the Criminal Code of the Togolese Republic of 2015.

174 Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006.

175 Art. 319 of the Criminal Code of the Republic of Paraguay of 1997.

176 Art. 90 of the Criminal Code of the Republic of Estonia of 2001.

177 Art. 210 of the Criminal Code of 2012 of the Democratic Republic of São Tomé and Príncipe.

178 Art. 264 of the Criminal Code of the Swiss Confederation of 1937.

179 Art. 319 of the Criminal Code of the Republic of Peru of 1991.

180 Art. 5 of the Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity of 2009.

181 Art. 400 of the Criminal Code of the Czech Republic of 2009.

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committed against “a group resisting occupation,”¹⁸² Honduras criminalizes offences against “ideological groups,”¹⁸³ and Poland extends protection to groups with “a different perspective on life,”¹⁸⁴ while both Spain¹⁸⁵ and the Dominican Republic¹⁸⁶ regard as genocide the commission of acts committed against “a specific group determined by the disability of its members.” The most expansive definition, however, can be found in the Criminal Code of Uruguay, which protects “political, syndical, and any other group identified by reasons of gender, sexual orientation, cultural or social background, age, disability or health.”¹⁸⁷

The criminal legislation of 16 countries has adopted an all encompassing approach that potentially extends to any identifiable group. Nine countries—Andorra,¹⁸⁸ Belarus,¹⁸⁹ Burkina Faso,¹⁹⁰ Cabo Verde,¹⁹¹ the Central African Republic,¹⁹² Chad,¹⁹³ Comoros,¹⁹⁴ France¹⁹⁵ and Niger¹⁹⁶—use the wording “group determined by any arbitrary criterion.” Canada includes “an identifiable group of persons,”¹⁹⁷

182 Art. 90 of the Criminal Code of the Republic of Estonia of 2001.

183 Art. 143 of the Criminal Code of the Republic of Honduras of 2019.

184 Art. 118 of the Criminal Code of the Republic of Poland of 1997.

185 Art. 607 of the Criminal Code of the Kingdom of Spain of 1995.

186 Art. 89 of the Criminal Code of the Dominican Republic of 2014.

187 Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006.

188 Art. 456 of the Criminal Code of the Principality of Andorra of 2005 (*groupe déterminé à partir de tout autre critère arbitraire*).

189 Art. 127 of the Criminal Code of the Republic of Belarus of 1999.

190 Art. 421–1 of the Criminal Code of Burkina Faso of 2019 (*groupe déterminé à partir de tout autre critère arbitraire*).

191 Art. 268 of the Criminal Code of the Republic of Cabo Verde of 2003 (*outro, determinado a partir de qualquer critério arbitrário*).

192 Art. 152 of the Criminal Code of the Central African Republic of 2010 (*groupe déterminé à partir de tout autre critère arbitraire*).

193 Art. 296 of the Penal Code of the Republic of Chad of 2017 (*groupe déterminé à partir de tout autre critère arbitraire*).

194 Art. 17 of Decree N° 12-022/PR, promulgating law No. 11-022 of 2011 on the Implementation of the Rome Statute (*groupe déterminé à partir de tout autre critère arbitraire*).

195 Art. 211(1) of the Criminal Code of the Republic of France of 1992 (*groupe déterminé à partir de tout autre critère arbitraire*).

196 Art. 208(1) of the Criminal Code of the Republic of Niger of 2003 (*groupe déterminé à partir de tout autre critère arbitraire*).

197 Section 4(3) of the Crimes against Humanity and War Crimes Act of 2000. However, the law proceeds by defining the crime as which “at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations.” Consequently, it seems that despite the confusing language, the Canadian legislator did not intend to expand the scope of protected groups. Still, the Canadian Criminal Code for the purpose of prosecuting incitement to genocide also defines genocide as a crime that can be committed against “an identifiable group of persons.” Art. 318 of the Criminal Code of Canada of 1985.

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the Czech Republic “other similar groups of people,”¹⁹⁸ Finland “another comparable group,”¹⁹⁹ Georgia “members of which are united ... by any other signs,”²⁰⁰ Lesotho “any other identifiable group,”²⁰¹ the Philippines “any other similar stable group,”²⁰² and Senegal groups “determined by any other criterion.”²⁰³

Finally, the Ethiopian Criminal Code not only protects groups but also nations,²⁰⁴ so presumably a military action threatening the existence of another state could qualify as genocide.

Expanding the scope of application of the crime of genocide by abolishing the special-intent requirement

The special or specific intent requirement for the crime of genocide is one of its defining features. In the words of the Kistić Trial Chamber, it is a crime “characterised and distinguished by a ‘surplus’ of intent.”²⁰⁵ Unsurprisingly, the survey only found one country – Mozambique – that categorically dispensed with the *mens rea* requirement.²⁰⁶ The Mozambique Criminal Code regulates genocide as one of the specific forms of “heinous crimes,” along with extermination, terrorism, and the rape of minors under the age of 12, and defines it as “deliberate killing motivated by ethnic, national, racial or religious differences.”²⁰⁷ Consequently, this legislation only requires a discriminatory intent, but not an intent to destroy the protected group, on the part of the perpetrator.

Expanding the scope of application of the crime of genocide by the omission of “as such”

The words “as such” do not seem to have an important role in the definition of genocide and indeed it has been suggested that they could be omitted without entailing any consequences for the interpretation of the crime.²⁰⁸ However,

198 Art. 400(1)(c) of the Criminal Code of the Czech Republic of 2009.

199 Chapter 11, Section 1 of the Criminal Code of the Republic of Finland of 1889.

200 Art. 407 of the Criminal Code of Georgia of 1999.

201 Art. 93 of the Criminal Code of the Kingdom of Lesotho of 2012.

202 Art. 5 of the Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity of 2009.

203 Art. 431 (1) of the Criminal Code of 1965 (*déterminé à partir de tout autre critère*).

204 Art. 269 of the Criminal Code of the Federal Democratic Republic Ethiopia of 2004.

205 *Prosecutor v. Kistić*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 520.

206 Bekou claims that the genocide definitions in French and Burkina Faso criminal law abolished the special-intent requirement but that seems unfounded as both legislations specifically require the intent to destroy. Olympia Bekou, “Crimes at Crossroads – Incorporating International Crimes at the National Level” 10 (2012) *Journal of International Criminal Justice* 677–691, at 683.

207 Art. 160 (2) (j) of the Criminal Code of the Republic of Mozambique of 2014.

208 Dino Carlos Caro Coria, “Prosecuting International Crimes in Peru” 10 (2010) *International Criminal Law Review* 583–600, at 587.

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a perusal of the *travaux préparatoires* of the Genocide Convention reveals that the term “as such” was originally intended by Venezuela to serve as a reference to a racist or discriminatory intent.²⁰⁹ Even though the perpetrator does not necessarily have to be driven by racist motivations, this requirement ensures that genocide can only be committed when “it is the group that has been targeted, and not merely specific individuals within that group.”²¹⁰

Nevertheless, 66 countries out of the total 138 countries that have implemented the crime of genocide have omitted the term “as such.”²¹¹

209 Schabas, *Genocide in International Law*, *supra* note 28, 294–305. Schabas even submits that “The organizers and planners must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide.” *Ibid.*, at 305.

210 *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-I, Judgment on Defence Motions to Acquit, 3 September 2001, para. 89. Ultimately, the ICTR emphasized that “the term ‘as such’ clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context.” *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgment of 9 July 2004, para. 49.

211 *Afghanistan*, Art. 333 of the Criminal Code of the Islamic Republic of Afghanistan of 2017; *Albania*, Art. 73 of the Criminal Code of the Republic of Albania of 1995; *Andorra*, Art. 456 of the Criminal Code of the Principality of Andorra of 2005; *Angola*, Art. 367 of the Criminal Code of Angola of 2019; *Armenia*, Art. 393 of the Criminal Code of the Republic of Armenia of 2003; *Azerbaijan*, Art. 103 of the Criminal Code of the Republic of Azerbaijan of 2000; *Bangladesh*, Section 3(2) (c) of the International Crimes (Tribunals) Act 1973 of the People’s Republic of Bangladesh; *Belarus*, Art. 127 of the Criminal Code of the Republic of Belarus of 1999; *Benin*, Art. 463 of the Criminal Code of 2018; *Bolivia*, Art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972; *Bosnia and Herzegovina*, Art. 171 of the Criminal Code of the Federation of Bosnia and Herzegovina of 2003; *Bulgaria*, Art. 416 of Criminal Code of the Republic of Bulgaria of 1968; *Burkina Faso*, Art. 16 of Law No. 2009-52/AN of 3 December 2009, Implementing the Rome Statute of the International Criminal Court at Domestic Level; *Cabo Verde*, Criminal Code of the Republic of Cabo Verde of 2003; *Cambodia*, Art. 183 of the Criminal Code of the Kingdom of Cambodia of 2009; *Canada*, Section 4(3) of the Crimes against Humanity and War Crimes Act of Canada of 2000 (French version); *Central African Republic*, Art. 152 of the Criminal Code of the Central African Republic of 2010; *Chad*, Art. 296 of the Criminal Code of the Republic of Chad of 2017; *Republic of Congo*, Art. 1 of the Law 8/98 of 31 October 1998 on the Definition and Repression of Genocide, War Crimes, and Crimes against Humanity; *Costa Rica*, Art. 382 of the Criminal Code of Costa Rica of 1998; *Côte d’Ivoire*, Art. 137 of the Criminal Code of Côte d’Ivoire of 1981; *Czech Republic*, Art. 400 of the Criminal Code of the Czech Republic of 2009; *Dominican Republic*, Art. 89 of the Criminal Code of the Dominican Republic of 2004; *Ecuador*, Art. 79 of the Criminal Code of the Republic of Ecuador of 2014; *El Salvador*, Art. 361 of the Criminal Code of the Republic of El Salvador of 1997; *Estonia*, Art. 90 of the Criminal Code of the Republic of Estonia of 2001; *Ethiopia*, Art. 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia of 2004; *Finland*, Chapter 11, Section 1 of the Criminal Code of the Republic of Finland of 1889; *France*, Art. 211(1) of the Criminal Code of the Republic of France of 1992; *Georgia*, Art. 407 of the Criminal Code of the Republic of Georgia of 1999; *Guatemala*, Art. 376 of the Criminal Code of the Republic of Guatemala of 1973; *Guinea Bissau*, Art. 101 of the Criminal Code of Guinea-Bissau of 1993; *Holy See*, Art. 14 of

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Interestingly, 21 of these countries have otherwise completely identical national definitions to the internationally recognized definition of the crime.²¹² This potentially suggests that a considerable number of states might indeed regard the term “as such” to be irrelevant for the application of the crime of genocide.

Expanding the scope of application of the crime of genocide by altering the wording of underlying offences

The internationally recognized interpretation of certain forms of genocide is significantly broader than borne out by a simple textual interpretation; therefore, a simple change in the wording does not necessarily result in expanding the

Vatican City State Law No. VIII, of 11 July 2013: Supplementary Norms on Criminal Law Matters; *Honduras*, Art. 143 of the Criminal Code of the Republic of Honduras of 2019; *Hungary*, Art. 142 of the Criminal Code of Hungary of 2012; *Kazakhstan*, Art. 168 of the Criminal Code of the Republic of Kazakhstan of 2014; *Kosovo*, Art. 148 of the Criminal Code of the Republic of Kosovo of 2012; *Kyrgyzstan*, Art. 383 of the 2017 Criminal Code of the Kyrgyz Republic; *Lesotho*, Art. 93 of the Penal Code of the Kingdom of Lesotho of 2010; *Lithuania*, Art. 99 of the Criminal Code of the Republic of Lithuania of 2000; *Mexico*, Art. 149-Bis of the Federal Criminal Code of the Republic of Mexico of 1931; *Moldova*, Art. 135 of the Criminal Code of the Republic of Moldova of 2002; *Montenegro*, Art. 426 of the Criminal Code of Montenegro of 2003; *Mozambique*, Art. 160 of the Criminal Code of the Republic of Mozambique of 2014; *Nicaragua*, Art. 484 of the Criminal Code of the Republic of Nicaragua of 2007; *Niger*, Art. 208(1) of the Criminal Code of the Republic of Niger of 2003; *North Macedonia*, Art. 403 of the Criminal Code of the Republic of Macedonia of 1996; *Norway*, Art. 101 of the Criminal Code of the Kingdom of Norway of 2005; *Panama*, Art. 440 of the Criminal Code of the Republic of Panama of 2007; *Paraguay*, Art. 319 of the Criminal Code of the Republic of Paraguay of 1997; *Peru*, Art. 319 of the Criminal Code of the Republic of Peru of 1991; *Poland*, Art. 118 of the Criminal Code of the Republic of Poland of 1997; *Republic of Korea*, Art. 8 of Act No. 8719 of 2007 on the Punishment of Crimes Within the Jurisdiction of the International Criminal Court; *São Tomé and Príncipe*, Art. 210 of the Criminal Code of the Democratic Republic of São Tomé and Príncipe of 2012; *Senegal*, Art. 431(1) of the Criminal Code of the Republic of Senegal of 1965; *Slovakia*, Art. 418 of the Criminal Code of the Slovak Republic of 2005; *Slovenia*, Art. 100 of the Criminal Code of the Republic of Slovenia of 2008; *Spain*, Art. 607 of the Criminal Code of the Kingdom of Spain of 1995; *Switzerland*, Art. 264 of the Criminal Code of the Swiss Federation of 1937; *Tajikistan*, Art. 398 of the Criminal Code of the Republic of Tajikistan of 1998; *Timor-Leste*, Art. 123 of the Criminal Code of the Republic of Timor-Leste of 2009; *Togo*, Art. 143 of the Criminal Code of the Togolese Republic of 2015; *Turkey*, Art. 76 of the Criminal Code of the Republic of Turkey of 2004; *Ukraine*, Art. 442 of the Criminal Code of Ukraine of 2001; *Uruguay*, Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006; *Uzbekistan*, Art. 153 of the Criminal Code of the Republic of Uzbekistan of 1994; *Vietnam*, Art. 422 Criminal Code of the Socialist Republic of Viet Nam of 2015; *Zimbabwe*, Chapter 9:20 of the Genocide Act of the Republic of Zimbabwe of 2000.

212 Armenia, Azerbaijan, Benin, Bosnia and Herzegovina, Cambodia, Canada, Holy See, Kazakhstan, Kosovo, Kirgizstan, Moldova, Montenegro, Northern Macedonia, Norway, Republic of Korea, Singapore, Slovakia, Slovenia, Tajikistan, Ukraine, and Zimbabwe.

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scope of application of the crime of genocide. Thus, the modality of “killing members of the group” is fulfilled even by the intentional killing of only one member of the group, and consequently most domestic changes only further specify but do not actually change the scope of application.²¹³ The only real change to this effect is the provision in the Criminal Code of Panama prohibiting the “inducing of suicide.”²¹⁴ Correspondingly, due to the broad international interpretation of the crime of “causing serious bodily or mental harm to members of the group,” there is no national provision actually extending its application.²¹⁵

On the other hand, many states have substantially extended the *actus reus* of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” Thirty one countries Andorra,²¹⁶ Angola,²¹⁷ Austria,²¹⁸ Costa Rica,²¹⁹ Côte d’Ivoire,²²⁰ Czech Republic,²²¹ the Dominican Republic,²²² El Salvador,²²³ Estonia,²²⁴ Ethiopia,²²⁵ Finland,²²⁶ France,²²⁷ Germany,²²⁸ Guinea Bissau,²²⁹ Hungary,²³⁰ Italy,²³¹ Liechtenstein,²³² Lithuania,²³³ Macao,²³⁴ Nicaragua,²³⁵ Niger,²³⁶ Panama,²³⁷ Paraguay,²³⁸ Peru,²³⁹ Poland,²⁴⁰ Russia,²⁴¹ São Tomé and

213 See “Killing members of the group,” above.

214 Art. 440(2) of the Criminal Code of the Republic of Panama of 2007 (*inducir al suicidio*).

215 See above Section 2.2.2.2.

216 Art. 456(1)(d) of the Criminal Code of the Principality of Andorra of 2005.

217 Art 367(b) of the Criminal Code of Angola of 2019.

218 Art. 321(1) of the Criminal Code of the Republic of Austria of 1974.

219 Art. 382(2) of the Criminal Code of Costa Rica of 1998.

220 Art. 137(3) of the Criminal Code of Côte d’Ivoire of 1981.

221 Art. 400(1)(c) of the Criminal Code of the Czech Republic of 2009.

222 Art. 89(3) of the Criminal Code of the Dominican Republic of 2004.

223 Art. 361 of the Criminal Code of the Republic of El Salvador of 1997.

224 Art. 90(1) of the Criminal Code of the Republic of Estonia of 2001.

225 Art. 269(c) of the Criminal Code of the Federal Democratic Republic Ethiopia of 2004.

226 Chapter 11, Section 1(1)(3) of the Criminal Code of the Republic of Finland of 1889.

227 Art. 211(1) of the Criminal Code of the Republic of France of 1992.

228 Art. 6(3) of the German Code of Crimes against International Law of 2002.

229 Art. 101(d) of the Criminal Code of Guinea-Bissau of 1993 (*sujeição do grupo a condições de existência ou a tratamentos cruéis, degradantes ou desumanos, susceptíveis de virem a provocar a sua destruição, total ou parcial*).

230 Art. 142(1)(c) of the Criminal Code of Hungary of 2012.

231 Art. 4 of the Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 of the Republic of Italy.

232 Art. 321(1) of the Criminal Code of the Principality of Liechtenstein of 1987.

233 Art. 99 of the Criminal Code of the Republic of Lithuania of 2000.

234 Art. 230(c) of the Criminal Code of the Special Administrative Region of Macao of 1995.

235 Art. 484(c) of the Criminal Code of the Republic of Nicaragua of 2007.

236 Art. 208(1) of the Criminal Code of the Republic of Niger of 2003.

237 Art. 440(5) of the Criminal Code of the Republic of Panama of 2007.

238 Art. 319(2) of the Criminal Code of the Republic of Paraguay of 1997.

239 Art. 319(3) of the Criminal Code of the Republic of Peru of 1991.

240 Art. 118(2) of the Criminal Code of the Republic of Poland of 1997.

241 Art. 357 of the Criminal Code of the Russian Federation of 1996.

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Príncipe,²⁴² Spain,²⁴³ Switzerland,²⁴⁴ Timor Leste,²⁴⁵ and the United States²⁴⁶ have completely removed the term “deliberately” during their national implementation and thus potentially expanded the applicability of the underlying offence to acts that are not calculated or intentional.²⁴⁷ Germany also changed the requirement of “calculated to bring about” to “apt to bring about.”²⁴⁸ Moreover, El Salvador changed the wording to “subjecting to conditions which make subsistence difficult,”²⁴⁹ and Georgia to “hard living conditions.”²⁵⁰ None of these definitions require the intention to physically destroy the protected group.

The underlying offence of “imposing measures intended to prevent births within the group” has also been altered by certain countries. Andorra included the act of “making births difficult”²⁵¹ and Lithuania “restricting the birth of the persons belonging to those groups.”²⁵² The Cambodian definition requires “imposing forceful measures or voluntary means intended to prevent births within the group.”²⁵³ The addition of the words “voluntary means” extends the underlying act of genocide beyond its original construction.²⁵⁴

242 Art. 210(1)(c) of the Criminal Code of the Democratic Republic of São Tomé and Príncipe of 2012.

243 Art. 607(1)(3) of the Criminal Code of the Kingdom of Spain of 1995.

244 Art. 264(1)(b) of the Criminal Code of the Swiss Federation of 1937.

245 Art. 123(1)(f) of the Criminal Code of the Republic of Timor-Leste of 2009.

246 Section 1091(a)(4) of the US Code – 18. Crimes and Criminal Procedure of 1948.

247 See Kai Ambos, *Treatise on International Criminal Law Vol. I: Foundations and General Part* (Oxford: Oxford University Press, 2013) 294–295.

248 Art. 6(3) of the German Code of Crimes against International Law of 2002 (*die geeignet sind*).

249 Art. 361 of the Criminal Code of the Republic of El Salvador of 1997 (*difícil su subsistencia*).

250 Art. 407 of the Criminal Code of the Republic of Georgia of 1999.

251 Art. 456 of the Criminal Code of the Principality of Andorra of 2005 (*rendre les naissances difficiles*).

252 Art. 99 of the Criminal Code of the Republic of Lithuania of 2000.

253 Art. 183(4) of the Criminal Code of the Kingdom of Cambodia. This is based on the unofficial translation provided in Cheung Bunleng, *Criminal Code, Khmer English Translation* (Phnom Penh: Edition Angkor, 2011). Another available online unofficial translation, however, translates the same provision as “submitting the members of the group to conditions that entail total or partial destruction of the group.” www.unodc.org/res/cld/document/khm/criminal_code_of_the_kingdom_of_cambodia_html/Cambodia_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf [accessed on 12 September 2019]. If this is the correct translation then the Cambodian legislation did not change the scope of application of the underlying offence.

254 See Simon M. Meisenberg, “Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court” (2015) 5 *Asian Journal of International Law* 123–142, at 127.

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Expanding the scope of application of the crime of genocide to additional modalities

Ten countries have introduced new forms of genocide in their domestic legislation that significantly expand the scope of application of the internationally accepted definition. Panama,²⁵⁵ Spain,²⁵⁶ and Uruguay²⁵⁷ created the underlying offence of “preventing a group’s way of life” to complement preventing birth; Italy criminalized as genocide “forcing members of the protected group to wear distinctive signs or emblems”,²⁵⁸ and Bolivia included committing “bloody massacres in the country”,²⁵⁹ while Paraguay prosecutes “making it impossible for [members of protected groups] to worship or practice their customs.”²⁶⁰

Guinea Bissau²⁶¹ and Timor Leste²⁶² prohibit in identical terms “[G]eneral confiscation or seizure of goods owned by the members of the group” and “the prohibition of certain commercial, industrial or professional activities to the members of the group.” The Criminal Code of Vietnam includes “destroying sources of living, cultural or spiritual life of a nation or sovereign territory, upsetting the foundation of a society in order to sabotage it.”²⁶³

All these new underlying acts are obviously an extension of certain forms of crimes against humanity to genocide,²⁶⁴ but the criminal legislation of São Tomé and Príncipe elevates its hate crime legislation by including persons who publicly “[d]efame or injure a person or a group of persons or expose them to public contempt for reasons of race, colour or ethnic origin” or who “[p]rovoke acts of violence against persons or group of persons of other races, colour or ethnic origin.”²⁶⁵

255 Art. 440(8) of the Criminal Code of the Republic of Panama of 2007 (*imponer medidas destinadas a impedir ... el género de vida de ese grupo*).

256 Art. 607(1)(4) of the Criminal Code of the Kingdom of Spain of 1995 (*adoptaran cualquier medida que tienda a impedir su género de vida*).

257 Art. 16(C) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*condiciones de existencia que puedan impedir su género de vida*).

258 Art. 6 of Law No. 962 on the Prevention and Punishment of the Crime of Genocide of 9 October 1967 of the Republic of Italy (*imposizione di marchi o segni distintivi*).

259 Art. 138 of the Criminal Code of the Plurinational State of Bolivia of 1972 (*masacres sangrientas en el país*).

260 Art. 319(4) of the Criminal Code of the Republic of Paraguay of 1997 (*imposibilitara el ejercicio de sus cultos o la práctica de sus costumbres*).

261 Art. 101(1)(e)-(f) of the Criminal Code of the Republic of Guinea-Bissau of 1993 (*confisco ou apreensão generalizada dos bens propriedade dos elementos do grupo; proibição de determinadas actividades comerciais, industriais ou profissionais aos elementos do grupo*).

262 Art. 123(1)(g)-(h) of the Criminal Code of the Republic of Timor-Leste of 2009 (*confisco ou apreensão generalizada dos bens propriedade dos elementos do grupo; proibição de determinadas actividades comerciais, industriais ou profissionais aos elementos do grupo*).

263 Art. 422(1) of the Criminal Code of the Socialist Republic of Viet Nam of 2015.

264 This is especially clear with regard to the Criminal Code of Vietnam, which lists genocide as a crime against humanity. *Ibid.*

265 Art. 210(2)(a)-(b) of the Criminal Code of the Democratic Republic of São Tomé and Príncipe of 2012 (*difamar ou injuriar uma pessoa ou um grupo de pessoas ou expuser as mesmas*).

Reasons for changing the crime of genocide in the domestic legal environment

This comprehensive review of national legislations has revealed a remarkable divergence from the internationally accepted definition of the crime of genocide. Admittedly, focusing solely on domestic legal regulations inevitably gives an incomplete picture, as domestic legal doctrine and ultimately domestic courts might (re)interpret the diverging criminal provisions to better align them with the international standard(s),²⁶⁶ choose between plausible contradictory interpretations,²⁶⁷ or even significantly expand their application.²⁶⁸ Nevertheless, the compiled data makes it possible to draw certain preliminary conclusions about the reasons and possible ramifications of this phenomenon.

Domestic version of genocide as a means to ensure historical justice

A transition from authoritarianism to democracy almost inevitably brings about a reflection on the past and a need to reaffirm the fundamental values of the new political establishment in opposition to the legacy of oppression. In such periods, legal regulations are “both backward looking and forward looking, retrospective and prospective, continuous and discontinuous,”²⁶⁹ essentially being a tool to assist in the transformation of the society. It is to be expected that under such circumstances many states may opt to expand the international definition of genocide to encompass specific victim groups or specific underlying offences.

a desprezo publico por causa da raça, da sua cor ou da sua origem étnica; Provocar actos de violência contra pessoa ou grupos de pessoas de outra raça, de outra cor ou de outra origem étnica).

266 See, for example, the 1999 decision of the Estonian Supreme Court holding that the killing of three partisans in 1946 did not constitute an act of genocide but a crime against humanity. Eva-Clarita Pettai, “Prosecuting Soviet Genocide: Comparing the Politics of Criminal Justice in the Baltic States” (2016) *European Politics and Society* 1–14, at 6.

267 In the Ethiopian “Red Terror Trials,” for instance, the Ethiopian Supreme Court held that political groups belonged to the protected groups in Art. 281 of the Penal Code of the Empire of Ethiopia of 1957, even though the authoritative Amharic version did not categorically list it, relying on the English version of the Code and the original French draft. Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (Springer, 2018) 190–191.

268 See, for example, the decision of the German Federal Constitutional Court in the Jorgić case affirming lower German court judgments that held that genocidal intent can be established even if the perpetrator had not attempted to destroy the group physically or biologically but “in its social existence, as a social unit with its particularities and its self-perception as a group.” *Geltung deutschen Strafrechts für im Ausland begangenen Völkermord*, German Federal Constitutional Court (BVerfG), Judgment of 12 December 2000 – 2 BvR 1290/99, at III. 4 a).

269 Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) 215.

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In the Baltic states, for instance, after regaining their independence following decades of brutal repression against political groups during the Soviet era,²⁷⁰ Estonia included “a group resisting occupation or any other social group,”²⁷¹ Latvia “persons identifiable by social class,”²⁷² and Lithuania “social and political group.”²⁷³ Similarly, the atrocities committed by repressive regimes plausibly explain why most Latin American countries expanded the definition of genocide in their domestic criminal legislation.²⁷⁴

It is understandable that states with particular experiences of repression and human rights violations may seek to adapt the internationally agreed upon definition to their particular contexts,²⁷⁵ since “genocide,” as the “crime of crimes,” bears a special stigma and the term conveys an extraordinary sense of gravity and evil.²⁷⁶ Indeed, in many countries debating the qualification of national tragedies as genocide could very well trigger public outrage since the general public might regard it as a denial of their historic grievances.²⁷⁷ Moreover, many countries have opted to fuse the category of genocide with crimes against humanity, or simply employ the crime of genocide in the absence of a national definition of crimes against humanity. An interesting example of such an approach was the adoption of the law “On Genocide and Crimes against Humanity Committed in Albania during the Communist Regime for Political, Ideological and Religious Motives” in 1995.²⁷⁸ While the title ostensibly claimed the law served to prosecute genocide, the text itself was focused on

270 For more detail see Eva-Clarita Pettai and Vello Pettai, *Transitional and Retrospective Justice in the Baltic States* (Cambridge: Cambridge University Press, 2014) 43–64.

271 Art. 61(1) of the Criminal Code of the Republic of Estonia of 1991 (as amended in 1994). The new Criminal Code retained this terminology. See Art. 90 of the Criminal Code of the Republic of Estonia of 2001.

272 Art. 68(1) of the Criminal Code of the Republic of Latvia of 1991 (as amended in 1993). This provision was changed with the adoption of the new Criminal Code in 1998 and this reference was omitted. See Art. 71 of the Criminal Code of the Republic of Latvia of 1998.

273 Art. 2 of the Law on the Liability for Genocide against the People of Lithuania of 1992 declared as genocide “the killing and torturing and deportation of Lithuanian inhabitants committed during the occupation and annexation of Lithuania by Nazi Germany and the USSR.” The 1998 Amendment of the Criminal Code of 1991 introduced Art. 71, which defined “annihilation of people on social and political grounds” as genocide. The current formulation was adopted in 2000. See Art. 99 of the Criminal Code of the Republic of Lithuania of 2000.

274 Elizabeth Santalla Vargas, “An Overview of the Crime of Genocide in Latin American Jurisdictions” 10 (2010) *International Criminal Law Review* 441–452, at 442.

275 Cristina Fernández-Pacheco Estrada, “Domestic Prosecution of Genocide: Fragmentation or Natural Diversity?” in Larissa van den Herik and Carsten Stahn (eds.) *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff, 2012) 429–459, at 454.

276 For more on the tension between the socially and legally accepted meaning of the term, see David Luban, “Calling Genocide by its Rightful Name: Lemkin’s Word, Darfur, and the UN Report” 7 (2006) *Chicago Journal of International Law* 303–320.

277 Estrada, *supra* note 275, 456.

278 Nr. 8001, 22 September 1995.

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crimes against humanity, thus trying to draw on the moral stigma of genocide but still complying with international standards.²⁷⁹

Change through the “domestication” of international criminal law

International law norms are seldom automatically incorporated into the domestic legal framework, but instead become part of domestic law through “a process of translation from international to national.”²⁸⁰ Domestic lawyers have their own system of practices, “a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values,”²⁸¹ which might be significantly different from the international law scholars’ modus operandi. Domestic lawyers are usually not well acquainted with international law methodology and thus international norms have to be adapted so that they fit into the national legal system.²⁸² This creates a “double life” – a simultaneous co-existence of international and domesticated norms at one and the same time.²⁸³ This is exacerbated by the fact that domestic lawmakers generally have very little political incentive to ensure the consistency of domestic law with international law, and sometimes might even be motivated to push for a diverging implementation.²⁸⁴

Such domestication is often explicitly endorsed by local courts. For instance, the Colombian Constitutional Court in 2005 emphasized that the domestic definition of genocide is not confined to international law, but rather finds its justification in the very protections afforded by the Constitution.²⁸⁵ Similarly, in 2014 the Lithuanian Constitutional Court reaffirmed that states can broaden the concept of genocide and that the differences of the Lithuanian national definition of genocide were justified given “the concrete legal and historical context.”²⁸⁶

279 For more on this law and the subsequent prosecutions, see Robert C. Austin and Jonathan Ellison, “Post-Communist Transitional Justice in Albania” 22 (2008) *East European Politics and Societies* 373–401.

280 Karen Knop, “Here and There: International Law in Domestic Courts” 32 (1999–2000) *New York University Journal of International Law and Politics* 501–535, at 506.

281 Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” 38 (1987) *The Hastings Law Journal* 805–853, at 806.

282 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011) 219.

283 Carsten Stahn and Larissa van den Herik, “‘Fragmentation’, Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box?” in Larissa van den Herik and Carsten Stahn (eds.) *The Diversification and Fragmentation of International Criminal Law* (The Hague: Martinus Nijhof, 2012) at 40.

284 See Kevin L. Cope and Hooman Movassagh, “National Legislatures – The Foundations of Comparative International Law” in Anthea Roberts et al. (eds.) *Comparative International Law* (Oxford: Oxford University Press, 2018) 271–294, at 272.

285 Colombian Constitutional Court, Sentence C-148/05 of 22 February 2005. See Vargas, *supra* note 275, at 448.

286 “On the Compliance of Certain Provisions of the Criminal Code of the Republic of Lithuania that are Related to Criminal Responsibility for Genocide with the Constitution of the Republic of Lithuania,” Lithuanian Constitutional Court, Decision No. KT11-N4/2014,

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Consequently, diverging national definitions of genocide might often be the result of different legal socialization processes and the necessity to adapt international norms into the domestic legal environment.

Path dependency

Legal regulation, and especially criminal law legislation, is inherently conservative and usually characterized by gradual change; hence states often retain pre-existing definitions of international crimes even if they otherwise implement the provisions of the Rome Statute.²⁸⁷ This, however, indicates that idiosyncratic versions of the crime of genocide often remain unaltered and can even spread to other jurisdictions, which adopt them due to existing historical/cultural/linguistic ties between the countries. For instance, the crime of genocide is identically defined in Austria²⁸⁸ and Liechtenstein,²⁸⁹ and in Guinea-Bissau²⁹⁰ and Timor-Leste.²⁹¹ São Tomé and Príncipe²⁹² adopted the definition of genocide of the previous Portuguese Criminal Code.²⁹³

Even without a full scale transplantation of a national definition, certain elements of the domestic approach can cross-pollinate. The French definition which extended protected groups to groups “determined by any other arbitrary criterion”²⁹⁴ was adopted by Andorra,²⁹⁵ Burkina Faso,²⁹⁶ the Central African Republic,²⁹⁷ Chad,²⁹⁸ Comoros,²⁹⁹ and Niger.³⁰⁰ Similarly,

18 March 2014. For a contrary example, see the Hungarian Constitutional Court decision that declares that the content of international crimes are defined by the international community. Hungarian Constitutional Court, Decision No 53/1993, 13 October 1993, Section IV(1).

287 Terracino, *supra* note 15, at 423.

288 Art. 321 of the Criminal Code of the Republic of Austria of 1974.

289 Art. 321 of the Criminal Code of the Principality of Liechtenstein of 1987.

290 Art. 101 of the Criminal Code of Guinea-Bissau of 1993.

291 Art. 123 of the Criminal Code of the Republic of Timor-Leste of 2009.

292 Art. 210 of the Criminal Code of the Democratic Republic of São Tomé and Príncipe of 2012. However, the Portuguese provision was entitled “genocide and racial discrimination,” while Art. 210 is only called “genocide”; thus, the legislation of São Tomé and Príncipe eliminated the difference between the two categories.

293 Art. 189 of the Criminal Code of the Republic of Portugal of 1982.

294 Art. 211(1) of the Criminal Code of the Republic of France of 1992 (*groupe déterminé à partir de tout autre critère arbitraire*).

295 Art. 456 of the Criminal Code of the Principality of Andorra of 2005 (*groupe déterminé à partir de tout autre critère arbitraire*).

296 Art. 421–1 of the Criminal Code of Burkina Faso of 2019 (*groupe déterminé à partir de tout autre critère arbitraire*).

297 Art. 152 of the Criminal Code of the Central African Republic of 2010 (*groupe déterminé à partir de tout autre critère arbitraire*).

298 Art. 296 of the Penal Code of the Republic of Chad of 2017 (*groupe déterminé à partir de tout autre critère arbitraire*).

299 Art. 17 of Decree N° 12-022/PR, promulgating law No. 11–022 of 2011 on the Implementation of the Rome Statute (*groupe déterminé à partir de tout autre critère arbitraire*).

300 Art. 208(1) of the Criminal Code of the Republic of Niger of 2003 (*groupe déterminé à partir de tout autre critère arbitraire*).

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Panama³⁰¹ and Uruguay³⁰² borrowed the *actus reus* of “preventing a group’s way of life” from the Spanish Criminal Code.³⁰³

Translation and drafting errors

In certain instances, differences between the international and domestic definitions of genocide might be the result of bad translation or sloppy drafting. This seems to be fairly common with regard to the term “as such.” Even though 65 countries omitted the term from their domestic definition,³⁰⁴ there is no evidence that this omission was deliberate on the part of these states, so the most plausible explanation is that they simply did not recognize its potential significance. Two countries, Bangladesh³⁰⁵ and Cambodia³⁰⁶, on the other hand reversed the words by implementing them “such as,” which clearly can be attributed to a drafting error.³⁰⁷

In addition, the German definition of genocide prohibits “conditions of life imposed on the group that are apt to bring about its physical destruction.”³⁰⁸ Even though changing the term from “deliberately” to “apt to” arguably lowers the threshold of applicability of the crime, it is the result of a mistranslation.³⁰⁹

Conclusions: *e pluribus unum* or resurrection of the Lemkian ideal?

While legal scholarship concerning the domestic definitions of the crime of genocide has not been uncommon, until now these studies only focused on

301 Art. 440(8) of the Criminal Code of the Republic of Panama of 2007 (*imponer medidas destinadas a impedir ... el género de vida de ese grupo*).

302 Art. 16(C) of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay of 2006 (*condiciones de existencia que puedan impedir su género de vida*).

303 Art. 607(1)(4) of the Criminal Code of the Kingdom of Spain of 1995 (*adoptaran cualquier medida que tienda a impedir su género de vida*).

304 See “Expanding the scope of application of the crime of genocide by the omission of ‘as such,’” above.

305 Section 3(2)(c) of the International Crimes (Tribunals) Act 1973 of the People’s Republic of Bangladesh.

306 Art. 4 of the Law on the Establishment of the Extraordinary Chambers, with Inclusion of Amendments as Promulgated on 27 October 2004.

307 This is especially evident in the Cambodian case, as the law specifies that it should be interpreted in accordance with the Genocide Convention. Art. 4 of Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

308 Art. 6(1)(3) of the German Code of Crimes against International Law of 2002.

309 Kai Ambos and Stephan Wirth, “Genocide and War Crimes in the Former Yugoslavia Before German Criminal Code” in Horst Fischer, Claus Kress, and Sascha Rolf Lüder (eds.) *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag, 2001) 769, at 785.

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a limited number of states and often failed to recognize changes in national legislation.³¹⁰ The hitherto prevailing view held that, with a few limited exceptions, states generally followed the international definition of genocide.³¹¹

My research clearly disproves this view. Out of the 196 countries examined (193 UN member states and the Holy See, Kosovo, and Palestine) and the Special Administrative Zone of Macao, I found that only 39 countries have completely identical definitions,³¹² while 100 countries and the Special Administrative Region of Macao have varying degrees of differences and 57

310 See Schabas, *supra* note 28, 405–409; Ferdinandusse, *supra* note 67, 26–39; Estrada, *supra* note 275, 429–459.

311 Bekou, *supra* note 206, at 680.

312 *Antigua and Barbados*, the Genocide Act of Antigua and Barbuda of 1975; *Argentina*, Art. 8 of Law No. 26.200 of 2007; *Australia*, Division 268 of the Criminal Code Act 1995 of the Commonwealth of Australia; *Bahamas*, the Genocide Act of 1969 of the Commonwealth of the Bahamas; *Belgium*, Articles 136ter of the Criminal Code of the Kingdom of Belgium of 1867; *Belize*, the Genocide Act of 1971 of Belize; *Brazil*, Art. 83.V of the Criminal Code of the Federative Republic of Brasil of 1940; *Burundi*, Art. 195 of the Criminal Code of the Republic of Burundi of 2009; *Croatia*, Art. 88 of the Criminal Code of the Republic of Croatia of 2011; *Cuba*, Art. 116(1) of the Penal Code of the Republic of Cuba; *Cyprus*, Section 2 of the 2006 Law Amending the Rome Statute for the Establishment of the International Criminal Court (Ratification) Law of 2002; *Democratic Republic of Congo*, Art. 221 of the Criminal Code of the Democratic Republic of Congo of 1940; *Eritrea*, Art. 107 of the Criminal Code of the State of Eritrea of 2015; *Fiji*, Crimes Decree of 2009 of the Republic of Fiji Islands; *Ghana*, Art. 49(A) of the Criminal Code of the Republic of Ghana of 1960; *Greece*, Law No. 3948/2011, on Compliance with the Provisions of the Statute of the International Criminal Court; *Grenada*, Grenada Genocide Act of 1972; *Guinea*, Art. 192 of the Criminal Code of the Republic of Guinea of 2016; *Iceland*, Law on the Punishment of Genocide, Crimes against Humanity, War Crimes and Crimes against Peace of 2018; *Indonesia*, Art. 8 of the Law No. 26 (2000) establishing the Ad Hoc Human Rights Court; *Iraq*, Art. 11 of the Statute of the Iraqi Special Tribunal; *Ireland*, Section 6 of the International Criminal Court Act 2006; *Israel*, the Crime Of Genocide (Prevention And Punishment) Law of 1950; *Kenya*, Art. 6(4) of the International Crimes Act of 2008; *Kiribati*, Art. 6(4) of the International Crimes Act of 2008; *Netherlands*, Section 3 of the International Crimes Act of 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law; *Rwanda*, Art. 91 of the Criminal Code of the Republic of Rwanda of 2018; *Saint Vincent and the Grenadines*, Art. 157 of the Criminal Code of Saint Vincent and the Grenadines of 1988; *Samoa*, Section 5 of the International Criminal Court Act 2007; *Serbia*, Art. 370 of the Criminal Code of the Republic of Serbia of 2005; *Seychelles*, the Genocide Act of 1969; *Solomon Islands*, Art. 52 of the Criminal Code of the Solomon Islands of 1963; *South Africa*, Part 1 of Schedule 1 of the Implementation of the Rome Statute of the International Criminal Court Act (2002); *Sweden*, Section 1 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes of 2014; *Tonga*, Section 2 of the Genocide Act of Tonga of 1969; *Trinidad and Tobago*, Art. 9 of the International Criminal Court Act of 2006; *Tuvalu*, Art. 62 of the Penal Code of Tuvalu of 1985; *United Kingdom*, Art. 50(1) of the International Criminal Court Act 2001 (four territories, however, have separate implementing legislation with identical text. *Scotland*, International Criminal Court (Scotland) Act 2001; *Isle of Man*, International Criminal Court Act 2003; *Bailiwick of Jersey*, the International Criminal Court (Jersey) Law 2014; *Bailiwick of Guernsey*, the International Criminal Court (Bailiwick of Guernsey) Law, 2019).

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countries have not even implemented the crime of genocide in their domestic criminal law.³¹³ These results clearly demonstrate that domestic divergences are not simply flukes or aberrations, but actually extend to the majority of states.

However, this does not necessarily mean that these changes should have an impact on the content or interpretation of the international definition of genocide. It has been suggested that these differences can be interpreted as a sign of the dissatisfaction of states with the international definition,³¹⁴ or that they can be evidence that the customary definition of the crime of genocide is much broader, even including political groups.³¹⁵ However, my research suggests that these changes are largely idiosyncratic modifications that are often based on considerations of historical justice, adaptation to the domestic legal system, path dependency, or simple errors; i.e. they are not modifications undertaken with the intention of creating a new *opinio juris* and state practice. As Kleffner aptly put it, they are simply “domestic crimes in ‘international disguise’.”³¹⁶

As a result, states should be extremely cautious about how they apply these domestic definitions. Unless the prosecuted act constitutes a crime against humanity or genocide, expansive definitions of genocide should not be applied retroactively as that would violate the principle of legality. Exercise of universal jurisdiction based on such definitions could even result in international disputes. The existence of restrictive definitions, on the other hand, does not seem to be reconcilable with the international obligation to prevent and suppress the crime of genocide, and thus could be regarded as an internationally wrongful act.

313 Algeria, Bhutan, Botswana, Brunei, Cameroon, China, Egypt, Equatorial Guinea, Eswatini, Gabon, Gambia, Guyana, Haiti, India, Iran, Japan, Democratic People's Republic of Korea, Kuwait, Lao People's Republic, Lebanon, Liberia, Libya, Madagascar, Malaysia, Maldives, Marshall Islands, Micronesia, Monaco, Myanmar, Namibia, Nauru, Nepal, Nigeria, Pakistan, Palau, Palestine, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, San Marino, Saudi Arabia, Sierra Leone, Somalia, South Sudan, Sri Lanka, Sudan, Suriname, Syria, Tanzania, Thailand, Tunisia, United Arab Emirates, Vanuatu, Venezuela, Yemen, and Zambia.

314 Coria, *supra* note 208, 457.

315 Schaack, *supra* note 161, at 2282–2283.

316 Kleffner, *supra* note 14, 100.

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R. Hofmann, “Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?”, in P. Dupuy, B. Fassbender, M. N. Shaw and K. Sommermann (eds.), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (2006), pp. 341-359

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•
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Pierre-Marie Dupuy, Bardo Fassbender,
Malcolm N. Shaw, Karl-Peter Sommermann
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**Victims of Violations of International Humanitarian Law:
Do They Have an Individual Right
to Reparation against States under International Law ?**

RAINER HOFMANN

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I. Introduction

On 13 April 2005, the United Nations Commission on Human Rights (UNCHR) adopted its *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*.¹ Hereby, it finalized its efforts to contribute to the development of the right to reparation of victims of gross violations of human rights and humanitarian law which had been initiated in 1993, when the then Special Rapporteur of the then Sub-Committee on Prevention of Discrimination and Protection of National Minorities, *Theo van Boven*, presented his study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. It included a set of *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law*² which later came to be generally referred to as the *Van Boven Principles*. Thereafter, the UNCHR continued its work on this issue and in 2000 the then Special Rapporteur, *Cherif Bassiouni*, submitted his final report which included revised *Basic Principles and Guidelines on the right to a remedy and reparation for victims of*

¹ UN Doc. E/CN.4/2005/L.48, 13 April 2005.

² UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993; for a detailed discussion of the principles see F.H. Paolillo, "On Unfulfilled Duties: The Obligation to Make Reparation in Cases of Violations of Human Rights", in: Götz/Selmer/Wolfrum (Hrsg.), *Liber Amicorum Günther Jaenicke, Zum 85. Geburtstag*, Berlin u.a. 1998, 291 *et seq.*

Under Article 75 of the Rome Statute, the International Criminal Court shall establish principles relating to reparations to or, in respect of, victims, including restitution, compensation, and rehabilitation. On this basis, the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims. It is, in particular, important to note that, pursuant to Article 79 of the Statute, a trust for the benefit of the victims and their families shall be established. The fund shall be fed, *inter alia*, by money and other property collected by fines and forfeitures as ordered by the Court.⁷¹ Now, with the first cases being investigated by the Prosecutor, it will be interesting to see whether and to what extent the Court will eventually apply Article 75 and award compensation to victims.

7. Conclusion

The above analysis shows that it is indeed difficult to argue that there was, under international law as applicable during World War II, a right to compensation for violations of the laws of war, as they stood during World War II, held by the individual victims of such violations. Thus, applying the fundamental principle of intertemporal law, it may be argued that, since individual victims of such violations did not have such a right during World War II, they cannot claim compensation for these violations today either.

What is somewhat different is the conclusion with respect to violations of present norms of international humanitarian law. While it is true that in the – so far – only court decision dealing with claims for compensation by the victims of a violation of presently applicable international humanitarian law, the *Oberlandesgericht Köln*, in its judgment of 28 July 2005 in the *Bridge of Varvarin* case, chose to hold that, notwithstanding the most significant developments of international law as regards the legal personality of the individual, international law would still not provide for a right to compensation for such violations held and to be exercised by the individual victims, it is also true that there are significant trends to the contrary: It may suffice to mention Article 75 of the Rome Statute, the practice of both UNCC and EECC, the position of the *Darfur Inquiry Commission* and a strongly increasing number of scholars. Nonetheless, in the absence of a general provision explicitly conferring such a right on the individual victims concerned, there is no State practice which would allow for the conclusion that such an individual right might be considered as existing under customary international law. So, the *lex lata* does not provide for an individual right of the victims of violations of international humanitarian law to reparation, including compensation, against States.

⁷¹ See, e.g., C. Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations", *Leiden Journal of International Law* 15 (2002), 667 *et seq.*

III. Considerations *de lege ferenda*

This result does not properly reflect the state of present international law with respect to the position of the individual. It is indeed difficult to accept that, while present international law recognises the, albeit limited, legal personality of individuals and provides for a system of rights, i.e. the human rights, the violation of which results, in principle, in a claim for reparation, by the individual victim, against the State responsible for the violations of such right, the situation should be different under international humanitarian law. In particular, at a time when the traditional view as to the mutually exclusive applicability of human rights and humanitarian law no longer exists, it is difficult to maintain that individual victims of a violation of a human rights norm, applicable under the specific conditions of the relevant armed conflict, should have an individual claim for compensation against the responsible State, whereas the individual victims of an international humanitarian law norm conferring rights on an individual should not have such a right to claim compensation. To give an example: Under the above-mentioned decision of the High Court of Justice in the *Al Skeini* case, a person tortured while held in a prison run by the British occupation forces might have a claim for compensation against the United Kingdom whereas persons who were injured, in a situation of armed conflict solely governed by the rules of international humanitarian law, by an attack violating international humanitarian law, would not have such a claim for compensation against the responsible State. There might be reasons to continue to uphold such a difference, but they must be truly valid reasons.

This means that Article 3 of the 1907 Hague Convention IV and also Article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions should, in principle, in the future be interpreted and applied in such a way as to accord an individual right to compensation for violations of humanitarian law against the State responsible for the violations. This would solve the problem that the mere existence of primary rights, such as human rights and rights of individuals under international humanitarian law, does not *per se* result in the existence of secondary rights, such as the right to a remedy and the right to reparation, including compensation.⁷² Given that there is still little evidence in customary international law for an individual right to a remedy against, and reparation for, violations of international humanitarian law, it remains true that such a right must be explicitly provided for.⁷³ Applying the generally recognised methods of systematic and teleological or dynamic treaty interpretation, Article 3 of the 1907 Hague Convention IV as well as Article 91 of the 1977 Additional Protocol I could – if not: should – be interpreted in such a way as to confer, on the individual victims of violations of international humanitarian law, a right to claim compensation for such violations: From a systematic point of view, such an interpretation would resolve the problem of

⁷² See, e.g., R. Provost (*supra* note 25), 43; cf. also C. Tomuschat (*supra* note 9), 13.

⁷³ See, e.g., S. Kadelbach (*supra* note 8), 81; and R. Provost, *ibid.*, 44.

the – not only at first view: incomprehensible – difference between violations of human rights and violations of humanitarian law; from a teleological perspective, the conferral of such a procedural right would enhance the legal position of the individual and, thus, the extent of legal protection; also, such an interpretation would be fully in line with the approach of dynamic interpretation which should not only be generally applied to human rights treaties, but also to international humanitarian law norms. To conclude this discussion, it should also be stressed that such an interpretation would not be incompatible with any other accepted rule of treaty interpretation.⁷⁴

This, however, is certainly not the end of the story: The recognition of such a right does not *per se* imply that victims might sue the responsible State in whatever *forum* they might wish to choose.⁷⁵ There are still strongly convincing arguments, both of a legal and a political nature, to continue to apply the rules of State immunity as regards *acta iure imperii*⁷⁶ – also with regard to violations of *ius cogens* norms. In any case, notwithstanding recent developments,⁷⁷ there is still too little evidence to argue that, under customary international law, States might be sued before the courts of another State for violations of *ius cogens* norms without having the right to invoke their rights under the law on State immunity.⁷⁸ Therefore, such claims might – and should – only be made before the courts of the State responsible for the relevant violations of international humanitarian law, or competent international courts.

Under a legal policy *perspective*, to allow for such claims before the national courts of the responsible State or international courts might, however, not be the best solution: Firstly, it must be questioned whether regular domestic courts or international human rights courts do have the necessary expertise to decide on presumably highly complex issues such as whether a specific

⁷⁴ See, e.g., F. Kalshoven (*supra* note 24), 836; C. Greenwood (*supra* note 30), 250; and Zegveld (*supra* note 8), 506.

⁷⁵ As Christian Tomuschat rightly put it: “A world full of self-appointed human rights vigilantes is certainly more a trauma than a vision of paradise” (*supra* note 9), 18.

⁷⁶ The distinction between *acta iure imperii* and *acta iure gestionis* has been upheld by, *inter alia*, the EurCourtHR in its decision in *McElhinney v. Ireland*, Judgment of 21 November 2001, RJD 2001-XI, para. 38 = *HRLJ* 23 (2002), 57.

⁷⁷ See in particular the decisions of the Greek courts in the *Distomo* cases (*supra* note 53) and the decision of the Italian *Corte Suprema di Cassazione* of 11 March 2004 in the *Ferrini* case, *Rivista di diritto internazionale* 87 (2004), 540; see also J. Bröhmer, *State Immunity and the Violation of Human Rights*, 1997, 189 *et seq.*; and J.F. Flauss, “Droit des immunités et protection internationale des droits de l’homme”, *Revue Suisse de droit international et de droit européen* 10 (2000), 299 *et seq.* (2005).

⁷⁸ See, in particular, EurCourtHR, *Kalogeropoulos et al. v. Greece*, (*supra* note 54), see also the majority (and the minority) opinion in EurCourtHR, *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, RJD 2001-XII = *HRLJ* 23 (2002), 39. See also C. Tomuschat (*supra* note 9), 15; and H. Fox, *The Law of State Immunity*, 2002, 316.

conduct in an armed conflict does in fact amount to a violation of international humanitarian law or human rights law. Secondly, it must be borne in mind that armed conflicts will most frequently result in situations of mass violations of international law. In such situations, to award individual compensation is not only practically impossible; neither is it an appropriate way to achieve a balanced solution as a precondition for the establishment of a generally acceptable post-conflict settlement and lasting peace. One of the lessons to be learned from the wars and armed conflicts of the past century is that it is in fact impossible to bring about individual justice in each and every case of violations of international law. Therefore, it is essential to consider alternative methods of post-conflict settlements, at least in situations of mass violations of international law. And indeed, the establishment of *ad-hoc* compensation commissions before which individual claimants would have standing seems to be a model to be further pursued.⁷⁹

IV. Concluding remarks

The further improvement of compliance with the norms of international humanitarian law remains high on the current agenda of international lawyers and politicians. To accord the individual victims of such violations a legally enforceable right to claim reparation, including monetary compensation, against the responsible State is certainly one of the avenues available. Neither the adoption of the UNCHR *Basic principles and guidelines* nor the judgment of the *Oberlandesgericht Köln* in the *Bridge of Varvarin* case have brought the pertinent discussion to an end – quite to the contrary: There is considerable need to further explore ways and means to bring justice to the individual victims; without such justice, it will be difficult to achieve lasting and peaceful post-conflict settlements. To grant such victims a right to assert their claims certainly constitutes one possibility which would be more in keeping with the present state of international law under which individuals are recognized as legal persons in their own right and no longer as mere subjects of States. The recognition of such a right, however, is only a first step; it must be accompanied by a discussion on the precise procedural aspects of such a right. Insofar, a thorough assessment of the *pros* and *cons* of the various options is certainly called for.

⁷⁹ On this issue see, e.g., J.K. Kleffner, "Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure", *Leiden Journal of International Law* 15 (2002), 237 *et seq.* (250).

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M. O. Hudson, “The Twenty-Ninth Year of the World Court”, *American Journal of International Law*, vol. 46 (1951), pp. 1-36

Available at:

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Annex 42

THE TWENTY-NINTH YEAR OF THE WORLD COURT *

BY MANLEY O. HUDSON

The twenty-ninth year of the Court at The Hague was marked by sustained and fruitful activity. Two judgments were handed down in the *Colombian-Peruvian Case Relating to Asylum*, and four advisory opinions were given at the request of the General Assembly of the United Nations. Proceedings in the Franco-Egyptian Case on *Protection of French Nationals in Egypt* were discontinued. At the close of the year four cases were on the Court's list: the *Anglo-Norwegian Fisheries Case*, the *Rights of American Nationals in Morocco Case*, a second *Colombian-Peruvian Asylum Case*, and a request for an advisory opinion concerning *Reservations to the Genocide Convention*. The progress registered during the year in the extension of the Court's jurisdiction was disappointingly slight.

COMPETENCE OF THE GENERAL ASSEMBLY FOR ADMISSION OF A STATE TO THE UNITED NATIONS

On November 22, 1949, the General Assembly of the United Nations adopted a resolution requesting the Court to give an advisory opinion on the following question:

Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?

The request, duly transmitted to the Registry,¹ was notified to states entitled to appear before the Court. On December 2, 1949, the Court issued an order fixing January 24, 1950, as the date of expiry of the period during which written statements would be received.² Statements were made within the time-limit by the Byelorussian Soviet Socialist Republic, Czechoslovakia, Egypt, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, and the United States of America; statements later made by the Republic of Argentina and Venezuela were accepted by a decision of the President of the Court. The Secretary General of the United Nations also submitted a written statement, setting forth the his-

* This is the twenty-ninth in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ A list of the numerous documents submitted with the request was annexed to the opinion.

² I. C. J. Reports, 1949, pp. 241-242.

of a State" referred to in Article IX is not criminal liability.⁵¹ Instead it is limited to the civil responsibility of a state, and such responsibility is governed, not by any provisions of the Convention, but by general international law.

In its ratification of the Convention, the Republic of the Philippines stated that it did not consider Article IX "to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law." This interpretation is so imperative that the statement of it would seem to have resulted from unnecessary precaution.⁵²

Various reservations have been made to Article IX. At the time of signature of the Convention, the Soviet Union, Ukraine, Byelorussia and Czechoslovakia declined to consider the article as binding insofar as they were concerned, and declared that as regards Article IX they maintained "the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision." A similar position was taken by Bulgaria in reservations made in its accession to the Convention. If this position represents a general view which is not confined to disputes relating to the Genocide Convention, it runs squarely counter to the provision in Article 40 of the Statute permitting the institution of proceedings in certain cases by the application of a single party to a dispute, and it would seriously restrict the rôle of the Court in the interpretation and application of international legislative instruments.

AVAILABILITY OF DOCUMENTS OF WRITTEN PROCEEDINGS

The writer ventures to offer a suggestion with regard to the Court's practice concerning the documents of the written proceedings in contested cases. Cases pending before the Court frequently involve questions of a wide general interest. After a case is disposed of by the Court's rendition of a final judgment, all the documents of the written proceedings—if the case is begun by an application, these will usually consist of a memorial, a counter-memorial, a reply and a rejoinder—as well as the stenographic

⁵¹ In the course of the drafting of the Convention by the Sixth Committee of the General Assembly, the Delegation of the United Kingdom withdrew its proposal to impose criminal responsibility on states (U.N. Doc. A/C.6/236) and supported the imposition of civil responsibility. General Assembly, 3rd Sess., Pt. I, Official Records, Sixth Committee, pp. 428, 440.

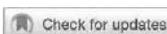
⁵² In presenting the Convention for the advice and consent of the Senate on June 16, 1949, the President of the United States endorsed a recommendation by the Acting Secretary of State that such action be taken "with the understanding that article IX shall be understood in the traditional sense of responsibility 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." This understanding was recommended by a subcommittee to the Senate Committee on Foreign Relations on May 23, 1950. In view of the conclusion stated above, no statement of such an understanding would seem to be needed.

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M. M. Islam, M. N. Khan and M. M. Rahman, “Intimate Partner Abuse Among Rohingya Women and Its Relationship With Their Abilities to Reject Husbands’ Advances to Unwanted Sex”, *Journal of Interpersonal Violence*, vol. 37 (2022)

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Original Research

Intimate Partner Abuse Among Rohingya Women and Its Relationship With Their Abilities to Reject Husbands' Advances to Unwanted Sex

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Abstract

Currently, around a million Rohingya refugees live in Cox's Bazar, Bangladesh. Displacement from homelands and restrictions on movement in the refugee camps may exacerbate intimate partner abuse (IPA) against refugee women and their abilities to reject husbands' advances to unwanted sex. This study examines Rohingya refugee women's attitudes toward and experience of intimate partner abuse (IPA) and their impact on the abilities to reject husbands' advances to unwanted sex. A survey was conducted among Rohingya refugee women in Cox's Bazar, Bangladesh. Women's attitudes toward IPA, and experience of IPA were the exposure variables. Women's abilities to say "no" to husbands' advances to unwanted sexual intercourse was the outcome variable. Multivariable logistic regression models were used to examine the relationships. Participants' median age was 22 years (range: 13-41). Most women perceived hitting/beatings by

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empowerment. Previous research suggests that there may be multiple risk factors for women's submission to unwanted sexual activity, including the quality of relationships, attitudes and expectations, and women's bargaining powers (Parish et al., 2007). The emergency situation in the Rohingya refugee camps along with the loss of livelihoods, lack of economic opportunity, and insecurity may all contribute to those risk factors.

Although assessing the underlying reasons for IPA and women's attitudes toward it are beyond the scope of this study, based on the existing literature regarding the Rohingya people and other similar populations, a range of factors can be identified. First, the social structure of the Rohingya people is patriarchal, and IPA is therefore influenced by gender norms that equate masculinity with dominance and femininity with submissiveness. Deep-rooted social and gender norms influence women's behaviors and practices (Tanabe et al., 2019). A previous study of Rohingya refugees in Malaysia found that women were just as likely as men (and in some cases more likely) to endorse gender roles that condone male control and accept the justification of IPA (Welton-Mitchell et al., 2019). Second, displacement from motherlands ruptures people's crucial social support networks and relationships, significantly reducing supportive avenues for women as trusted family and community members become separated. Among their new neighbors in refugee camps, social cohesion is likely to be weak and so is the possibility of women seeking help (Wachter et al., 2018). Also, displacement and uncertainty increase daily stress (Falb et al., 2014; Riley et al., 2017). Third, although it is not known whether the occurrences of IPA by husbands increased after they were displaced from Myanmar, evidence from the previous research suggests that economic pressures, cramped living conditions, male frustration at the lack of opportunities for their livelihoods, and a lack of legal structure in the camps may increase physical, sexual and emotional abuse (Al Mamun et al., 2018; Toma et al., 2018). The literature also suggests that employment is fundamental to men's identities and feelings of self-worth and that unemployment is strongly correlated with domestic violence (Cardoso et al., 2016).

Implications

The findings of this study have a substantial policy implication. We acknowledge that ensuring basic requirements such as food, shelter, health care, and sanitation for such a large refugee population is a massive undertaking, and humanitarian agencies and government and nongovernment organizations might not view doing anything beyond this to reduce IPA against Rohingya women as being a high priority. However, this is an important public health issue that needs to be addressed. The literature suggests that women's

accepting attitudes toward beatings by their husbands and their experience of physical abuse and unwanted sex can have direct effects on their sexual and reproductive health (Khan & Islam, 2018). These effects include unintended and unwanted pregnancies, frequent pregnancies and abortions, complications during pregnancy, sexually transmitted infections such as the human immunodeficiency virus, pelvic inflammatory disease, urinary tract infections, and sexual dysfunction, and the use of reproductive health services (Campbell, 2002; Plichta, 2004; Soleimani et al., 2017). An appropriate policy and effective programs for reducing IPA may result in decreases in the overall demand for healthcare and social services.

This study findings also have important implications for current and future interventions. IPA is a sensitive issue. The legal status of the Rohingya people in Bangladesh and the restrictions around their movements further complicate the issue. Thus, any intervention in addressing this problem should be carefully programmed and monitored. Improving women's awareness about their rights, changing their attitudes toward abuse, and helping them to feel greater entitlement and self-esteem are likely to reduce their attitudes toward and experiences of IPA and thereby to enhance their abilities to prevent unwanted sex (Yount et al., 2013). Unfortunately, there is limited opportunity for providing the Rohingya people with education or skills development for economic empowerment. However, the good news is that in early 2020, the government of Bangladesh granted permission to young Rohingya refugees to have formal schooling (Ahmed, 2020), which opens the door for a better future. Perhaps it is reasonable to undertake programs not only for reducing and eradicating IPA but also for improving women's understanding and their opportunities to take action with regard to their sexual and reproductive health. Programs such as creating opportunities for women to rebuild trusted social support networks in refugee camp settings, safe entry points for social services and information, and easy access to sexual and reproductive health care services should be high priorities (Wachter et al., 2018). Long-term interventions should include engaging the Rohingya community in denormalizing the current practice of IPA and encouraging them to question existing practices and norms, making them aware of the adverse effects of IPA, and providing them with religious guidance in understanding intimate relationships (Al Mamun et al., 2018).

Study Strengths and Limitations

A strength of this study is its primary data from a relatively large sample. In addition to women's attitudes toward IPA, we also used women's experience of IPA. On the other hand, our findings are only as valid as the reliability of

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D. A. Kourtis, “The Rohingya Genocide Case: Who is Entitled to Claim Reparations?”, *Opinio Juris*, 21 November 2019

Available at:

<http://opiniojuris.org/2019/11/21/the-rohingya-genocide-case-who-is-entitled-to-claim-reparations/>

The Rohingya Genocide Case: Who is Entitled to Claim Reparations?

 opiniojuris.org/2019/11/21/the-rohingya-genocide-case-who-is-entitled-to-claim-reparations/

November 21, 2019



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In a possibly historical movement, The Gambia has launched an [application](#) instituting proceedings against Myanmar for acts and omissions targeting the Rohingya [allegedly](#) constituent of the crime of genocide. The present short commentary will not focus on the legal perplexities of litigating an inter-State complaint on genocide (see [here](#), [here](#), and [here](#)). Instead, it will turn to a slightly overlooked issue, that of the exact scope of the World Court's [remedial jurisdiction](#), should the ICJ accept Myanmar's responsibility under the [Convention on the Prevention and Punishment of the Crime of Genocide](#).

The Obligation to Provide Reparations to Genocide Victims

In the present case, the applicant asks the Court, *inter alia*, to pronounce that Myanmar must perform the obligation of reparation in the interest of the Rohingya. Then it goes on to mention an indicative list of the remedies sought (allowing the safe and dignified return

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of forcibly displaced persons, ensuring respect for their full citizenship, safeguarding their human rights, and granting protection against discrimination, persecution, or other related acts). Moreover, The Gambia states in its application (para 112, fourth point) that Myanmar's obligation to provide reparations to the interested group is premised on Article I of the Genocide Convention. Evidently, the applicant proposes a particularly nonrestrictive reading of the said provision, which merits further analysis.

We should bear in mind that even the ICJ itself has supported a creative reading of the relevant rule. In the *Bosnian Genocide Case* (para 166), the Court deduced the obligation of States not to commit genocide through their organs and instrumentalities from the object and purpose of the Convention, interpreting constructively Articles I and IX. Contrariwise, in the present instance, the text of the Convention remains absolutely silent on the issue of reparations. Surprisingly, this was not always the case, since the original Secretariat draft contained an explicit rule (Article XIII) obligating the responsible State to grant to 'the survivors ... redress of a nature and in an amount to be determined by the United Nations'. According to the draft's commentary, this provision was considered complementary to the penal sanctions prescribed by the Convention, incorporating the self-evident principle that the State, which committed/failed to avoid the perpetration of genocide within its territory, must pay (Abtahi/Webb 102-104).

The omission of the provision from later drafts and the final text mirrored the reservations of the United States against the lack of precision characterizing the proposed rule and the need for a more holistic approach linked to the establishment of an international court vested with primary jurisdiction vis-à-vis the crime of genocide. Consequently, the Convention's *travaux préparatoires* confirm that at the time of its adoption the duty to redress was considered incumbent but not (yet) precisely delineated. That being the case, we can safely argue that subsequent practice under several international human rights instruments, and ultimately the adoption of the Rome Statute, have further elaborated and solidified the normative content of this obligation. Currently, the duty to redress has probably achieved the status of a general principle or a customary rule of international law, based on the respective right's universal recognition and acceptance (Darfur Report para 597). After all, as stated in the UN Basic Principles and Guidelines, applicable to the crime of genocide (Schabas 472; van Boven 34), the general obligation to provide reparation should not be seen as a new legal concept but rather as the result of an inductive assessment of the various rules adopted within a wide range of international regimes.

Who Is Entitled to Raise a Claim on Reparations for Genocide?

At this point, we should also consider the dual legal nature of the Genocide Convention as an instrument of international criminal and human rights law, securing the right of existence held collectively by the protected groups (*Reservations Advisory Opinion* 23). Notwithstanding the abstract existence of such a right, its judicial enforcement is not an easy task. To elaborate, in the present case, lacking special arrangements providing for the victims' *jus standi* before a competent international tribunal, it is not clear who is entitled to vindicate the aforementioned collective right, raising a reparations' claim on

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behalf of the victimized community. It has been suggested that the *erga omnes* character of the obligations arising from the Genocide Convention may influence the issues of representation and the assertion of reparations on behalf of the right-holder community. Nevertheless, relevant State practice remains both scant and contradictory. For instance, Ethiopia and Liberia, defending the Namibians' right to self-determination, sought only declaratory relief (Preliminary Objections 322-324; Second Phase 10-11). On the other hand, Portugal requested the ICJ to order Australia to pay reparations 'to the people of East Timor ... in such form and manner as may be indicated by the Court' (East Timor Case 95). Moreover, ILC's ARSIWA, citing the Namibia jurisprudence (para 127), seemingly support the position that, when a collective entity's right is at stake, third parties acting on its behalf can only seek declaratory relief (127 para 11).

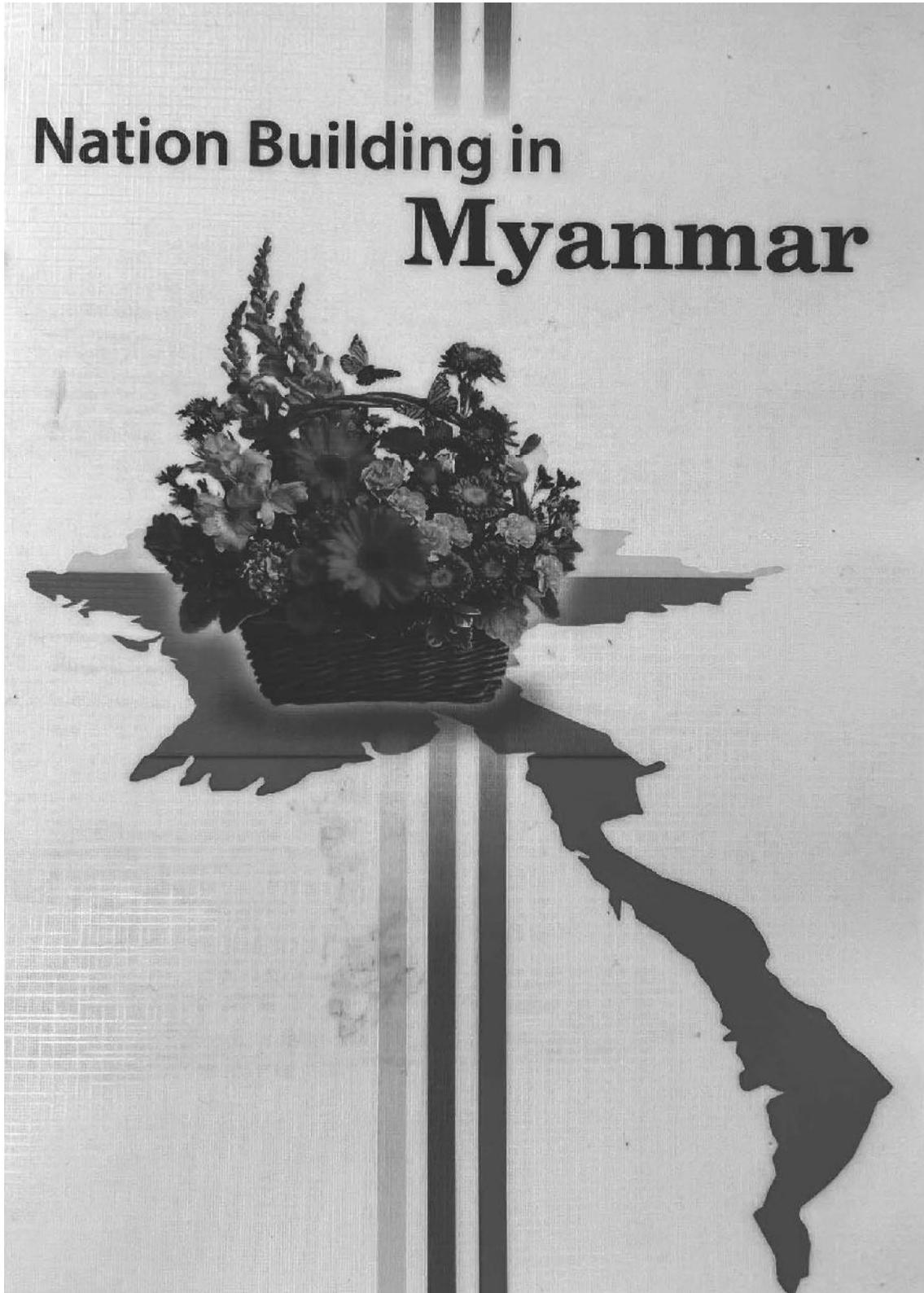
As a result, even though the obligation to provide reparations is accommodated in the spirit and teleology – but not the letter – of the Genocide Convention, reinforced by various international instruments, and further elaborated by relevant case law, the question whether reparations can be sought before the ICJ by third States on behalf of the victimized group remains controversial. Unlike the *erga omnes* obligations established directly by the Convention, the obligation to provide reparations is primarily owed to the survivors of the targeted group and stems from the breach of their collective right. Therefore, reliance on the jurisdiction of the ICJ to provide something more than a declaration of the existing norms would imply a new radical reading of the duty to redress as itself an *erga omnes* obligation owed to the international community for the benefit of the protected group. Otherwise, it is not clear how the applicant State can invoke the respective obligation before the Court, given the lack of direct links to the targeted population.

Concluding Remarks

Although The Gambia's initial submissions do not clarify whether a purely declaratory judgment on reparations or a more robust pronouncement is sought, the latter seems more unlikely, given the questions of causation, valuation, and identification that render particularly challenging a comprehensive *in casu* assessment of reparations. Moreover, one may argue that the ICJ is not particularly well-placed to adjudicate reparations claims within the context of mass criminality. Be that as it may, for the time being the chambers of a properly constituted remedial jurisdiction remain close to the victims of the ongoing mass atrocity, while the ICC will probably deal with only one aspect of the case. Therefore, the remedial powers of the World Court, even in the form of a declaratory judgment, possess not only an inherent authoritative value, but also the potential to strengthen the long overdue quest for accountability, justice, and redress for the Rohingya.

Annex 45

J. Leider, “Rohingya: The name, the movement, the quest for identity”, in *Nation Building in Myanmar*, Myanmar EGRESS/Myanmar Peace Center (2013), pp. 204-255



Nation Building in Myanmar



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June 2013

Rohingya: the name, the movement and the quest for identity

Jaques P. Leider

For quite a long time during the nineteenth and twentieth century, ethnicity was defined by cultural and racial criteria supported by the underlying assumption that cultural characteristics were markers of a fixed identity. People could thus be divided and subdivided into essentialized ethnic categories. It is this “culturalist” and racial understanding of ethnic identity, read back into history and widely spread in Myanmar, that has led to the formulation of the so-called list of 135 ethnic groups, a list that reflects political choices based on ethnic, cultural and historical criteria. These groups are hierarchized and co-exist in a multi-layered context that is determined by historical precursors, socio-economic environments and changing political conditions. Some are arguably more dominant and prominent than others. In Myanmar the constitutionally defined ethnic categories are often said to derive from the colonial state. But one may as well trace the concept of such categories back to various lists of 101 peoples found in precolonial Myanmar, Rakhine and Mon texts.¹ While ethnicity is a rigid concept that dominates political and social relations in Myanmar, contemporary scholarship would not support the inflexibility of such categories, because it rejects the “reification of ethnic distinctions” and the “obscuring” of processes of ethnic

¹ A compilation of such lists is provided by U Tin, *Myanmar Min OkchokponSadan*, chapter 188.

that “Chittagonian penetration in Arakan is steadily continuing and is resented not only by the Arakanese proper but also by the settled Chittagonians”. His report foresaw that unchecked immigration “contained the seed of future communal troubles”, but government restrictions were reported to be enacted later.⁶⁰

The communal tensions did indeed explode two years later during 1942, when following the Japanese invasion, thousands of Indians fled from Lower Burma back to India, provoking systematic land-grabbing and massacres with several thousand dead on both sides. This outbreak of violence was the result of social tensions that had not been dealt with by the authorities. They were apparently ignited by nationalist propaganda of the Burma Independence Army calling for the expulsion of the Indians who were considered to be the instruments of British colonial power.⁶¹ For two years, Rakhine became a battleground, with a Muslim-dominated north that supported the British and a Rakhine dominated zone in the south controlled by the Japanese. Confrontations between Muslim armed groups and the Rakhine took place during this period. These memories of the suffering have lingered over the decades on both sides of the divide, and after the war, territorial dispossessions in the north were not

⁶⁰ *Report on Indian Immigration* by James Baxter, 12 October 1940, p. 49, 51.

⁶¹ It is regrettable that contemporary observers who have been fast to blame Rakhine Buddhist xenophobia and the Myanmar government's security failures in 2012, fail to take into consideration the high percentage of new migrants that had created already a huge problem for the coexistence of two culturally distinct communities in the late colonial period. Disregarding the complex heritage of the past and its impact on the present, they have shifted the issue to its sole legal aspects in a contemporary context. Any comparison of the intensity of immigration in Western or other countries at the present moment with the varying levels where immigration is still compatible with social harmony would be sufficient to illustrate the case of northern Rakhine back in the 1930s.

undone. It is well known that it took years for the central Burmese State to regain effective control over Rakhine, where several armed groups entrenched themselves to fight the post-war government.

It was in the immediate aftermath of the war that the “threat” of independence powerfully reinforced the need for the Muslims to decide to either opt for a Muslim/Pakistan identity or a Myanmar/Rakhine connection. This was not a question for the Muslims who were already integrated in Rakhine’s society, but it was an issue for the recent migrant community in northern Rakhine. From among the great number of those who in Maungdaw and Buthidaung favored either to support Pakistan or to secede from Burma to gain their own state, came the Mujahid rebels, who took up arms even before Burma’s independence on the 4th January 1948.⁶² Hopes put on alleged British promises for independence were vain. Overtures made by Northern Rakhine militants to Ali Jinnah in April 1947 were turned down in July and the secession option was a dead end as Ali Jinnah and Aung San agreed that the international border at the Naf River was not going to be negotiated. This put further pressure on the Mujahids to follow a viable course of action. From that moment on, the Mujahids fought for political self-determination and the creation of an exclusive Muslim zone in Northern Rakhine.⁶³ Choosing the name “Rohingya”, they identified themselves with the history and geography of the country where they lived, inspiring a sense of Muslim cohesion

⁶² For a detailed account of the situation during and after the Second World War including the Mujahid rebellion, see Yegar, *Between Integration and Secession*, 23-48.

⁶³ About the Mujahid rebellion, see Yegar, *Between Integration and Secession* and Aye Chan, *Western Border*.

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J. Leider, “The Chittagonians in Colonial Arakan: Seasonal and Settlement Migrations”, in M. Bergsmo *et al.* (eds.), *Colonial Wrongs and Access to International Law* (2020), pp. 177-227

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Colonial Wrongs and Access to International Law

Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (editors)



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Front cover: *Extraction of resources was a primary engine of colonization. The pictures show teak extraction in Colonial Burma by the British Bombay Burmah Trading Corporation around 1920. Above A girdled teak tree and two foresters. Below The Corporation used some 3,000 elephants to move logs. The photographs were taken by Mr. Percival Marshall (an employee of the Corporation). TOAEP thanks his great grandson Mr. Ben Squires for making them available and Professor Jonathan Saha for explanations.*

Back cover: *Storing ground used by the Bombay Burmah Trading Corporation. The photograph was taken by Mr. Percival Marshall around 1920.*

The Chittagonians in Colonial Arakan: Seasonal and Settlement Migrations

Jacques P. Leider *

6.1. Introduction

Muslim Chittagonians formed the dominant group of seasonal labourers and new settlers in north and central Arakan (now Rakhine State in Myanmar) during British colonial rule in Burma (1826–1948). The considerable growth of their settlements in the late nineteenth century was the defining factor which transformed Arakan’s small pre-colonial Muslim community into the biggest Muslim group in Burma, concentrated in a densely populated border zone. The present chapter looks at these significant demographic and social changes, and responds to Morten Bergsmo’s observation that the International Criminal Court Prosecution’s legal approach in its request for a designated pre-trial chamber to authorize an investigation into alleged crimes in Rakhine State of 4 July 2019 “turns the spotlight on the demographic background of the conflict in northern Rakhine”.¹

The term ‘Chittagonians’ was commonly used in colonial sources as a catch-all name for a variety of people from Lower Bengal’s Chittagong division, which bordered Arakan division (Burma). According to the geographical context in Burma itself, it could refer to Chittagonian seamen or shipwrights along the Irrawaddy (the ‘lascars’), an array of Hindu and Buddhist traders, peddlers and cooks in Akyab and Rangoon, or mostly, as

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¹ Morten Bergsmo, *Myanmar, Colonial Aftermath, and Access to International Law*, Torkel Opsahl Academic EPublisher, Brussels, 2019, p. 1 (<https://www.toaep.org/ops-pdf/9-bergsmo>).

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were not counted or registered by the administration in Bengal or Burma. Only occasional estimations were established.

The language of the colonial archives reveals mindsets that are different from ours. Its vocabulary and syntax present late-nineteenth century and early-twentieth century views on the merits of immigration as a tool of civilizing progress; they demonstrate a colonial obsession with racial categorization underpinned by concepts of a moral economy which saw hard-working, land-conquering people (such as Bengali people from Chittagong) as agents of advancement, superior to other people often described as lazy, a term applied to various types of Southeast Asians in colonial settings, the Arakanese (Rakhine) being one such example. The colonial categorizing was not only a process of hierarchizing by racial and productivity criteria, but it also conditioned and formalized an interethnic 'othering' which impacted social and political relations.

However, the impression of a single homogenous colonial mind-set or a monolithic type of colonial knowledge would be mistaken. Views changed and seemingly moved by generational cohorts, interpretations of statistical data varied, and individual prejudice and opinions expressed in print could contradict or cut across state policies pursued in the name of progress. For that reason, colonial quotes no less than numerical figures, when cited as proofs or illustrations, need to be fleshed out with critical context.

The practice of decennial census reports started in British India in 1872. The two main criteria used to categorize the population in British Burma in the census reports of 1872, 1881, 1891, 1901 and 1911 was their religious affiliation and the language group they belonged to. This meant that independently of their origins, period of residence in Arakan, cultural roots, social integration, or their own sense of belonging, all the Muslims in Arakan found themselves grouped together under the heading of 'Muslims', while all those people (either Muslims or Hindus) who had ancient origins in Bengal and spoke dialectal forms of East Bengali were counted as Bengali speakers. On the other hand, since the early-nineteenth century, administrative and missionary descriptions pointed occasionally to a difference between local Muslims ('Arakan Mussulmans'/'Arakan Mahomedans') and 'Bengalis' or 'Indians' from Chittagong who were *new* immigrants. This difference between Muslim communities whose ancestors had lived in Arakan since the time of the Arakanese kings (that is, before 1785) and those who were post-1826 immigrant settlers was not

6. The Chittagonians in Colonial Arakan: Seasonal and Settlement Migrations

relevant for their categorization in the census records.¹¹ In racialized terms, Chittagonians were classified as ‘foreigners’ because they were Indians who were not viewed as an indigenous population of Burma. While Muslims could be either indigenous or foreigners, the option for Muslims to choose expressly between the category ‘Arakan Mahomedan’ or ‘Chittagonian’ in survey operations was provided only in the census reports of 1921 and 1931.

British records (land tax settlements, census reports, annual administration reports, gazetteers) contain statistical information on different groups of people living in Arakan, their professional occupations, religious affiliation, seasonal migration, agricultural land expansion, and, in the early-twentieth century, increasingly detailed demographic data (population number, births, age, civil condition, gender ratio, infirmities, education). The individuality of migrant and acculturated Muslims is difficult to recover in the interstices of these matter-of-fact administrative documents. Their subjectivity is effaced because they appear as a mass, positively portrayed as diligent farmers and gardeners, but *anonymous*. They were faceless and voiceless in the sense that the motives of their migrations and the representations of their lives as trans-regional labourers or settlers did neither take shape in their own words nor in the descriptions of the colonial commentators. The same is obviously true for the mass of the resident Buddhist population, too, whose subjective experience of territorial, economic and demographic change remains hidden. The reconstruction of a portrait of the people hits severe limits as we encounter the constrictions of archival records.

6.4. Chittagonians and the Colonial Rice Economy in Arakan

Arakan had been a flourishing Buddhist kingdom between the fifteenth and seventeenth century, its majority population being the Arakanese (Rakhine), a group probably more internally differentiated by regional characteristics than in contemporary times. As the kingdom expanded along the coast and established hegemonic control over the coast from Lower Burma to Southeast Bengal, its population became more diverse including Muslims, Hindus and Christians coming from neighbouring India and Southeast Asia. The royal administration depended on the role of

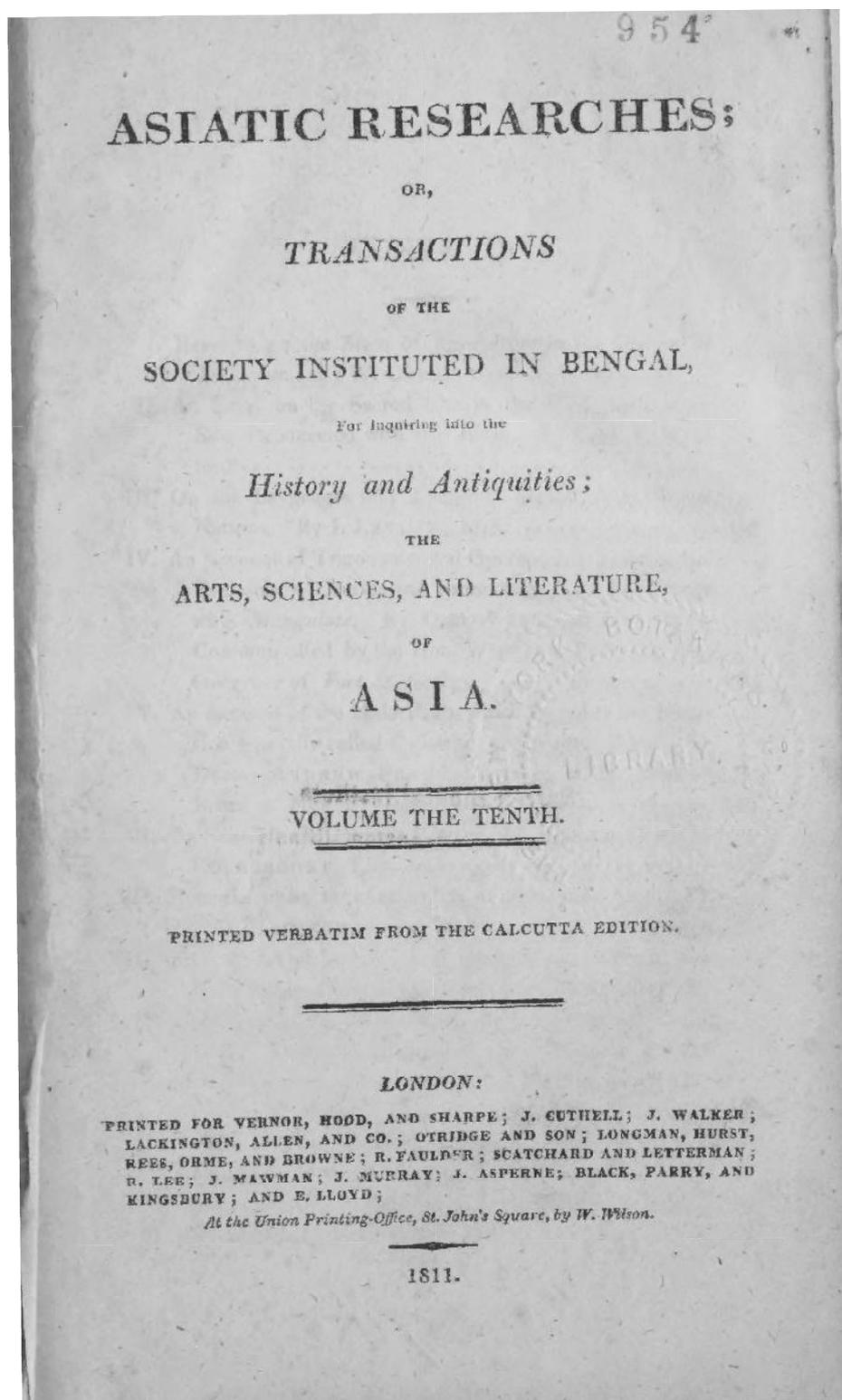
¹¹ 1785 marks the beginning of Burmese rule in Arakan and 1826 the conclusion of the Yandabo treaty which put an end to the war between the court of Amarapura and the East India Company.

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J. Leyden, “On the Language and Literature of the Indo-Chinese Nations”,
Asiatick Researches, vol. 10 (1811), pp. 158-289

Available at:

<https://www.biodiversitylibrary.org/item/93191#page/5/mode/1up>



III.

On the LANGUAGES and LITERATURE of the INDO-CHINESE NATIONS.

BY J. LEYDEN, M. D.

THE inhabitants of the regions which lie between *India* and *China*, and the greater part of the islanders of the eastern sea, though divided into numerous tribes, and equally dissimilar in their languages and manners, may yet with propriety be characterized by the term *Indo-Chinese*. Situated between *India* and *China*, each of which proudly styles itself the most ancient among the nations of the earth, they have contented themselves with more modest claims to antiquity, and professed to borrow from one or other of their neighbours the principal features of their religion, laws and manners. The different periods, however, at which these were adopted in different countries, the various degrees of civilization, and the pre-existing habits on which they were engrafted, have produced a diversity of national characteristics, by which they are not only distinguished from the *Indian* and *Chinese* nations, but also from one another, notwithstanding their common mixed origin.

The intercourse of *Europeans* with the *Indo-Chinese* nations, though, for the first two centuries after the arrival of the *Portuguese* in the east, scarcely inferior to that which was carried on with *India* or *China*, was not of such a kind as to furnish us with a very accurate or extensive knowledge of their laws, manners or literature; and for more than a century it has been rather declining than increasing. Neither, since our

a child, which is also *Barma*, and *mateinay*, which seems to be an error, as it does not signify *to sit*, either in *Rukhêng* or *Barma*, but literally "does not stand," the proper *Rukhêng* term being *rát chowk*. The words in the vocabulary certainly exist in *Rukhêng* as well as in *Barma*; but in some instances different words are in more general use, in the former; as *ahri*, *long*, instead of *shé*, and *po-mro-naing-grong*, *beast*, instead of *taraitzan*. The *Rukhêng* pronunciation, sometimes too, is modified by the *Burma*, and the letter *r* is almost always omitted in the specimen, though it is a distinguishing characteristic of the *Rukhêng* pronunciation. Thus, the *Rukhêng* requires *mri-gri*, *earth*, instead of *myægyee*, in the specimen; *kri*, *great*, instead of *kyee*; *kripamó*, *foot*, instead of *kiepamo*; *krowk*, *six*, instead of *kiouk*; *kri*, *a star*, instead of *kyay*, and *ni*, *the sun*, instead of *nay*. These errors, however, are not to be attributed to Dr. FR. BUCHANAN, nor detract, in the least, from the merit of his exertions in commencing the investigation; they evidently proceed from the inaccuracy, hurry, and indistinct pronunciation of his *Barma* assistants, and in his situation were perhaps not to be avoided, unless by attending to the native orthography.

Dr. F. BUCHANAN has also exhibited comparative specimens of two mixed dialects, spoken in *Arakan*; the first termed *Rúnga*, spoken by the *Moslems* of the country, and consisting of a mixture of *Arabic*, *Hindi*, and *Rukhêng*; the second, termed *Rusán*, used by the *Hindús* of *Arakan*, who adhere to the system of BRAHMA, and formed by a large proportion of corrupted *Sanscrit* and *Bengalí*, united to a comparatively small portion of *Rukhêng*. The dialect of the province of *Yó*, as it is pronounced by the *Barmas*, and *Ró* as it is termed by the *Rukhêng*, is

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G. Malhi, “An Experiment in International Criminal Justice: The Philosophy, Methodology, and Working of the International Criminal Tribunal for the Former Yugoslavia”, in O. Enwezor *et al.* (eds.), *Experiments with the Truth*, Documenta11_Platform2, Hatje Cantz Verlag, Ostfildern-Ruit (2002), pp. 195-203

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An Experiment in International Criminal Justice: The Philosophy, Methodology, and Working of the International Criminal Tribunal for the Former Yugoslavia

Gurjot Malhi

The subject of my talk today is the working of the International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague, The Netherlands. In 1990, the first multiparty elections were held in the Federal Republic of Yugoslavia. The parties were basically organized on ethnic lines, which shortly led to conflict between different ethnic groups. Several Republics started to break away from the Yugoslav federal structure. It began in Slovenia, where there was a brief armed clash, with some allegations of war crimes. Slovenia and Croatia declared their independence from Yugoslavia in 1991. Later, fighting erupted in Bosnia and Herzegovina between ethnic Serbs, Muslims and Croats, amid allegations of large-scale crimes and atrocities.

The ICTY was established in May 1993 by United Nations Security Council Resolution 827, which gave us jurisdiction over crimes committed in the territory of the former Yugoslavia since 1991. The jurisdiction was to cover the period beginning on January 1, 1991; the Security Council set no end date for our mandate, which is ongoing until peace is established — a condition to be determined by the Security Council, which was to decide on the date when the mandate would end. Within the territory of the former Yugoslavia, no geographical restrictions were imposed on us — our territorial jurisdiction extends to the entire territory of the former Yugoslavia.

The Tribunal was set up under Chapter VII of the Charter of the United Nations, which states that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall take measures to maintain or restore international peace and security. Initially this meant either military intervention — the use of peace-keeping forces — or the imposition of sanctions. The establishment of the ICTY marks the first time in the history of the UN that the Security Council created an organization to take measures to maintain international peace by supplying criminal justice. The Security Council was very worried about the allegations of massive crimes committed during the conflict — mass rapes, mass murders, crimes of different kinds in the detention camps, mass deportations, and so on. The UN Secretary General, whom the Security Council had asked to come up with the Statute for the Tribunal, was both conservative and cautious in his approach, ensuring that only those crimes that were already unquestionably governed by customary international law were included in the Tribunal's Statute.

The Statute contains four articles that give us jurisdiction over different crimes:

Article 2: Grave breaches of the Geneva Conventions of 1949, which include:

- Willful killing
- Torture or inhuman treatment
- Extensive destruction of property, not justified by military necessity
- And other measures regarding the treatment of prisoners of war and civilians

Article 3: Violations of the laws or customs of war, which include:

- Employment of poisonous weapons

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- Wanton destruction of cities, towns, or villages, or of undefended towns, villages, dwellings, or other buildings
- Destruction of cultural monuments and plunder

Article 4: Genocide, which includes various acts, for example murder or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.

Article 5: Crimes against humanity. These are crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- Murder
- Extermination
- Enslavement
- Deportation
- Imprisonment
- Torture
- Rape
- Persecutions on political, racial and religious grounds
- Other inhumane acts

Article 7.1 of the Tribunal's Statute gives us jurisdiction over individuals — the first time in human history that an international body has been given that authority. The Tribunal's jurisdiction extends to people who are responsible either as individuals or through a command responsibility that they may have had during the conflict.

The grave breaches of the Geneva Conventions mentioned in Article 2 include but are not limited to "willful killing; torture or inhuman treatment," and "extensive destruction ... of property not justified by military necessity" — for example, the shelling of a town full of civilians, over a number of days, in the absence of a clear military need. Other measures regarding the treatment of prisoners of war or civilians are detailed in the Statute.

Violations of the laws or customs of war include the "employment of poisonous weapons," the "wanton destruction of cities, towns, or villages," the "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings," the destruction of cultural monuments, the plunder or deliberate destruction of churches, mosques, and so on.

Genocide is a serious crime, and takes a lot of investigative and legal effort to prove. But it does have certain definable components: it includes various acts, such as murder or "deliberately inflicting on a group conditions of life calculated to bring about its physical destruction." These acts must be "committed with the intent" — this intent is very important, and legally very hard to prove — "to destroy, in whole or in part, a national, ethnical, racial, or religious group." You will note that this does not include a political group. To be categorized as genocide, the crime must be committed against a national, ethnical, racial, or religious group, and the intention has to be proved.

Before we can investigate violations of the Geneva Conventions and of the laws or customs of war, we have to prove the existence of an international armed conflict. Only then do these prohibitions come into effect. For crimes against humanity, on the other hand, the need to show that the conflict is international is removed — there still must be an armed conflict, but it need not be international in character. Crimes against humanity are those "committed in armed conflict, whether international

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or internal in character, and directed against any civilian population." They include "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds," and "other inhumane acts" that are also defined in the Statute.

Isolated cases of murder or rape here and there do not fall under our jurisdiction; rather than crimes against humanity, those are criminal cases to be prosecuted under the laws of the country where they occur. Two components must be proven in order for us to prosecute crimes against humanity: first, the offenses must be widespread; second, they must be systematic. If rapes, for example, are committed in thousands, over a large area, over a number of months, that crime may be described as widespread and systematic. And only when crimes are widespread and systematic can we take them on.

As I said, Article 7.1 of the Statute authorizes us to prosecute individuals — any "person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime." We prosecute leaders, but it is rare to find a president or a general holding a gun and shooting someone. That kind of open-and-shut case is highly unlikely to fall in our lap. What we normally come across, investigate, and prove is that such a person was involved in a conspiracy to commit a crime, or failed to prevent one. In fact Article 7.2 of the Statute explicitly asserts, "The official position of any accused person, whether as Head of State or Government" — be it president, premier, minister — "or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Similarly, Statute 7.3 continues, "The fact that any of the acts referred to ... were committed by a subordinate does not relieve his superior of criminal responsibility."

These concepts of command responsibility are very important. As I said, you rarely have a smoking gun. It is through other actions, and the widespread, systematic nature of the crime, that we can prove someone's knowledge. The first requirement is to prove that the person in command was actually in command, whether *de jure* or *de facto*. In these kinds of conflicts we often find that a person is *de jure* the general, say, but is actually not in command at all; some relatively low-level person, perhaps a major in the intelligence service, may *de facto* have more power than the general does. So we have to investigate who actually had power during the conflict. We have to prove that a person had the power of command, that he was in a position to take action against his subordinates, that he had knowledge of crimes being committed. If crimes are committed over a long period and the person had access to daily information flowing up and down the chain of command, then he has an element of knowledge. Knowledge, command, and then the failure to prevent those crimes from occurring — or, if the crimes have already occurred, the failure to take action against subordinates — if all of these can be proved we can charge that person under Article 7.3, that is, command responsibility.

Not unlike the Westminster model of government, the Tribunal is a single unit with three components: the Chambers, the Registrar, and the Office of the Prosecutor. My own office is in the Office of the Prosecutor. The Chambers consist of fourteen judges, who are elected by the General Assembly of the United Nations from a list submitted by the Security Council. Recently, because of the large number of pending cases, a certain number of *ad litem* judges have also been approved and are set to join the Tribunal in the future.

The Registry services both the Chambers and the Office of the Prosecutor. The Registrar is appointed by the UN Secretary General in consultation with the President of the ICTY. There is a Deputy Registrar, who is responsible for court work and for a detention facility at Scheveningen in The Hague. We have a Chief of Administration, who is responsible for personnel, budget, procurement, and financial matters.

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The Office of the Prosecutor — the structure is presently under review — consists of the Prosecutor, currently Carla Del Ponte of Switzerland, and the Deputy Prosecutor, currently Graham Blewitt of Australia. There is a Chief of Investigations and a Chief of Prosecutions. Under the Chief of Investigations are four Investigation Commanders and various field offices. The Chief of Prosecutions heads the Prosecutions Division, which consists of a number of Senior Trial Attorneys, Legal Advisers, etc.

There are a number of investigation teams, each with a team leader. The investigators are generally police officers while the legal staff, of course, are lawyers, who act as legal advisers during investigations and as co-counsels when the cases go to court. Then there are analysts and language staff, because the work is done in English or French but the language of the region might be Serbian, Croatian, Bosnian, or Albanian. Each team also has administrative staff, secretarial staff, etc.

We also have analysts of different kinds — criminal analysts, military analysts, historians, research officers, etc. — who examine the role of people most responsible for the crimes; explore questions of command structure, orders of battle, excessive use of force, and so on; and go into historical issues, such as the constitution of the former Yugoslavia, government and army staffing, and other matters, some of which lead into questions of *de jure* and *de facto* power.

We begin an investigation by identifying a crime base. When I joined the Tribunal, in the beginning of 1995, it was still in its infancy, and we hadn't yet fully explored and understood the massive scale of the crimes we would be investigating, and which crime we should investigate and which we should not. One of our starting points in the beginning had been the report of the Commission of Experts on the Former Yugoslavia, which had been set up by the UN. Then there were reports from various agencies, like that of the UN High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), and other groups, as well as from NGOs, newspapers, television, other media, and so on. Meanwhile some of our own investigations had also started. The conflict was still continuing; it wasn't easy to work in the former Yugoslavia just then. But the doors slowly opened. Our first witnesses were refugees in different parts of the world — Europe, America, Australia, Asia — and we went there to interview them and get their accounts. And so a base was established of individuals and groups involved in the crimes, people who had planned, organized, or implemented the conduct. We had to identify individuals on whom to focus the Tribunal's resources.

In our investigations as in any other large-scale investigation, there is a preliminary research phase, and then once the crime or crimes are fully identified there is the investigation phase — interviewing witnesses, collecting evidence relating to them, working with forensics and other sources. The indictment process follows. At the end of the investigation, the evidence that has been collected is put before a group of lawyers from all over the world in the ICTY, who spend days going over every aspect of the case to decide whether it meets the rigorous international standards that would allow us to go ahead with the prosecution. Often they send the case back for more investigation — the evidence isn't enough. This is a long process. Once the review committee is satisfied that we have enough evidence for an indictment, we go ahead. It also happens that we are told we don't have enough evidence, and we either drop the case or keep investigating; but if we do have enough evidence, the case goes to the Prosecutor, who signs the indictment, and then it goes to a judge, who confirms the indictment. The trial is held by a Trial Chamber of three judges. As I said, there are fourteen permanent judges. They divide into three Trial Chambers of three judges each, plus an Appeals Chamber of five judges. Right now *ad litem* judges are also coming on board, making for many additional Chambers to dispose of the pending cases.

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Once people are indicted we trace them — this is the intelligence phase. Sometimes the international military forces also get involved in arresting them. Once arrested and brought to The Hague, in the pretrial phase, they are detained in prison and make appearances in court. Case managers are appointed, and then, during the trial itself, there is investigative support should more work need to be done.

The Prosecutor's power to investigate derives from Article 18 of the Statute. "The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental organizations and non-governmental organizations." The Prosecutor "shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations" — with on-site investigations" meaning local interviews of witnesses, or forensic investigations of mass graves, of which, as you must know, there have been a number in the former Yugoslavia. "In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned" — there is mutual cooperation. In fact Article 29 of the Statute asserts that states are obliged to cooperate with the Tribunal, and Rule 39 of the Rules of Procedure and Evidence gives the Prosecutor power to seek their cooperation. Should the state refuse to cooperate, the Prosecutor can ultimately report the matter to the President, who reports it to the Security Council. This kind of refusal is of course the extreme case. Then it is up to the Security Council to take any measure necessary.

We also cooperate a great deal with international organizations like UNHCR and ICRC, various NGOs, and the different UN military forces. These agencies have been closely involved in the former Yugoslavia, and often have access to documents and information that can be very valuable to us.

The military force supplied by the UN to help to stabilize Bosnia-Herzegovina is called the SFOR; in Kosovo it is KFOR. In Bosnia-Herzegovina we have cooperated a great deal with the SFOR. When, say, a Trial Chamber or a judge in The Hague has granted us a search warrant for a location somewhere in the field, a military establishment or a political office perhaps, the SFOR provides us the necessary security and support in searches and seizures. Exhumations are an important part of our work, and in areas where we are under threat, the SFOR provides security for us. It also renders assistance in other matters. We are definitely dependent on international military forces like the SFOR to affect arrests. We share intelligence with them, mostly on the indicted, as also in other matters of investigation. Many areas in the former Yugoslavia are mined, and must be demined before we start an exhumation or any other field operation. At this point we have our own contractors in place in Bosnia, who do the demining for us, but the KFOR gave us demining support in Kosovo last year.

We have field offices in different countries in the former Yugoslavia — in Sarajevo in Bosnia-Herzegovina, Belgrade in the Federal Republic of Yugoslavia, Zagreb in Croatia, Banja Luka in Republika Srpska, Skopje in Macedonia, Pristina in Kosovo. We also have a forensic facility, Helba Camp, at Visoko in Bosnia-Herzegovina.

In 1999, the forensic operations in Kosovo were done entirely through gratis assistance, that is assistance provided to us free of charge by different countries. About four hundred forensic specialists participated, from fourteen countries — Austria, Belgium, Canada, Denmark, France, Germany, Iceland, Luxembourg, The Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States. That year the need was sudden, and we did not have our own teams. In 2000, however, we established and set up our own forensic teams in Kosovo. Kosovo was entirely new territory for us, and our operations there had to be carefully planned, because forensic work on such a large scale had not been done at the international level before. The UN and other organizations had established some basic protocols on investigations, but we had to set up our own mortuary and field proto-

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cols. Extensive discussions were held with the UN administration in Kosovo and various international groups. Several organizations put together their combined brains and efforts in making our forensic operations in Kosovo a success. There was close cooperation and working protocols, on a daily basis, between us and the Victim Recovery and Identification Commission (VRIC); the Transcultural Psycho-social Organization (TPO); the Organization for Security and Cooperation in Europe (OSCE); the United Nations Interim Administration Mission in Kosovo (UNMIK); and the KFOR. All these organizations assisted us tremendously in our work. We also requested assistance from all 189 Member States of the UN; the Prosecutor sent out a letter, and many countries responded. We had to set up an infrastructure, to take care of this massive international deployment of experts, including the setting up of morgue facilities at Orahovac in Kosovo.

The mortuary staff is internationally constituted and includes forensic pathologists, scene-of-crime officers (police officers), photographers, anthropologists, radiographers, and evidence analysts. The field staff includes archaeologists, anthropologists, scene-of-crime officers, surveyors, soil experts, etc. We also have support staff — project managers for both Kosovo and Bosnia-Herzegovina, logistics officers, forensic engineers, plant operators, mechanics, storemen, computer people, and so on.

In 2000 we had 159 forensic experts in Kosovo and 105 in Bosnia-Herzegovina. They came from twenty-seven countries: the United Kingdom, France, Colombia, The Netherlands, Poland, Belgium, Denmark, Canada, Argentina, Egypt, South Africa, Ireland, Guatemala, the United States, Switzerland, Italy, New Zealand, Sri Lanka, Finland, Germany, Portugal, Spain, Norway, Peru, Barbados, Austria, and Australia. In addition to the staff I have mentioned, a number of countries provided teams — ten in all, from Austria, Belgium, Canada, Denmark, Finland, France, Sweden, Switzerland, the UK, and Germany — to work gratis, and these teams included 300 experts who also did forensic work on behalf of the ICTY.

As of March 15, 2001, we have publicly indicted ninety-eight individuals. In addition there are some sealed indictments. Thirty-six people are in custody at the detention unit in The Hague.

The people on trial include politicians, military generals, camp commanders, and sexual violators. Dario Kordic, who was sentenced recently, was a politician; General Radislav Krstic was a commander of the army of the Republic of Srpska. Miroslav Kvočka, Milojica Kos, Mladen Radic, and Zoran Zigic — all of them relate to the Omarska detention camp trial. And then there are sexual offenders — again, this is perhaps the first time in history that systematic, widespread sexual crimes have been investigated and prosecuted in the international arena. Radomir Kovac, Dragoljub Kunarac, and Zoran Vukovic are some examples of the sexual offenders we have prosecuted.

The convictions the Tribunal has produced include Dusan Tadic, the first person arrested — he had been a camp guard. The convicted persons belong to all ethnic categories — some are Serbs, some are Croats or Bosnian Croats, and some are Muslims. Indeed, crimes were committed by all ethnic groups. Different sentences have been awarded for different degrees of criminal responsibility. Tihomir Blaskic, for example, a Croatian general — he has had the heaviest sentence: forty-five years. And Dragoljub Kunarac, one of the sexual offenders in the Foca rape case, was sentenced to twenty-eight years. Goran Jelusic was sentenced to forty years. As I said, there is often no smoking gun, but sometimes one turns up: there is a photograph of Jelusic using a pistol to kill a civilian. Some of the convictions of persons in positions of authority resulted from charges involving the responsibility of command. A person may not have committed any murder or rape himself, but if he was in charge of people who committed such crimes, and had knowledge of the crimes being committed but failed

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to prevent them or to punish his subordinates, he has command responsibility, a very important concept, as I said before. The ICTY has also acquitted some people and they have gone back home. Zejnir Delalic and Dragan Papic are examples of this.

As of October 2000 the ICTY had 1,200 staff members from seventy-five countries. In 2001 we have a budget of \$96,443,900. As of March 2001 our President is Judge Claude Jorda of France; our Vice-President is Judge Florence Ndepele Mwachande Mumba of Zambia; our Prosecutor is Carla Del Ponte; our Registrar is Hans Holthuis of the Netherlands; and we have judges from Australia, the United Kingdom, Portugal, Malaysia, Egypt, Guyana, Colombia, Morocco, Jamaica, the United States, Italy, and China.

Gurjot Malhi. An Experiment in International Criminal Justice: The Philosophy, Methodology, and Working of the International Criminal Tribunal for the Former Yugoslavia. In: Okwui Enwezor, Carlos Basualdo, Ute Meta Bauer, Susanne Ghez, Sarat Maharaj, Mark Nash, Octavio Zaya (ed.): Experiments with the Truth. Documenta11_Platform2. Hatje Cantz Verlag, Ostfildern-Ruit. 2002, pp. 195-203.

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M. McKay, *The Religious Landscape in Myanmar's Rakhine State*,
Peaceworks No. 149, United States Institute of Peace, August 2019

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PEACEWORKS



The Religious Landscape in Myanmar's Rakhine State

By Melyn McKay



UNITED STATES
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RELIGION

ABOUT THE REPORT

This report examines the ways in which religious actors, networks, and organizations in Myanmar's Rakhine State navigate and influence local conflict and peace dynamics. The research was supported by the United States Institute of Peace and the Bureau of Conflict and Stabilization Operations at the US Department of State.

ABOUT THE AUTHOR

Melyn McKay is a research anthropologist at the University of Oxford. Her work explores women's participation in religious and nationalist movements in Myanmar. For nearly a decade, she has designed and implemented qualitative research in complex environments including Syria, Lebanon, Burundi, and South Sudan. Susan Hayward, a senior advisor for religion and inclusive societies at USIP, and two local lead researchers, who for reasons of security are unnamed, also contributed to this report.

Cover photo: Two boys walking in Rakhine State near Sittwe. (Photo by Suphamong Eiamvorasombat/Shutterstock)

The views expressed in this report are those of the author alone. They do not necessarily reflect the views of the United States Institute of Peace. An online edition of this and related reports can be found on our website (www.usip.org), together with additional information on the subject.

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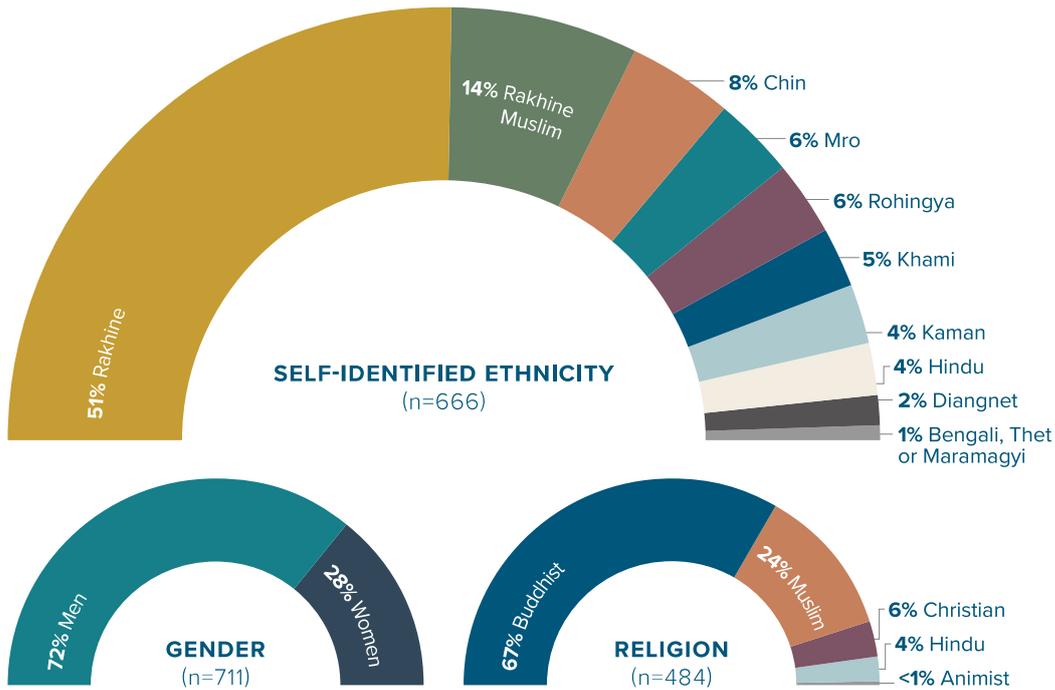


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Figure 1. Demographics of Survey Respondents

Researchers conducted in-depth interviews with 711 individual respondents, representing a variety of religious faiths, in nine townships in Rakhine State.



Note: Discrepancies in total figures reflect nonresponses.

sample who considered themselves to be practicing Hindus also identified as ethnically Hindu (rather than as Tamil, Bengali, Punjabi, Rohingya, and so on).

The gender breakdown heavily favored male respondents, a bias that was particularly pronounced among non-Buddhists. In part, this was a function of the research methodology, which employed in-depth interviews with high-level religious and community leaders (who tended to be men) to supplement focus group-based community consultations. In addition to broader community perspectives, this report includes the views of members of the Buddhist *sangha* (monks), Buddhist nuns (*thilashin*), Buddhist laymen and women

(both elders and youth leaders); Islamic clerics (imams, *moulvis*), scholars (*hafiz*), *hajis* (religious pilgrims to Mecca), and other community leaders (lay, both male and female, though predominantly male); Hindu Brahmans, ascetics (*thamadis*), ceremonial attendants (*pujatis*), and community leaders (lay, both male and female); Christian priests and pastors; as well as animist spirit (*nat*) shrine attendants.⁵

CONSIDERATIONS AND LIMITATIONS

Given the ongoing nature of the conflict in Rakhine State, the research encountered several challenges. First, the arduous research approvals process meant considerable delays. As a result, significant time passed between

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This report reproduces terminology as it was used by research participants or adopts “non-Kaman Muslims” when speaking more broadly about those participants from communities generally considered by local or international actors to be Rohingya. Many of the Muslim participants in northern and central Rakhine State referred to themselves as “Rakhine Muslim,” even when other members of the same community identified as “Rohingya.” Individuals and communities should—unambiguously—have the right to identify themselves in whatever way they choose. However, intracommunal discourses on the use of Rohingya exist within the Muslim community, and it is not the place of any international actor to presume a person’s ethnic identity on the basis of their religion. Relatedly, the term Rohingya is vocally rejected by much of Myanmar society. Thus the quotations included in this report may also use the term “Bengali Muslim,” which reflects the belief within Myanmar that non-Kaman Muslims in Rakhine State, however they identify, are recent immigrants from Bangladesh.

The Buddhist organization formerly known as Ma Ba Tha—shorthand for the organization’s longer name in Burmese, *a-Myo Batha Thathana saun shauk ye a-hpwe*, which is often translated as the Committee for the Protection of Race and Religion—emerged in 2013 in Yangon. Founded by Buddhist monastics and lay persons, its mission involved advocating for Buddhist interests and coordinating activities to revitalize Buddhist education and welfare. The group has been accused of propagating discriminatory, particularly anti-Muslim, sentiment and behavior. In 2016, the State Sangha Maha Nayaka Council (Ma Ha Na), the governing body of monastics appointed by the Myanmar state to oversee and regulate affairs within the Buddhist monastic community ruled that Ma Ba Tha had been operating unlawfully under that name.⁶ Although the group officially changed its name to the Buddha Dhamma Parahita Foundation in 2018, this name, too, as recently as July 2018, has been banned by the Ma Ha Na.⁷ In the majority of Myanmar, the organization

is, to a great extent, still referred to as Ma Ba Tha by both its followers and detractors. Ma Ba Tha will likely continue to be the most efficacious shorthand for the movement on the whole and is used throughout this report. In some instances, research participants have used the name Buddha Dhamma Parahita Foundation, particularly members and monastic leaders of the group in southern Rakhine; these references appear as Ma Ba Tha, too, given that the usage does not reflect a significant difference in understanding of the group’s mission, activities, or membership.

Sii Htein is a network of predominantly Rakhine monks engaged in promoting ethnic issues and certain aspects of an independence or autonomy agenda. The group has been involved in everything from aid blockades that prevent humanitarian actors from reaching Muslim communities to political lobbying. The network is most robust and visible in central and northern Rakhine. Like Ma Ba Tha, Sii Htein has over the years gone by several names, including the Organization for Discipline and Control. The mission and membership remain the same, however, so this report uses Sii Htein exclusively.

Muslim communities in Rakhine use both moulvis and mullah to refer to Islamic religious leaders. However, because mullah often has a negative association for the Kaman, this report uses only moulvis.

This report uses the Burmese pronunciation and spelling “Rakhine” to differentiate the historical kingdom and polity from contemporary identities. This does not indicate a particular political position on the validity of Rakhine autonomy efforts. Many participants used the terms “Arakan State” and “Arakanese.” Standard Burmese place names and spellings are used to differentiate historical references (such as Rangoon) from contemporary ones (such as Yangon). In some places, these may differ from the common Rakhine pronunciation.

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ISLAMIC IDENTITIES AND INTERPRETATIONS

According to the analysis of the Muslim researchers (both Kaman and Rohingya-identifying) who conducted interviews for this research, diversity of thought within Rakhine Muslim communities can be assessed along two primary axes: those who embrace the ethnonym Rohingya (and the political implications of it) versus those who prefer Rakhine Muslim, and less conservative versus more conservative Sunnis.⁷⁹

Within the research population, the majority of non-Kaman Muslims preferred to identify as Rakhine Muslim (70 percent) rather than as Rohingya (30 percent). This finding can be interpreted several ways, principally, that Rohingya carries within it a political statement that at present evokes a highly negative and indeed dangerous response from many within the broader Myanmar community. It is not unreasonable to assume that many of the research participants who claimed to prefer Rakhine Muslim would present their ethnic identity differently outside the parameters of a research interview. Still, participants made particular note of their preference to be called Rakhine Muslim, including to researchers who themselves identify as Rohingya. This does not suggest that differences between these two groups are not genuine (such as linguistic or demographic), but instead that the findings do not clarify this issue further. The only notable factor was geographic distribution: more than half (54 percent) of all Rohingya-identifying participants were living in IDP camps in Sittwe; those who did not lived in Rathedaung (38 percent) or Maungdaw (5 percent).⁸⁰ It may be that the experience of acute conflict causes communities to cohere around the Rohingya ethnonym, whereas communities still in villages that abut Buddhist communities have a greater incentive to assert a shared ethnic identity (that is, Rakhine) in an attempt to mitigate risk. This interpretation, however, is purely speculative.

The question of religious conservatism is also the source of some concern and even conflict for Muslim communities in every region. In Thandwe, these differences appear to fall along ethnic lines: the Kaman community and religious leaders report that Kaman prefer Hanafi jurisprudence; non-Kamans tend to lean toward Deobandist interpretations of Islam brought to the township by Tabligh Jamaat missionaries from Yangon.⁸¹ Generally, Muslim communities in Rakhine appear to follow more austere interpretations and engage in more conservative practices in the north and central parts of the state. In the south, Muslim communities generally report to follow syncretic cultural traditions that improve their integration with neighboring Buddhist communities. Marriage practices further evidence this trend: a majority of Muslims in southern Rakhine noted mixed Rakhine-Kaman heritage; marriage customs among Muslim communities in the north and central part of the state appear to be predominantly endogamous.

CHRISTIAN AND HINDU NETWORKS

The largest Hindu religious organizations have struggled to organize in Rakhine State given the hypersensitive context. Nevertheless, Hindu community committees have been established across central and northern Rakhine to enable more efficient aid delivery to at-risk or conflict-affected Hindu villages. Indeed, Hindu religious and parahita networks in Yangon are critical to the dwindling community's physical and economic well-being.

For Christians in Sittwe, the Myanmar Council of Churches is an important source of information, advice, and support. Similarly, Baptist churches across Rakhine are tightly networked to other conventions; for instance, the Mro Baptist Convention is part of the Karen Baptist Convention, and other Baptist churches across the country fall under the network of a larger, Rakhine convention.

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M. Mendelson, “State Responsibility for Breach of Interim Protection Orders of the International Court of Justice”, in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Institutions* (2004), pp. 35-53

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*State Responsibility for Breach of
Interim Protection Orders of the
International Court of Justice*

MAURICE MENDELSON*

THIS CHAPTER CONSIDERS the responsibility of States for breaches of provisional (also known as interim) measures of protection ordered by the International Court of Justice,¹ and certain connected questions.

Logically, the first question to be considered is whether interim measures are binding. Article 41 of the Statute of the International Court of Justice, which is for present purposes identical to Article 41 of the Statute of the Permanent Court of International Justice, provides:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

'Ought to be taken' seems rather weaker than 'must' or 'shall' be taken; and 'suggested' in paragraph 2 seems to point clearly to a lack of binding force.²

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¹ This essay is not concerned with what might be the position in other international courts and tribunals.

² J Elkind, *Interim Protection: A Functional Approach* (The Hague, 1981), p 153 is mistaken when he says that the reference to 'the respective rights of the parties' necessarily implies a correlative duty to observe *interim measures*: the phrase plainly relates to the substantive rights and duties of the parties, and in itself implies nothing about the 'incidental jurisdiction', as it has been called. He also seems mistaken when he says, 'The word 'ought' is normally used in

SUMMARY AND CONCLUSIONS

The link between the binding force of interim measures and their enforceability was perceived as far back as 1920, when what became the substance of Article 41 of the Statute was drafted. However, the Advisory Committee of Jurists and the League of Nations hoped to avoid the problem by using wording which was at best weak, was certainly unclear, and was widely thought to mean that the measures were not binding. For some 80 years this remained the position, until the Court in *LaGrand* held—to the surprise of many—that provisional measures were binding, and that the United States was responsible for having disregarded them.

Many who favour the progress of international law will applaud this outcome (if not necessarily the reasoning). The uncertainty of the previous situation was not satisfactory, and it is probably more appropriate for all orders of a court in contentious matters to be binding. Certainly, this was the lesson drawn by those who established the International Tribunal for the Law of the Sea, for example.⁴⁹

Nevertheless, the new-found obligatory character of provisional measures in the ICJ does throw up the question of the practical significance of their binding force. Enforceability, even in a broad sense, is of course not the only—or probably even the main—issue: the pull towards compliance will naturally be greater if obedience is not perceived to be a matter of choice. Nevertheless, it is appropriate to ask oneself what the consequences would be if—as is alas likely—some addressees of the Court's orders fail to comply.

Detailed analysis of the role of the Security Council in such a case is beyond the scope of this paper. However, on a brief examination it appears that the measures do not fall within Article 94 of the UN Charter. I suggest, however, that this does not exhaust the Council's powers, and that if it holds that there is a threat to the peace, breach of the peace or act of aggression under Article 39, then it would be entitled to take appropriate coercive measures under Chapter VII.

So far as the Court itself is concerned, it seems clear that it does not have the authority to fine States who do not comply, and still less to punish the individuals who acted on behalf of the State. It is also unlikely that the Court can impose procedural sanctions on the disobedient party, either by non-suiting the claimant or by giving a default judgment against the respondent. Certainly, nothing in the Statute or Rules of the Court expressly authorises the imposition of procedural penalties in such a case.

Whilst the Court may possibly have the power to offer redress for *dommage morale* in appropriate circumstances, it is questionable whether it has the right to award punitive or exemplary damages. If it has not, then this weapon is not available to ensure compliance with interim measures.

⁴⁹ See Law of the Sea Convention 1982, Art 290(6).

In that event, the only concrete sanction (as opposed to declaratory relief) in the public interest is for the Court to award simple damages to the victim of a failure to comply with binding interim measures. From the victim's point of view, this remedy is simply compensatory; but from the perpetrator's viewpoint, it might theoretically be a sanction. There are, however, difficulties with this approach.

First, where damages are awarded (or other relief given), it is difficult to identify what difference it makes that interim measures have been disregarded. Where the victim is entitled to relief in the main action, it will normally be entitled to a remedy for the particular conduct complained of, *whether or not provisional measures had been ordered*.

Secondly, if the victim of the breach is unable to obtain a remedy on the merits—either for reasons of jurisdiction or admissibility, or perhaps even because it is not seeking any substantive relief, but simply defending the action—it seems questionable that the Court's incidental jurisdiction will be sufficient to entitle it (the victim) to a remedy. It might be otherwise if the victim, whilst unsuccessful as to the main claim on the merits, has other claims (or counterclaims) of its own which the Court upholds. But in such a case the relief is given on the merits, and the fact that there has been a breach of interim measures is unlikely to make a difference to the level of damages awarded.

It seems to make no difference to this analysis even if the party who disobeys the order of interim measures is the one who requested it. So, if a potential transgressor were to ask its legal advisers 'What practical consequences will there be if we do not comply with interim measures?', the answer might well be:

You will be declared a miscreant by the Court, but apart from that there are unlikely to be any different consequences from what would have happened if no interim measures had been ordered, or if they had not been binding.

Essentially similar considerations apply if both parties have disobeyed the interim measures or if there are more than two; but the analysis naturally becomes more complicated.

Most of my analysis has been concerned with the remedy for the prejudice suffered by a victim of a breach of interim measures. But I briefly examined the position where a party has suffered loss because it has *complied* with the interim measures, in a case where ultimately it succeeds on jurisdiction, admissibility or the merits. I could not find any existing mechanism by which relief could be granted.

I think it unlikely, for a variety of reasons, that the Court will add 'teeth' to binding interim orders in the near future. More probably, having taken a bold step, it will want to proceed with caution.

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It makes sense for the interim injunctions of domestic courts to be binding, because they have compulsory jurisdiction and the means of enforcing their decisions. The International Court of Justice is not in that happy position. This is not necessarily to say that the decision in *LaGrand* was a mistake, but just that it has thrown up a new set of problems. In this paper I have sought to identify what practical difference the new dispensation is likely to make in terms of remedies for breach, and to identify the problem areas. In time, no doubt, the lineaments of the problems, and perhaps even their solutions, will become clearer. Meanwhile, I hope it has been of some use to focus attention on the issues.

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R. Mole, *The Temple Bells are Calling* (1963)

Available at:

[http://web.archive.org/web/20160506060757/http://
www.networkmyanmar.org/images/stories/PDF22/Mole.pdf](http://web.archive.org/web/20160506060757/http://www.networkmyanmar.org/images/stories/PDF22/Mole.pdf)

*The Temple Bells
are Calling*

*A Personal Record of the Last Years of
British Rule in Burma*

*by
Robert Mole*



Pentland Books

CHAPTER TEN

In the Valley of Death

1943-44

I RETURNED TO Calcutta towards the end of January feeling very much better and was posted back to Ewing's office, where the work was now rather different. The emphasis was no longer on the troubles of those who had fled from Burma, but on sending supplies to the inhabitants of those parts of the country which we were still administering. Our only refugee problem was the Arakanese camp at Dinajpur in northern Bengal. North Arakan had been peopled by a mixture of Arakanese Buddhists and Muslims of Chittagonian origin. After the collapse of the administration in 1942, communal strife had broken out, with the result that the two communities had become segregated, the Chittagonians concentrating in the north and the Arakanese in the south. Between the two was a sort of no man's land. The area occupied by the Chittagonians now became so Indian that the Burmese and Arakanese languages were no longer understood; and all Buddhist pagodas and monasteries were destroyed. During the troubles large numbers of Arakanese Buddhists had fled into Bengal, and a camp had been established for them in Dinajpur. Our government had sent there as camp commandant a senior officer who was himself Arakanese, and it seemed that he did not always work in harmony with the Deputy Commissioner, who was an Indian. Moreover, the statistics of death and disease in the camp perturbed us. We had of course to deal very tactfully with the Bengal Government over these matters, and they gave us a considerable amount of anxiety.

In the matter of supplies for the people of the frontier areas we worked in very close conjunction with the Burma Government's Directorate of Supply, which was responsible for physically moving them. The main areas of Burma now administered by us were the Chin Hills, the northern part of the Kabaw Valley and the Arakan Hill Tracts, and in almost all cases new supply routes had to be opened up, for in peacetime there had been virtually no trade across these frontiers of India and Burma.

Off and on I spent the best part of a year in Calcutta, some four

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THE TEMPLE BELLS ARE CALLING

months in 1942 and six in 1943. The friend whose flat I was sharing soon moved to an Army job in Delhi and I retained the flat. Calcutta seemed to grow more and more crowded. There was a large leave centre for British troops across the road from my flat, and the pavements of Chowringhee were thronged with troops, Indian, British and American.

Calcutta was a busy, but not a beautiful, city. The main streets were full of Bengalis in white shirts and *dhotis*, looking pretty prosperous. But as soon as you turned off these main streets, you were in dirty lanes of squalid shops and houses. Even the principal thoroughfares were beset by groups of beggars who stationed themselves on the pavements and exhibited their sores and deformities in the hope of exciting charitable feelings in the breasts of passers-by. Most of these were professional beggars, and it was said that the profession could be very lucrative. I have seen a small boy being instructed by an older beggar, no doubt his father, to cross his legs so as to make it appear that he was deformed. It was not until fairly late in the war that the authorities decided to clear these persons off the streets and to put them into some kind of home; they naturally met with opposition from those whose means of livelihood was thus abruptly terminated.

Another hazard of the Calcutta pavements was the bulls; one would not infrequently find one of these reclining on the wide Chowringhee pavement, sublimely unconscious of passing pedestrians. A disgusting spectacle was the refuse bins placed at many of the street corners. When these were full, scavengers would come and search through the rubbish for anything which might be of use. When they had finished, they invariably left the greater part of the contents on the pavement, and the stench of decaying vegetable matter heated by the tropical sun was frequently so foul as to force the pedestrian to cross the road in order to place as wide a berth as possible between himself and the garbage.

It was pleasant to walk in the late afternoon on the *maidan*, a long park running for about two miles between Chowringhee and the Hooghly River, and ending at the dome-capped Victoria Memorial, dazzling white in the sunshine. But war-time needs gradually encroached on the *maidan*; the Royal Air Force used its wide roads as runways, and little by little areas were fenced off and used for military purposes.

I have described how the frontier fringe of Burma, which was not occupied by the Japanese, was now being administered by civilian officials of the Burma Government; a Burma officer had been posted to Assam as Commissioner of the 'Frontier Division'. All these

CHAPTER ELEVEN

*North Arakan and the
Refounding of the Old
Town 1944-45*

*W*E TRAVELLED BY ROAD from Palasbari over the Khasi Hills, through the Assam capital of Shillong, and down again into the heat of the plains to Sylhet, where we boarded the train for Chittagong. We arrived the next day and spent the night in an Army rest camp. There was an office of the Civil Affairs supplies branch in Chittagong, which provided a truck to take us on to Bawli Bazaar, the headquarters of the Military Administration in North Arakan and some one hundred miles distant. We arrived in the late afternoon of the 30th April.

The area which was at that time under British administration was a small portion of the extreme north of the Akyab District, consisting of little more than the two narrow and parallel valleys of the Pruma and Kalapanzin Rivers. The Civil Affairs organisation in North Arakan provided both territorial and formation CAOs; there were no fewer than four divisions operating in the area, each with a CAO attached to it. Bawli Bazaar was a small village on the Pruma, which in peacetime had been of absolutely no consequence. The Senior CAO was Apedaile, and there was a territorial CAO, Peter Murray, stationed over the hills to the east at Goppe Bazaar in the Kalapanzin Valley. Peter had done his Burmese course with me at Oxford; after the outbreak of war he had joined the Burma Navy, and he continued to wear his naval badges of rank in the Civil Affairs Service, causing some confusion to military personnel. As a result of the communal disturbances which occurred in 1942 after the British evacuation from Arakan and to which I have referred before, the entire population of this area was now Muslim. They were Chittagonian by race and spoke a type of Bengali. Only a very few could speak Arakanese, a dialect form of Burmese, and we relied almost entirely on interpreters for communication with them.

Our camp at Bawli was on the river bank and consisted of a

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Bengal. I suggested keeping them and training them as mess servants and, since we were the only people in the area who could speak to them in their own language, they accepted the proposal with alacrity and served us cheerfully and well.

One grew rather tired of seeing only Chittagonian civilians, wearing their little white Mohammedan caps, and with their shirts invariably hanging outside their longyis. They were not a people who could inspire much affection, but they had their good qualities, and I was told of Chittagonians who went unconcernedly about their work in the fields while fighting raged around them. Across the Indian border there were some settlements of Arakanese Buddhists, whose forbears had fled into British territory during the Burmese invasions of Arakan at the end of the eighteenth century. They spoke their own dialect of Burmese and dressed in the Burmese fashion, and it was something of a paradox that we in North Arakan should have to cross into India to see Burmese villagers and to hear Burmese spoken.

Though on the Arakan front nothing of military interest was happening, things were going very well for the Allied forces on the other two Burma fronts. In northern Burma the area round Myitkyina and Mogaung was recaptured by the combined action of Stilwell's Chinese-American forces and the Chindits, while the Chinese had mounted an offensive from Yunnan to the east. Mogaung was taken before the end of June; Myitkyina was besieged for two and a half months, and fell at the beginning of August. On the Assam front the great Japanese offensive was halted by the middle of May, and on the 23rd June the road from Imphal to Kohima was cleared. Then began the pursuit of the Japanese by the troops of the 14th Army, which continued till the end of the war; Tamu was re-entered at the beginning of August. Sitting in what seemed to me a foreign country, I hoped – but with little optimism – that someone might realise that I knew the Mogaung area well and that I might be posted there; or at least that I might be sent back to the Kabaw Valley. But I spent the rest of the war in Arakan.

When John McTurk arrived back from leave towards the end of July, I went south to relieve George Merrells, who was CAO with 25th Indian Division. The divisional headquarters was at Maungdaw, some twenty miles south of Bawli, which in peace-time had been a township headquarters, but Merrells was living with an Engineer unit on Kappagaung, an island north of Maungdaw and joined to it by a bridge. We were here virtually on the shore of the Bay of Bengal, for Kappagaung and Maungdaw lay on the wide estuary of the Naf River, the boundary between India and Burma. Here I had

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ASIATIC RESEARCHES;

OR,

Transactions of the Society,

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THE HISTORY AND ANTIQUITIES, THE ARTS, AND
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BY G. H. HUTTMANN.

1828.

VIII.

HISTORICAL AND STATISTICAL
SKETCH OF
A R A C A N.

BY CHARLES PATON, Esq.

Sub-Commissioner in Aracan.

THE following particulars relating to the newly acquired province of Aracan, are the result of a tour made through its several subdivisions, and such communication, with the people of the country, as an imperfect command of the language would permit. I have, however, in all cases, endeavoured scrupulously to satisfy myself of the correctness of the information, by personal inspection, and by the fullest corroborative evidence that was procurable.

The ancient history of Aracan, has been chiefly extracted from Magh manuscripts, in the possession of the late Commissioner, Mr. Robertson. That of more recent periods has been gathered also from written records, but especially from the oral communications of individuals, who were implicated in the transactions, or who witnessed their occurrence.

called to him to stop, telling him that a choki had been established by the Burmese, and that each boat passing must pay two rupees. KOUNGJAKAY replied, *Shapuri* belongs to the Company, you have no right to establish a choki on it, and I will not allow you to search my boat; upon which NAAY's people fired into the boat, and KOUNGJAKAY was killed: the boatmen immediately pulled over to the *Chittagong* side, and reported the circumstance to the Thannadar, at *Tek Naf*, who brought the affair to the notice of the Magistrate, Mr. LEE WARNER, who sent a party of Sepoys to take possession of the Island of *Shapuri*. This was immediately made known to the Raja of *Aracan*, who, after some deliberation, sent a detachment of five hundred men to retake it, which they did, and this originated the war. Previous, however, to resorting to open hostilities, negotiations were attempted by the British Government, to settle the differences, and define the frontier of the two states, but in vain; shortly after the declaration of war, the Burmese entered our provinces in force, and cut up a Detachment at *Ramú*, under Captain Noton, when they stockaded themselves; but as soon as Sir A. CAMPBELL took *Rangoon*, they were recalled for the defence of *Pegu*.

Division and Population.—The province of *Aracan*, as has been observed, consists of four divisions, *Aracan* proper, *Ramree*, *Sandoway* and *Cheduba*. At the time of the first settlement of these districts, they were found to contain, the first, fifty-eight villages or hamlets; the second, twenty four; the third, seventeen; and the last, ten; besides the capital of *Aracan*, and the town of *Ramree*.

The population of *Aracan* and its dependancies, *Ramree*, *Cheduba*, and *Sandoway*, does not, at present, exceed a hundred thousand souls, and may be classed as follows:

Mugs, six-tenths.	} Total, 100,000 souls.
Musselmans, three-tenths.	
Burmese, one-tenth.	

The *Musselman* Sirdars generally speak good Hindustani, but the lower orders of that class, who speak a broken sort of Hindustani, are quite unintelligible to those who are not thoroughly acquainted with the jargon of the southern parts of the *Chittagong* district. The universal language of the provinces is the *Mug*, which, although differing in some respects from the *Burma*, particularly in pronunciation, is written and spelt in the same way, and with the same character. Almost every one is able to write, and as females are not precluded from receiving instruction, they are often shrewd and intelligent. The *Mugs* being particularly fond of hunting and fishing, do not make such good farmers as the *Musselmans*; however, as *Banias* and shop-keepers, they surpass the *Bengalis* in cunning, and, on all occasions try, and very often successfully, to overreach their customers: stealing is a predominant evil amongst them, yet they are not given to lying: when detected after the commission of any felonious act, however serious, they almost invariably, and with the utmost frankness, confess the crime, and detail with the greatest minuteness the manner in which it was perpetrated.

Customs in Marriage.—The *Burmese* follow the example of European nations, and court their wives: after the consent of the parents has been obtained, a day is fixed for the wedding, and all the relations and friends of the parties invited to a festival, in the bride's father's house. After the preliminaries of the dowry have been settled, the whole sit down to the feast; the bridegroom and bride eat out of the same dish, which binds the contract, and they are declared to be man and wife; when the son-in-law becomes a member of the family, till his wife's shyness has worn off, and she wishes to have a house of her own. The *Mugs* go through the same ceremony, with the exception of not having the pleasure of courting. The young folks are not allowed to think of marriage, unless the match be arranged by the parents.

Annex 54

R. Patrick, “An Essay Descriptive of A Chart of the Ten Numerals in Two Hundred Languages”, *Classical Journal*, vol. IV (1811), p. 327

Available at:

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AN ESSAY,
 DESCRIPTIVE OF
A CHART OF THE TEN NUMERALS
 IN TWO HUNDRED LANGUAGES;

Printed in the last No. of the CLASSICAL JOURNAL.

*On the first peopling of GREECE and ITALY, EUROPE, and
 ASIA, and on their parental tongues, or rather dialects of
 one Speech.*

As a preface to my Essay, I must quote the following passages from those great linguists, Wilford and Sir William Jones. [Jones' works, p. 131, 133.] "Seven hundred, or one thousand years is sufficient time for the [Mosaic] propagation, diffusion, and establishment of the human race. All politicians, arithmeticians, and lawyers agree, [Hales "on the Origination of Mankind," the writers in the first volume of the Ancient Universal History, and yet more, Mr. Malthus on Population,] that men increase in the geometric progression, 2, 4, 8, 16, &c. Hence it is easy to multiply the increase by the number of years." Page 132. "Iran is the centre of the circle to the three great tribes, Arabs, Indoos, Tartars, [the parents of our race, the only aborigines.]" (In page 65, 66, 64, of the Asiatic Researches, vol. ii. of the Calcutta edition.) "Iran alone is central; hence, therefore, the three great races diverged. There is no tradition of an ancient, [post-diluvian, primitive, aboriginal,] emigration the opposite way; [from the frigid to the temperate zone.]" In Jones's works, p. 135. "The three sons of Noah travelled in three subdivisions. The children of Yafet, [the Japetus of the Latins,] seem from the traces of Slavonian [or Sarmatian] names, and from the mention of being "enlarged," to have produced the race, which, for want of a correct appellation,

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The learned periodical Critics, therefore, it is humbly hoped, will kindly allow for such variations. I here quote my authorities.

The Hebrew, without points, is taken, and the Chaldee, from the *American and Philosophical Transactions*, vol. iv. p. 485. The Arabic from some of the numerous grammars. The Arabic of Morocco, from Jackson's travels thither, p. 189. A second specimen of it, from Chenier's travels thither, translated, vol. i. p. 245.

The Brebes, or Shilhi, from Hornman's travels, in the *African Society papers*, p. 190. and from Chenier's Morocco, vol. i. p. 245. The first of the three specimens in Chamberlayne's *pater-nosters*, p. 152. The Maltese, or Punic, in the *Ancient Universal History*. Modern Ethiopic, or Abyssinian, in Bruce's works, vol. iii. p. 408. in the note by the editor. The Sanscrit in the *Asiatic Researches*, vol. viii. p. 434.

The Persian from the *Amer. Phil. Trans.* vol. iv. p. 485. a second from a *Persian Grammar*. The Afghan, from Wilkinson's people on Mount Caucasus, vol. ii. p. 666. The Welsh, from Richards's *Welsh dictionary*; and second specimen from *Amer. Phil. Trans.* vol. iv. p. 485. The Irish, from the last work. The Biscayan, also from the last work.

The Sanscrit, from the 26th No. of the *Edinburgh Review*. The Moors, Gipsej, or Hindustani, from Bell's travels, vol. ii. p. 115. and from Philips's contemporary travels, by Campenhausen, in *Moldavia*. The Malabar, or Tamulian, from Cordiner's *Ceylon*; the same in Thunberg's *Voyages*. in Fry's *Pantographia*, p. 188. The Ceylon, or Cingalese, from Cordiner's *Ceylon*, vol. i. p. 122.

The Rooinga, Rossawn, Banga, Myammau, or Burmah, Siam, or Tainay, Tailong.

Moitay, Koloun, Passooko, Maploo, Play i. Play ii. Moan, from the 5th vol. of the *Asiatic Researches*, by Dr. Buchanan.

The ordinals of Siam, from Kœmpfer, vol. i. p. 4.; the cardinals from p. 321st of Turner's embassy to Tibet. Kookist or Lunkits or Lunctas, from the *Asiatic Res.* vol. vii. p. 198. Tancut, North of Tibet, from Bell's travels, vol. ii. p. 145. Cochin-china, from Barrow, p. 325. China, from Du Halde's *China*, vol. ii. p. 413; from Bell's travels, vol. ii. p. 115; from vol. iv. p. 486. of the *Amer. Phil. Tran.*; from *Archæologia*, vol. vi. p. 154. by Marsden. Ordinals of Japan, from Thunberg's travels, vol. iii. p. 91.

Ghazikumuk, Akuschæ, Kartel, Mingrelia, from the second volume of Wilkinson's people of Caucasus, Kisti and Zechetschen; Tscherkassian and Osses, from his first volume, p. 41. 274. 240.

Annex 55

A. P. Phayre, “Account of Arakan”, *Journal of the Asiatic Society* 1841, p. 679

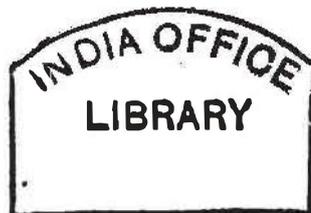
Available at:

[https://www.burmalibrary.org/docs21/Lieut. Phayre-1841-Account of Arakan-en-red.pdf](https://www.burmalibrary.org/docs21/Lieut._Phayre-1841-Account_of_Arakan-en-red.pdf)



April 17 1902 -

JOURNAL



OF THE

ASIATIC SOCIETY.

*Account of Arakan.** BY LIEUT. PHAYRE, *Senior Assistant Commissioner, Arakan.*

Arakan Proper, called by the natives *Ra-khoing-pyee*, or *Ra-khoing* country, lies between 20° and 21° 10' N. Lat. on the sea coast; in the interior it extends to about 21° 40'. It is bounded on the west by the Bay of Bengal and the estuary called *Naf*; on the north, by a range of mountains named *Wé-la-toung*, and by a line not well defined running N. E. through a hilly country to the *Kola-dan* river; on the east by the *Yú-ma* mountains; and on the south it is separated from the district of *Aeng*, and the island of *Rambree*, by various straits and creeks.

On the north, between *Arakan* and the *Chittagong* district, at some distance from the sea-coast, there are several tribes living among the hills and forests, who have hitherto remained independent of the British government. Our authority extends up the *Kola-dan* river, about 130 miles north from the town of *Akyab*, to the mouth of a stream called the *Oo-tha-lang*, but beyond that, stretch mountains and forests to the north-east, hitherto untrodden by civilized man, as far as *Munneepoor*; here live various savage tribes, who appear to be in a constant state of warfare with each other. On the east our boundary up to the *Yú-ma* mountains is only nominal. The tribes

* We give the name *Arakan* as a general term to four districts, which by the natives is restricted to what is the present district of *Akyab*. In this paper the name *Arakan* is used in the latter sense.

for 15 or 20 miles west of that range are independent, and have never submitted to any regular government, neither to that of the *Arakan* kings, the Burmese, or the British.

The boundary above described contains about six thousand square miles, of which from 12 to 1500 on the eastern side, are, from the inaccessible nature of the country, under the controul of the mountain tribes.

In *Arakan* there are three principal rivers; viz. the *Mayú*, the *Kola-dan*, and the *Lé-myo*; these all flow in a general north and south direction, at an average distance of 15 or 20 miles apart, the *Mayú* being to the west, the *Kola-dan* in the centre, and the *Lé-myo* to the east. Their channels are separated by ranges of hills running in the same general direction of N. and S.; the principal rocks are sandstone and shale.

In the upper course of these rivers, or about 150 miles from the sea, the hills are lofty, and so massed together, that the direction of the ranges is not discernible; but as the rivers descend, the country becomes open; then ascend a height; and single ranges of hills are seen, with broad and fertile plains extending from their bases as far as the eye can reach; the plains, dotted here and there with villages, are intersected by innumerable streams, and the bright-green rice fields, alternate with dark forest tracts. The three rivers for the last 20 or 30 miles of their course, are connected together by a vast number of creeks, through which all communication in the delta takes place. The *Kola-dan* in the lower part of its course is called the *Ga-tsha-bha*. The different branches of the *Lé-myo* in its lower course take various names.

The ancient history of *Arakan* presents such a tangled web of fiction, that I shall not attempt to give it in detail. I have not had sufficient leisure to study the subject, and my object being merely to give an account of the present state of the country, I shall only refer to its ancient history so far as is necessary to give a general idea of its condition previous to the British conquest, and to shew what race the present inhabitants belong to. The inhabitants are,

In the Plains.—1. *Ra-khoing-tha*.—2. *Ko-là*.—3. *Dom*.

In the Hills.—1. *Khyoung-tha*.—2. *Kúmé* or *Kidé-mé*.—3. *Khyeng*.—4. *Doing-núk*, *Mroong*, and other tribes.

The *Ra-khoing-tha* and *Khyoung-tha* are of the same race. Like the Burmans their national name is *Myam-má*, the first appellations here given being merely local, the former signifying inhabitant of *Ra-khoing* country; the latter, or *Khyoung-tha*, being the name given to those who inhabit the banks of mountain streams within the same villages as the hill tribes, and support themselves by hill cultivation. How they came to be separated from their countrymen does not appear; it is rather extraordinary that they should remain so, as they subject themselves in the hills to great hardships, while to procure a subsistence in the plains is a matter of no difficulty. Lately I have seen some instances of their settling in the plains and cultivating land with ploughs. The religion of both these people is Buddhism; they may be said to belong to the Mongolian family, or to be between the Mongolian and Malay race; their written language is the same as the Burmese; in the colloquial there are some provincial differences.

The *Kolas*, or Moosulmans, are of an entirely different race to the preceding, they being of Bengalee descent. The *Arakan* kings in former times had possessions all along the coast as far as *Chittagong* and *Dacca*. Coins are still extant, struck by the viceroys at the former town, with Bengalee and Persian characters on one side, and Burmese on the reverse. While the Arakanese held these possessions in Bengal, they appear to have sent numbers of the inhabitants into *Arakan* as slaves, whence arose the present *Kola* (foreign) population of the country; they form about 15 per cent. of the whole population. The *Arakan* Moosulmauns preserve the language of their ancestors for colloquial purposes, but always use the Burmese in writing; they have also adopted the dress of the country, with the exception of the *goung-boung*, or head dress.

The third class in the plains are *Doms*. These form such a minute section of the population, that it is scarcely necessary to mention them. The *Doms*, it would appear, were brought from Bengal to be used as *Phrakyon*, or pagoda slaves. It is a strange anomaly in the Búdhist religion, (as it prevails in Burmah,) that the servitors of the temples are invariably outcasts, with whom the rest of the community will hold no intercourse. In Burmah Proper, pagoda slaves are pardoned convicts, or persons condemned to the employment on account of crimes. The kings of *Arakan* finding in Bengal a number of degraded

castes ready made to their hands, imported them and their families as perpetual and hereditary pagoda slaves. Their duties were to sweep in the vicinity of the temple, clear away the remains of offerings, whether of food, flowers, &c. and also to wash the idol. These people of course are now released from their compulsory servitude, and have become cultivators, but in consequence of their former condition, they are regarded by the people with as much disgust as they would be from their low caste, by Hindoos.*

Since the conquest of *Arakan* by the English, a large number of Bengalees have settled in the town of *Akyab* as shop-keepers, and in the vicinity as cultivators; these are not taken into account. In the interior reside a few Brahmins, some of Munnipooree descent, who were brought by the Burmese as astrologers, and some are descendants of colonists from Bengal, brought by the *Arakan* kings. I am inclined to think, that the Arakanese monarchs were in latter times very Brahminically inclined, and that the Burman conquest by infusing fresh Buddhist vigour, and contempt for *Kolas* generally, followed by our own occupation of the country, has prevented the introduction of Hinduism, which probably would have been brought about in the same manner as it was in *Muneepoor*. The hill people, the *Khyoung-thás*, have already been described; next come the *Kú-mí*, or *Kwe-mí*, tribe.

* The Arakanese have so far adopted the Hindu prejudice against them, that if any *Ra-khoing-thá* has unwittingly eaten with, or drank water from the utensil of a *Dom*, or other low caste Hindu, he is excluded from society until he has undergone certain purifications. Some years ago, when in consequence of inundations on the W. coast of the Bay of Bengal the population was reduced to great distress, a number of Ooryas found their way to this coast, and were purchased by Arakanese, or pledged themselves for service, they became inmates of families, and eat and drank with them; all at once it was noised abroad, that Ooryas were no better than *Doms*, than pagoda slaves. Numbers of respectable persons, men, women and children were forthwith declared unclean. They were excluded from the villages, the public festivals, and the *kyoungs*, or monestaries. To restore them was no easy matter. In former times the king had only to smoke a cigar after it had been used by an outcaste, and he was deemed restored forthwith; but now the royal line no longer existed in the country. At length it was settled that a meeting should be held of the most respectable men in the country, who agreed to smoke with the unclean; the pipe to be handed last to the European Magistrate, and then a general feast to conclude all. The ceremony was gone through with the help of numerous *Phoon-gyees*, (or priests), and much to the comfort of the outcasts, deemed and held to be sufficient for their restoration to society.

Annex 56

G. Robertson KC, “Human Rights Fact-Finding: Some Legal and Ethical Dilemmas”, *UCL Human Rights Review*, vol. 3 (2010), p. 15

Available at:

<https://www.ucl.ac.uk/human-rights/sites/human-rights/files/robertson.pdf>

HUMAN RIGHTS FACT-FINDING: SOME LEGAL AND ETHICAL DILEMMAS

GEOFFREY ROBERTSON QC*

I. INTRODUCTION

Human rights fact-finding missions are of increasing importance, especially to the array of war crimes courts that have been established in the last decade. Their prosecutors draw on the reports of such missions as a basis for initiating investigations, and often seek to call evidence from the fact-finders as part of the prosecution case. A prosecution summons to go into the witness box can cause serious problems for human rights monitors, who must protect their sources and avoid being perceived as partisan. And because the reports of fact-finding missions can now lead to the prosecution of political and military leaders, or at least affect their post retirement travel plans, some leaders have devised new ways of attacking such reports, by threatening legal actions, usually in England, for libel or breach of confidentiality.

Academics have generally overlooked the importance of this subject - the most impressive exception being a study by Diane Orentlicher back in 1990.¹ It is time to take a more contemporary look at the ethical and legal dimensions of human rights fact-finding, and to applaud the launch of the 'Guidelines for International Human Rights Fact-Finding Visits and Missions' prepared by the Raoul Wallenberg Institute.²

* Mr Robertson has conducted many human rights fact finding missions for Amnesty International, the Bar Council and other organisations. He served as the first President of the UN war crimes court in Sierra Leone and is currently a distinguished jurist member of the Internal Justice Council of the United Nations. He is the author of *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn Penguin and New Press, London 2006). This is an edited version of his keynote address at the conference which inaugurated the Lund-London Guidelines on International Human Rights Fact-Finding Visits and Reports, prepared by the Raoul Wallenberg Institute.

¹ See DF Orentlicher, 'Bearing Witness: The Art and Science of Human Rights Fact-Finding' (1980) 3 *Harvard Human Rights Journal* 83.

² International Bar Association's Human Rights Institute in conjunction with the Raoul Wallenberg Institute, Lund University, Guidelines on International Human Rights Fact-Finding Visits and Report ('Lund-London Guidelines'), inaugurated 1 June 2009.

have had an unrivalled opportunity to find facts about Malawi's prison system, from the inside.

VII. SURVEILLANCE

A more common problem for members of fact-finding missions is to find themselves followed by secret (and not so secret) police. Here, in such cases, it is important not to lead them to witnesses, and interviews should be cancelled rather than reliance placed upon 'giving them the slip' which may be more difficult than it seems in an unknown or hostile city. In Prague in Stalinist times, I was always followed rather clumsily by ill-paid surveillance operatives; I would head to the city's Jewish cemetery, with its towering forests of tall tombs, and try to lose them. If I failed, I would take them behind me to the Terezin Museum, requiring them to pretend an interest in pictures painted by children of the ghetto en route to Auschwitz. However, I would always avoid leading them to my contacts, unless they were well known dissidents whose meetings were monitored in any event.

VIII. INTERVIEWING

The same principle of prudence should apply when interviewing people in prison or in any monitored space where guards are nearby or hidden microphones are possibly present. It is not fair to the prisoner, who either will not tell the truth if aware that his custodians are listening or will be punished if he does tell it. On an Amnesty mission concerning Vietnamese prisoners in re-education camps, it was very tempting to ask questions of prisoners during an organised visit, but we decided to avoid questioning because guards were invariably within earshot. The prisoners, of course, could volunteer whatever comments they wished, but their opinions were tempered by their fear of reprisals.

IX. REFUGEES

Special problems are encountered in refugee camps. There is always a power structure within such camps – they are usually run by a political faction, whose representatives insist on escorting and introducing you to refugees who tend to say the same thing about the conditions from which they have escaped and about their treatment in the camp. The ideal on such missions is to interview new arrivals as they arrive or are being registered and before they come under the sway of local camp leaders who will indoctrinate them with the approved 'line' about

political events back home, and will in certain cases coach them as to what to say. It may or may not be the truth – but because it is designed e.g. to support the political line of the faction, or to support a case for asylum rather than economic migration, such coached stories must be discounted.

X. VICTIMS

Ideally, prisoners and refugees and all persons who may be subject to pressure from custodians or others should be interviewed alone. This is a counsel of perfection, because investigators will often need a translator present and the choice may be problematic, especially if there is no choice and the translator is officially imposed. Interviewing prisoners alone does insulate their testimony from influence, although it is important to remember that some victims – especially of sexual crime – are inhibited by the subject matter and do need support before they can bring themselves to speak freely. Many traumatised victims of rape or torture simply will not divulge their excruciating experience to a stranger. In these circumstances, there can be no hard and fast rules about interviewing witnesses without anyone else present: a friend or counsellor may be a necessary companion.

XI. CONDUCT OF INTERVIEWS

As with other interviews which can have serious consequences, the interviewer has a duty to conduct the discussion as fairly as possible. Leading questions must not put words into the interviewee's mouth. The questions asked must not suggest the answer that is sought or that others have given. (A good reality check in the event of an important allegation is the question 'how do you know?'). The way to conduct an interview is to ask 'what happened then?' and not to say, for example, 'that is when they pulled your fingernails out, didn't they?'. Always look for corroboration of serious allegations: ask if there is another prisoner who saw the victim immediately before and after; whether there is an autopsy report that confirms an eye witness account of a lethal beating; check whether there are newspaper reports that confirm dates and events. Wherever a 'story' is told there will usually be elements that can be checked with others or with public records.

There is much at stake in how witnesses can be brainwashed, or persuaded (often by money or by threats to relatives) to give false evidence. Human rights fact-finders must develop a degree of cynicism

Annex 57

N. Robinson, *The Genocide Convention – Its Origins and Interpretation*
(1949)



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The Genocide Convention

Its Origins and Interpretation

by

NEHEMIAH ROBINSON

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1949

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with Art. 94 of the Charter, the members of the United Nations undertake to comply with the decision of the Court in any case to which they are parties; i.e., the fulfillment of its judgment constitutes an obligation under the Charter. Furthermore, the same article stipulates that if a party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. Thus, the Security Council may be involved in cases which otherwise would not come under its competence, in accordance with Chapters V-VII of the Charter. Finally, Art. 2(5) imposes on all members the obligation to give to the United Nations assistance in any action it takes in accordance with the Charter; therefore, the Security Council's measures may involve action by all members of the United Nations against a State refusing to comply with the judgment of the International Court of Justice.

(c) The obligation of the parties to submit disputes to the International Court of Justice is broad in regard to subject matters: it includes not only the interpretation of the provisions of the Convention, but also its application (i.e., cases where its non-applicability is contended) and the fulfillment of the obligations imposed (i.e. carrying out). The last would include the obligation to enact the necessary legislation (Art. V), to extradite culprits (Art. VII) and to prosecute those responsible for acts punishable under the Convention (Art. VI). In addition, such disputes may relate to the responsibility of a State for acts of Genocide or any of the other punishable acts. As stated above, one of the weak spots in the Convention is the lack of explicit reference to the responsibility of the State for action taken by its government or authorities. It was contended that Genocide could rarely be committed without the participation or tolerance of the State and that therefore the Convention which does not provide against such action could not accomplish its purpose. It was this contention which prompted the British and Belgian representatives to submit the amendment to Art. IX referred to above. However, there were many doubts as to the actual meaning of that proposal. First, it was not clear whether the responsibility was criminal or civil. It was obvious that States could not be charged with criminal, but only civil, or international, responsibility. However, the definition of civil responsibility is by no means clear. Usually, it involves the question of compensation, but no provision relating to reparation of damage was adopted, as stated above. In absence of such a specific reference and in view of the fact that the jurisdiction of the International Court of Justice, according to Art. 34

of the Statute, could be invoked only by another State,⁵⁾ the question of compensation could arise only if the respondent State were responsible for such action in the territory of another State or against citizens of the claimant State. No compensation could be claimed for the benefit of the citizens of the respondent State or other persons not protected by a claimant State because in international law the holder of a right in all international disputes is the State.⁶⁾

Art. 36 of the International Court of Justice Statute provides that 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. Since the non-compulsory character of the jurisdiction is the rule, the exception (i.e., compulsory jurisdiction) must be explicitly stated. Art. 36 is very cautious in this respect; it enumerated in Paragraph 2 four subjects of disputes in compulsory jurisdiction, among them "the nature and extent of reparation to be made for the breach of an international obligation." It would follow from this enumeration that since the Convention does not specifically refer to reparation, the parties to it did not undertake to have accepted the Court's compulsory jurisdiction in this question.

A claim for compensation could be based on the generally accepted rule of international law that an international delinquency involves the reparation of the material wrong done.⁷⁾ However, Art. IX did not create compulsory jurisdiction in question of reparation so that the claim must either be enforced by other means or the parties to the dispute must agree to submit this question to the Court.

On the other hand, there would appear to be no reason why the International Court of Justice could not generally declare that the respondent State is responsible for the damage caused, although it could neither state the amounts involved nor award such damages to the claimant State.

5) An amendment of Haiti (A/C. 6/263) which proposed to grant the right of recourse to individuals and groups was rejected by the Sixth Committee as not being in accordance with the Statute of the Court.

6) Harjone N. Whiteman, Damages in International Law, vol. I, p. 275, Washington 1937.

"It is an elementary principle that, when a government officially intervenes on behalf of its citizen, it makes his claim his own..." John Bassett Moore, dissenting opinion in the Mavrommatis Palestine Concessions Case, Permanent Court of International Justice, Series A, No 2, pp. 54, 63.

Some representatives (see Iran) felt that the Court would have no difficulty in deciding in each specific case to whom the reparation of damage caused should be made, but this contention is not borne out by the general rules of international law, if it implies a judgment on actual reparation.

7) See I. A. Eagleton, The Responsibility of States in International Law, N.Y., 1928, pp. 182-205; Hyde, vol. II, p. 682; Whiteman, vol. I, p. 275.

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N. Robinson, *The Genocide Convention, A Commentary* (1960)

THE GENOCIDE CONVENTION

A Commentary

By

NEHEMIAH ROBINSON

INSTITUTE OF **JEWISH AFFAIRS**
WORLD JEWISH CONGRESS
15 EAST 84TH STREET
NEW YORK 28, N. Y.

1960

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suits are permitted under the general law of the State. Nor would it prevent the State from providing for such compensation in enacting legislation provided for in Article V. Article V, however, does not expressly impose on the State an obligation to provide damages for them in the legislation. See, however, the comments to Article IX below.

ARTICLE V

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

(a) This article appears to contain one of the basic obligations the Contracting Parties to the Convention have undertaken, viz., to enact the necessary legislation that would give effect to its provisions and, in particular, to provide effective penalties for persons guilty of Genocide and other acts punishable under the Convention.

The article underwent several changes. The draft of the Ad Hoc Committee contained only an obligation to enact legislation to give effect to the provisions of the Convention. On the basis of the USSR proposal for amendments,¹ the Sixth Committee on November 6, 1948, adopted this article in a wording² which would have restricted the obligation of the Parties to that of providing "criminal penalties for the authors of such crimes to give effect to the provisions of this *Convention*." It appeared later that the drafting was not in accordance with the adopted amendment and the Sixth Committee changed the wording so as to stipulate a general obligation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for the perpetrators of the crime.³ In the final version adopted by the Drafting Committee, the article acquired the present wording.

(b) As it stands, the article may not appear to afford room for controversy. In practice, however, the word "necessary" created considerable difficulty. Thus, the Canadian Deputy Minister of Justice interpreted this word to mean that a Party to the Convention must under

¹ A/C.6/215, Rev. 1.

² **A/C.6/254.**

³ **A/C.6/254**, Rev. 1.

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Article V enact domestic legislation only where the existing criminal law is insufficient to cover all the acts made punishable under the Convention.⁴ The same view was held by the Norwegian Minister of Justice and Police, who was of the opinion that "it was not to be assumed that the Convention would require an amendment to the Norwegian law.

The Deputy Minister of Justice of Canada advised the Cabinet and Parliament of his country that no new legislation was required because he could not "conceive of any act of commission or omission occurring in Canada as falling within the definition of the crime of Genocide contained in Article II of the Convention (no reference was made to Article III) which would not be covered by the relevant section of the Criminal Code."^e

Similarly, the Australian Government has been and is of the opinion "that the laws at present in force in Australia already provide substantially for the punishment of the classes of acts described in the Convention. In all these circumstances the Commonwealth Government is of the opinion that existing laws provide adequate safeguards to cover any circumstances that appear likely to arise so far as Australia is concerned."⁷

⁴ House of Commons Debates. p. 2442. See also Younger, *op. cit.* Berle, ("Mis hors de loi du genocide," *Revue Internationale de Droit Penal*, Vol. 21 (1950), No. 2, p. 149), on the other hand, claims that the provisions of the Convention are not operative by themselves and that for the Convention to produce legal effect it is necessary for each State to enact its own domestic legislation. Mr. Berle claims further that, even if the Convention were operative by itself, it would not impose any modification of existing legislation. This is hardly logical.

⁵ Simson, *op. cit.*, p. 214.

s House of Commons Debates: Official Report, p. 2442.

⁷ Letter of the Department of External Affairs to the Executive Council of Australian Jewry, dated Feb. 28, 1958. It must be pointed out that Dr. Evatt (then Foreign Minister) took a different view during the debates in Parliament on the ratification of the Convention. He answered "yes" to the question, "Is it proposed to follow the ratification of the Convention by introducing into this Parliament legislation for the purpose of giving effect to it?" He also stated that "then [after the Convention came into effect] each signatory will be bound within its own jurisdiction to legislate in order to give the Convention effect." (Commonwealth of Australia, *Parliamentary Debates (Hansard)*, *Eighteenth Parliament, Second Session*, 1948-1949, p. 1880.)

These Rights and Freedoms (United Nations, DPI, 1950), p. 126, describes the obligation under Article V as one to "enact necessary national legislation to give effect to the Convention," which may mean that only where such legislation is necessary is there an obligation to enact it.

Annex 59

D. V. Sandifer, *Evidence Before International Tribunals* (revised edition, 1975)

Evidence Before
International Tribunals

Revised Edition

Durward V. Sandifer

University Press of Virginia
Charlottesville

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CHAPTER III

The Production of Evidence

THE RIGHTS OF THE PARTIES

Section 21. Communication of Evidence. It may be accepted as axiomatic that all pleadings and evidence produced by either party during the course of an arbitral proceeding must be communicated both to the tribunal and to the other parties. The only questions that require examination are the location of responsibility for such communication and the method by which it is accomplished. The problem is one largely peculiar to international proceedings; in municipal law the matter is taken care of by a fixed procedure and a permanent judicial organization.

Civil law practice generally requires mutual communication of documents in advance of the introduction of documents in the proceedings. Herzog says of French procedure: "[B]efore being introduced in the proceedings all documents must be submitted in advance for examination to adverse parties. Usually an *avoue* who wishes to introduce documentary evidence transmits it to the *avoue* of his client's opponent, who returns it after a few days."¹

In general arbitrations before ad hoc tribunals, responsibility for the communication of pleadings with accompanying documents is usually placed upon the parties. Communication must be made simultaneously to the tribunal and to the other party, and in the latter case is usually from agent to agent.² Bustamante cor-

¹ CIVIL PROCEDURE IN FRANCE §19 (1967). *Accord*: C. PRO. CIV. ARTS. 188, 189 (67th ed. Dalloz 1971); 1 C. LESSONA, *TEORÍA GENERAL DE LA PRUEBA EN DERECHO CIVIL* 84-85 (4th ed. 1957); HARRIS & SCHWARTZ, *Comparative Law: Important Contrasts in the Administration of Justice in the United States and West Germany*, 30 TEXAS L. REV. 462, 472-73 (1952); R. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* 306-07 (3d ed. 1970); A. ENGELMANN, *A HISTORY OF CONTINENTAL CIVIL PROCEDURE* 758-59 (1927); E. GARSONNET AND C. CEZAR-BRU, *PRÉCIS DE PROCÉDURE CIVILE* 291-92 (1911).

² *Island of Bulama Case* (Great Britain v. Portugal), 1869, art. III, 61 BRIT. AND FOREIGN STATE PAPERS 1163 (1869); *Fur Seal Arbitration* (United States v. Great Britain), 1903, arts. III, IV, 1 MALLOY, *TREATIES* 898; *San Domingo Improvement Co. Case* (United States v. Dominican Republic), 1903, art. III, *id.* at 415; *Muscat*

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rectly states the underlying principle: "The fair administration of justice requires that every document presented by one of the parties be known by the other or others in opportune time for discussing it and submitting to the tribunal the observations that it deems necessary."³ The arbitral agreement may provide that the requirement for communication to the other party may be satisfied by depositing the necessary copies with the legation or the foreign office of the other party.⁴ In proceedings before the Permanent Court of Arbitration at The Hague under Article 63 of the Hague Convention of 1907, agreement may be made to communicate all documents through the International Bureau. Resort has been had to this means of communication in a number of the proceedings conducted under this Convention. Documents communicated after the time limits fixed in the agreement or rules of procedure will not be considered unless communicated to the other parties, but the acceptance of documents so communicated is usually subject to the discretion of the tribunal.⁵

As claims commissions usually have to handle a large number of cases involving numerous pleadings and large quantities of documentary evidence, it is customary for them to establish a joint secretariat with which all documents are filed. The secretariat assumes responsibility for transmitting the documents to the other parties.

Proceedings in the International Court of Justice, with its permanent and efficiently organized Registry, more nearly approach those in municipal courts in this respect. Under Article 43 of the Statute, all communications must "be made through the Registrar, in the order and within the time fixed by the Court," and a

Dhows Case (France v. Great Britain), 1904, art. II, 98 BRIT. AND FOREIGN STATE PAPERS 46 (1906); Chevreau Case (France v. Great Britain), 1930, art. IV, COMPROMIS ET PROTOCOLES DES SÉANCES 3 (1931).

³ 5 DERECHO INTERNACIONAL PUBLICO 428 (1938) (translation).

⁴ Chamizal Case (United States v. Mexico), 1910, art. V, 3 TREATIES, CONVENTIONS (Redmond) 2730; Salem Claim (United States v. Egypt), 1921, art. 4, U.S. EXECUTIVE AGREEMENT SER. No. 33.

⁵ British Guiana-Venezuelan Boundary Arbitration, 1897, Rules of Procedure, June 14, 1899, art. 8, 92 BRIT. AND FOREIGN STATE PAPERS 467 (1900); Pelletier Claim (United States v. Haiti), 1884, 1 PELLETIER CLAIM 726 (1885); Venezuelan Preferential Case (Germany, Great Britain, and Italy v. Venezuela), 1903, RECUEIL DES ACTES ET PROTOCOLES 42, 52 (1904), PROCEEDINGS 62, 81 (1905); The Norwegian Claims Case (United States v. Norway), 1921, PROCEEDINGS 13 (1922).

"certified copy of every document produced by one party shall be communicated to the other party."⁶ The Rules provide in Article 48 that "the Registrar shall transmit to the judges and to the parties copies of the pleadings and documents annexed in the case, as and when he receives them."⁷ Certified true copies of documents produced or referred to during the oral proceedings, and not previously communicated, must be handed to the Registrar, who communicates them to the agent of the other party so that he may comment upon them if he so desires.⁸ During the proceedings in the *S.S. Wimbledon Case*, the Permanent Court decided that it could "only make official use of certain documents on condition of their being communicated to the Parties."⁹

The Court's system of communication through the Registry appears to have proved satisfactory in operation. It has the great merit of enabling the Court to keep full control of the communication of all documents. It also gives regularity and permanence to the proceedings and makes it possible to keep a full record of all acts and documents. The records of proceedings before ad hoc tribunals have often suffered greatly from the haphazard method of communication employed.

Section 22. Inspection and Discovery of Documents. The right of "discovery" of facts peculiarly within the knowledge of one of

⁶The rule concerning the communication of documents produced was derived from Article 64 of the Hague Convention of 1907. Baron Descamps said of the corresponding provision (Article 40) of the Convention of 1899 that it was regarded by the Third Commission as "a guarantee of prime importance." *HAGUE CONFERENCE REPORTS* 80.

⁷Article 52 of the Rules of the International Court of Justice provides, with respect to documents submitted after the termination of the written proceedings, that the Registry "will inform the Court" of the filing of such documents. See discussion of this provision in section 17 *supra*.

Before 1936 Article 47 of the Rules apparently contemplated direct communication between the parties concerning notice of evidence to be produced during the oral proceedings. Article 49 of the 1936 Rules (Article 53, 1972 Rules) was modified to require that the other parties be informed "through the Registry." In criticising the old rule in his Report of June 1933, the Registrar said that the Parties had "only exceptionally . . . communicated beforehand a list of documents which they intended to produce at the hearings" and that the Court had "never asked for the production of such a list." [1936] P.C.I.J., ser. D, No. 2 (3d add.), 825; [1972] I.C.J. ser. D, No. 2, at 19; 11 *INT'L LEGAL MATERIALS* 899, 912 (1972).

⁸6 P.C.I.J. ANN. R. (ser. E) 292 (1930); *Payment of Various Serbian Loans Issued in France* [1929] P.C.I.J. ser. C, No. 16-III, at 14-15.

⁹1 P.C.I.J. ANN. R. (ser. E) 268 (1925).

the parties is discussed at a later point.¹⁰ The right of parties to have copies of all documents produced communicated to them has as a corollary the rule that if documents are cited or referred to by a party without being produced, the other party shall have a right to the inspection or discovery of such documents.¹¹ In theory the necessity for the exercise of such a right cannot arise, as the obligation to submit with the pleadings all documents in support is almost always included in arbitral agreements, or in the rules of procedure, with the accompanying rule that copies of all documents be communicated to the parties. In actual practice, documents are at times referred to or even relied on without being submitted.¹²

In the event of such failure or omission to produce a relevant document that is in the possession of the party, the other party is

¹⁰ See section 85 *infra*.

¹¹ See section 26 *infra* for discussion of the *Parker Case* before the United States-Mexican Mixed Claims Commission of 1923. See also section 31. Cf. the following statement by V. Colin and H. Capitant: "The evidence submitted by a party must always be made known to the opposing party in such a manner that he may be in a position to discuss it and to answer it." *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 411 (1931) (translation).

¹² The obligation of disclosure is so comprehensive in Italian procedure that it would seem to render discovery superfluous: "[F]or the purpose of avoiding surprises the parties must constantly indicate beforehand what they intend to prove, by what means and with regard to oral evidence through whom. Matters on which proof is offered must be itemized in order to enable the opponent to raise and the judge to decide questions as to whether the evidence is relevant, material and admissible; the various types of proof of which the parties propose to avail themselves must be indicated beforehand in order that their competence may be scrutinized." Sereni, *Basic Features of Civil Procedure in Italy: A Comparative Study*, 1 *AM. J. COMP. L.* 373 (1952). Accord: Shartel & Wolff, *Civil Justice in Germany*, 42 *MICH. L. REV.* 863, 883-84 (1944); R. SCHLESINGER, *supra* note 1, at 307; I. SZÁSZY, *INTERNATIONAL CIVIL PROCEDURE* 278-80 (1967).

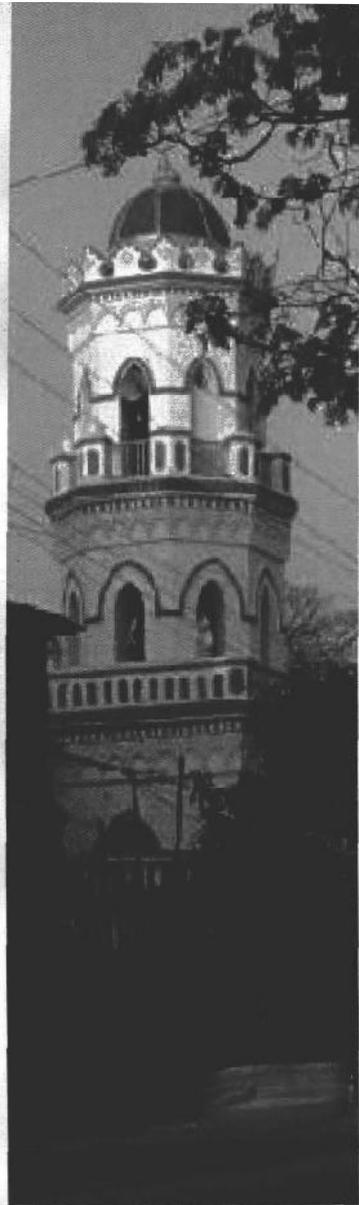
W. Buckland and A. McNair describe the procedure of disclosure in Roman law: "There were also rules more analogous to our discovery of documents. In our law the rule seems to be, roughly, that *either party* may call on the other to specify on oath all the documents which are or have been in his possession or power relating to any matter in question in the action; thereupon, he will, subject to a certain claim of privilege in certain cases upon the validity of which the Court will decide, be ordered to produce any or all of these documents for inspection by his opponent. In Roman law the edict *de edendo* gave the defendant the right to call for all documents on which the plaintiff proposed to rely This is entirely in the interest of the defendant; there was no corresponding right for the plaintiff." *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* 406 (2d ed. rev. 1952).

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A. Selth, *Burma's Muslims: Terrorists or Terrorised?*, Canberra Papers on Strategy and Defence No. 150, Australian National University, Strategic and Defence Studies Centre, 2003

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BURMA'S MUSLIMS: Terrorists or Terrorised?

Andrew Selth



Strategic and Defence Studies Centre
Canberra Papers on Strategy and Defence No. 150

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Burma's Muslims: Terrorists or Terrorised? 7

for more than one third of all those who followed Islam in Burma. They mainly spoke Urdu and Tamil, and 'maintained strong links with the religious and cultural practices of their homelands'.³⁹ Religious differences helped fuel economic and racial tensions, leading to large-scale riots against the Indian community in Rangoon in 1931 and 1938. Some Indians returned to Burma with the colonial administration in 1945, but their numbers never reached pre-war levels. When Ne Win's military government nationalised the Burmese economy in 1963 and introduced tough new citizenship laws, several hundred thousand South Asians, including many Muslims, departed for India and Pakistan. However, a sizeable community remains in modern Burma.

The fourth and largest Muslim community in Burma today is that of the Rohingyas. These are Bengali Muslims who live in Arakan State, on Burma's western coast facing the Bay of Bengal.⁴⁰ A few Muslims trace their ancestry back to an independent Arakanese kingdom that existed in the region during the 15th and 16th centuries. Its rulers enjoyed mixed relations with Muslim Bengal but employed many Muslims as administrators and soldiers.⁴¹ The kingdom was conquered by King Bodawpaya and incorporated into a unified Burma late in the 18th century. (His army contained a unit of Burmese Muslims who later settled in Arakan).⁴² There has always been traffic between Arakan and Bengal, but most Rohingyas arrived with the British colonialists in the 19th and early 20th centuries.⁴³ For many years Arakan was administered as part of the British Province of Bengal. There was another influx of migrants after the Second World War, and a number of large-scale population movements have occurred since, usually coinciding with economic or political crises in Bengal (which became East Pakistan in 1947 and the independent Peoples' Republic of Bangladesh in 1971). In 1986 Muslim Rohingyas were estimated to constitute about 56 per cent of the population of Arakan. By 1992, this proportion had risen to 70 per cent of the State's estimated 4 million people.⁴⁴

A key difference between the Muslim communities of Burma, and those of other regional countries, is that Islam was not imposed by external actors. Despite periodic conflicts with its neighbours, Burma was never the target of any powerful Muslim state wishing to spread its religion. For better and for worse, the proximity of Muslim Bengal left its mark on Arakan, but Islam failed to reach the heart of the country. The British colonialists who later conquered Burma were largely Christian. Nor was there any missionary activity by Muslim preachers, aiming to create large numbers of converts, as occurred in the Malay Archipelago. As a result, Burma's Muslim community developed mainly through immigration and exogamy, giving it a unique

Annex 61

Sometaya R., “Oppression Among the Oppressed: Inside the Refugee Camps in Cox’s Bazar”, Torkel Opsahl Academic EPublisher (TOAEP), Policy Brief Series, No. 105 (2020)

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Oppression Among the Oppressed: Inside Refugee Camps in Cox's Bazar

By **SOMETAYA Ryuta**
Policy Brief Series No. 105 (2020)

1. My Experience as a Reporter on the Rakhine Crises

As the Yangon Bureau Chief of *The Asahi Shimbun* since April 2017, I have covered the conflict in northern Rakhine involving the Rohingyas since 25 August 2017, having written more than 100 articles. I have visited northern Rakhine State in the western part of Myanmar numerous times, and the Cox's Bazar Rohingya refugee camps seven times. Each time I walked into the camps, I conducted 10 to 40 interviews with refugees, Bangladeshi government officials, and members of the local public.

Through more than 150 interviews, I have formed an impression of the complexity of the conflict involving the Rohingyas. I have tried to report on the conflict from various angles. Most of the articles are based on my interviews with the refugees, some convey the voices of local Bangladeshi people, and others the perspective of the Bangladeshi government. To report correct information, I have also conducted countless interviews on the Myanmar side: with government officials, politicians, and even Buddhist activists. I have taken great care to publish articles based on facts, not speculation. Sometimes, it was quite hard to listen to the stories of the refugees, but I repeated similar questions to make their stories more tangible. Some revealed their personal and sensitive experiences to me.

As long as I am in my current position, I plan to revisit the camps several times a year. I record all interviews and have stored my notes and information on the identity of my sources securely. In the following sections of this policy brief, I will present some of the less well-known problems in the refugee camps that my sources have revealed to me. All quotations are taken from my record of the interviews.

2. Threats by the Arakan Rohingya Salvation Army Against Hindu Refugees

Rumours of intimidation, violence and murder flowed from a sprawling, squalid camp for hundreds of thousands of Rohingya Muslims who have fled from neighbouring Myanmar. But finding Rohingya refugees who are willing to talk about these incidents proved daunting. They were living in fear of reprisals from the alleged perpetrators of the initial attacks in late August 2017 that triggered the civil war: the Arakan Rohingya Salvation Army ('ARSA'), the self-proclaimed protector of the Rohingya refugees.

Myanmar's crackdown on Rohingya Muslims in 2017 creat-

ed an international humanitarian crisis. More than 700,000 refugees fled into Bangladesh.¹ In November 2017, Myanmar and Bangladesh announced that they would start repatriating refugees in stages along an "official route".² However, by the time of writing, no one has taken this official route. Instead, several hundred refugees returned through "unofficial routes".³ Many of the returning refugees told me that they believe Myanmar was still a dangerous place for them.

When I asked them why they decided to return to an unsafe country, they mentioned the attacks by ARSA fighters in the refugee camp. They also said that ARSA members had threatened anyone who wanted to return to Myanmar. Returning home, especially through the official route, would indicate an acceptance of Myanmar's measures, which could weaken ARSA's influence in its battle against the government. ARSA is an armed organization formed by Rohingya refugees. The group's attacks against Myanmar security forces in Rakhine State in August 2017 triggered the crackdown that led to the Rohingya exodus.⁴

Using Twitter and other media, ARSA has declared that it "defend[s] the world's persecuted people".⁵ Many Rohingyas support the group.⁶ To find out if ARSA was actually attacking the same people it had vowed to protect, I visited the refugee camp in suburban Cox's Bazar in south-eastern Bangladesh in mid-December 2019. The camp was crammed with temporary housing made of bamboo and sheets provided by the United Nations. Raw sewage flowed in spaces between the homes, emitting foul stench. The sunlight poking through gaps between the sheets was the refugees' only source of light.

The Rohingyas in the camp repeatedly said that "ARSA

¹ The United Nations High Commissioner for Refugees ('UNHCR') reported over 742,000 refugees in July 2019. UNHCR, "Rohingya emergency", 31 July 2019 (available on its web site).

² "Myanmar signs pact with Bangladesh over Rohingya repatriation", *The Guardian*, 23 November 2017 (available on its web site).

³ These comments are based on my interviews on 23 August 2019 with refugees who returned to Myanmar.

⁴ International Crisis Group, "Myanmar's Rohingya Crisis Enters a Dangerous New Phase", in *Asia Report* No. 292, 7 December 2017 (<https://www.legal-tools.org/doc/22qmxu>).

⁵ Twitter, tweet from the handle @ARSA_Official ('ARSA_The Army'), 25 August 2017.

⁶ "Rohingya crisis: Finding out the truth about Arsa militants", *BBC News*, 11 October 2017 (available on its web site).

have fought for us”⁷ However, when asked about troubles in the camp, they lowered their heads and remained silent. Ninety per cent of the refugees in the camp are Rohingya Muslims.⁸ Some Hindus also fled to the camp from Rakhine amid the confusion of the Myanmar military crackdown.

The Hindus were the first persons willing to speak with me about ARSA-related problems in the camps. Source 1⁹ said he and 10 other Hindu refugees were summoned to a meeting with ARSA members at the temporary home of a group member about a year earlier. The Hindu refugees demanded that ARSA return money they had lent the group. The ARSA fighters then took the 11 Hindu refugees to separate locations and assaulted them. Only nine of them returned. “The other two are probably no longer alive”, Source 1 said.

Source 2¹⁰ said that around November 2018, when he was working outside the camp, men who called themselves ARSA members took him to a forest. They ordered him to read from a script in front of a video camera. When he refused, they beat him. So, he followed their orders, saying: “We Hindus are also angry about the measures taken by the Myanmar government”. A few days later, the video spread through Facebook. “They probably wanted to show that not only Rohingya but also Hindu refugees are angry about the Myanmar government”, Source 2 said.

Source 3,¹¹ who has tried to pull Hindu refugees together in the camp, said ARSA members threatened him after he expressed a desire to return to Myanmar at a meeting of camp refugee representatives. “You should not step out of line with us”, he quoted ARSA members as telling him. “We won’t allow you to selfishly return.” Source 3 also said they told him not to attend any more meetings at the camp. “Everybody is scared of being assaulted”, he said.

3. Victimization of Rohingyas in the Camps

Source 4,¹² a Bangladeshi reporter who helped me in my work, said Hindus are not the only targets of ARSA. “ARSA has been involved in various crimes”, he said. “Many of the victims are Rohingyas”.

I was able to contact a Rohingya refugee – Source 5¹³ – who said her husband was killed by ARSA. She was worried about speaking with a foreign reporter, so I let a Bangladeshi interpreter talk to her first. Source 5 then granted me the interview. “My husband was repeatedly asked by ARSA to join the group, but he refused”, Source 5 said. In July 2018, her husband, 35, was stabbed in the chest and other body parts; he died on a street outside the camp, Source 5 claimed.

Source 5 said the crime was committed in public, and three suspects were immediately arrested. However, she said she was never informed of the motive behind the attack or whether the assailants were connected to ARSA. Source 5, citing a warning

for her husband to be careful a few days before the fatal assault, said she had no doubt who was responsible for his death. “It was definitely ARSA”, she said. However, she added: “To be honest, I didn’t want to talk about it now that Myanmar has been sued at the International Court of Justice”¹⁴. She said she was worried that telling her story could influence the Court’s ruling if people around the world knew there are bad people among the Rohingya Muslims. When I tried to ask her in-depth questions, her relatives stopped her from speaking further by saying: “Don’t say anything else”.

According to Source 4, the Bangladeshi reporter, more than 40 people were killed in the camp in 2019. Although ARSA is believed to be behind many of the incidents, refugees will not discuss the details, even to local reporters.

When I thought I had to wrap up my interviews, I made contact with a 25-year-old Rohingya man (Source 6) who agreed to be interviewed by phone. Source 6 said seven or eight masked men took him to an unknown location in October 2019. “We heard that you want to return to Myanmar”, they said, before punching him twice in the face. He said he had told his family and friends that he wanted to return, and the information must have somehow found its way to ARSA. He said they issued a further threat: “If you say you want to return, we will keep observing you forever. No one can protect you if you step out from the camp”. The man said he no longer uses the word “return”.

He introduced me to a 67-year-old Rohingya refugee who told me about his encounter with ARSA fighters. A few months ago, he said, about 20 ARSA members arrived at his temporary home in the camp, but he was not there at the time. “I had consulted with the United Nations because I knew that ARSA members have sold relief supplies given by the UN”, he said. He believed that the ARSA members who visited his home planned to punish him. He has since moved around among the temporary homes of acquaintances to avoid the fighters.

“Many people have noticed that ARSA members are doing strange things, but no one can say anything because we fear them”, Source 6 said. “If we opposed them, we would be ignored by our friends who have believed that ARSA is the group that is protecting Rohingyas”.

Source 7¹⁵ explained the reasons for ARSA’s aggressive tactics in the camp: “A group of several hundred people in the camp identify themselves as ARSA. With prolonged living in the camp, young people who have lost hope for the future are inclined to join the group. There are no specific leaders, and they keep changing their alignments”¹⁶. ARSA is also involved in illegal drugs and prostitution, and its activities have been expanding for a year, the non-governmental organization (‘NGO’) worker said. “At night, the camp becomes almost lawless after Bangladeshi police and NGO members leave. ARSA is apparently working under such conditions”.

According to Source 8,¹⁷ more than a dozen Rohingya fam-

⁷ The words are based on the interviews in three Cox’s Bazar Rohingya refugee camps on 15-17 December 2019.

⁸ Based on 10 interviews with Hindus in the Rohingya refugee camps, it is estimated that the ratio of the Hindu population is less than 10%.

⁹ 62-year-old male Hindu refugee, interviewed on 15 December 2019.

¹⁰ 41-year-old male Hindu refugee, interviewed on 15 December 2019.

¹¹ 40-year-old male Hindu village chief, interviewed on 15 December 2019.

¹² 28-year-old male local journalist, interviewed on 16 December 2019.

¹³ 30-year-old Rohingya Muslim female, interviewed on 17 December 2019.

¹⁴ International Court of Justice, *The Gambia v Myanmar*, Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019 (<https://www.legal-tools.org/doc/69p376/>); “INSIGHT: Suu Kyi’s defence overshadowed by heavy criticism against her”, *The Asahi Shimbun*, 20 December 2019 (available on its web site).

¹⁵ Bangladeshi local staff of Médecins Sans Frontières.

¹⁶ These words are based on the interview with Source 7 on 17 December 2019.

¹⁷ Bangladeshi local staff of British charity group Christian Aid.

ilies confirmed that they wanted to return to Myanmar 48 hours before their scheduled departure from Bangladesh in November 2018.¹⁸ However, on the day of the return, no one showed any desire to leave Bangladesh. Some refugees mentioned “pressure from ARSA” “By delaying the return, ARSA might be trying to maintain its power of being a symbol of the Rohingya”, a member of an NGO said.

About 60 per cent of the refugees – approximately 400,000 persons – are children. The prolonged stay in the refugee camps makes their education a major issue. A learning centre, operated in one of the camps by the United Nations and NGOs, teaches around 40 children how to count in English. They sit on the dirt floor because there are no desks or chairs. Two hours are set aside each day for lessons. The teacher is a Rohingya woman who a year earlier was a student at the same learning centre. The class is made up of children as young as 5 or 6 years of age, along with a 15-year-old boy. There are no classes for children over the age of 15, meaning that around 25,000 children in the camps receive no education at all.¹⁹ Source 9²⁰ said: “I want to study, but there is no classroom or educational materials. I spend many days doing nothing”.

The lack of educational support is partially due to Bangladeshi government policy. One source said the government does not want to implement any programmes that could encourage the refugees to remain in Bangladesh. For that reason, the government has banned the teaching of the Bengali language to the Rohingya refugees. Instructions have been handed down that only the Myanmar and English languages are tolerated. The Rohingya dialect is close to the Bengali spoken in Chittagong District where the camps are.

4. Obstacles to Repatriation

A primary reason for the delay in repatriation is the lack of preparations by the nations involved. The Myanmar government asserts that preparations to accept the refugees have been completed. However, the government has refused to agree to the UNHCR’s suggestion that refugees be allowed to return temporarily to see for themselves where they would end up living.²¹ One concern held by the government is that the strong resistance shown by radical Buddhists in Rakhine State, where the Rohingyas are scheduled to return, will lead to trouble among those temporarily returning and make a permanent repatriation all but impossible. Indeed, radical Buddhist Arakanese are currently fighting a civil war against Myanmar’s Defence Services, through the Arakan Army.

Refugees say they have no intention of returning if they have no idea whether it will be safe for them to do so. In addition, while the Bangladeshi government clearly wants to promote repatriation, it has dragged its feet in preparing for such a move. According to my diplomatic sources, the Bangladeshi government decided on a 22 August 2019 start-date for repatriation.

¹⁸ Based on the interview with Source 8.

¹⁹ UNICEF Bangladesh, *Beyond Survival: Rohingya Refugee Children in Bangladesh Want to Learn*, UNICEF Advocacy Alert, August 2019 (available on its web site).

²⁰ 17-year-old male child, interviewed on 20 July 2019.

²¹ The UNHCR suggested a ‘go and see’ approach before the repatriation. UNHCR, “Statement by UN High Commissioner for Refugees on the repatriation of Rohingya refugees to Myanmar”, 11 November 2018 (<https://www.legal-tools.org/doc/v9ztzu>). However, the Myanmar government has not reacted to it.

without consulting the Myanmar government. The two governments only started preparing for the repatriation from about 19 August 2019.²² Refugees who were told immediately before the start that they were subject to repatriation said they needed more time to prepare mentally for the return. Mr Ambia Perveen, a member of the European Rohingya Council, said: “Repatriation is being pushed at the convenience of the governments, and the feelings of the refugees are being ignored”.²³

Some Rohingya refugees have already returned to Myanmar by sidestepping the formal procedures established by the two governments. A reporter of *The Asahi Shimbun* accompanied Mr MARUYAMA Ichiro, Japanese Ambassador to Myanmar, when he visited some of those refugees to ask them about their experiences. Many of the refugees said Rohingya militants had exerted pressure on the refugees not to return to Myanmar.

Myanmar requested the Japanese government to carry out the interviews to gain an insight into the mindset of returning refugees.²⁴ According to the Myanmar government, about 250 refugees returned out of their own accord by the end of August 2019.²⁵ Source 10²⁶ said a member of ARSA, who attacked a police unit in Rakhine State in August 2017, threatened him while in the refugee camp that: “I will kill you if you return home” ARSA members who live in refugee camps are believed to be in close contact with members back in Myanmar. Source 10 said he wanted to return to Myanmar because there were no jobs or money in the refugee camp. Last year, he and five family members crossed the border by foot with little in the way of belongings. They now live with a relative in northern Rakhine State. “ARSA is trying to prolong the refugee issue in order to continue to be the focus of global attention, so it can maintain its voice in various matters”, the man said. “My elderly parents still live in the camp, so I feel they are like hostages”.²⁷

Source 11²⁸ returned to Rakhine in October 2018 with two other family members. He said he was happy to be home even though he does not yet have a job and worries about putting food on the table for his family. “There are many in the refugee camp who want to return home, but are afraid of saying anything because they feel ARSA is watching”, the man said.

5. Problems of Drugs and Prostitution

Among the approximately 700,000 Rohingya refugees are some who have made desperate choices to survive. Source 12,²⁹ barely visible in the darkness of a shelter, said in a hoarse voice: “I have no hope. Now, I feel as though I am only waiting to die.” Source 12 and six family members fled to the refugee camp in September 2017, after their village was burned to the ground. Source 11 said he was quickly approached by another Rohingya man at the camp who said: “How about trying drugs?” Source 12, a

²² Based on sources from the Myanmar and Bangladesh governments.

²³ Based on the interview with Mr NARABE Takeshi, a staff writer of *The Asahi Shimbun* in June 2018.

²⁴ Based on the interviews with two Myanmar government officials and the Japanese Ambassador by the present writer.

²⁵ According to the Deputy Minister of Myanmar’s Ministry of Social Welfare, interviewed by the present writer on 23 August 2019.

²⁶ 40-year-old Rohingya man, interviewed on 27 August 2019 in Rakhine State.

²⁷ All quotations are from the interview with Source 10.

²⁸ 43-year-old Rohingya man, who returned to Myanmar, interviewed on 27 August 2019.

²⁹ 50-year-old Rohingya man, interviewed on 24 August 2019.

fisherman by trade, had no problems making ends meet when he lived in Myanmar. However, in the refugee camp the family only received rice and bean rations. He wanted to buy candy for his children as a treat but could not do so without money, so he took up the man's offer of drugs. He went to a shelter in the camp as instructed and received a bag containing a kilogram of powdered marijuana in a room so dark that he could not make out the face of the seller. A deal was made, and 7,000 Bangladeshi taka (USD 82) changed hands.

Source 12 paid out all the cash he had brought from Myanmar as payment. He followed instructions and divided the contents of the bag into 400 small paper packets. He was introduced to 'clients' who paid 50 taka for each packet. Buyers showed up on a daily basis, and he sold his entire stash in a week. He was left with 20,000 taka. He returned home after buying candy at a shop outside the camp and was met by his smiling children. The man kept up the business, telling himself it would only be for a short time more. Then, he began smoking his product. He felt he was living better than his neighbours because he was able to buy meat and fish. However, he also heard a rumour that the police had fatally shot two drug dealers over the past year. He has little hope of being able to return to his former existence even if he is repatriated. "I want my children to lead a better life, but I have become fatigued over my own", he said.

Source 13³⁰ sold not just marijuana but a stimulant known locally as 'yaba'. While the marijuana sells for 40 taka a packet, one yaba pill goes for 400 taka. Even if he has to pay part of his proceeds to his boss in the camp, he still ends up making 3,000 taka a day. Forty per cent of his customers are refugees living in the camp, and the rest are local Bangladeshis. The man lost his parents to illness when he lived in Myanmar. "I have to look after my three younger sisters", he said. "I have to save money for their marriages." He said the real reason he did not want to stop selling drugs was that he wanted to feel alive. "It is very trying living every day with nothing to do", he said. "Even if it is illegal, earning a living itself is an important thing." When his grandfather, who lives with him in the shelter, learned of his drug dealings, he beat him mercilessly with a stick and admonished him: "Don't live in a manner that is shameful as a human." The man said: "I now feel like I want to stop. I do not want to continue while making my grandfather unhappy"³⁷

Source 14³¹ arrived at the refugee camp in September 2017 with her nine-year-old daughter and two-year-old son, and she was at her wits' end because she did not know how to go about obtaining food rations distributed by international organizations. Her husband left the shelter and never returned, saying: "I cannot stand this kind of life." That was when an elderly woman living nearby raised the prospect of prostitution. "You need food

for your children, don't you? Come to this location tomorrow night", the old woman told her, providing a nearby shelter as the meeting point. When the young refugee went to the shelter, a stranger turned up who did not give his name and paid her 300 taka to have sex. After that, she went to the same shelter two or three times a week. Her son slept in the same shelter because he would not stop crying if she was away from him.

The woman obtained food from an international organization about four to five months after arriving at the camp. She was finally able to stop selling her body for money at the start of 2019, having put aside some funds. Nevertheless, she still weeps when she recalls that experience. "My regret over what I did will never disappear", she said. "I become very sad when I think that I will be a soiled human until the day I die"³²

6. Conclusion

The fact that more than 700,000 refugees fled from their homes in northern Rakhine in late 2017 is most definitely tragic. As a journalist, my role in the early stages was to convey the refugees' real voices to the world. Through numerous visits and interviews with refugees and local people in northern Rakhine and Cox's Bazar, I found that the problem in the camps – and the Rohingya issue itself – is much more complicated than I had initially thought. Many actors in the international community have harshly criticized Myanmar over this issue. I mostly agree that Myanmar has failed to handle this problem appropriately, which has tragically led to the flight of hundreds of thousands.

On the other hand, the starting point of the crisis that commenced on 25 August 2017 was an insurgency led by ARSA in northern Rakhine State. Dozens of interviews made me realize that the group still exists in Myanmar and in Bangladesh, and that it has a certain amount of power, which often threatens other Rohingya. My duty as a journalist is not to blame this militant group, but to unearth the reality in the camps in Bangladesh and in Rakhine State. Through visits to the camps and Rakhine, I will continue to dig into the actual features of the Rohingya issue in the future.

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³² All the quotes are based on the interview with Source 14 on 24 August 2019.

³⁰ 40-year-old Rohingya man interviewed in the refugee camp of Cox's Bazar on 24 August 2019.

³¹ 23-year-old Rohingya female, interviewed on 24 August 2019.



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Protecting Autonomy of Rohingya Women in Sexual and Reproductive Health Interventions

Haaris Siddiqi*

ABSTRACT

Rohingya women face challenges that ought to be acknowledged and addressed to ensure that when they seek health care, they can act autonomously and decide freely among available options. Self-determination theory offers valuable insight into supporting these women within their unique situations.

Keywords: Rohingya Women, Autonomy, Reproductive Health, Paternalism, Informed Consent, Muslim

INTRODUCTION

In August of 2017, military and paramilitary forces in Myanmar began purging the Rohingya Muslim population from the country, motivated by anti-Muslim prejudice of the Buddhist political and social majority. Mass murder, property destruction, kidnapping, torture, and sexual violence still affect Rohingya communities. As a result, more than a million individuals have fled Myanmar.¹ As of February 2021, approximately 880,000 Rohingya Muslims have taken refuge in Cox's Bazar, Bangladesh, the site of the largest refugee camps in the world.² The public health focus in these camps is on treatment of physical ailments and infectious diseases.³ While women of reproductive age and adolescent girls experience the highest level of violence among Rohingya communities in both Myanmar and Bangladesh, they have consistently lacked access to sufficient sexual and reproductive care.

In 1994, the Women's Commission for Refugee Women and Children exposed issues surrounding the sexual and reproductive health of displaced populations and propelled the recognition of SRH as a human right.⁴ Human rights interventionists and public health officials have made progress in the integration of sexual and reproductive health education, facilities, and resources into refugee camps in Cox's Bazar. This includes the introduction of menstrual cleanliness facilities and educational conversations. However, Rohingya women and male cultural leaders, or gatekeepers, remain reluctant to accept these resources and education.⁵ The prevalence of gender-based violence against women and restrictive policies enforced by

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III. Beneficence in Providing Care to Refugees

While public health scholars and government officials hold divided opinions on the level of treatment required to fulfill refugees' right to sexual and reproductive health care, most support enough care to ensure physical and psychological well-being.¹⁷ Beneficence requires that healthcare providers and states "protect the rights of others[,] prevent harm from occurring to others[, and] remove conditions that will cause harm to others."¹⁸ Under the principle of beneficence, there is a duty to provide sexual and reproductive treatment to Rohingya women in Cox's Bazar that is comparable to that received by citizens of the host state. In addition, the ethical principle of nonmaleficence may call for the creation of specialized care facilities for refugee communities, because a lack of response to refugees' vulnerability and psychological trauma has the potential to generate additional harm.¹⁹

In response to gendered power relations among the Rohingya community, husbands and male leaders are included in decisions surrounding maternal health and sexual and reproductive care for women. For example, healthcare professionals "have been found to impose conditions on SRH [sexual reproductive health] care that are not stated in the national... [menstrual regulation] guidelines, such as having a husband's permission."²⁰ The refugee healthcare community could do more to mitigate the potential of retribution taken by male community members against women that accept care by dispelling common misconceptions and precluding male community members from influencing female reproductive choices.²¹ However, some current practices allow the infiltration of male community leaders and husbands into the diagnosis, decision-making, and treatment spaces. Deferring decisions to male leaders for the sake of expediency risks conditioning women's access to care on male buy-in and diminishes Rohingya women's autonomy over their sexual and reproductive health.

IV. Male Influence and Female Autonomy

Ensuring patients control their own treatment decisions is an essential component of the ethical obligation of healthcare professionals to respect patients' autonomy. While patients can exercise their autonomy to accept the direction of the community, their autonomy is undermined when "external sources or internal states... rob [such persons]... of self-directedness."²² Sexual and reproductive health research on Rohingya women revealed that the presence of male family members during conversations "made female respondents uncomfortable to speak openly about their SRH [sexual and reproductive health]related experiences."²³ The same study found that when male family members were absent, Rohingya women were more transparent and willing to discuss such topics.²⁴ These findings indicate that the mere presence of male family members exerts control over Rohingya women in conversations with practitioners. Male involvement also stalls conversations between providers and Rohingya women which may harm the achievement of understanding and informed consent in diagnosis and treatment spaces.²⁵ Women do have the option of bringing their male community leaders and family members into sexual health discussions. Yet healthcare providers ought to monitor patients individually and avoid programmatic decision making regarding male involvement in the treatment space. While it is the ethical imperative of health interventionists and the state of Bangladesh to fulfill the duties of care required by the principles of beneficence and non-maleficence, the sole prioritization of expanding sexual and reproductive health care in Cox's Bazar risks ignoring autonomy.

V. Ethics of Paternalism in Provide-Patient Relations

Rohingya women's negative beliefs about contraceptives, such as the belief that they cause irreversible sterilization, are the second largest factor inhibiting their use.²⁶ To an extent, the Rohingya are justified in

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their skepticism. Prior to the 1990's, Bangladesh used nonconsensual sterilization as a mechanism of population control to attain access to international aid. Though the international conversation surrounding reproduction shifted its focus towards reproductive rights following the 1994 UN International Conference on Population and Development, delivery of reproductive care in the global South is frequently characterized by lack of transparency and insufficient patient understanding of the risks and consequences of treatment.

Additionally, women's lack of control impacts follow-up care and long-term contraception. For example, when women seek the removal of implantable contraceptives, healthcare professionals often refuse to perform the requisite operation.²⁷ Patients must understand the risks of treatment in their own culture and circumstances where societal views, misconceptions, or fears may influence healthcare practices. Healthcare providers need to recognize the coercive potential they hold in their relations with patients and guard against breaches of patient autonomy in the delivery of treatment. In accordance with the principle of beneficence, healthcare providers treating refugees or individuals seeking asylum ought to abide by the same fiduciary responsibilities they hold toward citizens of the host state.²⁸ When patients show hesitancy or refusal toward treatment, healthcare providers ought to avoid achieving treatment by paternalistic practice such as "deception, lying, manipulation of information, nondisclosure of information, or coercion."²⁹ Although well-intentioned, this practice undermines the providers' obligation to respect patients' autonomy.³⁰ The hesitancy of Rohingya women to accept some sexual or reproductive health care does not justify intentional lack of transparency, even when that treatment furthers their best health interests. However, paternalistic actions may be permissible and justified during medical emergencies.³¹

VI. Informed Consent

Respecting Rohingya women's autonomy also places affirmative duties on healthcare providers to satisfy understanding and informed consent. However, language barriers and healthcare providers' misconceptions about Rohingya religion and culture impede the achievement of these core conditions of autonomy for Rohingya women.³² In an interview, a paramedic in Cox's Bazar described the types of conversations healthcare providers have with Rohingya women in convincing them to accept menstrual regulation treatment, a method to ensure that someone is not pregnant after a missed period: "We tell them [menstrual regulation] is not a sin... If you have another baby now, you will get bad impact on your health. You cannot give your children enough care. So, take MR [menstrual regulation] and care for your family."³³ This message, like others conveyed to Rohingya women in counseling settings, carries unvalidated assumptions regarding the beliefs, needs, and desires of clients without making a proper attempt to confirm the truth of those assumptions. Healthcare providers' lack of cultural competence and limited understanding of Bangladesh's national reproductive health policy complicates communication with Rohingya women. Additionally, the use of simple language, though recommended by the WHO's guideline on Bangladesh's policy, is inadequate to sufficiently convey the risks and benefits of menstrual regulation and other treatments to Rohingya women.³⁴

For informed consent to be achieved, "the patient must have the capacity to be able to understand and assess the information given, communicate their choices and understand the consequences of their decision."³⁵ Healthcare providers must convey sufficient information regarding the risks, benefits, and alternatives of treatment as well as the risks and benefits of forgoing treatment.³⁶ Sexual and reproductive health policies and practices must aim to simultaneously mitigate paternalism, promote voluntary and informed choice among Rohingya women, and foster cultural and political competency among healthcare providers.

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Bangladesh, donors, and healthcare providers to protect Rohingya women's autonomous choices, while maximizing their well-being and minimizing harm.

DISCLAIMER: As a male educated and brought up in a Western setting, I acknowledge my limitations in judgement about Rohingya women's reproductive care. Their vulnerability and health risks can never be completely understood. To some extent, those limitations informed my theoretical approach and evaluation of Rohingya women SRH care. Self-determination theory places the patients' experiences and judgement at the center of decision-making. My most important contributions to the academic conversation surrounding Rohingya women are the identification of dilemmas where autonomy is at risk and advocating for self-determination.

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² "UN teams assisting tens of thousands of refugees, after massive fire rips through camp in Bangladesh," United Nations, last modified March 23, 2021, [https://news.un.org/en/story/2021/03/1088012#:~:text=The%20Kutupalong%20camp%20network%2C%20which,\(as%20of%20February%202021\)](https://news.un.org/en/story/2021/03/1088012#:~:text=The%20Kutupalong%20camp%20network%2C%20which,(as%20of%20February%202021)).

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²³ Ahmed et al., "Challenges and strategies," 6.

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³⁰ Beauchamp and Childress, "Principles," 231.

³¹ Beauchamp and Childress, "Principles."

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³⁷ Richard M. Ryan, and Edward L. Deci, "Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being," *American Psychologist* 55, no. 1 (Jan 2000):68-78.

³⁸ Johan Y.Y. Ng, Nikos Ntoumanis, Cecilie Thøgersen-Ntoumani, Edward L. Deci, Richard M. Ryan, Joan L. Duda, Geoffrey C. Williams, "Self-Determination Theory Applied to Health Contexts: A Meta-Analysis," *Perspectives on Psychological Science* 7, no. 4 (July 2021):325-340, <https://doi.org/10.1177/1745691612447309>.

³⁹ Ng et al., "Self-Determination Theory.,"; Nikos Ntoumanis, Johan Y.Y. Ng, Andrew Prestwich, Eleanor Quested, Jennie E. Hancox, Cecilie Thøgersen-Ntoumani, Edward L. Deci, Richard M. Ryan, Chris Lonsdale & Geoffrey C. Williams, "A meta-analysis of self-determination theory-informed intervention studies in the health domain: effects on motivation, health behavior, physical, and psychological health," *Health Psychology Review* 15, no. 2 (Feb 2020), <https://doi.org/10.1080/17437199.2020.1718529>.

⁴⁰ Leslie William Podlog, and William J. Brown, "Self-determination Theory: A Framework for Enhancing Patient-centered Care," *The Journal for Nurse Practitioners* 12, no. 8 (Sep 2016):e359-e362, <https://doi.org/10.1016/j.nurpra.2016.04.022>.

⁴¹ Podlog and Brown, "Self-determination Theory."

⁴² Podlog and Brown, "Self-determination Theory."

⁴³ Podlog and Brown, "Self-determination Theory."

Annex 63

L. Stilson, B. Sears and G. S. Comstock, "Notes on Arakan: By the Late Rev. G. S. Comstock, American Baptist Missionary in That Country from 1834 to 1844", *Journal of the American Oriental Society*, vol. 1, No. 3 (1847), pp. 219 and 221-258

NOTES ON ARAKAN:

BY THE LATE REV. G. S. COMSTOCK,

AMERICAN BAPTIST MISSIONARY IN THAT COUNTRY FROM 1834 TO 1844.

WITH A MAP OF THE PROVINCE,

DRAWN TO ACCOMPANY THEM:

BY REV. L. STILSON,

MISSIONARY COMPANION OF THE AUTHOR.

~~~~~  
COMMUNICATED TO THE AMERICAN ORIENTAL SOCIETY,

BY BARNAS SEARS, D. D.,

PRESIDENT OF THE THEOLOGICAL INSTITUTION, NEWTON, MASS.

WITH NOTES,

BY THE CORRESPONDING SECRETARY.

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## NOTES ON ARAKAN.

§ 1. *General Description of the Country.*

THE name of Arakan is derived from *Rakaing*, the native appellation of the country, of which Mug authors give several different derivations. Of these, the most probable is one which makes it to be a euphonic change from *Rakak*, sometimes also written *Rakaik*, the name of a fabulous eater of human flesh, supposed to have been applied to the country on account of the reported cannibalism of the savage tribes, who inhabit the mountains of the interior.<sup>1</sup> The province extends from 15° 53' to 21° 30' north latitude, and from 92° 15' to 94° 45' east longitude, and is bounded on the north by the river Naf, and a range of mountains which divide it from Chittagong; on the east, by the *Yomadoong*, or Yoma mountains, which separate Arakan from Burma; on the south, the province comes to a point, called Pagoda Point; and the western boundary is the Bay of Bengal.<sup>2</sup> Its greatest

<sup>1</sup> Formerly, according to Captain Phayre, Senior Assistant-commissioner in Arakan, only the northern portion of the country now called by this name, was known among the natives as the *Rakaingdye*, or Rakaing-land,—a fact of importance with reference to the origin of the population. It has been suggested, with much plausibility, that *Rakak* is derived from *Yekka*, for the Sanskrit *Yaksha*, signifying, in popular usage, a monster, half man, half beast, which devours human flesh; and that it was adopted as their national appellation by the Arakanese, from the superior strangers who communicated to them the religion of Buddha. The Buddhist missionaries from India, whose narratives we have, call Arakan *Yekhapura*. See *Journal of the Royal Asiatic Society of Bengal*, XII. p. 24. [E. E. S.]

<sup>2</sup> The same principal boundaries are assigned to the country by other writers; but its extent in degrees is variously stated, probably, in part, because the measure has been taken sometimes on the line of the sea-coast, and some-

keys, and other smaller animals, are found on the hills and in the jungles.—Of birds, a great variety of such as frequent the surrounding countries, are found in Arakan; some of them are highly prized for their splendid plumage, and others for their excellent flavor.—The boa constrictor, cobra capella, and indeed snakes and reptiles of nearly every kind, are common.—Of fish, there is an abundance of all the kinds usually found in tropical seas and rivers. Sharks and alligators abound, and turtle, sole, pomfret, mullet, skait, bunnalo, crabs, lobsters of a small kind, shrimps, oysters, and various other species of fish, are not unfrequently taken. The Mugs enumerate more than two hundred kinds of fish; though the markets of the province seldom furnish many that are particularly palatable to Europeans.

§ 2. *Number of the Inhabitants, and their Races; with a Sketch of the History of the Mugs.*

The population of Arakan at the present time (1842) is estimated at about 250,000. Of these, about 167,000 are Mugs, 40,000 are Burmese, 20,000 are Mussulmans,<sup>4</sup> 10,000 are Kyens, 5,000 are Bengalese, 3,000 are Toungmroos, 2,000 are Kemees, 1,250 are Karens, and the remainder are of various races, in smaller numbers. The Mugs are the earliest inhabitants of the country, at least of the plains, of which we have any knowledge. The name of *Mugs*, as applied to inhabitants of this country, originated with foreigners, and I never found an Arakanese who could give any account of it.<sup>5</sup> The people call themselves "*Rakaingthas*," that is, "sons of Arakan." They are evidently a part of the *Myonma* family, to which belong also the present inhabitants of Burma, including the Shans, etc., and the Karens, Kyens, and other numerous hill tribes of Arakan.<sup>6</sup> The traditions of all the branches of this family refer to "the far

<sup>4</sup> In official returns, speaking of the Arakanese, "Mussulman" denotes the *Kummanchees*, or followers of Mohammed, and no others. The Mussulmans and Hindoos of the western peninsula are comprehended under the general term "natives of Bengal," or "Bengalees." [Note by Rev. R. A. Fink.]

<sup>5</sup> Europeans have borrowed this name from India. [E. E. S.]

<sup>6</sup> According to the geographer Ritter, the original form of the family name of all these was *Maruma*, which became contracted to *Mranma*, and by the

East India Company in 1825, with which event Mug history ends.

Most of the Burmese probably, came into the country while it was a dependency of Ava, although many have immigrated since. The Mussulmans are supposed to be the descendants of Bengalee slaves, imported when the kings of Ava held Chittagong and Tippera. They have retained for the most part the language and customs of their forefathers; but have partially adopted the dress of the country. Within a few years past, many Bengalee Mussulmans have immigrated to Arakan, to get higher wages and better living, than they could procure in Chittagong: these constitute the five thousand Bengalees mentioned in enumerating the population of the province. A part of the Mussulman population, one thousand or more, residing principally in Ramree, are the descendants of some people, who came from Delhi, in company with one of the Mogul princes, who having failed in an attempt upon the throne, fled for refuge to the court of Arakan. They were his guard, and as their weapon was a bow, were called *Kamonthas*, or bowmen, which name their descendants still retain. They have adopted the language and dress of the Mugs, and a part of them have become Boodhists.<sup>12</sup>

“The Kyens have a tradition that they are direct descendants of some Burmese refugees, or of the remnants of an army, that was lost in the mountains, when attempting to penetrate to the westward;” and they are found in large numbers throughout the whole Yoma range, only a small portion of them being within British jurisdiction. They are evidently of the Myonma family, and it is probable that their forefathers left their original seat, earlier than those of the Mugs.<sup>13</sup>

<sup>12</sup> These are probably the descendants of the followers of Suja, Aurungzeb's brother. [E. E. S.]

<sup>13</sup> S. J. R. A. S. of B., X. p. 684. An extended account of the Kyens may be found in Ritter's *Erdk. v. Asien*. IV. l. 279, &c., according to which they have the tradition, that they once occupied the whole of Ava and Pegu, but were at length forced from the plains to the mountains by a race from the north, who came among them peaceably, but afterwards attempted to subdue them; and this may be what is alluded to in the tradition mentioned in the text, of their descent from the remnants of an army lost in the mountains, when attempting to penetrate to the westward. A very important particular in Ritter's

## Annex 64

C. Tams, “All’s Well That Ends Well: Comments on the ILC’s Articles on State Responsibility”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 62 (2002), pp. 759-796

Available at:

[https://www.zaoerv.de/62\\_2002/62\\_2002\\_1\\_a\\_759\\_808.pdf](https://www.zaoerv.de/62_2002/62_2002_1_a_759_808.pdf)



## All's Well That Ends Well

### Comments on the ILC's Articles on State Responsibility

*Christian J. Tams\**

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It is another matter whether its approach will always be practically feasible. This to some extent depends on the identity of the entity for whose protection the collective obligation was established. Depending on the type of obligation concerned, the primary victim could e.g. be another State (such as the victim of an aggression), a non-State entity (such as a group of persons subjected to racial discrimination), or an individual. Finally, there may also be situations where the wrongful act in question affects a common good which cannot be personified (such as biological diversity or the safety of the marine environment).<sup>110</sup>

If the primary victim is a State, few problems arise, since there are recognised rules prescribing who may act for the State. Under normal circumstances, the required consent will have to be given by the government. The situation is different if the primary victim is a non-State entity. In the absence of a theory of representation of non-State entities, express consent will often be difficult to obtain since the State disregarding the rights of the group will often prohibit its political organisation. If the primary victim is an individual, there will equally be problems of communication. Finally, such communication is, by definition, impossible, if the breach primarily affects non-personified common goods, e.g. in the field of environmental law. Given this degree of uncertainty, it will be left to international practice to work out in detail under what conditions a State taking up rights of other actors can claim to act in those actors' interest.<sup>111</sup> That said, the ILC deserves to be commended for having elaborated a balanced conceptual framework on the basis of which international practice may evolve. Compared to the 'all or nothing' approach taken in old article 40, the differentiated new regime set out in article 48 marks a considerable step forward.

#### (6) Conclusion

During the second reading, the ILC has substantially clarified the rules on invocation of State responsibility and, by adopting detailed rules on the rights of legally interested States, has broken new ground. As has been stated, a lot depends on whether States will actually make use of their rights under article 48. However, there is no denying that the ILC's debates are the most ambitious attempt at conceptualising the problem of multilateral legal relations. It is to be hoped that articles 42 and 48 guide the international community on its way "[f]rom Bilateralism to Community Interest".<sup>112</sup>

<sup>110</sup> Commentary to article 48, paras. (7) and (12). In his Third Report, the Special Rapporteur stated that "[e]xamples of such [collective] obligations arise in the fields of environment (for example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear free zone treaty or a test ban treaty) (note 7), para. 106(b).

<sup>111</sup> Cf. the Commission's acknowledgement that article 48(2)(b) "involves a measure of progressive development", Commentary to article 48, para. (12).

<sup>112</sup> Cf. the title of Bruno Simma's Hague Lecture, 250 *Revue des Cours* (1994 VI), 217-384.

# **Annex 65**

C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005)



**Enforcing Obligations *Erga Omnes*  
in International Law**

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individuals) of *erga omnes* breaches, which international lawyers have only begun to address, and on which there is very little concrete practice.<sup>45</sup> Insofar as the present study discusses the existence of a right to take countermeasures, or to institute ICJ proceedings, this right therefore is understood as a right to react with a view to stopping on-going breaches or to secure a declaration of their unlawfulness.<sup>46</sup> Finally, this also means that there can be no detailed discussion of the relation between different claimants asserting a right to respond against *erga omnes* breaches<sup>47</sup> – a question that heavily depends on rules governing reparation and the eventual distribution of the proceeds secured by way of restitution or compensation.<sup>48</sup>

### 3.

Of course, the *erga omnes* concept has been the subject of a number of earlier studies, many of which focus on the decentralised enforcement of obligations *erga omnes*. In view of the continuing interest in it, and the remaining controversies, a reassessment nevertheless seems justified; this in particular because more recent developments have helped clarify some of the underlying issues. The ICJ and its members have pronounced on specific features of obligations *erga omnes* in the *East Timor*, *Genocide*, *Gabčíkovo* cases, as well as, most recently, the *Israeli Wall case*.<sup>49</sup> Perhaps more importantly, as has been stated already, the ILC's Articles on State Responsibility, completed in 2001, recognise the pivotal role of the *erga omnes* concept. Part Three of the ILC's text constitutes

<sup>45</sup> On the question see the various contributions in Tomuschat/Randelzhofer (1999); and cf. further paras. 12–14 of the ILC's commentary to article 48 ASR.

<sup>46</sup> See Brownlie (1998), 124–126; Gray (1987), 96–108, on the manifold functions that declaratory relief may serve.

<sup>47</sup> See, however, below, section 7.2.3.a, for brief comment on article 51 UNC.

<sup>48</sup> On the issue see article 48, para. 2b ASR, requiring that claims 'must be made in the interest of the direct victims of the wrongful act', while acknowledging that 'this aspect of article 48 (2) involves a measure or progressive development' (commentary to article 48 ASR, para. 12).

As regards the relation between States seeking to vindicate obligations *erga omnes* and direct beneficiaries of such obligations see also Portugal's arguments in the *East Timor case*, ICJ Pleadings, *Réplique*, para. 9.49 and Memorial, paras. 9.12–9.13 (arguing that compensation should be paid into a fund used to support the direct beneficiaries). For scholarly discussion see von Schorlemmer (2003), 265–271, 283–287.

<sup>49</sup> See ICJ Reports 1995, 90 (*East Timor*); 1996, 595 (*Genocide*); 1997, 7 (*Gabčíkovo*), and 43 ILM (2004), 1009 (*Israeli Wall*) respectively. The text of the *Israeli Wall* opinion is also available at [www.icj-cij.org](http://www.icj-cij.org).