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

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24 AUGUST 2023

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COLONIAL ERA DOCUMENTS

Annex 161

British Burma, Census of British Burma, 1872 (Government Press, Rangoon, 1875)

Available at:

https://legal-tools.org/doc/91gtbw/pdf

Annex 161

Indian Bengal Presidency.

REPORT

ON

THE CENSUS OF BRITISH BURMA

TAKEN IN AUGUST 1872.

RANGOON:

PRINTED AT THE GOVERNMENT PRESS.

1875.

and is not acknowledged in the language of the people. Though the alphabet used by the Mun is derived from an Indian source through the Dravidians, there is probably little or no trace of the language of that race in the Mun tongue."

146. The kingdom thus established flourished and extended its power up to a recent period, carrying on wars with varying success against the Burman Kings of Ava and Toungoo, and with Siam, and even on one occasion interfering in the affairs of Arakan, till its final subjugation by Alompra in 1757-58. After the conquest of Pegu, the Burmans treated the Talaings with much severity, and [as is noticed in Appendix 3 (paragraphs 9—11) of this report] many thousands emigrated to Siam. In the first Burmese war, the Talaings received and assisted the English cordially, and, on our returning from Pegu after the treaty of Yandaboo, the Burmans avenged themselves upon our unfortunate friends.

147. "The Burmese, since the conquest of Pegu by Alompra (Alaung Phra) in 1757-58, had strongly discouraged the use of the Mun language. After the war with the British, the language of the people who had welcomed the invader was furiously proscribed: it was forbidden to be taught in the Buddhist monasteries or elsewhere. The result has been that, in little more than a century, the language of about a million of people has become extinct. It is probable that there are not now one hundred families in Pegu Proper in which it is spoken as their vernacular tongue. In the province of Martaban, however, including a part of Maulamyaing, there are thousands who still speak the Mun language only. These are chiefly the descendants of emigrants who left Pegu in 1826, when the British army retired and occupied the Tenasserim territory. There are, however, some thousands of the Mun people in Siam, who emigrated there towards the end of the eighteenth, and in the early part of the nineteenth centuries, to escape the cruel rule of the Burmese."

148. Since our occupation, any oppression of Talaings which may previously have existed has, of course, disappeared. But another process—that of absorption by the more powerful race—is effecting the obliteration of the Talaings as a distinct people quite as surely and rapidly as the most vigorous persecution could. Already the language is disappearing. The rising generation speak Burmese, and in dress and manners there is practically no difference from the latter race. The returns show their numbers as only 181,000, or about 6½ per cent. on the total population of the province. But it is probable that all the mixed race of Burmese and Talaings, and possibly many pure Talaings, are returned as Burmans.

They are to be met chiefly in Tenasserim, and in Amherst and Moulmein form the majority of the population; but there are some tribes on the Koladyne, in Arakan, whose origin is traced to the Talaing army who entered Arakan in the thirteenth century.

149. There is one more race which has been so long in the country that it may be called indigenous, and that is the Arakanese Mussulman. These are descendants, partly of voluntary immigrants at different periods from the neighbouring province of Chittagong, and partly of captives carried off in the wars between the Burmese and their neighbours. There are some 64,000 of them in Arakan, differing from the Arakanese but little, except in their religion and the social customs which their religion directs.

Arakanese Mussulmans.

150. Of the hill-men, the Karens are vastly the most numerous and important. It has already been suggested that the numerous tribes known to us as Karens are a part of the wave of hill-men who, at some early period, came down along the mountain chains on either side of the Irrawaddy and Salween to near the sea. The Karens were probably one of the, if not *the*, earliest of these. They have traditions of a long pilgrimage of their people across a dismal desert, which strangely resembles the story of the Hebrew Exodus—indeed, the whole of their traditions have so strong a Jewish tinge as to render it very probable that their forefathers must have been in contact with the Jewish colonies, of whom unmistakeable traces have been found in various parts of Western China. Like their relations, the Khyengs, they speak regretfully of a lost birth-right. They once were a united people, knowing God, and having books as perfect as other nations;

The Karens.

Annex 162

Census of India, 1921, Volume X, Burma, Part I, Report (Office of the Superintendent, Government Printing, Burma, 1923)

Available at:

https://www.legal-tools.org/doc/r84t1w/pdf

CENSUS OF INDIA, 1921

Volume X

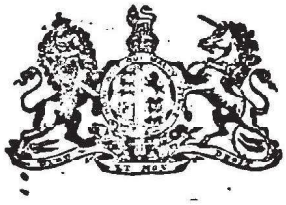
BURMA

PART I. REPORT

BY

S. G. GRANTHAM, I.C.S.

SUPERINTENDENT OF CENSUS OPERATIONS, BURMA



RANGOON

OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING, BURMA

1923

Yamèthin district is probably due to the settlement. According to the census report of 1901 descendants of Mahomedans brought by the Burmese as prisoners of war from Arakan and Manipur were also commonly described as Zerbadis. The latter are probably the Kathè Mahomedans who for 1921 have been tabulated under the Meit'ei race of the Chin group and are the subject of a later article of this chapter; it is not known how the former have been returned in the census of 1921 nor how either were tabulated in 1901.

The numbers of Zerbadis tabulated at successive censuses are shown in Marginal Table 7, but these numbers cannot be accepted forthwith. Only the 24 Buddhists were tabulated in 1891 when the term was first used. But there were 10,062 of Indo-Burman mixed races tabulated in 1881, of whom many must have been what would now be regarded as Mahomedan Zerbadis; while over 20,000 Zerbadis were recorded in 1901. It is clear therefore that there must have been some Mahomedan Zerbadis in 1891 tabulated under other descriptions. Possibly the Mahomedan Burmese, nearly 7,000 in number, who were tabulated in the census of that year, were Zerbadis; but there is no certainty even about this, and the total of Zerbadis in 1891 is quite unknown. In 1901 no classification of the Zerbadis by religion was given. In 1911 the Buddhists had greatly increased since 1891, but in 1921 their numbers are much less again (764 persons). It is really impossible to say exactly what were the correct numbers of Zerbadis in any year. It is certain there has been an increase in those numbers; but whether the variation in the tabulated numbers is a fair measure of that is another question. In the census report of 1911 it was remarked that the rapid increase shown by a comparison of the figures for 1901 and 1911 in Marginal Table 7 was significant as indicating the extent to which intermarriage between the Burmese and Musalman races was proceeding. But it is probable that part of the increase of 1911 was due to a growing tendency on the part of Zerbadis to regard themselves as a distinct race. The growth of this racial consciousness has been shown in the formation of a Burma Moslem Society, and in the protest of that society against the election rules under which a Burma Moslem, born in Burma of a father also born in Burma, is regarded as an Indian if his father's father had a domicile in India but outside Burma at the time of his father's birth, and as a Burman if that grandfather was born in Burma. In the census of 1921 the practice of recording race instead of the Mahomedan tribal designations has also helped probably in securing a more complete record of the Zerbadis. It was natural for a Zerbadi to describe himself in earlier censuses as Sheikh, Saiyad, etc., according to the tribe to which his father or earlier progenitor had belonged, because he would regard that as true as well as his Zerbadi description; but he would be more likely to return Zerbadi when the alternative was such a race-name as Bengali or Chulia. Still the remarks on Burmese Mahomedans earlier in this article suggest that the numbers of Zerbadis even for 1921 are not quite complete.

7. Zerbadis as tabulated.

Census.	Religion.	Persons.	Males.	Females.
1921	*Mahomedan* ...	93,482	45,229	48,253
	Other religions ...	834	519	315
	Total ...	94,316	45,648	48,668
1911	*Mahomedan* ...	56,339	26,266	30,073
	Buddhist ...	3,390	1,781	1,609
	Total ...	59,729	28,047	31,682
1901	Total ...	20,423	11,223	9,200
1891	Buddhist ...	24	23	1

159. Arakan-Mahomedans.—The Arakan-Mahomedans are practically confined to the Akyab district and are properly the descendants of Arakanese women who have married Chittagonian Mahomedans. It is said that the descendants of a Chittagonian who has permanently settled in Akyab district always refuse to be called Chittagonians and desire to be called Arakan-Mahomedans; but as permanent settlement seems to imply marriage to an Arakanese woman this is quite in accordance with the description given. Although so closely connected with Chittagonians racially the Arakan-Mahomedans do not associate with them at all; they consequently marry almost solely among themselves and have become recognised locally as a distinct race. The Arakanese Buddhists in Akyab asked the Deputy Commissioner there not to let the Arakan-Mahomedans be included under *Arakanese* in the census. The instruction issued

to enumerators with reference to Arakan-Mahomedans was that this race-name (in Burmese *Yakaing-kala*) should be recorded for those Mahomedans who were domiciled in Burma and had adopted a certain mode of dress which is neither Arakanese nor Indian and who call themselves and are generally called by others *Yakaing-kala*.

The number of Arakan-Mahomedans tabulated in 1921 was nearly 24,000. The numbers tabulated at previous census as Mahomedan Arakanese have been as in Marginal Table 8. Such differences of numbers as are shown here indicate enumeration of the Arakan-Mahomedans at previous censuses under other descriptions; in the census tables of 1901 it is impossible to identify them. Probably they have been entered as Sheikh or possibly under *Other Mahomedan Tribes* in all the three earlier censuses mentioned in the table. The defect of females is possibly due to some women who marry Indian Mahomedans describing themselves as of the same race as their husbands.

8. Tabulated Arakan Mahomedans.

Census.	Persons.	Males.	Females.
1921	23,775	12,740	11,035
1911	4,675	3,558	1,117
1901	...	...	...
1891	466	288	178

160. **Arakan-Kamans.**—The Arakan-Kamans are generally known simply as *Kamans*, but Arakan has been prefixed in this census to prevent confusion of their name with that of the Khaman race of the Mishmi Group which is found in the Putao district and is called the Khaman-Mishmi race for distinction. Previously no separate record of the Arakan-Kamans has been made. They are the descendants of the followers of Shah Shuja, son of Aurungzebe, who fled to Arakan in 1660 A.D. after the failure of his attempt to seize the Moghul throne. After the death of Shah Shuja they were formed into a royal bodyguard of archers, and hence received their name. Their features are Indian, but their language dress and manners are Arakanese. They are still located in the Akyab and Kyaukpyu districts, 4 males in Sandoway being the only ones enumerated outside those districts. Of a total of 1,054 males and 1,126 females, all are Mahomedans except 10 males and 7 females who are Buddhists. The Arakan-Kamans are not included in People VI as Burma Moslems; the Buddhists are in People I with the Burma Group and the Mahomedans in People VII with *Other Mahomedans born in Burma*.

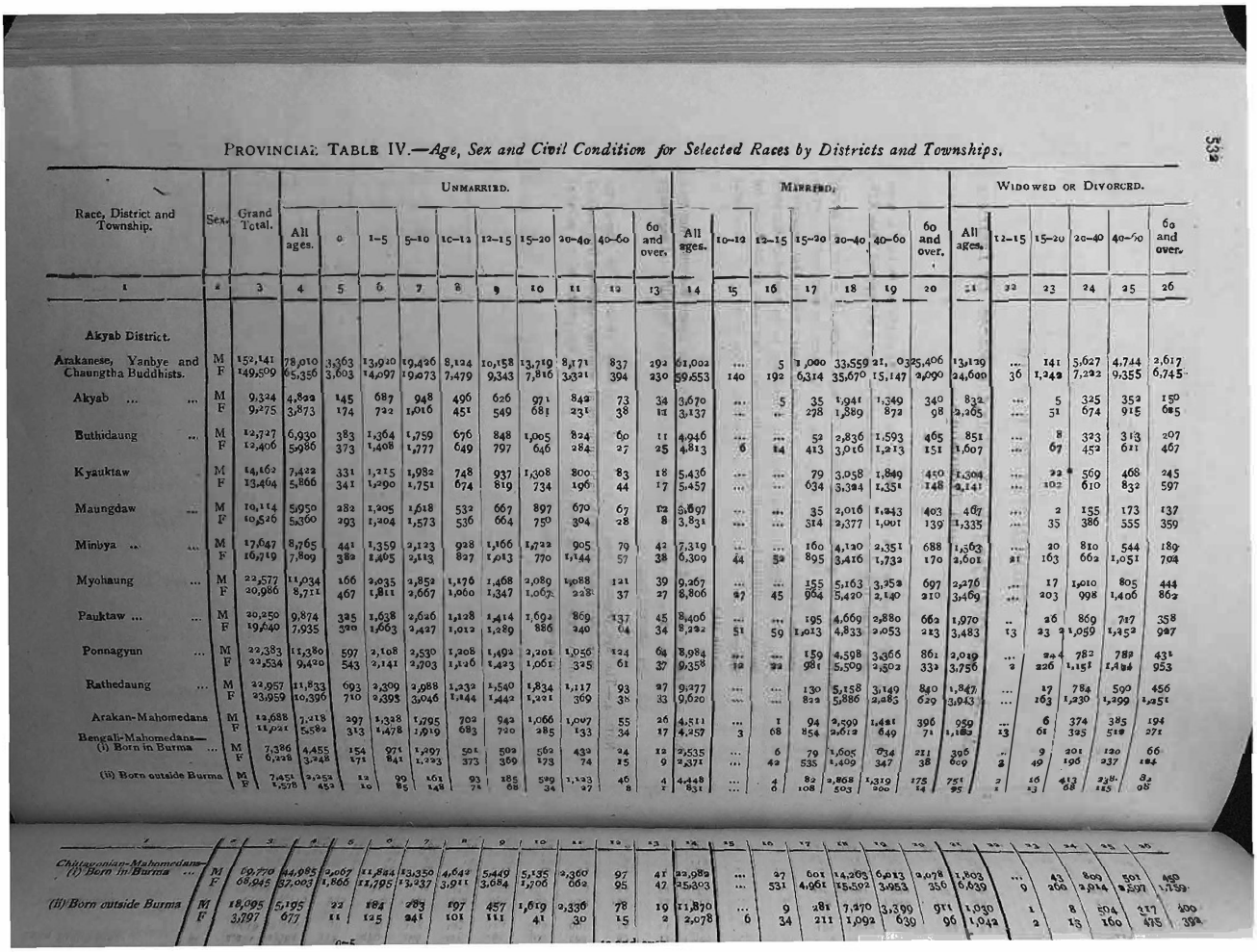
161. **Kalè.**—The Burmese term *Kalè* formerly meant merely Hindu, and this is the meaning given for it in Stevenson's Burmese-English dictionary; probably it meant a Tamil Hindu, but as these were formerly much the most numerous kind of Hindu in Burma there was not enough difficulty to interfere with the ordinary use of the word. *Kalè* is used now to describe a class of persons who are descended from marriages of early Tamil immigrants with Burmese women, and have adopted Buddhism and the Burmese language, and regard themselves as a definite community amongst the Burmese Buddhists and as differing only very little from the main bulk of that class, to whom they often bear a close physical resemblance. In a law-suit relating to an inheritance in a family of this class a few years ago however it was decided that neither Buddhist nor Hindu law applied to them; and there are some religious practices which would probably not be regarded as permissible by most pure Burmese Buddhists. The number of Kalè of this kind is very small; a leading member of the community estimated that there might be 200 in Rangoon and a few more in other parts; he was not prepared to estimate the total number but thought 400 might be near the mark for the total in the whole province including Rangoon. The enumeration schedules were examined for some people in Rangoon known to be Kalè, and it was found they had all been recorded as Burmese Buddhists in accordance with the view they ordinarily take of themselves, and with the instruction to enumerators which is given in the second article of this chapter. On the other hand, it was found in the tabulation-office, that for nearly all the people described in the enumeration record as *Kalè* by race the religion was given as Hinduism and the language as Kalè, Tamil, Chetty or Hindu (*sic*). Most of these are probably pure Tamils and the others the offspring of Hindu fathers and Burmese mothers, who, as they have claimed to be Hindus, must be regarded as belonging to their father's race, which would generally be the Tamil race. Hindu Kalè are therefore the product of an idiosyncrasy of some enumerators who used the term Kalè in its old meaning. The total number of them is small; Insein district for instance

Annex 163

Census of India, 1921, Volume X, Burma, Part II, Tables (Office of the Superintendent, Government Printing, Burma, 1923)

Available at:

https://indianculture.gov.in/rarebooks/census-india-1921-part-ii-tables-volume-x-burma



PROVINCIAL TABLE IV.—*Age, Sex and Civil Condition for Selected Races by Districts and Townships.*

Race, District and Township.	Sex.	Grand Total.	Unmarried.									Married.							Widowed or Divorced.					
			All ages.	0	1–5	5–10	10–12	12–15	15–20	20–40	40–60	60 and over.	All ages.	10–12	12–15	15–20	20–40	40–60	60 and over.	All ages.	12–15	15–20	20–40	40–60	60 and over.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
Akyab District.																									
Arakanese, Yanbye and Chaungtha Buddhists.	M	152,141	78,010	3,363	13,920	19,426	8,124	10,158	13,719	8,171	837	292	61,002	...	5	1,000	33,559	21,032	5,406	13,129	...	141	5,627	4,744	2,617
	F	149,509	65,356	3,603	14,097	19,073	7,479	9,343	7,816	3,321	394	230	59,553	140	192	6,314	35,670	15,147	2,090	24,600	36	1,242	7,292	9,355	6,745
Akyab	M	9,324	4,822	145	687	948	496	626	971	842	73	34	3,670	...	5	35	1,941	1,349	340	832	...	5	325	352	150
	F	9,275	3,873	174	722	1,016	451	549	681	231	38	11	3,137	...	...	278	1,889	872	98	2,265	...	51	674	915	625
Buthidaung ...	M	12,727	6,930	383	1,364	1,759	676	848	1,005	824	60	11	4,946	...	...	52	2,836	1,593	465	851	...	8	323	313	207
	F	12,406	5,986	373	1,408	1,777	649	797	646	284	27	25	4,813	6	14	413	3,016	1,213	151	1,607	...	67	452	621	467
Kyauktaw	M	14,162	7,422	331	1,215	1,982	748	937	1,308	800	83	18	5,436	...	...	79	3,058	1,849	450	1,304	...	22	369	468	245
	F	13,464	5,866	341	1,290	1,751	674	819	734	196	44	17	5,457	...	...	634	3,384	1,351	148	2,141	...	102	610	832	597
Maungdaw ...	M	10,114	5,950	282	1,205	1,618	532	667	897	670	67	12	3,897	...	...	35	2,016	1,243	403	467	...	2	155	173	137
	F	10,526	5,360	293	1,204	1,573	536	664	750	304	28	8	3,831	...	...	314	2,377	1,001	139	1,335	...	35	386	555	359
Minbya	M	17,647	8,765	441	1,359	2,123	928	1,166	1,722	905	79	42	7,319	...	...	160	4,120	2,351	688	1,563	...	20	810	544	189
	F	16,719	7,809	382	1,405	2,113	827	1,013	770	1,144	57	38	6,309	44	52	895	3,416	1,732	170	2,601	21	163	662	1,051	704
Myohaung ...	M	22,577	11,034	166	2,035	2,852	1,176	1,468	2,089	1,088	121	39	9,267	...	...	155	5,163	3,252	697	2,276	...	17	1,010	805	444
	F	20,986	8,711	467	1,811	2,667	1,060	1,347	1,067	228	37	27	8,806	47	45	964	5,420	2,140	210	3,469	...	203	998	1,406	862
Pauktaw	M	20,250	9,874	385	1,638	2,626	1,128	1,414	1,692	869	137	45	8,406	...	...	195	4,669	2,880	662	1,970	..	26	869	717	358
	F	19,440	7,935	320	1,663	2,427	1,012	1,289	886	340	64	34	8,232	51	59	1,013	4,833	2,053	223	3,483	13	23	1,059	1,252	907
Ponnagyun ...	M	22,383	11,380	597	2,108	2,530	1,208	1,492	2,201	1,056	124	64	8,984	...	...	159	4,598	3,366	861	2,019	...	24	782	789	431
	F	22,534	9,420	543	2,141	2,703	1,126	1,423	1,061	325	61	37	9,358	12	22	981	5,509	2,502	332	3,756	2	226	1,151	1,184	953
Rathedaung ...	M	22,957	11,833	693	2,309	2,988	1,232	1,540	1,834	1,117	93	27	9,277	...	...	130	5,158	3,149	840	1,847	...	17	784	590	456
	F	23,959	10,396	710	2,393	3,046	1,244	1,442	1,221	369	38	33	9,620	...	...	822	5,886	2,885	629	3,943	...	163	1,230	1,299	1,251
Arakan-Mahomedans	M	12,688	7,218	297	1,328	1,795	702	942	1,066	1,097	55	26	4,511	...	1	94	2,599	1,421	396	959	...	6	374	385	194
	F	11,021	5,582	313	1,478	1,919	683	720	285	133	34	17	4,257	3	68	854	2,612	649	71	1,182	13	61	395	519	271
Bengali-Mahomedans— (i) Born in Burma ...	M	7,386	4,455	154	971	1,297	501	509	562	432	94	12	2,535	...	6	79	1,605	634	211	396	..	9	201	120	66
	F	6,228	3,248	171	841	1,223	373	369	173	74	15	9	2,371	...	42	535	1,409	347	38	609	2	49	196	237	124
(ii) Born outside Burma	M	1,451	1,252	12	99	161	93	185	589	1,123	46	4	4,448	...	4	82	2,868	1,319	175	751	2	16	413	238	82
	F	1,578	452	10	85	148	71	68	34	27	8	1	831	...	0	108	503	200	14	95	1	13	68	115	98
Chittagonian-Mahomedans— (i) Born in Burma ...	M	69,770	44,985	2,067	11,844	13,350	4,642	5,449	5,135	2,360	97	41	22,982	...	37	601	14,263	6,013	2,078	1,803	...	43	809	501	450
	F	68,945	37,003	1,866	11,795	13,437	3,911	3,084	1,706	662	95	42	25,303	...	531	4,961	15,502	3,953	356	6,639	9	208	2,914	2,597	1,759
(ii) Born outside Burma	M	18,095	5,195	22	184	283	197	457	1,619	2,336	78	19	11,870	...	9	281	7,270	3,399	911	1,030	1	8	504	317	200
	F	3,797	677	11	125	941	101	111	41	30	15	2	2,078	6	34	211	1,092	639	96	1,042	2	13	160	478	391

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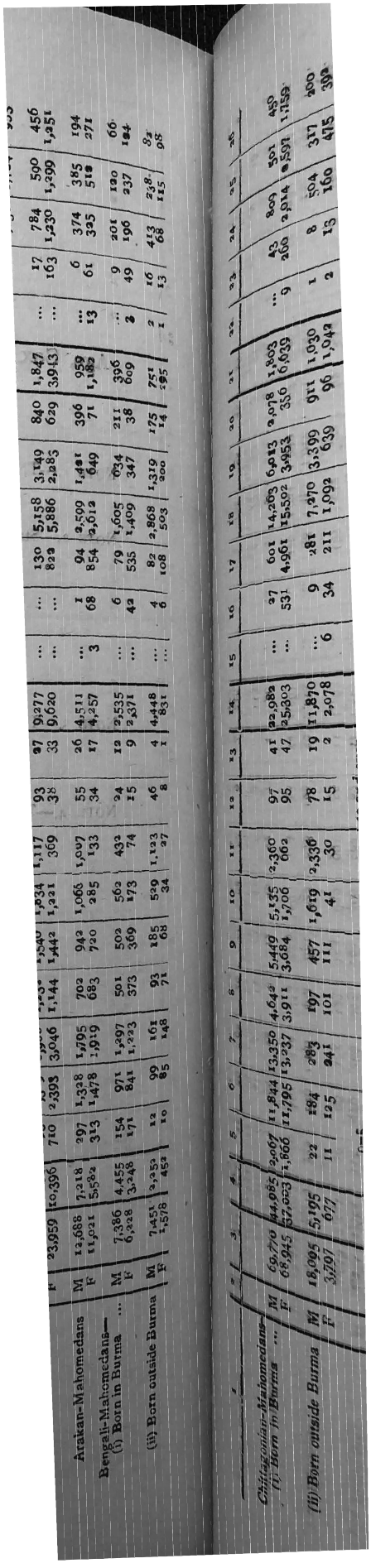

Annex 164

Census of India, 1931, Volume XI, Burma, Part I, Report (Office of the Superintendent, Government Printing and Stationery, Burma, 1933)

Available at:

https://www.legal-tools.org/doc/7z9vl8/pdf

CENSUS OF INDIA, 1931

VOLUME XI

BURMA

PART I.—REPORT

BY

J. J. BENNISON, I.C.S.

SUPERINTENDENT OF CENSUS OPERATIONS, BURMA

RANGOON

Office of the Supdt., Government Printing and Stationery, Burma

1933

for sea traffic between Akyab and Chittagong but there are no figures for the land traffic and the sea traffic figures alone are of no use in estimating the increase in the population due to immigration from India. During the last decade the Indians increased from 201,387 to 210,990, *i.e.*, by 9,603 or just under 5 per cent, while Indo-Burman races increased from 24,856 to 49,745, *i.e.*, by 24,889 or by 100 per cent. The Deputy Commissioner, Akyab, says this is due to the fact that at the last census some Arakan Mahomedans returned themselves as Indians; and he considers the 1931 figures to be correct in view of the fact that Indians and Indo-Burmans were more minutely questioned about their race in 1931. If the figures for Indians and Indo-Burman races are combined the increase is 34,492 or about 15 per cent. It is difficult to estimate at all accurately the separate increases in the Indian and Indo-Burman populations. In the Centre and Delta subdivisions the Indo-Burman races increased during the last decade by about 26 and 35 per cent, respectively. If the Indo-Burman races in the Akyab district increased by, say 30 per cent, then the actual increase would be 11,480 (assuming the 1931 figures to be correct) and the increase in the Indian population would then be 23,012, which is an increase of about 12 per cent on the estimated population in 1921, namely, 187,978 (210,990 – 23,012). But since only about 41 per cent of the Indians at the 1921 and 1931 censuses were females there would probably be not much difference between the birth and death rates of the Indian population and whatever increase there was in the Indian population would be due largely, if not entirely, to migration. The matter can also be approached from a consideration of the birth-place statistics. In 1921 the number of persons born in India who were enumerated in Akyab was 48,121 while the corresponding number in 1931 was 45,876. As no information is available regarding the age-distribution of these immigrants the death rate can only be guessed. If it were 50 per *mille* (it would be high since immigration has been going on for some time) the increase in the population of Akyab district due to immigration from India would probably be between 21,000 and 22,000. In 1921 the number of emigrants from Akyab district enumerated in India was 589; figures for 1931 are not available but if the decrease due to emigration is taken to be a few hundred then the increase due to migration (*i.e.*, the increase due to immigration less the decrease due to emigration) would be about 21,000. This figure does not differ a great deal from the estimated actual increase in the Indian population (23,012), from which it would appear that there is not very much difference between the birth and death rates of the Indian population. Races of the Burma group (mostly Arakanese, Yanbyè and Chaungtha) which form slightly more than one half of the population of Akyab district increased by only 7 per cent. According to the birth-place statistics there was a certain amount of emigration to Kyaukpyu, Sandoway, Bassein and other Lower Burma districts but this would probably amount to only three or four thousands; there was no appreciable immigration from other districts in Burma. The rate of natural increase of the races of the Burma group in Akyab district during the last decade would appear therefore to be in the neighbourhood of 8 per cent. The occupied area increased by only 4 per cent. The increase in the population of Kyaukpyu district was 10 per cent, the same rate of increase as that of the occupied area. Part of the increase—probably about two or three thousands—appears to be due to immigration: according to the birth-place statistics most of the immigrants were born in Akyab or India. Races of the Burma group, which form about 88 per cent of the population, increased by 9 per cent; the rate of natural increase would probably be about one per cent less than this, or about the same as in Akyab district. The population of Sandoway district increased by 15 per cent which is appreciably larger than the rates of increase for Akyab and Kyaukpyu. It is rather difficult to account for this large increase. Immigration is not responsible since the emigrants, if anything, exceeded the immigrants. Two British India Steam Navigation Company's steamers arrived at Andrew Bay on the morning after the census and their passengers and crew were included in the population of the district but they only amounted to 720. The Deputy Commissioner says that a large part of the increase is due to better enumeration in 1931. There does not appear to be any other explanation. The races of the Burma group, which represent about 88 per cent of the population, increased by 15 per cent and since there was very little migration this figure represents approximately the rate of natural increase. Since the rate of natural increase of the races of the Burma group in the Akyab

118. Chinese Languages.—The Chinese have increased in number by 30 per cent and speakers of Chinese languages by 46 per cent. The big increase for speakers is due to the reduction in the number of Chinese who speak other languages from 27,548 in 1921 to 15,957 in 1931. Chinese who do not speak their own language usually speak Burmese. The Yunnanese are mostly found in the Northern Shan States; they have increased by 14 per cent while speakers of Yunnanese have increased by 21 per cent. In 1921 there were 4,382 Yunnanese, or 7 per cent of the total number, who spoke languages other than Yunnanese; in 1931 there were only 577 or one per cent of the total number. Chinese other than Yunnanese have increased by 40 per cent during the decade while speakers of Chinese languages other than Yunnanese have increased by 67 per cent.

55. Chinese.

Year of Census.	Language.	Race.
1931 ...	178,316	193,594
1921 ...	122,162	149,060

119. Indian Languages.—Indians have increased during the decade by 15 per cent and speakers of Indian languages by 23 per cent. At the 1921 census, about 40 thousand Indians returned Burmese as the language ordinarily used in the home; for the 1931 Census, figures for Indians who returned a non-Indian language as their mother tongue have not been compiled but the number is probably very much less than 40,000. The excess of speakers of Indian languages over the number of Indians at the 1931 Census is accounted for by the fact that some of the Indo-Burman races have returned an Indian language as their mother tongue. Marginal table 57 shows that the excess is largely confined to the Akyab district. In this district many of the Arakan Mahomedans have apparently returned Bengali as their mother tongue. In Kyaukpyu district the excess is 1,539 and in Sandoway only 573. In the remaining districts of the province the Indo-Burman races are usually Zerbadis and most of them appear to have returned Burmese or some other indigenous language as their mother tongue.

56. Indian Languages and Races.

Year of Census.	Language.	Race.
1931 ...	1,079,820	1,017,825
1921 ...	879,697	881,357

57. Indian Languages and Races.

Area.	Language.	Race.	Excess of Language over Race.
Akyab District ...	259,787	210,990	48,797
Remainder of Province.	820,033	806,835	13,198
Total ...	1,079,820	1,017,825	61,995

120. The Pau Chin Hau Script.—In paragraph 135 of Chapter XI. an account is given of the Pau Chin Hau movement in the Chin Hills. Reference is made there to certain Chin characters which were revealed to Pau Chin Hau in one of his dreams. Copies of the original characters are not available but apparently they were very numerous. The characters were revised, the third and last revision being carried out in 1931. The new alphabet consists of 21 consonants. The first page of the Spelling Book together with the corresponding Roman version is printed on page 195. It will be noticed that there are tones. It is maintained that the Chin sounds can be properly represented in these new characters but not in the Roman character. "The Sermon on the Mount" in St. Matthew has already been printed in this character. In this work of translation Pau Chin Hau is helped by a vernacular school teacher named Than Chin Kham who lives in Tonzan village near Tiddim and who knows Burmese. The whole of St. Matthew is being translated and in May 1932 the first eight chapters had already been completed. For the purpose of translation, the Burmese version of St. Matthew is used and also a Chin version (in the Roman character), which was done by Mr. Cope, the American Baptist Missionary in the Chin Hills: this version in the Roman character is also given in "The Sermon on the Mount" referred to above. No information is available as to the number of persons who can read the script.

The persons recorded as Malabaris also come from the Malabar district of Madras and speak Malayalam ; the number recorded was 3,205, which included 2,376 Hindus, 571 Muslims and 206 Christians. The Malabari Muslims are presumably the same as the Kakas. The Kakas and Malabari Muslims in 1931 numbered 10,012, compared with 5,438 in 1921. The Kakas, like the Ghulias, are shop-keepers (usually eatables and ærated waters) and they have spread to practically every district in the province ; in Rangoon the number enumerated was 2,076.

Nursapuris or Narsapuris (the latter is probably the correct spelling) speak Telugu and they are mostly Muslims. The name appears to have been derived from the name of a taluk called Narsapur in the West Godaviri district in Madras. The persons originally called Narsapuris presumably came from this taluk but the name appears now to be applied to persons who come from the same neighbourhood. The total number of Narsapuris recorded was 5,049, which included 4,284 Muslims and 669 Christians ; most of the Christians were enumerated in Pyapôn district. There were also 1,459 Muslims who returned their race as Telugu. Telugus are sometimes called Coringhis ; this name appears to be derived from the name of a seaport in Madras Presidency from which they originally sailed for Burma. Deccanis come from the Deccan ; they too are Muslims and they usually speak Hindustani. The number recorded was only 1,190.

Maimons (Memons), Khojas and Borahs are Muslims and come mainly from Gujarat. An interesting account of the Khojas and Memons will be found on pages 445 and 451, respectively, of the Baroda Census Report for 1931. Surtis come from the Surat district of Bombay and they too are Muslims. Gujaratis come from Gujarat, the total number recorded being 6,469 ; Hindus numbered 4,981, Muslims 990 and Jains 461. The Sindhis come from Sind ; most of those recorded were Hindus.

The Konkani come from the Konkan coast of the Bombay Presidency, while Goanese come from Goa on the same coast. Separate figures have been given for Goanese and Konkani but in Imperial Table XV figures for speakers of Goanese have been included in the figures for speakers of Konkani since Goanese is understood to be a dialect of Konkani.

The Kumaunis are people from the three districts of Almora, Naini Tal and Garhwal in the Kumaun division of the United Provinces ; there is probably very little, if any, difference between the Kumaunis and Garhwalis but they have been tabulated separately, in case there is any difference. Speakers of Kumauni and Garhwali have, however, been included in the speakers of Central Pahari.

The cloth-selling money lenders known as Kabulis have been included in the figures for Pathans.

The Gurkhas come from Nepal. They have increased from 22,251 in 1921 to 39,532 in 1931, *i.e.* by 17,281 or 78 per cent. One-third were enumerated in the Shan States (8,203 in the Northern Shan States and 5,035 in the Southern Shan States), and one-third in Myitkyina and Katha (10,085 in Myitkyina and 3,125 in Katha) ; the remainder were scattered, the only other district containing a large number being Mandalay (3,377).

Chittagonians come from the Chittagong district of Bengal. It might be argued that the figures for Chittagonians should be included in those for Bengalis, but there is no harm done in giving separate figures for them. There is, of course, a certain amount of overlapping. This is evident from the fact that the Bengalis have dropped from 77,988 to 65,211 since 1921 while the Chittagonians have increased from 206,388 to 252,152 ; the combined figures show an increase of 32,987 or 11·6 per cent. According to the instructions issued at the 1921 census, the words *Kawtaw*, *Barua*, *Babuji* and *Magh* were given as alternative names for Chittagonian, and if any of these alternative names were returned, enumerators were required to enter the word Chittagonian in the enumeration schedules. The same instructions were issued at the 1931 census. It would, however, have been better if Maghs had been separately recorded. In Burma the word *Magh* is usually applied to the Buddhist cooks who come from Chittagong and they are also called *Barua* or *Babuji*. On the other hand in Bengal the word *Magh* is usually applied to the Arakanese. The Census Superintendent of Bengal has furnished the following information about them :—

"You will find details about the Maghs in Risley, Tribes and Castes of Bengal, Part II. I have tabulated no details of them because the name is used by two distinct peoples (*a*) the

tribes originating in Arakan and (*b*) the Chittagonian Buddhist Bengalis. Those whom you have are (*b*), since they call themselves *Barua*. The derivation of the name is not certainly known and the origin of the people you are dealing with is uncertain. They are said to be the result of the union of Bengali women with Burmese invaders whilst they possessed Chittagong, but this origin is repudiated by the caste itself and they derive themselves from Magadha, the modern Bihar. This derivation gives them an etymology for their name (from Maga or Magadha) and an explanation of the names which they have claimed in place of Magh, *viz. Magadhi* and *Rajbangshi* (=of the royal lineage). Rajbangshi however is a name claimed by many castes descended from the tribes which at one time or another had or are assumed to have had any sort of 'kingdom' in any part of the province, and is not recognised as a definite caste name for them. There are Buddhists in the Chittagong Hill Tracts who might get into Burma (*e.g.*, the other Maghs) but I think you are safe in saying that all Buddhist Chittagonians in Burma are Maghs (*i.e.*, Barua or Bhuiya Maghs) particularly if they speak Bengali and certainly such as cooks."

The word Rajbansi referred to above was recorded in the Akyab district and the Arakan Hill Tracts in 1901 but not at later censuses in Burma.

U San Shwe Bu, formerly Honorary Archæological Officer of Arakan, has sent me the following regarding the derivation of the word *Magh* :—

"It is quite certain the word originated in Eastern Bengal about the beginning of the 17th century where the Mohamedans applied it for the first time to the Arakanese who lived there. A manuscript in the Bodleian Library written by a contemporary historian, Shiab-ud-din Talish, throws a flood of illuminating light on the subject. He states that in the 17th century, owing perhaps to the evil influence exerted by the Portuguese who had been permitted to settle in the country in large numbers, piracy became the normal occupation of the Arakanese in Eastern Bengal. They infested the inland waterways and creeks and terrorised the riverine villages by pillage and plunder and carried off hundreds of people at a time for subsequent sale as slaves in neighbouring countries. They were so much hated by the inhabitants of those parts that they called the Arakanese pirates "Magh," an abbreviation of a word meaning 'a despicable dog.' The word therefore was originally a contemptuous term; but in course of time it came to be applied to the Arakanese both in the Chittagong district as well as in Arakan. ('Studies in Mogul India' Sarkar.)"

The total number of Chittagonian and Bengali Buddhists enumerated was 4,243 (3,317 males and 926 females) and it is interesting to note that there is now a Chittagong Buddhist Association in Burma, with headquarters in Rangoon.

I am also indebted to U San Shwe Bu for the following derivation of *Kawtaw* :—

"The word 'Kawtaw' originated in Lower Burma. All Chittagonian Bengalis were given this name by the Burmese people, first in Rangoon, later, elsewhere. It is very modern as it only came into being after the Annexation. In the Chittagong dialect the word 'Kawtaw' means 'how much.' This was invariably the first word used by a Chittagonian as a preliminary to some purchase in the Rangoon bazaar, and as the Burmese could not understand him at all he and his compatriots came to be known as 'Kawtaw Kala.'"

143. Indo-Burman Races.—The Indo-Burman races include the the Zerbadis, the Arakan Mahomedans, the Arakan Kamans and the Myedus. The number of persons belonging to these races has increased by 56,904 or 45 per cent. It is pointed out in paragraph 141 that in 1921 a number of Arakan Mahomedans in the Akyab district—estimated at between 10,000 and 15,000—returned themselves as Indians. The increase is therefore reduced to between 30 and 35 per cent.

7. Indo-Burman Races.

Year of Census.	Persons.	Males.	Females.
1931 ...	182,166	90,307	91,859
1921 ...	125,262	61,751	63,511

The Arakan Mahomedans are mostly found in the Akyab district; the only other districts containing an appreciable number are Kyaukpyu (1,597) and Sandoway (1,658). They are properly the descendants of Arakanese women who have married Chittagonian Muslims. In Burma they are called ရိုးကလေး (*Yakaing-kala*). They are recognised locally as a distinct race and they dress differently from the Arakanese and Chittagonians. The number recorded in 1931 was 51,615, which is more than double the number in 1921, namely 23,775. The reason for the large increase has been explained above.

The Arakan Kamans have increased from 2,180 to 2,686 and are practically confined to the Akyab and Kyaukpyu districts. According to paragraph 160 of the 1921 Census Report "they are descendants of the followers of Shah Shuja, son of Aurungzebe, who fled to Arakan in 1660 A.D. after the failure of his attempt to seize the Moghul throne. After the death of Shah Shuja they were

Annex 165

Census of India, 1931, Volume XI, Burma, Part II, Tables (Office of the Superintendent, Government Printing and Stationery, Burma, 1933)

Available at:

http://lsi.gov.in:8081/jspui/bitstream/123456789/3427/1/45875_1931_TAB.pdf

CENSUS OF INDIA, 1931

VOLUME XI

BURMA

PART II.—TABLES

BY

J. J. BENNISON, I.C.S.

SUPERINTENDENT OF CENSUS OPERATIONS, BURMA

RANGOON

Office of the Supdt., Government Printing and Stationery, Burma

1933

IMPERIAL TABLE

Serial No.	District or State.	Total. Persons.	Total. Males.	Total. Females.	Buddhist. Persons.	Buddhist. Males.	Buddhist. Females.	Animist. Persons.	Animist. Males.	Animist. Females.	Hindu *. Persons.	Hindu *. Males.	Hindu *. Females.
	1	2	3	4	5	6	7	8	9	10	11	12	13
	Provincial Total.	14,647,497	7,480,676	7,166,821	12,348,037	6,088,257	6,259,780	763,243	397,240	366,003	570,953	428,173	142,780
	Divisional Burma.	13,102,048	6,688,231	6,413,817	11,131,111	5,474,918	5,656,193	520,778	273,215	247,563	543,917	406,598	137,319
	Arakan Division	*1,008,535*	*522,609*	*485,926*	*653,699*	*323,545*	*330,154*	*78,712*	*40,948*	*37,764*	*18,350*	*16,509*	*1,841*
1	Akyab ...	637,580	339,643	297,937	337,661	170,099	167,562	40,038	20,975	19,063	16,085	15,044	1,641
2	Arakan Hill Tracts.	21,418	11,031	10,387	2,564	1,386	1,178	18,529	9,404	9,125	201	143	58
3	Kyaukpyu ...	220,292	107,729	112,563	195,152	94,038	101,114	17,466	9,135	8,331	768	716	52
4	Sandoway ...	129,245	64,206	65,039	118,322	58,022	60,300	2,679	1,434	1,245	696	606	90
	Pegu Division	*2,549,637*	*1,375,268*	*1,174,369*	*2,022,479*	*1,001,435*	*1,021,044*	*32,303*	*20,052*	*12,251*	*282,430*	*210,952*	*71,478*
5	Rangoon Town	400,415	271,063	129,352	135,466	69,936	65,530	5,500	3,820	1,680	140,901	112,735	28,166
6	Pegu ...	489,969	254,048	235,921	419,500	208,733	210,767	6,645	4,168	2,477	41,060	27,282	13,778
7	Tharrawaddy	508,319	252,548	255,771	483,559	235,211	248,348	2,821	1,765	1,056	9,068	6,995	2,073
8	Hanthawaddy	408,831	218,919	189,912	331,684	166,559	165,125	4,414	2,961	1,453	52,247	35,741	16,506
9	Insein ...	331,452	175,519	155,933	262,677	131,650	131,027	6,427	3,825	2,602	31,283	22,244	9,039
10	Prome ...	410,651	203,171	207,480	389,593	189,346	200,247	6,496	3,513	2,983	7,871	5,955	1,916
	Irrawaddy Divn.	*2,334,774*	*1,199,758*	*1,135,016*	*2,095,170*	*1,042,220*	*1,052,950*	*20,467*	*14,228*	*6,239*	*67,106*	*55,110*	*11,996*
11	Bassein ...	571,043	292,029	279,014	499,482	247,527	251,955	4,562	3,084	1,478	15,647	13,366	2,281
12	Henzada ...	613,280	303,750	309,530	581,987	284,713	297,274	2,604	1,695	909	7,279	5,889	1,390
13	Myaungmya ...	444,784	235,655	209,129	386,071	195,197	190,874	6,215	4,429	1,786	13,083	11,534	1,549
14	Maubin ...	371,509	188,770	182,739	339,971	168,194	171,777	2,475	1,646	829	8,537	7,334	1,203
15	Pyapon ...	334,158	179,554	154,604	287,659	146,589	141,070	4,611	3,374	1,237	22,560	16,987	5,573
	Tenasserim Divn.	*1,872,668*	*971,431*	*901,237*	*1,579,255*	*797,225*	*782,030*	*60,577*	*33,171*	*27,406*	*82,812*	*57,117*	*25,695*
16	Salween ...	53,186	27,990	25,196	27,989	15,098	12,891	22,451	11,165	11,286	350	282	68
17	Thaton ...	532,628	274,942	257,686	483,981	244,310	239,671	3,972	2,309	1,663	22,612	14,853	7,759
18	Amherst ...	516,233	270,677	245,556	438,021	222,552	215,469	11,930	6,547	5,383	24,645	17,758	6,887
19	Tavoy ...	179,964	92,637	87,327	164,579	82,292	82,287	4,040	2,855	1,185	3,733	3,190	543
20	Mergui ...	161,987	85,263	76,724	123,865	62,713	61,152	6,346	3,968	2,378	7,700	5,709	1,991
21	Toungoo ...	428,670	219,922	208,748	340,820	170,260	170,560	11,838	6,327	5,511	23,772	15,325	8,447
	Magwe Division	*1,722,044*	*847,600*	*874,444*	*1,493,662*	*726,470*	*767,192*	*193,337*	*94,595*	*98,742*	*17,571*	*14,531*	*3,040*
22	Thayetmyo ...	274,177	135,565	138,612	253,442	124,297	129,145	15,843	7,928	7,915	2,276	1,727	549
23	Minbu ...	277,876	136,662	141,214	269,194	131,149	138,045	4,524	2,326	2,198	2,016	1,707	309
24	Magwe ...	499,573	250,783	248,790	478,521	234,162	244,359	2,151	1,265	886	10,314	8,928	1,386
25	Pakokku ...	499,181	241,137	258,044	492,318	236,756	255,562	3,908	2,027	1,881	1,358	1,161	197
26	Chin Hills ...	171,237	83,453	87,784	187	106	81	166,911	81,049	85,862	1,607	1,008	599
	Mandalay Divn.	*1,696,332*	*836,894*	*859,438*	*1,575,157*	*762,381*	*812,776*	*7,674*	*5,127*	*2,547*	*42,793*	*29,795*	*12,998*
27	Mandalay ...	371,636	191,741	179,895	304,476	149,491	154,985	2,749	2,199	550	28,386	19,224	9,162
28	Kyaukse ...	151,320	74,880	76,440	141,513	69,383	72,130	225	154	71	1,419	1,154	265
29	Meiktila ...	309,999	147,171	162,828	300,745	141,447	159,298	237	193	44	3,381	2,509	872
30	Myingyan ...	472,557	228,784	243,773	468,070	225,525	242,545	432	316	116	2,284	1,778	506
31	Yamethin ...	390,820	194,318	196,502	360,353	176,535	183,818	4,031	2,265	1,766	7,323	5,130	2,193
	Sagaing Division	*1,918,058*	*934,671*	*983,387*	*1,711,689*	*821,642*	*890,047*	*127,708*	*65,094*	*62,614*	*32,855*	*22,584*	*10,271*
32	Bhamo ...	121,193	59,984	61,209	65,584	32,725	32,859	39,970	18,926	21,044	1,397	1,043	354
33	Myitkyina ...	171,524	90,916	80,608	79,197	41,038	38,159	70,242	36,365	33,877	14,179	9,133	5,046
34	Shwebo ...	446,790	214,170	232,620	430,672	204,650	226,022	593	419	174	3,463	2,671	792
35	Sagaing ...	335,965	159,881	176,084	329,040	155,655	173,385	135	104	31	2,690	1,888	802
36	Katha ...	254,170	126,863	127,307	240,528	117,939	122,589	4,933	3,033	1,900	5,653	3,841	1,812
37	Lower Chindwin	383,434	178,543	204,891	380,084	176,154	203,930	293	215	78	1,338	994	344
38	Upper Chindwin	204,982	104,314	100,668	186,584	93,481	93,103	11,542	6,032	5,510	4,135	3,014	1,121
	Eastern States	1,545,449	792,445	753,004	1,216,926	613,339	603,587	242,465	124,025	118,440	27,036	21,575	5,461
39	Northern Shan States.	616,458	321,211	295,247	445,761	225,049	220,712	127,140	66,084	61,056	17,344	14,615	2,729
40	Southern Shan States.	870,230	441,984	428,246	754,476	379,616	374,860	84,871	43,980	40,891	8,365	5,798	2,567
41	Karenni ...	58,761	29,250	29,511	16,689	8,674	8,015	30,454	13,961	16,493	1,327	1,162	165

*Includes Arya

XVI.—*Religion.*

Muslim.			Christian.			Confucian.			Jain.			Jew.			Sikh.			Others.			
Persons.	Males.	Females.	Persons.	Males.	Females.	Persons.	Males.	Females.	Persons.	Males.	Females.	Persons.	Males.	Females.	Persons.	Males.	Females.	Persons.	Males.	Females.	Serial No.
14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	
584,839	363,824	221,015	331,106	171,352	159,754	35,696	22,342	13,354	721	464	257	1,218	625	593	10,907	7,882	3,025	777	517	260	
577,394	358,485	218,909	298,990	154,507	144,483	17,868	12,300	5,568	721	464	257	1,218	625	593	9,190	6,618	2,572	761	501	260	
255,469	*140,276*	*115,193*	*1,884*	*1,033*	*851*	*240*	*156*	*84*	...	...	...	*3*	*2*	*1*	*23*	*18*	*5*	*155*	*122*	*33*	
242,381	132,976	109,405	398	255	143	240	156	84	...	...	...	3	2	1	19	14	5	155	122	33	1
108	88	20	16	10	6	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	2
6,694	3,736	2,958	212	104	108	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	3
6,286	3,476	2,810	1,258	664	594	...	...	...	...	...	...	...	...	...	4	4	...	...	...	...	4
116,082	*87,856*	*28,226*	*77,773*	*42,407*	*35,366*	*14,431*	*9,842*	*4,589*	*512*	*330*	*182*	*1,094*	*555*	*539*	*1,993*	*1,510*	*483*	*540*	*329*	*211*	
70,791	56,147	14,644	30,888	17,094	13,794	13,478	9,106	4,372	443	296	147	1,069	544	525	1,363	1,070	293	516	315	201	5
11,038	7,928	3,110	11,400	5,714	5,686	288	195	93	...	...	...	4	1	3	32	25	7	2	2	...	6
5,511	3,897	1,614	7,140	4,512	2,628	103	83	20	18	15	3	...	...	...	98	69	29	1	1	...	7
13,535	9,570	3,965	6,450	3,696	2,754	249	218	31	1	1	...	5	4	1	228	161	67	18	8	10	8
10,249	6,969	3,280	20,409	10,559	9,850	155	121	34	35	15	20	16	6	10	198	127	71	3	3	...	9
4,958	3,345	1,613	1,486	832	654	158	119	39	15	3	12	...	...	...	74	58	16	...	...	...	10
45,797	*34,928*	*10,869*	*105,691*	*52,854*	*52,837*	*444*	*348*	*96*	*10*	*7*	*3*	*11*	*11*	...	*78*	*52*	*26*	...	...	...	
11,393	8,228	3,165	39,738	19,647	20,091	194	150	44	1	1	...	10	10	...	16	16	...	...	...	...	11
5,826	3,764	2,062	15,525	7,654	7,871	39	25	14	...	...	...	...	...	...	20	10	10	...	...	...	12
13,150	12,071	3,079	24,091	12,302	11,789	150	112	38	...	...	...	1	1	...	23	9	14	...	...	...	13
6,266	4,683	1,583	14,252	6,905	7,347	2	2	...	...	...	...	...	...	...	6	6	...	...	...	...	14
7,162	6,182	980	12,085	6,346	5,739	59	59	...	9	6	3	...	...	...	13	11	2	...	...	...	15
75,659	*45,943*	*29,716*	*73,131*	*37,130*	*36,001*	*645*	*426*	*219*	*189*	*119*	*70*	*11*	*7*	*4*	*362*	*269*	*93*	*27*	*24*	*3*	
501	405	96	1,844	999	845	32	27	5	...	...	...	...	...	...	19	14	5	...	...	...	16
16,047	10,386	5,661	5,663	2,840	2,823	256	159	97	...	...	...	...	...	...	97	85	12	...	...	...	17
31,865	18,912	12,953	9,385	4,648	4,737	187	124	63	101	72	29	5	2	3	87	57	30	7	5	2	18
3,051	1,934	1,117	4,487	2,310	2,177	62	47	15	...	...	...	...	...	...	10	8	2	2	1	1	19
14,551	7,849	6,702	9,461	4,964	4,497	20	18	2	1	1	...	5	5	...	20	18	2	18	18	...	20
9,644	6,457	3,187	42,291	21,369	20,922	88	51	37	87	46	41	1	...	1	129	87	42	...	...	...	21
9,938	*7,359*	*2,579*	*5,796*	*3,392*	*2,404*	*220*	*150*	*70*	...	...	...	*3*	*3*	...	*1,517*	*1,100*	*417*	...	...	...	
1,995	1,256	739	511	287	224	78	50	28	...	...	...	...	...	...	32	20	12	...	...	...	22
1,446	1,021	425	152	85	67	31	20	11	...	...	...	...	...	...	513	354	159	...	...	...	23
5,286	4,153	1,133	2,388	1,581	807	65	47	18	...	...	...	3	3	...	845	644	201	...	...	...	24
1,166	900	266	328	220	108	46	33	13	...	...	...	...	...	...	57	40	17	...	...	...	25
45	29	16	2,417	1,219	1,198	...	...	...	...	...	...	...	...	...	70	42	28	...	...	...	26
53,375	*29,414*	*23,961*	*13,711*	*7,699*	*6,012*	*563*	*553*	*210*	*10*	*8*	*2*	*92*	*43*	*49*	*2,922*	*2,050*	*872*	*35*	*24*	*11*	
24,456	14,053	10,403	9,684	5,508	4,176	443	274	169	10	8	2	82	39	43	1,319	923	396	31	22	9	27
7,300	3,712	3,588	628	306	322	6	6	...	...	...	..	...	...	...	229	165	64	...	...	...	28
4,931	2,609	2,322	501	274	227	5	...	5	...	...	...	3	...	3	196	139	57	...	...	...	29
1,345	914	431	384	221	163	4	4	...	...	...	...	...	...	...	37	25	12	1	1	...	30
15,343	8,126	7,217	2,514	1,390	1,124	105	69	36	...	...	...	7	4	3	1,141	798	343	3	1	2	31
21,074	*12,709*	*8,365*	*21,004*	*9,992*	*11,012*	*1,425*	*1,025*	*400*	...	...	...	*4*	*4*	...	*2,295*	*1,619*	*676*	*4*	*2*	*2*	
1,923	1,339	584	10,931	5,022	5,909	879	556	323	...	...	...	1	1	...	508	372	136	...	...	...	32
2,388	1,731	657	4,449	1,803	2,646	419	373	46	...	...	...	1	1	...	649	472	177	...	...	...	33
9,112	4,775	4,337	2,504	1,339	1,165	43	25	18	...	...	...	...	...	...	402	290	112	1	1	...	34
3,044	1,704	1,340	869	408	461	...	...	...	...	...	...	...	...	...	185	122	63	2	...	2	35
2,256	1,442	814	707	531	176	77	64	13	...	...	...	...	...	...	15	12	3	1	1	...	36
1,156	833	323	308	187	121	4	4	...	...	...	...	...	...	...	251	156	95	...	...	...	37
1,195	885	310	1,236	702	534	3	3	...	...	...	...	2	2	...	285	195	90	...	...	...	38
7,445	5,339	2,106	32,116	16,845	15,271	17,728	10,042	7,686	...	...	...	...	...	...	1,717	1,264	453	16	16	...	
3,689	2,961	728	6,928	3,624	3,304	14,777	8,256	6,521	...	...	...	...	...	...	804	607	197	15	15	...	39
3,463	2,158	1,305	15,322	8,075	7,247	2,923	1,765	1,158	...	...	...	...	...	...	810	592	218	...	...	...	40
293	220	73	9,866	5,146	4,720	28	21	7	...	...	...	...	...	...	103	65	38	1	1	...	41

and Brahmo.

IMPERIAL TABLE XVII.

Race.

NOTES 1. The population of the estimated area of East Manglün in the Northern Shan States amounting to 19,649 (males 9,925, females 9,724) has been omitted from this table because statistics for race are not available. An estimate of the number of Marus, Lisaws, Nungs, Kachins and Tibetans in the unenumerated parts of Myitkyina district, the "Triangle" and the Hukawng Valley is given in Chapter XII of the Report Volume.

2. The same classification system has been used for races as for languages (see Note 3 to Imperial Table XV on page 219).

3. Part I of this table corresponds to Part IB of Imperial Table XV and gives the provincial totals for each race by religion. Indians have not been classified by caste; the Report volume should be consulted regarding the Indian races for which figures have been given. Figures for the separate European and allied races included in Group Y are given in Imperial Table XIX. The races shown with *nil* entries may exist in parts of the province outside the census area or they may have been recorded under some other name.

4. Alternative names for some of the races are given in Parts IB and IC of Imperial Table XV (see Notes 4 and 5 to that table on page 219).

5. Part II of this table corresponds to Part ID of Imperial Table XV and gives the district figures for each race-group; for some race-groups there is a further classification by religion.

6. Part IIIA gives district figures for certain selected indigenous races; for some of these races there is a further classification by religion. Part IIIB supplements Part IIIA by giving the distribution of all other indigenous races. Figures for the more important Indian races, classified by religion and birth-place are given in Provincial Table V.

IMPERIAL TABLE XVII—*Race.* PART I.—*Provincial Totals of Races by Religion*—concld.

Race-group and Race.		Religion.	Males.	Females.
R2	Cantonese ...	Total ...	24,303	9,687
		Animist ...	*12,110*	*4,153*
		Confucian ...	*6,204*	*2,568*
		Buddhist ...	*5,530*	*2,749*
		Christian ...	*282*	*143*
		Others ...	*177*	*74*
R3	Fukienese ...	Total ...	33,057	16,981
		Animist ...	*15,670*	*6,856*
		Buddhist ...	*12,261*	*7,369*
		Confucian ...	*4,783*	*2,567*
		Christian ...	*304*	*174*
		Others ...	*39*	*15*
R4	Other and unspecified Chinese.	Total ...	29,001	12,874
		Animist ...	*18,243*	*7,359*
		Buddhist ...	*9,047*	*4,839*
		Confucian ...	*1,174*	*460*
		Muslim ...	*227*	*94*
		Christian ...	*291*	*122*
		Others ...	*19*	...
S	**Indo-Burman Races.**	...	90,307	91,859
S1	Arakan-Mahomedan	Total ...	26,153	25,462
		Muslim ...	*26,150*	*25,462*
		Buddhist ...	*3*	...
S2	Zerbadi ...	Total ...	60,413	62,292
		Muslim ...	*57,415*	*59,736*
		Buddhist ...	*2,637*	*2,180*
		Christian ...	*220*	*135*
		Others ...	*141*	*241*
S3	Arakan-Kaman ...	Total ...	1,296	1,390
		Muslim ...	*1,287*	*1,383*
		Buddhist ...	*9*	*7*
S4	Myedu ...	Total ...	2,445	2,715
		Muslim ...	*2,240*	*2,441*
		Buddhist ...	*205*	*274*
X	**Indian Races**	...	733,911	283,914
X1	Assamese ...	Total ...	891	435
		Hindu ...	*772*	*413*
		Others ...	*119*	*22*
X2	Baluchi ...	...	53	11
X3	Bengali ...	Total ...	48,682	16,529
		Muslim ...	*28,781*	*10,750*
		Hindu ...	*18,160*	*5,360*
		Buddhist ...	*1,491*	*309*
		Christian ...	*228*	*90*
		Others ...	*22*	*20*
X4	Bhotia ...	Hindu ...	1	...
X5	Bihari ...	...	508	31
X6	Borah ...	Muslim ...	112	48
X7	Chittagonian ...	Total ...	163,912	88,240
		Muslim ...	*157,155*	*86,749*
		Hindu ...	*4,891*	*873*
		Buddhist ...	*1,826*	*617*
		Others ...	*40*	*1*
X8	Chulia ...	Total ...	23,269	8,723
		Muslim ...	*23,108*	*8,656*
		Others ...	*161*	*67*
X9	Deccani ...	...	817	373
X10	Dogra ...	...	146	10
X11	Garhwali ...	...	961	263
X12	Goanese ...	...	651	150
X13	Gujarati ...	...	4,622	1,847
X14	Gurkha ...	Total ...	26,689	12,843
		Hindu ...	*25,745*	*12,447*
		Buddhist ...	*655*	*282*
		Others ...	*289*	*114*
X15	Hindustani ...	Total ...	132,842	42,125
		Hindu ...	*103,591*	*32,445*
		Muslim ...	*27,328*	*9,020*
		Buddhist ...	*1,273*	*383*
		Christian ...	*460*	*227*
		Others ...	*190*	*50*
X16	Jat ...	...	273	11
X17	Kachi ...	...	539	193
X18	Kaka (Moplah) ...	Total ...	9,039	402
		Muslim ...	*8,949*	*392*
		Others ...	*90*	*10*
X19	Kanarese ...	...	151	89
X20	Kashmiri ...	...	38	6
X21	Khoja ...	...	208	159
X22	Konkani ...	...	75	...
X23	Kumaoni ...	...	2,010	319
X24	Mahratta ...	...	437	162
X25	Maimon ...	Total ...	3,097	758
		Muslim ...	*3,097*	*747*
		Others ...	...	*11*
X26	Malabari ...	Total ...	2,645	560
		Hindu ...	*1,931*	*445*
		Muslim ...	*542*	*29*
		Christian ...	*137*	*69*
		Others ...	*35*	*17*
X27	Marwari ...	...	1,480	823
X28	Moghul ...	...	348	239
X29	Nursapuri ...	Total ...	3,361	1,688
		Muslim ...	*2,865*	*1,419*
		Christian ...	*438*	*231*
		Others ...	*58*	*38*
X30	Oriya ...	Total ...	58,905	3,680
		Hindu ...	*56,016*	*3,110*
		Muslim ...	*910*	*231*
		Buddhist ...	*1,427*	*157*
		Christian ...	*501*	*173*
		Others ...	*51*	*9*
X31	Parsi ...	...	307	191
X32	Pathan ...	Total ...	3,501	971
		Muslim ...	*3,439*	*937*
		Others ...	*62*	*34*
X33	Punjabi ...	Total ...	21,343	7,445
		Hindu ...	*7,269*	*2,675*
		Muslim ...	*5,866*	*1,634*
		Sikh ...	*7,792*	*2,969*
		Arya and Brahmo.	*73*	*83*
		Others ...	*343*	*84*
X34	Rajput ...	...	416	67
X35	Sindhi ...	...	270	56
X36	Surati ...	Total ...	3,937	2,195
		Muslim ...	*3,783*	*2,170*
		Others ...	*154*	*25*
X37	Tamil ...	Total ...	93,435	56,453
		Hindu ...	*78,135*	*45,304*
		Christian ...	*12,082*	*9,705*
		Muslim ...	*1,504*	*748*
		Buddhist ...	*1,584*	*658*
		Others ...	*130*	*38*
X38	Telegu ...	Total ...	123,940	35,819
		Hindu ...	*118,696*	*33,883*
		Christian ...	*3,184*	*1,285*
		Muslim ...	*1,086*	*373*
		Buddhist ...	*881*	*263*
		Others ...	*93*	*15*
Y	**European, etc.**	...	17,769	13,082
	European and allied Races, including Armenians.	...	7,885	3,766
	Anglo-Indians ...	...	9,884	9,316
Z	**Other Races ...**	...	1,836	1,203
	Arab ...	...	61	18
	Egyptian ...	...	9	...
	Goa-Portuguese	...	40	16
	Japanese ...	...	448	187
	Jew ...	...	643	618
	Mauritian ...	...	3	4
	Negro ...	...	5	...
	Persian ...	...	370	327
	Philippino ...	...	67	11
	Singhalese ...	...	179	21
	Turk ...	...	11	1

PROVINCIAL TABLE II.

Population of Townships, States and Hill-Tracts classified by Race.

NOTES 1. The population of the estimated area of East Manglün in the Northern Shan States amounting to 19,649 (males 9,925, females 9,724) has been omitted from this table because statistics for race are not available. The totals in this table for the whole province, the Eastern States and the Northern Shan States are therefore different from those in Provincial Table I.

2. "Other Indigenous Races" (columns 6 and 7) includes all races in groups A to O, except Burmese; "Others" (columns 14 and 15) includes Indians other than Hindus and Muslims, Indo-Burman races (group S), Europeans and Anglo-Indians (group Y) and Other Races (group Z). The classification system for races is given in Part I of Imperial Table XVII and figures for districts are given in Parts II, IIIA and IIIB of that table.

PROVINCIAL TABLE II.—*Population of Townships, etc., Classified by Race.*

Serial No.	District, Township, State, etc.	Total.		Burmese.		Other Indigenous Races.		Chinese.		Indian Hindu.		Indian Muslim.		Others.	
		Males.	Females.	Males.	Females.	Males.	Females.	Males.	Females.	Males.	Females.	Males.	Females.	Males.	Females.
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
	Provincial Total *	7,490,676	7,166,821	4,202,079	4,393,952	2,307,725	2,316,266	127,049	66,545	425,389	140,220	271,514	125,080	146,920	124,758
	Divisional Burma ...	*6,688,231*	*6,413,817*	*4,187,329*	*4,381,870*	*1,597,624*	*1,609,394*	*88,279*	*40,612*	*403,847*	*134,803*	*267,326*	*124,232*	*143,826*	*122,906*
	*Eastern States** ...	*792,445*	*753,004*	*14,750*	*12,082*	*710,101*	*706,872*	*38,770*	*25,933*	*21,542*	*5,417*	*4,188*	*848*	*3,094*	*1,852*
	Arakan Division	522,609	485,926	36,719	37,339	326,746	330,628	723	255	16,479	1,828	111,130	86,430	30,812	29,446
	1. Akyab District ...	*339,643*	*297,937*	*824*	*790*	*188,929*	*185,301*	*499*	*190*	*15,019*	*1,630*	*107,797*	*84,850*	*26,575*	*25,176*
1	Akyab	35,010	14,998	96	68	9,523	9,400	363	166	10,437	733	12,082	2,607	2,509	2,024
2	Bullidaung ...	47,111	44,087	15	7	19,642	19,174	13	2	678	179	20,620	24,632	143	93
3	Kyauktaw ...	32,374	28,012	168	188	19,512	18,677	38	8	609	99	5,658	3,489	6,389	5,551
4	Maungdaw ...	70,611	68,467	22	23	13,517	13,844	4	...	1,104	547	40,431	38,841	15,533	15,212
5	Minbya	29,609	26,065	145	160	24,222	22,821	36	7	564	5	4,450	2,905	192	167
6	Myohaung ...	35,922	31,082	237	229	27,911	26,356	18	1	691	44	5,650	3,195	1,415	1,257
7	Pauktaw ...	25,126	23,662	...	...	21,276	21,146	11	...	147	5	3,506	2,309	186	202
8	Ponnagyun ...	29,522	28,251	21	20	27,531	27,530	2	2	406	6	1,530	648	32	45
9	Rathedaung ...	34,358	33,313	120	95	25,795	26,353	14	4	383	12	7,870	6,224	176	625
	2. Arakan Hill Tracts	*11,031*	*10,387*	*4*	...	*10,642*	*10,269*	...	...	*143*	*58*	*88*	*20*	*154*	*40*
10	Paletwa ...	11,031	10,387	4	...	10,642	10,269	...	...	143	58	88	20	154	40
	3. Kyaukpyu District	*107,729*	*112,563*	*494*	*261*	*102,661*	*109,257*	*101*	*39*	*713*	*50*	*2,165*	*1,389*	*1,595*	*1,567*
11	An	20,110	19,337	93	73	19,898	19,258	1	...	47	5	68	...	3	1
12	Cheduba ...	16,844	18,125	108	23	16,705	18,086	2	3	7	1	10	...	12	12
13	Kyaukpyu ...	27,612	28,584	98	91	26,507	28,163	58	19	377	36	314	12	258	263
14	Myebon	18,673	17,801	63	34	16,189	16,144	20	16	248	8	1,702	1,339	451	260
15	Ramree	24,490	28,716	132	40	23,362	27,606	20	1	34	...	71	38	871	1,031
	4. Sandoway District	*64,206*	*65,039*	*35,397*	*36,288*	*24,514*	*25,801*	*123*	*26*	*504*	*90*	*1,080*	*171*	*2,488*	*2,663*
16	Gwa	13,082	13,956	12,648	12,863	1,038	977	22	1	41	2	143	10	90	103
17	Sandoway ...	27,530	27,351	18,668	19,270	5,039	5,315	76	23	507	83	883	147	2,357	2,513
18	Taungup ...	22,694	23,732	4,081	4,155	18,437	19,509	25	2	56	5	54	14	41	47
	Pegu Division ...	1,375,268	1,174,369	914,287	938,282	98,905	101,070	35,795	18,206	210,521	71,285	77,129	17,023	38,631	28,503
	5. Rangoon Town District	*271,063*	*129,352*	*61,063*	*60,935*	*2,921*	*2,663*	*19,919*	*10,707*	*112,457*	*28,001*	*49,825*	*7,710*	*24,878*	*19,336*
19	Municipality ...	253,565	128,561	60,021	60,797	2,884	2,652	19,740	10,695	103,023	27,608	44,641	7,646	23,256	19,163
20	Cantonment { Civil	475	261	37	36	5	4	...	...	231	86	94	30	108	105
	Cantonment { Military	571	141	1	4	1	2	...	...	200	83	127	11	242	41
21	Port	16,452	389	1,004	98	31	5	179	12	9,003	224	4,963	23	1,272	27
	6. Pegu District ...	*254,048*	*235,921*	*181,762*	*184,806*	*31,494*	*31,399*	*5,031*	*2,521*	*27,278*	*13,775*	*7,102*	*2,223*	*1,381*	*1,197*
22	Daik-u ...	34,904	33,137	27,005	27,747	3,706	3,670	718	373	2,357	847	993	396	125	104
23	Kawa ...	41,830	37,893	32,189	30,868	4,367	4,164	807	455	3,856	2,154	508	161	103	91
24	Nyaunglebin East ...	36,995	33,881	26,376	27,388	4,325	4,452	890	408	3,596	1,119	1,504	269	304	245
25	Nyaunglebin West ...	31,847	29,066	19,800	20,135	7,467	7,375	602	335	2,447	603	1,264	370	267	248
26	Pegu	50,462	47,060	34,006	35,238	7,169	7,094	1,129	546	6,182	3,237	1,569	569	407	376
27	Thanatpin ...	27,028	25,620	19,473	19,821	2,720	2,881	464	213	3,697	2,420	577	219	97	66
28	Waw	30,982	29,264	22,913	23,609	1,740	1,763	421	191	5,143	3,395	687	239	78	67
	7. Tharrawaddy District	*252,548*	*255,771*	*224,073*	*235,273*	*15,170*	*15,865*	*1,895*	*792*	*6,995*	*2,072*	*3,272*	*951*	*1,143*	*818*
29	Gyobingauk ...	28,827	29,782	25,458	27,335	1,843	1,946	255	122	788	235	388	91	95	53
30	Letpadan East ...	19,973	19,601	15,858	16,905	1,626	1,708	275	112	1,426	554	540	144	248	178
31	Letpadan West ...	30,730	31,308	27,065	28,206	2,477	2,696	159	45	594	175	322	112	113	74
32	Minhla East ...	22,695	22,819	19,507	20,351	2,203	2,204	167	80	515	110	271	61	32	13
33	Minhla West ...	23,762	24,424	21,424	22,763	1,123	1,238	269	157	561	136	342	101	43	29
34	Monyo	29,074	29,197	27,829	28,223	890	900	59	15	201	28	63	5	32	26
35	Nattalin	36,760	38,411	34,640	37,088	971	993	235	108	622	133	246	57	46	32
36	Tharrawaddy ...	32,018	30,779	25,811	26,254	3,207	3,278	306	105	1,495	528	796	292	403	322
37	Zigôn	28,709	29,450	26,481	28,148	830	902	170	48	793	173	301	88	131	91
	8. Hanthawaddy District	*218,919*	*189,912*	*149,083*	*148,030*	*17,494*	*17,922*	*3,717*	*1,635*	*35,713*	*16,495*	*7,928*	*2,261*	*4,984*	*3,569*
38	Kayan	32,575	28,756	24,663	23,855	1,577	1,422	751	367	4,409	2,648	864	240	311	224
39	Kungyangôn North ...	26,810	24,423	16,707	16,453	5,770	5,911	297	139	2,619	1,366	837	251	580	303
40	Kungyangôn South ...	24,644	22,463	17,594	17,384	2,719	2,859	332	155	1,808	807	1,286	490	905	768
41	Kyauktan ...	30,903	26,332	21,671	21,401	490	515	459	147	7,054	3,743	726	174	503	352
42	Syriam	27,310	18,776	14,038	14,219	205	181	422	136	9,151	2,860	2,239	430	1,255	950
43	Thôngwa ...	30,894	28,434	24,039	24,166	256	282	783	385	4,565	2,919	426	142	825	540
44	Twante	45,783	40,728	30,371	30,552	6,477	6,752	673	306	6,107	2,152	1,550	534	605	432
	9. Insein District ...	*175,519*	*155,933*	*116,490*	*116,304*	*22,306*	*23,158*	*3,572*	*1,841*	*22,124*	*9,029*	*6,332*	*3,024*	*4,695*	*2,577*
45	Hlêgu	32,633	30,750	23,295	23,225	5,690	5,715	444	289	2,242	982	627	403	335	136
46	Insein	73,545	57,186	43,167	41,078	4,967	5,197	1,770	810	16,248	6,429	3,812	1,622	3,581	2,050
47	Taikkyi	38,238	37,267	27,820	28,933	5,753	6,173	631	332	2,051	757	1,471	870	512	202
48	Tantabin ...	31,103	30,730	22,208	23,068	5,896	6,073	727	410	1,583	861	422	129	267	189
	10. Prome District ...	*203,171*	*207,480*	*181,816*	*192,934*	*9,520*	*10,063*	*1,661*	*710*	*5,954*	*1,913*	*2,670*	*854*	*1,550*	*1,006*
49	Padaung ...	28,407	28,013	24,399	24,227	3,473	3,571	178	62	90	12	64	31	203	110
50	Paukkaung ...	22,193	22,631	19,142	19,676	2,722	2,865	103	41	116	16	53	19	57	14
51	Paungdè ...	35,977	37,009	32,889	35,363	889	978	272	121	1,174	243	540	211	213	93
52	Prome	44,669	43,610	37,355	39,950	822	880	818	363	3,406	1,401	1,466	413	802	603
53	Shwedaung ...	32,804	34,211	31,288	33,000	842	930	126	50	216	39	151	72	181	120
54	Thegôn	39,121	42,006	36,743	40,718	772	839	164	73	952	202	396	108	94	66

* See note 1 on page 273.

Annex 166

Government of Burma, *Final Report of the Riot Inquiry Committee* (Superintendent, Government Printing and Stationery, Burma, 1939)

Available at:

https://ia801609.us.archive.org/22/items/in.ernet.dli.2015.206317/2015.206317.Final-Report.pdf

Annex 166

FINAL REPORT

OF THE

Riot Inquiry Committee

RANGOON
SUPDT., GOVT PRINTING AND STATIONERY, BURMA
1939

LIST OF AGENTS FOR THE SALE OF GOVERNMENT PUBLICATIONS.

In Burma

American Baptist Mission Press, Rangoon
British Burma Press Branch Rangoon
Burma Book Club, Ltd., Post Box No 1068, Rangoon
City Book Club, No 98 Phayre Street, Rangoon
Continental Trading Co., No 363 Lower Main Road Moulmein.
Maung Lu Gale, Law Book Depôt, No. 42, Ayo-o-gale, Mandalay.
Messrs. K. Bin Hoon & Sons, Nyaunglebin.
New Light of Burma Press, No 61, Sule Pagoda Road, Rangoon
Proprietor, Thu Dhama Wadi Press, No 16—80, Maung Khine Street Rangoon
Rangoon Times Press, Rangoon

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Book Co., Ltd., No 4/4A College Square Calcutta
Butterworth & Co (India) Ltd., Calcutta
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D B Taraporevala, Sons & Co., Bombay
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S K Lahiri & Co., No 56, College Street, Calcutta
Thacker, Spink & Co (1933), Ltd., No 3 Esplanade East, Calcutta
Thacker & Co., Ltd., Bombay
W Newman & Co., Calcutta

In Europe and America

The publications are obtainable either direct from The High Commissioner for India, Public Department, India House, Aldwych, London, W C 2 or through any bookseller

Annex 166

CHAPTER XXI.

Summary of Conclusions and Recommendations.

1. General Causes.

(A) *Conclusions as to Causes.*

(1) The discovery of Maung Shwe Hpi's book was not, in our opinion, the " cause " in any real sense of the riots which began in Rangoon on the 26th of July 1938, spread to the Districts in July and August, continued here and there well into September and finally degenerated into the wave of unrest and contempt of law, order and social discipline which has been apparent since and still endures. While the passages from the book did give offence to those sincere Buddhists who chanced to see or hear of them, they would not, we think, alone have provoked disorder on a serious and extended scale and, still less, would they have provoked the prolonged and fierce attacks throughout the country which Muslims and Zerbadis, and in particular the traders among them, have suffered, in which to some extent other Indians and Indian traders too have shared.

The " book " was not the real cause. Interim Report, page 48.

(2) But, though the discovery of Maung Shwe Hpi's book was not the real cause, it was, viewed in its true perspective, an " immediate cause " or the " occasion " of the outbreak of the rioting in Rangoon itself. It was the " occasion " in the sense that it attracted a fierce and irresponsible publicity in the Burmese Press, designed, less as a vindication of the Religion (which needed none), than as political propaganda to embarrass the subsisting Ministry and to further a political campaign against Indians and other foreigners in Burma. It was an " immediate cause " only in the sense that it formed the motive of the meeting of the 26th of July on the platform of the Shwe Dagon Pagoda in Rangoon, out of which the procession to the bazaar and the subsequent rioting developed. In the Districts, too, it served only as the " occasion ", and often the " excuse ", for anti-Indian rioting. We are convinced that the real causes lay deeper than the book.

The book was only the occasion and the excuse for rioting. Interim Report, page 48.

(3) An attempt has been made to represent the riots to us as religious riots. But, just as the book was not, in our opinion, the real cause, so the riots were not, we think, religious riots. At the highest, the book gave to them in the beginning a religious odour and an anti-Muslim bias. The real nature of the riots has, we think, tended to be obscured because the " occasion " of the beginning of them in Rangoon had a religious flavour and because *pongyis* were generally prominent in them and Indian-Muslims and Zerbadis became the particular objects of attack. But to none of these phenomena can, in our opinion, the real " causes " of the riots be traced. To whatever extent real indignation over Maung Shwe Hpi's book played its part in individual places, it was we think a very minor " cause " in the real sense. And, if further proof of this were needed than the events of July and September themselves afford, we think that the serious unrest in Burma which has prevailed since then, and still continues, affords proof, in ample measure, that the real origin of the disturbances and the real cause of their protraction was, and is, political.

The riots were not religious riots. They were political.

A piece of political opportunism.

(4) The riots at bottom were political and communal. Their immediate cause was we think, a complex piece of irresponsible political opportunism which saw in Maung Shwe Hpi's book and in the indignation it was capable of provoking a pretext both deliberately to embarrass the subsisting Ministry which had enjoyed eighteen months of office and to exploit for political ends the social and economic phenomena presented by Burma's large, industrious and useful population of Indian British Subjects.

The Materials employed.

Religious sentiment.

Chapter VII, page 7.

(5) Maung Shwe Hpi's book and the pride of Burman Buddhists in their Religion and their race made possible an emotional appeal to their strong religious sentiment. The intemperate and undignified invective of the Burmese Press from the 19th of July onwards shows to what extent this was exploited. Neither the Religion of Buddha nor the Burmese race stood in any jeopardy at all from Maung Shwe Hpi's book and no intelligent and honest person could for a moment have supposed they did. Yet, throughout the country, an hysterical appeal was deliberately made to Burman Buddhists to protect their religion and their race. This abuse to which the book and the deep spiritual instincts of a devout people were put was undoubtedly one of the causes of the first outbreak of rioting in Rangoon and other places and it gave to the riots the anti-Muslim trend they took. But it was not the book that caused the riots, but those who used it.

The new Nationalism of Burma.

Interim Report, Chapter IV, page 23.

Interim Report, Chapter VI, page 34.

(6) There were other materials at hand to work upon of which the foremost was the wave of Burman "nationalism" to which the constitutional and political changes of the pre-separation period, culminating in separation itself, had given birth and the Burman's natural pride of race had fostered. This, too, while natural in itself and healthy, but dangerous in abuse, has been exploited to the utmost. Separation of Burma from India in 1922 was made a political issue and since then there has been created not merely an issue of separation between India and Burma, but a dangerous and irrelevant issue of the place of Indians in Burma itself. This was assisted by the Burmese Press and politicians by emotional and ill-advised appeals over a number of years to Burmese "nationalism". And the culmination came when, after separation itself, the Burmese politicians and the Burmese Press found themselves free to pursue the dangerous and intemperate courses of anti-Indian propaganda on which they had embarked already. When the time came the ground had been well prepared in which to plant the seeds of anti-Indian rioting.

The exploitation of the "Indian Question". Interim Report, Chapter IV, page 14

(7) Other phenomena to work upon were obvious but it was easy to ignore their origins and history. Burma became part of British India only for reasons of administrative convenience. But it remained geographically remote and its people different in almost every way from the people of India. By a process, essential and highly beneficial at the time to the quick development of Burma, a large and prosperous Indian population has grown up. This population grew out of a process of necessary labour immigration, commercial enterprise and financial outlay over a period of many years and has now attained in Burma an indefeasible footing as British Subjects within the Empire. This large Indian population, and the problems it presents, have, under the stress

of natural processes and artificial stimulants, lent themselves to political misunderstanding and misrepresentation as a menace to Burma's new found nationalism, to the economic life of Burmans and even to their Religion. And out of this there is the gravest danger of there arising, if it has not already arisen, a communal or racial question within Burma which is dangerous to Indians in the country and may be a danger to Burma's own future. For, it is no ordinary "communal" question of caste or religion, but it is one of race and lies between Burma and India itself.

Indian immigration.

The scale of Indian immigration into Burma in the past and the comparative experience, ability, industry and thrift, and the relative success, of the Indian financier and immigrant have, under present political influences, tended to obscure in the mind of the Burman the benefits his country has received, and will yet receive, from the Indians in the country and to create a real apprehension lest it may be continued so as to interfere with the prospects of the Burman himself in his own country. These apprehensions have been assisted to some extent by the complete breakdown in Burma, if not the complete abandonment, in the past of the policy of creating a self-supporting population of peasant proprietors of land, helped by legislation and free from the unsettling influences of artificial and fluctuating economic conditions. To these phenomena have been added the unpopularity of the Indian Chettyar, the benefit of whose presence in the country in the past has been forgotten in the financial disasters and misunderstandings of the depression and in the ensuing process which has placed him temporarily in possession of a large part of the agricultural land of Burma. And at least one social problem has emerged, upon which Burmans feel strongly, in the conditions of marriage between their women and Indians and other foreigners in the country (1).

The breakdown of the land policy. Interim Report, Chapter III, page 11.

The "Marriage Question." Interim Report, Chapter V, page 28.

(8) In the beginning of 1938 Burma embarked upon a course of political labour agitation and unrest which itself was a first cousin to the riots which followed. The strikes in the oilfields and at Syriam were we think wholly political and, in common with the riots, sprang from the same subversive political sources and dangerous economic propaganda. They too were politically designed to embarrass a Ministry because it was in power.

Labour agitation. Interim Report, Chapter VI, page 44.

(9) To these materials must be added the trade depression which set in during 1929 and its continuance throughout this decade, accompanied by world-wide unrest.

Trade depression.

(10) These were, in brief, the materials that were worked upon and were finally exploded by the exploitation of Maung Shwe Hpi's book. There has, we think, been created a real and dangerous racial problem. We think this problem is far more dangerous than the communal problems of India because it is one involving races of widely differing

A real and dangerous racial problem which must be cured before it is too late.

(1) In our interim report we stated in error that a non-Christian could not apply for a divorce under the Divorce Act. That was the law under the Indian Divorce Act (1869), *vide* section 2. By Act XXX of 1927 this section was amended and now the condition for the Courts jurisdiction to grant relief under the Act extends to a case where the petitioner or respondents profess the Christian faith. To this extent our interim report at page 32 must be amended.

characteristics and is not one of religion or community alone. We desire to make it clear that we think this danger to be a very real and pressing one to remove which, *before it is too late*, no stone should be left unturned. We cannot see in the immediate future of Burma a stability of thought and of conditions, which, if it is left alone, will allow this problem to cure itself. We find a tendency to treat it lightly. But we have satisfied ourselves that, in the minds of most Burmans, there has been created a conviction that their vital interests clash with those of the Indian and other non-Burman races in the country and that there is not room for both. We think, ourselves, that there will always be room in Burma for the Indian and that, if there were not, Burma herself probably would be the loser. But we emphasize the danger which exists, for it lies at the root of the passions which made these riots, of which Indians were the object, possible and, so long as it, and politics, subsist, will make them possible again. We are convinced that most of the present feeling lies in ignorance and misapprehension of which an unscrupulous advantage has been taken. If the evil is to be cured, then it must first be understood. Indians and Burmans must understand each others problems. The phenomenon of the presence of a great Indian community as British Subjects in Burma must necessarily present racial problems to be understood, difficulties to be removed and adjustments to be made, if, and where, they clash. But before these problems can be understood and goodwill restored, the facts will have to be examined and made known. Then only will misunderstanding be removed and then only can policies be framed under which, without injustice to either race, they can live in peace in Burma. We are not sure that at present the facts are known.

The root of the trouble is ignorance and misapprehension.

The Means employed.

Burma's history of toleration.

(11) We have said that the riots were political in character. But they were not spontaneous. We believe that, if not subjected to subversive influences, the Burman well deserves his reputation of generous tolerance, both racial and religious. It is on that account all the more tragic that riots such as those we have inquired into should have occurred. Those who are responsible for creating them and the passions which have made them possible have done a great injustice to Burma's reputation.

The four agencies. Interim Report, Chapter VI, page 33 and Chapter XIX, page 276.

(12) We think that the four agencies which share between them the burden of having created the underlying or general causes which led to the riots were the Burmese Press, the individual politician, the *Thakin* and its associated and allied groups and that element of *pongyis* which has engaged itself in politics :—

(a) The Burmese Press. Interim Report Chapter VI, page 34.

(*a*) The Burmese Press has we think pursued, both in the pre-separation and the post-separation period, a course of dangerous and intemperate political and economic prejudice against the Indian, and in particular against the Indian trading communities of Burma. It arose out of the political campaigns preceding the separation decision and it has been perpetuated since and has, unhappily, become part of the domestic politics of Burma. That portion of the Burmese Press which opposed the Coalition Ministry in office in July 1938 took, we think, deliberate political advantage of the book of Maung Shwe Hpi to

Annex 167

United Kingdom, message sent by H. E. Rance, Governor of Burma, to F. Burrows, Governor of Bengal, 8 February 1947, National Archives, FO643/61/4

(Continuation notes, précis, draft, etc.)

Rangoon, the 8th February 1947.

My dear Burrows,

My Government is very concerned over the illegal immigration into Burma from the Chittagong area. Recently one of the Members of my Executive Council visited the Arakan and he reports that some 63,000 illegal entries have made their way into the towns of Buthidaung and Maungdaw. I do not know how true this is but undoubtedly there is a great deal of criticism regarding this immigration from the indigenous people of the Arakan. I expect my Government will be taking the matter up officially with the Government of India but I thought that you would like to know in the first instance.

Your troubles seem never to get any smaller, neither do mine, I hope that we shall both be presented with "halo's" when it is time for us to pass on. I do hope that your wife, now that she has experienced a cold weather, is taking a more lenient view of India, its climate and its peoples. I have my wife with me and she is loving this country. If only there were a little less politics and a little more hard work Burma could be almost a paradise.

With my very best wishes,

Yours v. Sincerely,

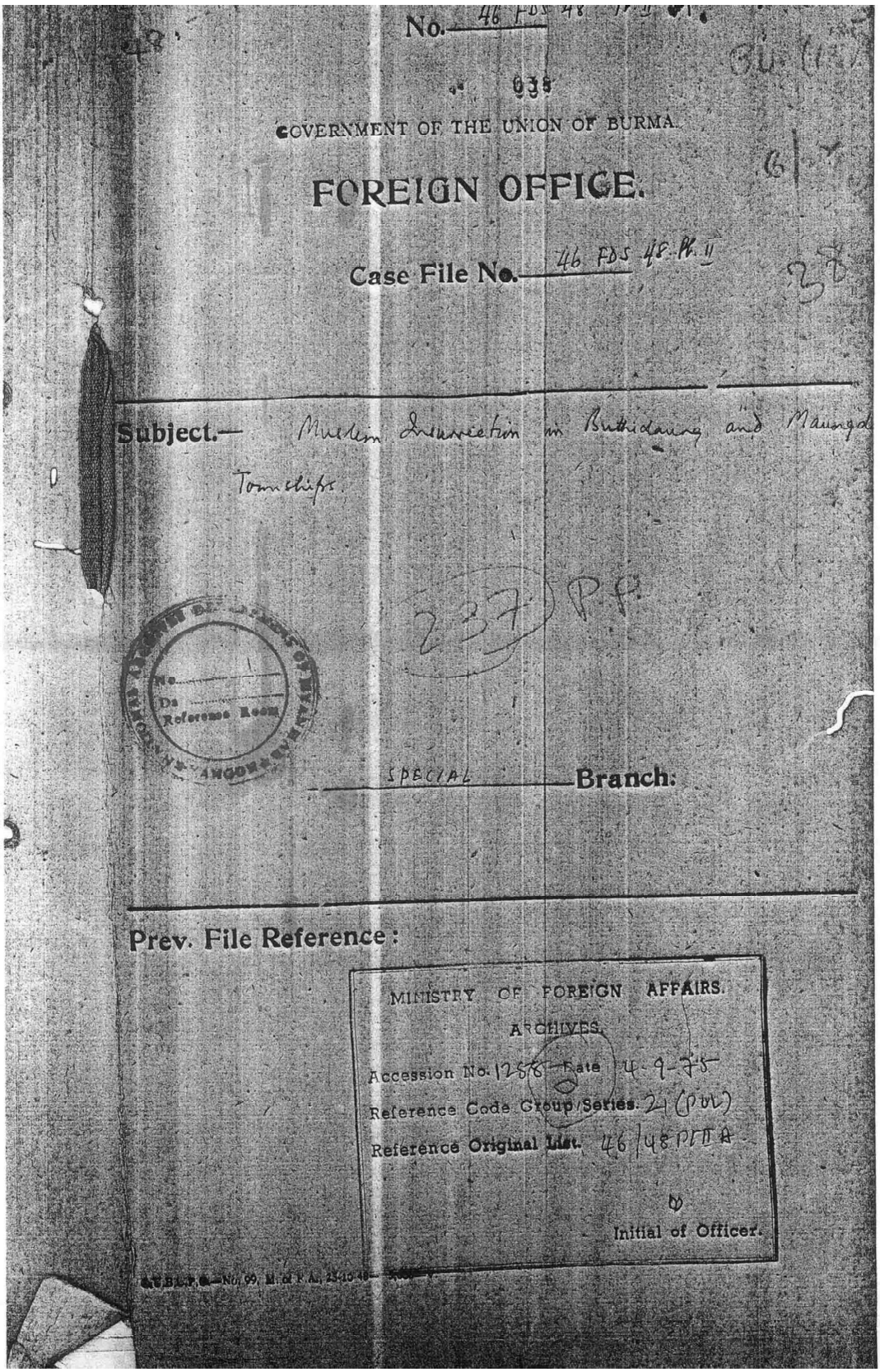
(H.E.RANCE)

His Excellency Sir Frederick Burrows, GCIE.

Governor of Bengal.
Government House
Calcutta

Annex 168

Union of Burma, Report of Police Special Branch containing the contents of an address presented by Jamiat-ul-Ulema (North Arakan) to the Prime Minister, 9 December 1948, National Archives Department of Myanmar Accession no 1288, reference code 21 (Pol)



No. 46 FDS 48 [illegible]

935

GOVERNMENT OF THE UNION OF BURMA.

FOREIGN OFFICE.

Case File No. 46 FDS 48-Pt. II

Subject.— Muslim Insurrection in Buthidaung and Maungdaw Townships.

237 PP

SPECIAL Branch.

Prev. File Reference:

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"SECCON " - ADIG.II

TELS: SOUTH 717 - DIG.SB
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160
(46 FDS 48)
154

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SPECIAL BRANCH II
SECRETARIAT BUILDINGS
RANGOON.

Dated the 7th Dec. 1948.

Copy of the following is forwarded to the :-

1. Chief Secretary Ministry of Home Affairs.
2. Permanent Secy., Foreign Office.
3. Inspector General of Police, Burma.

for information.

(WAH. LYNSDALE) S.P.
for D.I.G. of Police, S.B. Burma.

****

ADDRESS PRESENTED BY JAMIAT UL ULEMA NORTH ARAKAN.
ON BEHALF OF THE PEOPLE OF NORTH ARAKAN
TO
THE HON'BLE PRIME MINISTER OF THE UNION OF BURMA ON THE OCCASION OF HIS VISIT TO MAUNGDAW ON THE 25TH OCTOBER 1948

******

MAY IT PLEASE YOUR EXCELLENCY.

On behalf of the vast majority of the people of North Arakan which includes Maungdaw and Buthidaung Township, we are elated to feel honoured by this kind visit of You Excellency to our land and it is to us and honour rarely accorded by a Head of the Government to welcome him with unbounded loyalty and devotion amidst us.

In humbly tendering this heartiest welcome on behalf of our people of this part of the Union of Burma we most emphatically wish to express our people unstinted loyalty and devotion to the Union of Burma, the people of which we are a part. In expressing this loyalty and devotion to this country of ours, we have in mind to dispel any misunderstanding that has been created about us amongst some of our bretherns inhabiting other parts of the Union of Burma. There has been some propaganda going round about that we are as a people, labouring to unite with Pakistan or that we are creating a state of things directing towards the disruption of the Union. On behalf of our people, we wish to clear this misunderstanding once for all and declare that we as a whole never want to be seceded from the Union. We emphatically say that we will always be within the Union of Burma as her most Loyal Citizens.

We feel that we should appraise your Excellency of the Historical background of our people in this part of the Union so that there may not be any doubt as to our rights and status. We are dejected to mention that in this country we have been wrongly taken as a part of the race generally known as Chittagonions and as foreigners. We humbly submit that we are not. We have a history of our own district from that of Chittagonians. We have culture of our own. Historically we are a race by ourselves our religion of Islam was propagated amongst our ancestors by the Arabs sin e 788 A. D., in this land of ours.

The Arabs settled down in Coastal places in Arakan first in 738 A.D. They brought with them the religion of Islam. By iner- marriages with these Arab settlers and by conversion the religion of Islam became a living force amongst us and now we have at least 95 percent of our people professing this great religion. The existence of curious Arab Mosques known as "Buddar Mukan" reverenced by Buddhists and Chinese as well as Mohammedans along the Arakan coast

Arakan coast testify the trouth of this historical fact. These Buddar Mukans date back to the tenth Centrury A.D. There is still a Buddahar Mukan standing in Akyab Town, revered by all the communities in Akyab. This living fact testifies the existence in this country of the religion of Islam in tenth Century A.D. The descendents of these early Arab settlers were known as Ruwangyas or Rushangyas. Our people and most of the people professing Islam in Akyab district are the decendents of these Ruwangyas or Rushangyas and converts. The religion of Islam was recognized and respected by many of the Kings of Arakan. In the middle ages, many of the Arakanese Kings adopted Islamic names for themselves, such as Ali Khan (1434-59), Kalama Sha (Ba Sawpyu) (1459-82), Hussain Sha, (Minkhamaung) 1612-22) and Min Bin as Sulton (1531-52). These kings while introducing coinage system, inscribed " Kalama" the Mohammedan confession of faith in Persion script on their coins. The Court language was persion. All these facts, we most humbly submit, conclusively show that we are as a race not new commers or settlers in this part of the country. Our race is as old as any other races in Arakan. There are many villages and places in Maungdaw, Buthidaung and Rethedaung Townships bearing Arabic names side by side with those of Arakanese, and to quote a few instances, Arabic Nurullah village, in Arakanese Tetuchaungywa, Arabskah village, in Arakanese Hlaphawza ywa, Hanifatanki and so on. There are other historical facts and legends also, with which we do not venture to load this humble address of ours, to show out racial status in Arakan.

Our spoken dialect is an admixture of Arabic, Persion, Urdu, Arakanese and Benglis. This admixture in our dialect came to be adopted as we are a border race and which generally happened with other border races of the Union.

Our ancestors used Arabic script and this fact also shows the descent of our ancestors from the early Arab settlers. Our spoken language is diffesent from that of Chittagonian and the Bengalis. We have adopted Urdu as our written language only very recently while the Chittagonians have Bengalis as their written as well as spoken language. At present we have adopted and formulated a scheme for the introduction of Burmese as our written language. We venture to submit that lack of teachers and schools for theworking of the scheme, retarded its progress.

In the last war, during, the North Arakan campaign our people of Maungdaw, Buthidaung and Kyauktaw sacrificed their lives and properties and fought against the enemy and gave it a crashing blow, for the attainment of freedom of Burma and their brilliant and heroic records will, certainly, go down to history like other races of Burma.

Our people inhabit the area comprising Maungdaw and Buthidaung Townships and that part of Rathidaung Township to the West of Mayu River. At least 95 per cent of the population in this area are our people. The population according to 1931 census is not less than 250,000. This census does not include the population of some 12 villages in Maungdaw Township, in which 12 villages no census was taken at all. This in fact shows that the populatinn of our people inhabitation the area geographically defined above having a character of its own is in no way less than the population of the Chin Special Division which has 220,410 inhabitants.

Our people had been neglected and oppressed under the Alien British Rule and when our country regained its freedom our people were jubilous and at once fell that all the ills of a Foreign Rule would be cured and that our people would enjoy fair play and sympathetic understanding in the hands of the free Government of our country, the Union of Burma. The divide and rule Policy of an Alien Govt. had created in the past a large measure of misunderstanding and distrust between our people and our Arakanese brethrens. This Policy culminated in the massacre of 1942 of our people residing in various parts of Akyab District. This unhappy episode brought in, in its tail, communal fends through out the whole

whole of Akyab District. We are at pains to rub this unhappy happenings from the minds of us all and come to an amicable settlement between our people and our Arakanese brethrens. We venture to submit that to achieve this happy result certain unbalanced things in the administration of our area needs Your Excellency's sympathetic attention and change for a better understanding.

We feel that it is our bourden duty to appraise Your Excellency in this visit of the said unbalanced nature of the administration in this area where we reside so that Your Excellency may be able to pour Your Excellency's kind heart for for any redress that may be necessary.

Since the days of British Administration, we have been an oppressed people, oppressed by the Officialdom under the British. We are sorry to find that traces of these ills are still in existence. In our Township Advisery Committee, we are given 2 representatives as against 11 for our Arakanese brethrens, though our people forms 95 percent of the total population in the Township. Our people are placed under Arakanese Headman in villages where we are in great majority. We had officers and other personals professing our faith in the Administration of our area before a Member of our Arakanese brethrens was posted to Arakan as a Commissioner and during his Administration almost all the officers and personals were withdrawn from the Administration in our area and they were replaced by Arakanese Officers and personals. Our people have not been considered for appointments in the Union Military Forces. These are, we are sorry to submit, some of the ailings attacking the minds of our people. Besides these, very recently, we are sorry to learn, that for the coming General Election, Buthidaung Township with a population of over 80,000 is alloted one seat and Maungdaw Township with a population over 120,000 was alloted two seats for the Chamber of Deputies, whereas Akyab and Rathidaung Township with a population of about 120,000 conbined, are given three seats, and Myohaung and Kyauktaw with a population of about 180,000 conbined are given three seats. We have undergone great pains at heart to learn this unequal treatment given to us and we venture to submit that on population basis alone Maungdaw and Buthidaung Townships re entitled to be alloted not less than five seats in the Chamber of Deputies. After due consideration and meditation we are driven to feel that there was and is discrimination operating against our people in several fields of life in Arakan. We fervently hope that all concerned inrrespective of race, and creed will work to eliminate this unbalanced discrimination in the land of ours. This state of affairs created certain amount of apprehension and dissatisfaction in the minds of our people. The existence of these elements amongst our people was taken advantage of and played upon by undemocratic and law-less forces of Arakan and a few of the weak minded members our people fell a prey to the preachings and pursuations of these law-less forces.

Our people are peace-loving and while there was campaign of non-payment of Revenue through out Arakan, all our people have been loyal and paying Revenues to the Government regularly. Only very recently lawlessness and undemocratic forces crept into out midst, and we are sorry to state that many of our innocent people in the villages are suffering on account of these lawless elements. These are the little things which can be classified as the effects of the causes of dissatisfaction previously added. We venture to submit that it is our bourden duty to bring these misled members of our people back into the realm of democracy. We declare we shall work for the realization of this aim.

Your Excellency's Government has recently set up a Commission for the purpose of ascertaining the aspirations of the people for the claims of autonomy in Arakan and of solving problems arising there from. As stated before, our people possess the qualifications and characteristics of a territory having a defined geographical area with a character of its own unity of language and culture different from the Arakanese community of

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historical traditions and a fairly large population with a measure of economic self sufficiency. The desire of our people forming 96 percent of the population inhabiting the area consisting of Buthidaung and Maungdaw townships and that portion of Rathidaung township to the West of Mayu River, is to maintain the distinct identy of this area as a separate administration unit within the Union of Burma. The paramount will of our people of this area is to place it under the direct control Government of the Union of Burma, even if the rest of Arakan enjoys the status of a separate state or an Antonomus Region of the Union. Our area being one on the border of the Union, we feel that we will be better protected from the inroads of the people of a Foreign State, if we are directly under the protection of the Government of the Union. Our area is already too thickly populated and we do not desire to have any addition of immigrants to our area. We are economically self-sufficient it is not necessary for us to import agriculture and other labourers as is required in other parts of Akyab District. We do not depend upon Foreign labour for our agricultural purposes as is necessary in other parts of Arakan. We submit that the creation of the area inhabited by our peophe as a separate Administrative unit is the only means to solve the deverse problems facing us here.

If this proposition is not practicable in the opinion of Your Excellency's Government, we further crave leave to represent that our area may be created as a separate district with local autonomy on equal Region of Arakan. Statistic support our case that our area returns sufficient Revenue to run it as a separate district. Akyab district as it now is an oversized district in the Union of Burma with its population of 76,000 the largest population of any one district in the Union. As a separate district our area will compare favourably well with that of Insein.

We are conscious that the Union of Burma at this juncture of her History requires the greatest of National solidarity needed by any nation for her very existence, we are conscious that there should be complete unity amongst all the races of the Union, we cannot and well never appreciate and encourage any lawlessness in the country. We assure Your Ecellency that our people will co-operate with Your Excellency's Govt. to the obliterate lawlessness in the country. We are one with Your Excellency when Your Excellency addressed the Regional Autonomy Commission, that "What then is the foundation of which the national unity should be built? To put it in a nut-shell the firm foundation is no other than the satisfaction of all the firm foundation is no other than the satisfaction of all nstionals .... To put it briefly, satisfaction is not other than conviction by each national group that it is receiving fair and just treatment at the hands of others. Mere lip service cannot get satisfaction; it must be implemented by deeds."

On befhalf of our people in offering this address of Welcome to Your Excellency to our humble land, we also offer our prayer for Your Excellency&s long life and we pray "Long live the Union of Burma, and she may ever be guided by the wisest of all statesmen".

We ever remain loyal servants of
the Union of Burma.

President and members, on behalf
of the Jamiat-UL-Ulema.

Kz. D/- 16.11.48.

DOCUMENTS OF THE UNITED NATIONS AND OF UNITED NATIONS BODIES

Annex 169

UN GA, Draft Convention for the Prevention and Punishment of Genocide (Prepared by the Secretariat), UN Doc. A/AC.10/42, 6 June 1947, reproduced in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

Volume One

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Annex 169

United Nations *Nations Unies* UNRESTRICTED
GENERAL ASSEMBLY ASSEMBLEE GENERALE A/AC.10/42
6 June 1947
ENGLISH ONLY

COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

DRAFT CONVENTION FOR THE PREVENTION AND PUNISHMENT OF GENOCIDE

(Prepared by the Secretariat)

Preamble

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

1. They call on the solidarity of all members of the international community to oppose this heinous crime.
2. They proclaim that the acts of genocide under the present Convention are crimes against the Law of Nations, the prevention and punishment of which meet a fundamental need of civilization, international order and peace.
3. They pledge themselves to prevent all acts of genocide and to punish all persons guilty of such acts, wherever they may occur.

Article 1

Definitions

(Protected Groups)

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

(Acts Qualified as Genocide)

II. In this Convention, the word "genocide" is understood to mean criminal acts against any one of the groups of human beings aforesaid,

Article 10

(International Court Called upon to Try Genocide)

For this section, two drafts are submitted:

1st draft:

The penal court under Article 8 shall be the International Court having jurisdiction in all matters connected with international offences.

2nd draft:

An international court will be instituted to try genocide offences (cf. Annexes).

Article 11

(Dissolution of Groups or Organizations Having Taken Part in Genocide)

The High Contracting Parties pledge themselves to the dissolution of any group or organization which has taken part in any act of genocide mentioned in the aforesaid Articles 1, 2, 3.

Article 12

(Of Action by United Nations to Suppress Genocide)

Notwithstanding any dispositions under the preceding articles, should the aforesaid crimes be committed in any part of the world, or should there be serious reasons to believe that they have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

The said High Contracting Parties may take every measure in their power to give effect to the intervention of the United Nations.

Article 13

(Indemnity to Genocide Victims)

When genocide is committed in a country by the government in power or by sections of the population without the government succeeding in effectively suppressing it, the State shall pay to the survivors of any

human group which is a victim of genocide such indemnity as the United Nations may decree.

Article 14

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

Disputes as to the interpretation or application of the present Convention shall be submitted to the International Court of Justice.

Article 15

(Language – Date of the Convention)

This Convention, of which the Chinese, English, French, Russian and Spanish texts are authentic, shall bear the date of……

Article 16

(First Draft)

(What States may Accede. Means of Accession)

1. The present Convention shall be open to accession by all the Members of the United Nations and non-Member states to which the Economic and Social Council has sent an invitation.
2. The instruments of accession shall be transmitted to the Secretary-General of the United Nations.

(Second Draft)

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

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

2. After the… day of… 1948 the present Convention may be acceded to by any Member state of the United Nations and by and non-Member state having received the aforesaid invitation.

Annex 170

UN GA, Draft Convention for the Prevention and Punishment of Genocide (Prepared by the Secretariat), UN Doc. A/AC.10/42/Rev.1, 12 June 1947, reproduced in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (2008)

The Genocide Convention

The Travaux Préparatoires

By
Hirad Abtahi and Philippa Webb

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Annex 170

United Nations GENERAL ASSEMBLY | *Nations Unies* ASSEMBLEE GENERALE | UNRESTRICTED
A/AC.10/42/Rev.1
12 June 1947
ENGLISH
ORIGINAL: FRENCH

COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

IRAFT CONVENTION FOR THE PREVENTION AND FUNISHMENT OF GENOCIDE

(Prepared by the Secretariat)

Preamble

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

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

Article 1

Definitions

(Protected Groups)

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

(Acts qualified as Genocide)

Article 10

(International Court competent to try Genocide)

Two drafts are submitted for this section:

1st draft: The court of criminal jurisdiction under Article 9 shall be the International Court having jurisdiction in all matters connected with international crimes.

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

Article 11

(Dissolution of Groups or Organizations Having Participated in Genocide)

The High Contracting Parties pledge themselves to dissolve any group or organization which has participated in any act of genocide mentioned in Articles 1, 2, 3 above.

Article 12

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

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

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

Article 13

(Reparations to Victims of Genocide)

When genocide is committed in a country by the government in power or by sections of the population without the government succeeding in effectively suppressing it, the State shall grant to the survivors of the human group that is a victim of genocide a reparation the nature and amount of which is to be determined by the United Nations.

Article 14

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

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

Article 15

(Language – Date of the Convention)

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of.....

Article 16

(First Draft)

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

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

(Second Draft)

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

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

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

Annex 171

UN GA, Letter from the Chairman of the Committee on the Progressive Development of International Law and its Codification to the Secretary-General on the Draft Convention on Genocide dated 17 June 1947, UN Doc. A/AC.10/55, 18 June 1947, reproduced in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (2008)

The Genocide Convention

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Annex 171

United Nations *Nations Unies* UNRESTRICTED
GENERAL ASSEMBLY ASSEMBLEE GENERALE A/AC.10/55
18 June 1947
ORIGINAL: ENGLISH

COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

LETTER FROM THE CHAIRMAN OF THE COMMITTEE TO THE SECRETARY-GENERAL ON THE DRAFT CONVENTION ON GENOCIDE

17 June 1947

His Excellency Mr. Trygve Lie
Secretary-General, United Nations
Lake Success, New York

Sir,

The Committee has received, under cover of your letter of 10 June 1947 the text of "the draft convention for the prevention and punishment of the crime of genocide, drawn up by the Secretariat, with the assistance of experts in the field of international and criminal law, in accordance with the Resolution of the Economic and Social Council of 28 March 1947."

The Committee fully realizes the urgency, which was expressed in the recommendation contained in the Resolution of the General Assembly of 11 December 1946, of organizing cooperation between States with a view to facilitating the speedy prevention and punishment of the crime of genocide. It notes, however, that the text prepared by the Secretariat, owing to lack of time, has not yet been referred to the Member Governments of the United Nations for their comments, as is contemplated in the Resolution of the Economic and Social Council, and it regrets that, in the absence of information as to the views of the governments, it feels unable at present to express any opinion in the matter.

I have the honour to be, Sir,
Your obedient Servant,
Sir Dalip Singh, Chairman,
Committee on the Progressive
Development of International
Law and its Codification

Annex 172

UN ECOSOC, Draft Convention on the Crime of Genocide, UN Doc. E/447, 26 June 1947

Available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/701/92/pdf/NL470192.pdf?OpenElement

United Nations | *Nations Unies*

ECONOMIC AND SOCIAL COUNCIL | CONSEIL ECONOMIQUE ET SOCIAL

UNRESTRICTED

E/447
26 June 1947
ENGLISH
ORIGINAL: FRENCH

DRAFT CONVENTION ON THE CRIME OF GENOCIDE

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

/TABLE OF CONTENTS

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

"The Economic and Social Council,

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

"(a) to undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and

"(b) after consultation with the General Assembly Committee on the Development and Codification of International Law and if feasible the Commission on Human Rights, and after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide."

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

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

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

II. How the present study was prepared

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

In determining what should be included in the draft, he was guided by

/the Assembly

the Assembly resolution of 11 December 1946 concerning genocide, and he adopted the principles and methods of application established therein.

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

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

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

III. Definition of the notion of genocide

Genocide is the deliberate destruction of a human group.

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

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

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

Secondly, if the notion of genocide were excessively wide, the success of the convention for the prevention and punishment of what is perhaps the most odious international crime would be jeopardized. If

/the convention

The three forms of genocide

Article I describes the three forms of genocide which Professor Lemkin has called "physical", "biological" and "cultural" genocide.

In order to convey a concrete and exact idea of these three forms, the draft gives a general enumeration of the material means used for committing genocide.

1. "Physical" genocide

This involves acts intended to "cause the death of members of a group, or injuring their health or physical integrity".

The means referred to are:

(a) Group massacres or individual executions

This calls for no comments.

(b) Subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals.

This is what may be termed "slow death". In such cases, the intention of the author of genocide may be less clear. Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is thirty per cent to forty per cent, the intention to commit genocide is unquestionable. There may be borderline cases where a relatively high death rate might be ascribed to lack of attention, negligence or inhumanity, which, though highly reprehensible, would not constitute evidence of intention to commit genocide. At all events, there are such borderline cases which have to be dealt with on their own merits.

(c) Mutilations and biological experiments imposed with no curative purpose

These practices were current in Hitlerite Germany.

Biological experiments are to be condemned even if they have a scientific value because they imply that the life and health of the members of the group of human beings subjected to them are regarded as

/worthless.

worthless.

(d) Deprivation of all means of livelihood by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

Man cannot live without the help he receives from the community in exchange for his services to it. If the State systematically denies to members of a certain group the elementary means of existence enjoyed by other sections of the population, it condemns such persons to a wretched existence maintained by illicit or clandestine activities and public charity, and in fact condemns them to death at the end of a medium period instead of to a quick death in concentration camps; there is only a difference of degree.

2. "Biological" genocide

This is characterized by measures aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive.

Such restrictions may be physical, legal or social.

Article I lists these processes as follows:

(a) Sterilization and/or compulsory abortion

These are biological means.

(b) Segregation of the sexes

This may be induced by various causes such as compulsory residence in remote places, or the systematic allocation of work to men and women in different localities.

(c) Obstacles to marriage

These are legal restrictions.

3. "Cultural" genocide

This consists not in the destruction of members of a group nor in restrictions on birth, but in the destruction by brutal means of the specific characteristics of a group; this section gave rise to divergent views among the experts.

/Professor Donnedieu

ARTICLE V

(Command of the Law and Superior Orders)

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

Comments on Article V

It should not be possible for offenders, whoever they may be, to take shelter behind a command of the law or superior orders.

After the fall of a regime which has organized genocide, individuals and officials will no doubt invoke this excuse. They will say: "It was not for us to question the law whereby we were governed, or the commands which came to us from a superior authority. Out duty was to obey, and we obeyed."

Hence great care must be taken to provide expressly that command of the law or superior orders are no defence.

In certain cases, of course, a command of the law or superior orders may constitute extenuating circumstances. That is a question for the judge. The principle, however, is that an individual who participated in genocide will not escape liability by pleading that the law or superior orders forced him to participate in genocide.

/ARTICLE VI

ARTICLE VI

(Provisions concerning Genocide in Municipal Criminal Law)

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

Comments on Article VI

It is essential that the Parties to the Convention should introduce into their criminal law provisions for the punishment of the acts of genocide as defined by the Convention.

It did not seem advisable to establish in the Convention the punishments to be applied to various acts of genocide, because penal systems vary and because it is preferable to leave some freedom of action to States, whenever this does not present any real disadvantage. It is enough to say that the penalties should be sufficiently rigorous to make punishment effective.

/ARTICLE VII

everything in their power to support any action by the United Nations intended to prevent or stop these crimes.

2. Mr. Pella and Mr. Lemkin thought it desirable to provide that the Secretary-General of the United Nations should have the duty of informing the competent organs of the United Nations. For various reasons, Governments might hesitate to take the initiative in submitting a question to the organs of the United Nations. In such cases, the Secretary-General, being free of the particular (and possibly perfectly legitimate) preoccupations of States, would act as a representative of the common cause and lay the matter before the organs of the United Nations.

This proposal, however, even in the opinion of its authors, raises the constitutional question whether a Convention to which not every Member of the United Nations will necessarily be a party may confer upon the Secretary-General powers or duties relating to the application of the Charter which are not already laid down by the Charter.

/ARTICLE XIII

ARTICLE XIII

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

Comments on Article XIII

1. This article contains far-reaching principles.

It represents an application of the principle that populations are to a certain extent answerable for crimes committed by their governments which they have condoned or which they have simply allowed their governments to commit.

Some, perhaps, will contest the validity of this principle by arguing that often criminal intent, the basis of criminal liability, was absent in the population and that the crimes committed by governments were so committed against the will of the majority of the people, the government representing only a minority which forced its will on the people; or again, that the country as a whole did not know what it was doing because it was misled by systematic government propaganda without any means of opposition.

The first answer to that will be that things do not actually always happen like that. Sometimes criminal conduct by governments does not betray the will of the people but accurately reflects the passions, hatreds and prejudices common to the majority or a large part of the population, the remainder of the population being indifferent, passive or offering only mild opposition.

But even where there was no criminal intent on the part of the majority of the people of the country, it is just that the country as a whole should be held to account for the following reasons:

(a) In this case, the nature of the liability of a whole population

is not "penal", involving punishment, but "civil", involving the obligation to make reparations to victims of genocide. Hence, such liability can be created even in the absence of a general criminal intent on the part of the nation as a whole.

(b) "Civil" liability, in traditional legal thought, is based on the idea of a wrongful act.* Such wrong need not be intentional; ineptitude or negligence are sufficient grounds for liability. Whenever bad governments rule over a people the latter has always been to blame at some time or other. It may be charged with irresponsibility, negligence, indifference, naiveté, lack of judgment, or practical good sense, of courage and will, etc. If the people concerned had not displayed some of those faults it would never have brought or allowed to come to power the governments which committed genocide, or were unable to prevent it.

(c) Furthermore, "civil" liability for genocide must be borne by somebody. If the country in which genocide was committed is not to be held responsible for reparations, who is?

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

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

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

/2. What is

2. What is redress to consist of?

Redress may be made to members of the human group who are victims of genocide, or to the group as a whole.

(a) Redress for members of the group.

The dead cannot be brought back to life but compensation or pensions may be given to the spouses, children, or other persons maintained by the deceased.

There may be restitution of seized property or compensation corresponding to the value of the goods in question, wherever such restoration is not possible.

Compensation may be made to persons who have been imprisoned, deported or maltreated.

Special benefits may be granted to survivors of the group in the form of houses, scholarships, etc.

(b) Redress for the group as such.

Such redress may take various forms: reconstitution of the moral, artistic and cultural inheritance of the group (reconstruction of monuments, libraries, universities, churches, etc. and compensation to the group for its collective needs).

Annex 173

UN ECOSOC, Ad Hoc Committee on Genocide, Summary Record of the Eighteenth Meeting (23 April 1948), UN Doc. E/AC.25/SR.18, 26 April 1948

Available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/800/69/pdf/NL480069.pdf?OpenElement

United Nations | *Nations Unies*

ECONOMIC AND SOCIAL COUNCIL | **CONSEIL ECONOMIQUE ET SOCIAL**

UNRESTRICTED

E/AC.25/SR.18
26 April 1948

ORIGINAL : ENGLISH

AD HOC COMMITTEE ON GENOCIDE

SUMMARY RECORD OF THE EIGHTEENTH MEETING

Lake Success, New York
Friday, 23 April 1948, at 2 p.m.

Chairman:	Mr. MAKTOS	(United States of America)
Vice-Chairman:	Mr. MOROZOV	(Union of Soviet Socialist Republics)
Rapporteur:	Mr. AZKOUL	(Lebanon)
Members:	Mr. LIN MOUSHENG	China
	Mr. ORDONNEAU	France
	Mr. RUDZINSKI	Poland
	Mr. PEREZ-PEROZO	Venezuela

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defined in articles I, II, III and IV of the present Convention" after "religious hatred" should be deleted.

Mr. MOROZOV (Union of Soviet Socialist Republics) accepted that amendment.

Mr. PEREZ-PEROZO (Venezuela) considered the USSR draft somewhat long and repetitious, although he would be willing to support it in a shorter form.

He proposed that the word "criminal" before the word "legislation" should be deleted, as he considered that such measures would be more effective if they were contained in other types of legislation besides criminal. Educational measures, for example, might be introduced.

Secondly, he suggested that the draft would be clearer and briefer in the following form: "...make provision in their legislation for measures aimed at the prevention and punishment of genocide and other punishable acts, as defined in the present Convention", deleting the rest of the draft.

Mr. MOROZOV (Union of Soviet Socialist Republics) accepted the deletion of the word "criminal".

He could not, however, agree to the second suggestion submitted by Mr. Perez-Perozo, and proposed therefore that the Committee should vote first on the Venezuelan amendment, and, if that were defeated, on the USSR draft.

Mr. LIN MOUSHENG (China) considered that the authors of the other two drafts should be allowed to make statements in support of them before a vote were taken.

The important difference between his draft and the proposed Venezuelan amendment of the USSR draft was that the former used the word "undertake" instead of "pledge", and spoke of "such legislation...

/as may be

Mr. LIN MOUSHENG (China) proposed that, in order to avoid a vote, the Committee could decide to consider the USSR draft and decide upon it after a very short discussion.

Mr. ORDONNEAU (France) accepted that suggestion.

Mr. MOROZOV (Union of Soviet Socialist Republics) thought that the Committee should first decide whether the Convention should contain a provision whereby the High Contracting Parties were required to introduce into their national legislation measures for the prevention and suppression of genocide and penalties for the punishment of the crime. If such a provision was agreed upon in principle, his draft and any amendments to it could next be discussed.

The Committee decided, by four votes to three, to include such a provision.

DISCUSSION OF TEXT OF ARTICLE FOR THE PROVISION OF MEASURES AGAINST GENOCIDE TO BE INTRODUCED INTO NATIONAL LEGISLATIONS

Mr. MOROZOV (Union of Soviet Socialist Republics) proposed the following text:

"The High Contracting Parties pledge themselves to make provision in their criminal legislation for measures aimed at prevention and suppression of genocide and also at prevention and suppression of incitement to racial, national and religious hatred, as defined in articles I, II, III and IV of the present Convention and to provide measures of criminal penalties for the commission of those crimes, if such penalties are not provided for in the active codes of that State."

The CHAIRMAN, speaking as representative of the United States of America, proposed the following text:

/"The High

Annex 174

UN ECOSOC, Ad Hoc Committee on Genocide, Summary Record of the Nineteenth Meeting (27 April 1948), UN Doc. E/AC.25/SR.19, 5 May 1948

Available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/800/72/pdf/NL480072.pdf?OpenElement

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ECONOMIC AND SOCIAL COUNCIL | **CONSEIL ECONOMIQUE ET SOCIAL**

UNRESTRICTED

E/AC.25/SR.19
5 May 1948

ENGLISH
ORIGINAL: FRENCH

AD HOC COMMITTEE ON GENOCIDE

SUMMARY RECORD OF THE NINETEENTH MEETING

Lake Success, New York,
Monday, 27 April 1948, at 11.15 a.m.

Chairman:	Mr. MAKTOS	United States of America
Vice-Chairman:	Mr. MOROZOV	Union of Soviet Socialist Republics
Rapporteur:	Mr. AZKOUL	Lebanon
Members:	Mr. LIN MOUSHENG	China
	*Mr. DEVINAT	France
	Mr. ORDONNEAU	France
	Mr. RUDZINSKI	Poland
	Mr. PEREZ-PEROZO	Venezuela
Secretariat:	Mr. SCHWELB	Assistant Director of the Human Rights Division
	Mr. GIRAUD	Secretary of the Committee

*Mr. Devinat replaced Mr. Ordonneau during the first part of the meeting.

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be replaced by the words: "to give effect to the provisions of the present convention".

Mr. RUDZINSKI (Poland) pointed out that this proposal too, amounted to reverting to the text of a previous proposal and consequently it should also be regarded as inadmissable.

The CHAIRMAN asked the Committee whether they agreed that the proposal of the United States delegation should be put to the vote.

The Committee decided by four votes to two, with one abstention, to put the United States proposal to the vote.

The CHAIRMAN put to the vote the text of the draft Article submitted by the Chinese delegation and amended it to read as follows:

"The High Contracting Parties undertake to enact the necessary legislation, in accordance with their constitutional procedures, to give effect to the provisions of the present convention."

The Committee approved this text by four votes to three

Mr. MOROZOV (Union of Soviet Socialist Republics) regretted that he was obliged to protest against the procedure that had been followed. Two amendments to the same text, submitted in the same procedural conditions, had been the subject of diametrically opposite rulings from the Chair regarding their admissibility. Such a manner of conducting the debates could not contribute to the normal progress of the Committee's work.

In explanation of his vote against the proposed text, he said that he had opposed it because, in its present form, it did not guarantee the real and practical adoption of legislation for the prevention and punishment of genocide. Moreover, this text did not take account of the prevention and punishment of incitement to racial,national and religious hatred.

/Consequently

Annex 175

UN ECOSOC, Ad Hoc Committee on Genocide, Report of the Committee and draft Convention drawn up by the Committee, UN Doc. E/794, 24 May 1948

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/802/87/pdf/NL480287.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/803/69/pdf/NL480369.pdf?OpenElement

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ECONOMIC AND SOCIAL COUNCIL | **CONSEIL ECONOMIQUE ET SOCIAL**

UNRESTRICTED

E/794
24 May 1948
ENGLISH
ORIGINAL: FRENCH

AD HOC COMMITTEE ON GENOCIDE

(5 April - 10 May 1948)

REPORT OF THE COMMITTEE

AND

DRAFT CONVENTION DRAWN UP BY THE COMMITTEE

(Dr. Karim AZKOUL - Rapporteur)

/TABLE OF CONTENTS

ARTICLE VI

(Domestic Legislation) "The High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedures to give effect to the provisions of this Convention."

Observations

The representative of the Union of Soviet Socialist Republics had submitted for the Committee's consideration the following text:

"The High Contracting Parties pledge themselves to make provision in their criminal legislation for measures aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement of racial, national and religious hatred in accordance with the provisions of this Convention and to provide criminal penalties for the authors of such crimes."

The question was raised by some members of the necessity in general of a special provision in the Convention on the legislative measures for the fulfilment of the Convention. It was contended that States were under the obvious obligation to take every measure for the proper performance of the obligations to which they subscribe. Moreover, the facts constituting genocide are already dealt with by domestic criminal laws (murder, etc.).

It was contended that the provisions of such an article might prevent certain countries from becoming parties to the Convention owing to the difficulty of obtaining the passing of the necessary legislation. This obstacle is particularly serious in federal States where criminal law is principally in the province of legislation, by the individual States which form the federation.

To this effect the representatives of the Union of Soviet Socialist Republics and Poland stated that there already existed a number of conventions, providing for the obligation of States-signatories to envisage in their legislation the measures of criminal penalties for certain kinds of crimes.*

They contended that the introduction in the national legislation of laws for the suppression and prevention of genocide, the suppression and prevention of racial, national and religious hatred and laws for criminal

* For example: The Convention for the Prevention of Traffic in Women and Children, Geneva, 30 September 1921; Convention for the Repression of Counterfeiting Currency, Geneva, 20 April 1929, etc.

/penalties

Annex 176

UN GA, Sixth Committee, Genocide—Draft Convention and Report of the Economic and Social Council, Union of Soviet Socialist Republics: Amendments to the draft convention (E/794), UN Doc. A/C.6/215/Rev.1, 9 October 1948

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/801/14/pdf/NL480114.pdf?OpenElement

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https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/802/99/pdf/NL480299.pdf?OpenElement

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GENERAL ASSEMBLY | ASSEMBLEE GENERALE
A/C.6/215/Rev.1
9 October 1948
ENGLISH
ORIGINAL: RUSSIAN

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Third session
SIXTH COMMITTEE

GENOCIDE - DRAFT CONVENTION
AND REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Union of Soviet Socialist Republics: Amendments to the draft convention (E/794)

The Soviet delegation proposes the introduction into the draft Convention on Genocide (E/794, 24 May 1948) of the following amendments:

1. In the Preamble to the Convention:

(a) In paragraph 1, page 68 of the Russian text (page 54 of the English text) (E/794), after the words "a grave crime against mankind", add the words: "directed towards the destruction of separate human groups on racial, nationalistic or religious grounds"; in the same paragraph, after the words "... the United Nations", delete the word "and", substitute a comma, and after the words "... by the civilized world, add: "and which is a blot on the countries where such crimes, propaganda and incitement to their commission are still practised";

(b) In paragraph 2 on page 68 of the Russian text (page 54 of the English text) (E/794), after the words: "having been profoundly shocked by many recent instances of genocide", add the words: "which is organically bound up with Fascism-Nazism and other similar race 'theories' which preach racial and national hatred, the domination of the so-called higher races and the extermination of the so-called lower races";

(c) In paragraph 4 on page 68 of the Russian text (page 54 of the English text) (E/794), after the words: "... being convinced that", add the following words: "all civilized peoples are required both in peace and in war to take decisive measures"; in the same paragraph, after the words: "... for the commission of genocide", add the words: "and to suppress and prohibit the stimulation of racial, national and religious hatred and to punish severely persons guilty of inciting, committing or preparing the commission of the aforementioned crimes and that to this end..."

/2. Delete

4. To Article IV to add points "e" and "f" as drafted hereunder and accordingly to call point "e" in the draft Convention point "g". The following is the proposed working of the new points "e" and "f":

"(e) The preparatory acts for committing Genocide in the form of studies and research for the purpose of developing the technique of Genocide: setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for Genocide; issuing instructions or orders and distributing tasks with a view to committing Genocide";

"(f) All forms of public propaganda (press, radio, cinema etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of Genocide." (E/794, page 70 of the Russian text, page 55 of the English text).

Article V to become point 1 of that Article and to be completed by the addition of point 2 as follows: "command of the law or superior orders shall not justify genocide." (E/794, page 71 of the Russian text, page 55 of the English text).

6. In Article VI, after the words "to give effect to the provisions of this Convention...", add "... aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement of racial, national and religious hatred...", and after "... the necessary legislation in accordance with their constitutional procedures", add the words "to provide criminal penalties for the authors of such crimes". (E/794, page 71 of the Russian text, page 56 of the English text).

7. In Article VIII delete the words "or by a competent international tribunal." (E/794, page 39 of the Russian text, page 29 of the English text).

8. In Article VIII, delete points 1 and 2, and substitute the following: "the High Contracting Parties undertake to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter." (E/794, pages 71 and 72 of the Russian text, page 56 of the English text).

9. Article X of the Convention to be deleted. (E/794, page 72 of the Russian text, pages 56 and 57 of the English text).

10. Complete the Convention by adding the following Article:
"The High Contracting Parties pledge themselves to disband and prohibit any organizations aimed at inciting racial, national or religious hatred or the commission of acts of genocide".

11. In Article XII, point 1, for "General Assembly" substitute the words "Economic and Social Council".

/12. Replace

Annex 177

UN GA, Sixth Committee, 95th meeting (8 November 1948), UN Doc. A/C.6/SR.95

Taken from:

United Nations, Official records of the Third Session of the General Assembly, Part I, Legal Questions: Sixth Committee: Summary records of meetings, 21 September--10 December 1948

English and French version of the full document available at:

https://digitallibrary.un.org/record/698144?ln=en

He stated that the question was whether extradition should be granted for the acts enumerated in article II or, as proposed in the *Ad Hoc* Committee draft, for the acts listed in article IV. He would put the Belgian proposal to the vote. Those voting in favour of it would be voting for the elimination of the reference to article IV.

The amendment was rejected by 17 votes to 16, with 4 abstentions.

Mr. CHAUMONT (France) said that he had voted against the Belgian amendment because of the procedure adopted. If effective international guarantees were created, it was well that the Belgian amendment had been rejected. If not, then the anxiety of the Belgian delegation was fully comprehensible.

The CHAIRMAN then put the United Kingdom amendment [*A/C.6/236*] to the vote.

The amendment was adopted by 27 votes to 7, with 2 abstentions.

Mr. KAECKENBEECK (Belgium) said he had been obliged to vote against the United Kingdom amendment because the retention of the reference to article IV would involve serious legal difficulties and might even preclude Belgian acceptance of the convention as a whole.

Mr. CHAUMONT (France) said that he had voted in favour of the amendment, although he preferred the drafting of the Belgian amendment.

The meeting rose at 1 p.m.

NINETY-FIFTH MEETING

Held at the Palais de Chaillot, Paris, on Monday, 8 November 1948, at 3.15 p.m.

Chairman: Mr. R. J. ALFARO (Panama).

44. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

ARTICLE IX *(conclusion)*

In reply to a request made by the representative of Luxembourg at the 94th meeting, the CHAIRMAN stated that extradition would be effected in conformity with the laws and treaties in force, as provided in the second paragraph of article IX; consequently States, whose legislation did not provide for the extradition of their own nationals, would be under no obligation whatsoever to grant it.

He then put to the vote the whole of article IX in the following wording:

"Genocide and the other acts enumerated in article IV shall not be considered as political crimes for the purposes of extradition.

"Each Party to this convention pledges itself to grant extradition in such cases in accordance with its laws and treaties in force."

Article IX was adopted by 26 votes to 2, with 5 abstentions.

Il déclare que la question est de savoir si c'est pour les actes énumérés à l'article II ou, comme le propose le projet du Comité spécial, pour les actes énumérés à l'article IV que l'extradition doit être accordée. Il va mettre aux voix la proposition de la Belgique: les membres de la Commission qui voteront pour seront considérés comme votant en faveur de l'élimination de la référence à l'article IV.

Par 17 voix contre 16, avec 4 abstentions, l'amendement est rejeté.

M. CHAUMONT (France) déclare qu'il a voté contre l'amendement de la Belgique en raison de la procédure adoptée. Si des garanties internationales effectives doivent être assurées, alors il est bien que l'amendement de la Belgique ait été rejeté; dans le cas contraire, les préoccupations de la délégation de la Belgique sont parfaitement compréhensibles.

Le PRÉSIDENT met alors aux voix l'amendement du Royaume-Uni [*A/C.6/236*].

Par 27 voix contre 7, avec 2 abstentions, l'amendement est adopté.

M. KAECKENBEECK (Belgique) dit qu'il a été forcé de voter contre la proposition du Royaume-Uni en raison des sérieuses difficultés juridiques que la référence à l'article IV provoqueront, ce qui pourra même empêcher la Belgique d'accepter la convention dans son ensemble.

M. CHAUMONT (France) déclare qu'il a voté pour l'amendement, bien qu'il préfère la rédaction de l'amendement présenté par la Belgique.

La séance est levée à 13 heures.

QUATRE-VINGT-QUINZIEME SEANCE

Tenue au Palais de Chaillot, Paris, le lundi 8 novembre 1948, à 15 h. 15.

Président: M. R. J. ALFARO (Panama).

44. Suite de l'examen du projet de convention sur le génocide [*E/794*]: rapport du Conseil économique et social [*A/633*]

ARTICLE IX *(fin)*

Le PRÉSIDENT précise, en réponse à la question posée à la 94ème séance par le représentant du Luxembourg, que l'extradition s'effectuera conformément aux lois et traités en vigueur, ainsi qu'il est prévu au deuxième alinéa de l'article IX, et que, par conséquent, les Etats dont la législation ne prévoit pas l'extradition de leurs nationaux ne seront nullement tenus de les livrer.

Il met alors aux voix l'ensemble de l'article IX, ainsi conçu:

"Le génocide et les autres actes énumérés à l'article IV ne seront pas considérés comme des crimes politiques pour ce qui est de l'extradition.

"Les Parties à la Convention s'engagent en pareil cas à accorder l'extradition conformément à leur législation et aux traités en vigueur."

Par 26 voix contre 2, avec 5 abstentions, l'article IX est adopté.

to the second sentence of the amendment to article V proposed by his delegation [*A/C.6/236*].

Mr. MAKTOS (United States of America) said that he had abstained from voting because, in his opinion, the word "rulers" could not be applied to all heads of State, and, particularly, to the President of the United States of America.

Mr. SUNDARAM (India) said that he also had abstained, not because he objected to the word "rulers," but because he did not think the expression "constitutionally responsible rulers" necessarily excluded the heads of State of countries having a parliamentary regime.

The CHAIRMAN opened the debate on the second sentence of the United Kingdom amendment to article V.

Mr. FITZMAURICE (United Kingdom) explained that his delegation had proposed that amendment in order that the convention might contain a direct reference to the type of genocide which was most likely to occur, i.e. genocide committed by a State or a Government. Since it was to be assumed that individuals acting on behalf of the State would not be punished by the courts of that State, it was essential to insert into the convention provisions to the effect that such acts would constitute a violation of the convention.

Those provisions should be read in conjunction with the United Kingdom amendment to article VII of the convention [*A/C.6/236/Corr.1*], which completed the idea underlying the amendment to article VII by stating that the case would be submitted to the International Court of Justice, which would order the cessation of acts of genocide, and the payment of reparation to the victims.

Mr. MAKTOS (United States of America) stressed the necessity of remaining within realistic bounds. The aim of the convention was to ensure the suppression of genocide and the punishment of the culprits. It should therefore not contain provisions regarding the payment of reparations to the victims; that question belonged to another branch of the law.

Mr. CHAUMONT (France) agreed with the United States representative's remarks. French law did not recognize the criminal responsibility of States or Governments, which were legal entities. While such entities could have financial responsibility, they could not be held criminally responsible.

The French delegation desired to restrict the definition of genocide to crimes committed by rulers, but had no objection to stressing the principle of the responsibility of Governments in acts of genocide. It drew attention, however, to the fact that the principle of the criminal responsibility of rulers was stated in the first paragraph of article V. If, therefore, the provisions proposed by the United Kingdom delegation were designed to reiterate that principle, they were unnecessary; if their purpose was to provide for a type of responsibility other than the criminal responsibility of rulers, then they were out of place in a convention for the suppression of genocide.

tire l'attention sur la deuxième phrase de l'amendement que sa délégation a proposé à l'article V [*A/C.6/236*].

M. MAKTOS (Etats-Unis d'Amérique) déclare qu'il s'est abstenu de prendre part au vote, étant donné qu'à son avis le mot *rulers* ne saurait s'appliquer à tous les chefs d'Etat, notamment au Président des Etats-Unis d'Amérique.

M. SUNDARAM (Inde) s'est également abstenu, non parce qu'il s'oppose au mot *rulers*, mais parce qu'il estime que l'expression *constitutionally responsible rulers* n'exclut pas nécessairement les chefs d'Etat des pays à régime parlementaire.

Le PRÉSIDENT ouvre le débat sur la deuxième phrase de l'amendement à l'article V proposé par la délégation du Royaume-Uni.

M. FITZMAURICE (Royaume-Uni) expose que sa délégation a proposé cet amendement afin qu'il existe dans la convention une allusion directe au cas de génocide le plus susceptible de se produire, c'est-à-dire au cas de génocide commis par un Etat ou un gouvernement. Etant donné qu'il est à prévoir que les individus qui agiront au nom de l'Etat ne seront pas punis par les tribunaux de cet Etat, il est indispensable d'insérer dans la convention des dispositions prévoyant que de tels actes constitueront une violation de la convention.

Ces dispositions doivent être lues en relation avec l'amendement du Royaume-Uni à l'article VII de la convention [*A/C.6/236/Corr.1*] qui complète l'idée qui est à la base de l'amendement à l'article V, en précisant que l'affaire sera soumise à la Cour internationale de Justice, qui ordonnera la cessation des actes de génocide et le paiement de réparations aux victimes.

M. MAKTOS (Etats-Unis d'Amérique) insiste sur la nécessité de rester sur le plan de la réalité. La convention a pour but d'organiser la répression du génocide et le châtiment des coupables. Il ne convient donc pas d'y insérer des dispositions relatives aux réparations à payer aux victimes, cette question relevant d'une autre branche du droit.

M. CHAUMONT (France) s'associe aux observations du représentant des Etats-Unis. La conception française du droit ne connaît pas la responsabilité pénale des Etats ou des gouvernements, qui sont des personnes morales. Celles-ci peuvent avoir une responsabilité pécuniaire, mais il ne saurait être question de les tenir pénalement responsables.

La délégation française, qui voulait limiter la définition du génocide aux crimes commis par les gouvernants, ne s'oppose nullement à ce que l'on fasse ressortir la responsibilité gouvernementale dans les actes de génocide. Elle attire cependant l'attention sur le fait que le principe de la responsabilité pénale des gouvernants est affirmé au premier paragraphe de l'article V et que, par conséquent, si les dispositions proposées par la délégation du Royaume-Uni visent à répéter ce principe, elles sont inutiles, et si elles tendent à prévoir une forme de responsabilité différente de la responsabilité pénale des gouvernants, elles ne trouvent pas leur place dans une convention sur la répression du génocide.

Annex 178

UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, Revised text adopted by the Sixth Committee for Article VI, UN Doc. A/C.6/254/Rev.1, 9 November 1948

English version available at:

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SIXTH COMMITTEE

GENOCIDE: DRAFT CONVENTION AND REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Revised text adopted by the Sixth Committee for Article VI

The High Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of this Convention, and in particular, to provide effective penalties for the authors of the crimes mentioned in article IV.

Annex 179

UN GA, Sixth Committee, Genocide—Draft Convention and Report of the Economic and Social Council, Belgium and United Kingdom of Great Britain and Northern Ireland: Joint amendment to article X of the draft convention on genocide (E/794), UN Doc. A/C.6/258, 10 November 1948

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/802/63/pdf/NL480263.pdf?OpenElement

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GENERAL ASSEMBLY | ASSEMBLEE GENERALE

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Third session
SIXTH COMMITTEE

GENOCIDE - DRAFT CONVENTION AND REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Belgium and United Kingdom: Joint amendment to article X of the draft Convention (E/794)

Replace article X by:

"Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice, at the request of any of the High Contracting Parties."

Annex 180

UN GA, Sixth Committee,103rd meeting (12 November 1948), UN Doc. A/C.6/SR.103

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/802/04/pdf/NL480204.pdf?OpenElement

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English and French version of the full document available at:

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the article was not an amendment but a proposal to be dealt with according to rule 120.

With regard to rule 102, Mr. Kerno fully supported the Chairman's ruling. If a point of order were raised, the Chairman was obliged to give his ruling immediately, without a discussion. If his ruling were challenged, the appeal should immediately be put to the vote, without any discussion.

The meeting rose at 1.05 p.m.

HUNDRED AND THIRD MEETING

Held at the Palais de Chaillot, Paris, on Friday, 12 November 1948, at 3.15 p.m.

Chairman: Mr. R. J. ALFARO (Panama).

52. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

ARTICLE X

The CHAIRMAN opened the discussion on article X. He recalled that the following delegations had submitted amendments to the text of the *Ad Hoc* Committee: Union of Soviet Socialist Republics [*A/C.6/215/Rev.1*]; Belgium [*A/C.6/217*]; United Kingdom [*A/C.6/236*]; Belgium and United Kingdom [*A/C.6/258*]. Two amendments had been proposed by India [*A/C.6/260*][1] and Haiti [*A/C.6/263*][2] to the joint amendment submitted by Belgium and the United Kingdom.

Mr. FITZMAURICE (United Kingdom) stated that he had withdrawn the original United Kingdom amendment [*A/C.6/236*], substituting for it the joint amendment [*A/C.6/258*]. In the absence of the representative of Belgium, it was impossible to say definitely whether the original Belgian amendment would be withdrawn, but Mr. Fitzmaurice thought that it had also been withdrawn in favour of the joint text.

Mr. DIGNAM (Australia) observed that the decision to delete article VIII of the convention (101st meeting) prejudged the fate of any provision based on the principle contained in that article, namely, action by organs of the United Nations. Article X dealt with the settlement of disputes by the International Court of Justice, which was one of the competent organs of the United Nations covered by article VIII. Strictly speaking, therefore, the Committee should not discuss article X. If it did so it should be for the definite purpose of rectifying the mistake of having deleted article VIII.

The Australian delegation considered that a clause should be inserted in article X concerning

[1] *Amendment submitted by India:* For the words "at the request of any of the High Contracting Parties" substitute the words "at the request of any of the parties to the dispute."

[2] *Amendment submitted by Haiti:* Add at the end of the text "or of any victims of the crime of genocide (groups or individuals)".

partie d'un tout. Mais si l'on considère chaque article de la convention comme une proposition séparée, la proposition de supprimer cet article ou de remplacer son texte par un autre texte ne constitue plus un amendement, mais bien une proposition à laquelle s'applique l'article 120.

En ce qui concerne l'article 102, M. Kerno appuie entièrement la décision du Président. Lorsqu'une question d'ordre est soulevée, le Président est tenu de faire connaître sa décision immédiatement et sans discussion. S'il est fait appel de la décision du Président, l'appel doit être immédiatement mis aux voix, sans discussion.

La séance est levée à 13 h. 5.

CENT-TROISIEME SEANCE

Tenue au Palais de Chaillot, Paris, le vendredi 12 novembre 1948, à 15 h. 15.

Président: M. R. J. ALFARO (Panama).

52. Suite de l'examen du projet de convention sur le génocide [*E/794*]: rapport du Conseil économique et social [*A/633*]

ARTICLE X

Le PRÉSIDENT ouvre le débat sur l'article X. Il rappelle que le texte du Comité spécial est l'objet de plusieurs amendements, présentés par les délégations suivantes: Union des Républiques socialistes soviétiques [*A/C.6/215/Rev.1*], Belgique [*A/C.6/217*], Royaume-Uni [*A/C.6/236*], Belgique et Royaume-Uni [*A/C.6/258*]. L'amendement commun présenté par la Belgique et le Royaume-Uni est l'objet de deux amendements proposés par les délégations de l'Inde [*A/C.6/260*][1] et d'Haïti [*A/C.6/263*][2].

M. FITZMAURICE (Royaume-Uni) déclare que l'amendement primitif du Royaume-Uni [*A/C.6/236*] est retiré et remplacé par l'amendement commun [*A/C.6/258*]. Le représentant de la Belgique étant absent, il n'est pas possible d'avoir une réponse formelle sur le retrait éventuel de l'amendement primitif de la Belgique, mais M. Fitzmaurice pense qu'il est également retiré en faveur de l'amendement commun.

M. DIGNAM (Australie) fait remarquer que la décision de supprimer l'article VIII de la convention (101ème séance) préjuge le sort de toute disposition ayant pour base le principe contenu dans l'article VIII, à savoir l'action des organes des Nations Unies. Or, l'article X traite du règlement des différends par la Cour internationale de Justice, qui est un des organes compétents des Nations Unies envisagés à l'article VIII. Théoriquement, la Commission ne devrait donc pas examiner l'article X. Si elle le fait, il faut que ce soit dans un but concret, c'est-à-dire avec l'intention de réparer l'erreur commise en supprimant l'article VIII.

La délégation australienne estime qu'il faudrait introduire dans les dispositions de l'article X

[1] *Amendement de l'Inde:* Remplacer les mots "à la requête d'une Haute Partie contractante" par "à la requête d'une partie au différend".

[2] *Amendement d'Haïti:* Ajouter à la fin de ce texte: "ou de toutes victimes du crime de génocide (groupes ou individus)."

international criminal court referred to in the draft resolution which the Committee had adopted at its 99th meeting on the initiative of the Netherlands and Iran, requesting the International Law Commission to study the problem. The last part of that article merely endorsed the rule that "the civil court must await decision by the criminal court", which should also be applied in the field of international law.

It was therefore essential that that part of article X should be retained; for that reason the delegation of Egypt would abstain from voting on the joint amendment.

Mr. CHAUMONT (France) explained that he too opposed the deletion of that sentence, which he had not mentioned in his preceding remarks, thinking that it would not be discussed until the Committee came to the Belgian amendment [*A/C.6/217*], which had been reintroduced by Iran.

Mr. GUERREIRO (Brazil) observed that there were no serious objections to the joint amendment.

Article VIII was unnecessary, as it merely proclaimed the rights already laid down in the United Nations Charter. Article X, on the other hand, introduced into the draft convention the compulsory jurisdiction of the International Court of Justice. That compulsory jurisdiction, in accordance with Article 36 of the Statute of the Court, applied only to the States which had signed a special declaration to that effect. Article X would thus supplement the provisions of the Statute in that respect.

The delegation of Brazil was prepared to accept the joint amendment, provided the second part of article X of the draft remained deleted, so that it would conform to article VII, from which mention of a competent international tribunal had been deleted. If the International Criminal Court, whose establishment was under consideration, were to be created, it would be an easy matter to revise the convention so as to adapt it to the new situation.

Referring to the amendments to the joint amendment, Mr. Guerreiro said that the Indian amendment related merely to a drafting point; the amendment presented by Haiti, however, was contrary to the Statute of the International Court of Justice; consequently, in view of the express provisions in the Statute as to how and by whom the Court could be seized of a matter, he suggested to the authors of the joint amendment and to the Committee that they should simply delete the last phrase of the amendment, which would in no way alter its meaning.

Mr. SPIROPOULOS (Greece) approved, in general, the principle of the joint amendment. He wondered, however, whether there was a difference between the application and the fulfilment of a convention and whether, therefore, it was necessary to retain both words in the text.

Furthermore, the notion of the responsibility of a State did not seem to him very clear. What was meant was obviously not international responsibility for violation of the convention, which was already implicit in article I of the draft convention. The French delegation thought that the amendment related to the civil responsibility of

dont l'établissement dans l'avenir est envisagé par le projet de résolution adopté par la Commission à sa 99ème séance, sur l'initiative des Pays-Bas et de l'Iran, projet de résolution invitant la Commission du droit international à étudier le problème. En effet, cette fin d'article ne fait que consacrer la règle suivant laquelle "le criminel tient le civil en l'état", qui doit également trouver son application dans le domaine du droit international.

Le maintien de cette phrase de l'article X s'impose donc: c'est pourquoi la délégation égyptienne s'abstiendra de voter sur l'amendement commun.

M. CHAUMONT (France) précise qu'il est, lui aussi, hostile à la suppression de cette phrase, dont il n'a pas parlé dans sa précédente déclaration parce qu'il pensait qu'elle ne serait discutée qu'au moment où la Commission aborderait le débat sur l'amendement belge [*A/C.6/217*], repris par la délégation de l'Iran.

M. GUERREIRO (Brésil) constate qu'il n'existe pas d'objections sérieuses contre l'amendement commun.

L'article VIII était inutile, car il ne faisait qu'énoncer des droits déjà inscrits dans la Charte des Nations Unies. Au contraire, l'article X introduit dans le projet de convention la compétence obligatoire de la Cour internationale de Justice. Cette obligation, aux termes de l'Article 36 du Statut de la Cour, n'existe qu'à l'égard des Etats qui ont signé une déclaration spéciale à cet effet. L'article X ajoutera donc à cet égard aux dispositions du Statut.

La délégation du Brésil est prête à accepter l'amendement commun, à condition que la suppression de la seconde partie de l'article X du projet soit maintenue, pour le mettre en harmonie avec l'article VII, dans lequel la mention d'un tribunal international compétent a été éliminée. Si la cour pénale internationale dont l'établissement est envisagé vient à être créée, il sera aisé de reviser la convention afin de l'adapter à cette situation nouvelle.

Quant aux amendements à l'amendement commun, M. Guerreiro pense que celui de l'Inde ne concerne qu'un point de rédaction, tandis que celui d'Haïti est contraire au Statut de la Cour internationale de Justice, et, puisque ce Statut prévoit expressément par qui et comment la Cour peut être saisie, il suggère aux auteurs de l'amendement commun et à la Commission de supprimer purement et simplement le dernier membre de phrase de l'amendement, ce qui ne saurait nuire à sa signification.

M. SPIROPOULOS (Grèce) approuve d'une façon générale le principe de l'amendement commun. Il se demande toutefois s'il existe une différence entre l'application et l'exécution d'une convention et s'il est, par conséquent, nécessaire de maintenir les deux termes dans le texte.

D'autre part, la notion de la responsabilité d'un Etat ne lui paraît pas très précise. Il ne peut s'agir évidemment de la responsabilité internationale pour violation de la convention, qui résulte déjà implicitement de l'article premier du projet de convention. La délégation française considère que cet amendement concerne la responsabilité

the State; and that idea seemed to be confirmed by the original Belgian text [*A/C.6/252*] which referred to reparation for damage caused. If, however, that interpretation were accepted, the result would be that in a number of cases the State responsible for genocide would have to indemnify its own nationals. But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself.

In spite of the criticisms he had just made, Mr. Spiropoulos would vote for the joint amendment.

Mr. PRATT DE MARÍA (Uruguay), while regretting that the principle of the establishment of an international criminal court had not been retained in the convention, favoured the joint amendment; he was, however, opposed to the Indian and Haitian amendments.

Mr. DEMESMIN (Haiti) approved the principle of the joint amendment, to which he had himself proposed an addition. He would explain later the reasons for his proposal.

Mr. INGLES (Philippines) recalled that during the discussion of article V (95th meeting), he had already stated that his delegation was opposed to any responsibility on the part of the State for acts of genocide, because under Philippine law a legal entity could have no criminal responsibility distinct from that of the various individuals of which it was composed. True, the joint amendment did not specifically state that criminal responsibility was involved, but from the very nature of the convention, the purpose of which was the punishment of genocide, that idea could be inferred.

In those circumstances, and since the clause might make it difficult for certain countries to ratify the convention, Mr. Ingles asked the Belgian and United Kingdom delegations to withdraw their amendment, for when they, as well as other delegations, had pointed out that their Governments could not accept the convention if it involved the responsibility of their monarchs, the Committee had borne their remarks in mind and had excluded from article V rulers who were not constitutionally responsible (95th meeting). If it had been agreed, at their request, that a constitutional monarch could not be guilty of genocide, why should they not agree that a State could not be responsible for that crime either?

Moreover, it might be said that that question had already been settled when the Committee opposed introducing the idea of the responsibility of the State into article V (96th meeting).

The Philippine representative could not accept the idea that a whole State should be stigmatized for acts for which only its rulers or its officials were responsible. When it was maintained that genocide was always committed with the complicity or tolerance of a State, what was meant was the rulers and the officials, namely, the persons who composed the State and not the State itself, the responsibility of which was inconceivable.

For those reasons, the Philippine delegation would vote against the amendment, and, if it were

civile de l'Etat, ce qui semble d'ailleurs confirmé par le texte belge initial [*A/C.6/252*] qui parle de réparation des dommages causés. Mais, si l'on admet cette interprétation, on aboutira, dans nombre de cas, à la situation suivante: l'Etat responsable du génocide devra indemniser ses propres ressortissants; or, l'on sait qu'en droit international, le vrai titulaire d'un droit, c'est l'Etat et non les particuliers. L'Etat donc s'indemnisera lui-même.

Malgré les critiques qu'il vient de formuler à son encontre, M. Spiropoulos votera en faveur de l'amendement commun.

M. PRATT DE MARÍA (Uruguay), tout en regrettant que le principe de la création d'une cour pénale internationale n'ait pas été maintenu dans la convention, se prononcera en faveur de l'amendement commun, mais contre les amendements de l'Inde et d'Haïti.

M. DEMESMIN (Haïti) approuve le principe de l'amendement commun auquel il a lui-même proposé une addition, dont il exposera ultérieurement les motifs.

M. INGLES (Philippines) rappelle que, lors de la discussion de l'article V (95ème séance), il a déjà exposé que sa délégation était hostile à toute responsabilité de l'Etat pour actes de génocide, parce que la législation philippine n'admet pas qu'une personne morale puisse avoir une responsabilité pénale distincte de celle des individus qui la constituent. Certes, l'amendement commun ne précise pas qu'il s'agit de responsabilité pénale, mais il est permis de l'induire de la nature même de la convention, dont l'objet même est la répression du génocide.

Dans ces conditions, et puisque cette clause pourrait constituer, pour certains pays, un obstacle à la ratification de la convention, M. Ingles demande aux délégations de la Belgique et du Royaume-Uni de retirer leur amendement, car lorsqu'elles ont invoqué, avec d'autres délégations, l'impossibilité pour leurs Gouvernements d'accepter la convention si elle engageait la responsabilité de leurs monarques, la Commission a tenu compte de leurs observations en excluant de l'article V les gouvernants constitutionnellement non responsables (95ème séance). S'il a été admis, sur leur demande, qu'un roi constitutionnel ne pouvait être coupable de génocide, pourquoi n'admettraient-elles pas qu'un Etat, non plus, ne puisse être responsable de ce crime.

D'ailleurs, on pourrait soutenir que cette question a déjà été tranchée lorsque la Commission s'est opposée à l'introduction de la notion de la responsabilité de l'Etat dans l'article V (96ème séance).

Le représentant des Philippines refuse d'accepter l'idée qu'on stigmatise un Etat tout entier pour des actes dont, seuls, ses gouvernants ou ses fonctionnaires sont responsables; il fait observer que lorsqu'on soutient que le génocide est toujours commis avec la complicité ou la tolérance d'un Etat, c'est, en réalité, des gouvernants et des fonctionnaires de cet Etat qu'on veut parler, c'est-à-dire des individus qui le composent et non de l'Etat lui-même, dont la responsabilité ne peut se concevoir.

Pour ces raisons, la délégation des Philippines votera contre l'amendement et, s'il est adopté, se

Annex 181

UN GA, Sixth Committee, 104th meeting (13 November 1948), UN Doc. A/C.6/SR.104

English version available at:

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of a State. Once that fact had been established, the State concerned would have to punish the offenders. The international responsibility of States thus entailed practical results.

The Bolivian representative thought that the joint Belgian and United Kingdom amendment considerably improved article X. On the other hand, the amendment submitted by the delegation of Haiti seemed inconsistent with Article 34 of the Statute of the Court.

The Bolivian delegation would therefore vote against the Haitian amendment.

Mr. FITZMAURICE (United Kingdom), replying to the Canadian representative, said that the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility.

The meeting rose at 5.55 p.m.

HUNDRED AND FOURTH MEETING

Held at the Palais de Chaillot, Paris, on Saturday, 13 November 1948, at 10.50 a.m.

Chairman: Mr. R. J. ALFARO (Panama).

53. Continuation of the consideration of the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

APPOINTMENT OF A DRAFTING COMMITTEE

The CHAIRMAN proposed the appointment of a drafting committee consisting of the following members: Belgium, China, Cuba, Egypt, France, Poland, Union of Soviet Socialist Republics, United Kingdom, United States of America.

It was so agreed.

ARTICLE X (*continued*)

Mr. MOROZOV (Union of Soviet Socialist Republics) stated that the joint United Kingdom and Belgian amendment [*A/C.6/258*] was not acceptable to the USSR delegation because its adoption would not prevent acts of genocide or violations of the convention. The purpose of the amendment seemed to be to prevent any country from submitting to the Security Council or to the General Assembly any complaint in regard to acts of genocide, thereby preventing the United Nations from taking quick action. The mass extermination of a human group could not be called a dispute between the parties to the convention and therefore could not be within the province of the International Court of Justice. Moreover, the Court was not the competent body to consider situations endangering the maintenance of international peace and security, since it did not have the means to prevent acts of genocide.

The question under discussion was not the criminal but the civil responsibility which provided for damages for acts of genocide. The obligation to provide for damages could exist only as a result of the admission of the offence by the State

a été commis sur le territoire d'un Etat; ce point fixé, l'Etat intéressé devra punir les coupables. La responsabilité internationale des Etats entraîne donc des conséquences pratiques.

Le représentant de la Bolivie estime que l'amendement commun de la Belgique et du Royaume-Uni constitue une amélioration sensible de l'article X. Par ailleurs, l'amendement proposé par la délégation d'Haïti semble incompatible avec l'Article 34 du Statut de la Cour.

C'est pourquoi la délégation bolivienne votera contre l'amendement d'Haïti.

M. FITZMAURICE (Royaume-Uni), répondant au représentant du Canada, déclare que la responsabilité envisagée dans l'amendement commun de la Belgique et du Royaume-Uni est la responsabilité internationale des Etats à la suite d'une violation de la convention. Il s'agit là d'une responsabilité civile et non pas d'une responsabilité pénale.

La séance est levée à 17 h. 55.

CENT-QUATRIEME SEANCE

Tenue au Palais de Chaillot, Paris, le samedi, 13 novembre 1948, à 10 h. 50.

Président: M. R. J. ALFARO (Panama).

53. Suite de l'examen du projet de convention sur le génocide [*E/794*]: rapport du Conseil économique et social [*A/633*]

NOMINATION D'UN COMITÉ DE RÉDACTION

Le PRÉSIDENT propose la nomination d'un comité de rédaction comprenant les Etats membres suivants: Belgique, Chine, Cuba, Egypte, France, Pologne, Union des Républiques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique.

Il en est ainsi décidé.

ARTICLE X (*suite*)

M. MOROZOV (Union des Républiques socialistes soviétiques) déclare que la délégation de l'URSS ne peut accepter l'amendement commun du Royaume-Uni et de la Belgique [*A/C.6/258*] parce que son adoption n'empêchera pas les actes de génocide ou les violations de la convention. Le but de l'amendement semble être d'empêcher un Etat de soumettre une plainte pour actes de génocide au Conseil de sécurité ou à l'Assemblée générale, empêchant ainsi l'Organisation des Nations Unies de prendre rapidement les mesures nécessaires. L'extermination en masse de collectivités humaines ne peut pas être considérée comme un différend entre les parties à la convention et ne peut donc être du ressort de la Cour internationale de Justice. Celle-ci, d'autre part, n'est pas compétente pour examiner les situations mettant en danger le maintien de la paix et de la sécurité internationale, car elle ne dispose pas des moyens nécessaires pour empêcher les actes de génocide.

La question qui est en discussion n'est pas la responsabilité pénale, mais la responsabilité civile, qui prévoit des réparations pour les actes de génocide. L'obligation de prévoir ces réparations ne peut découler que de la reconnaissance de

or compensation would redress the wrong. The convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation.

Mr. RAAFAT (Egypt) wished to reply to certain comments made on his statement at the 103rd meeting concerning the deletion of the last part of article X.

The Iranian representative had said that the last part of article X should be deleted; Mr. Raafat pointed out, however, that although no international criminal court existed as yet, it would be advisable not to preclude the possibility of establishing such a court at a later date. The Committee, therefore, should not adopt the Iranian proposal [*A/C.6/217*] for the deletion of the second part of article X.

Mr. Raafat requested that the joint amendment of Belgium and the United Kingdom should be divided into two parts and voted upon separately.

Mr. ABDOH (Iran), referring to the amendment submitted by the representative of Haiti (103rd meeting), said that in his opinion it was contrary to the terms of Article 34 of the Statute of the International Court of Justice.

Turning to the question of the joint amendment submitted by Belgium and the United Kingdom, Mr. Abdoh said that it would not preclude the possible intervention of other competent organs of the United Nations, such as the Security Council or the General Assembly. When a case of genocide arose which was a threat to international peace and security, Chapters VI and VII of the Charter might be applied. Article 36 of the Statute of the Court permitted the intervention of that body in the cases referred to in the joint amendment.

The Iranian representative felt that the amendment did not clearly determine the civil responsibility of States with regard to the crime of genocide; he would therefore appreciate a clarification by the United Kingdom representative on various points.

When answering a question by the representative of Canada, the United Kingdom representative had said (103rd meeting) that he envisaged civil responsibility in his amendment. In international law, a State asked for reparation of damages inflicted on its nationals by another State; but in the case of genocide, it was a question of injuries inflicted on citizens by citizens of the same State. Mr. Abdoh wondered how the civil responsibility of the State would arise. Reparations could be paid to a State when its citizens had been the victims of an act of genocide in another State, but in some of the cases envisaged in the convention, it was difficult to determine which State would have the right to damages.

The representative of Iran would also like to have the views of the representative of the United Kingdom on the nature of the damages, if a State were not directly but indirectly concerned, merely as signatory to the convention. If each State party to the convention were entitled to reparations, such a provision would obviously lead to abuse.

ni aucune compensation ne saurait réparer le dommage causé. La convention serait sans valeur, si elle était rédigée dans des termes qui permettraient aux criminels coupables d'actes de génocide de se soustraire au châtiment en payant des dommages-intérêts.

M. RAAFAT (Egypte) tient à répondre à certains commentaires sur la déclaration qu'il a faite à la 103ème séance en ce qui concerne la suppression de la dernière partie de l'article X.

Le représentant de l'Iran a dit que la dernière partie de l'article X doit être supprimée; mais M. Raafat fait observer que, bien qu'il n'existe pas encore de tribunal pénal international, il serait bon de ne pas exclure la possibilité d'en créer un ultérieurement. La Commission ne devrait donc pas adopter la proposition de l'Iran [*A/C.6/217*] tendant à la suppression de la deuxième partie de l'article X.

M. Raafat demande que l'amendement commun de la Belgique et du Royaume-Uni soit divisé en deux parties qui seront mises aux voix séparément.

M. ABDOH (Iran) déclare que l'amendement du représentant d'Haïti (103ème séance) est, à son avis, incompatible avec les dispositions de l'Article 34 du Statut de la Cour internationale de Justice.

Passant à l'amendement commun de la Belgique et du Royaume-Uni, M. Abdoh fait observer qu'il n'exclurait pas l'intervention éventuelle d'autres organismes compétents des Nations Unies, tels que le Conseil de sécurité ou l'Assemblée générale. S'il se produisait un cas de génocide qui constituât une menace à la paix et à la sécurité internationales, on pourrait avoir recours aux Chapitres VI et VII de la Charte. Aux termes de l'Article 36 de son Statut, la Cour internationale de Justice est autorisée à s'occuper des cas mentionnés dans l'amendement commun.

Le représentant de l'Iran estime que l'amendement ne définit pas clairement la responsabilité civile des Etats en matière de génocide; il serait donc reconnaissant au représentant du Royaume-Uni de bien vouloir préciser un certain nombre de points.

En réponse à une question du représentant du Canada, le représentant du Royaume-Uni a déclaré (103ème séance) que la responsabilité civile était prévue dans son amendement. En droit international, un Etat demande réparation pour des dommages causés à ses ressortissants par un autre Etat, mais, dans le cas du génocide, il s'agit de dommages causés à des citoyens d'un Etat par d'autres citoyens du même Etat; M. Abdoh se demande donc comment la responsabilité civile de l'Etat sera établie. Un Etat peut recevoir réparation lorsque ses nationaux ont été victimes d'un acte de génocide commis dans un autre Etat; toutefois, dans certains cas envisagés dans la convention actuelle, M. Abdoh ne peut parvenir à déterminer quel Etat aura droit à une réparation.

Le représentant de l'Iran voudrait également connaître l'opinion du représentant du Royaume-Uni sur la nature des réparations dans le cas d'un Etat qui serait intéressé, non pas directement, mais indirectement, en tant que signataire de la convention. Si chaque Etat partie à la convention a droit à des réparations, il en ré-

The International Court of Justice could not inflict fines and, furthermore, Mr. Abdoh wished to know what would be the juridical basis for receiving such moneys.

Mr. FITZMAURICE (United Kingdom) expressed surprise that certain delegations had argued that provision to refer acts of genocide to the International Court of Justice might be a hindrance to the punishment of the crime.

In reply to statements made by the representatives of the USSR and Poland (103rd meeting), he stated that reference to the International Court could not prevent the submission of a case of genocide to the Security Council if it threatened international peace and security. The reference of disputes as to the responsibility of States under the convention, or as to the interpretation of the convention, could not in any way affect the submission of cases to any of the competent organs of the United Nations.

With regard to the questions put to him by the representative of Iran, Mr. Fitzmaurice wished to point out that he did not contemplate that a case of cash reparations would arise. The cases of reparation mentioned by the Iranian representative did not occur in acts of genocide, because the offences were generally committed by the State against its own nationals.

An argument which had been put forward in the Committee was that to refer cases to the International Court of Justice would be useless because any action on its part would be taken too late and would not repair injuries already committed. The United Kingdom representative did not think that acts of genocide occurred suddenly; genocide was a process in which racial, religious or political groups were gradually destroyed. When it became clear that genocide was being committed, any party to the convention could refer the matter to the International Court of Justice. Should the Court decide that a breach of the convention had been committed, it could order punishment. In accordance with Article 94 of the Charter, Member States were legally bound to comply with the decisions of the International Court. Furthermore, Article 94, paragraph 2 of the Charter provided that if a State failed to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party might have recourse to the Security Council.

The United Kingdom delegation had always taken into account the enormous practical difficulties of bringing rulers and heads of States to justice, except perhaps at the end of a war. In time of peace it was virtually impossible to exercise any effective international or national jurisdiction over rulers or heads of States. For that reason, the United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide.

Mr. Fitzmaurice accepted the amendment submitted by the representative of India (103rd meeting).

sultera naturellement des abus. La Cour internationale de Justice ne peut pas infliger d'amendes; de plus, M. Abdoh voudrait savoir sur quel principe de droit on se baserait pour percevoir ces amendes en espèces.

M. FITZMAURICE (Royaume-Uni) est surpris que certaines délégations prétendent que le fait de saisir la Cour internationale de Justice d'actes de génocide risquerait de faire obstacle à la répression de ce crime.

En réponse aux déclarations des représentants de l'URSS et de la Pologne (103ème séance), M. Fitzmaurice déclare que le fait de soumettre à la Cour internationale de Justice une affaire de génocide ne saurait empêcher que le Conseil de sécurité n'en soit également saisi au cas où la paix et la sécurité internationales se trouveraient menacées. Le fait de soumettre à la Cour les différends relatifs à la responsabilité des Etats aux termes de la convention, ou à l'interprétation de la convention, ne saurait empêcher le renvoi des cas de génocide devant l'un des organes compétents des Nations Unies.

En réponse aux questions posées par le représentant de l'Iran, M. Fitzmaurice tient à préciser qu'il n'envisage pas des réparations en espèces. Les cas de réparation auxquels le représentant de l'Iran a fait allusion ne peuvent se présenter lorsqu'il s'agit du génocide, étant donné que, en général, les crimes sont commis par l'Etat contre ses propres nationaux.

On a souvent prétendu à la Commission qu'il serait inutile de soumettre les cas de génocide à la Cour internationale de Justice, car celle-ci agirait trop tard et ne pourrait réparer les torts déjà causés. Le représentant du Royaume-Uni ne pense pas que les actes de génocide se produisent subitement: le génocide est la destruction progressive de groupes raciaux, religieux ou politiques. S'il se précise qu'un génocide est en voie de perpétration, toute partie à la convention peut en saisir la Cour internationale de Justice. Si celle-ci décide qu'une violation de la convention a été commise, elle pourra infliger une peine. Conformément à l'Article 94 de la Charte, les Etats Membres sont légalement tenus de se conformer aux décisions de la Cour internationale. En outre, le paragraphe 2 de cet Article 94 prévoit que si un Etat ne satisfait pas aux obligations qui lui incombent en vertu d'un arrêt rendu par la Cour, l'autre partie peut recourir au Conseil de sécurité.

La délégation du Royaume-Uni a toujours tenu compte du fait que, du point de vue pratique, il est extrêmement difficile de traduire en justice des gouvernants et des chefs d'Etat, sauf peut-être à la suite d'une guerre. En temps de paix, il est pratiquement impossible d'exercer une juridiction internationale ou nationale efficace sur des gouvernants ou des chefs d'Etat. C'est pourquoi la délégation du Royaume-Uni a considéré qu'il était indispensable, pour établir une convention efficace sur le génocide, de prévoir que les actes de génocide seront soumis à la Cour internationale de Justice, et d'introduire la notion de la responsabilité internationale des Etats ou des gouvernements.

M. Fitzmaurice accepte l'amendement soumis par le représentant de l'Inde (103ème séance).

Annex 182

UN GA, Sixth Committee, 106th meeting (15 November 1948), UN Doc. A/C.6/SR.106

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/802/10/pdf/NL480210.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/802/11/pdf/NL480211.pdf?OpenElement

Taken from:

United Nations, Official records of the Third Session of the General Assembly, Part I, Legal Questions: Sixth Committee: Summary records of meetings, 21 September--10 December 1948

English and French version of the full document available at:

https://digitallibrary.un.org/record/698144?ln=en

UNITED NATIONS

GENERAL ASSEMBLY

3RD SESSION

PART I

1948/49

OFFICIAL RECORDS

SIXTH COMMITTEE

(795 p.)

to punish crimes of genocide committed on their own territories.

Mr. KAECKENBEECK (Belgium) said he had previously given his views on the question of universal punishment. He wished to draw the Committee's attention to two points to which too little prominence had been given. The first was that if a national court proved to be ineffective, the joint amendment submitted by the United Kingdom and Belgium [*A/C.6/258*] to article X would offer a better remedy than that offered by the application of universal punishment; the second was that it was doubtful whether the preparation of the convention on genocide was a proper occasion to attempt to introduce theoretical improvements into penal law.

The dangers pointed out by several delegations should not go unheeded; the Belgian delegation, therefore, anxious to keep the practical aspects of the question in view, would vote against the Iranian amendment, whatever its form.

Mr. ABDOH (Iran) was in favour of the amendment to article X submitted by the United Kingdom and Belgium, but thought that its scope of application was not the same as that of his own amendment. The intention of the joint amendment was to provide for the censure of any State failing to discharge its international obligations, whereas his own was designed to secure the punishment of individuals. As the Iranian delegation was prepared to exclude rulers from the scope of universal punishment, its amendment did not rule out the joint amendment; the two were complementary.

Mr. Abdoh requested that the principle of universal punishment should be put to the vote, on the understanding that the text of the Iranian amendment might be subject to revision by the drafting committee with a view to incorporating therein the various amendments agreed to by his delegation.

The CHAIRMAN pointed out that the principle of universal punishment had not been submitted to the Committee for its consideration and that the discussion had covered only the text submitted by the Iranian delegation. The vote should therefore be taken on that text, although it might, of course, undergo drafting changes if it were adopted.

The Iranian amendment was rejected by 29 votes to 6, with 10 abstentions.

Mr. SUNDARAM (India) said he shared entirely the Iranian delegation's desire for the application of the principle of universal punishment; but he had not been able to vote for the amendment in the form in which it had been submitted as it could have lent itself too easily to abuse; he had therefore abstained from voting.

The CHAIRMAN called upon the members of the Committee to take a decision on the text of article VII proposed by the *Ad Hoc* Committee, as amended by the deletion of the words "or by a competent international tribunal" (98th meeting).

Mr. MANINI Y RÍOS (Uruguay) enquired whether article VII as amended meant that jurisdiction would be vested exclusively in the courts of States on whose territories crimes of genocide were committed.

Etats l'obligation de punir les crimes de génocide commis sur leur territoire.

M. KAECKENBEECK (Belgique) rappelle qu'il a déjà exprimé son opinion sur la question de la répression universelle. Il tient à attirer l'attention de la Commission sur deux points qui n'ont pas été suffisamment mis en relief: le premier est que si la juridiction nationale s'avère inefficace, on trouvera dans l'amendement à l'article X présenté par le Royaume-Uni et la Belgique [*A/C.6/258*] un remède plus utile que celui qu'offre l'application de la répression universelle; le deuxième est qu'on peut se demander si l'élaboration de la convention sur le génocide est une occasion propice pour tenter de faire faire des progrès théoriques au droit pénal.

Il ne serait pas sage d'ignorer les dangers signalés par plusieurs délégations; c'est pourquoi, afin de tenir compte des aspects pratiques de la question, la délégation belge votera contre l'amendement de l'Iran, quelle qu'en soit la forme.

M. ABDOH (Iran) approuve l'amendement à l'article X proposé par le Royaume-Uni et la Belgique, mais il lui semble que son domaine d'application n'est pas le même que celui de l'amendement de l'Iran; en effet, le premier a pour objet d'assurer une certaine condamnation de l'Etat qui ne remplirait pas ses obligations internationales, tandis que le deuxième a en vue une répression pénale s'exerçant contre les individus. Etant donné que la délégation de l'Iran est disposée à exclure les gouvernants de la répression universelle, son amendement n'exclut pas l'autre: ces deux amendements se complètent.

M. Abdoh demande qu'on mette aux voix le principe de la répression universelle, quitte à faire modifier le texte même de l'amendement de l'Iran par le comité de rédaction pour y incorporer les divers amendements acceptés par sa délégation.

Le PRÉSIDENT fait observer que le principe de la répression universelle n'a pas été mis en discussion et que les débats n'ont porté que sur le texte présenté par la délégation de l'Iran; en conséquence, c'est ce texte qui doit être mis aux voix, étant bien entendu que des modifications de rédaction pourront lui être apportées, s'il est adopté.

Par 29 voix contre 6, avec 10 abstentions, l'amendement de l'Iran est rejeté.

M. SUNDARAM (Inde) déclare qu'il approuve entièrement le désir de la délégation de l'Iran de voir appliquer le principe de la répression universelle; toutefois, la forme dans laquelle l'amendement a été présenté ne lui a pas permis de se prononcer en sa faveur; il laisse trop de dangers d'abus; c'est pourquoi il s'est abstenu.

Le PRÉSIDENT invite les membres de la Commission à se prononcer sur le texte de l'article VII proposé par le Comité spécial, tel qu'il a été amendé par la suppression des mots "ou devant un tribunal international compétent" (98ème séance).

M. MANINI Y RÍOS (Uruguay) demande si l'article VII amendé signifie que la compétence appartiendra exclusivement aux tribunaux des Etats sur les territoires desquels les crimes de génocide auront été commis.

be wondered whether the provisions of article IV, sub-paragraph (*b*), dealing with conspiracy to commit genocide, did not present the same difficulties for his Government.

The Polish delegation urged the inclusion of the article proposed by the USSR delegation in the convention because, in its opinion, the extremely dangerous nature of the crime of genocide made it imperative. In order to prevent a repetition of the crimes committed during the past twenty years, the organizations referred to in the article in question had to be declared illegal.

Mr. PÉREZ PEROZO (Venezuela) pointed out that the Committee's task was not to draw up a penal code but to draft an international convention listing the acts which constituted genocide, and leaving it for each Government, party to the convention, to determine, in accordance with its sovereign rights, the punishment to be meted out to persons guilty of those acts. The Soviet Union proposal for the disbandment of organizations fostering genocide amounted to a specification, in the convention, of the punishment to be applied in a given case.

The Venezuelan delegation was of the opinion that the convention should not lay down the punishment to be meted out to those guilty, of committing genocide, for the right to prescribe such penalties belonged to the legislature of each country, which would exercise it in conformity with the country's general juridical principles.

Under the provisions of article VI of the convention, the signatories undertook to apply effective punitive measures to those committing genocide. In the opinion of the Venezuelan delegation, it would not be advisable to go beyond these provisions and Governments should be left free to determine for themselves what punishments must be applied.

Mr. RAAFAT (Egypt) noted that the USSR proposal was directly based on the idea contained in the text of article XI, of the draft convention prepared by the Secretary-General [*E/447*], which provided for the disbanding of any group or organization which had participated in any act of genocide mentioned in articles I, II and III. That idea had been taken up again in the *Ad Hoc* Committee by the Polish delegation,[1] with the substantial change that in the new version a single act of genocide was sufficient to cause the disbanding of the organization.

That same principle reappeared in the Soviet Union proposal in a still more dangerous form, for the disbanding of the organization no longer depended on the juridically established fact of participation in the crime, but on two conditions: incitement to racial, national or religious hatred and incitement to the commission of genocide, these two conditions being required to exist concurrently, as indicated by the word *et* in the French text.[2]

The first condition was allied with the concept of propaganda for genocide, a concept which had

[1] See *Official Records of the Economic and Social Council*, third year, seventh session, supplement No. 6, page 14.

[2] In the English text the word is "or".

Gouvernement. Il y a lieu de se demander si les dispositions de l'alinéa *b*) de l'article IV, concernant l'entente en vue de l'accomplissement du génocide, ne présentent pas le même inconvénient pour le Royaume-Uni.

Si la délégation de la Pologne insiste pour faire figurer dans la convention l'article proposé par la délégation de l'URSS, c'est parce qu'elle estime que le caractère particulièrement dangereux du crime de génocide l'exige. Pour prévenir le renouvellement des crimes commis au cours des vingt dernières années, il faut déclarer illégales les associations du genre de celles que vise l'article en question.

M. PÉREZ PEROZO (Venezuela) fait remarquer que la tâche de la Commission ne consiste pas à rédiger un code pénal, mais bien à élaborer une convention internationale énumérant les actes qui constituent le génocide, en laissant à chaque Etat partie à la convention le soin d'établir, dans l'exercice de ses droits souverains, les peines à appliquer aux personnes qui se rendraient coupables de tels actes. Or, la proposition de l'Union soviétique, qui prévoit la dissolution des organisations incitant au génocide, équivaut à fixer dans la convention la peine à appliquer dans un cas déterminé.

La délégation du Venezuela est d'avis que la convention ne devrait pas prévoir de peines pour punir les coupables d'actes de génocide, car le droit de fixer ces peines appartient au législateur de chaque Etat, qui s'en acquittera en s'inspirant des principes généraux de droit en vigueur dans son pays.

Aux termes de l'article VI de la convention, les Etats signataires s'engagent à prévoir des sanctions pénales efficaces frappant les auteurs d'actes de génocide; la délégation du Venezuela estime qu'il ne convient pas d'aller au delà de ces dispositions et qu'il faut laisser ces Etats libres de déterminer eux-mêmes les peines à appliquer.

M. RAAFAT (Egypte) constate que la proposition de l'URSS est directement inspirée de l'idée contenue dans le texte de l'article XI du projet du Secrétaire général [*E/447*], qui prévoyait l'obligation de dissoudre les groupes ou associations qui auraient participé à la commission des faits de génocide visés à l'article premier et aux articles I, II et III. Cet article fut repris par la délégation polonaise devant le Comité spécial[1], mais avec une modification importante, car, dans cette nouvelle version, il suffisait que les organisations aient participé à un seul acte de génocide pour encourir la dissolution.

C'est le même principe que l'on retrouve dans la proposition de l'Union soviétique, sous une forme encore plus dangereuse, car la dissolution ne dépend plus du fait judiciairement constaté de la participation au crime, mais de deux conditions, dont l'une est d'avoir attisé les haines raciales, nationales ou religieuses et l'autre d'avoir poussé à l'accomplissement du génocide, ces deux conditions devant être réunies, ce qui résulte de l'emploi du mot "et".

La première condition relève de la propagande en vue du génocide, dont la notion a été reconnue

[1] Voir les *Procès-verbaux officiels du Conseil économique et social*, troisième année, septième session, supplément n° 6, page 14.

Annex 183

UN GA, Sixth Committee, 133rd meeting (2 December 1948), UN Doc. A/C.6/SR.133

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/802/30/pdf/NL480230.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/802/31/pdf/NL480231.pdf?OpenElement

Taken from:

United Nations, Official records of the Third Session of the General Assembly, Part I, Legal Questions: Sixth Committee: Summary records of meetings, 21 September--10 December 1948

English and French version of the full document available at:

https://digitallibrary.un.org/record/698144?ln=en

The CHAIRMAN put to the vote draft resolution III, as submitted by the Drafting Committee [*A/C.6/289*].

The draft resolution was adopted by 29 votes to none, with 7 abstentions.[1]

Mr. QUIJANO (Argentina) asked whether it would be possible for the Secretariat to provide a Spanish version of the convention.

Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) stated that copies of the convention would be distributed as soon as possible in the five official languages.

A question had also been raised as to whether it would be possible to proceed to the signing of the convention at the current session of the General Assembly. After making enquiries on the subject, he had found that it might be possible to do so. In view of the short time available, however, it would not be possible to have the convention printed; typewritten copies in four of the official languages and a calligraphic copy in Chinese could, he thought, be provided.

Mr. Kerno drew attention to the fact that before a representative could sign the convention on behalf of his Government, he had to have full powers to do so. For those representatives who had not already been accredited with full powers, he stated that it had been the practice for the Secretary-General to accept as credentials conferring provisional full powers a telegram signed by the Head or the Foreign Minister of the State concerned and followed by a confirmatory letter. He would remind representatives that they themselves would have to take the necessary steps in the matter.

The meeting rose at 6 p.m.

HUNDRED AND THIRTY-THIRD MEETING

Held at the Palais de Chaillot, Paris, on Thursday, 2 December 1948, at 11 a.m.

Chairman: Mr. R. J. ALFARO (Panama).

86. Continuation of the discussion on the draft convention on genocide [*E/794*]: report of the Economic and Social Council [*A/633*]

TEXT SUBMITTED BY THE DRAFTING COMMITTEE

The CHAIRMAN invited those members of the Committee who so desired to explain their vote on draft resolution I and on the annexed draft convention for the prevention and punishment of the crime of genocide submitted by the Drafting Committee [*A/C.6/289*].

He reminded the meeting that, in accordance with the rule adopted by the Committee (81st meeting), speeches should be limited to five minutes; and he asked the delegations concerned to confine their remarks to an explanation of their vote.

[1] The texts of the three draft resolutions and of the draft convention, as adopted by the Committee, are contained in document A/C.6/289/Rev.1.

Le PRÉSIDENT met aux voix le projet de résolution III présenté par le Comité de rédaction [*A/C.6/289*].

Par 29 voix contre zéro, avec 7 abstentions, le projet de résolution est adopté.[1]

M. QUIJANO (Argentine) demande au Secrétariat s'il lui serait possible de fournir un texte espagnol de la convention.

M. KERNO (Secrétaire général adjoint chargé du Département juridique) répond que l'on distribuera aussitôt que possible des exemplaires de la convention rédigée dans les cinq langues officielles.

On s'est demandé également si l'on pourrait procéder à la signature de la convention au cours de la présente session de l'Assemblée générale. Renseignements pris, le Secrétaire général adjoint pense que ce sera possible. Mais, en raison du peu de temps dont on dispose, on ne pourra pas avoir la convention imprimée. M. Kerno pense que le Secrétariat pourra fournir des exemplaires dactylographiés dans quatre des cinq langues officielles, ainsi qu'un exemplaire calligraphié en chinois.

M. Kerno fait observer que, pour signer la convention pour le compte de leurs Gouvernements, les représentants doivent avoir pleins pouvoirs à cet effet. Pour les représentants qui ne sont pas encore accrédités avec pleins pouvoirs, M. Kerno indique que le Secrétaire général a pris pour habitude de tenir pour valable, comme document conférant provisoirement les pleins pouvoirs, un télégramme signé du chef de l'Etat intéressé ou de son Ministre des affaires étrangères et suivi d'une lettre de confirmation. Le Secrétaire général adjoint tient à rappeler aux représentants qu'ils ont, en la matière, à prendre eux-mêmes les dispositions nécessaires.

La séance est levée à 18 heures.

CENT-TRENTE-TROISIEME SEANCE

Tenue au Palais de Chaillot, Paris, le jeudi 2 décembre 1948, à 11 heures.

Président: M. R. J. ALFARO (Panama).

86. Suite de l'examen du projet de convention sur le génocide [*E/794*]: rapport du Conseil économique et social [*A/633*]

TEXTE SOUMIS PAR LE COMITÉ DE RÉDACTION

Le PRÉSIDENT invite les membres de la Commission qui le désirent à expliquer leur vote sur le projet de résolution I et sur le projet de convention pour la prévention et la répression du crime de génocide y annexé, soumis par le Comité de rédaction [*A/C.6/289*].

Il rappelle que les interventions ne doivent pas dépasser cinq minutes, conformément à la règle adoptée par la Commission (81ème séance), et il prie les délégations intéressées de se borner à exposer les raisons qui les ont poussées à se prononcer comme elles l'on fait.

[1] Le texte des trois projets de résolution et du projet de convention, tel qu'il a été adopté par la Commission, figure au document A/C.6/289/Rev.1.

Mr. Morozov (Union of Soviet Socialist Republics) explained that his delegation had abstained from voting on the draft convention because that draft omitted a number of points which the USSR wished to see included. He stated, in that connexion, that his delegation wished to submit several amendments to the draft when it came up for debate at a plenary meeting of the General Assembly.

Mr. Gross (United States of America) said his delegation had voted for the resolution and the annexed draft convention on genocide for the same reasons as those which had led his delegation to give most fervent support, from the very beginning, to the work of preparing an international convention for the prevention and punishment of that odious crime. He hoped that the convention could be signed during the third session of the General Assembly.

Mr. Gross did not deny that his delegation was deeply disturbed by the fact that the draft convention had not received the unanimous approval of the Sixth Committee. Mr. Morozov's statement that the Soviet Union delegation would propose amendments to the draft convention during the discussion in the plenary session of the Assembly served merely to increase the anxiety felt by the United States delegation, which had always been of the opinion that motions for a reconsideration of questions on which the Committee had already taken a decision should be submitted to the Committee itself. The United States delegation was therefore obliged to regard the attitude of the USSR delegation as an attempt to frustrate the painstaking and diligent work of the Sixth Committee.

The United States delegation had spared no effort to obtain unanimous approval for the convention on genocide. It was for that reason that it had agreed to the omission of political groups among the groups to be protected by the convention; and the abstention of the Soviet Union and certain other States when the vote was taken (128th meeting) had come as a surprise. Mr. Gross hoped that all the members of the Committee would unite their efforts to ensure that the convention, which no one considered perfect, but which nevertheless represented the best possible compromise, would receive the unanimous approval of all the Members of the United Nations.

Finally, the United States representative made the following observations on certain provisions of the convention.

Article IX stipulated that disputes between the contracting parties relating to the interpreation, application or fulfilment of the convention "including those relating to the responsibility of a State for genocide or any of the other acts mentioned in article III" should be submitted to the International Court of Justice. If the words "responsibility of a State" were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of international law, to the subjects of the plaintiff State; and if, similarly, the words "disputes . . . relating to the . . . fulfilment" referred to disputes concerning the interests of subjects of the plaintiff State, then those words would give rise to no objection. But if, on the

M. Morozov (Union des Républiques socialistes soviétiques) explique que sa délégation s'est abstenue de prendre part au vote sur le projet de convention parce que ce projet ne contient pas un certain nombre d'éléments que l'URSS aurait voulu y voir figurer. Il signale à ce propos que sa délégation entend présenter des amendements à ce projet, lors du débat en séance plénière de l'Assemblée générale.

M. Gross (Etats-Unis d'Amérique) déclare que sa délégation a voté en faveur de la résolution contenant en annexe le projet de convention sur le génocide pour les raisons mêmes qui l'ont poussée à donner, dès le début, son appui le plus chaleureux à l'initiative d'élaborer une convention internationale pour prévenir et réprimer ce crime odieux. Il espère que la convention pourra être signée au cours de la troisième session de l'Assemblée générale.

M. Gross ne cache pas que sa délégation est vivement préoccupée par le fait que le projet de convention n'a pas fait l'objet d'une approbation unanime au sein de la Sixième Commission. La déclaration de M. Morozov, selon laquelle la délégation de l'Union soviétique proposera des amendements au projet de convention au cours du débat en séance plénière de l'Assemblée, ne fait qu'ajouter aux inquiétudes ressenties par la délégation des Etats-Unis qui avait toujours pensé que les motions tendant à obtenir un nouvel examen des questions sur lesquelles la Commission s'est déjà prononcée seraient présentées à la Commission elle-même. La délégation des Etats-Unis se voit obligée d'interpréter l'attitude de la délégation de l'URSS comme une tentative pour faire échec aux travaux assidus et laborieux de la Sixième Commission.

La délégation des Etats-Unis n'a épargné aucun effort pour assurer à la convention sur le génocide une approbation unanime. C'est ainsi qu'elle a renoncé à faire figurer les groupes politiques parmi les groupes protégés par la convention et elle n'a pas manqué d'être surprise par l'abstention de l'Union soviétique et de certains autres Etats lors du vote sur cette question (128ème séance). M. Gross exprime l'espoir que tous les membres de la Commission joindront leurs efforts pour que cette convention, qui n'est parfaite aux yeux de personne mais qui constitue néanmoins le meilleur compromis auquel on puisse aboutir, obtienne l'approbation unanime de tous les Etats Membres de l'Organisation des Nations Unies.

Enfin, le représentant des Etats-Unis formule les observations suivantes sur certaines dispositions de la convention.

L'article IX prévoit que les différends entre les parties contractantes, relatifs à l'interprétation, à l'application ou à l'exécution de la convention, "y compris ceux relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III" seront soumis à la Cour internationale de Justice. Si les mots "responsabilité d'un Etat" sont pris dans leur acception traditionnelle de responsabilité envers un autre Etat pour dommages causés, en violation des principes de droit international, à des ressortissants de l'Etat demandeur, et, de même, si les mots "différends . . . relatifs . . . à l'exécution" désignent les différends mettant en jeu des intérêts de ressortissants de l'Etat demandeur, ces mots ne rencontreraient aucune

other hand, the expression "responsibility of a State" were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision; and the United States Government would have reservations to make about that interpretation of the phrase.

With regard to article VII, relating to extradition, the United States representative declared that, until the United States Congress had passed the legislative measures necessary to bring the convention into force, the United States Government could not hand over any person accused of a crime by virtue of which he was not already liable to extradition under the terms of the existing laws. Moreover, the provisions of the United States Constitution relating to the non-retroactivity of laws were such as to prevent the United States Government from extraditing any person accused of a crime committed before the promulgation of the law defining that new crime.

Mr. LITAUER (Poland) speaking on a point of order, asked the Chairman if it was permissible for delegations, when explaining their vote, to criticize the vote of other delegations.

Mr. MOROZOV (Union of Soviet Socialist Republics) pointed out that the United States representative had acted contrary to the rules of procedure in criticizing the attitude of the USSR delegation and giving it a tendentious interpretation, when explaining his own delegation's vote.

Mr. Morozov, while protesting against that interpretation, stressed the fact that his delegation's sole purpose in proposing amendments to the draft convention was to improve the text of that convention, and to make it a more effective instrument for the prevention and punishment of genocide.

The representative of the Soviet Union asked the Chairman to draw the attention of the members of the Committee to the fact that, when explaining their votes, they should limit themselves to explaining the reasons for their own vote, without embarking on criticism of the attitude of other delegations. Otherwise those who spoke first would be at a disadvantage with regard to the speakers who followed them and would be obliged to speak a second time.

The CHAIRMAN recalled that at the beginning of the meeting, he had told the members of the Committee that they should make their statements as concise and relevant as possible; he hoped they would comply with his recommendations.

Mr. DE MARCHENA DUJARRIC (Dominican Republic) explained that the fact that he had voted in favour of the draft convention in no way implied that the delegation of the Dominican Republic repudiated the reservations it had expressed during the discussion of the draft, particularly with regard to the articles against which it had voted.

Mr. SUNDARAM (India) said his delegation had voted in favour of resolution I and the draft convention although that draft contained one or two unsatisfactory features. His Government, however, reserved its position with regard to articles

objection. Mais si l'expression "responsabilité d'un Etat" n'est pas employée dans son sens traditionnel et si elle signifie qu'un Etat peut être tenu à des dommages-intérêts pour le préjudice causé par lui à ses propres ressortissants, il y a de sérieuses objections à élever contre cette disposition et le Gouvernement des Etats-Unis formule des réserves quant à cette interprétation.

En ce qui concerne l'article VII, relatif à l'extradition, le représentant des Etats-Unis déclare que tant que le Congrès des Etats-Unis n'aura pas pris les mesures législatives nécessaires pour mettre la convention à exécution, le Gouvernement des Etats-Unis ne pourra pas livrer une personne accusée d'un crime pour lequel elle ne serait déjà sujette à extradition aux termes des lois existantes. De plus, les dispositions de la Constitution des Etats-Unis relatives à la non-rétroactivité des lois empêcheraient le Gouvernement des Etats-Unis d'accorder l'extradition de toute personne accusée d'avoir commis un crime antérieurement à la promulgation de la loi définissant le nouveau crime.

M. LITAUER (Pologne), soulevant une motion d'ordre, demande au Président s'il est permis aux délégations, lorsqu'elles expliquent leur vote, de critiquer celui des autres délégations.

M. MOROZOV (Union des Républiques socialistes soviétiques) fait remarquer que c'est en violation du règlement intérieur que le représentant des Etats-Unis, au cours des explications qu'il a fournies sur le vote de sa délégation, a critiqué l'attitude de la délégation de l'URSS et en a donné une interprétation tendancieuse.

M. Morozov, tout en protestant contre une telle interprétation, souligne qu'en proposant des amendements au projet de convention, sa délégation ne vise à rien d'autre qu'à améliorer le texte de ce projet, en vue de rendre la convention plus efficace pour prévenir et réprimer le génocide.

Le représentant de l'Union soviétique demande au Président d'attirer l'attention des membres de la Commission sur le fait qu'il convient, dans les explications de vote, de se limiter à exposer les raisons qui ont motivé le vote, sans critiquer l'attitude des autres délégations. Autrement, ceux qui parlent les premiers se trouveraient dans une position désavantageuse par rapport aux orateurs qui suivent et ils seraient obligés de prendre la parole à nouveau.

Le PRÉSIDENT rappelle qu'il a déjà souligné, au début de la séance, la nécessité pour les membres de la Commission de rendre leurs déclarations aussi précises et aussi concises que possible et il espère qu'ils ne manqueront pas de se conformer à ses recommandations.

M. DE MARCHENA DUJARRIC (République Dominicaine) tient à préciser que son vote en faveur du projet de convention n'implique nullement l'abandon des vues et des réserves exprimées par la délégation de la République Dominicaine au cours de la discussion de ce projet, notamment en ce qui concerne les articles contre lesquels elle s'est prononcée.

M. SUNDARAM (Inde) dit que sa délégation a voté en faveur de la résolution I et du projet de convention, bien que ce projet contienne un ou deux éléments peu satisfaisants. Il réserve toutefois l'attitude de son Gouvernement à l'égard

Annex 184

UN GA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council (E/794), Draft resolutions proposed by the Drafting Committee, UN Doc. A/C.6/289/Rev.1, 2 December 1948

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/DER/NL4/802/78/pdf/NL480278.pdf?OpenElement

French version available at:

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GENERAL ASSEMBLY | ASSEMBLEE GENERALE

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A/C.6/289/Rev
2 December 19
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Third Session
SIXTH COMMITTEE

GENOCIDE: DRAFT CONVENTION AND REPORT OF THE ECONOMIC AND SOCIAL COUNCIL (E/794)

Draft resolution proposed by the Sixth Committee

I.

THE GENERAL ASSEMBLY

APPROVES the annexed Convention on the prevention and punishment of the crime of genocide and submits it for signature and ratification or accession in accordance with its Article XI.

ANNEX

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

THE CONTRACTING PARTIES,

CONSIDERING that the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 declared that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and

BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co operation is required;

HEREBY AGREE AS FOLLOWS:

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(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.

ARTICLE III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are rulers, public officials or private individuals.

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.

ARTICLE VI

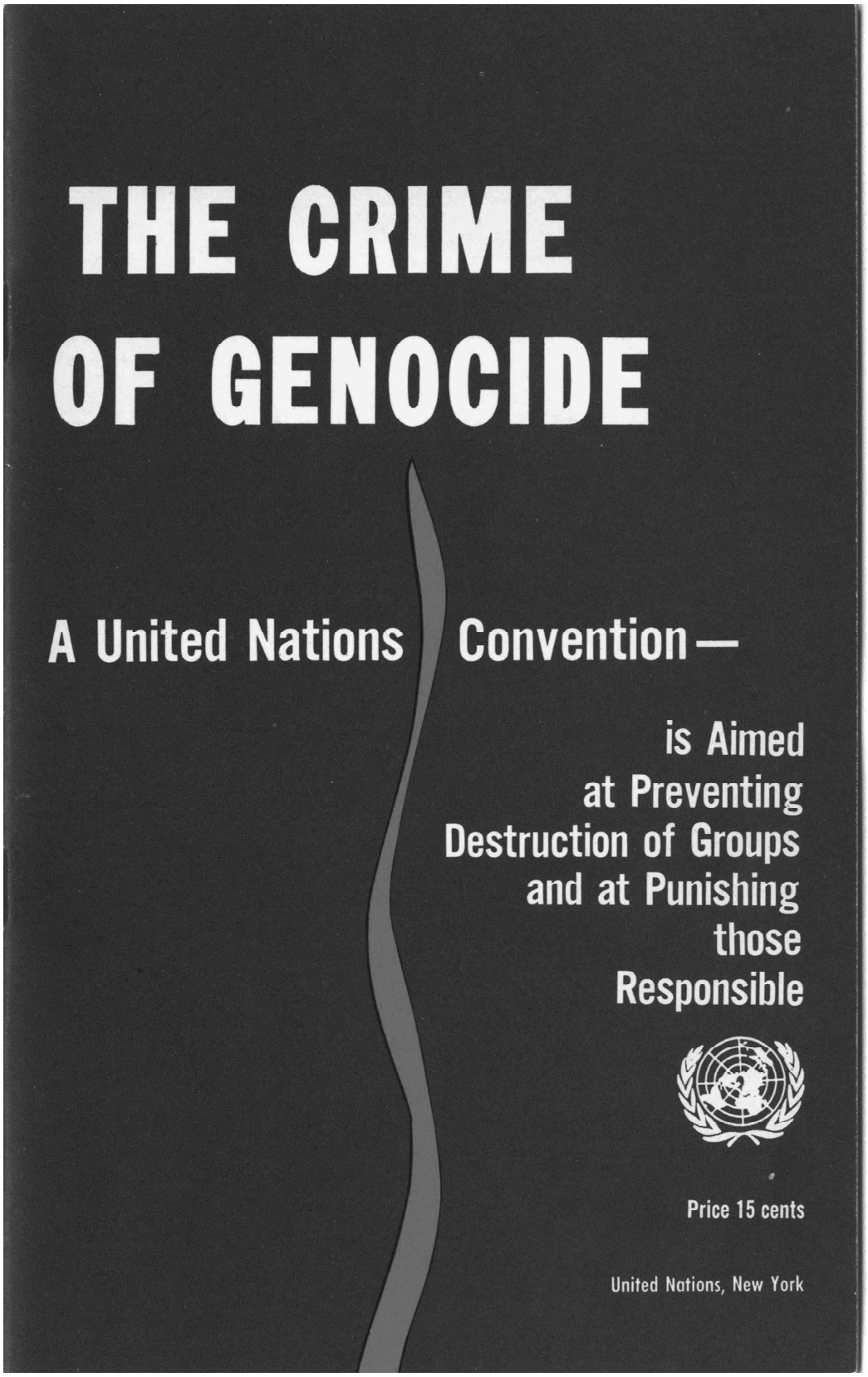
Persons charged with genocide or with any of the other acts enumerated in Article III shall be brought to trial before the competent courts of the State in the territory of which the act was committed, or before the international penal tribunal which shall be competent with respect to those Contracting Parties that have recognized its jurisdiction.

Annex 185

United Nations Office of Public Information, *The Crime of Genocide: A United Nations convention is aimed at preventing destruction of groups and at punishing those responsible* (5th edn., 1959)

Available at:

https://stars.library.ucf.edu/prism/603


THE CRIME
OF GENOCIDE
A United Nations Convention—
is Aimed
at Preventing
Destruction of Groups
and at Punishing
those
Responsible
Price 15 cents
United Nations, New York

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tories, Great Britain emphasized that constitutionally it could not commit its dependent territories. These territories may have to pass the legislation in order to apply the provisions and, however likely this may be, Great Britain could not commit them automatically.

On "cultural genocide" in the definition of the crime, China, Haiti, Lebanon, Liberia, Pakistan, the Philippines, Saudi Arabia and Syria voted for the U.S.S.R. amendment, in addition to the Ukrainian S.S.R., Yugoslavia, the Byelorussian S.S.R., Czechoslovakia and Poland, who voted for all the U.S.S.R. amendments. The majority agreed, of course, that crimes like the destruction of churches, schools and libraries, or other measures of cultural extermination, were barbarous but, they felt, protection of these rights belong to the field of human rights. To extend the Genocide Convention to cover such crimes, they felt, would weaken the purpose for which the Convention is designed: namely, to prevent and punish physical destruction of specific human groups.

Venezuela proposed a modification to the effect that the systematic destruction of the religious edifices, schools and libraries of a group should be included in the definition but withdrew the amendment.

After the U.S.S.R. amendments were put to vote and defeated, representative A. P. Morozov restated his country's position. He then added: "The fault which I have mentioned in the present draft convention undoubtedly diminishes its effectiveness. Since, however, the convention does provide for the condemnation of genocide, since it appeals to all countries to fight the crime of genocide—which so far has remained unpunished only too frequently — the U.S.S.R. delegation will vote in favor of the draft convention as submitted."

Numerous other concessions in favor of securing unanimity were made by a number of countries in the course of two years of study and debate and drafting. The United States, for example, gave up its earlier insistence on the inclusion of "political" groups in the definition. Brazil opposed the idea of international penal jurisdiction as "too vague and idealistic." On the other hand, France desired not only to include the principle of an international penal court but also detailed ideas on the functions of such a court. Indeed, at an earlier stage, the United Kingdom held the view that the whole idea of a workable Convention on the subject was unrealistic. It also anticipated certain legal difficulties with respect to amending its criminal law. But, through patient debate, which, as Dr. Gilberto Amado, of Brazil, pointed out, did not follow any "hermetically sealed compartments"

Annex 186

UNHCR Archives Geneva, Memorandum of Jacques Cuénod and Angelo Rasanayagam to UNHCR Headquarters “Mission to Dacca 11 May – 14 May 1978”, 17 May 1978, Box 55 ARC 2/ A42

Mr. Horelight

NATIONS UNIES
HAUT COMMISSARIAT
POUR LES RÉFUGIÉS

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

34

STRICTLY
CONFIDENTIAL

MEMORANDUM

HCR/BKK/945

A : TO : The High Commissioner,
UNHCR Headquarters, Geneva

DE : FROM : Jacques Cuénod and Angelo Rasanayagam

NOTRE : OUR REF. :
VOTRE : YOUR REF. : 100.BGD.EMA

17 May 1978

OBJET : SUBJECT : Mission to Dacca : 11 May - 14 May 1978

PART I - GENERAL

Objectives of Mission, Official Contacts, Field Trip

1. The purpose of the mission was to examine at first hand the situation of displaced persons from Burma in the Chittagong and Chittagong Hill Tracts Districts of Bangladesh, particularly with a view to gathering information on their nationality status and other relevant elements. We arrived in Dacca on the evening of Thursday, 11 May with a six-hour delay. The next morning we had an extended working breakfast during which we were given a full briefing on the situation by the UNDP Resident Representative, Mr. Bernard Zagorin, and the WFP Senior Adviser, Mr. Trevor Page.

2. Prior to our arrival, the authorities had made arrangements for a two-day field trip to the border areas. We left for Chittagong at 9.30 a.m. but returned to Dacca due to bad weather. We finally reached Chittagong on the evening of Friday 12 May, and were briefed on arrival by the Commissioner of Chittagong Division, Mr. Abdul Awal, a former Director-General of Social Welfare. On Saturday 13 May, we travelled 140 miles by car from Chittagong to Ukhia, in the Cox's Bazaar Sub-division of Chittagong District, accompanied by the Deputy Divisional Commissioner (head of district), Mr. Ziauddin Chaudury, a Director at the Foreign Ministry, Mr. Aziz Chaudury, and a UNDP Programme Officer, Mr. Jan Swietering. At the "Control Centre" for relief operations for "Burmese Muslims" we received a further briefing, including statistics of arrivals in the five camps which we visited subsequently.

3. On our return from Chittagong on the morning of 14 May, we met with the Foreign Secretary, Mr. Tabarak Hussain,

19 MAY 1978 .../2.

PART III - PROTECTION

Section A : The Social and Political Background

Ethnic Groups in Arakan

13. Arakan is isolated from the rest of Burma by the Goma range which is an extension of a southern spur of the Himalayas, running through the hills of Assam and Manipur in India, and the Chin Range in Burma. There is evidence of a kingdom in the Arakan dating back to the fourth century A.D., and the Arakanese, who are of Tibeto-Burman extraction and predominantly Buddhist by religion, are one of the earliest indigenous races of Burma.

14. The arrival of the Arakanese in Burma probably preceded that of the dominant Burmans of the Irrawaddy Valley (likewise of Tibeto-Burman extraction) and also because of their geographical position, the Arakanese have maintained a sense of separate identity. The last independent Arakanese kingdom, which also exercised control over parts of East Bengal, was absorbed by the Burman Kingdom of Ava in 1784, and some 50,000 Arakanese Buddhist refugees fled to Chittagong in British India. (Bangladesh Government officials mentioned an Arakanese Buddhist population of some 100,000 persons in the Chittagong Hill Tracts District).

15. There are no reliable census figures for the Arakan. However, it was estimated in 1969 that there were some 300,000 Arakanese Buddhists (called "Moghs" by the Muslim populations of the Arakan, probably a derogatory term). The total population of Arakan was also estimated at some 1.847 million persons of whom 60-65% were believed to be Muslims, the highest concentration of Muslims in Burma. (According to some sources in Bangladesh, the Muslim populations of Arakan are now estimated at 1 to 1.5 million).

16. The Muslim populations of Arakan are loosely referred to as Rohingyas when in fact they are of three, possibly four distinct origins:

a) the Rohingyas in the strict sense, who are descendants of Arab traders who settled in Arakan as far back as the 12th - 13th centuries and married into the local population.

b) the descendants of the rebellious Moghul prince, Shah Shuja, and his numerous followers who were expelled from the Moghul dominions in the 17th century and found final refuge in Arakan.

c) immigrants from the sub-continent, mainly of Bengali and Chittagonian origin, after the Arakan was ceded along with Tenasserim, to the British East India Company in 1826. Those among this group who took Burmese wives are known as Zerbadis, and grew to quite large proportions (122,000, according to the 1931 census).

.../6.

Historically, therefore, there were Muslim settlements in Arakan pre-dating the British annexations of Burmese territories and from this fact we are permitted to conclude that a proportion of the Muslims of Arakan, although of predominantly sub-continental origin, form a quite distinct group from the economic migrants from the Indian sub-continent who settled in Burma during the British Raj.

Note on the British and Post-Independence Periods in Burma

17. After the British annexation of Lower Burma (in 1853) and Upper Burma (in 1886), most of the territories of the present Union of Burma became an integral part of the British Indian Empire administered by the Viceroy of India from Calcutta and later New Delhi. The free movement of migrants from British India proper that this entailed was regulated to some extent only after 1937 when a separate British administration was set up for Burma and an Indo-Burmese Immigration Agreement concluded between the two administrations.

18. These other immigrants from the sub-continent, comprising Hindus, Muslims, Christians, Buddhists and Sikhs, numbered a little over 1 million persons in all parts of Burma, according to the 1931 census (the last complete Burmese census). Some 21.8% of this population was born in Burma. During the Japanese invasion and occupation of Burma during World War II, some half-million Indian subjects of the British Crown fled westwards to the sub-continent. It is presumed that some 150-200,000 of them returned after the war. At the time of Burmese Independence in 1948, those Indo-Pakistanis who opted for Burmese citizenship, under the Union Citizenship Act of 1948, numbered only some 60,000 although by that time some 50% of the Indo-Pakistanis were local born. The Land Nationalisation Act of 1954, and the far-reaching nationalisations effected by the Ne Win Government (particularly the Enterprise Nationalisation Act of 1963 affecting the retail trade), as well as a series of punitive administrative measures aimed at non-Burmese, led to a large-scale exodus of Indo-Pakistanis estimated at 160,000 or more. These measures affected mostly the wealthier elements, with the result that the current population of persons of Indo-Pakistani origin/ comprise mainly the unskilled and semi-skilled labour classes.

Religious and Political Conflicts in Arakan

19. Because of the relatively high concentration of Muslims, of whatever origin, in Arakan, under-lying communal tensions led to direct confrontations with the Buddhists just before and during the Japanese occupation. The mass exodus across the Arakan hills and the Naf river, of British Indians during the war, provided the opportunity for local scores to be settled between native Arakanese Buddhists and Muslims, the violence later extending to immigrant Bengali Muslims of more recent origin. After the war, provoked by events leading to the partition of the sub-continent in 1947, an Arakanese Muslim separatist movement called the Mujahids undertook armed action against the authorities of the newly independent Union of Burma. By 1961, the movement had virtually collapsed.

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.../7.

23. The necessary implications of these two provisions, as applied to the Muslim categories mentioned in paragraph 16 above, would therefore be that those mentioned under paragraph 16 (a) and (b) would qualify as citizens under Section 3 of the Act and a greater or smaller proportion of those mentioned under paragraph (c) above would qualify under Section 4 (2). A further implication would be that they are natural-born citizens who are not required to submit to the procedure of election.

24. It appears that the provision for election of union citizenship was put in as a result of a reciprocal arrangement, provided for by the British Government through the Burma Independence Act of 1947. (Maung Maung, Burma's Constitution, 1959). That is,a qualifying person could opt for Burmese citizenship or choose to remain as a British national, the latter defined as (to quote section 11 (iv) of the Constitution) "a person who was born in any of the territories which at the time of his birth was included within His Brittanic Majesty's Dominions". One could presume that this would apply to a resident of sub-continental origin in Burma who was not a natural-born citizen.

25. The only qualification for election of citizenship mentioned in the Constitution was a residence requirement of eight years prior to 1947: The Union Citizenship Act of 1948 lays down the rules for electing citizenship. Originally the period allowed for those entitled to make their choice was one year from the coming into operation of the Act. But the period was extended till April 1954, after which date special exemptions had to be granted by the Burmese President, through the Ministry of Immigration and National Registration, for those applying for citizenship.

26. While the basic rule in international customary law is that the establishment of criteria for according or denying nationality status is a sovereign right of the country concerned, the Burmese legislative enactments which have been cited reveal a respect for the customary criteria for according or denying nationality status by the State: that there should be no manifest discrimination so that a section or sections of its territorial population is deprived of or denied its right to acquire a nationality status. This implies a fulfilment of the second basic presumption in international law: in the context of a transfer of power, or change of government,no section or sections of its territorial population should become stateless, through denial of the possibility of choosing a nationality.

Extent of Applicability of Legal Enactments

27. In actual fact, only some 60,000 persons of sub-continental origin appear to have elected for Burmese citizenship, out of the more than half-million resident in Burma at the time. The Citizenship Act of 1948 also provided for naturalisation as a means of access to citizenship, with the usual qualifications. But the relevance of this provision for those in question is doubtful. Another factor that is of relevance here is that

.../9.

Annex 187

UN ECOSOC, Commission on Human Rights, Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur, UN Doc. E/CN.4/Sub.2/416, 4 July 1978

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UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of Discrimination and Protection of Minorities
Thirty-first session
Item 17 of the provisional agenda

STUDY OF THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur

CONTENTS

GE.78-7047

329. The Special Rapporteur finds it difficult to share the opinion (referred to in paragraphs 325 and 326 above) that article IX establishes an international civil responsibility of the State to its own nationals. In the absence of any case where the article has been applied and interpreted by the International Court of Justice, both the preparatory work, as described in paragraphs 310-317 above, and the text of the article itself lead him to doubt that the purpose of the provision was to include in the concept of international responsibility of the State, which of its very nature implies solely legal relations between States, 334/ a liability towards its own nationals. If such was not the case, the provision seems superfluous. In any event, if it were decided to review the Convention, it would be desirable to clear up the problem of the scope of State responsibility.

330. As regards the significance of article IX of the Convention, a writer has expressed the opinion that:

> "The recognition of the compulsory jurisdiction of the Court in all disputes between Contracting Parties arising under the Convention constitutes an important means of international judicial implementation of a treaty on substantive criminal law by way of the international civil responsibility of States. Undoubtedly the Article contains a provision of cardinal significance but it does not contribute to international and individual criminal justice."335/

331. The Special Rapporteur would say that the compulsory jurisdiction of the International Court of Justice on genocide might, theoretically, be of some importance for the application of the Convention, bearing in mind the non-existence of an international criminal court and the ineffectiveness of the provisions of article VI on the competence of national courts in the territory where the crime was committed.336/ Nevertheless, the fact that article IX has not been applied, although acts of genocide have been alleged since the 1948 Convention came into force, casts doubt on the practical usefulness of this article.

J. Invitations to become parties to the Convention addressed by the General Assembly to non-member States in accordance with article XI of the Convention

332. Article XI of the Genocide Convention specifies, inter alia, that:

> "The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly. ... After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid."

334/ See, for instance, Report of the International Law Commission on the work of its twenty-fifth session (7 May-13 July 1973), draft articles on State responsibility (A/9010), para. 58, article I, (2) to (4).

335/ Drost, op.cit., p. 134.

336/ See para. 211 above.

Annex 188

UN ECOSOC, Commission on Human Rights, Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/G85/123/55/pdf/G8512355.pdf?OpenElement

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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Thirty-eighth session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker

GE.85-12355

legal manuals to emphasize that any soldier is personally responsible for the acts he commits. The defence of superior orders had also not been allowed by German judges in at least one of the Leipzig trials after the First World War, and this doctrine was therefore not one that was invented de novo by the victors at Nuremberg. 46/

53. There therefore should be little doubt that courts today would hold that the concept of individual responsibility will override any defence of superior orders. Nevertheless, since wider public education about this doctrine is highly crucial for the aversion of future genocide, the Special Rapporteur recommends that explicit wording should be added to the Convention, perhaps at the end of Article III, that "In judging culpability, a plea of superior orders is not an excusing defence". Similarly, wider publicity should be given to this principle in national codes governing armed forces, prison staffs, police officer, doctors and others, to advise and warn them that it is not only their right to disobey orders violating human rights, such as to carry out genocide or torture, but their legal duty so to disobey. Such precepts should also be taught in all schools, and the United Nations Educational, Scientific and Cultural Organization might be asked to encourage this internationally.

54. Individuals' responsibility however need not necessarily exclude in appropriate cases a State's collective responsibility also towards the victims, including sometimes liability for damages and restitution. The French representative argued in the debate preparing the Convention:

> "The theoreticians of nazism and fascism, who had taught the doctrine of the superiority of certain races, could not have committed their crimes if they had not had the support of their rulers; similarly, pogroms had occurred frequently only in countries where no severe legal measures were taken against the perpetrators. Thus the experience of history showed the way; it was inconceivable that human groups should be exterminated while the Government remained indifferent; it was inadmissible that the central authority should be powerless to put a stop to mass assassination when homicide was the first of punishable crimes. When the crime of genocide was committed, it was committed either directly by the Governments themselves or at their behest; alternatively, they remained indifferent and failed to use the power which every Government should have in order to ensure public order. Thus, whether as perpetrator or as accomplice, the Government's responsibility was in all cases implicated. 47/

Germany has subsequently paid substantial reparations for genocidal crimes against the Jews. It is therefore recommended, to deter pour encourager les autres, that when the Convention is revised, consideration shall be given to including provision for a State's responsibility for genocide together with reparations.

46/ Ann Tusa and John Tusa, op.cit., pp. 87/8; A. Ruckerl, The Investigation of Nazi Crimes (Heidelberg, C.F. Muller, 1979).

47/ A/C.6/78, p. 146.

Annex 189

UN Office of the High Commissioner for Human Rights, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 March 1992

Available at:

https://www.refworld.org/docid/453883fb0.html

Annex 189

Forty-fourth session (1992)

General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)

1. This general comment replaces general comment No. 7 (the sixteenth session, 1982) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular

those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging,

ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

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UN, Security Council resolution 780 (1992), S/RES/780 (1992), 6 October 1992

English version available at:

https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/39/pdf/NR001139.pdf?OpenElement

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https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/012/13/pdf/NR001213.pdf?OpenElement

UNITED NATIONS

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Security Council

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GENERAL

S/RES/780 (1992)
6 October 1992

RESOLUTION 780 (1992)

Adopted by the Security Council at its 3119th meeting, on 6 October 1992

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, 1/ and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

Recalling also its resolution 771 (1992) of 13 August 1992, in which, inter alia, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law,

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of mass killings and the continuance of the practice of "ethnic cleansing",

1. Reaffirms its call, in paragraph 5 of resolution 771 (1992), upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former

1/ United Nations Treaty Series, vol. 75, Nos. 970-973.

92-48440 4386Z (E) 061092 061092 /...

Yugoslavia, and requests States, relevant United Nations bodies, and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter, and to provide other appropriate assistance to the Commission of Experts referred to in paragraph 2 below;

2. Requests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia;

3. Also requests the Secretary-General to report to the Council on the establishment of the Commission of Experts;

4. Further requests the Secretary-General to report to the Council on the conclusions of the Commission of Experts and to take account of these conclusions in any recommendations for further appropriate steps called for by resolution 771 (1992);

5. Decides to remain actively seized of the matter.

Annex 191

UN, Commission on Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories, Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58, UN Doc. E/CN.4/1993/37, 17 February 1993

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/108/30/pdf/G9310830.pdf?OpenElement

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Annex 191

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E/CN.4/1993/37
17 February 1993

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Forty-ninth session
Agenda item 12

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58

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121. Nevertheless, the Special Rapporteur was informed that within Myanmar the written press, radio and television continued to be subject to governmental censorship, and that the distribution of written material was also subject to governmental limitations and control.

122. The Government also told the Special Rapporteur that the foreign press would not be allowed at the National Convention or to be present at the drafting of the Constitution.

123. In July 1989, reportedly hundreds of NLD members distributed leaflets. Many were allegedly detained, but the Special Rapporteur was told that it was not known why, of those detained, six young boys (all eight-year olds) were singled out for sentencing.

124. Persons who were detained were allegedly not able to publish at all after they were released. One actor was allegedly unable to appear in movies after his release.

125. One writer told the Special Rapporteur that all writers were obliged to fill in questionnaires regarding their political beliefs. Those who refused or answered "wrongly" were subsequently restricted from publishing and many were detained.

126. The Special Rapporteur was informed by persons released from prison in 1992 that during their detention they were not allowed any written material, including the State-run newspaper, or material with which to write or non-political literature; they were reportedly also denied access to radios.

127. Contact with foreigners is legally prohibited including receiving or passing information or written material.

F. Situation of Myanmar Muslims of Rakhine state

128. The Special Rapporteur was informed by Governments, specialized agencies and non-governmental organizations working in academic settings that Myanmar Muslims of Rakhine state (or Arakan state) comprise approximately 40 per cent of the 3 million inhabitants. He was told that Muslim persons began their migration into Myanmar in the twelfth and thirteenth centuries. A second wave of migration took place in the seventeenth century and a third in the early nineteenth century. This last movement took place while Myanmar, (then Burma) was a colony under British rule. Bangladesh at that time, was part of India and Burma was ruled by greater Indian governance rather than by the authorities in Britain. Movement of persons across what would later become national borders between Bangladesh and India or India and Myanmar was then unimpeded and natural. By the time Burma became an independent Union in 1948, there was a consolidated Burmese Muslim population of Indian/Bangladeshi ethnic origin.

129. Non-governmental sources told the Special Rapporteur that the movement of this group has been restricted since independence. The restrictions on movement prevented them in part from making the initial application for

citizenship in 1948, as well as for any category of citizenship since. Because of the restrictions on movement, even identification or residency cards were often unavailable to these Muslim Rakhine.

130. All of the Myanmar Muslims from Rakhine state interviewed by the Special Rapporteur were born in Myanmar. Most said that their parents had been born in Myanmar, but they were not sure about their grandparents' birthplaces. Some of the persons interviewed spoke Burmese. Most spoke a certain Bengali dialect similar to the Chittagonian dialect which is spoken in the Bangladesh region bordering Rakhine state. The dialects are not identical however, and all of the persons interviewed spoke the dialect specific to Myanmar and not Bangladesh. The Special Rapporteur was informed that despite the fact that the language is indicative of historical residency in Myanmar by the Muslim Rakhine, their language is no longer officially recognized by the authorities as one of the "languages of Myanmar". The new nationality law requires that citizens be able to speak one of the officially recognized languages. Under this law, the Rakhine are thus excluded for qualification as citizens.

131. Nevertheless, contradictory information regarding citizenship status was compiled in that most of the persons interviewed said that they had been allowed to vote in the 1990 general elections, a right understood to be reserved for citizens.

132. The Special Rapporteur was told that when Burma became an independent Union, attempts were made to expel some of the Rakhine Muslim population, and the first flow of refugees took place. A large exodus took place in 1978 when a census was carried out and again in 1991 which marked the present mass exodus to Bangladesh.

133. Since that time,it is alleged, the resettlement policies to places other than sites of origin, have disrupted family integrity and curtailed access of this group to land adequate for making a living. The most recent Muslim Rakhine refugee flow, primarily to Bangladesh, began in 1988. At the time of the Special Rapporteur's visit to Bangladesh, there were approximately 250,000 Myanmar refugees in Bangladesh.

134. The Special Rapporteur had occasion to carry out numerous interviews with these refugees in three different refugee camps; nevertheless, due to time limitations, a complete analysis of the demographics was not possible. The Special Rapporteur, however, was able to ascertain that most of the refugee population comes from four Myanmar sub-districts, Buthidaung, Maungdaw, Rathedaung and Akyab all within Rakhine (Arakan) state. Over 95 per cent of the refugees are Muslim, however some Hindu Rakhine are also among this refugee population.

135. According to the information received and carefully reviewed by the Special Rapporteur, in addition to the non-respect for the family unit and lack of land resources due to arbitrary resettlement, the Muslim Rakhine are one of many ethnic minorities in Myanmar who have not been adequately granted civil, political, social, economic and cultural rights commensurate with those people considered "Burmese". Although the Special Rapporteur received information that some places of worship had been destroyed or debased, the composite of evidence carefully reviewed by the Special Rapporteur indicated

Annex 192

Statute of the International Criminal Tribunal for the former Yugoslavia, original version contained in the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/248/35/img/N9324835.pdf?OpenElement

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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

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Annex

Statute of the International Tribunal

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

/...

56. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

57. Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

58. The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.

59. The corresponding article of the statute would read:

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

/...

C. Competence ratione loci (territorial jurisdiction) and ratione temporis (temporal jurisdiction)

60. Pursuant to paragraph 1 of resolution 808 (1993), the territorial and temporal jurisdiction of the International Tribunal extends to serious violations of international humanitarian law to the extent that they have been "committed in the territory of the former Yugoslavia since 1991".

61. As far as the territorial jurisdiction of the International Tribunal is concerned, the territory of the former Yugoslavia means the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.

62. With regard to temporal jurisdiction, Security Council resolution 808 (1993) extends the jurisdiction of the International Tribunal to violations committed "since 1991". The Secretary-General understands this to mean anytime on or after 1 January 1991. This is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.

63. The corresponding article of the statute would read:

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

D. Concurrent jurisdiction and the principle of non-bis-in-idem

64. In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.

65. It follows therefore that there is concurrent jurisdiction of the International Tribunal and national courts. This concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal. The details of how the primacy will be asserted shall be set out in the rules of procedure and evidence of the International Tribunal.

/...

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor, and

(c) A Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

Article 13

Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

/...

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 14

Officers and members of the Chambers

1. The judges of the International Tribunal shall elect a President.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

4. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Trial Chamber as a whole.

/...

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

/...

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Annex 193

UNHCR, “Burma, Memorandum on repatriation”, UNHCR Information Section, 5 November 1993

Available at:

https://www.burmalibrary.org/reg.burma/archives/199401/msg00058.html

[Date Prev][Date Next][Thread Prev][Thread Next][Date Index][Thread Index]

BURMA: memorandum on repatriation

- *Subject*: BURMA: memorandum on repatriation
- *From*: strider@xxxxxxxxxxx
- *Date*: Sat, 22 Jan 1994 09:26:00

Subject: BURMA: memorandum on repatriation

/* Written 4:12 pm Nov 11, 1993 by wrts@xxxxxxxxxxx in igc:reg.seasia */
/* ---------- "BURMA: memorandum on repatriation" ---------- */
[the following was issued by the Information Section of the UNHCR
on 5 November 1993.]

A Memorandum of Understanding between the Government of the Union of Myanmar and UNHCR was signed on 5 November 1993, in Yangon. The Director General of the Department of Immigration and Manpower, U Maung Aung singed the MOU on behalf of the Government and Mr. W. Blatter, Director, Regional Bureau for Asia and Oceania, UNHCR, Geneva, on behalf of the United Nations High Commissioner for Refugees. The signing of the MOU marks a milestone in the voluntary repatriation programme from Bangladesh. It is the result of an agreement reached during the visit to Myanmar of Mrs. Sadako Ogata, the United Nations High Commissioner for Refugees, in July of this year.

The MOU stipulates the modalities of UNHCR's presence and programmes in the Rakhine State. It states, interalia, that UNHCR will be given access to all returnees; that the returnees will be issued with the appropriate identification papers and that the returnees will enjoy the same freedom of movement as all other nationals.

The voluntary repatriation programme has the following components:

1. The movement phase, during which the necessary infrastructure will be put into place to facilitate the reception of a larger number of returnees.

2. Initial assistance in the villages of origin. In addition in relief items such as household goods and construction materials (bamboo), the returnees will also receive food assistance for two months, provided by WFP.

3. The Reintegration phase: to enhance the economic and social stability of the returnees, community level projects in the fields of agriculture, health, water and sanitation and education will be implemented with the respective technical departments which will also benefit the surrounding population. Close coordination will be maintained with UNDP and other UN agencies such as UNICEF and WHO; this is in order to avoid any overlapping and to assure the continuum from relief to development.

UNHCR will in the coming weeks seek the financial support of the International Community to implement this important voluntary repatriation programme from Bangladesh to Myanmar.

- Prev by Date: **Burma's 92-year-old Strand Hotel re**
- Next by Date: **HR Violations in Burma (r)**
- Previous by thread: **Burma's 92-year-old Strand Hotel re**
- Next by thread: **HR Violations in Burma (r)**
- Index(es):
  - **Date**
  - **Thread**

Annex 194

ICTY, Rules of Procedure and Evidence, IT/32, 14 March 1994

English version available at:

https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_original_en.pdf

French version available at:

https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_original_fr.pdf

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

IT/32
14 March 1994

Original: English & French

Second session
The Hague,
The Netherlands
17 January - 11 February 1994

RULES OF PROCEDURE AND EVIDENCE

(ADOPTED ON 11 FEBRUARY 1994)

Part Three

ORGANIZATION OF THE TRIBUNAL

Section 1 The Judges

Rule 14
Solemn Declaration

(A) Before taking up his duties each Judge shall make the following solemn declaration:

"I solemnly declare that I will perform my duties and exercise my powers as a Judge of the 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 honourably, faithfully, impartially and conscientiously".

(B) The declaration, signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative, shall be kept in the records of the Tribunal.

Rule 15
Disqualification of Judges

(A) A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw,

and the President shall assign another Judge to sit in his place.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rule 47, shall not sit as a member of the Trial Chamber for the trial of that accused.

(D) No member of the Appeals Chamber shall sit on any appeal in a case in which he sat as a member of the Trial Chamber.

(E) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or, with the consent of the accused, continuation of the proceedings from that point.

Rule 16
Resignation

A Judge who decides to resign shall communicate his resignation in writing to the President who shall transmit it to the Secretary-General of the United Nations.

Part Eight

REVIEW PROCEEDINGS

Rule 119
Request for Review

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

Rule 120
Preliminary Examination

If a majority of Judges of the Chamber that pronounced the judgement agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

Rule 121
Appeals

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

Rule 122
Return of Case to Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

Annex 195

Statute of the International Criminal Tribunal for Rwanda, original version contained in Security Council resolution 955 (1994), S/RES/955 (1994), 8 November 1994

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/pdf/N9514097.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/437/49/pdf/N9443749.pdf?OpenElement

the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. Decides to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. Decides to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

/...

(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.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

/...

Article 4

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

/...

Annex 196

UN GA, International Law Commission, First report on State responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/490, 24 April 1998

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/115/04/pdf/N9811504.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/115/05/pdf/N9811505.pdf?OpenElement

Annex 196

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/490 and Add. 1–7*

First report on State responsibility, by Mr. James Crawford, Special Rapporteur

[*Original: English and French*]
[*24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998*]

CONTENTS

*Incorporating documents A/CN.4/490/Add.2/Corr.1, A/CN.4/490/Add.4/Corr.1 and A/CN.4/490/Add.7/Corr.1.

16. Indeed the distinction has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules, the breach of which may give rise to responsibility. For example, there has been an extensive debate about whether State responsibility can exist in the absence of damage or injury to another State or States. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand in some situations there is no legal injury to another State unless it has suffered material harm.[13] The position varies, depending on the substantive or primary rule in question. It is only necessary for the draft articles to be drafted in such a way as to allow for the various possibilities, depending on the applicable primary rule. A similar analysis would apply to the question whether some "mental element" or culpa is required to engage the responsibility of a State, or whether State responsibility is "strict" or even "absolute", or depends upon "due diligence".

17. There remains a question whether the draft articles are sufficiently responsive to the impact that particular primary rules may have. The regime of State responsibility is, after all, not only general but also residual. The issue arises particularly in relation to article 37 of part two (*Lex specialis*). It is discussed below.

18. Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary rules. This is true, at least apparently, for the definition of international crimes in article 19, and especially paragraph 3. Article 19, however, raises broader issues, which are discussed in chapter I below. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is article 35, dealing with compensation in cases where the responsibility of a particular State is precluded by one of the circumstances dealt with in articles 29 to 33.[14] On the other hand article 35 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the "circumstances precluding wrongfulness" in articles 29 to 33 although whether it is equally applicable to each of those circumstances is a question to which it will be necessary to return.

2. Issues excluded or insufficiently developed

19. Many of the comments made so far with regard to the scope of the draft articles relate to issues which should be excluded (e.g. international crimes, countermeasures, dispute settlement). But a number of topics have been identified which require further treatment. For example, the provisions dealing with reparation, and especially the payment of interest, have been said to be inadequately developed.[15]

20. Another such issue is obligations *erga omnes*. Since its well-known dictum in the *Barcelona Traction* case,[16] ICJ has repeatedly referred to the notion of obligations *erga omnes*, most recently on the admissibility of Yugoslavian counter-claims in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[17] The matter is presently dealt with in the definition of "injured State" in article 40, where it is linked to the concept of international crimes.

21. Comments of Governments on obligations *erga omnes* are very varied.

22. France is generally critical of the notion, while not denying that in special circumstances a State may suffer legal injury merely by reason of the breach of a commitment. However, it says that "in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule".[18] This may appear to deny the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all States in compliance with certain norms.

23. Germany, by contrast, sees in the clarification and elaboration of the concepts of obligations *erga omnes* and *jus cogens*, in the field of State responsibility, a solution to the vexed problems presented by article 19.[19]

24. The United States takes an intermediate position, supporting the clarification and in some respects the narrowing of the categories of "injured State" in article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denies that injured States acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[20]

25. The United Kingdom likewise raises issues of the definition of "injured State" in the context of multilateral treaty obligations. In particular it questions the consistency of article 40, paragraph 2 (*e*) (ii), with article 60, paragraph 2 (*c*), of the 1969 Vienna Convention on the Law of Treaties, which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting State only "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty".[21]

26. These and related questions will be referred to in chapter I of the present report, in the context of international crimes, and (depending on the decisions to be taken

[13] See, for example, the *Lake Lanoux* arbitration, UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

[14] See, for example, A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 35.

[15] Ibid., comments by the United States on article 42, comments by France under General remarks, para. 5; and comments by Mongolia on article 45.

[16] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32.

[17] *Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35.

[18] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 40, para. 3.

[19] Ibid., comments by Germany under part two, chap. IV.

[20] Ibid., comments by the United States on article 19, para. 2.

[21] Ibid., comments by the United Kingdom on article 40, para. 2.

Annex 197

UN ECOSOC, Commission on Human Rights, Situation of human rights in Myanmar: Report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution 1998/63, UN Doc. E/CN.4/1999/35, 22 January 1999

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/103/33/pdf/G9910333.pdf?OpenElement

French version available at:

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UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/1999/35
22 January 1999

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 9 of the provisional agenda

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Situation of human rights in Myanmar

Report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution 1998/63

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GE.99-10333 (E)

Rapporteur received the testimonies of a total of 50 persons selected from among newly arrived persons from Myanmar, mostly Karen, Shan and Karenni. The information and views obtained in the course of his visits are reflected below under the relevant subject headings.

A. The problem of displacement

27. Internal displacement in Myanmar represents a particular case of human tragedy resulting from conflict between the Government and different ethnic groups. It is estimated that over half a million displaced persons, living in Mon, Karen, Shan and Karenni States, are in need of humanitarian assistance. Since the independence of Myanmar in 1948, the country has suffered from unresolved conflicts between most of the ethnic minorities and the central authorities in spite of a number of ceasefire agreements. These conflicts precipitated insurgencies in several parts of the country which have resulted in large numbers of internally displaced persons and a considerable number who have sought refuge in neighbouring countries, particularly Thailand, Bangladesh and India.

28. The Special Rapporteur is not in possession of independently verified statistics on the number of displaced persons in Myanmar, but local and international NGOs estimate the number in Karen State to be between 100,000 and 200,000. [1] Unofficial estimates place the current number in Shan State to be over 300,000 [2] and in Karenni State, 70,000. Finally, there are reportedly about 40,000 persons displaced in Mon State.

29. By the end of June 1998, the refugee camp caseload of displaced persons from Myanmar living in Thailand was 112,841. [3] The breakdown by ethnic group was as follows: 86,823 Karen, 12,665 Mon, 13,353 Karenni. [4] In addition, there were a number of Shan displaced persons who were not living in refugee camps but were scattered mainly throughout the north of Thailand. It is generally believed that tens of thousands of people from Myanmar have entered Thailand during the last three years.

B. The main causes of displacement

30. The problem of displacement in Myanmar is complex and open to so many different interpretations that a comprehensive assessment is difficult. The causes of displacement are numerous and differ from one region to another, although certain common features and trends can be discerned.

31. The role of the army, in this context, is paramount. Since independence, it has exercised a strong influence over the governing of the ethnic states. Many Karen, Karenni and Shan do not perceive the army as a national army, and soldiers, particularly ethnic Burmese, generally behave towards the local population as if they were enemies.

32. Violence against civilians would appear to have been a fundamental component of the overall military strategy of the Myanmar army. That strategy is designed first to secure resources from the local population, in particular food, combatants and workers, and second to weaken the resource base of insurgent groups and their capacity to govern. To this latter end, the army

Annex 198

UN GA, Report of the Secretary-General pursuant to General Assembly resolution 53/35, *The fall of Srebrenica*, UN Doc. A/54/549, 15 November 1999

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/348/76/img/N9934876.pdf?OpenElement

French version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/348/77/img/N9934877.pdf?OpenElement

United Nations A/54/549

General Assembly

Distr.: General
15 November 1999

Original: English

Fifty-fourth session
Agenda item 42
The situation in Bosnia and Herzegovina

Report of the Secretary-General pursuant to General Assembly resolution 53/35

The fall of Srebrenica

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99-34876 (E) 271199

had any significant presence in Bosnia and Herzegovina. During those 60 days, approximately 1 million people were displaced from their homes. Several tens of thousands of people, most of them Bosnian Muslims, were killed. The accompanying scenes of barbarity were, in general, not witnessed by UNPROFOR or by other representatives of the international community, and do not form a part of this report. In addition, the war in Bosnia and Herzegovina included nine months of open warfare between the mainly Muslim forces of the Bosnian Government and the mainly Croat forces of the Croatian Defence Council. This fighting, although important to understanding the conflict in Bosnia and Herzegovina, did not generally involve the safe areas that are the central focus of this report. The record of that conflict, therefore, does not appear in this document.

7. At the outset, I wish to point out that certain sections of this report may bear similarity to accounts of the fall of Srebrenica that have already appeared in a number of incisive books, journal articles, and press reports on the subject. Those secondary accounts were not used as a source of information for this report. The questions and account of events which they present, however, were independently revisited and examined from the United Nations perspective. I hope that the confirmation or clarification of those accounts contributes to the historical record on this subject. I also wish to point out that I have not been able to answer all the hitherto unanswered questions about the fall of Srebrenica, despite a sincere effort to do so.

8. This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified.

9. All of these exceptional measures that I have taken in preparing this report reflect the importance which I attach to shedding light on what Judge Riad described as the "darkest pages of human history".

need to open the route over Mount Igman to resupply Sarajevo, and for the rapid reaction force, when operational, to protect the humanitarian convoys — though he cautioned against its more robust application in favour of minimizing the risk of escalation, placing emphasis on Mr. Bildt's current peacemaking efforts.

261. The United Nations High Commissioner for Refugees gave the Secretary-General a very bleak assessment of the humanitarian situation. She indicated that during the month of June 1995 only 20 per cent of the assessed needs had been met in Bosnia and Herzegovina, except in the contiguous Federation areas. Sarajevo had received only 8 per cent of its assessed requirements. The airlift remained suspended since 8 April and soldiers had taken over driving the humanitarian trucks over Mount Igman into Sarajevo, since it had become too dangerous for civilians. She stressed the need for greater involvement of the military in providing humanitarian assistance in the light of the deteriorating security situation. The meeting concluded with a sense that if there were no breakthroughs on the peacemaking front in the immediate future the United Nations would have to consider withdrawing from Bosnia.

D. 9 July: events leading to the establishment of a blocking position and warning to the Serbs

262. None of the UNPF senior leadership gathered together at Geneva on 8 July had yet been informed of the seriousness of the events in Srebrenica. On the basis of the research conducted in the context of the present report, it appears that the leadership first learned about the extent of the deteriorating situation from UNPF headquarters by telephone at 0840 hours on 9 July. The assessment provided to them by the military information cell indicated that the BSA might be attempting to "shrink the pocket". Upon receiving this report, the Special Representative of the Secretary-General delegated his authority for the use of close air support to the Force Commander, who immediately left for Zagreb. The Special Representative also returned to Zagreb later that day, and the Deputy Force Commander reported to him that the situation had stabilized. An aide also confirmed that no request for close air support had thus far been received in Zagreb (which was technically true, as the requests that had been made up to that time had been turned down in Sarajevo).

263. That afternoon, on 9 July, the United Nations military observers in Sector North-East provided an assessment of the situation in Srebrenica. Their report indicated that the Dutchbat observation posts and personnel had been directly targeted, that the Dutchbat Commander had refused to release the ARBiH weapons when requested, and that the Dutchbat soldiers did not have the capacity to control the situation and prevent advances into the enclave, adding that "this has left the civilian population, the ARBiH and Dutchbat at the direct mercy of the BSA". The report offered five possible explanations for the BSA's attack on Srebrenica:

(1) To gain control of the roads between the enclaves and Zvornik;

(2) To secure control of the natural resources in the region, i.e., bauxite;

(3) To gain control of the black market system in the area;

(4) To "get the entire region under BSA control";

(5) To alter the ARBiH actions around Sarajevo.

264. The report of the United Nations military observers concluded with an assessment that "the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish". Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them.

Attacks on five more Dutchbat observation posts

265. Bosnian Serb soldiers entered OP Uniform at approximately 0900 hours on the morning of 9 July, and disarmed the crew. Roughly half an hour later, the BSA forced the crew to drive to the former OP Echo, which the BSA had taken over early in June. Along the way, the crew was able to observe and report that hills on the eastern side of the enclave were occupied by BSA artillery positions. The BSA then ordered the UNPROFOR crew to drive to Bratunac, where it arrived at approximately 1200 hours. The crew radioed Dutchbat in Srebrenica, reporting that the Serbs had told them that they would be evacuated to the Netherlands.

United Nations personnel, non-governmental organizations and the local population. The Force Commander told Tolimir that the United Nations would not leave the enclave and demanded that the BSA halt their attack. At 2120 hours, UNPROFOR headquarters in Sarajevo reported that the Serbs had bypassed the Dutchbat blocking positions, and that Dutchbat and the Bosniacs were now coordinating a joint defence. The Force Commander called General Mladić's headquarters again at 2125 hours to tell them that the situation was impossible, and that he would do everything he could to avoid the use of force, but that there were limits. Mladić's staff responded that it was all "Muslim propaganda" and that they would have to verify the situation themselves.

290. The Force Commander briefed the staff on his conversation with Mladić's office at 2135 hours. At this time, reports were received in Zagreb that the fighting in Srebrenica had now stopped. The Force Commander concluded that UNPF was faced with three scenarios:

(1) To do nothing, in which case the Serbs would either halt their advance or completely bypass the blocking positions;

(2) To call in close air support immediately, but since it was dark and the situation was confused, this could be risky;

(3) To wait until morning to use close air support, in order to avoid the risk of friendly fire and to clarify targets.

291. An officer then relayed a message which he had just received from the Dutchbat Commander in Srebrenica, expressing the latter's belief that the blocking position could still hold its ground, and the hope that things would remain calm through the night; the Dutchbat Commander did not consider that close air support would be useful at the moment, but he would like it ready by 0600 hours the following morning. The NATO Liaison Officer responded that the NATO pilots could be put on alert immediately, but that they would not be able to stay in the air all night. The Force Commander summarized his position, stating that he had not used close air support that evening because it was dark and the Serb infantry were better stopped by the Netherlands infantry on the ground. He reflected that it was odd that the Serbs had behaved as they did in the middle of a negotiation process.

292. The delegate of the Special Representative of the Secretary-General in Belgrade telephoned the Special Representative's office at 2245 hours to indicate that he had seen President Milošević, who had responded that not much should be expected of him because the Bosnian Serbs "did not listen to him". At 2300 hours, the Force Commander, having spoken to General Tolimir, who had told him that the offensive action had stopped, requested his team to reconvene at 0600 hours the next morning.

293. The Force Commander then dispatched a report to United Nations Headquarters in New York providing an update on the situation as of 2300 hours on 10 July. He recounted the extent of BSA shelling of the town during the course of the day and the estimates of casualties received. He stated that during the BSA advance, shortly after 1800 hours, Dutchbat had directly engaged in firefights with the BSA, using personal weapons and 0.50-calibre machine-guns. (This appears to have been based on initial reports which later proved to be incorrect — Dutchbat had not engaged in firefights with the BSA, but had only fired flares at them, and had fired machine-gun rounds over their heads.) He noted with concern that two BSA tanks, which had been heard operating behind the BSA infantry lines, might advance to engage the blocking position. He reported that, in the evening, the ARBiH had apparently set up defensive positions near the Dutchbat blocking positions, presumably in an effort to stop the BSA advance, which had stopped as of 2300 hours. However, he also added that other reports had indicated that the Dutchbat observation post on the western boundary of the pocket was surrounded by the BSA and might have been directly targeted.

294. In his report, the Force Commander also explained why he had decided against the use of close air support that evening. He added that as of 0600 hours the following day NATO aircraft would be airborne and ready to conduct a close air support mission at shorter notice, and against infantry if necessary, if called upon to do so. He further stated that UNPF headquarters had considered unacceptable a "ceasefire" offer by the Serbs (which had been delivered to the Dutchbat Commander by the BSA Commanding Officer), and under which Dutchbat forces would withdraw, without their weapons and equipment, as would non-governmental organization personnel. All civilians wishing to evacuate to Tuzla would do so within 48 hours.

295. At approximately midnight, the Dutchbat Commander convened a meeting with the Bosniac leadership in Srebrenica. The United Nations military observers summarized the results of the meeting in their report to Sector North-East a few hours later. They indicated that the Dutchbat Commander had informed the Bosniac leadership in Srebrenica, comprising the Mayor, the Deputy Mayor, the President of the Executive Council and the ARBiH Chief of Staff, that the BSA had offered an ultimatum for "surrender" which UNPROFOR had categorically rejected. The Dutchbat

which, at UNPF's request, had been airborne since 0600 hours, would soon need to return to Italy to refuel. The UNPROFOR Commander's Chief of Staff concurred because the Serb attack had not resumed. At the same time, he requested that the planes return as quickly as possible. He was apparently told that the planes would be available to respond to a request for close air support by approximately 1400 hours.

301. Sometime before 1000 hours, the Special Representative of the Secretary-General informed his staff that he had spoken with the Secretary-General. The Special Representative added that he had declined the Secretary-General's offer to delegate to him the authority for calling in air strikes. Approximately one hour later, UNPF headquarters in Zagreb received the request from UNPROFOR Bosnia and Herzegovina Command for close air support for Dutchbat in Srebrenica.

302. The Bosnian Serbs resumed their attack at approximately 1100 hours, with direct tank fire against Dutchbat positions. By 1130 hours, B Company was reporting that the BSA was firing at its compound. The BSA also began shelling OP Mike and OP November in the northern portion of the enclave. At 1200 hours, the Force Commander advised the Special Representative to approve the request for close air support to be used against any forces either attacking the blocking positions or firing with heavy weapons on other United Nations positions in Srebrenica town. The Special Representative approved the request at 1217 hours, providing additional authorization for close air support against any forces attacking United Nations observation posts along the perimeter of the enclave. It is worth noting that the form which the Force Commander and the Special Representative signed on 11 July was the same as that which had been submitted to Zagreb on 9 July. In their view, it was a standing request which would be acted upon on the receipt of updated target information and the notification, communicated verbally if necessary, that the warning of 9 July to the Serbs had not been heeded. Thus, the confusion between Srebrenica and Tuzla over the forms on the morning of 11 July appears to have been, in Zagreb's perspective, irrelevant to the decision to approve close air support.

303. At 1210 hours, the United Nations military observers in Srebrenica reported that the crew of OP November had withdrawn, under Serb fire, to a new position approximately 400 m behind the observation post. At almost the same time, a Serb tank fired at one of the Dutchbat APCs in the B1 blocking position. At 1230 hours, the BSA began firing on OP Hotel, which was located on high ground overlooking Srebrenica town and positions to the south. Within half an hour, the Serbs were shelling the town from positions to the south and east. At around 1330 hours, the BSA fired two shells which impacted in the B Company compound, where 4,000 to 5,000 Bosniac civilians were taking refuge; an unspecified number were injured.

304. The advancing Serb forces now entered the town encountering little or no resistance either from UNPROFOR or from the ARBiH. The Serb flag was hoisted above a bakery at the southern end of the town at 1407 hours, according to one individual who was there at the time. The residents of Srebrenica town, including those who had sought refuge at the B Company base, began to flee northwards in the direction of Potočari at approximately 1430 hours. Srebrenica had fallen. Until that point, at least three (but possibly up to five) requests for air support by Dutchbat had been turned down at various levels in the chain of command. Dutchbat had also not fired a single shot directly at the advancing Serb forces.

305. Eighteen NATO aircraft had by now made their way to Srebrenica. Six of them were detailed to attack targets, with the remainder largely designated for the suppression of enemy air defence systems, if required. At approximately 1440 hours, two NATO aircraft dropped a total of two bombs on what were thought to be Serb vehicles advancing towards the town from the south. It was not clear at the time what damage had been done, if any. NATO aircraft also overflew the southern and north-western portions of the enclave, respectively, but were unable to locate targets.

306. Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request. The message was passed to NATO accordingly, and the air action was halted. The Minister made similar calls to the Under-Secretary-General for Peacekeeping Operations in New York and his Military Adviser (a Netherlands Major General) at the same time, which were echoed in démarches by the Permanent Representative of the Netherlands.

307. President Milošević telephoned the Special Representative of the Secretary-General at 1500 hours, and

stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true.

308. At 1600 hours, the United Nations military observers reported that upwards of 20,000 inhabitants, mainly women, children and the elderly, were converging on the Dutchbat headquarters compound in Potočari. They added that "... the shelling of the town [had been ongoing] despite the airstrikes ... the town is in the hands of the BSA ... B-Company has left the compound in Srebrenica and is heading for Potočari ... the airstrikes on the north part of the enclave have not taken place up till now ... that means that the compound is a very easy target for all the weapons on the north ridge of the enclave". A covering note transmitting this report stated that, "apparently, there has been too little too late".

309. About an hour earlier, Dutchbat had assigned the battalion's logistics officer and approximately 30 soldiers to coordinate the reception of the people fleeing from Srebrenica. The commanding officer assessed that the main gate to the compound was vulnerable to Serb fire, and accordingly ordered that a hole be cut in the fence on the other side of the compound. Some 4,000 to 5,000 refugees had entered the compound through this hole by the early evening. Dutchbat then assessed that it did not have the provisions or space required to accommodate any more refugees and blocked entry into the compound for the additional refugees who were struggling to get in. These refugees, estimated to number some 15,000 to 20,000, also comprised mainly women, children and elderly. They remained outside the compound, in its immediate vicinity, throughout the night.

310. The majority of Srebrenica's men of military age did not seek refuge in Potočari. The vast majority of them, including the civilian and military authorities, as well as some of their families, decided instead that they would risk making their way on foot to Tuzla, some 50 km away, through Serb lines and through forested, partly mined territory. They decided that they would fight their way through if they had to. By mid-afternoon on 11 July, the men who were preparing to make the journey began to gather in the hamlet of Šušnjari, located in the north-western portion of the enclave.

311. Meanwhile, the acting UNPROFOR Commander spoke with General Gvero, Deputy Commander of the BSA, at 1810 hours. The notes on the conversation indicate that he told Gvero that, while the NATO aircraft had been withdrawn from the area, they could be recalled at any time. He also informed him that the Dutchbat Commander had been instructed to contact the BSA in order to obtain a ceasefire. He further stated that he would defend his troops if and when attacked and requested that the Dutchbat soldiers currently being held by the BSA be released immediately. General Gvero pledged to "look into the situation" and to revert back the following morning.

312. Upon the Force Commander's request, the acting UNPROFOR Commander then issued instructions to Dutchbat, ordering them to enter into negotiations with the BSA to secure an immediate ceasefire. He added that "giving up any weapons and military equipment [was] not authorized and [was] not a point of discussion". He ordered Dutchbat to concentrate their forces in the Potočari compound and to withdraw from the remaining observation posts. He ordered them to "take all reasonable measures to protect refugees and civilians in [their] care". He added that they should "continue with all possible means to defend [their] forces and installation from attack". This was "to include the use of close air support if necessary". While noting the clarity of the instructions, the Dutchbat commanders assessed that they were simply no longer in a position to carry them out.

313. At around 2000 hours, the Serbs contacted Dutchbat using the communications equipment in one of the vehicles that they had commandeered in the preceding days. They instructed the Dutchbat Commander to come to the Hotel Fontana in Bratunac for a meeting. He arrived there at approximately 2030 hours, and was surprised to find General Mladić, accompanied by General Živanović, the Commander of the BSA Drina Corps. The BSA had gathered a considerable media entourage as well. The meeting lasted roughly 45 minutes, which Mladić reportedly used mostly to shout at the Dutchbat Commander, accusing him and the United Nations of having wrongfully used air power against the BSA. He blamed the United Nations for not having disarmed the Bosniacs in Srebrenica. The Dutchbat Commander attempted to explain the desperate situation of the thousands of inhabitants who had gathered in Potočari. Mladić responded that the Dutchbat Commander should return for a second meeting at 2330 hours, and that he should bring with him representatives of the refugees, and if possible, someone from the civil authorities.

314. The Dutchbat Commander returned to the Hotel Fontana at 2330 hours accompanied by the Director of Srebrenica's high school, whom he had asked to serve as a representative of the refugees. (Of the town's official civilian leaders, only Ibran Mustafić, representative of Srebrenica in the Assembly of Bosnia and Herzegovina, joined the Bosniacs seeking protection from UNPROFOR at Potočari. All other leaders, expressing scepticism as to whether UNPROFOR was willing or able to protect them,

VIII. Aftermath of the fall of Srebrenica: 12-20 July 1995

The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratio Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krsti , Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work.

A. 12 July: meetings with Mladić; deportation commences

318. On 12 July, the Special Representative of the Secretary-General transmitted the text of the Dutchbat Commander's report to United Nations Headquarters in New York. In doing so, he also provided an update of the situation as it stood at that time. He indicated that the BSA was still holding 31 Dutchbat soldiers hostage, including the B Company Commander who had been apprehended by the BSA the day before. He added that the three observation posts that were still being manned were now behind Serb lines. He also stated that Dutchbat could provide only two meals for each of the refugees in Potočari, after which their stocks would be exhausted. He stressed that Bosnian Government authorities were opposed to the United Nations plan to evacuate all those in Potočari who wished to leave Srebrenica. Minister Hasan Muratović, on behalf of the Bosnian Government, had reportedly told UNHCR representatives that his Government did not accept the evacuation of civilians out of Potočari, other than in cases of medical emergencies. Mr. Muratović had apparently added that because Srebrenica was a "United Nations safe area", the newly displaced should be accommodated there. The Special Representative also indicated in his report that there was a "real concern" that Žepa would be the next objective of the Serbs. General Maldić had reportedly announced on Bosnian Serb radio that all Bosnians in Žepa

killing, which appears to have been carried out by small-arms fire and hand grenades thrown into the hall.

365. Erdemović told the Tribunal: "I wanted to testify because of my conscience, because of all that happened because I did not want that. I was simply compelled to, forced to, and I could choose between my life and the life of those people; and had I lost my life then, that would not have changed the fate of those people. The fate of those people was decided by somebody holding a much higher position than I did. As I have said already, what really got me, I mean, it has completely destroyed my life and that is why I testified." It is worth bearing in mind that Erdemović, a Bosnian Croat, remains the only individual who participated in the executions from 14 to 17 July who has surrendered himself. The Tribunal has reconstructed the crime scene from that period on the basis of the forensic evidence, which it has used to corroborate the stories of the handful of men who survived the executions.

366. The accounts of the survivors of the other execution sites are equally horrific. The horror for those being held in Bratunac had begun a few days earlier, on 14 July, when one group of men was loaded into buses and taken to a school near the Lazete Hamlet, where they were then jammed into a warehouse. Throughout the morning, the warehouse continued to be filled with men, until they were eventually taken out, given some water and told that they were to be exchanged. They were then put on trucks which took them 800 m north of the school, taken off the trucks, lined up in a field, and shot.

367. Also on 14 July, another group was taken from Bratunac past Zvornik to Karakaj and the aluminium factory, and were dropped of at the Petkovski school. They were jammed into the school's gymnasium and classrooms. During the course of the day, they were subjected to lethal beatings. In the afternoon and evening, people were placed in trucks and taken to the plateau of the dam of the aluminium factory (the Red Dam), and executed. Some of their bodies are believed to have been thrown in the lake, others piled into mass graves.

368. On or about 15 July, a group of approximately 450 people were taken from Bratunac to Kozluk, located on the Drina, north of Karakaj. They were all summarily executed, only a few hundred metres from the barracks of the "Drina Wolves".

369. On 16 July, the column of Bosniac men that had set out from Srebrenica and Šušnjari was still trying to make its way to ARBiH-held territory. Many of these men surrendered and were apparently loaded on buses and trucks and taken to the Cerska Valley. One Srebrenica survivor later recalled realizing that he was walking on blood as he arrived there, and that one week later others passing through the Cerska Valley could smell corpses. One hundred and fifty bodies with their hands bound were subsequently found at a mass grave near this location.

370. Over the past four years, the Tribunal has been able to determine that those killed between 14 and 17 July were buried within 24 to 48 hours in mass graves in close proximity to the execution sites. (See the map at the end of this chapter.) In some cases, the victims were made to dig their own graves. In others, they were shot while standing in them. It appears that, over the course of the next several months, the bodies were taken out of the initial mass graves, and reburied in 33 different "secondary sites". Each of these secondary sites is believed to contain the remains of between 80 and 180 bodies. The Tribunal has managed to probe each of those sites, and has fully exhumed seven of them. To date, the Tribunal has found the remains of approximately 2,000 victims from those sites which it has fully exhumed, of which the identities of roughly 30 have been determined thus far.

14 July: meeting with Milošević and Mladić

371. The international community does not appear to have had any evidence at the time that executions were taking place in such staggering numbers. In fact, almost all the individuals interviewed in the context of this report indicated that they simply did not expect, or even imagine, the possibility of such barbarity. However, the Dutchbat debriefing report reveals that two Dutchbat soldiers, on their way back from Nova Kasaba to Bratunac on 14 July, had seen between 500 and 700 corpses on the roadside. However, the same report indicated that two other members of Dutchbat travelling in the same vehicle saw only a few corpses. No written record has been located indicating that Dutchbat made either account available to the UNPROFOR chain of command on 14 July, or in the days immediately thereafter. Thus, it is not clear how many bodies were there at the time, and if they were those of soldiers who had been in the "column" and had been killed in battle with the BSA, or those of defenceless individuals who had been summarily executed.

372. On 14 July, the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting,[27] he pressed the President to arrange immediate access for UNHCR to assist

the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a "green light" would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ("Route Swan") be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.

373. A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić.

374. Meanwhile, the Security Council had again convened to discuss the situation in Srebrenica and had adopted a presidential statement (S/PRST/1995/32) in which it recalled its resolution 1004 (1995) and expressed deep concern about the ongoing forced relocation of tens of thousands of civilians from the Srebrenica safe area to the Tuzla region by the Bosnian Serbs. The Council considered this forced relocation to be a clear violation of the human rights of the civilian population. The Council was "especially concerned about reports that up to 4,000 men and boys had been forcibly removed by the Bosnian Serb party from the Srebrenica safe area". It demanded that "in conformity with internationally recognized standards of conduct and international law the Bosnian Serb party release them immediately, respect fully the rights of the civilian population of the Srebrenica safe area and other persons protected under international humanitarian law and permit access by the International Committee of the Red Cross".

F. 15 July: massacres continue; agreement reached between Mladić and the United Nations Protection Force

375. The Co-Chairmen of the International Conference on the Former Yugoslavia, the Special Representative of the Secretary-General, and the UNPROFOR Commander convened for a meeting at the United States Embassy in Belgrade on the morning of 15 July. Mr. Bildt briefed the gathering on the results of his meeting with Milošević and Mladić the previous day. Aware of reports that grave human rights abuses might have been committed against the men and boys of Srebrenica, but unaware that mass and systematic executions had commenced, the gathering of senior international officials then joined Milošević and Mladić for a largely ceremonial meeting over lunch. This was followed by a meeting between the UNPROFOR Commander and Mladić to finalize the details.

376. In his account of those meetings,[28] Mr. Bildt explains that the participants decided not to initially reveal publicly that the meeting had been held, or to divulge the substance of any agreements reached. He explains that this decision was taken because the meeting with Mladić was ostensibly taking place without Karadžić's knowledge and that they did not want the latter to find out. (Mr. Bildt indicates that it had become part of a concerted effort to use Mladić in order to undermine Karadžić.) Mr. Bildt adds that it was nevertheless decided that the provisions of the agreement relating to Srebrenica would take effect immediately, even if not officially signed, whereas the provisions relating to Goražde, Žepa and Sarajevo and other matters would be finalized after another meeting between Mladić and the UNPROFOR Commander, to be held in Serb-held territory outside of Sarajevo, at 1200 hours on 19 July. The second meeting would not be kept secret, and after its conclusion, all points agreed upon, including on Srebrenica, would then be revealed.

377. The points of agreement reached on Srebrenica, as reported to United Nations Headquarters at the time, were the following:

> Full access to the area for UNHCR and ICRC;
>
> ICRC to have immediate access to "prisoners of war" to assess their welfare, register them, and review procedures at Bosnian Serb reception centres in accordance with the Geneva Conventions;
>
> UNPROFOR requests for resupply of Srebrenica, via Belgrade, Ljubovija and Bratunac, to be submitted on 17 July;

their ears cut off and some women have been raped."[29] The story was picked up by a number of wire services and reproduced. At approximately the same time, survivors of executions had also begun to recount their testimonies to the international and local press.

390. This prompted the Secretariat to write to the Special Representative the following day: "you will, no doubt, have read and heard the extensive reports of atrocities committed by the Bosnian Serbs during their recent takeover of Srebrenica. While many of these reports emerge from refugees, they are widespread and consistent, and have been given credence by a variety of international observers, including UNHCR. We have however, received nothing on the subject from UNPROFOR." The Secretariat urged the Special Representative to ensure that UNPROFOR interview the Netherlands personnel who had already returned from Srebrenica. The instruction to the Special Representative continued: "our inability to corroborate (or authoritatively contradict) any of the allegations currently being made, many of which involve events of which UNPROFOR in Potočari could not have been unaware, is causing mounting concern here". The Special Representative responded that the Dutchbat soldiers that had been in Bratunac had been debriefed immediately upon arrival in Zagreb. He added, however, that such debriefings "did not reveal any first-hand accounts of human rights violations".

H. 19 July: Mladić and United Nations Protection Force Commander meet again and conclude agreement

391. On the basis of his recent meeting with President Milošević and General Mladić in Belgrade, the Special Representative of the Secretary-General was hopeful that both might feel it opportune to show some generosity. He sought the views of the UNPROFOR Commander, who responded that "peacekeeping [had] come to an end", and that the safe area policy had "manifestly failed". In his view, the war would continue for some time, until there was "symmetry" in the territorial holdings of the belligerents. He thought that this symmetry might emerge as time was not on the side of the Bosnian Serbs, who he predicted would become relatively weaker as the months wore on. He warned that the Serbs would seek a ceasefire which would "seal their territorial gains".

392. The UNPROFOR Commander met with Mladić on 19 July at the Restoran Jela in Serb-held territory outside of Sarajevo. Throughout the meeting, he maintained contact with Mr. Bildt, who was holding parallel negotiations with President Milošević in Belgrade. The UNPROFOR Commander again stressed to Mladić how essential it was that ICRC be granted immediate access to the men being detained, and that freedom of movement to the enclaves be restored for UNPROFOR and UNHCR. He pressed Mladić to explain his troops' behaviour in the aftermath of the fall of Srebrenica, to which Mladić responded that his troops had "finished [it] in a correct way". Mladić added that, on the night of 10-11 July, a significant number of ARBiH troops had broken through the confrontation line in the direction of Tuzla. Mladić continued that he had opened a corridor to let these troops go. He accepted that some "skirmishes" had taken place with casualties on both sides, and that some "unfortunate small incidents" had occurred. The UNPROFOR Commander and Mladić then signed the agreement which provided for the following:

> ICRC access to all "reception centres" where the men and boys of Srebrenica were being held, by the next day;
>
> UNHCR and humanitarian aid convoys to be given access to Srebrenica;
>
> The evacuation of wounded from Potočari, as well as the hospital in Bratunac;
>
> The return of Dutchbat weapons and equipment taken by the BSA;
>
> The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point.

393. During the meeting, Mladić claimed triumphantly that Žepa had fallen to advancing Serb forces. This, however, was untrue, and the situation on the ground in Žepa was complex.

Annex 199

UN GA, International Law Commission, Report of the International Law Commission on the work of its fifty-first session (1999), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat, UN Doc. A/CN.4/504, 8 February 2000

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Annex 199

United Nations A/CN.4/504

General Assembly

Distr.: General
8 February 2000

Original: English

International Law Commission
Fifty-second session
Geneva, 1 May-9 June 2000 and
10 July-18 August 2000

Report of the International Law Commission on the work of its fifty-first session (1999)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat

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00-27960 (E) 030300

consequences of the wrongful act listed in chapter II when an "international crime" was committed would not be required.

66. It was observed that the list of situations in paragraph 2 was not exhaustive and could cause confusion since it did not expressly mention either bilateral custom or breach of obligations arising from a unilateral act, which could be *uti singuli* or *erga omnes*, despite the reference to customary law in subparagraph (e). Conversely, support was expressed for an illustrative list to allow for the possibility of other situations. It was also noted that the question of a State being injured by a unilateral act of another State was currently being considered by the Commission under a separate topic. At the same time, doubt was raised as to whether the list was useful since some of the examples were problematic. For example, paragraph 2 (e), addressing injury by a violation of a multilateral treaty, appeared to usurp article 60 of the Vienna Convention on the Law of Treaties. It was maintained that violations of treaty provisions should first be governed by the provisions of the treaty itself, after which the appropriate legal framework would be the law of treaties, not State responsibility.

Chapter II
Rights of the injured State and obligations of the State which has committed an internationally wrongful act

67. The chapter was considered well balanced. However, attention was drawn to the need to consider the relation between States entitled to invoke responsibility with regard to the same breach and the question of whether one State's claim for reparation absorbed the rights of the other States.

Article 41
Cessation of wrongful conduct

68. Support was expressed for the underlying principle since the obligation to cease wrongful conduct was the first necessity. It was felt that cessation could appear in a separate provision or in an article on the consequences of an internationally wrongful act (art. 36).

Article 42
Reparation

69. The requirement of full reparation without qualification was considered well established in international law. It was noted that only the State directly affected could claim reparation for the damage suffered and that other States must be satisfied with the obligations set forth in draft articles 41 and 46, without prejudice to Chapter VII of the Charter of the United Nations. Doubts were expressed regarding the legal basis for the exception in paragraph 3, which could be abused by States to avoid their legal obligations and erode the principle of full reparation.

Article 43
Restitution in kind

70. There was opposition to the exception provided in subparagraph (d).

Article 44
Compensation

71. Compensation was considered an essential issue which required more detailed provisions, particularly concerning the assessment of pecuniary damage, including interest and loss of profits. Suggestions included referring to the various forms of compensation proposed by the Special Rapporteur in 1989 or the various rules derived from international practice and jurisprudence, such as the principle whereby damage suffered by a national was the measure of damage suffered by the State. It was also suggested to provide that interest "shall", rather than "may", be included in any compensation award to reflect existing international law and to deprive the wrongdoing State of an incentive to delay payment of compensation. It was remarked that payment of interest on overdue compensation should be determined only after the amount of compensation had been fixed and a sufficient grace period for its payment had been allowed. Conversely, it was considered unnecessary to specify the obligation to pay interest. A preference was expressed for a more analytical version of article 44, which made no reference to interest or lost profits.

Article 45
Satisfaction

72. It was suggested that the term "moral damage" in paragraph 1 should be defined. Reservations were

Annex 200

UN GA, 55th Session, Official Records, Sixth Committee, Summary record of the 17th meeting, 27 October 2000, UN Doc. A/C.6/55/SR.17, 14 November 2000

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Annex 200

United Nations A/C.6/55/SR.17

General Assembly
Fifty-fifth session

Official Records

Distr.: General
14 November 2000

Original: English

Sixth Committee

Summary record of the 17th meeting
Held at Headquarters, New York, on Friday, 27 October 2000, at 10 a.m.

Chairman: Mr. Politi . . . . . (Italy)

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00-70929 (E)
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54 or was a separate obligation, and whether it was subject to limitations.

73. Under article 43 (b) (ii), the notion of "injured State" was extended to "all the States concerned" in certain situations, which presumably covered some *jus cogens* norms and global agreements on environmental protection. It must be clarified, however, whether the provision was also intended to cover international human rights instruments, specifically excluded from the equivalent provision of article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

74. One of the Special Rapporteur's achievements had been to reduce the concept of obligations *erga omnes* to a viable, realistic level. The new article 49 provided for invocation of responsibility by States other than the injured State if the obligation breached was owed to a group of States, such as the parties to a multilateral treaty on human rights or the environment, or to the international community as a whole, in situations of *jus cogens* or a very few treaties of a nearly universal character.

75. Under the new article 49, States other than the injured State could request cessation of the internationally wrongful act and guarantees of non-repetition; they could even demand compliance with the obligation of reparation in the interest of the injured State or beneficiaries of the obligation breached. The concept was worth pursuing but required further thought. Since there was no provision for cooperation, various States might formulate inconsistent or even contradictory requests, and compliance with one such request and not others might further complicate the situation. At the least, article 49, paragraph 3, should include a provision on cooperation similar to that contained in article 54, paragraph 3, concerning cooperation in the taking of countermeasures. An even better solution would be to establish an obligation on the part of all States interested in exercising their rights under article 49, paragraph 3, to agree on joint requests.

76. Countermeasures as a means of obtaining compliance for obligations *erga omnes* presented a thorny problem. The draft had evolved considerably since its first reading. As it stood, States other than the injured State were not entitled to take countermeasures, unless requested to do so by the injured State, for non-serious breaches of *erga omnes* obligations. They might call for cessation and non-repetition under article 49, paragraph 2, but could do nothing to induce compliance. He doubted that that was the desired result.

77. In the case of serious breaches as defined in article 41, however, under article 54, paragraph 2, any State might take countermeasures in the interest of the beneficiaries of the obligation breached. The provision was confusing, because it covered two different situations. If the serious breach met the conditions of article 43 (b), any State concerned was an injured State and entitled as such to take countermeasures, but not, as the draft articles stood, to make requests in the interest of the beneficiaries. It would seem inappropriate for such a State to be able to take countermeasures on behalf of the beneficiaries without first having sought compliance on their behalf. To correct the situation, a provision similar to that in article 49, paragraph 2, concerning requests in the interest of the beneficiaries should be included under article 44, paragraph 2.

78. Moreover, as presently drafted, the provision in article 54, paragraph 2, created the impression that in case of a breach under article 41, any State could take countermeasures without first having made requests in accordance with article 49, paragraph 2 (b). It was arguable that such an interpretation was excluded by article 53, paragraph 1, but he felt the connection should be made explicit.

79. The cooperation in taking countermeasures referred to in article 54, paragraph 3, complicated adherence to the principle of proportionality laid down in article 52. A possible solution might be to add a provision to article 53 requiring all States intending to take countermeasures to mutually agree on them before taking them. The article, which concerned conditions relating to resort to countermeasures, needed redrafting in any event, because it referred only to the injured State. Nothing in the draft articles as they stood required a State other than the injured State to negotiate with the responsible State before taking countermeasures.

80. As worded, article 59 on the relation to the Charter of the United Nations was ambiguous. It was not clear whether it referred to the obligation to refrain from the threat or use of force or to the competence of the organs of the United Nations to deal with breaches of an obligation, and, in the latter case, whether it was attempting to establish the United Nations prior right

Annex 201

UN GA, 55th Session, Official Records, Sixth Committee, Summary record of the 18th meeting, 27 October 2000, UN Doc. A/C.6/55/SR.18, 4 December 2000

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Annex 201

United Nations A/C.6/55/SR.18

General Assembly
Fifty-fifth session

Official Records

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4 December 2000
English
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Sixth Committee

Summary record of the 18th meeting
Held at Headquarters, New York, on Friday, 27 October 2000, at 3 p.m.

Chairman: Mr. Suheimat (Vice-Chairman) (Jordan)
later: Mr. Politi (Chairman) . . . . . (Italy)

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which restitution would seriously impair the economic stability of the responsible State, or to at least make it clear that the subparagraph removed was covered by the new subparagraph (b).

25. Article 39 provided for interest, whatever the form of reparation. Satisfaction, however, was essentially an expression of regrets and an acknowledgement of a breach that was solely concerned with damages which were not economically quantifiable, and it was therefore logical that it should be excluded from the provision.

26. The delegation of Slovenia supported the approach adopted by the Commission, which was not to give too broad a definition of the injured State and to draw a distinction between States that were individually injured and those which, while not directly injured, nevertheless had a legal interest in the performance of the obligation. The articles concerned with the invocation of responsibility, which were based on the provisions of the Vienna Convention on the Law of Treaties, set out the procedure and established clear rules in the matter. The work of the Commission in the field of diplomatic protection would permit the elaboration of rules that could be applied to questions of the nationality of claims and exhaustion of domestic remedies. The delegation of Slovenia was of the view that article 49 (2) (b), which provided that a State not directly injured was entitled to claim reparation in the interest of the injured State or of the beneficiaries of the obligation breached, was questionable and proposed that the words "of the injured State or" should be deleted from the paragraph.

27. On the subject of countermeasures, Slovenia was of the view that, while the question should be included in the codification of the rules on State responsibility, it was different from State responsibility and merited separate treatment. The Commission had carefully considered the question, including the right of any State, under certain conditions, to take countermeasures in cases of serious breaches of obligations. In certain circumstances, such as in the case of serious and systematic human rights violations, the proposed rules could certainly be justified but, because of its broad scope, risked at the same time giving rise to abuses.

28. **Mr. Jacovides** (Cyprus) recalled that he had stated 10 years earlier that, while State responsibility had concentrated primarily on responsibility for injury to aliens, with the development of *jus cogens* and its acceptance in the Vienna Convention on the Law of Treaties and the existence of hierarchically higher rules as set out in the United Nations Charter, the topic of State responsibility had been placed on a much broader foundation and it was now recognized, including by the International Court of Justice, that obligations *erga omnes* existed and that the interest of the international community as a whole and of international public order needed to be taken into account. The Commission must ensure that the expectations of the international community, and in particular of the new States that had come into existence after the classical rules of international law on that topic had been formulated were not disappointed.

29. In the view of the delegation of Cyprus, that position was still valid. While it was understandable that the pendulum might swing backwards towards the middle ground from extreme and controversial positions in the light of the constant evolution of international law, care should be taken not to allow it to swing back too far to the traditional conventional approach at the expense of progressive notions imported into the law largely as a result of the impact of newly independent States.

30. Turning to the current text, several issues remained outstanding. On the question of what form the draft articles should take, the delegation of Cyprus, together with other States, notably the Nordic States, would prefer that they be adopted as a legally binding convention, alongside such major codification projects as the Vienna Convention on the Law of Treaties, the United Nations Convention on the Law of the Sea and, more recently, the Rome Statute of the International Criminal Court. The subject was too important to have it treated in a lesser fashion, such as a model law or a declaration. However, Cyprus was not precluding any other alternatives, provided that its basic concerns were satisfied. Cyprus had consistently advocated the position that all multilateral law-making treaties concluded under the auspices of the United Nations should include an effective, comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding disputes arising out of the substantive provisions of the convention in question. That position was dictated both by reason of the attachment of Cyprus to the general principle of equal justice under the law and by reason of its national self-interest as a small State which needed the

enabled it to get the responsible State to assume its obligations with respect to cessation and reparation or to negotiate in order to settle the dispute without affecting the rights of that State, in conformity with the principle of reciprocity. His delegation endorsed the proposals put forward by a number of delegations concerning the establishment of criteria and norms with respect to countermeasures to ensure that the latter were not used to harm the responsible State. Moreover, responsibility in all its forms should be defined on the basis of the United Nations Convention on the Law of Treaties. That issue should be the subject of a treaty or, better still, an instrument of the United Nations on the responsibility of States. Cooperation between the different delegations and the Commission was necessary to achieve a consensus so as to put an end to all the wrongful acts committed by some irresponsible States thus giving effect to the provisions of the Charter of the United Nations concerning the maintenance of international peace and security.

59. **Ms. Álvarez Núñez** (Cuba) said that her country attached importance to and had contributed to the consideration of the issue of State responsibility. The Commission had made laudable efforts to replace the concept of State crime by an acceptable definition which clearly established the international responsibility of States in cases of acts of aggression, threat or use of force in international relations and the unilateral imposition of coercive measures. However, her delegation was concerned by the inclusion in article 41 of the concept of serious breaches of essential obligations to the international community and the reference in article 42 to the consequences of such breaches, which should be considered in the light of the delicate link with article 49 on the invocation of responsibility by States other than the injured State and article 54 itself, paragraph 2 of which provided that any State might take countermeasures. The concept of essential obligations for the protection of basic interests, which justified the intervention of States that were not directly injured, should be further clarified because it was directly related to the concepts of *jus cogens* and obligations *erga omnes* with respect to which international codification efforts had not made much progress. Her delegation preferred the term "international community of States" used in the Vienna Convention on the Law of Treaties to the very vague and disturbing term "international community". Moreover, the recognition in article 54, paragraph 2, of the right of any State to take countermeasures in the interest of the beneficiaries of the obligation breached went well beyond the progressive development of international law. The lack of precision in the provisions proposed in the draft articles might lead to the justification of collective sanctions or collective interventions. Therefore, articles 49 and 54, which gave rise to complications, should be deleted and the meaning of the provisions of article 41 should be elucidated.

60. Countermeasures were one of the most controversial aspects of the question of State responsibility because they often served as a pretext for the adoption of unilateral measures such as armed reprisals and other types of intervention. It was therefore important to define them carefully and to set limits on their use. In that respect, the current version of the draft articles was a significant improvement compared with the previous text. In general, the legitimization of reprisals following an illicit act tended to aggravate disputes between States and was used to justify the wrongful use of force — whether direct or indirect.

61. Furthermore, article 54 itself, in paragraph 1, invoked article 49, paragraph 1, which referred to the protection of a collective interest, meaning that a State other than the injured State could act on behalf of the injured State and adopt countermeasures, which were actually collective. That scenario, which involved more risks than benefits, ran counter to the provisions of article 52 concerning the principle of proportionality. Accordingly, it should not fall within the purview of the draft articles and, if it actually occurred, it should be governed by the existing rules of international law, particularly the provisions of the Charter of the United Nations. The same comment applied to provisional countermeasures.

62. Countermeasures therefore required many clarifications and lengthy consideration: they should be taken only as a last resort and under no circumstances should consist of acts which, by their nature and consequences, involved the direct or indirect use of force or were a tactic motivated by purely political considerations, in violation of the principles of the Charter of the United Nations and international law.

63. With regard to the final form of the draft articles, her delegation believed that much still remained to be done to arrive at a working document that was acceptable to everyone and representative of the

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UN GA, International Law Commission, Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/517, 2 April 2001

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Annex 202

United Nations A/CN.4/517

General Assembly

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International Law Commission
Fifty-third session
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Fourth report on State responsibility

by Mr. James Crawford, Special Rapporteur

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01-31656 (E) 190401

38. The remaining issue concerns article 43 (b) (ii), which deals with so-called "integral" obligations.[49] Although the term is sometimes used to cover obligations in the general interest (e.g., human rights obligations), the Special Rapporteur understands it to refer to obligations which operate in an all-or-nothing fashion. Under article 60 (2) (c) of the 1969 Vienna Convention, the breach of an integral obligation entitles any other party to suspend the performance of the treaty not merely vis-à-vis the State in breach but vis-à-vis all States. In other words, a breach of such an obligation threatens the treaty structure as a whole. Fortunately this is not true of human rights treaties; rather the reverse, since one State cannot disregard human rights on account of another State's breach. Treaties such as non-proliferation and disarmament treaties, or others requiring complete collective restraint if they are to work (as with the central obligations of States parties to the Outer Space Treaty or the Antarctic Treaty), are integral in this sense. The category may be narrow but it is an important one. Moreover it has as much relevance for State responsibility as it has for treaty suspension. The other parties to an integral obligation which has been breached may have no interest in its suspension and should be able to insist, vis-à-vis the responsible State, on cessation and restitution. For these reasons the Special Rapporteur believes that article 43 (b) (ii) should be retained. The Drafting Committee might, however, usefully consider its wording, in accordance with several suggestions which have been made.[50]

Other States entitled to invoke responsibility: article 49

39. Although Japan suggests that article 49 is not a "core issue of the law of State responsibility", most other Governments have accepted the principle it seeks to embody, and it was of course expressly accepted by the International Court in 1970. But a number of questions have been raised as to the formulation and intended function of the article.

40. The first concerns the notion of "the protection of a collective interest" in article 49 (1) (a). After all, which international obligations (beyond the purely bilateral) are not in some sense "established for the protection of a collective interest"? Even treaties that most closely approximate to the classical "bundle" of bilateral obligations are at a deeper level established for the protection of a collective interest. For example, it is usually thought that diplomatic relations between two States pursuant to the Vienna Convention on Diplomatic Relations are bilateral in character, and "ordinary" breaches of that Convention vis-à-vis one State would hardly be considered as raising issues for the other States which are parties to it. But at some level of seriousness a breach of the Convention might well raise questions about the institution of diplomatic relations which would be of legitimate concern to third States.[51] It may be that article 49 (a) should be further qualified so

[49] For the development of the concept of integral obligations, see the Special Rapporteur's Third Report, A/CN 4/507, para 91

[50] These include the addition of the word "necessarily" and the change of "or" to "and" in the final phrase Thus the paragraph could read: "(b) Is of such a character as necessarily to affect the enjoyment of the rights and the performance of the obligations of all the States concerned"

[51] Cf *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p 43 (para 92)

as to limit it to breaches which in themselves are such as to impair the collective interest of the States parties to the obligation.[52]

41. Indeed it has been suggested that a similar restriction should be applied to article 49 (1) (b). France suggests that the paragraph should be limited to the serious breaches covered by Part Two, Chapter II. This suggestion has greater force in respect of claims for reparation as envisaged by article 49 (2) (b) than it has for claims to cessation. It does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole. This would seem to follow directly from the Court's dictum in *Barcelona Traction*. Whether a claimant State should be able to seek reparation "in the interests of the injured State or of the beneficiaries of the obligation breached" is, perhaps, less clear. In particular, this is something the injured State, if one exists, might reasonably be expected to do for itself.

42. These are matters which the Commission may wish to revisit, and the Drafting Committee should certainly consider whether article 49 (1) (a) might be more tightly drawn. On the other hand, the Special Rapporteur believes that article 49 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. In his view a case for the fundamental reconsideration of article 49 has not been made.

[52] Such a suggestion would still allow for the paradigm case intended to be covered by paragraph (a), viz , the interest of Ethiopia and Liberia in South Africa's performance of its obligations as mandatory of South West Africa: *Second South West Africa Cases*, *I.C.J. Reports 1966*, p 6 See Third Report, A/CN 4/507, paras 85, 92

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International Law Commission, Comments and observations received from Governments, UN Docs. A/CN.4/515 and Add.1–3, 19 March, 3 April, 1 May and 28 June 2001, *Yearbook of the International Law Commission 2001*, vol. II, Part One

Available at:

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A/CN.4/SER.A/2001/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2001

Volume II
Part One

Documents of the fifty-third session

UNITED NATIONS
New York and Geneva, 2010

Annex 203

obligations, such as an obligation to make reparation for damage caused by the act in question".[1] Unlike previous article 35, the current article 27 does not specify in which circumstances precluding wrongfulness a State may incur an obligation to make compensation. Japan supports this approach. However, since the work for international liability is not likely to develop soon, the commentary should explain in what cases of circumstances precluding wrongfulness compensation is not expected. In particular, article 21 on peremptory norms is a new category and needs certain explanation in this regard.

2. Also, it should be made clear in the commentary that self-defence and countermeasures do not preclude any wrongfulness of, so to speak, indirect injury that might be suffered by a third State in connection with a measure of self-defence or countermeasures taken against a State.

[1] *Yearbook ... 1980*, vol. II (Part Two), p. 61, para. (1) of the commentary to article 35.

Subparagraph (a)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (*a*) would be more accurate if it read "the duty to comply with the obligation".

Subparagraph (b)

Netherlands

The Netherlands is of the opinion that article 27 (*b*) should relate not to chapter V in its entirety but solely (as proposed by the Special Rapporteur) to articles 24–26 (see *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, art. 35, p. 89, para. 358).

PART TWO

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I. GENERAL PRINCIPLES

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In part two on the content of international responsibility of a State, chapters I–II, concerning general principles and the various forms of reparation, are particularly clear, concise and well structured.

Slovakia

Slovakia is generally satisfied with the structural changes in part two of the draft articles. Slovakia welcomes and supports the inclusion of new part two *bis* (implementation of State responsibility).

Article 29. Duty of continued performance

Netherlands

In response to paragraph 76 on article 36 *bis* (corresponding to the present articles 29–30) in *Yearbook ... 2000*, vol. II (Part Two), p. 24, the Netherlands would draw attention to the sentence: "In terms of its placement, the general principle of cessation should logically come before reparation since there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further." The Netherlands takes the view that the clause "and the matter would go no further" is not correct, for the other legal consequences of an internationally wrongful act would stand, even if the responsible State immediately ceased its wrongful conduct.

Article 30. Cessation and non-repetition

Netherlands

1. Paragraph 91 of *Yearbook ... 2000*, vol. II (Part Two), p. 26, makes a connection between the "assurances and guarantees of non-repetition" and, *inter alia*, the "seriousness of the breach". In the Netherlands' view, reference should also be made in article 30 to the "gravity of the breach" as referred to in article 42. Conversely, article 42, paragraph 3, should contain a cross-reference to chapter I, and not only to chapter II as is currently the case.

2. See also comments on article 29, above.

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (*b*) would be more accurate if it read "to give appropriate assurances and guarantees".

United States of America

1. In addition to these areas (see General remarks above), the United States would like to draw the attention of the Commission to other provisions, including article 30 (*b*) on assurances and guarantees of non-repetition, which it believes should be deleted as it reflects neither customary international law nor State practice.

2. Article 30 (*b*) requires the State responsible for an internationally wrongful act "[t]o offer appropriate assurances and guarantees of non-repetition, if circumstances so require". The United States urges the deletion of this provision because it does not codify customary international law, and there is fundamental scepticism, even amongst the Commission itself, as to whether there can be any legal obligation to provide assurances and guarantees of non-repetition.[1] There are no examples of cases in which courts have ordered that a State give assurances

[1] *Yearbook ... 2000*, vol. II (Part Two), p. 26, para. 88.

right to seek cessation and assurances of non-repetition. However, the draft articles do not explicitly deal with the question of what happens when a breach of obligations falling short of the peremptory norms occurs. The Commission may wish to consider whether the actual text of the draft articles can be further clarified in this respect.

United Kingdom of Great Britain and Northern Ireland

The requirement in subparagraph (*a*) that a waiver must be "valid" is unnecessary, being plainly implicit in the term "waiver". The requirement that waiver must be "unequivocal" either sets out a condition implicit in a waiver, in which case it is unnecessary, or qualifies the term "waiver" and limits the application of draft article 46 to a subcategory of waiver, in which case it is undesirable.

Article 48. Invocation of responsibility against several States

United States of America

The United States is concerned that article 48, which deals with invocation of responsibility against several States, could be interpreted to allow joint and several liability. Under common law, persons who are jointly and severally liable may each be held responsible for the entire amount of damage caused to third parties. As noted by the Special Rapporteur in his third report, States should be free to incorporate joint and several liability into their specific agreements, but apart from such agreements, which are *lex specialis*, States should only be held liable to the extent the degree of injury suffered by a wronged State can be attributed to the conduct of the breaching State (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 75, para. 277). To clarify that article 48 does not impose joint and several liability on States, the United States proposes that article 48, paragraph 1, be redrafted to read as follows:

"Where several States are responsible for the same internationally wrongful act, the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct."

Paragraph 1

Republic of Korea

It is not clear whether article 48, paragraph 1, also applies to situations where there are several wrongful acts by several States, each causing the same damage. If so, the words "the same internationally wrongful act" should be amended accordingly to reflect such a meaning.

Article 49. Invocation of responsibility by States other than the injured State

Argentina

Argentina welcomes the establishment of a distinction between the State or States directly injured by an internationally wrongful act and other States that may have an interest in enforcing the obligation breached. Article 49 defines cases in which a State other than the State directly affected may invoke the international responsibility of another State, as well as the conditions governing such invocation (specifically, the right of the State to seek cessation of the wrongful act, and guarantees of non-repetition). This is a reasonable solution.

Austria

From a doctrinal as well as from a practical, political point of view, the issue of *erga omnes* obligations has played an important role for a long time in the Commission's work on State responsibility, not in the least because this doctrine has evolved in the last few years such that nobody could have foreseen. The Special Rapporteur has reduced the concept of *erga omnes* obligations to a viable, realistic level. States invoking responsibility with regard to such obligations are no longer only referred to as "injured States". Article 49 dealing with "States other than the injured State" entitles such States to invoke responsibility if the obligation breached is owed to a group of States or to the international community as a whole. While a "group of States" may be the parties to a multilateral treaty concerning human rights or the environment provided that this can be viewed as a collective interest, only *jus cogens*, some rules of customary international law and very few treaties of a nearly universal character will obviously qualify as obligations owed to the international community as a whole.

China

Article 49 would allow any State other than the injured State to invoke the responsibility of another State, while article 54 would further allow such States to take countermeasures at the request and on behalf of an injured State. These provisions would obviously introduce elements akin to "collective sanctions" or "collective intervention" into the regime of State responsibility, broadening the category of States entitled to take countermeasures, and establishing so-called "collective countermeasures". This would run counter to the basic principle that countermeasures should and can only be taken by States injured by an internationally wrongful act. More seriously, "collective countermeasures" could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States. Furthermore, "collective countermeasures" are inconsistent with the principle of proportionality enunciated in article 52. The same countermeasures would become tougher when non-injured States join in, leading to undesirable consequences greatly exceeding the injury. Finally, as "collective countermeasures" further complicates the already complex question of countermeasures, and taking into account the objection to "collective countermeasures" expressed by many States, China suggests that draft articles 49 and 54 in the revised text be deleted entirely.

Annex 203

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The somewhat controversial article 49 providing for the invocation of responsibility by States other than the injured State is acceptable to the Nordic countries and indeed necessary, seen in the context of the provisions concerning serious breaches of obligations to the international community as a whole.

France[1]

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State ***if that State has committed an internationally wrongful act which constitutes a serious breach of an obligation owed to the international community of States as a whole and which is essential for the protection of its fundamental interests:***

~~(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;~~

~~(*b*) The obligation breached is owed to the international community as a whole.~~

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

~~(*a*)~~ Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article ***29*** ~~30~~ [41, 46];

~~(*b*) Compliance with the obligation of reparation under chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.~~

3. The requirements for the invocation of responsibility by an injured State under articles ***41*** ~~41~~, ***42*** ~~45~~ [22] and ***43*** ~~46~~ apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

[1] *Paragraph 1*, chapeau: France proposes that the description of an internationally wrongful act contained in current article 41 be used here and that article 41 be deleted, as suggested.

Paragraph 1 (a): As explained above, this provision could become article 43 (*c*) (or article 40 (*c*) in the text proposed by France).

Paragraph 2 (b): On several occasions, France has defended the idea that what should distinguish the injured State from the State having a legal interest is the fulfilment of the obligation of reparation. The State which has only a legal interest can only demand the cessation of the breach committed by another State. It cannot seek reparation for the damage caused by an internationally wrongful act which has not directly affected it, nor is there any reason for it to substitute itself for the injured State in demanding the reparations owed to that State. Unlike the injured State which can, by invoking the responsibility of the State which has committed the internationally wrongful act, seek reparation for the damage it has suffered, a State which has a legal interest, can only demand the cessation of the internationally wrongful act when invoking the responsibility of the State which has violated the obligation. For this reason, in the view of France, article 49, paragraph 2 (*b*) (or article 46, paragraph 2 (*b*), in the text proposed by France), should be deleted. Only subparagraph (*a*), which establishes the principle that a State having a legal interest can demand the cessation of an internationally wrongful act, should be retained.

Japan

1. It should be recalled that in essence, the law of State responsibility is the secondary rule to regulate the relationship between wrongful States and injured States. This draft has now turned out to be the law regulating the relationship among wrongful States, injured States and affected States other than injured States (hereinafter referred to as "interested States"). Accepting that there exists a category of "interested States", it is doubtful whether such category of States should be dealt with in the law of State responsibility.

2. In fact, setting aside countermeasures, interested States can seek only "cessation" and "assurances and guarantees of non-repetition". Cessation is, in other words, to reaffirm the continued observance of the primary obligation. It is only natural that all the States that have agreed on the primary obligation should abide by that obligation. The relations between the State that breached the obligation and the State requesting its compliance can be recognized in the context of the relationship in the primary rule, not necessarily in the context of the secondary rule.

3. The inclusion of provisions on interested States may be legitimized by the objective of enhancing the function of restoring legality by State responsibility; however, it is not desirable to bestow too much power on the law of State responsibility. Rather, this might blur the importance of its core function, which is to define the relationship between injured States and responsible States.

4. See also comments on article 43, above.

Netherlands

1. The Netherlands has also noted the observation by the Special Rapporteur in paragraph 127 of *Yearbook … 2000*, vol. II (Part Two), that a savings clause should be inserted to indicate that entities other than States may also invoke responsibility in cases involving breaches of obligations owed to the international community as a whole (*erga omnes*). He gives the example of persons who are victims of human rights abuses, who have certain procedures available to them in international law. Although there is a savings clause in article 34, paragraph 2, it applies to part two only. A similar savings clause should also be included in part two *bis*.

2. The Netherlands agrees with the three scenarios regarding the invocation of State responsibility for breaches of *erga omnes* obligations described in paragraph 352 of *Yearbook … 2000*, vol. II (Part Two).

3. The Netherlands notes that in its current form article 49, paragraph 2 (*b*), applies solely to part two, chapter II, and not to reparation for serious breaches.

4. See also comments on articles 43 and 46, above.

Republic of Korea

See comments on articles 43 and 46, above.

Annex 203

Slovakia

See comments on article 43, above.

United Kingdom of Great Britain and Northern Ireland

Observations of a general nature on the concept of the "interested" State have been made above (see article 43). The following comments relate to matters of detail (see article 49, paragraphs 1–2, below).

Paragraph 1

Argentina

Paragraph 1 (*a*) of the article entitles a State other than the injured State to invoke the responsibility of another State if "[t]he obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest". Since any multilateral treaty can establish, to one degree or another, a "collective interest", Argentina believes it would be helpful for the Commission to offer additional clarification regarding this concept, in order to facilitate the interpretation and application of the article in practice.

Republic of Korea

See comments on article 43 (*b*) above.

United Kingdom of Great Britain and Northern Ireland

1. It is not clear what is meant, in paragraph 1 (*a*), by "the protection of a collective interest". It is presumably intended to establish a subcategory of multilateral treaties; but it is not apparent what the criterion is or how it should be applied. It is neither necessary nor desirable to establish such a subcategory of multilateral treaties. The words "and is established for the protection of a collective interest" should be omitted, thus allowing all parties to all multilateral treaties and other multilateral obligations to have the status of "interested States", although in the absence of injury a State would not, of course, be entitled to the full range of remedies available to an injured State.

2. The term "may seek" in paragraph 2 is wrong. It implies that, for example, some parties to multilateral treaties not established for the protection of collective interests may not even request that another party cease its violation of the treaty.

Paragraph 2

Austria

1. States other than the injured State may request the cessation of the internationally wrongful act and guarantees of non-repetition (see article 49, paragraph 2 (*a*)). Of special interest is the fact that the draft introduces a new right to request compliance with the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached (art. 49, para. 2 (*b*)). This would refer to victims of human rights violations or of violations of the environment. Whereas in the case of the environment this could concern nationals of the State invoking the responsibility, the first case—victims of human rights violations—will mainly concern nationals of other States, most importantly nationals of the State which has committed the wrongful act.

2. This concept is very interesting and worth pursuing, but probably has not yet been fully explored. In most cases of human rights violations, States will act in favour of victims who are nationals of the State which has committed the wrongful act. Each party to the multilateral human rights treaty concerned would be entitled to invoke this right, so that there could be a multitude of claimants. In this case, the draft does not envisage an obligation to cooperate between the States invoking responsibility, as article 54, paragraph 3, with its—relatively weak—obligation to cooperate applies only to countermeasures. It must be borne in mind that the problem of many States entitled to invoke State responsibility with regard to one single wrongful act seems to raise more problems than are solved by the draft articles. Further reflection and the introduction of a more precise regime is therefore required.

United Kingdom of Great Britain and Northern Ireland

1. The comments on paragraph 2 made in the debate in the Sixth Committee suggest that paragraph 2 (*b*) is highly ambiguous. It might be seen as entitling an interested State to demand reparation, to be made to itself, thereby advancing the interest "of the injured State or of the beneficiaries of the obligation breached". The State might subsequently make over all or part of the fruits of reparation to the injured State or to the "beneficiaries". This would be a wholly novel form of action in international law. Alternatively, paragraph 2 (*b*) might be seen as entitling an interested State to demand that the responsible State make reparation directly to the injured State or to the beneficiaries of the obligation. It is not clear how it is envisaged that paragraph 2 (*b*) would operate in practice.

2. A further difficulty concerns the relevance of the wishes of the injured State. If there is an injured State, it can make the claim itself. If it chooses not to claim, the position should be treated as analogous to a waiver under draft article 46 and, just as the injured State loses thereby the right to invoke the responsibility of the claim, so should the possibility of the claim being made by others on its behalf be extinguished. Exceptional circumstances, such as the invasion of a State and the destruction of the capacity of its Government to invoke responsibility or otherwise act on behalf of the State, might be dealt with in the commentary.

3. A similar point might be made concerning the wishes of the beneficiaries of the obligation; but there is a more fundamental concern in relation to that provision. The proposed right to invoke responsibility "in the interest … of the beneficiaries of the obligation breached" is novel. The United Kingdom is sympathetic to the aim of ensuring that there are States entitled to claim in all cases of injury to common interests, such as the high seas and its

resources and the atmosphere. There are, on the other hand, concerns that the current formula would have unintended and undesirable effects.

4. In the context of human rights obligations falling within draft article 49, paragraph 1, for example, draft article 49, paragraph 2 (*b*), appears to entitle all States not merely to call for cessation and assurances and guarantees of non-repetition, but also to demand compliance with obligations concerning reparation "in the interest" of the abused nationals or residents of the responsible State. It may involve decisions on the form of repatriation that intrude deeply into the internal affairs of other States. That provision goes further than is warranted by customary international law. It also goes further than is necessary for the safeguarding of human rights: for that purpose, cessation of the wrongdoing is the crucial step. There is a serious risk that this provision may disrupt the established frameworks for the enforcement of human rights obligations, with the consequence that States will become less willing to develop instruments setting out primary norms of human rights law. Paragraph 2 (*b*) goes further than is warranted in the current state of international law, and is unnecessary. It is hoped that the Commission will reconsider draft article 49, paragraph 2 (*b*), with a view to omitting it or at least narrowing its scope.

United States of America

The United States notes that under article 49, paragraph 2 (*a*), States other than injured States may seek from the responsible State assurances and guarantees of non-repetition in addition to cessation of the internationally wrongful act. For the reasons expressed above with respect to article 30 (*b*), the United States believes that the "assurances and guarantees of non-repetition" provision of article 49, paragraph 2 (*a*) should likewise be deleted.

Paragraph 3

Austria

Owing to the lack of an obligation to cooperate in the context of article 49, it is possible to imagine that various States formulate various, even contradictory, requests, or, in the case of requests for compensation, that they demand compensation at very different financial levels. It must be asked how the State which has committed the wrongful act is to deal with such a situation, and what would be the effects of the compliance with one of these requests and not with the others. If it is not possible to solve this problem in a clear way, at least article 49, paragraph 3, should be revised so as to comprise also a provision about cooperation similar to the provision contained in article 54, paragraph 3. It would be an even better solution to envisage an obligation to negotiate a joint request of all States interested in exercising their rights under article 49, paragraph 3.

Republic of Korea

This paragraph would be more straightforward if the words "*mutatis mutandis*" were inserted between the words "under articles 44, 45 and 46 apply" and "to an invocation of responsibility", since some modification might be needed in the process of the application of articles 44–46 to the invocation of responsibility by States other than the injured State.

Chapter II. Countermeasures

Argentina

1. In 1998 Argentina stated that "[t]he taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations" in exceptional cases.[1] In this connection, the treatment of the topic in part two *bis*, chapter II, sets limits and conditions on this concept that are in principle acceptable, inasmuch as it makes clear the exceptional nature of countermeasures and specifies the procedural and substantive conditions relating to resort to countermeasures.

2. As for the logical place for rules on this topic, some have even suggested excluding the question of countermeasures. While from a purely theoretical standpoint there may be some merit in not including this question, there is no doubt that, in the current state of international law, countermeasures represent one of the means of giving effect to international responsibility. Against that background, Argentina thinks it would be useful to include precise rules within the draft articles, as contained in part two *bis*, chapter II, so as to minimize the possibility of abuses.

[1] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 151, para. 9.

China

China believes that in the context of respect for international law and the basic principles of international relations, countermeasures can be one of the legitimate means available to a State injured by an internationally wrongful act to redress the injury and protect its interests. However, in view of past and possible future abuses of countermeasures, recognition of the right of an injured State to take countermeasures must be accompanied by appropriate restrictions on their use, in order to strike a balance between the recognition of the legitimacy of countermeasures and the need to prevent their abuse. China has noted that the relevant provisions in the revised text have been improved in this regard. For example, the new text has added a number of qualifying conditions, clearly setting out the purposes of and limitations on the use of countermeasures. In addition, the reference to "interim measures of protection" has been deleted. China welcomes these improvements, but the text on countermeasures still needs further refinement and improvement. In particular, the desirability of the newly added article 54 on "collective countermeasures" and the related article 49 needs further consideration.

Annex 204

International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), adopted on 3 August 2001, *Yearbook of the International Law Commission 2001*, vol. II, Part Two, as corrected

Available at:

https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf

Annex 204

Draft articles on
Responsibility of States for Internationally Wrongful Acts, with commentaries
2001

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[437] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[443] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[445] In other cases, the injured State requires specific instructions to be given,[446] or other specific conduct to be

[436] *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

[437] *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

[438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[440] See paragraph (5) of the commentary to article 36.

[441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[443] *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

[444] *Ibid*., para. 124.

[445] See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[446] See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit.* (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477]Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[484]

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

[482] See further article 42 (*b*) (ii) and commentary.

[483] Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

[484] *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

Chapter II

REPARATION FOR INJURY

Commentary

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

[485] See paragraphs (4) to (14) of the commentary to article 31.

[486] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[489] Satisfaction must "not be out of proportion to the injury".[490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

[487] Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

[488] See article 35 (*b*) and commentary.

[489] See article 31 and commentary.

[490] See article 37, paragraph 3, and commentary.

[491] For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [677]

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid*., p. 254, para. 35.

[678] *Ibid*., pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[725]

(8) Under *paragraph 1* (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[726] The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[727] With regard to the latter, the Court went on to state that "[i]n 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*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[728] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[729]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[732]

(12) Under *paragraph 2* (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2* (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

[725] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[726] For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[727] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[728] *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[729] See footnote 54 above.

[730] *S.S. "Wimbledon"* (see footnote 34 above), p. 30.

[731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

[732] *Namibia* case (see footnote 176 above), p. 56, para. 127.

[733] See, e.g., the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.[734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

CHAPTER II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[735] This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[737] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[738] Countermeasures involve conduct taken in derogation from a subsisting treaty

[734] See also paragraphs (3) to (4) of the commentary to article 33.

[735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[736] See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

[737] *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

[738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

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UN GA, 56th Session, Official Records, Sixth Committee, Summary record of the 12th meeting (31 October 2001), UN Doc. A/C.6/56/SR.12, 9 November 2001

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Annex 205

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Sixth Committee

Summary record of the 12th meeting
Held at Headquarters, New York, on Wednesday, 31 October 2001, at 10 a.m.

Chairman	Mr. Abdalla (Vice-Chairman)	(Sudan)
later:	Mr. Lelong (Chairman)	(Haiti)

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01-61324 (E)

as an injured State. His Government therefore called for caution in defining the notion of an integral obligation.

7. His observations were intended to prompt further reflection on a set of draft articles which would provide a valuable and reliable guide. For that reason, he hoped that the General Assembly would adopt a resolution as recommended by the Commission.

8. **Mr. Popkov** (Belarus) welcomed the completion of the Commission's work on the draft articles on responsibility of States for internationally wrongful acts, which were so important that they should take the form of a convention. To date, State responsibility had been regulated by customary international law and its implementation had therefore proved rather difficult. The strengthening of international legal rules relating to State responsibility through a binding international instrument would undoubtedly enhance the effective application of those rules as a whole. Moreover, the results of the Commission's work should, as a general rule, be embodied in legally binding instruments, as that was the only way in which the Commission could fully play its role in the codification and progressive development of international law. An international conference of plenipotentiaries should therefore be convened in order to secure the widest possible participation of States in the discussion of the articles with a view to concluding a convention on the topic. His delegation also supported the Commission's recommendation that the General Assembly should adopt a resolution on the draft articles.

9. The agreement reached on the need to include provisions on countermeasures in the draft articles would guarantee the genuine implementation of enforcement measures against responsible States and limit the possibility of abuses in that respect. For that reason, his delegation welcomed the approach to countermeasures in Part Three, which emphasized that such measures should be seen not as a means of punishing a State for wrongful conduct, but as a remedy for the infringement of international law.

10. It had been a mistake to disregard the possibility of adopting collective enforcement measures, such as sanctions, against States which had committed internationally wrongful acts, because the application of such measures by international organizations might be an efficacious means of bringing pressure to bear on the responsible State and persuading it to fulfil its obligations to another State, a group of States or the international community.

11. It was important to retain the provisions on dispute settlement, which had been contained in the first-reading text of Part Three, in a draft convention. The inclusion in a draft convention of a special section dealing with dispute settlement procedures was of fundamental importance to the implementation of an international regime of State responsibility, as was the incorporation of provision for mandatory international arbitration proceedings or reference to the International Court of Justice in the event of disputes connected with the adoption of countermeasures. The possibility of any abuses when countermeasures were taken should be precluded; arbitration would offer some safeguards against such abuses. The wary attitude of some States to binding arbitration was motivated by political, rather than legal considerations. The outcome of arbitration was less predictable than the solution of disputes by other means, especially for States in a strong political and economic position. For weaker States, however, the settlement of disputes by arbitration would be the best means of protecting their interests. The lack of any reference whatsoever in the draft articles to binding judicial procedures was a retrograde step running counter to the trend in respect of the settlement of international disputes. The whole question should therefore be reconsidered. Even if the provisions on the binding settlement of disputes did not apply to primary rules, a court or tribunal could solve a significant range of disputes regarding State responsibility.

12. There was no direct contradiction between Part Three of the text adopted on first reading or possible provisions on the mandatory settlement of disputes linked to the application and interpretation of an international convention on the one hand and the principle of the freedom to choose peaceful means of dispute settlement set forth in Article 33 of the Charter of the United Nations on the other.

13. Article 48 was progressive in nature in that it took into account the modern concept of *erga omnes* obligations. His delegation therefore looked forward to further discussion of that issue at a conference of plenipotentiaries, since the maintenance of provisions on that subject in an international instrument would depend on the political will of States.

14. He hoped that the Commission would once again focus its attention on the formulation of international

Annex 206

UN GA, 56th Session, Official Records, Sixth Committee, Summary record of the 14th meeting (1 November 2001), UN Doc. A/C.6/56/SR.14, 13 November 2001

English version available at:

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Annex 206

United Nations A/C.6/56/SR.14

General Assembly
Fifty-sixth session

Official Records

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13 November 2001

Original: English

Sixth Committee

Summary record of the 14th meeting
Held at Headquarters, New York, on Thursday, 1 November 2001, at 10 a m.

Chairman: Mr. Lelong (Haiti)

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of the former and any breach of the latter. Moreover, since the draft articles did not address the issue of who was to decide whether the breach of a peremptory norm was of a serious nature, controversies were likely to arise in practice.

59. His delegation would prefer that the General Assembly, take note of and welcome the draft articles in a resolution to which the articles would be annexed. At the current stage, his delegation had no objection to the Committee's recommendation that the Assembly should consider the possibility of convening an international conference to examine the draft articles with a view to concluding a convention on the topic.

60. **Mr. Belinga Eboutou** (Cameroon) said while the draft articles were balanced and reflected both common law and State practice, they also embodied certain aspects of the progressive development of international law which were a source of legitimate concern. Thus, while article 48 (Invocation of responsibility by a State other than the injured State) followed a trend in current international law, its scope and practical consequences required further consideration.

61. He was even more concerned at the draft articles' approach to the issue of countermeasures, which could be resorted to only by the most powerful of States. Since they were used by some members of the international community and were recognized under international law, as the International Court of Justice had confirmed in the *Gabčikovo-Nagymaros Project* case, the Commission had rightly undertaken to establish a strict framework for the practice. However, the balance achieved in former article 53 (A/55/10) had been lost in the current version of the draft articles. While he supported deletion of the word "provisional", since countermeasures would necessarily be temporary in nature, he did not understand why paragraph 4 of former article 53 had been deleted. The purpose of countermeasures was to induce the responsible State to meet its obligations under international law; thus, the taking of countermeasures against a State that was pursuing negotiations in good faith amounted to an imposition of sanctions.

62. Equally important was the relationship between countermeasures taken by one or more States and measures decided upon by the Security Council under Article 41 of the Charter of the United Nations. Article 59 did not resolve that problem, since the Charter itself did not establish whether Council-mandated measures automatically entailed the cessation of countermeasures by States or whether the two types of measures could be implemented simultaneously without violating the principle of proportionality.

63. He was not convinced by the arguments against the inclusion of a dispute settlement mechanism in a text which contained provisions on countermeasures; an impartial third party would be required in order to determine whether the accused State was really responsible, and thus whether the countermeasures taken against it were legitimate and proportional, or whether the violation was "serious" within the meaning of article 40, paragraph 1. States could not be compelled to submit their disputes for settlement, since many of them had not made the declaration under article 36, paragraph 2, of the Statute of the International Court of Justice and there was, as yet, no comprehensive convention on compulsory arbitration.

64. Lastly, he hoped that the draft articles would be adopted during the current session of the General Assembly in a resolution establishing a time period within which a diplomatic conference would be convened with a view to the conclusion of a convention on the topic.

65. **Mr. Vilhena de Carvalho** (Portugal) said that although the notion of "international crimes of State" had disappeared from the draft articles, their primary objective remained unchanged and the issues of *jus cogens* and obligations *erga omnes* were adequately dealt with. It was true that there was no concrete State practice on the issue of crimes of State and that Security Council measures had been limited to the notion of threats and breaches of the peace and had not even addressed that of acts of aggression. However, it would have been difficult for the Commission not to distinguish between more and less serious breaches of international law. Thus, replacement of the article on international crimes of State by one on serious breaches of obligations under peremptory norms of general international law appeared to be an acceptable compromise.

66. The concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law which, because of their importance to the international community as a whole, deserved to be

Annex 207

UN, CRC, Committee on the Rights of the Child, Thirty-sixth session, Consideration of Reports Submitted by the States Parties under Article 44 of the Convention, Concluding observations: Myanmar, UN Doc. CRC/C/15/Add.237, 30 June 2004

English version available at:

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UNITED NATIONS

CRC

Convention on the Rights of the Child

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30 June 2004

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COMMITTEE ON THE RIGHTS OF THE CHILD

Thirty-sixth session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION

Concluding observations: Myanmar

1. The Committee considered the second periodic report of Myanmar (CRC/C/70/Add.21) at its 959th and 960th meetings (see CRC/C/SR.959 and 960), held on 26 May 2004, and adopted, at the 971st meeting (CRC/C/SR.971), held on 4 June 2004, the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the State party's second periodic report, which followed the established guidelines. The Committee also takes note of the submission of the written replies to its list of issues (CRC/C/Q/MYA/2), which allowed for a clearer understanding of the situation of children in the State party. The Committee acknowledges that the presence of a high-level and multidisciplinary delegation directly involved with the implementation of the Convention allowed for a constructive dialogue and a better understanding of the rights of the child in the State party.

B. Follow-up measures undertaken and progress achieved by the State party

3. The Committee welcomes:

(a) The adoption of Rules and Regulations related to the Child Law in 2001;

(b) The establishment of the National Human Rights Committee in 2000;

(c) The establishment of the Myanmar Women's Affairs Federation in 2003, whose mandate includes promotion and protection of the rights of children;

GE.04-42435 (E) 040804

78. **In line with its previous recommendations (ibid., para. 46) the Committee recommends that within this reform, the State party undertake, in particular, measures to:**

(a) Raise the age of criminal responsibility to an internationally acceptable age;

(b) Ensure that all alleged offenders below the age of 18 are judged according to a specific procedure and do not receive the same penalties as adults;

(c) Ensure the establishment of juvenile courts and appoint trained juvenile judges in all regions of the country;

(d) Limit by law the length of pre-trial detention;

(e) Provide children with legal assistance at an early stage of judicial proceedings;

(f) Protect the rights of children deprived of their liberty and improve their conditions of detention and imprisonment, including a child-sensitive and accessible independent mechanisms for children to make complaints, and the separation of child offenders from children in need of special protection;

(g) Ensure that children remain in regular contact with their families while in the juvenile justice system;

(h) Introduce regular medical examination of inmates by independent medical staff;

(i) Introduce training programmes on relevant international standards for all professionals involved with the system of juvenile justice;

(j) Make every effort to establish a programme of rehabilitation and reintegration of juveniles following judicial proceedings;

(k) Review the procedure concerning the quasi-judicial decisions to send children under the age of 18 to training schools, without the possibility of appeal; and

(l) Consider seeking technical assistance from, inter alia, OHCHR and UNICEF.

Children belonging to indigenous and minority groups

79. The Committee is deeply concerned about the situation of the children of the Bengali people residing in northern Rakhine State, also known as the Rohingyas, and of children belonging to other ethnic, indigenous or religious minorities and in particular that many of their rights are denied, including the rights to food, to health care, to education, to survival and development, to enjoy their own culture and to be protected from discrimination.

Annex 208

UN ECOSOC, Commission on Human Rights, Situation of human rights in Myanmar, Report of the Special Rapporteur, Paulo Sérgio Pinheiro, UN Doc. E/CN.4/2005/36, 2 December 2004

English version available at:

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Economic and Social
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2 December 2004

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COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 9 of the provisional agenda

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Situation of human rights in Myanmar

Report of the Special Rapporteur, Paulo Sérgio Pinheiro

GE.04-16771 (E) 231204

granted access to the country by the Government in the past 12 months, the Special Rapporteur has been unable to conduct a first-hand assessment of those allegations, but he hopes to be able to look into them when he is invited to return to the country.

38. The Special Rapporteur is particularly concerned by the situation in one ethnic area, namely, north-western Rakhine state. During the reporting period, mosques continued to be demolished, the freedom of movement of the Bengali-speaking Muslim minority remained excessively restricted and the vast majority of that minority remained de facto stateless.

39. Recent reports on the situation in Rakhine state indicate that, subsequent to the recent dismantling of military intelligence (MI) structures, a large part of the NaSaKa border forces, comprising the military, MI, police, immigration and customs, has been disbanded and replaced by units from other sections of the Myanmar armed forces. The NaSaKa forces were allegedly a major perpetrator of human rights abuses with respect, in particular, to taxation, extortion and forced labour. Some reports indicate that the early consequences of the dismantlement of the NaSaKa forces and MI have been decreases in taxes, marriage fees and travel authorization fees, and reduced in extortion and corruption. The Special Rapporteur cautiously welcomes those developments and will continue to follow the situation closely.

40. Conflicts, human rights abuses and a lack of protection have contributed over the years to large-scale internal displacement and flight into neighbouring countries. According to field surveys conducted in 2004 by human rights and assistance groups, the latest estimate of internally displaced persons (IDPs) in eastern border areas of Myanmar, namely, Tanintharyi division, Mon, Kayin and Kayah states, Southern Shan state and Eastern Bago division is some 526,000, the majority of whom are believed to be in settlements in ceasefire areas, while the remainder are in Government-controlled relocation sites or still in hiding in free-fire areas. Girls and women are estimated to comprise slightly more than half of the total IDP population. The latest figure represents a significant decrease from the 2002 estimate of 633,000, which may be caused by a number of factors, including sustainable return or resettlement, forced migration into urban and rural communities and cross-border migration. However, the estimated number of people allegedly displaced since the end of 2002 remains high at some 157,000, despite a marked reduction since the mid-late 1990s in the size of the population affected by forced relocation.

41. Such a high rate of civilian displacement suggests that harassment and abuses continue against the population of those areas, including ceasefire zones and, in particular, relocation sites. IDPs are vulnerable in every aspect of their lives and, in particular, with respect to health care, education and access to food and safe drinking water. Child mortality and malnutrition rates among IDPs are believed to be double those of the national baseline rate. Their vulnerability is linked, on the one hand, to a lack of social protection and, on the other hand, to a lack of humanitarian and human rights protection caused by a conflict environment and specific patterns of abuse. In order of prevalence, those abuses include forced labour (57 per cent), extortion in the form of arbitrary taxation (52 per cent), travel restrictions (23 per cent), food destruction (17 per cent), arbitrary arrest (14 per cent) and eviction (12 per cent).

Annex 209

UN SC, Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, attaching the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 25 January 2005

English version available at:

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Annex 209

United Nations S/2005/60

Security Council

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1 February 2005

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Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council

In my letter of 8 October 2004, I informed you and the members of the Security Council of my decision to appoint a five-member Commission of Inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur, Sudan. I requested the Commission to carry out the task within a period of three months and submit its report to me.

Attached please find the report submitted to me by the Commission.

(*Signed*) Kofi A. **Annan**

05-22536 (E) 070205
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"African" and those supporting the Government as "Arab". Clearly, however, not all "African" tribes support the rebels and not all "Arab" tribes support the Government. Some so-called Arab tribes appear to be either neutral or even support the rebels. For example, the Gimmer, a pro-Government African tribe, is seen by the African tribes opposed to the Government as having been Arabized. Other measures contributing to a polarization of the two groups include the 1987-1989 conflict over access to grazing lands and water sources between nomads of Arab origin and the sedentary Fur. The Arab-African divide has also been fanned by the growing insistence on such a divide in some circles and in the media. All this has contributed to the consolidation of the contrast and gradually created a marked polarization in the perception and self-perception of the groups concerned. At least those most affected by the conditions explained above, including those directly affected by the conflict, have come to perceive themselves as either African or Arab.

511. There are other elements that tend to indicate the self-perception of two distinct groups. In many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves", "blacks", *nuba*, or *zurga*, which might imply a perception of the victims as members of a distinct group. However, in numerous other instances they use derogatory language that is not linked to ethnicity or race.[176] As for the victims, they often refer to their attackers as Janjaweed, a derogatory term that normally designates "a man (a devil) with a gun on a horse". However, in this case the term Janjaweed clearly refers to "militias of *Arab* tribes on horseback or camelback". In other words, the victims perceive the attackers as persons belonging to a different and hostile group.

512. For these reasons it may be considered that the tribes that have been victims of attacks and killings subjectively make up a protected group.

513. *Was there a genocidal intent?* Some elements emerging from the facts, including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show a lack of genocidal intent. An important element is the fact that in a number of villages attacked and burned by both militias and Government forces, the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men. A telling example is the attack of 22 January 2004 on

[176] Epithets that eyewitnesses or victims reported to the Commission include the following: "This is your end The Government armed me " "You are Masalit, why do you come here, why do you take our grass? You will not take anything today " "You will not stay in this country " "Destroy the *Torabora* " "You are Zaghawa tribes, you are slaves " "Where are your fathers, we would like to shoot and kill them " "Take your cattle, go away and leave the village " In an attack of 1 November 2003 on the village of Bir-Saliba (in the region of Sirba, Kulbus), a witness heard the attackers yell "Allah Akbar, we are going to evict you Nyanya" and explained that "Nyanya" in their dialect is the name of the poison used to kill insects (however, this derogatory term was probably also used as a reference to the rebel organization in the South that existed before the establishment of SPLA, and was called Nyanya)
During rape: "You are the mother of the people who are killing our people " "Do not cut the grass because the camels use it " "You sons of *Torabora* we are going to kill you " "You do not have the right to be educated and must be *Torabora*" (to an 18-year-old student of a boarding school): "You are not allowed to take this money to fathers that are real *Torabora*" (To a girl from whom the soldier who raped her also took all her money): "You are very cheap people, you have to be killed"

Wadi Saleh, a group of 25 villages inhabited by about 11,000 Fur. According to credible accounts of eyewitnesses questioned by the Commission, after occupying the villages, the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning gathered all those who had survived or had not managed to escape into a large area. Using a microphone, they selected 15 persons (whose names they read from a written list), as well as 7 *omdas* (local leaders), and executed them on the spot. They then sent many men, including all elderly men, all boys and all women to a nearby village where they held them for some time, whereas they executed 205 young villagers who they asserted were rebels (*Torabora*). According to male survivors interviewed by the Commission, about 800 persons were not killed (most of the young men spared by the attackers were detained for some time in the Mukjar prison).

514. This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among or getting support from the local population.

515. Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in camps for internally displaced persons. In other words, the populations surviving attacks on villages are not killed outright in an effort to eradicate the group; rather, they are forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Government of the Sudan may be held to be in breach of international legal standards on human rights and rules of international criminal law, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the internally displaced persons belong. Suffice it to note that the Government of the Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicine and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.).

516. Another element that tends to show a lack of genocidal intent is the fact that in contrast with other instances described above, in a number of instances villages with a mixed composition (African and Arab tribes) have not been attacked. This holds true, for instance, for the village of Abaata (north-east of Zalinguei in Western Darfur), consisting of Zaghawa and members of Arab tribes.

517. Furthermore, it has been reported by a reliable source that one inhabitant of the Jabir village (situated about 150 km from Abu Shouk Camp) was among the victims of an attack carried out by Janjaweed on the village on 16 March 2004. He stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butts of their guns. Prior to his beating, however, his younger brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and he had been shot dead. Clearly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being motivated only by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.

Annex 210

UN GA, 59th Session, Official Records, Sixth Committee, Summary record of the 15th meeting, 28 October 2004, UN Doc. A/C.6/59/SR.15, 23 March 2005

English version available at:

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Annex 210

United Nations A/C.6/59/SR.15

General Assembly
Fifty-ninth session

Official Records

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23 March 2005
English
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Sixth Committee

Summary record of the 15th meeting
Held at Headquarters, New York, on Thursday, 28 October 2004 at 10 a.m.

Chairman: Mr. Simon (Vice-Chairman) (Hungary)
later: Mr. Bennouna (Chairman) (Morocco)

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manner in which innovations to promote their progressive development had been introduced.

101. The draft articles contained provisions that regulated extremely important issues which should be carefully considered and discussed. The time had come to explore the possibility of convening an international conference of plenipotentiaries to consider the text with a view to concluding a convention in the matter. The conference would be a good opportunity to evaluate the extent to which dispute settlement provisions might be incorporated into the draft articles. As a traditional defender of arbitration, Uruguay would consider with interest the proposals that would be submitted in that regard.

102. **Ms. Mas y Rubi Sposito** (Bolivarian Republic of Venezuela) commended the Commission's work in the development and codification of international law on responsibility of States for internationally wrongful acts. Such acts should include responsibility of States for the actions of transnational corporations linked to them either by their nationality or that of their majority stockholders or of the decision makers in their administration. Furthermore, the extraterritorial application by States of illegal provisions of their domestic law that caused harm to other States must be defined as illegal. The draft articles must be carefully examined and discussed.

103. Her delegation supported the holding of an international conference of plenipotentiaries to examine the draft articles of a future convention on that topic, but only when the draft had reached the stage where it could be discussed at that level. She agreed with the Committee's recommendation that such a conference would provide a good opportunity to evaluate whether it would be appropriate to include dispute settlement provisions in the draft. Her delegation supported voluntary arbitration as a legal formula for the settlement of disputes in international law.

104. **Mr. Lavalle** (Guatemala) said that the basic problem posed by the draft articles on responsibility of States for internationally wrongful acts was that of the final form of the articles. There were only two possibilities: to convert them into a multilateral treaty of universal scope, or to make them a part of universal customary law. He preferred the second option for four reasons. First, the articles had already begun to move in that direction and some of their provisions had been mentioned by international courts or arbitral tribunals, or had guided the decisions of those bodies. Second, if the articles ended up as part of treaty law, it would not always be easy for the Commission's commentaries to be given the importance they deserved as criteria for interpretation. Third, if the articles acquired the standing of customary law they would immediately become binding on all States, whereas if they became a treaty, at least initially, they would be binding only on the States parties. Finally, their incorporation into international law as customary law would probably be simpler than the elaboration of a treaty. Few of the provisions of the 1996 articles would achieve that status alongside those of 2001, but their survival would be advantageous, especially that of articles 12 (mutatis mutandis) and 13, article 18, paragraph 5, and article 25, paragraph 3. Articles 16 and 17 should not be interpreted to mean that if the scenarios described therein were to occur, but if for the State which aided, assisted or participated in the "act" that was "internationally wrongful if committed by that State", the act was not wrongful, then the conduct should be considered lawful. Natural justice required that the conduct must, under any rule of general international law, be a wrongful act.

105. By definition, however, such conduct would be wrongful because it infringed a primary rule of international law, in which case the incident would not be covered by the articles mentioned. Nevertheless, if the scenarios described in articles 16 and 17 (with the exception of those referred to in paragraph (b) of both articles) occurred, then a primary rule of general international law would have been violated. It was difficult, therefore, to understand how there could be a violation not of a separate rule, but of one that was also part of general and primary international law, in cases in which all the hypotheses of one or another article were combined.

106. The question arose as to what that primary norm would be. If the norms established in articles 16 and 17 were secondary, it would not to be possible to find it. The only way out of that logical predicament was to attribute a primary character to the rules contained in the articles in question, which would imply that such rules were out of place in the draft articles.

107. It seemed odd that, in accordance with article 48, paragraph 2 (b), a State other than the injured State could, in the interest of the latter, claim from the responsible State the obligation of reparation. That

seemed to indicate that, in any case, a State other than the injured State automatically took on the character of agent of the injured State, without which the necessary measures could not be taken to enable the injured State to obtain the reparation owed to it. It might well happen, however, that the injured State either did not desire such reparation or had, in accordance with article 20, given its consent to the violation of international law that had caused the injury. Nevertheless, it was possible that the injured State might wish to act on its own behalf. For that reason he understood that, despite the provisions of paragraph (b), a non-injured State could not act on behalf of the injured State unless the latter authorized or gave its consent for that purpose. Similar although much more complex observations also could be made with regard to the power granted in paragraph (b) to a State other than the injured State to invoke the responsibility of the wrongdoing State on behalf of the beneficiaries of the obligation breached.

108. As for article 54, Guatemala believed that the Commission could have undertaken a measure of progressive development. The article could have provided that, if a State which applied *motu propio* the penalties provided for in Article 41 of the Charter of the United Nations to another State which had not complied with the obligations imposed by the Security Council under Chapter VII of the Charter, the State taking the measures would be acting in accordance with the law even if the measures assumed non-compliance with an obligation imposed on it under international law vis-à-vis the State which was the object of the measures, as long as it was not one of the obligations specified in article 50, paragraph 1, of the draft articles.

The meeting rose at 1 p.m.

Annex 211

UN ECOSOC, Commission on Human Rights, Summary records of the 57th meeting, 19 April 2005, UN Doc. E/CN.4/2005/SR.57, 29 April 2005

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Economic and Social Council

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29 April 2005

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COMMISSION ON HUMAN RIGHTS

Sixty-first session

SUMMARY RECORD OF THE 57th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 19 April 2005, at 3 p.m.

Chairperson: Mr. WIBISONO (Indonesia)

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39. His delegation therefore deeply regretted having been unable to support the "Basic principles and guidelines" as included in the annex to resolution E/CN.4/2005/L.48. The text was an inaccurate reflection of customary international law. It erroneously sought to apply the principles of State responsibility to relationships between States and individuals and failed to differentiate adequately between human rights law and international humanitarian law. While certain instruments provided for the presentation of individual claims for the violation of human rights, such provisions did not exist for violations of international humanitarian law. The claim that such a right existed under the Hague Convention No. IV of 1907 or Protocol I Additional to the 1949 Geneva Conventions was entirely unsubstantiated. While the absence of a legal basis for individual reparation claims for violations of international humanitarian law might be regrettable, it must be taken into account. His delegation had repeatedly raised those concerns, which had compelled it to abstain from voting.

40. Ms. BARTON (United States of America), speaking in reference to resolution E/CN.4/2005/L.40, said that her delegation supported negotiations on the drafting of an international instrument on enforced disappearances if conducted during one annual two-week formal session. The objective should be to produce a well-drafted and well-vetted instrument that reflected a consensus without deadlines for completion of negotiations. Resolution E/CN.4/2005/L.40 should not be interpreted as an attempt to restate or affect provisions of legislation governing detention.

The meeting was suspended at 3.50 p m. and resumed at 4 p.m.

INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE:

(a) VIOLENCE AGAINST WOMEN

(agenda item 12) (continued) (E/CN.4/2005/L.51 and 53; E/CN.4/2005/2-E/CN.4/Sub.2/2004/48 (chapter I, draft decision 10))

Draft resolution on elimination of violence against women (E/CN.4/2005/L.51)

41. Ms. WALKER (Canada), introducing the draft resolution on behalf of the sponsors, said that the text highlighted elements of the relationship between violence against women and HIV/AIDS and identified the promotion and protection of sexual and reproductive rights of women and girls as an effective and necessary response to HIV/AIDS. The draft resolution also reaffirmed States' obligation to promote and protect the human rights of women and to exercise due diligence to prevent and punish all forms of gender-based violence.

42. By agreement among the sponsors, paragraph 11 had been amended to read: "*Also urges* Governments to effectively promote and protect women's and girls' human rights, including reproductive rights and sexual health, in the context of HIV/AIDS to lessen their vulnerability to HIV infection and to the impact of AIDS, as included in the summary of the Guidelines on HIV/AIDS and Human Rights in paragraph 12 of document E/CN.4/1997/37, and to cooperate

Annex 212

UN GA, 60th Session, Official Records, Third Committee, Summary record of the 39th meeting, 10 November 2005, UN Doc. A/C.3/60/SR.39, 8 December 2005

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/597/38/pdf/N0559738.pdf?OpenElement

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Annex 212

United Nations A/C.3/60/SR.39

General Assembly
Sixtieth session

Official Records

Distr.: General
8 December 2005

Original: English

Third Committee

Summary record of the 39th meeting
Held at Headquarters, New York, on Thursday, 10 November 2005, at 3 p m.

Chairman: Mr. Butagira (Uganda)

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importance to the issue of reparation. However, even if not breaking the consensus, it wished to uphold the views it had expressed in its explanation of vote at the sixty-first session of the Commission on Human Rights.

19. **Ms. Mortenson** (United Kingdom) said that the United Kingdom had been pleased to sponsor the draft resolution, but wished to make a statement concerning its understanding of the text. In his report on the third consultative meeting (contained in E/CN.4/2005/59), the Chairperson-Rapporteur had made it clear that the revised Principles and Guidelines did not introduce new principles of international law (ibid., para. 10). His interpretation was clearly correct: the Principles and Guidelines were not legally binding and did not create any new obligations on States in international law. Her delegation was nonetheless convinced that the Basic Principles and Guidelines would be an extremely valuable tool for States when they were considering policies on remedies and reparation, and it therefore welcomed their adoption.

20. **Mr. Muñoz** (Chile) thanked all those delegations that had supported the draft resolution, which was so important for human rights. It had been a very long but participatory and transparent process that had involved Member States, experts, non-governmental organizations and other international organizations. The Basic Principles and Guidelines, which he agreed were long overdue, would be a very useful tool in preventing impunity and promoting human rights, and he therefore welcomed the consensus reached.

(b) Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (*continued*) (A/C.3/60/L.28, L.30, L.34-L.37, L.40, L.44 and L.58)

Draft resolution A/C.3/60/L.34: Human rights and unilateral coercive measures

21. **Mr. Mohd Radzi** (Malaysia), introducing the draft resolution on behalf of the States members of the Non-Aligned Movement and China, said that certain States continued to take unilateral coercive measures contrary to international law and the Charter of the United Nations. Such measures had negative repercussions for developing countries and created additional obstacles to the full enjoyment of human rights. They also created obstacles to trade relations among States, impeded the full realization of social and economic development and hindered the well-being of the population in the affected countries, with particular consequences for women, children, adolescents and the elderly.

Draft resolution A/C.3/60/L.35: Enhancement of international cooperation in the field of human rights

22. **Mr. Mohd Radzi** (Malaysia), introducing the draft resolution on behalf of the States members of the Non-Aligned Movement and China, said that the resolution had always enjoyed consensus, and he hoped that would continue to be the case.

Draft resolution A/C.3/60/L.36: The right to development

23. **Mr. Mohd Radzi** (Malaysia), introduced the draft resolution on behalf of the States members of the Non-Aligned Movement and China, which remained committed to the promotion of the right to development.

Draft resolution A/C.3/60/L.37: Protection of human rights and fundamental freedoms while countering terrorism

24. **Mr. Gómez Robledo** (Mexico), introducing the draft resolution on behalf of the original sponsors and also Canada, Costa Rica, Croatia, Ecuador, Liechtenstein, Lithuania, Malta and Poland, said that terrorism was a serious problem for the territorial integrity and security of States. However, the obligation of States to protect their populations did not justify the derogation from or suspension of the human rights of those under their jurisdiction. Respect for and promotion of human rights should be an essential part of any administrative measure or legislation to combat terrorism. Any violations of human rights were counterproductive. He welcomed the new mandate of the Special Rapporteur on the promotion and protection of human rights while countering terrorism.

25. **Mr. Khane** (Secretary of the Committee) said that Albania, Bulgaria, Denmark, the Dominican Republic, Estonia, Georgia, Greece, Guinea, Hungary, Jordan, Kenya, Latvia, Madagascar, Nigeria, the Republic of Moldova, Romania, the former Yugoslav Republic of Macedonia, Timor-Leste and Ukraine had also joined the sponsors.

Annex 213

UN, General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/69/147, 21 March 2007

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/704/92/pdf/N1470492.pdf?OpenElement

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Annex 213

United Nations A/RES/60/147

General Assembly

Distr.: General
21 March 2006

Sixtieth session
Agenda item 71 (*a*)

Resolution adopted by the General Assembly on 16 December 2005

[*on the report of the Third Committee (A/60/509/Add.1)*]

60/147. 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 General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights,[1] the International Covenants on Human Rights,[2] other relevant human rights instruments and the Vienna Declaration and Programme of Action,[3]

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of the 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 by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005[4] and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* the 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 annexed to the present resolution;

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[1] Resolution 217 A (III)

[2] Resolution 2200 A (XXI), annex

[3] A/CONF 157/24 (Part I), chap III

[4] See *Official Records of the Economic and Social Council, 2005, Supplement No. 3* and corrigendum (E/2005/23 and Corr 1), chap II, sect A

05-49642

Annex 214

Statute of the International Residual Mechanism for Criminal Tribunals, contained in Security Council resolution 1966 (2010), S/RES/1966 (2010), 22 December 2010

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/706/08/pdf/N1070608.pdf?OpenElement

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United Nations S/RES/1966 (2010)

Security Council

Distr.: General
22 December 2010

Resolution 1966 (2010)

Adopted by the Security Council at its 6463rd meeting, on 22 December 2010

The Security Council,

Recalling Security Council resolution 827 (1993) of 25 May 1993, which established the International Tribunal for the former Yugoslavia ("ICTY"), and resolution 955 (1994) of 8 November 1994, which established the International Criminal Tribunal for Rwanda ("ICTR"), and all subsequent relevant resolutions,

Recalling in particular Security Council resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, which called on the Tribunals to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 ("completion strategy"), and *noting* that those envisaged dates have not been met,

Acknowledging the considerable contribution the Tribunals have made to international criminal justice and accountability for serious international crimes, and the re-establishment of the rule of law in the countries of the former Yugoslavia and in Rwanda,

Recalling that the Tribunals were established in the particular circumstances of the former Yugoslavia and Rwanda as *ad hoc* measures contributing to the restoration and maintenance of peace,

Reaffirming its determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice,

Recalling the statement of the President of the Security Council of 19 December 2008 (S/PRST/2008/47), and *reaffirming* the need to establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible for crimes, after the closure of the Tribunals,

Emphasizing that, in view of the substantially reduced nature of the residual functions, the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions,

10-70608 (E)

STATUTE OF THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (IRMCT)

Preamble

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations to carry out residual functions of the 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 (hereinafter "ICTY") and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter "ICTR"), the International Residual Mechanism for Criminal Tribunals (hereinafter "the Mechanism") shall function in accordance with the provisions of the present Statute,

Article 1: Competence of the Mechanism

1. The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute,[1] as well as the rights and obligations, of the ICTY and the ICTR, subject to the provisions of the present Statute.

2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused.

3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

4. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute,

(a) any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt; or

(b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.

[1] See Articles 1 to 8 ICTY Statute (S/RES/827 (1993) and Annex to S/25704 and Add 17658 (1993)) and Articles 1 to 7 ICTR Statute (Annex to S/RES/955 (1994))

Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency.

5. The Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article.

Article 2: Functions of the Mechanism

The Mechanism shall continue the functions of the ICTY and of the ICTR, as set out in the present Statute ("residual functions"), during the period of its operation.

Article 3: Structure and Seats of the Mechanism

The Mechanism shall have two branches, one branch for the ICTY and one branch for the ICTR, respectively. The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha.

Article 4: Organization of the Mechanism

The Mechanism shall consist of the following organs:

(a) The Chambers, comprising a Trial Chamber for each branch of the Mechanism and an Appeals Chamber common to both branches of the Mechanism;

(b) The Prosecutor common to both branches of the Mechanism;

(c) The Registry, common to both branches of the Mechanism, to provide administrative services for the Mechanism, including the Chambers and the Prosecutor.

Article 5: Concurrent Jurisdiction

1. The Mechanism and national courts shall have concurrent jurisdiction to prosecute persons covered by Article 1 of this Statute.

2. The Mechanism shall have primacy over national courts in accordance with the present Statute. At any stage of the procedure involving a person covered by Article 1 paragraph 2 of this Statute, the Mechanism may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the Mechanism.

Article 6: Referral of Cases to National Jurisdictions

1. The Mechanism shall have the power, and shall undertake every effort, to refer cases involving persons covered by paragraph 3 of Article 1 of this Statute to the authorities of a State in accordance with paragraphs 2 and 3 of this Article. The Mechanism shall have the power also to refer cases involving persons covered by paragraph 4 of Article 1 of this Statute.

2. After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Mechanism, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

Article 20: Protection of Victims and Witnesses

The Mechanism shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses in relation to the ICTY, the ICTR, and the Mechanism. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 21: Judgements

1. The Single Judge or Trial Chamber shall pronounce judgements and impose sentences and penalties on persons covered by Article 1 of this Statute who are convicted by the Mechanism.

2. All judgements shall be delivered in public and shall be accompanied by a reasoned opinion in writing. Judgements by a Chamber shall be rendered by a majority of the judges, to which separate or dissenting opinions may be appended.

Article 22: Penalties

1. The penalty imposed on persons covered by paragraphs 2 and 3 of Article 1 of this Statute shall be limited to imprisonment. The penalty imposed on persons covered by paragraph 4 of Article 1 of this Statute shall be a term of imprisonment not exceeding seven years, or a fine of an amount to be determined in the Rules of Procedure and Evidence, or both.

2. In determining the terms of imprisonment, the Single Judge or Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and in those of Rwanda, respectively.

3. In imposing the sentences, the Single Judge or Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

4. In addition to imprisonment, the Single Judge or Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 23: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from convicted persons or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Single Judge or Trial Chamber.

Article 24: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber or the Appeals Chamber of the ICTY, the ICTR, or the Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Mechanism an application for review of the judgement. The Prosecutor may submit such an

application within one year from the day that the final judgement was pronounced. The Chamber shall only review the judgement if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision.

Article 25: Enforcement of Sentences

1. Imprisonment shall be served in a State designated by the Mechanism from a list of States with which the United Nations has agreements for this purpose. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism.

2. The Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States, and other agreements with international and regional organizations and other appropriate organisations and bodies.

Article 26: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.

Article 27: Management of the Archives

1. Without prejudice to any prior conditions stipulated by, or arrangements with, the providers of information and documents, the archives of the ICTY, the ICTR and the Mechanism shall remain the property of the United Nations. These archives shall be inviolable wherever located pursuant to Section 4 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

2. The Mechanism shall be responsible for the management, including preservation and access, of these archives. The archives of the ICTY and the ICTR shall be co-located with the respective branches of the Mechanism.

3. In managing access to these archives, the Mechanism shall ensure the continued protection of confidential information, including information concerning protected witnesses, and information provided on a confidential basis. For this purpose, the Mechanism shall implement an information security and access regime, including for the classification and declassification as appropriate of the archives.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.

2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

(a) the identification and location of persons;

Annex 215

UN, ICCPR, Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, 12 September 2011

English version available at:

https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/453/31/pdf/G1145331.pdf?OpenElement

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Annex 215

United Nations CCPR/C/GC/34

International Covenant on Civil and Political Rights

Distr.: General
12 September 2011

Original: English

Human Rights Committee
102nd session
Geneva, 11-29 July 2011

General comment No. 34

Article 19: Freedoms of opinion and expression

General remarks

1. This general comment replaces general comment No. 10 (nineteenth session).

2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.[1] They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.

5. Taking account of the specific terms of article 19, paragraph 1, as well as the relationship of opinion and thought (article 18), a reservation to paragraph 1 would be incompatible with the object and purpose of the Covenant.[2] Furthermore, although freedom of opinion is not listed among those rights that may not be derogated from pursuant to the provisions of article 4 of the Covenant, it is recalled that, "in those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the

[1] See communication No 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996

[2] See the Committee's general comment No 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol I (A/50/40 (Vol I)), annex V

47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.[110] All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.[111] In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[112] States parties should consider the decriminalization of defamation[113] and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.[114]

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[115]

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.[116] The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

The relationship between articles 19 and 20

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As

[110] Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6)

[111] Ibid

[112] Ibid

[113] Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2)

[114] See communication No 909/2000, *Kankanamge v. Sri Lanka*, Views adopted on 27 July 2004

[115] Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add 119) See also concluding observations on Kuwait (CCPR/CO/69/KWT)

[116] So called "memory-laws", see communication No , No 550/93, *Faurisson v. France* See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19

Annex 216

UN GA, Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights: Addendum: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, UN Doc. A/HRC/22/17/Add.4, 11 January 2013

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United Nations A/HRC/22/17/Add.4

General Assembly

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Human Rights Council
Twenty-second session
Agenda item 2
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Annual report of the United Nations High Commissioner for Human Rights

Addendum

Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred* **

Summary

The Office of the High Commissioner for Human Rights (OHCHR) organized a series of expert workshops on the prohibition of incitement to national, racial or religious hatred, in which legislative patterns, judicial practices and policies in this regard were explored. This report summarizes the results of this initiative. In particular, it provides details on the wrap-up expert meeting organized in Rabat in October 2012, which brought together conclusions and recommendations from the expert workshops and resulted in the adoption by the experts of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which is included in the annex to this report.

* The summary of the present report is circulated in all official languages. The report, which is annexed to the summary, is reproduced in the language of submission only.
** Late submission.

29. It was suggested that a high threshold be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. In order to establish severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium. To assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. In this regard, a six-part threshold test was proposed for expressions considered as criminal offences:

(a) **Context**: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) **Speaker**: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(c) **Intent**: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) **Content and form:** The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) **Extent of the speech act**: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

Recommendations

30. National and regional courts should be regularly updated about international standards and international, regional and comparative jurisprudence relating to incitement to hatred because when confronted with such cases, courts need to undertake a thorough analysis based on a well thought through threshold test.

31. States should ensure the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

32. Due attention should be given to minorities and vulnerable groups by providing legal and other types of assistance for their members.

33. States should ensure that persons who have suffered actual harm as a result of incitement to hatred have a right to an effective remedy, including a civil or non-judicial remedy for damages.

34. Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply. Administrative sanctions and remedies should also be considered, including those identified and put in force by various professional and regulatory bodies.

C. Policies

Conclusions

35. While a legal response is important, legislation is only part of a larger toolbox to respond to the challenges of hate speech. Any related legislation should be complemented by initiatives from various sectors of society geared towards a plurality of policies, practices and measures nurturing social consciousness, tolerance and understanding change and public discussion. This is with a view to creating and strengthening a culture of peace, tolerance and mutual respect among individuals, public officials and members of the judiciary, as well as rendering media organizations and religious/community leaders more ethically aware and socially responsible. States, media and society have a collective responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law.

36. Political and religious leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech. It should be made clear that violence can never be tolerated as a response to incitement to hatred.

37. To tackle the root causes of intolerance, a much broader set of policy measures is necessary, for example in the areas of intercultural dialogue – reciprocal knowledge and interaction –, education on pluralism and diversity, and policies empowering minorities and indigenous people to exercise their right to freedom of expression.

38. States have the responsibility to ensure space for minorities to enjoy their fundamental rights and freedoms, for instance by facilitating registration and functioning of minority media organizations. States should strengthen the capacities of communities to access and express a range of views and information and embrace the healthy dialogue and debate that they can encompass.

39. Certain regions have a marked preference for a non-legislative approach to combating incitement to hatred through, in particular, the adoption of public policies and the establishment of various types of institutions and processes, including truth and reconciliation commissions. The important work of regional human rights mechanisms, specialized bodies, a vibrant civil society and independent monitoring institutions is fundamentally important in all regions of the world. In addition, positive traditional values, compatible with internationally recognized human rights norms and standards, can also contribute towards countering incitement to hatred.

40. The importance of the media and other means of public communication in enabling free expression and the realization of equality is fundamental. The traditional media

Annex 217

UN, CERD, General recommendation No. 35: Combating racist hate speech, UN Doc. CERD/C/GC/35, 26 September 2013

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Annex 217

United Nations CERD/C/GC/35

International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
26 September 2013

Original: English

Committee on the Elimination of Racial Discrimination

General recommendation No. 35

Combating racist hate speech*

I. Introduction

1. At its eightieth session, the Committee on the Elimination of Racial Discrimination (the Committee) decided to hold a thematic discussion on racist hate speech during its eighty-first session. The discussion took place on 28 August 2012 and focused on understanding the causes and consequences of racist hate speech, and how the resources of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) may be mobilized to combat it. Participants in the discussion included, in addition to members of the Committee, representatives from permanent missions to the United Nations Office in Geneva, national human rights institutions, non-governmental organizations, academics and interested individuals.

2. Following the discussion, the Committee expressed its intention to work on drafting a general recommendation to provide guidance on the requirements of the Convention in the area of racist hate speech in order to assist States parties in discharging their obligations, including reporting obligations. The present general recommendation is of relevance to all stakeholders in the fight against racial discrimination, and seeks to contribute to the promotion of understanding, lasting peace and security among communities, peoples and States.

Approach adopted

3. In drafting the recommendation, the Committee has taken account of its extensive practice in combating racist hate speech, concern about which has engaged the full span of procedures under the Convention. The Committee has also underlined the role of racist hate speech in processes leading to mass violations of human rights and genocide, and in conflict situations. Key general recommendations of the Committee that address hate speech include general recommendations No. 7 (1985) relating to the implementation of article 4;[1] No. 15 (1993) on article 4, which stressed the compatibility between article 4 and

* Adopted by the Committee at its eighty-third session (12–30 August 2013)

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 18* (A/40/18), chap VII, sect B

of the Convention, it "was regarded as central to the struggle against racial discrimination",[12] an evaluation which has been maintained in Committee practice. Article 4 comprises elements relating to speech and the organizational context for the production of speech, serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails. The article also has an expressive function in underlining the international community's abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.

11. In the chapeau and subparagraph (a), regarding "ideas or theories of superiority" or "racial superiority or hatred" respectively, the term "based on" is employed to characterize speech impugned by the Convention. The term is understood by the Committee in the context of article 1 as equivalent to "on the grounds of"[13] and in principle holds the same meaning for article 4. The provisions on dissemination of ideas of racial superiority are a forthright expression of the preventive function of the Convention and are an important complement to the provisions on incitement.

12. The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.[14]

13. As article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope. In the light of the provisions of the Convention and the elaboration of its principles in general recommendation No. 15 and the present recommendation, the Committee recommends that the States parties declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

(e) Participation in organizations and activities which promote and incite racial discrimination.

14. The Committee recommends that public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial

[12] General recommendation No 15, para 1

[13] The latter phrase is employed in the seventh preambular paragraph of the Convention See also paragraph 1 of general recommendation No 14 (1993) on article 1, paragraph 1, of the Convention (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 18* (A/48/18), chap VIII, sect B)

[14] Human Rights Committee general comment No 34, paras 22- 25; 33-35

Annex 218

UN GA, 68th Session, Official Records, Sixth Committee, Summary record of the 15th meeting, 21 October 2013, UN Doc. A/C.6/68/SR.15, 15 January 2014

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Annex 218

United Nations A/C.6/68/SR.15

General Assembly
Sixty-eighth session

Official Records

Distr.: General
15 January 2014

Original: English

Sixth Committee

Summary record of the 15th meeting
Held at Headquarters, New York, on Monday, 21 October 2013, at 10 a m.

Chair: Mr. Kohona (Sri Lanka)

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13-52403 (E)

whole the articles were well articulated and balanced and were a good basis for further work. Since the goal of the International Law Commission was to promote the progressive development and codification of international law, and relevant General Assembly resolutions had repeatedly drawn the attention of States to the articles, his delegation supported the idea of holding an international conference to elaborate a legally binding convention on responsibility of States for internationally wrongful acts.

23. **Mr. Gharibi** (Islamic Republic of Iran) said that his country attached high importance to the question of State responsibility and was of the view that many provisions of the articles were an expression of customary international law, in particular articles 41, 48, 50 and 54. They not only reflected existing international law but were also consistent with a number of authoritative pronouncements in international case law, including decisions of the International Court of Justice, and prevailing doctrine. The rules on State responsibility were the cornerstone of the rule of law in international relations; they should be clear and known to all subjects of international law, and that was only possible if they were crystallized in a treaty. Accordingly, his delegation believed that the time was ripe to convene a diplomatic conference to adopt a convention on State responsibility. The articles were the best basis for such a legally binding instrument.

24. **Ms. Tajuddin** (Malaysia) recalled that at the sixty-fifth session of the General Assembly, her delegation had not been in favour of initiating negotiations aimed at developing a convention on state responsibility, because such a move might unravel the fragile balance in the wording of the articles. It had also indicated that the articles needed further in-depth consideration and that, as comprehensive as they might set out to be, they should only be considered guidelines.

25. Malaysia remained concerned about draft article 2, which seemed to suggest that fault or wrongful intent on the part of the State was not required in order to establish the existence of an internationally wrongful act. That obligation must be carefully considered by States. It was also concerned about article 7, which dealt with the *ultra vires* acts of State organs. Introducing such an obligation would require States to assume the conduct or wrongdoing of an organ or a person beyond the power given to such organ or person by those States. There would be considerable financial implications for a State found to be in breach of such an obligation. Given that such issues required further consultations among States, the articles should remain in the form of guidelines at the current juncture.

26. **Mr. Aprianto** (Indonesia) said that the articles on State responsibility would make an important contribution to strengthening the commitment of States to the rule of law and would be instrumental in governing relations between States, in particular with respect to the peaceful settlement of disputes. Discussions should continue on whether to convene a diplomatic conference to elaborate an international convention on the basis of the articles. Such a conference would give all States the opportunity to present their views in a more exhaustive manner and would enrich the progressive development of international law.

27. **Ms. Cabello de Daboin** (Bolivarian Republic of Venezuela) said that the topic of responsibility of States for internationally wrongful acts was of primary importance for preserving international order, developing relations among States based on respect and equality, and strengthening the rule of law internationally. The Committee should decide at the current session either to adopt a declaration as a first step towards codification, or to call for the convening of an international conference to adopt the articles in treaty form. Nonetheless, the adoption of such a declaration or the convening of such a conference did not mean that areas in which countries were not in agreement could not be further developed at a later stage.

Agenda item 82: Diplomatic protection (A/68/115 and A//68/115/Add.1)

28. **Mr. León González** (Cuba), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that diplomatic protection was an important area with a long-standing tradition in international relations between States. The articles on diplomatic protection generally reflected the most frequently recognized State practice on the topic and were consistent with international customary norms. It was therefore important to work towards the adoption of an international convention to permit the harmonization of State practice and jurisprudence on the topic. The negotiation of such a convention would

Annex 219

UN, CEDAW, CRC, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014

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United Nations CEDAW/C/GC/31-CRC/C/GC/18

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of the Child

Distr.: General
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Committee on the Elimination of Discrimination against Women

Committee on the Rights of the Child

Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices

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marriages (coercing a widow to marry a relative of her deceased husband). In some contexts, a forced marriage may occur when a rapist is permitted to escape criminal sanctions by marrying the victim, usually with the consent of her family. Forced marriages may occur in the context of migration in order to ensure that a girl marries within the family's community of origin or to provide extended family members or others with documents to migrate to and/or live in a particular destination country. Forced marriages are also increasingly being used by armed groups during conflict or may be a means for a girl to escape post-conflict poverty.[10] Forced marriage may also be defined as a marriage in which one of the parties is not permitted to end or leave it. Forced marriages often result in girls lacking personal and economic autonomy and attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.

24. The payment of dowries and bride prices, which varies among practising communities, may increase the vulnerability of women and girls to violence and to other harmful practices. The husband or his family members may engage in acts of physical or psychological violence, including murder, burning and acid attacks, for failure to fulfil expectations regarding the payment of a dowry or its size. In some cases, families will agree to the temporary "marriage" of their daughter in exchange for financial gains, also referred to as a contractual marriage, which is a form of trafficking in human beings. States parties to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography have explicit obligations with regard to child and/or forced marriages that include dowry payments or bride prices because they could constitute a sale of children as defined in article 2 (a) of the Protocol.[11] The Committee on the Elimination of Discrimination against Women has repeatedly stressed that allowing marriage to be arranged by such payment or preferment violates the right to freely choose a spouse and has in its general recommendation No. 29 outlined that such practice should not be required for a marriage to be valid and that such agreements should not be recognized by a State party as enforceable.

C. Polygamy

25. Polygamy is contrary to the dignity of women and girls and infringes on their human rights and freedoms, including equality and protection within the family. Polygamy varies across, and within, legal and social contexts and its impact includes harm to the health of wives, understood as physical, mental and social well-being, the material harm and deprivation that wives are liable to suffer and emotional and material harm to children, often with serious consequences for their welfare.

26. While many States parties have chosen to ban polygamy, it continues to be practised in some countries, whether legally or illegally. Although throughout history polygamous family systems have been functional in some agricultural societies as a way of ensuring larger labour forces for individual families, studies have shown that polygamy actually often results in increased poverty in the family, especially in rural areas.

[10] Committee on the Elimination of Discrimination against Women general recommendation No 30, para 62

[11] See also art 3 (1)(a)(i)

27. Both women and girls find themselves in polygamous unions, with evidence showing that girls are much more likely to be married or betrothed to much older men, increasing the risk of violence and violations of their rights. The coexistence of statutory laws with religious, personal status and traditional customary laws and practices often contributes to the persistence of the practice. In some States parties, however, polygamy is authorized by civil law. Constitutional and other provisions that protect the right to culture and religion have also at times been used to justify laws and practices that allow for polygamous unions.

28. States parties to the Convention on the Elimination of All Forms of Discrimination against Women have explicit obligations to discourage and prohibit polygamy because it is contrary to the Convention.[12] The Committee on the Elimination of Discrimination against Women also contends that polygamy has significant ramifications for the economic well-being of women and their children.[13]

D. Crimes committed in the name of so-called honour

29. Crimes committed in the name of so-called honour are acts of violence that are disproportionately, although not exclusively, committed against girls and women because family members consider that some suspected, perceived or actual behaviour will bring dishonour to the family or community. Such forms of behaviour include entering into sexual relations before marriage, refusing to agree to an arranged marriage, entering into a marriage without parental consent, committing adultery, seeking divorce, dressing in a way that is viewed as unacceptable to the community, working outside the home or generally failing to conform to stereotyped gender roles. Crimes in the name of so-called honour may also be committed against girls and women because they have been victims of sexual violence.

30. Such crimes include murder and are frequently committed by a spouse, female or male relative or a member of the victim's community. Rather than being viewed as criminal acts against women, crimes committed in the name of so-called honour are often sanctioned by the community as a means of preserving and/or restoring the integrity of its cultural, traditional, customary or religious norms following alleged transgressions. In some contexts, national legislation or its practical application, or the absence thereof, allows for the defence of honour to be presented as an exculpatory or a mitigating circumstance for perpetrators of such crimes, resulting in reduced sanctions or impunity. In addition, prosecution of cases may be impeded by unwillingness on the part of individuals with knowledge of the case to provide corroborating evidence.

[12] Committee on the Elimination of Discrimination against Women general recommendations Nos 21, 28 and 29

[13] Committee on the Elimination of Discrimination against Women general recommendation No 29, para 27

Annex 220

UN, ICCPR, Human Rights Committee, Concluding Observations on the initial report of Haiti, UN Doc. CCPR/C/HTI/CO/1, 21 November 2014

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United Nations CCPR/C/HTI/CO/1

International Covenant on Civil and Political Rights

Distr.: General
21 November 2014
English
Original: French

Human Rights Committee

Concluding observations on the initial report of Haiti*

1. The Committee considered the initial report of Haiti (CCPR/C/HTI/1) at its 3102nd and 3103rd meetings (CCPR/C/SR.3102 and 3103), held on 9 and 10 October 2014. At its 3126th meeting, held on 27 October 2014, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the initial report of Haiti, which was 16 years overdue, and the information presented therein. It appreciates having had the opportunity to engage in a constructive dialogue with the State party's high-level delegation on the measures that the State party has taken since the entry into force of the Covenant to implement its provisions. The Committee is grateful to the State party for its written replies (CCPR/C/HTI/Q/1/Add.1) to the Committee's list of issues (CCPR/C/HTI/Q/1), which were supplemented by oral responses provided by the delegation during the dialogue and additional information provided in writing.

B. Positive aspects

3. The Committee welcomes the following legislative and institutional measures taken by the State party since the entry into force of the Covenant for the State party in 1991:

(a) The appointment of a Deputy Minister for Human Rights and Extreme Poverty and the creation of the Interministerial Human Rights Committee;

(b) The adoption of the Organic Act on the organization and functioning of the Office of the Ombudsman (*Office de la protection du Citoyen*); the Office obtained an "A" rating from the Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in December 2013;

(c) The Paternity, Maternity and Filiation Act, which entered into force in June 2014;

(d) The Trafficking in Persons Act, promulgated on 4 June 2014;

* Adopted by the Committee at its 112th session (7–31 October 2014).

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out these investigations independently and to routinely maintain statistics on homicides committed by the forces of law and order and on the unlawful use of firearms, covering investigations carried out, prosecutions brought, penalties prescribed and reparation awarded. The Committee encourages the State party to continue its efforts to provide the forces of law and order with human rights training in accordance with its obligations under the Covenant and in line with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, in order to reduce the incidence of homicide and serious injury caused by firearms.

Ratification of the Second Optional Protocol to the Covenant

11. The Committee finds it regrettable that ratification of the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, was recently withdrawn from the parliament's agenda without satisfactory explanation (art. 6).

The Committee recommends that the State party consider ratifying the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as soon as possible.

Prohibition of torture and cruel, inhuman or degrading treatment

12. The Committee notes that article 293 of the Criminal Code provides penalties for the physical torture of an arrested or detained person. The Committee regrets to say that such a definition is not consistent with the Covenant or the Committee's jurisprudence in this area, in particular because it includes no reference to psychological torture. With regard to alleged cases of torture or other ill-treatment, the Committee is concerned about the lack of action on recommendations made by the General Inspectorate of the National Police and the lack of systematic information regarding any investigations that have been carried out and the penalties imposed (arts. 2 and 7).

When drafting the new criminal code which the Government has undertaken to adopt by the end of 2014, the State party should include a definition of torture that covers all the elements, including psychological torture, as reflected in the Committee's general comment No. 20 on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment. It should also ensure that the new criminal code adequately provides for the prosecution and conviction of perpetrators of such acts, and their accomplices, in accordance with the seriousness of the offence.

Violence against women

13. The Committee is concerned about the low level of protection from violence against women, in particular rape. While noting the progress made in enabling victims of rape to obtain a medical certificate free of charge, it notes with regret that a medical certificate is required to initiate criminal proceedings for rape. It further notes that the law criminalizing such acts and other acts of violence against women has not yet been adopted. The Committee notes that shelters have been established, although they appear to be few in number and difficult to reach, especially in rural areas (arts. 2, 3 and 7).

The State party should accelerate the adoption of specific legislation on violence against women with a view to strengthening the legal framework for protection against domestic violence, sexual harassment, rape, including marital rape, and other forms of violence suffered by women. The legislation should also include a provision stating that a victim's testimony is sufficient to initiate criminal investigations into an act of rape. The State party should also take measures to ensure that all women victims of violence have access to assistance, including legal assistance, and are able to find refuge in shelters.