INTERNATIONAL COURT OF JUSTICE

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

THE GAMBIA

v.

MYANMAR

REJOINDER OF
THE REPUBLIC OF THE UNION OF MYANMAR

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30 December 2024

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

Other extracts are also included at CMM, Vol. II, Annex 20

Available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSC15217R0000619817.PDF

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

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

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

Registry: Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

510. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.

511. On reading through the *travaux préparatoires* of the Genocide Convention[96], it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

512. Based on the *Nottebohm* decision[97] rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

513. An ethnic group is generally defined as a group whose members share a common language or culture.

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[96] Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

[97] International Court of Justice, 1995

Annex 10

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

Other extracts are also included at CMM, Vol. II, Annex 16

English version available at:

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

French version available at:

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

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

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991	Case No:	IT-98-33-A
		Date:	19 April 2004
		Original:	English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

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

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

13. The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders.[23] The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.

14. These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.

15. In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia.[24] This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people.[25] This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region.[26] Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the

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Judgement, para. 65. Properly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied.

[23] For a discussion of these examples, see William A. Schabas, *Genocide in International Law* (2000), p. 235.

[24] Trial Judgement, para. 560 ("The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4."). *See also* Trial Judgement, para. 591. Although the Trial Chamber did not delineate clearly the interrelationship between these two alternative definitions, an explanation can be gleaned from its Judgement. As the Trial Chamber found, "most of the Bosnian Muslims residing in Srebrenica at the time of the [Serbian] attack were not originally from Srebrenica but from all around the central Podrinje region." Trial Judgement, para. 559; *see also ibid.*, para. 592 (speaking about "the Bosnian Muslim community of Srebrenica and its surrounds"). The Trial Chamber used the term "Bosnian Muslims of Srebrenica" as a short-hand for the Muslims of both Srebrenica and the surrounding areas, most of whom had, by the time of the Serbian attack against the city, sought refuge with the enclave. This is also the sense in which the term will be used in this Judgement.

[25] While the Trial Chamber did not make a definitive determination as to the size of the Bosnian Muslim community in Srebrenica, the issue was not in dispute. The Prosecution estimated the number to be between 38,000 and 42,000. *See* Trial Judgement, para. 592. The Defence's estimate was 40,000. *See ibid.*, para. 593.

[26] The pre-war Muslim population of the municipality of Srebrenica was 27,000. Trial Judgement, para. 11. By January 1993, four months before the UN Security Council declared Srebrenica to be a safe area, its population swelled to about 50,000 – 60,000, due to the influx of refugees from nearby regions. *Ibid.*, para. 14. Between 8,000 and 9,000 of those who found shelter in Srebrenica were subsequently evacuated in March – April 1993 by the UN High Commissioner for Refugees. *Ibid.*, para. 16.

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importance of the Muslim community of Srebrenica is not captured solely by its size.[27] As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted.[28] The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.

16. In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the "safe areas" established by the UN Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it "should be free from armed attack or any other hostile act."[29] This guarantee of protection was re-affirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops.[30] The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.

17. Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.

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[27] The Muslim population of Bosnia and Herzegovina in 1995, when the attack against Srebrenica took place, was approximately 1,400,000. *See* http://www.unhabitat.org/habrdd/conditions/southeurope/bosnia.htm, accessed 26/03/2004 (estimating that the Muslims constituted 40 percent of the 1995 population of 3,569,000). The Bosnian Muslims of Srebrenica therefore formed about 2.9 percent of the overall population.

[28] Trial Judgement, para. 12; *see also* para. 17.

Annex 11

International Criminal Tribunal for the former Yugoslavia, Stakić, IT- IT-97-24, Judgment, Trial Chamber, 31 July 2003 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-97-24/JUD35R0000039063.doc

French version available at:

https://www.icty.org/x/cases/stakic/tjug/fr/sta-tj030731-f.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	Case No.	IT-97-24-T
		Date:	31 July 2003
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 July 2003**

PROSECUTOR

v.

MILOMIR STAKI]

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Branko Luki}
Mr. John Ostojic

> Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.[1103]

e. The specific intent to destroy a group "in part"

522. The key factor is the specific intent to destroy the group rather than its actual physical destruction.[1104] As pointed out by the Trial Chamber in *Semanza*, "there is no numeric threshold of victims necessary to establish genocide".[1105] This Trial Chamber emphasises that in view of the requirement of a surplus of intent, it is not necessary to prove a *de facto* destruction of the group in part[1106] and therefore concludes that it is not necessary to establish, with the assistance of a demographer, the size of the victimised population in numerical terms. It is the genocidal *dolus specialis* that predominantly constitutes the crime.

523. In construing the phrase "destruction of a group in part", the Trial Chamber with some hesitancy follows the jurisprudence of the Yugoslavia and Rwanda Tribunals which permits a characterisation of genocide even when the specific intent extends only to a limited geographical area, such as a municipality.[1107] The Trial Chamber is aware that this approach might distort the definition of genocide if it is not applied with caution.[1108]

524. This Trial Chamber concurs with the Trial Chamber in *Krsti}* which held that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it".[1109] Furthermore,

> Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a

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[1102] *Jelisi}* Trial Judgement, para. 79.
[1103] *Sikirica et al.* Judgement on Defence Motions to Acquit, para. 89.
[1104] See *e.g.* N. Jørgensen, "The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea", (2002) 15 *Leiden Journal of International Law*, p. 389, at p. 394.
[1105] *Prosecutor v Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, ("*Semanza* Trial Judgement and Sentence"), para. 316.
[1106] The Trial Chamber concludes from this that it is not necessary to establish, with the assistance of a demographer, the size of the victimised population in numerical terms.
[1107] See *Akayesu* Trial Judgement, paras. 704, 733; *Jelisi}* Trial Judgement, para. 83; *Sikirica et al.* Judgement on Defence Motions to Acquit, para. 68.
[1108] See *e.g.* W. Schabas, "Was genocide committed in Bosnia and Herzegovina? First Judgements of the International Criminal Tribunal for the Former Yugoslavia", (November 2001) *Fordham International Law Journal*, p. 23, at pp. 42-43: "Although the concept of genocide on a limited geographic scale seems perfectly compatible with the object and purpose of the Convention, it does raise questions relating to the plan or policy issue. Localized genocide may tend to suggest the absence of a plan or policy on a national level, and while it may result in convictions of low-level officials within the municipality or region, it may also create a presumption that the crime was not in fact organized on a larger scale."
[1109] *Krsti}* Trial Judgement, para. 590.

> broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.[1110]

525. The Trial Chamber notes that according to the jurisprudence of this Tribunal, the intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group, such as its leadership.[1111]

526. It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts,[1112] the concrete circumstances, or "a pattern of purposeful action."[1113]

f. Modes of Liability

527. In the Appeals Chamber Decision in *Ojdani}*, it was held that joint criminal enterprise was "a form of 'commission' pursuant to Article 7(1) of the Statute".[1114] The Appeals Chamber found that "insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated".[1115]

528. "Commission", as a mode of liability, is broadly accepted, and joint criminal enterprise provides one definition of "commission". The Appeals Chamber in *^elebi}i* characterised "commission" as "primary liability". Furthermore, as stated in the *Kunerac* Trial Judgement, a crime can be committed individually or jointly with others, that is, "[t]here can be several

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[1110] *Ibid.*
[1111] *Sikirica et al.* Judgement on Defence Motions to Acquit, paras 65, 76-85.
[1112] *Akayesu* Trial Judgement, paras. 523-4; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), paras. 166-7; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case Nos IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 ("*Karad`i} and Mladi}* Review"), paras. 94-95; *Jelisi}* Appeal Judgement, paras. 47-49; *Sikirica et al.* Judgement on Defence Motions to Acquit, para. 61: "the requisite intent for the crime of genocide will have to be inferred from the evidence". *Rutaganda* Appeal Judgement, para. 525: "En l'absence de preuves explicites directes, le *dolus specialis* peut donc se déduire d'un ensemble de faits et de circonstances pertinentes".
[1113] *Kayishema* and *Ruzindana* Trial Judgement, para. 93.
[1114] *Prosecutor v Milan Milutinovi}, Nikola [ainovi} & Dragoljub Ojdani}*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdani}'s Motion Challenging Jurisdiction – Joint Criminal Enterprise, (*Ojdani}* Decision) 21 May 2003, para. 20.
[1115] *Ibid.*

Annex 12

International Criminal Tribunal for Rwanda, Nahimana, ICTR-99-52- T, Judgment and Sentence, Trial Chamber, 3 December 2003 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-99-52/MSC26797R0000541998.PDF

French version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Judgement/NotIndexable/ICTR-99-52/MSC31270R0000541993.PDF

ICTR-99-52-T
05 — 12 — 2003
(34936 — 34483)

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

34936
S. Mussa

Or. : Eng.

TRIAL CHAMBER I

Before Judges: Navanethem Pillay, presiding
Erik Møse
Asoka de Zoysa Gunawardana

Registrar: Adama Dieng

Judgement of: 3 December 2003

THE PROSECUTOR

V.

FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

JUDGEMENT AND SENTENCE

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Mr John Floyd III
Mr René Martel

uses these elements in order to seek a way to infiltrate", to some extent undercut the apparent message of the broadcast, perhaps intentionally, by suggesting that RPF was infiltrating along ethnic lines. The insinuation is subtle, though, and the broadcast, in isolation as an excerpt, does not indicate lack of sincerity on the basis of the text itself, with the possible exception of this last line. It is only when read in the context of other contemporaneous broadcasts that a cynical purpose might be inferred.

425. In contrast, some broadcasts explicitly called for killing of civilians. In an RTLM broadcast on 23 May 1994, Kantano Habimana said:

> Let me congratulate thousands and thousands of young men I've seen this morning on the road in Kigali doing their military training to fight the *Inkotanyi*... At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country. Whether they reach at the airport or somewhere else, but they should leave their lives on the spot. That's the way things should be...Some (passengers) may pretext that they are refugees, others act like patients and other like sick-nurses. Watch them closely, because *Inkotanyi's* tricks are so many... Does it mean that we have to go in refugee camps to look for people whose children joined the RPA and kill them? I think we should do it like that. We should also go in refugee camps in the neighbouring countries and kill those who sent their children within the RPA. I think it's not possible to do that. However, if the *Inkotanyi* keep on acting like that, we will ask for those whose children joined the RPA among those who will have come from exile and kill them. Because if we have to follow the principle of an eye for an eye, we'll react. It can't be otherwise.[428]

426. The Chamber notes the call for extermination in this broadcast, and although there is some differentiation in the use of the term *Inkotanyi* from the Tutsi population, nevertheless the broadcast called for killing of those who were not *Inkotanyi*, the killing of those in refugee camps whose children joined the RPA. The broadcast also warned listeners to be vigilant at the roadblocks and to beware passengers using the "pretext" that they were refugees, in effect calling on the population to attack refugees.

427. In an RTLM broadcast on 28 May 1994, Kantano Habimana made it clear that even Hutu whose mothers were Tutsi should be killed:

> Another man called Aloys, *Interahamwe* of Cyahafi, went to the market disguised in military uniform and a gun and arrested a young man called Yirirwahandi Eustache in the market... In his Identity Card it is written that he is a Hutu though he acknowledges that his mother is a Tutsi... Aloys and other *Interahmawe* of Cyahafi took Eustache aside and made him sign a paper of 150000 Frw... He is now telling me that they are going to kill him and he is going to borrow this amount of money. He is afraid of being killed by these men. If you are an *Inyenzi*[429] you must be killed, you cannot change anything. If you are *Inkotanyi*, you cannot change anything. No one can say that he has captured an *Inyenzi* and the latter gave him money, as a price for his life. This cannot be

[428] Exhibit C7, CD 93, K0146700-02.
[429] The translation uses the word "cockroach" for all references in the original to "*Inyenzi*".

> accepted. If someone has a false identity card, if he is *Inkotanyi*, a known accomplice of RPF, don't accept anything in exchange. He must be killed.[430]

428. From this broadcast it is clear that Yirirwahandi Eustache was perceived to be an *Inyenzi* and *Inkotanyi* because he acknowledged that his mother was a Tutsi. The chilling message of the broadcast was that any accomplice of the RPF, implicitly defined to be anyone with Tutsi blood, cannot buy his life. He must be killed.

429. Many RTLM broadcasts named and denounced individuals, identifying them as accomplices or threats to security. In an RTLM broadcast on 2 June 1994, Valerie Bemeriki said:

> And yet, there will certainly be criticism regarding what must be in this commune, but I'm not saying ... There are not many of them; only one person named ... a woman named Jeanne. Jeanne is a sixth-form teacher at Mamba, Mamba in Muyaga commune. Jean is not doing good things in this school. Indeed, it has been noted that she's the cause of the bad atmosphere in the classes she teaches. She had a husband named Gaston, a Tutsi, who took refuge in Burundi. He left, but when he reached the other side, he started to plot against the Hutus of his commune; he arranged their murder through this woman, his wife, Jeanne. He is doing everything possible to launch attacks in Muyaga commune, through this woman named Jeanne, who is a teacher at Mamba, in Muyaga commune. She did not stop at that, she teaches that to her students; she urges them to hate the Hutus. These children spend the entire day at that, and, indeed, the people of Muyaga, who are well known for their courage, should warn her. You therefore realize that she is a security threat for the commune.[431]

430. According to Chrétien, Jeanne's husband, a Tutsi, had to go into hiding. Following the RTLM broadcast Jeanne, a Hutu, complained to the bourgmestre that she was getting threats. He told her to stay calm, but she did not trust this advice and went into hiding herself.[432] Asked specifically about this broadcast on cross-examination, Nahimana said he disapproved of it.[433]

431. RTLM also broadcast lists of names of individuals. In an RTLM broadcast on 31 March 1994, for example, Mbilizi announced among the news headlines "13 students of Nyanza who form a brigade that is called Inziraguteba ["persons who are never late"] will soon be enrolled by the RPF." Shortly thereafter Mbilizi started his report of this news by saying that 13 students of Nyanza had just been enrolled by the RPF. He named five schools and then read a list of thirteen names of the people he said were in the Brigade Inziraguteba. Together with each name was broadcast the young man's post in the Brigade, his age, the name of his school, and what his RPF code name would be. The ages given ranged from 13 to 18 years old. After reading the list of names, Mbilizi said:

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[430] Exhibit C7, CD 11, K0143676.
[431] Exhibit P103/20B.
[432] T. 1 July 2002, pp. 184-86.
[433] T. 27 Sept. 2002, p. 58.

435. Prosecution Witness GO, a civil servant in the Ministry of Information whose job it was to monitor RTLM before 6 April 1994, described the early programming of RTLM as follows:

> RTLM started by endearing itself to the people by attracting them with music, music which is referred to as "hot" and it was mainly Congolese music... And little by little the programmes broadcast - the broadcasts changed and events that took - based on events that took place in Burundi in October RTLM started presenting to the people an issue - i.e., that the Tutsis constituted danger to the Hutu majority. But the manner of presentation was diluted so as it does not - so that it is not seen as a mistake by the authorities, and to get them to sanction the RTLM. And when the Arusha peace accords were adopted, RTLM was much clearer in its statements by addressing itself to what it referred to as the "masses", that henceforth power has been taken from their hands and that they were going to - that they were going to be - they were going to be put into a situation of servitude. From January, the date on which the extended transitional government was to be established, this was - this whole message was addressed to the people, those they referred to as the "masses". And, indeed, the people followed the message like dogs that had been taught to bite, and everywhere there were demonstrations of *Interahamwe* and *Impuzamugambi*. There was a lot of insecurity. These groups were chanting, "Let us exterminate them, let us exterminate them". There was a climate of fear among the people, and it was apparent that the entire population had listened to the teachings of RTLM.[439]

436. Witness GO described the gradual build-up of effect over time noting, "I monitored the RTLM virtually from the day of its creation to the end of the genocide, and, as a witness of facts, I observed that the operation of the genocide was not the work done within a day."[440] He described the impact of RTLM as follows:

> [W]hat RTLM did was almost to pour petrol – to spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country.[441]

437. The witness gave the following summary of what he heard listening from his home after 6 April, where he stayed after many others from the Ministry of Information were killed:

> RTLM was constantly asking people to kill other people, to look for those who were in hiding, and to describe the hiding places of those who were described as being accomplices. I also remember RTLM programmes in which it was obvious that the people who were speaking were happy to say that there had been massive killings of *Inyenzi*, and they made no difference between *Inyenzis* and Tutsis. And they said that they should continue to search for those people and kill them so that the future generations would have to actually ask what *Inyenzis* looked like, or, ultimately, what Tutsis looked like.[442]

[439] T. 10 Apr. 2001, pp. 49-50.
[440] *Ibid.*, p. 45.
[441] T. 4 June 2001, p. 33.
[442] T. 10 Apr. 2001, p. 58.

449. Prosecution witnesses also described RTLM broadcasts apparently designed to manipulate the movement of Tutsis so as to facilitate their killing. An incident recounted by Nsanzuwera involved Professor Charles Kalinjabo, who was killed at a roadblock in May 1994 after RTLM broadcast an appeal to all Tutsis who were not *Inkotanyi* but rather patriots to join their Hutu comrades at the roadblocks. Charles Kalinjabo was among those who consequently left his hiding place and went to a roadblock, where he was killed after RTLM then broadcast a message telling listeners not to go and search for the enemies in their houses because they were there at the roadblocks.[461] Witness FW testified that on 11 April 1994, he heard an RTLM broadcast telling all Tutsis who had fled their homes that they should return because a search for guns was to be conducted, and that the houses of all those who were not home would be destroyed in this search. The witness FW said that some people returned home on hearing this broadcast and named among them Rubayiza Abdallar and another person called Sultan, both Tutsi neighbours of his who were killed when they returned home on the same day, 11 April. Witness FW stated that most of those who returned home following this broadcast were killed. He did not go home but looked for a hiding place because he did not trust RTLM.[462]

450. Witness FW also testified about an incident that took place at the Islamic Cultural Centre on 13 April 1994. The witness estimated that there were 300 men, 175 women and many children, all Tutsis taking refuge there. He described dire conditions and said that some Hutu youth were entering the compound and bringing food to those inside. On 12 April, he saw the RTLM broadcaster Noël Hitimana there, and heard him asking these youth why they were bringing food to the *Inyenzi* in the Islamic Cultural Centre. Witness FW testified that he told Hitimana that these people he was calling *Inyenzi* were his neighbours and asked him why he was calling them *Inyenzi*. Approximately one hour later, Witness FW said he heard Kantano Habimana on RTLM saying that in the Islamic Cultural Centre there were armed *Inyenzi* and that the Rwandan Armed Forces must be made aware of this fact. According to the witness, none of the refugees in the compound was armed; they were all defenceless. The next morning, on 13 April, the compound was attacked by soldiers and *Interahamwe*, who encircled and killed the refugees. From his place of hiding, Witness FW was able to see what was happening. He described the reluctance of some *Interahamwe* to kill people in a mosque, which led them to order everyone to come out, including elderly women and children. They were then taken to nearby houses, and almost everyone was subsequently killed. The next morning the witness found six survivors, three of whom were severely wounded and died subsequently. They told him that once the refugees had been put into the houses, grenades were thrown into the houses, and that they were the only survivors of the attack. Among those killed was Witness FW's cousin, a seven year-old girl.[463]

451. Witness FW testified that in May he heard an RTLM broadcast, which he described as one of the "inflammatory programs". Gahigi was interviewing Justin Mugenzi who was saying that in 1959 they had sent the Tutsi away but that this time

[461] T. 23 Apr. 2003, pp. 53-55, 75-82.
[462] T. 1 Mar. 2001, pp. 51-53, 122-23.
[463] *Ibid.*, pp. 61-83, 89-90.

around they were not going to send them away, they were going to kill them, that the Hutu should kill all the Tutsi – the children, women and men – and if they had come back it is because they were not killed last time. The same mistake should not be made again, they should kill all the Tutsi. Witness FW said this statement made them very scared because they realised that their chances of survival were very slim and that if they were alive it would not be for too long.[464]

452. Prosecution Witness Thomas Kamilindi, a Rwandan journalist, recalled in his testimony that he was threatened by an RTLM broadcast, following an interview he did at the Hotel des Mille Collines. During the interview, he asserted that militiamen, with help from some part of the army, were responsible for the killings, and that the RAF was losing ground to the RPF. The next day RTLM mentioned Thomas Kamilindi being at this hotel, which was a sanctuary for *Inyenzi*. Kantano Habimana said on air, "Thomas, listen, come back home. Come and work with us. What you're doing is not good. You've gone the wrong way." He said he understood from this that the militia were being told to come and find him. He was told by other refugees that Valerie Bemeriki had said on air, "Kamilindi you can say anything you want. You can sell the country as you want, but know that the Hotel des Mille Collines is not a bunker." Mr. Kamlindi was told subsequently by the hotel manager that the army had decided to bombard the hotel, and he was informed by a captain from UNAMIR that General Dallaire was in contact with General Bizimungu in an effort to save the hotel. Three hours after Bemeriki's broadcast, a shell was fired into the hotel, which was subsequently declared a UN site to which armoured vehicles were sent for protection. When Mr. Kamilindi, among forty refugees, was evacuated by UNAMIR, they were stopped at a roadblock and almost killed by *Interahamwe* militia and soldiers. While negotiations regarding the convoy were going on, Kamilindi said the *Interahamwe* were shouting his name, saying "Kamilindi, come down; we are going to kill you. The others will be saved." [465]

453. Prosecution Witness X, a member of the *Interahamwe*, testified that he listened regularly to RTLM from the time of its creation. In the time prior to 6 April 1994, he said he heard information broadcast on RTLM that was false. As an example, he cited a report that grenades were thrown, attributing the grenades to the RPF when in fact they were thrown by the MRND. He also mentioned a list that RTLM publicized as a list, created by the RPF, of people it was going to kill, which was false. Witness X said he saw this list two days before it came out in January 1994. He was told by a mutual friend of his and Nahimana's that the list was going to be published. It was produced by a group of people, which included Nahimana as well as Bagosora.[466] In cross-examination, Counsel for Nahimana noted that Witness X had signed a communique in February 1994 condemning RPF lists for extermination, indicating that the lists were thought to be genuine. Witness X maintained that the list was not authentic.[467] Counsel for Barayagwiza noted that several of the people on the list, including Gatabazi and Bucyana, were in fact killed, suggesting that the information was not false. Witness X insisted that

[464] *Ibid.*, pp. 84-85.
[465] T. 21 May 2001, pp. 89-101.
[466] T. 18 Feb. 2002, pp. 110-21; Exhibit P88.
[467] T. 21 Feb. 2002, pp. 82-85.

suggested that *Inkotanyi* were pretending to be refugees, directing listeners that even if these people reached the airport, presumably to flee, "they should leave their lives on the spot". Habimana's 5 June 1994 RTLM broadcast called attention to a young boy fetching water as an enemy suspect, without any indication as to why he would have been suspect. In the 15 May 1994 broadcast, Gaspard Gahigi, the RTLM Editor-in-Chief, told his audience "the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi." In the 29 May 1994 RTLM broadcast, a resident described checking identity papers to differentiate between the Hutu and the *Inkotanyi* accomplices, and in the 4 June 1994 RTLM broadcast, Kantano Habimana advised listeners to identify the enemy by his height and physical appearance. "Just look at his small nose and then break it", he said on air.

482. Many of the individuals specifically named in RTLM broadcasts after 6 April 1994 were subsequently killed. In the 20 May 1994 RTLM broadcast, Valerie Bemeriki named several priests including Father Ngoga, Father Ntagara, and Father Muvaro, all of whom were subsequently killed. Nahimana acknowledged in his testimony that Father Muvaro, whom he knew, had died because he was a Tutsi. Nsanzuwera testified that Desire Nshunguyinka was killed with his wife, sister and brother-in-law at a roadblock after RTLM broadcast the license plate of his car. Witness FS testified that his brother's name was mentioned on RTLM on 7 April 1994 and shortly thereafter his brother was killed together with his wife and seven children. He testified that several people were killed following such radio broadcasts. On a larger scale, several RTLM broadcasts were apparently designed to manipulate the movement and thereby facilitate the killing of Tutsi in numbers. Nsanzuwera testified that Charles Kalinjabo was killed at a roadblock after he left his hiding place on account of an RTLM broadcast calling on Tutsi patriots to join their Hutu comrades at the roadblocks. Subsequently RTLM broadcast a call to its listeners to look for the enemy at the roadblocks. Similarly, Witness FW testified that after an RTLM broadcast directing Tutsi who had fled to return home to prevent the destruction of their houses, most of the Tutsi who returned home because of this broadcast, including several of his neighbours, were killed on the same day. While the extent of causation by RTLM broadcasts in these killings may have varied somewhat, depending on the circumstances of these killings, the Chamber finds that a causal connection has been established by the evidence, noting the widespread perception of this link among witnesses, best represented by all the urgent telephone calls Des Forges received at the time from people in Rwanda, desperately seeking to "stop that radio".

483. Many of the RTLM broadcasts explicitly called for extermination. In the 13 May 1994 RTLM broadcast, Kantano Habimana spoke of exterminating the *Inkotanyi* so as "to wipe them from human memory", and exterminating the Tutsi "from the surface of the earth... to make them disappear for good". In the 4 June 1994 RTLM broadcast, Habimana again talked of exterminating the *Inkotanyi,* adding "the reason we will exterminate them is that they belong to one ethnic group". In the 5 June 1994 RTLM broadcast, Ananie Nkurunziza acknowledged that this extermination was underway and expressed the hope that "we continue exterminating them at the same pace". On the basis of all the programming he listened to after 6 April 1994, Witness GO testified that RTLM was constantly asking people to kill other people, that no distinction was made between

the *Inyenzi* and the Tutsi, and that listeners were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like.

484. The Chamber has considered the extent to which RTLM broadcasts calling on listeners to take action against the Tutsi enemy represented a pattern of programming. While a few of the broadcasts highlighted asked listeners not to kill indiscriminately and made an apparent effort to differentiate the enemy from all Tutsi people, most of these broadcasts were made in the context of concern about the perception of the international community and the consequent need to conceal evidence of killing, which is explicitly referred to in almost all of them. The extensive witness testimony on RTLM programming confirms the sense conveyed by the totality of RTLM broadcasts available to the Chamber, that these few broadcasts represented isolated deviations from a well-established pattern in which RTLM actively promoted the killing of the enemy, explicitly or implicitly defined to be the Tutsi population.

485. The Chamber has also considered the progression of RTLM programming over time – the amplification of ethnic hostility and the acceleration of calls for violence against the Tutsi population. In light of the evidence discussed above, the Chamber finds this progression to be a continuum that began with the creation of RTLM radio to discuss issues of ethnicity and gradually turned into a seemingly non-stop call for the extermination of the Tutsi. Certain events, such as the assassination of President Ndadaye in Burundi in October 1993, had an impact by all accounts on the programming of RTLM, and there is no question that the events of 6 April 1994 marked a sharp and immediate impact on RTLM programming. These were not turning points, however. Rather they were *moments of intensification*, broadcast by the same journalists and following the same patterns of programming previously established but dramatically raising the level of danger and destruction.

Factual Findings

486. The Chamber finds that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi, and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts. After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group.

487. Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement.

Annex 13

International Criminal Tribunal for Rwanda, Ntagerura et al., ICTR-99-46-A, Judgement, Appeals Chamber, 7 July 2006 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-99-46/MSC24261R0000550681.PDF

French version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Judgement/NotIndexable/ICTR-99-46/MSC48524R0000550684.PDF

ICTR-99-46-A
29-03-2007
(6575bis/A – 6374bis/A)

6515bis/A

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart

Counsel for André Ntagetura
Benoït Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

> reasonable doubt in assessing Witness H's evidence implicating Zoran and Mirjan Kupreškić in that attack cannot be sustained.[353]

(b) Piecemeal approach to the evidence

171. To support its argument that the Trial Chamber erroneously adopted a piecemeal approach to the evidence, the Prosecution refers to the *Musema* Appeal Judgement. There, the Appeals Chamber endorsed the view of the ICTY Appeals Chamber in the *Tadić* Judgement on Allegations of Contempt:

> [A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.[354]

172. In the Appeals chamber's view, the case law referred to by the Prosecution does not address the issue of the standard of proof applicable to any particular fact. The duty of the Trial Chamber to consider all the evidence does not relieve it from the duty to apply the required standard of proof to any particular fact.

173. The Prosecution quotes as one of the examples for the alleged error of law by applying the standard of proof to individual items of evidence the Trial Chamber's conclusions in paragraph 118 of the Trial Judgement.[355] The Appeals Chamber notes that the Trial Chamber did not look at the testimony of the different witnesses in isolation, but considered it in the light of other evidence. It took into account the testimony of a Defence witness (Witness BLB), which created doubts as to the credibility of Witness LAH in general, and also that of Prosecution Witness NL, but found that it did not corroborate the testimony of Witness LAH. The Trial Chamber's approach clearly follows the principle enunciated in the *Tadić* Judgement on Allegations of Contempt. Only at the end of this analysis does the Trial Chamber apply the standard of proof and determine whether the fact in question was proved beyond a reasonable doubt.

174. It appears to the Appeals Chamber that the Prosecution's argument does not clearly distinguish between the different stages of the fact-finding process which a Trial Chamber undertakes before it can enter a conviction:

- At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be

[353] *Kupreškić et al.* Appeal Judgement, para. 226 (footnotes omitted).
[354] *Tadić* Judgement on Allegations of Contempt, para. 92, quoted by *Musema* Appeal Judgement, 134.
[355] Prosecution Appeal Brief, para. 193, fn. 257. Prosecution Witness LAH had testified that he had taken part in a meeting at the Bushenge market, where, according to the witness, Ntagerura had said that in a short time President Habyarimana would no longer be there, "and at that time, the fate of the Tutsi will be sealed". (See Trial Judgement, para. 114, referring to T.10 October 2000, pp. 63, 104, 109-110; T.11 October 2000, pp. 25, 26. The Trial Chamber found that the testimony of another Prosecution witness, Witness NL, did not corroborate Witness LAH's testimony. The Trial Chamber therefore concluded that it was not satisfied beyond a reasonable doubt that Ntagerura took part in the meeting (Judgement, para. 118).

analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.

- Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

- At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt,[356] a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.

In light of the above analysis, the Appeals Chamber agrees with the Prosecution that "applying the criminal standard of proof piecemeal to individual items of evidence" would amount to an error.[357]

(c) Conclusion

175. The Appeals Chamber recalls that the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond a reasonable doubt. The Appeals Chamber agrees with the Prosecution's argument that "if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt".[358] Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.

[356] The Appeals Chamber considers that the "material facts" which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.
[357] Prosecution Appeal Brief, para. 258.
[358] AT. 6 February 2006, p. 52.

Annex 14

International Criminal Tribunal for the former Yugoslavia, Halilović, IT-01-48-A, Judgement, Appeals Chamber, 16 October 2007 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-01-48-A/JUD179R0000207830.TIF

French version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/French/Judgement/NotIndexable/IT-01-48-A/JUD179R0000229287.pdf

UNITED NATIONS

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

Case No. IT-01-48-A

Date: 16 October 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **16 October 2007**

PROSECUTOR

v.

SEFER HALILOVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Mr. Arthur Buck
Ms. Laurel Baig
Mr. Xavier Tracol
Mr. Matteo Costi

Counsel for Sefer Halilović:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

factual findings. The Prosecution, however, generally has not identified specific pieces of evidence that would have been wrongly evaluated by the Trial Chamber.

124. As the Prosecution points out, Exhibit 498 was not mentioned at all in the Trial Judgement.[333] Having carefully analysed the relevant portions of the Trial Judgement, the Appeals Chamber considers that the fact that this exhibit was not referred to by the Trial Chamber might be an indication that it disregarded relevant evidence.[334] This document is a letter written in 1995 by Halilović himself to BiH President Alija Izetbegović, where Halilović declared, among other things, that the Inspection Team headed by him carried out "Operation Neretva 93", thereby corroborating exhibits and testimonies that the Trial Chamber considered unreliable[335] and contradicting the final conclusions reached in the Trial Judgement.[336] The Appeals Chamber is however mindful that the Trial Chamber might legitimately have looked with extreme caution at a document written many months after the events by an accused who chose not to testify. It cannot be said that, even considering this piece of evidence, no reasonable trier of fact could have reached the conclusions that the Trial Chamber reached. In light of these considerations, and since the Prosecution has generally not identified specifically where the Trial Chamber might have erred, the Appeals Chamber will not entertain this contention further.

125. With respect to the process through which a trier of fact evaluates the evidence, the Appeals Chamber endorses the following considerations of the ICTR Appeals Chamber:

> - At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.
>
> - Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

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[332] *Kvočka et al.* Appeal Judgement, para. 23.
[333] Prosecution Appeal Brief, para. 2.1.
[334] *Kvočka et al.* Appeal Judgement, para. 23.
[335] *See*, for example: Bakir Alispahić, T. 62 (23 May 2005) and T. 33 (27 May 2005); Vahid Karavelić, T. 107 (19 April 2005) (cited in Trial Judgement, para. 183); Salko Gušić, T. 43 (7 February 2005) (cited in Trial Judgement, para. 191); Ramiz Delalić, T. 25 (18 May 2005) (cited in Trial Judgement, para. 219); Exhibit 131 (a map erroneously cited in Trial Judgement, para. 175, as the only exhibit mentioning "Operation Neretva"); Exhibit 281, p. 2 (the book "A Cunning Strategy" by Sefer Halilović cited, *inter alia*, in Trial Judgement, para. 258).
[336] Trial Judgement, paras 189, 210 and 737.

> - At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.[337]

The ICTR Appeals Chamber also clarified that "'material facts' which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt".[338] Following this principle, the Appeals Chamber has acknowledged that not every factual finding in a Trial Judgement must be established beyond reasonable doubt and has unequivocally stated that "[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, *and any fact which is indispensable for the conviction*, beyond reasonable doubt".[339] With these considerations in mind, the Appeals Chamber turns to address the second part of the argument raised by the Prosecution under the heading "standard of proof".

(ii) Whether the Trial Chamber misapplied the standard of proof to its factual findings

126. With respect to the allegation that the Trial Chamber erred in requiring the Prosecution to prove each factual allegation in the Indictment beyond reasonable doubt regardless of whether this fact was necessary for conviction, the Appeals Chamber notes that the Prosecution only identified two paragraphs (189 and 221) in the Trial Judgement where the Trial Chamber allegedly committed such an error.[340] Apart from these examples, the Appeals Chamber was not provided with specific references to factual findings affected by the alleged error. Given that the alleged error of law potentially impacts on every finding made by the Trial Chamber, the Prosecution was required to develop its arguments more precisely by referring to specific paragraphs of the Trial Judgement. Indeed, the appealing party must explain how the alleged error invalidates the decision in practice; it is not enough to point to a general deficiency throughout the Trial Judgement and request review of unspecified factual findings.[341] The Appeals Chamber also notes that the paragraphs mentioned contain a total of four factual findings. In particular, paragraph 189 contains the finding that the Prosecution had not proven beyond reasonable doubt that, at the Zenica meeting, its participants: (i) discussed "Operation Neretva", (ii) discussed who would be commander of such an operation, and (iii) planned a specific and detailed operation to liberate Mostar. Paragraph 221 contains the finding

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[337] *Ntagerura et al.* Appeal Judgement, para. 174 (footnote omitted).
[338] *Ntagerura et al.* Appeal Judgement, fn. 356.
[339] *Blagojević and Jokić* Appeal Judgement, para. 226 (emphasis added). *See* also *Ntagerura et al.* Appeal Judgement, para. 174; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Order to File Table, 24 July 2006 ("*Brđanin* Order to File Table"), p. 1. For an application of this principle, *see Kupreškić et al.* Appeal Judgement, para. 226.
[340] Prosecution Appeal Brief, paras 2.127-2.131.

Annex 15

International Criminal Court, ICC-02/05-01/09-3, Sudan / Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (extract)

English version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF

French version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_00810.PDF

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-02/05-01/09
Date: 4 March 2009

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Redacted Version

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir

Convention, and that the Elements of Crimes elaborate upon it by, *inter alia*, requiring a contextual element.[142]

122. The Majority also notes that the Prosecution underlines the existence of this contextual element of the crime of genocide at paragraph 76 of the Prosecution Application.

123. The Majority further observes that, according to this contextual element provided for in the Elements of Crimes, the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.

124. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.

125. The Majority is aware that there is certain controversy as to whether this contextual element should be recognised.[143]

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[142] Some authors have referred to this element as a jurisdictional element insofar as the Elements of Crimes of genocide do not expressly require that it be covered by the knowledge of the perpetrator. According to these authors, this marks a significant difference with the provision on crimes against humanity because, according to article 7(1) of the Statute, the perpetrator must be aware that his or her actions or omission are part of a widespread or systematic attack against a civilian population. See Werle, G. *Principles of International Criminal* Law, The Netherlands, TMC Asser Press, 2005, pp. 191-194. See also Ambos K., "*Current issues in international criminal law*" in Criminal Law Forum, 14, 225-260, Kluwer Academic Publishers, 2004, pp. 247-248. However, the Majority observes that, in the absence of an express subjective requirement in relation to the contextual element of genocide, the general subjective element provided for in article 30 of the Statute would be applicable. On the application of the general subjective element provided for in article 30 of the Statute, see ICC-01/04-01/07-717, paras. 226-228, 251, 271, 295, 315, 316, 331, 346, 359 and 372.

[143] See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 177-179. See also Schabas, W.A., *Genocide in International Law. The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009,

Annex 16

International Criminal Tribunal for the former Yugoslavia, Dragomir Milošević, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-98-29%231-A/JUD212R0000277454.TIF

French version available at:

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IT-98-29/1-A 1826
A 1826 - A 1669
12 NOVEMBER 2009

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No. IT-98-29/1-A Date: 12 November 2009 Original: English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

III. ALLEGED FAILURE TO ESTABLISH THE ESSENTIAL ELEMENTS OF CRIMES (MILOŠEVIĆ'S FIRST GROUND OF APPEAL)

19. Milošević argues that the Trial Chamber erred by failing to establish beyond reasonable doubt his guilt for the crimes of which he was convicted, notably terror, murder and inhumane acts.[50] He submits that in so doing, the Trial Chamber "violated the legal norms" governing the crimes in question, as well as the presumption of innocence.[51] Specifically, Milošević argues that while both the *actus reus* of the crime of terror and the *chapeau* element for crimes against humanity require acts "directed against the civilian population",[52] the Trial Chamber failed to establish beyond reasonable doubt that the attacks carried out by the SRK were in fact directed against civilians.[53] In his opinion, this error invalidates the Trial Chamber's findings on terror (count 1) and all crimes against humanity (counts 2, 3, 5, and 6).[54] Further, Milošević submits that the Trial Chamber failed to establish beyond reasonable doubt the *mens rea* of the crime of terror and the causal link required for the crimes against humanity of murder and inhumane acts.[55] Following a few preliminary observations, the Appeals Chamber will consider Milošević's challenges related to the elements of the crime of terror and then proceed with the analysis of the remainder of his arguments under this ground of appeal.

A. Preliminary issues

1. Standard of proof beyond reasonable doubt

20. Throughout his appeal and under this ground in particular, Milošević claims that certain conclusions could not have been reached beyond reasonable doubt.[56] The Appeals Chamber recalls that the standard of proof "requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused".[57] The Appeals Chamber also emphasizes that "for a finding of guilt on an alleged crime, a reasonable trier of fact must have reached the conclusion that all the facts which are material to the elements of that crime have been

[50] Defence Notice of Appeal, para. 6; Defence Appeal Brief, p. 2, paras 10, 24, 161. For legal findings relevant to these crimes, see Trial Judgement, paras 869-888 and 914-938. The Appeals Chamber adopts the Trial Chamber's approach of referring to the crime in question as "terror" for purposes of consistency, but notes that its appropriate qualification is crime of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". See *Galić* Appeal Judgement, paras 102-104, discussing the elements of the crime.
[51] Defence Notice of Appeal, para. 5; Defence Appeal Brief, p. 2.
[52] Defence Appeal Brief, paras 18-19.
[53] Defence Appeal Brief, paras 22, 24; Defence Reply Brief, para. 8.
[54] Defence Appeal Brief, para. 22.
[55] Defence Appeal Brief, paras 130-142.
[56] Defence Appeal Brief, p. 2, referring to Defence Notice of Appeal, paras 5-6; Defence Appeal Brief, para. 162.
[57] *Mrkšić and Šljivančanin* Appeal Judgement, para. 220; *Martić* Appeal Judgement, para. 61.

proven beyond reasonable doubt by the Prosecution".[58] Therefore, not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends.[59] The Appeals Chamber also recalls that as a general rule, the standard of appellate review, namely whether "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt", permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial".[60] However, an inference drawn from circumstantial evidence to establish a fact that is material to the conviction or sentence cannot be upheld on appeal if another reasonable conclusion consistent with the non-existence of that fact was also open on that evidence, given that such inference should be the only reasonable one.[61]

21. In the present case, the Trial Chamber explicitly referred to the principle laid down in Article 21(3) of the Statute that an accused is presumed innocent until proven guilty.[62] It also correctly specified that in order to enter a conviction, each element of the crime and the mode of liability, as well as any fact that is indispensable for the conviction, must be proven beyond reasonable doubt.[63] Concerning circumstantial evidence, the Trial Chamber held that any conclusion from such evidence "must be the *only* reasonable conclusion available".[64] After delineating the standard, the Trial Chamber explicitly stated that the findings in the Judgement are made on the basis of proof beyond reasonable doubt.[65] Accordingly, the Appeals Chamber rejects Milošević's general submission that the Trial Chamber did not apply the proper standard of proof. It notes, however, that this does not in principle prevent Milošević from alleging errors of law with regard to specific factual findings.[66]

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[58] *Martić* Appeal Judgement, para. 55; *Čelebići* Trial Judgement, para. 601; *Halilović* Appeal Judgement, para. 109. See also *Kvočka et al.* Appeal Judgement, para. 23:

> The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98*ter*(C) of the Rules. However, this requirement relates to the Trial Chamber's Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. [...] (footnotes omitted).

[59] *Ntagerura et al.* Appeal Judgement, paras 174-175. See also *Mrkšić and Šljivančanin* Appeal Judgement. para. 217, recalling that "a trier of fact should render a reasoned opinion on the basis of the entire body of evidence and without applying the standard of proof 'beyond reasonable doubt' with a piecemeal approach".

[60] *Ntagerura et al.* Appeal Judgement, para. 305, citing *Kordić and Čerkez* Appeal Judgement, para. 288.

[61] *Čelebići* Appeal Judgement, para. 458. The Appeals Chamber recalls that, in such cases, "the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven" (*Stakić* Appeal Judgement, para. 219). See also *Karera* Appeal Judgement, para. 34.

[62] Trial Judgement, para. 8.

[63] Trial Judgement, para. 8.

[64] Trial Judgement, para. 8.

[65] Trial Judgement, para. 8.

[66] See also *infra*, Section III.C.2.(e), paras 88 *et seq.*

Annex 17

International Criminal Tribunal for Rwanda, Nizeyimana, ICTR-2001-55C-PT, Decision on Prosecutor's Motion for Judicial Notice of Facts of Common Knowledge, Decision Chamber, 3 March 2010 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-00-55C/MSC43942R0000561340.PDF

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ICTR-00-55C-PT
3-3-2010
(1197 - 1195)
1197

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

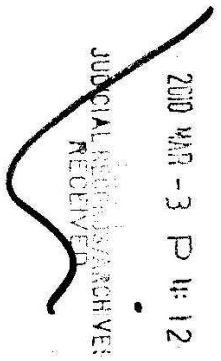
OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 3 March 2010



THE PROSECUTOR

v.

Idelphonse NIZEYIMANA

CASE NO. ICTR-2001-55C-PT

DECISION ON PROSECUTOR'S MOTION FOR JUDICIAL NOTICE OF FACTS OF COMMON KNOWLEDGE

Rule 94 (A) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Richard Karegyesa
Drew White
Yasmine Chubin
Astou Mbow

Defence Counsel for Idelphonse Nizeyimana:
John Philpot

INTRODUCTION

1. On 10 February 2010, the Prosecution filed a motion for judicial notice of facts of common knowledge (the "Motion"). The Defence has not responded.

DELIBERATIONS

2. The Prosecution submits six facts of common knowledge for the Chamber to take judicial notice of:

(i) Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda.

(ii) Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Hutu, Tutsi, and Twa, which were protected groups within the scope of the Genocide Convention of 1948.

(iii) Between 6 April 1994 and 17 July 1994, there were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of the Tutsi ethnic identity.

(iv) Between 6 April 1994 and 17 July 1994 in Rwanda there was an armed conflict that was not of an international character.

(v) Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

(vi) Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949, and their Additional Protocol II of 8 June 1977, having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964, and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

3. The Chamber recalls that pursuant to Rule 94 (A) of the Rules of Procedure and Evidence (the "Rules"), a "Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." As stated by the Appeals Chamber in the *Semanza* Appeal Judgment:

> As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94(A) "commands the taking of judicial notice" of material that is "notorious." The term "common knowledge" encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.[1]

4. Where a Trial Chamber determines that a fact is one "of common knowledge", it must take judicial notice of it. In *Karemera et. al.*, the Appeals Chamber emphasised that the "Trial Chamber

[1] *The Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment (AC), 20 May 2005, ("*Semanza* Judgment (AC)"), para. 194. The Appeals Chamber cited *The Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Chamber's 10 April 2003 Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003.

has no discretion to determine that a fact, although 'of common knowledge', must nonetheless be proven through evidence at trial".[2]

5. The Chamber notes that all six facts listed in paragraph 2 above have been accepted by the Appeals Chamber as facts of common knowledge, not subject to reasonable dispute.[3] Therefore, the Chamber is obliged to take judicial notice of these facts.

6. Further, the Chamber considers that taking judicial notice of the facts proposed by the Prosecution will not affect Idelphonse Nizeyimana's right to a fair trial. As was noted by the Appeals Chamber in *Karemera et. al.*, taking judicial notice of a fact of common knowledge "does not lessen the Prosecutor's burden of proof or violate the procedural rights of the Accused. Rather, it provides an alternative way that the burden can be satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge."[4]

7. The Chamber notes that the Prosecution must still introduce evidence demonstrating the specific events alleged in the Indictment and show that the conduct and mental state of Idelphonse Nizeyimana specifically makes him culpable of the charges against him.

FOR THESE REASONS, THE CHAMBER

I. **GRANTS** the Prosecution's Motion; and

II. **TAKES JUDICIAL NOTICE** of facts (i) to (vi) as described in paragraph 2, above.

Arusha, 3 March 2010, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

[2] *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-48-AR73, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 ("*Karemera* Decision (AC)"), para. 23.
[3] *Karemera* Decision (AC), para. 35 for fact (i); para. 25 for fact (ii) (Note, that while in *Semanza*, the Appeals Chamber accepted the part of the proposed (ii), relating to Hutu, Tutsi, and Twa as being ethnic groups classifications, the Trial Chamber in *Karemera et al.*, when requested to accept the same formulation, preferred the wording "which were protected groups falling within the scope of the Genocide Convention of 1948." The Appeals Chamber dismissed the appeal against this part of the decision.); paras. 29 and 31 for facts (iii) and (iv); *Semanza* Judgment (AC), para. 192 accepted facts (iii), (iv), (v) and (vi).
[4] *Karemera* Decision (AC), para. 37.

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(Art. 27 of the Directive for the Registry)

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From:	☒ ChamberIII **W. Paterson** (names)	☐ Defence (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
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Dates:	Transmitted: **03/03/2010**		Document's date: **03/03/2010**	
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Annex 18

International Criminal Tribunal for the former Yugoslavia, Karadžić, IT-95-5/18-T, Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, Trial Chamber, 25 March 2010 (extract)

English version available at:

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IT-95-5/18-T
D 32743 - D 32736
25 MARCH 2010

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UNITED
NATIONS

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

Case No.: IT-95-5/18-T

Date: 25 March 2010

Original: English

IN THE TRIAL CHAMBER III

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **25 March 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR MODIFICATION OF PROTECTIVE MEASURES: WITNESSES KDZ490 AND KDZ492

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

9. Several Trial Chambers have expounded upon what is required to justify the application of Rule 69(A).[15] In particular, the Prosecution must establish "exceptional circumstances", that is, something more than the prevailing conditions in the former Yugoslavia by themselves.[16] There are several factors which have been considered relevant to a determination of "exceptional circumstances" warranting delay of the identification of a witness to the accused, such as the objective likelihood of interference resulting from disclosure to the accused;[17] whether there is a specific rather than a general basis for the request;[18] and the length of time before the trial at which disclosure to the accused must take place.[19]

10. When weighing the relative interests at stake, a Trial Chamber seised of a request for delayed disclosure must be cognisant of the fact that under Article 20(1) of the Statute, "the balance dictates clearly in favour of an accused's right to the identity of witnesses which the Prosecution intends to rely upon".[20] While "due regard" must also be given to protection of victims and witnesses, this is a secondary consideration.[21]

11. By virtue of Rule 75(F)(i) of the Rules, "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal [...] [they] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal". In that regard, the Appeals Chamber has held that "delayed disclosure" orders are protective measures to which Rule 75(F) applies.[22] Thus, the protective measures subsist unless and until they are rescinded, varied, or augmented on the application of a party to the appropriate Judge or Trial Chamber, according to the procedure set out in Rule 75(G). Before determining an application under Rule 75(G)(ii), Rule 75(I) requires the Chamber to obtain all relevant information from the first proceedings and consult with any judge who ordered the protective measures in those

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[15] *See* First *Brđanin* Decision, paras. 24–38; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 ("Second *Brđanin* Decision"), paras. 12–23; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000 ("Third *Brđanin* Decision"), para. 13; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Order of Protection, 1 August 2006, p. 5.

[16] First *Brđanin* Decision, para. 11.

[17] First *Brđanin* Decision, para. 26; Second *Brđanin* Decision, paras. 19, 22; Third *Brđanin* Decision, para. 16.; *see also Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002 ("Fourth *Brđanin* Decision"), para. 8.

[18] *See* First *Brđanin* Decision, paras. 28–31.

[19] *See* First *Brđanin* Decision, paras. 24, 28, 33–34; Second *Brđanin* Decision, paras. 16, 18; Third *Brđanin* Decision, paras. 13, 15.

[20] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 32.

[21] First *Brđanin* Decision, para. 20; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

[22] *Prosecutor v. Krajišnić*, Case No. IT-00-39-A, Decision on "Motion by Mićo Stanišić for Access to all Confidential Materials in the Krajišnić Case", 21 February 2007, para. 6; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to all Confidential Materials in the Brđanin Case, 24 January 2007, para. 17.

Annex 19

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

Other extracts also included at CMM, Vol II, Annex 22

English version available at:

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ICTR-98-44-T
2-2-2012
(54949-54559)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 2 February 2012

THE PROSECUTOR

v.

Édouard KAREMERA and
Matthieu NGIRUMPATSE

Case No. ICTR-98-44-T

JUDGEMENT AND SENTENCE

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

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

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

1614. Considering the open and notorious targeting and slaughter of Tutsis at roadblocks, and their willingness to provide weapons to the killers, the Chamber is convinced that Ngirumpatse was aware of the genocidal intent of the perpetrators and shared it.

1615. The weapons distributed on 12 April 1994 substantially contributed to the genocide in the same way. The Chamber does not discount the possibility that the decision to organise this latter weapons distribution was taken by Nzirorera without consultation with Ngirumpatse, given that the Accused fled Kigali on that day. Recalling the Chamber's finding that at a JCE to pursue the destruction of Tutsi population in Rwanda manifested itself with the weapons distribution on 11 April 1994, the Chamber, however, considers that the distribution of weapons on 12 April 1994 furthered the JCE to destroy the Tutsi population in Rwanda.

1616. Noting that Nzirorera and Bagosora were members of the JCE and recalling that each member of a JCE is criminally liable for acts pursuant to the common purpose which have been committed by, or can be imputed to, a JCE member, the Chamber finds that Ngirumpatse has incurred JCE liability in the basic form for the distribution of weapons carried out by Bagosora and Nzirorera on 12 April 1994, which intended for the weapons to be used to kill Tutsis. Moreover, the Chamber recalls that Ngirumpatse substantially contributed to the execution of the common purpose of the JCE (see para. 1458).

1617. Thus, Ngirumpatse is guilty of genocide pursuant to Article 6(1) of the Statute for the distributions of weapons that took place on 11 and 12 April 1994.

1618. Recalling that Karemera and Ngirumpatse bear superior responsibility for the acts of administrative personnel in the ministries controlled by the MRND, such as Bagosora, the Chamber finds that they are also responsible as superiors for Bagosora's participation in the distribution. Noting that Karemera and Ngirumpatse took no steps to punish Bagosora for his involvement in the weapons distribution, the Chamber finds Karemera guilty of genocide pursuant to Article 6 (3) of the Statute and will consider Ngirumpatse's superior responsibility as an aggravating factor during sentencing.

Meeting at Murambi Training School on 18 April 1994 (V.2.1)

1619. The Chamber has found that the Interim Government ministers and national party leaders, including Karemera and Ngirumpatse, met on 18 April 1994 with the local authorities of Gitarama. During the meeting, they intimidated the local authorities to stop protecting Tutsis and instead allow the *Interahamwe* to continue killing Tutsis.

1620. Hundreds of thousands of unarmed civilians were killed by *Interahamwe*, other militias, and soldiers throughout Rwanda by mid-July 1994 (see V.7). Given the circumstances in Rwanda at the time, the only reasonable conclusion is that the perpetrators of these acts possessed the intent to destroy, in whole or in substantial part, the Tutsi group.

1621. The Chamber finds that Karemera and Ngirumpatse aided and abetted the commission of genocide by intimidating local government officials so they would stop protecting Tutsis and allow *Interahamwe* to kill Tutsis. By eliminating the resistance offered by the immediate superiors of the perpetrators, the Accused substantially contributed to the killing of Tutsis in Gitarama. Considering the situation in Rwanda at the time, and the speeches made at the Murambi meeting, the Chamber finds the only reasonable inference to be that the Accused were aware of the perpetrators' genocidal intent and shared it with them. Therefore, the Chamber finds the Accused liable for genocide under Article 6 (1) for aiding and abetting genocide.

Annex 20

International Criminal Tribunal for Rwanda, Nizeyimana, ICTR-00-55C-T, Judgment and Sentence, Trial Chamber, 19 June 2012 (extract)

English version available at:

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

ICTR-00-55C-T
22-06-2012
(10895-10901)

Before: Judge Lee Gacuiga Muthoga, presiding
Judge Seon Ki Park
Judge Robert Fremr

Registrar: Adama Dieng

Date: 19 June 2012

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

Case No. ICTR-2000-55C-T

JUDICIAL RECORDS/GREFFE
2012 JUIN 22 PM 12:44

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Drew White
Kirsten Gray
Yasmine Chubin

Counsel for the Defence:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastian Chartrand
Léopold Nsengiyumva

1521. While these attacks only resulted in the deaths of two Tutsis and the serious bodily harm of a third, the Chamber has no doubt that the perpetrators acted with the intent to destroy at least a substantial part of the Tutsi group. These attacks were emblematic of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis at this roadblock and others manned by ESO soldiers in Butare town.[3866] Notably, a prominent Tutsi lecturer, Pierre Claver Karenzi, was killed in the vicinity of a nearby roadblock manned by ESO soldiers on the same day that Rwekaza was killed and Witness ZAV was shot.[3867]

1522. Indeed, these attacks followed President Sindikubwabo's 19 April 1994 speech, which marked a significant increase in violence and the targeting of Tutsi civilians within Butare town. Around 20 April, ESO soldiers killed Rosalie Gicanda, the former Tutsi Queen of Rwanda, and others taken from her home.[3868] Around 21 April, ESO soldiers participated in the separation and killing of Tutsis at the Butare University.[3869] Around 29 April, ESO soldiers participated in the separation and removal of Tutsis at the *Groupe Scolaire*, which led to their subsequent slaughter.[3870] There is additional evidence that, starting in the last third of April, soldiers used lists to identify and kill Tutsis at the Butare University Hospital.[3871]

1523. In this context, the fact that only two Tutsis were killed and one injured on these occasions reflects the rudimentary and inefficient means employed by ESO soldiers to commit these crimes.[3872] It raises no doubt that the soldiers possessed genocidal intent at the moment of their commission.[3873] Based on Nizeyimana's conduct during the killing of Rwekaza and attack of Witness ZAV, as well as his actions during Uwambaye's murder, the record demonstrates that he shared this genocidal intent. This conclusion is further supported by the Chamber's findings relating to Nizeyimana's participation in other proven criminal conduct.

1524. The Chamber concludes that Nizeyimana is responsible, pursuant to Article 6 (1) of the Statute, for ordering the killing of Remy Rwekaza and Beata Uwambaye and causing serious bodily and mental harm to Witness ZAV. The facts equally support the conclusion that Nizeyimana participated in a basic joint criminal enterprise to kill Tutsis at this roadblock. However, the Chamber considers that "ordering", which is also a direct form a responsibility, most appropriately captures Nizeyimana's criminal participation in these specific events.[3874]

[3866] II.7.3.
[3867] II.6.5.
[3868] II.6.2.
[3869] II.5.1.
[3870] II.10.
[3871] *See* II.8.1.
[3872] *Cf. Krstić* Appeal Judgement, para. 32 ("In determining that genocide occurred ... the cardinal question is whether the intent to commit genocide existed. ... the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.").
[3873] *See Hategekimana* Appeal Judgement, para. 133-135 (affirming the Trial Chamber's conclusion that the killers of three Tutsi women possessed genocidal intent when viewed in context of the specific killings and other violence targeting Tutsis).
[3874] The legal characterisation of Nizeyimana's actions as ordering instead of committing pursuant to a joint criminal enterprise does not impact sentencing considerations.

Annex 21

International Criminal Tribunal for the former Yugoslavia, Tolimir, IT-05-88/2-T, Judgment, Trial Chamber, 12 December 2012 (extract)

English version available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-05-88%232/JUD247R0000392018.pdf

UNITED NATIONS

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

Case No. IT-05-88/2-T
Date: 12 December 2012
Original: English

IN TRIAL CHAMBER II

Before: **Judge Christoph Flügge, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: **Mr. John Hocking**

Judgement of: **12 December 2012**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC WITH CONFIDENTIAL ANNEX C

JUDGEMENT

The Office of the Prosecutor:
Peter McCloskey

The Accused:
Zdravko Tolimir

minor inconsistencies commonly occur in testimony without rendering it unreliable, it is within the discretion of the Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[83] If the Chamber does not refer to the evidence given by a witness, even if it is in contradiction what the Chamber finds, it is to be presumed that the Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[84] When the Chamber deems it appropriate in light of its obligation to present a "reasoned opinion in writing", it will refer to evidence that contradicts a finding.

32. In order to determine whether the allegations in the Indictment have been proven, the Chamber has received oral testimony of witnesses, admitted "Exhibits"—that is, documentary, video and audio evidence—and taken judicial notice pursuant to Rule 94(B) of facts adjudicated before the Tribunal. Documentary evidence includes not only written statements and transcripts admitted pursuant to Rules 92 *bis*, 92 *ter*, and 92 *quater*, but also documents mostly produced before, during or shortly after the events alleged in the Indictment.

33. Individual items of evidence, such as the testimony of witnesses or Exhibits, have been analysed in the light of the entire body of evidence adduced. Only after the analysis of all the relevant evidence has the Chamber considered that it can determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence relied upon by the Accused.[85]

34. The Chamber has received direct and circumstantial evidence. Direct evidence supports the truth of an assertion, that is, without an intervening inference. Circumstantial evidence is evidence of circumstances surrounding an event from which a fact at issue may be reasonably inferred.[86] Such evidence alone may be sufficient for a finding of fact beyond reasonable doubt.[87] Such a finding must be the *only* reasonable conclusion available from the evidence.[88]

35. In deciding whether to rely upon the testimony of a witness or a document the Chamber has balanced the relevant items of evidence with respect to their reliability, credibility, and authenticity, before coming to a finding about the facts established in the Judgement.

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83 *Kvočka et al.* Appeal Judgement, para. 23; *Čelebići* Appeal Judgement, paras. 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.

84 *Kvočka et al.* Appeal Judgement, para. 23.

85 *Ntagerura et al.* Appeal Judgement, para. 174; *Halilović* Appeal Judgement, para. 125. *See also* Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial, 4 February 2011, Annex ("Revised Order Annex"), para. 16.

86 *Popović et al.* Trial Judgement, para. 12; *Čelebići* Appeal Judgement, para. 458.

87 *Kupreškić et al.* Appeal Judgement, para. 303.

88 *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Gotovina et al.* Trial Judgement, para. 303; *Popović et al.* Trial Judgement, para. 12.

the Majority accepts that the Bosnian Serb Forces did not kill the entirety of the Bosnian Muslim leadership of Žepa, which would have arguably included Hamdija Torlak, the President of the Executive Board of Žepa, it does not consider this to be a factor against its determination that the acts of murder against these three men constitutes genocide. It recalls in this regard Torlak's speculation that he was not killed because his appearance at negotiations with Mladić was well documented on video.[3225] The Majority considers this to be a plausible reason why he was not killed. Moreover, it recalls that when the forcible removal operation of Žepa's population had started, the male population of the enclave was still hiding out in the nearby mountains. The VRS had exhausted its resources on the ground as a result of the operation against Srebrenica and the ensuing engagement in combat with members of the column before opening the corridor. Media attention to the actions of the Bosnian Serbs had started to increase.

781. In accordance with the *Jelišić* Trial Chamber's finding—in which it relied on the Commission of Experts Report—the Majority also takes into account the fate of the remaining population of Žepa;[3226] their forcible transfer immediately prior to the killing of these three leaders is a factor which supports its finding of genocidal intent. To ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient—in the case of Žepa—to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders. These three men, similar to the thousands of those murdered following the fall of Srebrenica, also ended up in mass graves.[3227]

782. The Majority has no doubt that the murder of Hajrić, Palić and Imamović was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. On the basis of the above, the Majority, Judge Nyambe dissenting, is satisfied beyond reasonable doubt that Bosnian Serb Forces killed the three leaders named in the Indictment with the specific genocidal intent of destroying part of the Bosnian Muslim population as such.

E. Conspiracy to Commit Genocide

1. Charges

783. The Indictment charges the Accused with conspiracy to commit genocide pursuant to Article 4(3)(b) of the Statute and alleges that there was an agreement between the Accused and

[3225] Hamdija Torlak, T. 4408–4409 (25 August 2010).
[3226] *See Jelisić* Trial Judgement, para. 82, cited in relevant part in *supra* n. 3138.
[3227] *See supra* para. 680.

Annex 22

International Criminal Court, Gbagbo, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, Pre-Trial Chamber I, 3 June 2013 (extract)

English version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_04054.PDF

French version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04880.PDF

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/11-01/11**
Date: **3 June 2013**

PRE-TRIAL CHAMBER I

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR V. LAURENT GBAGBO

Public

Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute

conforms with the right of the Defence to be tried without undue delay pursuant to article 67(1)(c) of the Statute.

26. In relation to the quality of individual items of evidence, the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence.

27. As a general matter, it is preferable for the Chamber to have as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody. Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witness.

28. Although there is no general rule against hearsay evidence before this Court, it goes without saying that hearsay statements in the Prosecutor's documentary evidence will usually have less probative value. Reliance upon such evidence should thus be avoided wherever possible. This is all the more so when the hearsay in question is anonymous, in the sense that insufficient information is available about who made the observation being reported or from whom the source (irrespective of whether the source is a witness interviewed by the Prosecutor or a documentary item of evidence) obtained the information.

29. Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations ("NGO reports") and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position[40] because it is not able to

[40] See, for example, Pre-Trial Chamber I, Transcript of Hearing, 27 February 2013, ICC-02/11-01/11-T-20-Red-ENG, p. 48 lines 17-25 and p. 49, lines 1-17 and p. 60, lines 16-25; *id.*, Transcript of Hearing, 25 February 2013, ICC-02/11-01/11-T-18-Red-ENG, p. 31, lines 1-25.

investigate and challenge the trustworthiness of the source(s) of the information, thereby unduly limiting the right of the Defence under article 61(6)(b) of the Statute to challenge the Prosecutor's evidence, a right to which the Appeals Chamber attached "considerable significance".[41] Further, it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence. In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information.[42]

30. In relation to corroboration, it should be noted that it will often be difficult, if not impossible, to determine whether and to what extent anonymous hearsay in documentary evidence corroborates other evidence of the same kind. This is because it will usually be too difficult to determine whether two or more unknown sources are truly independent of each other, and the Chamber is not allowed to speculate in this regard. The Chamber does not exclude the possibility that in exceptional cases it may be apparent from the evidence that two or more anonymous hearsay sources in documentary evidence corroborate each other because they are clearly based on independent sources. However, since even in such cases the Chamber may still not have enough information about the trustworthiness of these sources, it will be extremely cautious in attributing the appropriate level of probative value.

31. The Chamber is mindful of the Prosecutor's right to "rely on documentary or summary evidence and [that she] need not call the witness expected to testify at the trial".[43] However, the fact that during the confirmation process the Prosecutor is

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[41] Appeals Chamber, *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 40.

[42] The Chamber observes, in this regard, that the problem with anonymous hearsay may not necessarily be resolved by the fact that the Chamber has some generic information about the source. What matters is that enough information about the trustworthiness of the source of the information is available in order to allow the Chamber to attribute the appropriate level of probative value to the information.

[43] Article 61(5) of the Statute.

value.[47] In this regard, the Chamber adopts a similar position to the one held by other Pre-Trial Chambers, according to which the Chamber may, in order to counterbalance the disadvantageous position of the Defence, decline to confirm allegations that are supported only by anonymous or summary witness statements.[48]

35. In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.

4. The Evidentiary Record of the Prosecutor in the Present Case

36. During the Hearing, the Prosecutor made clear that besides the four charged incidents,[49] she is relying upon further 41 incidents to establish her allegation for the existence of an "attack directed against any civilian population" under article 7 of

[47] Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 90.

[48] Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 90; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 50; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 49; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 41; Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 52; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 160.

[49] The Chamber notes the Prosecutor's contention that the four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread or systematic attack, see ICC-02/11-01/11-420-Red, para. 30.

Annex 23

International Criminal Court, Katanga, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 7 March 2014 (extract)

English version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF

French version available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_02618.PDF

Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-01/04-01/07**
Date: **7 March 2014**

TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public Document

Judgment pursuant to article 74 of the Statute

witnesses' status, their possible membership of a militia, their ability to testify and their credibility.[108]

66. In-court testimonies allowed the Chamber to measure the very specific significance of local customs and the role of family relationships in Ituri. It also noted that the notions of hierarchy and obedience could be interpreted very differently and, in this regard, the role of fetish-priests [*féticheurs*] in the local societies warranted special attention.

67. Most probably, the Prosecution's investigation would have benefited from pursuing these issues, which would have permitted a more nuanced interpretation of certain facts; a more accurate interpretation of some of the testimonies and, hence, a fine-tuning of the criteria relied on by the Chamber in assessing the credibility of several witnesses. In fact, many of the socio-cultural aspects of the evidence were discussed further to questions from the Bench. In the Chamber's view, these aspects should have been discussed as soon as presentation of the Prosecution's evidence commenced so as to prompt a more informed adversarial debate from the outset .

B. THE CHAMBER'S CRITERIA FOR EVALUATION OF THE EVIDENCE

1. Onus of proof

68. Under article 66 of the Statute, the accused is presumed innocent until the Prosecutor has proved his or her guilt.[109] In order to convict the accused, each element of the particular offence charged must be established "beyond reasonable doubt".[110]

69. The Chamber emphasises that the standard of proof "beyond reasonable doubt" must be applied in establishing an element of crime or the mode of liability held

[108] See "Section V Analysis of the credibility of specific witnesses".
[109] Rome Statute, articles 66(1) and 66(2).
[110] Rome Statute, article 66(3); *Lubanga* Judgment, para 92.

against the accused, as well as in establishing the existence of facts indispensable for entering a conviction.

70. It is the Chamber's position that the fact that an allegation has not, in its view, been proven beyond reasonable doubt, does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to adjudge the veracity of the alleged fact in the light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt".

2. Facts requiring no evidence

a) Facts of common knowledge

71. Under article 69(6) of the Statute, the Chamber may take judicial notice of facts of common knowledge. However, the Chamber has been unable to do so in the specific context of the present case.

b) Agreements as to evidence

72. In accordance with rule 69 of the Rules, the parties may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested. In such circumstances, the Chamber may consider such alleged fact as being proven.

Annex 24

International Criminal Tribunal for the former Yugoslavia, Tolimir, IT-05-88/2-A, Judgment, Appeal Chamber, 8 April 2015 (extract)

Available at:

https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-05-88%232-A/JUD267R2000466847.pdf

UNITED
NATIONS

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

Case No. IT-05-88/2-A
Date: 8 April 2015
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge William H. Sekule
Judge Patrick Robinson
Judge Mehmet Güney
Judge Jean-Claude Antonetti

Registrar: **Mr. John Hocking**

Judgement: **8 April 2015**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer QC
Mr. Kyle Wood
Mr. Todd Schneider
Ms. Lada Šoljan
Mr. Nema Milaninia

Mr. Zdravko Tolimir, *pro se*

Tolimir's related argument that forcible transfer can only be considered as evidence of genocidal intent if the affected members of the group are transferred to a place where they are subjected to conditions leading to their death or destruction. As noted, a trial chamber may rely on the act of forcible transfer as evidence of genocidal intent, regardless of the destination of the transfer.[752] Tolimir's argument is thus dismissed.

255. In view of the Appeals Chamber's prior conclusion that the Trial Chamber erred in finding that the forcible transfer operation of Žepa's Bosnian Muslims satisfied the *actus reus* requirements of Article 4(2)(b) and (c) of the Statute,[753] Tolimir's *mens rea* arguments pertaining to that operation are dismissed as moot.[754]

(iii) Conclusion

256. For the foregoing reasons, the Appeals Chamber, Judge Antonetti dissenting, dismisses Grounds of Appeal 11 and 7, in part (with regard to forcible transfer as an indicator of genocidal intent).

(b) Genocidal intent with regard to the killings of Mehmed Hajrić, Amir Imamović and Avdo Palić (Ground of Appeal 12)

257. The Trial Chamber held that the Bosnian Serb Forces killed three of "the most prominent leaders" of Žepa's Bosnian Muslim community, namely Mehmed Hajrić, Žepa's mayor and president of the War Presidency, Colonel Avdo Palić, commander of the ABiH Žepa Brigade based in Žepa, and Amir Imamović, the head of the Civil Protection Unit, with the intent to destroy the Muslim population of Eastern BiH as such.[755] The Trial Chamber held that these killings were committed with genocidal intent because these three leaders represented the core of Žepa's civilian and military leadership[756] and were deliberately "selected for the impact that their disappearance

[752] *Krstić* Appeal Judgement, para. 33. In support of his argument, Tolimir quotes the judgement of the District Court of Jerusalem in the *Eichmann* case. *See* Appeal Brief, para. 80, n. 58. Tolimir's reliance on that case is, nevertheless, misplaced. The District Court found, in relevant part, that Eichmann had "caused this grave [bodily or mental] harm by means of enslavement, starvation, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps – all this under conditions intended to humiliate the Jews, to deny their rights as human beings, to suppress and torment them by inhuman suffering and torture". *Eichmann* District Court Judgement, para. 199. In holding so, the District Court was determining the means used by Eichmann and others to inflict serious bodily or mental harm on the Jewish people. The District Court did not find that genocidal intent may be inferred from acts of forcible transfer only where the transferred group has been exposed to certain types of conditions, such as enslavement or confinement to a concentration camp.

[753] *See supra*, paras 221, 237.

[754] *See* Appeal Brief, para. 180.

[755] Trial Judgement, paras 778, 782.

[756] Trial Judgement, para. 780.

would have on the survival of" the Bosnian Muslims of Eastern BiH "as such".[757] The Trial Chamber reasoned that the forcible transfer of Žepa's population "immediately prior to" the killing of these leaders supported its finding of genocidal intent as, in order "[t]o ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient – in the case of Žepa – to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders".[758]

(i) Submissions

258. Tolimir submits that the Trial Chamber erred in fact and law in finding that Bosnian Serb Forces killed Palić, Hajrić, and Imamović with the intent to destroy part of the Bosnian Muslim population of Eastern BiH as such.[759] First, Tolimir submits that the Trial Chamber erred in finding that the selective targeting of leading figures of a community can be proof of genocidal intent.[760] Second, Tolimir argues that the Trial Chamber erred in finding that the three Žepa leaders were "key for the survival" of Žepa's Bosnian Muslim community.[761] Tolimir points out in this regard that the members of the War Presidency were appointed, not elected, officials[762] whose presence in the enclave and involvement in combat activities was "illegal under the law of war" and in violation of the Demilitarization Agreement of 8 May 1993 and the COHA of 1994.[763] With regard to Palić, Tolimir adds that the Trial Chamber relied on the "emotional" testimony of Palić's wife and communications "between military personnel of the opposing parties", without critically analysing such evidence, whereas other evidence indicated that Palić was much less respected and influential than found by the Trial Chamber.[764]

259. Third, Tolimir asserts that the Trial Chamber's reasoning was based on the erroneous presumption that the three Žepa leaders were killed with genocidal intent, as shown by its speculation on why another leader (Hamdija Torlak, President of the Executive Board of Žepa, who was also taken into detention) was not killed.[765] Finally, Tolimir argues that the Trial Chamber

[757] Trial Judgement, para. 782. The Trial Chamber specifically found that the three Žepa leaders were "key to the survival of the small community" and their killing was of "symbolic purpose for the survival of the Bosnian Muslims of Eastern BiH". Trial Judgement, para. 780.
[758] Trial Judgement, para. 781.
[759] Notice of Appeal, paras 67-69; Appeal Brief, para. 182.
[760] Appeal Brief, para. 183. Quoting a dissenting opinion in the *Bosnia Genocide* Judgment on Preliminary Objections of the ICJ, Tolimir argues that a division of the protected group into an elite entitled to "special, stronger protection" and less protected, ordinary members is "anachronistic and discriminatory" and lacks a basis in the *travaux préparatoires* of the Genocide Convention. Appeal Brief, para. 183, *quoting* Dissenting Opinion of Judge Kreća, *Bosnia Genocide* Judgment on Preliminary Objections, para. 90.
[761] Appeal Brief, paras 182, 187, 195.
[762] Appeal Brief, para. 184.
[763] Appeal Brief, para. 190.
[764] Appeal Brief, paras 188-189. *See also* Reply Brief, para. 58.
[765] Appeal Brief, para. 191. The Trial Chamber held that Torlak was not targeted because of his prominence in the media as a negotiator on behalf of the Žepa community (Trial Judgement, para. 780), but Tolimir argues that such

erred in finding that the forcible transfer of the Žepa population immediately prior to the killing of the three Žepa leaders is a factor supporting a finding of genocidal intent.[766] He submits that in the absence of any evidence as to the perpetrators, dates, and circumstances of these three killings, no reasonable fact-finder could have concluded beyond reasonable doubt that they were killed with genocidal intent, especially since the killings occurred after the completion of the forcible transfer.[767]

260. The Prosecution responds that Tolimir fails to show an error of fact or law by the Trial Chamber in finding that the Bosnian Serb Forces acted with genocidal intent when they murdered the three Žepa leaders.[768] According to the Prosecution, the Trial Chamber correctly held that targeting the leadership of a protected group can indicate genocidal intent, irrespective of the process of selection of the targeted leaders.[769] The Prosecution also asserts that the Trial Chamber reasonably concluded that Palić was respected and trusted by the Žepa population,[770] relying on the "measured and accurate" testimony of Palić's wife, which was supported by other evidence.[771] In the Prosecution's view, the three leaders' role in the ABiH's breach of Žepa's demilitarised zone status is irrelevant. Furthermore, the Prosecution contends that the fact that other Bosnian Muslim leaders were not targeted does not undermine the Trial Chamber's analysis.[772] According to the Prosecution, the Trial Chamber properly considered the three murders in the context of the surrounding events, including the forcible transfer from Žepa, in determining that the three Žepa leaders were killed with genocidal intent.[773] The Prosecution finally avers that Tolimir fails to show an error in the Trial Chamber's finding that the Bosnian Serb Forces were responsible for these killings.[774]

(ii) Analysis

261. The Appeals Chamber first observes that the Trial Chamber correctly stated that the prominence of the targeted portion of the protected group is a relevant factor in determining

reasoning already presupposes that the concerned individuals were killed with genocidal intent. Appeal Brief, para. 191.

766 Appeal Brief, para. 192.

767 Appeal Brief, paras 185-186, 192-195. Tolimir specifically asserts that the Trial Chamber failed to consider evidence regarding the escape of Hajrić and Imamović from Bosnian Serb custody, as well as evidence concerning possible other reasons for the killings, namely the three Žepa leaders' alleged involvement in crimes against Bosnian Serbs. Appeal Brief, paras 193-194.

768 Response Brief, paras 98-99.

769 Response Brief, para. 100.

770 Response Brief, para. 101.

771 Response Brief, paras 101-103.

772 Response Brief, paras 100, 104-105.

773 Response Brief, para. 106.

774 Response Brief, para. 107.

whether the perpetrator intended to destroy at least a substantial part of the protected group.[775] Indeed, as the Trial Chamber held, "genocidal intent may [...] consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such".[776] This holding is consistent with other trial judgements of the Tribunal,[777] as well as the Appeals Chamber's own jurisprudence. The Appeals Chamber recalls, in this respect, that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4" of the Statute.[778]

262. The Commission of Experts Report, on which the Trial Chamber relied as support for its legal analysis *vis-à-vis* the killings of the three Žepa leaders,[779] states, in relevant part:

> [i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. If a group has its leadership exterminated, *and at the same time or in the wake of that,* has a relatively large number of the members of the group killed or subjected to other heinous acts, *for example deported on a large scale or forced to flee*, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.[780]

263. The Appeals Chamber finds no legal error in the Trial Chamber's statement that the selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent.[781] The Appeals Chamber is not persuaded that the commission of genocide through the targeted killings of only the leaders of a group suggests that the leaders of the group are subject to special, stronger protection than the other members of the group, as Tolimir suggests. Recognising that genocide may be committed through the killings of only certain prominent members of the group "selected for the impact that their disappearance would have on the survival of the group as such"[782] aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders. A dissenting opinion in a judgement of

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[775] Trial Judgement, para. 749.
[776] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.
[777] *See Sikirica et al.* Judgement on Motions to Acquit, para. 77; *Jelisić* Trial Judgement, para. 82.
[778] *Krstić* Appeal Judgement, para. 12 (*cited* in Trial Judgement, para. 749).
[779] Trial Judgement, paras 749, 777. The *Jelisić* Trial Judgement also relied on this report as the basis for its holding that genocidal intent may consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. *See Jelisić* Trial Judgement, para. 82.
[780] Commission of Experts Report, para. 94 (emphasis added).
[781] Trial Judgement, paras 749, 777, and authorities cited therein. The Appeals Chamber notes that this statement correctly stated the applicable law, even though, with the exception of the present case, no conviction for genocide has ever been entered by the Tribunal, or other international criminal tribunals, on the basis of the selective targeting of a protected group's leadership. *See, e.g., Sikirica et al.* Judgement on Motions to Acquit, paras 84-85; *Jelisić* Trial Judgement, paras 82-83.
[782] Trial Judgement, para. 777, and authorities cited therein.

the ICJ, the sole authority cited by Tolimir,[783] does not bind this Tribunal and is not sufficient to substantiate Tolimir's argument.

264. The Appeals Chamber also fails to see the relevance of the method of selection of the targeted leaders of Žepa in view of the Trial Chamber's findings on the prominent positions these three men occupied in the Žepa community.[784] For a finding of genocide it suffices that the leaders were "selected for the impact that their disappearance would have on the survival of the group as such".[785] Genocide may be committed even if not all leaders of a group are killed – even though targeting "the totality [of the leadership] per se may be a strong indication of genocide regardless of the actual numbers killed".[786]

265. With regard to Tolimir's challenge to the Trial Chamber's conclusion that the three Žepa leaders were killed with genocidal intent, the Appeals Chamber notes the Trial Chamber's finding that all three Žepa leaders were arrested and detained "shortly after the completion of the forcible removal operation in Žepa" at the end of July 1995.[787] The Trial Chamber found that after several days in detention, Hajrić and Imamović were killed sometime in late August 1995, while Palić was killed in early September 1995.[788] The Appeals Chamber recalls that according to the Commission of Experts Report and as the Trial Chamber itself recognised, "[t]he character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group [...] at the same time or in the wake of that" attack.[789] As the Trial Chamber found, the selective targeting of a protected group's leadership may amount to genocide only if the leaders are selected because of "the impact that their disappearance would have on the survival of the group as such".[790] The impact of the leaders' disappearance may of course be assessed only *after* the leaders are attacked. Only by considering what happened to the rest of the protected group at the same time or in the wake of the attack on its leadership could "the impact that [the leaders'] disappearance would have on the survival of the group as such" be assessed.[791]

266. The Appeals Chamber is not convinced of the reasonableness of the Trial Chamber's finding regarding the impact of the killings of the three Žepa leaders on the Žepa civilian population. The Trial Chamber cited no evidence in support of its finding that the disappearance of

[783] Appeal Brief, para. 183.
[784] Trial Judgement, paras 599, 778.
[785] Trial Judgement, para. 777, and authorities cited therein.
[786] Commission of Experts Report, para. 94 (*cited* in Trial Judgement, para. 777).
[787] Trial Judgement, para. 778.
[788] Trial Judgement, paras 679-680, 778.
[789] Commission of Experts Report, para. 94. The Trial Chamber also stated that the killings of the three Žepa leaders must not be seen in isolation, but in conjunction with "the fate of the remaining population of Žepa". Trial Judgement, para. 781.
[790] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.

the three Žepa leaders would have an impact on the protected group. The Trial Judgement contains no reference to evidence as to the impact of the disappearance of the three Žepa leaders on the survival of the Bosnian Muslim population from Žepa. The Appeals Chamber notes, in this regard, that, even though the Trial Chamber found, based on forensic evidence, that the three Žepa leaders suffered violent deaths caused by injuries to the head or skull while in the custody of Bosnian Serb Forces and were then buried in a mass grave,[792] there are no findings or references to evidence as to whether the VRS members who detained and murdered the three Žepa leaders intended, for instance, to use their actions in a way that would intimidate and expedite the removal of the Bosnian Muslims of Žepa, prevent their return, or impact their survival as a group in any other way.[793]

267. The Appeals Chamber has already established that the Trial Chamber did not err in finding that the only reasonable inference from the evidence was that the three Žepa leaders suffered a violent death at the hands of their Bosnian Serb captors.[794] However, the Trial Chamber failed to explain how their detention and killings – committed weeks after the entire Žepa population had been forcibly transferred from the enclave – had any impact "on the survival of the group as such".[795] The Trial Chamber accepted in its conclusion that there was such an impact, but it did not consider or analyse whether or how the killings of the three Žepa leaders *after* the Bosnian Muslim civilian population of Žepa had been transferred to safe areas of BiH specifically affected the ability of those removed civilians to survive and reconstitute themselves as a group.[796] A finding that Žepa's Bosnian Muslims lost three of their leaders[797] does not suffice to infer that those civilians were affected by the loss of their leaders in a way that would threaten or tend to contribute to their physical destruction as a group.

268. The Appeals Chamber also notes that the killings of the three Žepa leaders were alleged and found to be natural and foreseeable consequences of the JCE to Forcibly Remove; in other words,

[791] Trial Judgement, para. 749, *citing Jelisić* Trial Judgement, para. 82.
[792] Trial Judgement, paras 658, 665-666, 677-680. Tolimir does not raise specific challenges to these findings *per se*, but claims that there is no specific proof of who were the perpetrators, dates, and exact circumstances of these three killings. *See* Appeal Brief, para. 185. The Appeals Chamber has already rejected such claims as Tolimir does not explain at all why it was unreasonable for the Trial Chamber to conclude that the three Žepa leaders suffered violent deaths while detained by the Bosnian Serb Forces. *See supra*, paras 152-153.
[793] The Appeals Chamber notes the Trial Chamber's finding that on the morning of 28 July 1995, Mladić told a UN officer that Avdo Palić was dead – even though at that time, Palić was still alive and was only killed after 5 September 1995. Trial Judgement, paras 666, 679. Mladić's misstatement was contradicted by Tolimir, who stated that he could not confirm the information of Palić's death. Trial Judgement, para. 666. These findings do not undermine the Appeals Chamber's conclusion that the Trial Chamber made no findings as to the impact of the disappearance of the three Žepa leaders on the survival of the Bosnia Muslims from Žepa. Mladić's false statement about Palić's death does not amount to an effort to intimidate or threaten the destruction of the Bosnian Muslims from Žepa.
[794] *See supra*, para. 144.
[795] Trial Judgement, para. 782.
[796] Trial Judgement, paras 780-782.

these killings were neither charged nor found to be: (i) connected with the killings of Srebrenica's male population; or (ii) part of the forcible transfer operations involving Srebrenica's women, children and elderly and Žepa's Muslim population, which constituted the common purpose and sole objective of the JCE to Forcibly Remove.[798] These Trial Chamber's findings confirm the tenuous connection between the three killings and the genocidal acts committed against the Muslims of Eastern BiH under the two JCEs and further undermine the notion that the three killings formed part of the same genocidal enterprise.

269. In this context, particularly in light of the fact that the forcible transfer operation of Žepa's Bosnian Muslims had been completed before the three Žepa leaders were detained and killed and in the absence of any findings as to whether or how the loss of these three prominent figures affected the ability of the Bosnian Muslims from Žepa to survive in the post-transfer period, the inference of genocidal intent was not the only reasonable inference that could be drawn from the record. In the view of the Appeals Chamber, the evidence does not allow for the conclusion that the murders of the three Žepa leaders had a significant impact on the physical survival of the group as such so as to amount to genocide. There is, in sum, no sufficient evidentiary support for the finding that Hajrić, Palić, and Imamović were killed "with the specific genocidal intent of destroying part of the Bosnian Muslim population as such".[799] The Trial Chamber, therefore, erred in holding that the record established beyond reasonable doubt that Hajrić, Palić, and Imamović were killed by the Bosnian Serb Forces with the specific intent of destroying part of the Bosnian Muslim population as such and thus that their murders constituted genocide. The Appeals Chamber's conclusion does not preclude, of course, that these killings constituted crimes proscribed under other provisions of the Statute.

(iii) Conclusion

270. Based on the foregoing, the Appeals Chamber grants Ground of Appeal 12 and reverses Tolimir's conviction for genocide for the killings of Hajrić, Palić, and Imamović. Tolimir's remaining arguments are rendered moot and need not be addressed.[800]

4. Conclusion

271. For the foregoing reasons, the Appeals Chamber dismisses, in their entirety, Grounds of Appeal 7, 8, and 11.[801] The Appeals Chamber also dismisses Ground of Appeal 10 in part (with

[797] Trial Judgement, para. 782.
[798] Trial Judgement, paras 776, 1148-1154.
[799] Trial Judgement, para. 782.
[800] Judge Antonetti appends a separate opinion.

Annex 25

International Criminal Court, Ongwen, ICC-02/04-01/15-2022-Red, Judgment of the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, Appeals Chamber, 15 December 2022 (extract)

Available at:

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-02/04-01/15 A
Date: 15 December 2022

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding**
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public Redacted

Judgment
on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"

> circumstances which form the basis for the Chamber's decision under Article 74 of the Statute.[583]

320. The Trial Chamber then proceeded to articulate the burden and standard of proof stating that the onus is on the Prosecutor to prove the guilt of the accused and that pursuant to article 66(3) of the Statute, in order to convict the accused, the Trial Chamber must be convinced of the guilt of the accused beyond reasonable doubt.[584] The Trial Chamber explained that the standard of "beyond reasonable doubt is to be applied to any facts indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged"[585] and that for this determination it is required to carry out "a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue".[586] Having set out these principles, the Trial Chamber described its general approach to the evaluation of different types of evidence, and its assessment of the credibility of individual witnesses and the reliability of their evidence, based on its evaluation of the evidence as a whole.[587] It went on to provide a detailed analysis of the evidence underpinning its factual findings that it had identified earlier in the Conviction Decision[588] and explained its assessment with respect to the grounds excluding criminal responsibility.[589] Finally, the Trial Chamber set out its legal findings in relation to the charges brought against Mr Ongwen.[590]

321. The Appeals Chamber notes, that in exercising its fact-finding function, the Trial Chamber correctly articulated the burden and standard of proof as described above, and therefore it must be assumed that it proceeded on the basis of a correct understanding of these concepts.[591] Furthermore, the Appeals Chamber recalls that it has previously held that the "beyond reasonable doubt" standard is to be applied to the facts that are

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[583] Conviction Decision, para. 121 (emphasis added).
[584] Conviction Decision, paras 226-227.
[585] Conviction Decision, para. 227.
[586] Conviction Decision, para. 227.
[587] Conviction Decision, paras 232-850. At paragraph 261 of the Conviction Decision, the Trial Chamber emphasised that its assessments of the witnesses and their evidence was based on "the totality of the evidence before the Chamber and not only on each witness's evidence alone" and "must be read in conjunction with the evidentiary discussion further below in the present judgment".
[588] Conviction Decision, paras 851-2447.
[589] Conviction Decision, paras 2448-2672.
[590] Conviction Decision, paras 2673-3115.
[591] *See also* *Ntaganda* Appeal Judgment, para. 594.

indispensable for entering a conviction, namely, those constituting the elements of the crimes or modes of liability charged.[592] It follows that not each and every fact in the Conviction Decision must be proved beyond reasonable doubt.[593] For this reason, the Appeals Chamber has held that a "clear distinction must be made between facts constituting the elements of the crime and mode of liability […] and any other set of facts introduced by the different types of evidence […]".[594]

322. As the Defence fails to show any error in the Trial Chamber's application of the requisite standard of proof, its arguments on this point are rejected.

323. In addition, the Defence argues that the Trial Chamber applied a standard of "ample evidence" instead of "proof beyond a reasonable doubt" when assessing the evidence.[595] For the reasons that follow, the Appeals Chamber finds no merit in this argument.

324. In support of its argument, the Defence points to various paragraphs of the Conviction Decision that purport to demonstrate that the Trial Chamber adopted a standard of "ample evidence".[596] By way of example, the Appeals Chamber notes the following paragraphs of the Conviction Decision referenced by the Defence:

i. With respect to D-0133 and his evidence on the phenomenon of escape from the LRA the Trial Chamber stated: "*[l]astly, the Chamber finds Pollar Awich's statement that 'there are no cases where children escaped […] voluntary' incredible considering the* ***ample evidence*** *received to the contrary*";[597]

ii. As to D-0121's evidence that the civilians who were abducted and later rescued and returned by Captain Engola were not from Abok and were abducted on a day other than the day of the attack, the Trial Chamber stated: "*[g]iven the* ***ample evidence*** *showing that the abductees rescued*

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[592] *Ntaganda* Appeal Judgment, para. 37; *Bemba et al.* Appeal Judgment, para. 96, *Ngudjolo* Appeal Judgment, paras 123-125; *Lubanga* Appeal Judgment, para. 22.
[593] *D. Milošević* Appeal Judgment, para. 20. *See also* *Bemba et al.* Appeal Judgment, para. 868, *Lubanga* Appeal Judgment, para. 22.
[594] *Bemba et al.* Appeal Judgment, para. 868.
[595] Appeal Brief, paras 202-207. In paragraph 204 of the Appeal Brief the Defence referred to paragraph 447 of the Conviction Decision in relation to the Trial Chamber's impeachment of the credibility of P-0250. As paragraph 447 of the Conviction Decision does not relate to P-0250 the Appeals Chamber will not consider this aspect of the Defence's argument.
[596] Appeal Brief, paras 203-206, *referring to* Conviction Decision, paras 542, 612, 1464, 1484, 1845, 1497, 1746 and fn. 4970.
[597] Appeal Brief, para. 203, *referring to* Conviction Decision, para. 612 (emphasis added).

CASE LAW OF MUNICIPAL COURTS

Annex 26

Israel, District Court of Jerusalem, *Attorney-General v. Eichmann*, Judgment of 11 December 1961 (extract)

Available at:

https://www.legal-tools.org/doc/aceae7/pdf

IN THE DISTRICT COURT OF JERUSALEM

Criminal Case No. 40/61

Before His Honour JUDGE MOSHE LANDAU (Presiding)
His Honour JUDGE BENJAMIN HALEVI
His Honour JUDGE YITZCHAK RAVEH

For the Prosecution: THE ATTORNEY GENERAL

The Accused: ADOLF, son of Karl Adolf, EICHMANN

J U D G M E N T

The references in the Judgment are to the official record in Hebrew.

Adolf Eichmann has been brought to trial in this Court on charges of unsurpassed gravity - charges of crimes against the Jewish People, crimes against humanity, and war crimes. The period of the crimes ascribed to him, and their historical background, is that of the Hitler regime in Germany and in Europe, and the counts of the indictment encompass the catastrophe which befell the Jewish People during that period - a story of bloodshed and suffering which will be remembered to the end of time.

This is not the first time that the Holocaust has been discussed in court proceedings. It was dealt with extensively at the International Military Tribunal at Nuremberg during the Trial of the Major War Criminals, and also at several of the trials which followed; but this time it has occupied the central place in the Court proceedings, and it is this fact which has distinguished this trial from those which preceded it. Hence also the trend noticed during and around the trial, to widen its range. The desire was felt - understandable in itself - to give, within the trial, a comprehensive and exhaustive historical description of events which occurred during the Holocaust, and in so doing, to emphasize also the inconceivable feats of heroism performed by ghetto-fighters, by those who mutinied in the camps, and by Jewish partisans.

There are also those who sought to regard this trial as a forum for the clarification of questions of great import, some of which arose from the Holocaust, while others, of long standing but which have now emerged once again in more acute form, because of the unprecedented sufferings which were visited upon the Jewish People and the world as a whole in the middle of the Twentieth Century.

How could this happen in the light of day, and why was it just the German people from which this great evil sprang? Could the Nazis have carried out their evil designs without the help given them by other peoples in whose midst the Jews dwelt? Would it have been possible to avert the Holocaust, at least in part, if the Allies had displayed a greater will to assist the persecuted Jews? Did the Jewish People in the lands of freedom do all in its power to rally to the rescue of its brethren and to sound the alarm for help? What are the psychological and social causes of the group-hatred which is known as anti-Semitism? Can this ancient disease be cured, and by what means? What is the lesson which the Jews and other nations must draw from all this,

With regard to Terezin, we shall quote a statement, dated 21 August 1843, sent by Dr. Munk, director of the health services in the ghetto, to the chief medical officer and all the gynaecologists there, which reads as follows:

"As a consequence of the two latest notifications of births, SS Obersturmbannfuehrer Burger has announced that in future all fathers of children conceived here, and also the mothers and the children, will be included in transports and deported. We therefore request you again to report, first of all, all pregnancies known to you which have not yet been reported, since otherwise the examining gynaecologist becomes an accessory, and therefore guilty. The information to be given to the pregnant women must be in unequivocal language, saying that the abortions have to be made on official instructions." (T/863)

On this subject, Rahm (who succeeded Seidl as camp commander) stated at his trial (T/864):

"Until about March 1944, I knew nothing about the prohibition according to which women in the ghetto were forbidden to bear children... Then Eppstein [head of the Jewish Council] told me that he thought that - in accordance with what had been agreed between himself and Eichmann - the general prohibition in force in Germany concerning artificial abortions did not apply to Jews, and that this agreement was exploited by Eichmann, in oder to force Jewish women in the ghetto to have abortions...and when Guenther came to visit me, I asked him about it, and he confirmed to me that I did not have to see to it personally, but it was already a matter for the Jews themselves, and that the Elder of the Jews had received notification about it from Eichmann directly."

It should be mentioned that this same Burger, who was mentioned in Dr. Munk's statement, was one of the Accused's men (T/37, p. 1478). In this matter of the prevention of births, our conclusion is that it has not been proved that the Accused was involved in giving the order in the Kovno Ghetto, of which Dr. Peretz spoke. In the "Brown File" on Easter Occupied Territories, in the drafting of which the Accused participated, we have also not found instructions with regard to the prevention of births amongst the Jews. But with regard to Terezin, the Accused's responsibility for the order given there for the termination of pregnancy, and for its implementation, has been proved fully.

160. The Prosecution adduced evidence with regard to a specially horrible chapter with which the Accused's name is also connected. The reference is to the collection of skeletons in the Institute of Anatomy at the University of Strasbourg.

One of the pseudo-scientific institutions of the Nazi period was called "The Ancestral Heritage." Its president was Himmler and its director a man called Sievers. The task of the institution was "to investigate the area, spirit, activity and inheritance of the Indo-German group of the Nordic race" (T/1362). Under the auspices of this institution, Professor Hirt of the University of Strasbourg carried out examinations of skeletons and skulls.

On 9 February 1942, Sievers submits to Brandt, who belonged to Himmler's personal staff, a memorandum proposing that examinations of this kind be also carried out on skeletons and skulls of Jews (T/1363). In a letter dated 7 July 1942, Himmler gives his approval to Hirt's research work (N/18). In order to secure Jews, alive and dead, Sievers approaches Gluecks, the official in charge of concentration camps, who

(4) We convict the Accused, pursuant to the fourth count, of a crime against the Jewish People, an offence under Section 1(a)(1) of the above-mentioned Law, in that during the years 1943 and 1944 he took measures calculated to prevent births among Jews, by directing that births be banned and pregnancies terminated among Jewish women in the Terezin Ghetto, with intent to exterminate the Jewish People.

We acquit the Accused of having committed all other acts mentioned in the fourth count of the indictment.

(5) We convict the Accused, pursuant to the fifth count, of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that during the period from August 1941 to May 1945, in the territories and areas mentioned in paragraph (1) of the conviction, as above, he, together with others, caused the murder, extermination, enslavement, starvation and deportation of the Jewish civilian population in those countries and in those areas.

We also convict the Accused of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that he, together with others, caused during the period from March 1938 to October 1941, the expulsion of Jews from their homes in the territories of the Old Reich, Austria and the Protectorate of Bohemia-Moravia, by way of compulsory emigration through the Central Offices for Jewish Emigration in Vienna, Prague and Berlin.

We also convict the Accused of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that during the period from December 1939 to March 1941 he, together with others, caused the deportation of Jews to Nisko and the deportation of Jews from areas in the East annexed to the Reich, and from the Reich area itself into the German-occupied area in the East and to France.

(6) We convict the Accused, pursuant to the sixth count, of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that, when carrying out the activities mentioned in paragraphs 1-5 of the conviction, he persecuted Jews on national, racial, religious and political grounds.

(7) We convict the Accused, pursuant to the seventh count, of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that, during the period from March 1938 to May 1945, in the territories and areas mentioned in paragraph (1) of the conviction, as above, he, together with others, caused the plunder of the property of millions of Jews through mass terror, linked with the murder, destruction, starvation and deportation of those Jews.

(8) We convict the Accused, pursuant to the eighth count, of a war crime, an offence under Section 1(a)(3) of the above- mentioned Law, in that he performed the acts of persecution, expulsion and murder mentioned in the preceding counts, so far as these were committed during the Second World War, against Jews from among the populations of the countries occupied by Germany and the other countries of the Axis.

(9) We convict the Accused, pursuant to the ninth count, of a crime against humanity, an offence under Section 1(a)(2) of the above-mentioned Law, in that he, together

Annex 27

New Zealand, Court of Appeal, *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (extract)

IN RE THE ROYAL COMMISSION TO INQUIRE INTO AND REPORT UPON STATE SERVICES IN NEW ZEALAND

COURT OF APPEAL. Wellington. 1961. 8, 9 August; 8 September. GRESSON P. NORTH J. CLEARY J.

Commission of Inquiry—Parties—Right to appear and cross-examine witnesses—Right to be represented by counsel—Commissions of Inquiry Act 1908, s. 4 (Commissions of Inquiry Amendment Act 1958, s. 3 (1)).

Section 4A of the Commissions of Inquiry Act 1908 (as enacted by s. 3 (1) of the Commissions of Inquiry Amendment Act 1958) reads as follows:

"Any person interested in the inquiry shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry."

On a Special Case stated by the Royal Commission to Inquire into and Report upon State Services in New Zealand:

Held, 1. (per Gresson P.) where the nature of the inquiry is such that parties could not be cited, s. 4A gives persons to whom it applies no rights to appear and be heard: *Timberlands Woodpulp Ltd.* v. *Attorney-General* [1934] N.Z.L.R. 270; [1934] G.L.R. 269, applied.

2. (per North and Cleary JJ.) s. 4A of the Commissions of Inquiry Act 1908 entitles one to whom it applies to a fair opportunity to make any relevant statement which he may decide to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice, but (*semble*) where the inquiry concerns the conduct of any person, that person's rights may be more extensive: *University of Ceylon* v. *Fernando* [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631 (J.C.), applied.

3. (*per totam curiam*) whether persons to whom s. 4A applies may appear before a Commission by counsel, or cross-examine witnesses, are matters for the Commission to determine in its own discretion:

4. (*per totam curiam*) organisations (both incorporated and unincorporated) of State employees are "persons" within the meaning of s. 4A, and as such are capable of having an interest in the inquiry apart from any interest in common with the public.

SPECIAL CASE for the decision of the Court of Appeal, referred by the Royal Commission to Inquire into and Report upon State Services in New Zealand under the provisions of ss. 10 and 13 of the Commissions of Inquiry Act 1908. The following statement of facts is taken from the judgment of North J.

On 6 July 1961 a Royal Commission was constituted under the chairmanship of one of Her Majesty's Judges, the Hon. Mr Justice McCarthy, to receive representations upon, inquire into and investigate and report upon the organisation, staffing and methods of control and operation of departments of State, and so far as was considered necessary, into agencies of the executive government of New Zealand. It was the duty of the Commission to recommend such changes as would best promote efficiency, economy and improved services in the discharge of public business. Particular matters to which the Commission's attention was directed were the recruitment of staff, retention and promotion of staff, rights of appeal, retirement, classification and grading, discipline and superannuation. The Commission's warrant authorised and empowered it to make or conduct any

" Commission appointed to inquire into a matter involving status, or a " charge affecting individuals, or any dispute or claim which properly " comes within any of the four classes of cases set out in s. 2 and which " in its nature is (or perhaps may be) a dispute between parties " (*ibid.*, 294; 279).

In the circumstances, it is a little surprising to find that the Commissions of Inquiry Amendment Act 1958 not only has done nothing to clear up the difficulty but has added yet another problem for s. 4A purports to give to another class of persons a right which has never been defined in the case of parties. A specially interested person is said to " be entitled to appear and be heard as if he had been cited as a party to an inquiry ". The new section seems to proceed on the basis that parties have by law a well-defined right to appear and be heard, which is now given as well to specially interested persons. It may be that the Legislature had in mind a particular kind of inquiry such as an inquiry into a disaster or accident where conceivably there might be interested persons apart from those immediately concerned. But whether this be the true explanation or not I do not find it possible, as a matter of construction, to limit s. 4A in this way for the language used appears to make the new provision applicable alike to all Commissions of Inquiry. Therefore, it would seem to me that it is necessary to face up to the question what legal rights of appearance are possessed by a cited party to an inquiry. Mr Inglis contended that the nature of the inquiry was irrelevant. I do not think this is so for the section in terms speaks of the " right to appear and be heard " *at the inquiry*, which must mean the inquiry in question.

A Commission of Inquiry is certainly not a Court of law. Courts of law by ancient usage have formulated their own rules of procedure and rights of audience, representation, and the like which are now well defined: see *Collier* v. *Hicks* (1831) 2 B. & Ad. 663, 671; 109 E.R. 1290, 1293. Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a *lis*, a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one. True, some Commissions may find it convenient to cite parties and indeed there may be persons named in the warrant of appointment itself who presumably could be regarded as " parties " in a general sense. In the case of such a Commission, questions of costs may arise, and if that stage is reached, no doubt the Commission must then act in accordance with judicial principles and see that parties are heard before any order is made against them. But, so far as the section confers a right to a hearing of a wider nature and so makes it right to compare a Commission of Inquiry with an administrative tribunal, it by no means follows that even in the case of parties before a tribunal, they would have the wide rights claimed by Mr Inglis. The question whether the requirements of natural justice have been met by the procedure adopted by a tribunal clearly depends to a very considerable extent on the facts and circumstances of the case in point. There are, as Tucker L.J. said in *Russell* v. *The Duke of Norfolk* [1949] 1 All E.R. 109: " in my view, no words which are of universal application " to every kind of inquiry and every kind of domestic tribunal. The " requirements of natural justice must depend on the circumstances of " a case, the nature of the inquiry, the rules under which the tribunal " is acting, the subject-matter that is being dealt with and so forth " (*ibid.*, 118).

Annex 28

India, Supreme Court of India, *Sham Kant v. State of Maharashtra, AIR* 1992 SC 1897 (extract)

Available at:

https://indiankanoon.org/doc/1456974/

Sham Kant vs State Of Maharashtra on 15 February, 1992

Equivalent citations: AIR1992SC1879, 1992CRILJ3243, 1992(2)CRIMES943(SC), JT1992(3)SC497, 1992(1)SCALE1282, 1992SUPP(2)SCC521

Author: S. Ratnavel Pandian

Bench: S.R. Pandian

ORDER

S. Ratnavel Pandian, J.

1. The appellant, Sham Kant who was aged about 24 years at the relevant period of the occurrence in question i.e. in June 1980 was acting as Sub-Inspector in Ramtek Police Station in the State of Maharashtra. The facts giving rise to this appeal briefly stated are as follows:

> For the sake of convenience, we address this appellant as accused No.1 as arrayed before the trial Court alongwith six others who were accused Nos. 2 to 7.
>
> On the intervening night of 23rd/24th June 1980, there was a house-breaking in the Shantinath Jain Temple, Ramtek. A brass idol and some silver ornaments called Chhatra worth about R.4,500/- were stolen from the temple. The priest of the temple, Bhorumal lodged a complaint in respect of this incident on 24th June 1980 at Ramtek Police Station. On the basis of this complaint, a case was registered in Crime No. 96/1980 under Sections 452 and 380 IPC. As the regular Sub-Inspector of Police, Mr. Bukhari attached to that Police Station was on leave, the accused No.1 was acting as the Station House Officer. He entrusted the investigation of this case to accused No.1, a Head Constable. Accused Nos. 3 and 4 were Head Constables of the Station and Accused No. 5 to 7 were the constables. They were all assisting accused No. 2 in the investigation which was under the supervision and guidance of accused No.1.

2. One Ratiram Raut (who is since dead) and PW 13 (Motiram Bagde) were taken into custody as suspects in connection with theft of the brass idol evidently for interrogation on the night of 25th June. Both of them were taken to the Shantinath Jain Temple. Some more suspects namely one Ramu, Ramesh and Habib were also taken into custody by the police. According to the prosecution, they were all beaten by the police during the interrogation by means of leather belt, tyre belt called Gangaram and canes besides being assaulted with fists and kicks in order to extract a confession of their guilt and to recover the stolen property. Inspite of the inhuman treatment meted out by the

On 2nd July 1980, PW 2, the Jailer working in the Central Prison, Nagpur found number of injuries on PW 13 and Ratiram. The injured persons were examined by PW 24, the jail doctor who also found injuries on their person. Added to that, PW 14 who conducted inquest over the dead body of Ratiram also found number of injuries which he has noted in the inquest report Ext.17. The evidence of PW 19, Mohammed Ismail also corroborates the evidence of PW 13. The statements recorded by the jailer under Exts.21 and 21 from Ratiram and Motiram were also vital documents supporting the evidence of PW 13. In fact, the High Court has examined the evidence of PW 19 in extenso and found it to be true observing:

> In view of the fact that he had taken trouble for intimating to the higher offices on telephone and also to go to the Central Jail, Nagpur and to bring Ratiram and Motiram to Kamptee, the evidence of PW 19 Ismail cannot be doubted.

26. PW 23 who was arrested alongwith Ratiram and PW 13 in connection with the same idol theft case has also testified to the fact that both Ratiram and Motiram were beaten by the first accused with a belt.

27. After carefully scanning through the evidence of PW 2, 7, 13.19, 20, 23, 25, 29 and the various documents Exts.21, 22 and 34, we have no reservation in coming to the conclusion that Ratiram and Motiram were subjected to ill-treatment by the appellant in order to extort a confession or any information leading to the detection of the stolen properties.

28. The findings of the Commission of Inquiry that there is no reliable and independent material to hold that Ratiram was ill-treated in police custody and the injuries found on him possibly might have been sustained by him prior to his arrest is not binding on this Court when the Court has arrived to its own conclusion on the independent assessment of the persuasive evidence that Ratiram was subjected to ill-treatment by the appellant for extorting a confession or any information leading to the detection of the brass idol and other stolen articles. In fact, the circumstances veering the case and the numerous injuries found on the deceased Ratiram and PW 13, bearing mute and chilling testimony to the police brutality demonstrably establish the prosecution case as against the appellant.

29. The submission of the learned Counsel, Mr. V.A. Bobde that the High Court has grossly erred in convicting the appellant contrary to the numerous pronouncements made by this Court laying down the guidelines in respect of the scope and powers of the High Court in interfering with the appeals against acquittal is absolutely untenable. It is now well settled by the long course of decisions of this Court that where the view taken by the trial Court in acquitting the accused is extremely perverse and is not reasonably sustainable on the evidence on record, then the appellate Court can interfere with such an order of acquittal and set at naught the injustice done to the parties. this Court has examined the principle of law in interfering with an order of acquittal in Chandra Mohan Tiwari v. State of Madhya Pradesh . We think it not necessary to refer all those decisions on this principal of law.

Annex 29

Ireland, Supreme Court of Ireland, *Goodman International and Lawrence Goodman v. The Honourable Mr. Justice Liam Hamilton, Ireland and the Attorney General* [1992] 2 IR 542 (extract)

Goodman International and **Laurence Goodman,** Applicants, v. **The Honourable Mr. Justice Liam Hamilton,** sole member of the Tribunal of Inquiry into the Beef Processing Industry, **Ireland** and **The Attorney General,** Respondents [1991 No. 233JR]

High Court 21st October, 1991

Supreme Court 1st November, 1991

Constitution - Courts - Tribunal of Inquiry - Jurisdiction - Beef industry - Fraud - Malpractice - Allegations made in Dáil Éireann - Resolution for public inquiry - Remit - Parties - Current civil proceedings - Past criminal prosecutions - Private disputes - Public interest - Good name - Fair procedures - Judicial domain - "Exercise of limited functions and powers of a judicial nature" - Whether Tribunal's remit trenching upon judicial function - Resolution of Dáil Éireann - Presumption of constitutionality - Tribunals of Inquiry (Evidence) Act, 1921 (11 Geo. 5, c.7) - Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (No. 3) - Constitution of Ireland, 1937, Articles 34, 37, 38 and 40, s. 3.

Evidence - Admissibility - Tribunal - Public inquiry - Beef industry - Allegations of fraud, malpractice or criminal conduct - Whether court rules of admissibility of evidence to apply - Whether prior statements of allegations to be available - Hearing - Whether public or private - Tribunals of Inquiry (Evidence) Act, 1921 (11 Geo. 5, c.7) - Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (No. 3).

Article 37 of the Constitution of Ireland, 1937, provides:-

"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

A television programme broadcast on the 13th May, 1991, alleged fraud and malpractice in the beef processing industry by the applicants, said to control a 30% share in the industry. Similar allegations had previously been made in Dáil Éireann and on the 24th May, 1991, it adopted a resolution that it was expedient that a Tribunal of Inquiry be established to inquire into "definite matters of urgent public importance", *viz.*:-

"(i) Allegations concerning illegal activities, fraud and malpractice in and in connection with the beef processing industry made or referred to
(a) in Dáil Éireann and
(b) on a television programme transmitted on May 13th, 1991.

(ii) Any matters connected with or relevant to the matters aforesaid which the Tribunal considers it necessary to investigate in connection with its inquiries into the matters mentioned at (i) above."

an administration of justice within the meaning of Article 34 of the Constitution.

In a sense, a positive test which can be applied, and very strikingly, is that contained in clause 5 of the principles laid down by Kenny J. It is no part, and never has been any part of the function of the judiciary in our system of law, to make a finding of fact, in effect, *in vacuo* and to report it to the Legislature. The courts do not even exercise a function of making, in cases between litigants, a finding of fact which does not have an effect on the determination of a right.

With regard to the suggestion that the findings of the Tribunal, if not an impermissible administration of justice by a body other than a court, is a usurpation of the activities of courts in cases where either civil cases are pending or may be instituted, it seems to me that again this submission arises from a total misunderstanding of the function of the Tribunal. A finding by this Tribunal, either of the truth or the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal contract or malpractice. I am, therefore, satisfied that the submission under Article 34 must fail.

Article 37, section 1

The submission made on behalf of the applicants concerning this Article was, in a sense, dependent on establishing that the activities of the Tribunal constituted an administration of justice within the meaning of Article 34. I find it difficult to distinguish between the exercise of the functions and powers of a judicial nature and the administration of justice, and I am satisfied that the same considerations apply to the test to be applicable to each of these.

My conclusion is that the activities of the Inquiry are not in any way the exercise of a judicial power or function, it being no part of a judicial function, nor part of the judicial domain, to ascertain the truth or falsity of facts and report them to Parliament. The question as to whether the exception, or saver, contained in Article 37, s. 1 arises by reason of the existence of criminal matters becomes, therefore, wholly irrelevant.

Annex 30

Canada, Supreme Court of Canada, *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440 (extract)

English version available at:

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1548/index.do?site_preference=normal

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The Canadian Red Cross Society, George Weber, Dr. Roger A. Perrault, Dr. Martin G. Davey, Dr. Terry Stout, Dr. Joseph Ernest Côme Rousseau, Dr. Noel Adams Buskard, Dr. Raymond M. Guevin, Dr. John Sinclair MacKay, Dr. Max Gorelick, Dr. Roslyn Herst and Dr. Andrew Kaegi and Bayer Inc. and Baxter Corporation *Appellants*

v.

The Honourable Horace Krever, Commissioner of the Inquiry on the Blood System in Canada *Respondent*

and

The Canadian Hemophilia Society, the Canadian Aids Society, Canadian Hemophiliacs Infected with HIV, T-COR, the HIV-T Group (Blood Transfused), the Toronto and Central Ontario Regional Hemophilia Society, the Hepatitis C Survivors' Society, the Hepatitis C Group of Transfusion Recipients & Hemophiliacs and Janet Conners (Infected Spouses & Children) Association *Interveners*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* CANADA (COMMISSION OF INQUIRY ON THE BLOOD SYSTEM)

File No.: 25810.

1997: June 25; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Public inquiry — Jurisdiction — Notices of possible findings of misconduct — Whether Commission had jurisdiction to

La Société canadienne de la Croix-Rouge, George Weber, le docteur Roger A. Perrault, le docteur Martin G. Davey, le docteur Terry Stout, le docteur Joseph Ernest Côme Rousseau, le docteur Noel Adams Buskard, le docteur Raymond M. Guevin, le docteur John Sinclair MacKay, le docteur Max Gorelick, le docteur Roslyn Herst et le docteur Andrew Kaegi et Bayer Inc. et Baxter Corporation *Appelants*

c.

L'honorable Horace Krever, ès qualités de Commissaire de l'enquête sur le système d'approvisionnement en sang au Canada *Intimé*

et

La Société canadienne de l'hémophilie, la Société canadienne du SIDA, Canadian Hemophiliacs Infected with HIV, T-COR, HIV-T Group (Blood Transfused), Toronto and Central Ontario Regional Hemophilia Society, la Société des survivant(e)s d'hépatite C, Hepatitis C Group of Transfusion Recipients & Hemophiliacs et Janet Conners (Infected Spouses & Children) Association *Intervenants*

RÉPERTORIÉ: CANADA (PROCUREUR GÉNÉRAL) *c.* CANADA (COMMISSION D'ENQUÊTE SUR LE SYSTÈME D'APPROVISIONNEMENT EN SANG AU CANADA)

N° du greffe: 25810.

1997: 25 juin; 1997: 26 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Enquête publique — Compétence — Préavis d'éventuelles conclusions faisant état d'une faute — Le commissaire

Philip S. Tinkler, for the intervener the Hepatitis C Survivors' Society.

Pierre R. Lavigne, for the intervener the Hepatitis C Group of Transfusion Recipients & Hemophiliacs.

Dawna J. Ring, for the intervener Janet Conners (Infected Spouses & Children) Association.

The judgment of the Court was delivered by

1 CORY J. — What limits, if any, should be imposed upon the findings of a commission of inquiry? Can a commission make findings which may indicate that there was conduct on the part of corporations or individuals which could amount to criminal culpability or civil liability? Should different limitations apply to notices warning of potential findings of misconduct? It is questions like these which must be considered on this appeal.

Factual Background

2 More than 1,000 Canadians became directly infected with Human Immunodeficiency Virus (HIV) from blood and blood products in the early 1980s. Approximately 12,000 Canadians became infected with Hepatitis C from blood and blood products during the same time period. This tragedy prompted the federal, provincial and territorial ministers of health to agree in September of 1993 to convene an inquiry which would examine the blood system.

3 On October 4, 1993, pursuant to Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11 (the Act), the Government of Canada appointed Krever J.A. of the Ontario Court of Appeal (the Commissioner) to review and report on the blood system in Canada. Specifically, the Order in Council directed the Commission to:

> ... review and report on the mandate, organization, management, operations, financing and regulation of all

Philip S. Tinkler, pour l'intervenante la Société des survivant(e)s d'hépatite C.

Pierre R. Lavigne, pour l'intervenante Hepatitis C Group of Transfusion Recipients & Hemophiliacs.

Dawna J. Ring, pour l'intervenante Janet Conners (Infected Spouses & Children) Association.

Version française du jugement de la Cour rendu par

LE JUGE CORY — Quelles limites, s'il y a lieu, convient-il d'imposer aux conclusions d'une commission d'enquête? Une commission peut-elle tirer, quant à la conduite de sociétés ou de particuliers, des conclusions assimilables à des déclarations de responsabilité civile ou pénale? Y a-t-il lieu d'imposer des limites différentes aux préavis annonçant l'éventuelle imputation d'une faute? Voilà le genre de questions qui doivent être examinées dans le présent pourvoi.

Contexte factuel

Plus de 1 000 Canadiens ont été directement infectés par le virus de l'immunodéficience humaine (VIH) véhiculé par le sang et les produits sanguins au début des années 1980. Environ 12 000 Canadiens ont été infectés par le virus de l'hépatite C véhiculé par le sang et les produits sanguins au cours de la même période. Cette tragédie a poussé les ministres fédéral, provinciaux et territoriaux à s'entendre en septembre 1993 sur la création d'une commission d'enquête chargée d'examiner le système d'approvisionnement en sang.

Le 4 octobre 1993, en vertu de la partie I de la *Loi sur les enquêtes*, L.R.C. (1985), ch. I-11 (la Loi), le gouvernement du Canada a chargé le juge Krever, de la Cour d'appel de l'Ontario (le commissaire), de faire enquête et rapport sur le système d'approvisionnement en sang au Canada. Le décret ordonnait expressément à la commission de:

> ... faire enquête et rapport sur le mandat, l'organisation, la gestion, les opérations, le financement et la

B. The Scope of a Commissioner's Power to Make Findings of Misconduct

34 A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson,Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:

> A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished.

Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by

B. L'étendue du pouvoir du commissaire de conclure à l'existence d'une faute

Une commission d'enquête ne constitue ni un procès pénal, ni une action civile pour l'appréciation de la responsabilité. Elle ne peut établir ni la culpabilité criminelle, ni la responsabilité civile à l'égard de dommages. Il s'agit plutôt d'une enquête sur un point, un événement ou une série d'événements. Les conclusions tirées par un commissaire dans le cadre d'une enquête sont tout simplement des conclusions de fait et des opinions que le commissaire adopte à la fin de l'enquête. Elles n'ont aucun lien avec des critères judiciaires normaux. Elles tirent leur source et leur fondement d'une procédure qui n'est pas assujettie aux règles de preuve ou de procédure d'une cour de justice. Les conclusions d'un commissaire n'entraînent aucune conséquence légale. Elles ne sont pas exécutoires et elles ne lient pas les tribunaux appelés à examiner le même objet. La nature et les conséquences limitées des enquêtes ont été correctement décrites dans l'arrêt *Beno c. Canada (Commissaire et président de la Commission d'enquête sur le déploiement des Forces armées canadiennes en Somalie)*, [1997] 2 C.F. 527, au par. 23:

> Une enquête publique n'est pas du tout un procès civil ou criminel [. . .] Dans un procès, le juge assume un rôle juridictionnel et seules les parties ont la responsabilité de présenter la preuve. Dans une enquête, les commissaires sont dotés de vastes pouvoirs d'enquête pour accomplir leur mandat d'enquête [. . .] Les règles de preuve et de procédure sont donc considérablement moins contraignantes dans le cas d'une commission d'enquête que dans le cas d'une cour de justice. Les juges décident des droits visant les rapports entre les parties, une commission d'enquête ne peut que «faire enquête» et «faire rapport» [. . .] Les juges peuvent imposer des sanctions pécuniaires ou pénales; la seule conséquence susceptible de découler d'une conclusion défavorable de la Commission d'enquête [. . .] est que des réputations pourraient être ternies.

Par conséquent, même si les conclusions d'un commissaire peuvent avoir un effet sur l'opinion publique, elles ne peuvent entraîner de conséquences ni au pénal ni au civil. En d'autres termes, même s'il se peut qu'elles soient perçues par le public comme des déterminations de responsabilité, les conclusions d'un commissaire ne sont ni

Annex 31

Australia, High Court of Australia, *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 (extract)

Available at:

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1982/31.html

High Court of Australia

Victoria v Australian Building Construction Employees' & Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25 (11 May 1982)

HIGH COURT OF AUSTRALIA

VICTORIA v. AUSTRALIAN BUILDING CONSTRUCTION EMPLOYEES' AND BUILDERS LABOURERS' FEDERATION [1982] HCA 31; (1982) 152 CLR 25

Crown - Constitutional Law (Cth) - Practice

High Court of Australia

Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4), Aickin(5), Wilson(6) and

Brennan(7) JJ.

CATCHWORDS

Crown - Royal Commission - Validity - Inquiry and report on commission of criminal offence - Contempt of court - Tendency of public proceedings of duly constituted Royal Commission to interfere with administration of justice.
Constitutional Law (Cth) - Powers of Federal Parliament - Judicial power of Commonwealth - Federal Court of Australia - Jurisdiction - Power to restrain proceedings of State Royal Commission - Power to punish for contempt of Federal Court proceedings constituted by proceedings of State Royal Commission - The Constitution (63 & 64 Vict. c.12) ss.51(xxxv), 76, 77, 109 - Federal Court of Australia Act 1976 (Cth), ss. 23, 31.

Practice - High Court - Appeal from Federal Court - Objection to competency - Appeal not to lie from Federal Court in matter arising under Pt VIII of Conciliation and Arbitration Act or for contempt of Federal Court in relation to proceedings under that Act - Injunction to restrain apprehended contempt of Federal Court proceedings for deregistration of organization under Pt VIII - Alleged contempt in unrelated proceedings - Whether judgment in respect of contempt of Federal Court - Federal Court finding of contempt - Whether conclusive - Federal Court of Australia Act 1976 (Cth), ss. 23, 31, 33 - Conciliation and Arbitration Act 1904 (Cth), ss. 118A, 118B, 143.

course of justice"; were this to occur the Crown would, as his Honour observed, be held to have exceeded its powers. But nothing has been pointed to as supporting such a view of the present inquiry. (at p67)

19. That the foregoing should represent the state of the Australian authorities is scarcely surprising; and this because letters patent to a commissioner requiring him to inquire into and report upon whether crimes have been committed do just that and no more. The Commissioner by accepting the commission no doubt becomes subject to certain obligations but no rights or obligations of others are affected by the issue of the letters patent. Grave consequences may, of course, ensue from their issue: persons may be required to attend and be subjected to extensive questioning in public and on oath, but this will flow from statutory enactment and not directly from any exercise of prerogative power; persons may suffer greatly in their reputation because of what is said of them in the proceedings of the commission, but if they are denied their normal remedy in defamation this again will be because of statutory enactment and not the exercise of prerogative power; if the executive chooses to publish the Commissioner's report, as by laying it before Parliament, that too may inflict great and perhaps irremediable harm upon those of whom it speaks ill, but it will not be the issue of the letters patent but the use ultimately made of the report by the Executive that will be the cause. The appointment of a commissioner to inquire into and report upon the commission of a crime creates no prerogative criminal court; his report can neither commit anyone nor involve those consequences which a curial finding of guilt entails. The only direct consequence of his reported conclusion that a particular person has committed a crime is that the mind of the executive is informed of his conclusion. The legal consequences are no different from those which would follow were some private person to choose to inquire of his own motion into the circumstances of a crime and then to inform the executive of his conclusions. It is only the weight which the executive is likely to attach to the two conclusions that will differ. The Commissioner's report will carry immensely more weight because it comes from one who has been selected by the executive and upon whom statute law has conferred ancillary compulsive powers and immunities to aid him in his inquiry. Those ancillary powers and immunities have been granted by Parliament and their validity cannot be challenged nor, as Dixon J. observed in McGuinness (1940) 63 CLR, at p 99 , will their existence prejudice the lawfulness of a commission of inquiry which finds itself armed with them. (at p68)

20. One submission made on behalf of the applicant was that McGuinness might be distinguished because of the contrast between the terms of the letters patent in that case and those in the present. The instant letters patent certainly direct the Commissioner to inquire into and report upon whether activities contrary to law have been engaged in and include a not very happily phrased direction as to the quality of the evidence upon which findings should be based. But they are not, on this score, distinguishable in essentials from the terms of the inquiry which was in question in McGuinness; its terms were, if anything, more specific in requiring that the commission of particular criminal acts should be inquired into and reported upon. (at p68)

Annex 33

Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press, 2006 reprint of the 1953 original) (extract)

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

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WITH A FOREWORD BY

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"BEST EVIDENCE" RULE

As a general rule, to quote the Final Report of the sole Commissioner of the United States Domestic Commission established pursuant to the Convention with Spain of February 17, 1834:—

"Each claimant was required to produce the highest evidence, which the nature of his claim admitted, to establish the allegations of his memorial." [81]

Where evidence of better quality should be available and its non-production is not satisfactorily explained, this will weigh against the party whose allegations may either be proved or disproved by such evidence.[82] Where documentary evidence should be available, this must be produced.[83] The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production.[84]

charge should submit evidence of the highest and most conclusive character." ICJ: *Corfu Channel Case* (Merits) (1929) *ICJ Reports 1949*, p. 4, at p. 17. A charge of less gravity, it seems, may be substantiated with less evidence.

Cf. also the slender requirement of proof in a question of minor importance in the issue of the case, Mex.-U.S. G.C.C. (1923): *Acosta Case* (1928) *Op. of Com. 1929*, p. 121, at p. 121. See also *supra*, p. 309, note 30.

[81] U.S. Domestic Commission, Spanish Claims (Act of 1836): *Final Report* (1838) 5 *Int.Arb.*, p. 4542, at p. 4544.

[82] Mex.-U.S. G.C.C. (1923): *McCurdy Case* (1929) *Op. of Com. 1929*, p. 137, at p. 141; *Pomeroy's El Paso Transfer Co. Case* (1930) *Op. of Com. 1931*, p. 1, at p. 6.

Cf. Mex.-U.S. Cl.Com. (1868): *La Abra Silver Mining Co. Case* (1875) 2 *Int.Arb.*, p. 1324. Umpire relied on "respectable" testimony, although he recognised that evidence, presumably available, in the form of books or reports from the company had, without explanation, not been produced (p. 1328). The claim was subsequently discovered to be a fraud and the money awarded was returned to Mexico. See *infra*, p. 359.

[83] Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930) D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109: "Thus, in the case of a contract, there is a principle which is almost universally admitted and with which I am in entire agreement, that, in general, both the existence and the terms of the contract must be established by a written document signed by the parties, for in making a contract it should always be possible to reduce it to writing, and this, moreover, is the common practice of civilised mankind." See footnote 84.

U.S. Domestic Commission, Spanish Claims (Act of 1836): *Final Report* (1838) 5 *Int.Arb.*, p. 4542, at p. 4544.

See also the first two cases cited in the preceding footnote.

[84] *Pomeroy's El Paso Transfer Co. Case* (1930) *loc. cit.*, at p. 6. Claim for payment from Mexican Government for alleged services rendered at latter's order. No evidence submitted except two affidavits from members of the claimant company. Held that at least a written order should have been required from the Mexican authorities. The decision in this case concerned only the problem of proof. Even for an international agreement between two States the written form is not necessary (see PCIJ: *Legal Status of Eastern Greenland Case* (1933) D.O. by Anzilotti, A/B. 53, p. 91). *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923) 1 UNRIAA, p. 369, at p. 393. *Cf. Lamu Case* (1889) 5 *Int.Arb.* p. 4940, at p. 4942.

" But in the case of a tort or a criminal matter it is obviously almost always impossible to have any document attesting the facts." [85]

Much, however, depends upon the circumstances of the case as to the amount of evidence that may be available.[86] While a Government cannot rely on its own lack of power to procure evidence as an excuse for the non-production of available evidence when such power could easily be obtained,[87] the collecting of evidence for an international dispute is not a valid reason for violating the rights of another State.[88]

In general, therefore, as the British-Mexican Claims Commission (1926) said with regard to the amount of evidence to be adduced by the claimant:—

" He is to create the conviction that he has earnestly tried to place all existing evidence at our disposal," [89]

although, as was said by the same Commission in the *Odell Case* (1931):—

" The Commission also realise that the weighing of outside evidence, if any such be produced, may be influenced by the degree to which it was possible to produce proof of a better quality. In cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court

[85] Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930), D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109.

[86] Thus in a case where the claimant complained of being injured by the derailment of a train, the Brit.-Mex. Cl.Com. (1926) said: " The wrecking of a military train by revolutionaries in the neighbourhood of one of the principal towns of the country, is a fact that could hardly have passed unnoticed. It must have left some trace in the archives of the Railway Company and in the contemporary press. Mr. Odell relates that on the fatal spot itself he was attended to by a surgeon, that the Superintendent of the Railway Company at Puebla also spoke to him at the scene of the derailment, that he was as soon as possible taken to the Hospital at Puebla, that he resumed work nine months later, and that finally, in June, 1912, he was given a certificate of dismissal on account of his disability to serve. It is difficult to believe that none of those sources could furnish confirmation of one or more of the facts alleged by the claimant ". (*Odell Case* (1931) *Further Dec. & Op. of Com.*, p. 61, at pp. 63-4). *Cf.* U.S.-Ven. M.C.C. (1903): *Gage Case*, *Ven.Arb. 1903*, p. 164, at p. 167: " From the nature of the facts as to the treatment of prisoners by their gaoler, it will always be difficult to find other witnesses besides the prisoners themselves."

[87] Germ.-U.S. M.C.C. (1922): *Lehigh Valley Railroad Co. Case* (1933) *Dec. & Op.*, p. 1084, at pp. 1126-7.

[88] *Cf.* ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports*, *1949*, p. 1, at pp. 34-35.

[89] *Gill Case* (1931), *Further Dec. & Op. of Com.*, p. 85, at p. 90.

can be more easily satisfied than in cases where no such endeavour seems to have been made." [90]

The general principle requiring the best available evidence is thus tempered by considerations of possibility.[91]

CIRCUMSTANTIAL EVIDENCE

In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence. In the *Corfu Channel Case* (Merits) (1949), before the International Court of Justice, Judge Azevedo said in his dissenting opinion:—

"A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses.

"It would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risks of occasional errors, a court of justice must be content." [92]

This part of his opinion is in agreement with the majority decision, which, in admitting proof by inferences of fact (*présomptions de fait*) or circumstantial evidence, held that:—

"This indirect evidence is admitted in all systems of law, and its use is recognised by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion . . . The proof may be drawn from inferences of fact [*présomptions de fait*], provided that they leave *no room* for reasonable doubt." [93]

[90] *Ibid.*, p. 61, at p. 63.

[91] *Cf.* also ICJ: *Corfu Channel Case* (Merits) (1949); *ICJ Reports, 1949*, p. 4, at p. 18. In case one State is the victim of an unlawful act committed within the exclusive territorial jurisdiction of another State, "the fact of this exclusive territorial control exercised by one State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence."

[92] *ICJ Reports, 1949*, p. 4, at pp. 90–91.

[93] *Ibid.*, at p. 18. Italics of the Court. From the established fact that Albania kept a strict watch over the Corfu Channel during the whole period when the mines could have been laid there, and the established fact that any laying of mines in the Channel during that period would have been detected from the observation posts set up in Albania, the "Court draws the conclusion that the

Annex 34

Mya Kay Tu, *Records of Royal Tradition* (Myanma Padathar Publishing House, Yangon, 1966) (extract)

(Unofficial Translation)

Kala Wun (The Minister for Kala) **Page. 297**

King Mindon, a visionary king, showed his compassion to both his subjects and foreigners living in the country without any discrimination. He allowed people for those who were different religions and ethnicities to practice their own belief and customs. Throughout the country, various places of worship such as Church, Chinese Temple, and Muslim mosques were constructed under his leadership.

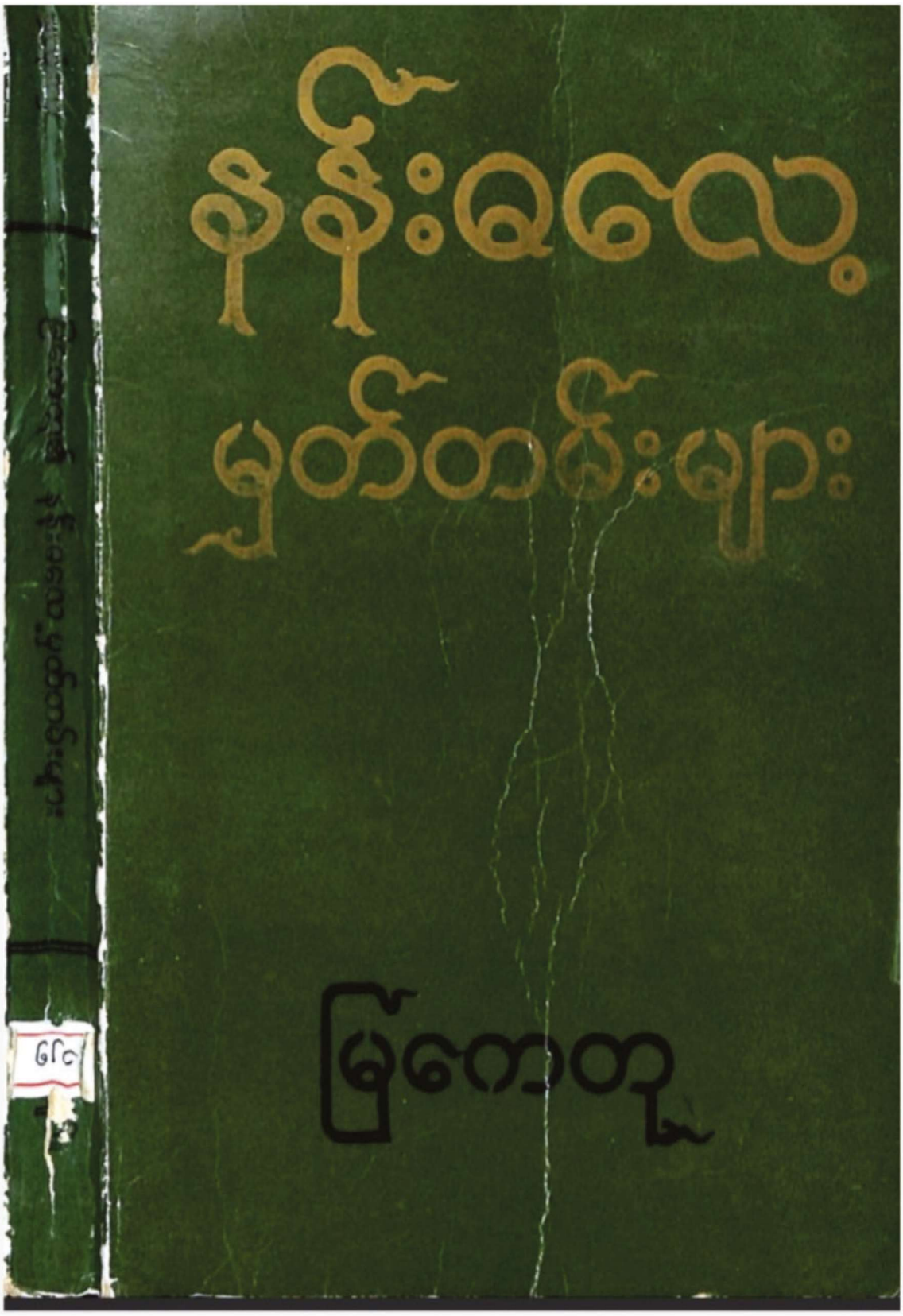
This led to him being highly regarded and respected by people from other countries. In matters concerning foreigners, he often appointed to those as an administrative personnel who could assist the country. For instance, officials like the **Kala Wun** (the Minister for Kala), the Ponnar Wun (the Minister of Braman Devotee) and Chinese ministers were appointed to represent and advocate for the interests of their respective communities.

Kala Wun (the Minister for Kala) is the position of administrative official who works for the interests of foreigners, Muslims, the different ethnicity residing in the state.

Reference:

Mya Kay Tu, **"Records of Royal Tradition,"** Myanma Padathar Publishing House, Yangon, 1966, p. 297.

2



3

ပုံနှိပ်ခြင်း

ပထမအကြိမ်။ ။၁၉၆၆ ခု၊ ဒီဇင်ဘာလ၊ အုပ်ရေ—၂၀၀၀
ဒုတိယအကြိမ်။ ။၁၉၇၁ ခု၊ ဒီဇင်ဘာလ၊ အုပ်ရေ—၂၀၀၀

ဘာသောက်

ဘုသစ်နှင့်သားများ

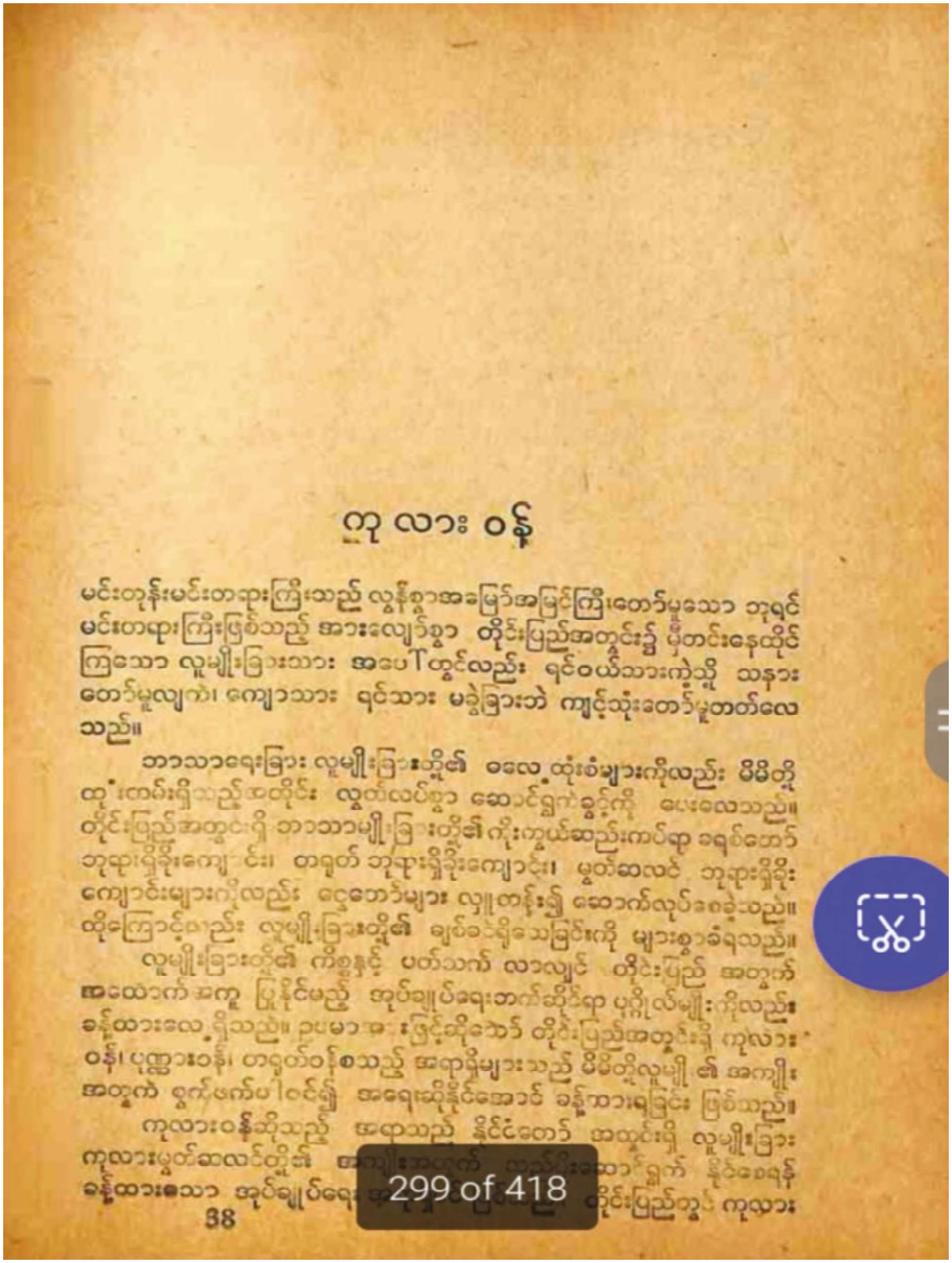
မျက်နှာဖုံး

ကိုစံတိုး

အတွင်းရိုက်

ချင်းတွင်းရောင်စုံ

ဒေါ်မိမိအေး (၀၁၁၇၀-မြဲ) မြန်မာ့ပဒေသာ စာပေတိုက်၊ ၂၄၉၊ ကျိုက္ကဆံလမ်း၊ ကျောက်မြောင်း၊ တာမွေစာတိုက် ရန်ကုန်မြို့က ထုတ်ဝေ၍၊ ဦးလှသန်း (၀၀၃၆-မြဲ) စည်ပင်သာယာပုံနှိပ်တိုက် ၆၄၊ ၁၂၄လမ်း၊ တန်ဖောင်ကလေး၊ ရန်ကုန်က ရိုက်နှိပ်သည်။



ကုလားဝန်

မင်းတုန်းမင်းတရားကြီးသည် လွန်စွာအမြော်အမြင်ကြီးတော်မူသော ဘုရင်မင်းတရားကြီးဖြစ်သည့် အားလျော်စွာ တိုင်းပြည်အတွင်း၌ မိုတင်းနေထိုင်ကြသော လူမျိုးခြားသား အပေါ်တွင်လည်း ရင်ဝယ်သားကဲ့သို့ သနားတော်မူလျက်၊ ကျေသား ရင်သား မခဲခြားဘဲ ကျင့်သုံးတော်မူတတ်လေသည်။

ဘာသာရေးခြား လူမျိုးခြားတို့၏ ဓလေ့ထုံးစံများကိုလည်း မိမိတို့ထုံးကမ်းရှိသည့်အတိုင်း လွတ်လပ်စွာ ဆောင်ရွက်ခွင့်ကို ပေးလေသည်။ တိုင်းပြည်အတွင်းရှိ ဘာသာမျိုးခြားတို့၏ ကိုးကွယ်ဆည်းကပ်ရာ ခရစ်တော်ဘုရားရှိခိုးကျောင်း၊ တရုတ် ဘုရားရှိခိုးကျောင်း၊ မွတ်ဆလင် ဘုရားရှိခိုးကျောင်းများကိုလည်း ဌေတော်များ လှူတန်း၍ ဆောက်လုပ်စေခဲ့သည်။ ထိုကြောင့်လည်း လူမျိုးခြားတို့၏ ချစ်ခင်ရိုသေခြင်းကို များစွာခံရသည်။

လူမျိုးခြားတို့၏ ကိစ္စနှင့် ပတ်သက် လာလျှင် တိုင်းပြည် အတွက် အထောက်အကူ ပြုနိုင်မည့် အုပ်ချုပ်ရေးဘက်ဆိုင်ရာ ပုဂ္ဂိုလ်မျိုးကိုလည်း ခန့်ထားလေ့ရှိသည်။ ဥပမာအားဖြင့်ဆိုသော် တိုင်းပြည်အတွင်းရှိ ကုလားဝန်၊ ပုဏ္ဏားဝန်၊ တရုတ်ဝန်စသည့် အရာရှိများသည် မိမိတို့လူမျိုး၏ အကျိုးအတွက် စွက်ဖက်ပါဝင်၍ အရေးဆိုနိုင်အောင် ခန့်ထားရခြင်း ဖြစ်သည်။

ကုလားဝန်ဆိုသည့် အရာသည် နိုင်ငံတော် အထွဋ်ရှိ လူမျိုးခြားကုလားမွတ်ဆလင်တို့၏ အကျိုးအတွက် လည်ပိုးဆောင်ရွက် နိုင်စေရန် ခန့်ထားစေသော အုပ်ချုပ်ရေး [illegible] တိုင်းပြည်တွင် ကုလား

Annex 35

Maung Hin Aung, *A History of Burma* (Colombia University Press, 1967) (extract)

A HISTORY OF BURMA

by Maung Htin Aung

Columbia University Press

New York and London

1967

example, for the financial year 1899–1900 the value of exports was approximately 160 millon rupees and the imports 100 million; in 1913–1914, on the eve of the first world war, the value of exports was 390 million, and imports 250 million; and in 1926–1927 the value of exports was 660 million and imports 390 million.

However, as the profits of trade accrued not to the Burmese but to the British companies, and as there was no control of foreign exchange and remittances, all the profits left the country in the form of remittances, of which no statistics were ever compiled. In addition, the salaries of the British and Indian troops, of the British officials, and of the Indian personnel in the clerical services of the government were also remitted to England or to India. The wages of Indian laborers were also sent back to their relations in India. In other words, the Burmese candle was being burned at both ends. Her minerals and her timber were extracted but the money obtained in exchange for her products went out of the country. Thus the economic development of Burma was in reality economic exploitation of the country. In the meantime, the Burmese farmer continued in his downward course. Within two decades of the conquest the majority of the Burmese farmers had lost their lands to the Indian moneylenders, but, even as paid laborers working on the very land they used to own, they had to compete with Indian laborers, who came in thousands. Because of their low standard of living the Indian laborers were able to undercut their Burmese counterparts by accepting lower wages. The desperate position of the Burmese farmer was seen in the occurrence of small peasant rebellions all over the country from time to time. With only swords and spears, the peasants were ready to follow any charlatan who would promise them invulnerability against British bullets.

The obvious measure the British government should have taken was to restrict the immigration of Indian laborers, but again it refused to recognize the separate identity of the Burmese; as Burma was merely an Indian province, it seemed only right that Indians should come and go at will. In other words, just as the British government would not interfere with the exploitive practices of the Indian moneylender, it would not stop the Indian laborer from coming to Burma or prevent him from sending back to India 90 per cent of his wages. Under the kings, the Burmese farmer had worked without respite for nine months of the year; for the remaining three months, which coincided with the hot, dry season, when the ground was parched, the vegetation died, and many trees shed their leaves, he took his vacation. Pooling his surplus wealth with those of his neighbors, he would hold initiation and ear-piercing ceremonies for his sons and daughters, offer ceremonial alms to the monks, and arrange for strolling players to give their performances at the village square. It was the time also of the annual festival at many pagodas nearby, and in his gaily decorated cart he would take his family on a pilgrimage to the pagodas and also to visit friends and relations. The rhythm of his life was broken when he was forced to become a farm laborer, for during the three months of the hot season he would be without any employment and without funds.

A few of the more fortunate among his fellow villagers continued to hold such ceremonies and festivals. The displaced farmer looked back with longing to his past and looked forward with despair to his future; he joined hands with other unfortunates like himself to form a rowdy gang, which created disturbances and fought the police, often turning the joyous social occasion into a crisis of riot and lawlessness. As for the Indian laborer, he blithely went back to his home in South India to find temporary work there, for steamer tickets to India were cheap because the steamship companies were subsidized by the government of India, or he went to the docks, to factories, or to oil fields to obtain employment easily. The Burmese laborer was experienced only in farm work, and with his higher standard of living he could not stay in the congested workmen's quarters of the factories and the oil fields. Within a few years the Burmese villager came to acquire a reputation of being

Annex 36

M. Bedjaoui, “The ‘Manufacture’ of Judgments at the International Court of Justice”, *Pace Yearbook of International Law*, vol. 3 (1991), pp. 29-61 (extract)

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THE "MANUFACTURE" OF JUDGMENTS AT THE INTERNATIONAL COURT OF JUSTICE†

Mohammed Bedjaoui††

INTRODUCTION

The functions of a Judge at the International Court of Justice may be summed up in four verbs: to read, to listen, to deliberate and to decide. It is, you see, not too complicated a profession and yet it may be simplified still more by casting some light upon the most mysterious of the four verbs: deliberate. The reservation of this word to just one of the four functions should not however mislead the reader into considering that there is anything less than deliberate in the others. On the contrary, conscious care attends every stage in the impressively lengthy period of gestation through which any judgment (or advisory opinion) of the Court must pass, and the deliberation properly so-called comes only towards the end. Hence, before describing the various phases of that deliberation, I shall have to perform a lengthy prelude on the theme of the adversary procedure. Some idea has to be given of the mass of materials which, in the course of the proceedings, accumulate in the depot known as the case file, pending their transfer into the processing plant, i.e. the deliberation. These materials derive from various sources and ar-

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† The author wishes warmly to thank Mr. B. Noble, Deputy Registrar of the International Court of Justice, for his precious assistance in the preparation of this article.

EDITOR'S NOTE: At the request of the author, the text of this article remains unedited. With great deference to the esteemed author, we respect and preserve the delicate shades of meaning entrusted to translation by Mr. Noble.

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them. One wonders at times whether certain lengthily thrashed out contentions would have been given any prominence at all if the case had been instituted by an application, when there would have been far less anxiety to leave no stone unturned. This anxiety probably peaks during the preparation of the Counter-Memorials, when each party, having read its opponent's Memorial, will have discovered the chinks in the latter's armour, but will also have realized those in its own. This is perhaps why each party, when its opponent's Counter-Memorial is unveiled, tends to find it necessary that it should cover some areas anew in a Reply. Of the ten or more cases referred to the International Court of Justice by special agreement,[18] eight have run to three rounds of pleadings. It must be said, however, that in several cases the special agreement itself had made provision for such protracted written proceedings.[19]

I may here allow myself a digression considering that the special agreement may also have laid down the time-limits it is proposed to request at each stage of the proceedings, generally six months for each Memorial or Counter-Memorial, this reveals quite a lot about the attitude of states towards judicial settlement. Even taking into account a certain safety-first attitude whereby each special agreement tends to be modelled on previous ones,[20] it is undeniable that making provision for three rounds of pleadings does not evince excessive haste. One may conclude that in these cases one of the main attractions of judicial settlement is its stately pace, and the possibility it affords of being able to put off the solution of a thorny problem for as long as desired. It is of course quite legitimate to avail oneself of this possibility, but then in fairness it must be realized that it may be quite wrong to foist upon the Court itself the reputation of being slow and heavy.

Did I say heavy? In the famous Barcelona Traction case, though it owes its celebrity to the time it lasted rather than for the bulk of its documentation, the pleadings weighed 25 kilo-

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[18] *See e.g.*, Continental Shelf (Libyan Arab Jamahiriya/Malta), 1984 I.C.J. 3 North Sea Continental Shelf Cases (F.R.G./Den.: F.R.G./Neth.), 1969 I.C.J. 4; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1982 I.C.J. 3 (Order).

[19] *See e.g.*, Continental Shelf (Tunisia/Libyan Arab Jamahiriya) 1982 I.C.J. 18.

[20] Jurists, like judges, feel comfortable with precedents which they imagine have smoothed the way for them.

grams. They amounted to 60,776 pages in all, including the annexes. But even in the average case the pleadings are voluminous even if they do not run to such impressive figures. However, the case was far from being an isolated instance. The case between Tunisia and Libya concerning the *Continental Shelf*,[21] and the *Gulf of Maine* case between Canada and the United States,[22] bade fair to snatch the record from *Barcelona Traction* which, moreover, had just managed to beat the *South West Africa Cases*.[23] What is more, even in a case where one of the parties withdrew after the jurisdictional phase,[24] namely that between Nicaragua and the United States, the documentation reached comparable proportions.

The weight of documentation does not necessarily correspond to the weight of the arguments, for at least two-thirds of the bulk consists of annexes, that is, texts produced in support of the contentions sustained in the pleadings. And the more insubstantial the contention, the more support it requires. On the other hand, the more it is substantial, the more documentary evidence should, in principle, be available to support it. Either way, the annexes are bound to proliferate. In large part, moreover, they owe their inclusion to respect for the highly justified demands of the Rules of Court which are framed to insure the authenticity of all documentary evidence.[25] Thus, for example, if a document not readily available is partially quoted, the entire document has to be deposited in the Registry.[26]

In practice, the annexes produced by parties are heterogeneous in the extreme, ranging as they do from the straightforward reproduction of legislative texts to photocopies or transcriptions of historical documents, whether in the original language or in a

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[21] (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment).

[22] Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can./U.S.), 1984 I.C.J. 246 (Judgment).

[23] (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, (Judgment).

[24] *See* Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment).

[25] Rules of Court, art. 65-69 (1978).

[26] *Id.* art. 50, para. 2. "If only parts of a document are relevant, only such abstracts as are necessary for the purpose of the pleading in question need be annexed. A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available." *Id.*

Annex 37

Jennings and Watts, *Oppenheim's International Law* (9th edn, 1996) (extract)

OPPENHEIM'S INTERNATIONAL LAW

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nationality. This is likely particularly to be the case where the grant of nationality is questioned because of alleged non-conformity with international law.[20]

Despite such limitations on the international effects of nationality granted by a state to an individual, a state's own determination that an individual possesses its nationality is not lightly to be questioned. It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes. Furthermore, even where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws.[21]

In general, it matters not, as far as international law is concerned,[22] that a state's internal laws may distinguish between different kinds of nationals – for instance, those who enjoy full political rights, and are on that account named citizens,[23] and those who are less favoured, and are on that account not named citizens. In some Latin-American countries, for example, the expression 'citizenship' has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship, without being divested of nationality as understood in international law.[24] In the United States, while the expressions 'citizenship' and nationality are

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20 The matter arose in several courts in connection with the imposition of German nationality (under a law made in 1938 pursuant to the German–Czech Agreement of 1938) on certain inhabitants of the Sudetenland, in violation of the provisions of the Munich Agreement of 1938: see *Ratz-Lienert and Klein v Nederlands Beheers-Instituut*, ILR, 24 (1957), p 536; *Weber and Weber v Nederlands Beheers-Instituut*, *ibid*, p 431. Other courts have regarded that law and the two treaties as invalid and, for that reason, as not giving rise to a conferment of German nationality which had to be recognised: eg *Amato Narodni Podnik v Julius Keilwerth Musikinstrumentenfabrik*, *ibid*, p 435. Yet others regarded the German law of 1938 as effective to confer German nationality: *Nederlands Beheers-Instituut v Nimwegen and Männer*, ILR, 18 (1951), No 63; *In re Baroness von Scharberg*, *ibid*, No 67; *German Nationality (Annexation of Czechoslovakia) Case*, ILR, 19 (1952), No. 56. In the last case the Federal German Constitutional Court accepted that while as a rule every state was entitled to provide in its own discretion how its nationality was acquired and lost, that discretion was circumscribed by the general rules of international law according to which a state may confer its nationality only upon persons who have some close factual connection with it. See also *North Transylvania Nationality Case* (1965), ILR, 43, p 191. See also § 386, nn 10–14 as to forced naturalisations.

21 Thus in the *Nottebohm* case the ICJ did not question that Nottebohm was, as a matter of the law of Liechtenstein, a national of that country.

22 Unless the state concerned has restricted its liberty of action with regard to these questions by treaty with another state. See also two Advisory Opinions of the Permanent Court, Series B, No 4 (*Nationality Decrees in Tunis and Morocco*) and No 7 (*Acquisition of Polish Nationality*), and the ensuing arbitration between Germany and Poland (noted by Garner, AJ, 20 (1926), pp 130–35), RIAA, 1, p 401.

23 Note the use, in this context, of the term 'citizen' in Art 25 of the Covenant on Civil and Political Rights 1966 (on which, see generally § 440).

24 See, for instance, Arts 39 and 42 of the Constitution of Bolivia 1967; Arts 19 and 22 of the Constitution of Ecuador 1967, which provides for loss of nationality in some cases and suspension of rights of citizenship in other cases; Arts 30 and 34–6 of the Mexican Constitution 1917 (as amended in 1966), and note also Art 37(B), which provides for loss of citizenship (as distinguished from loss of nationality) for such causes as accepting or using titles of nobility which imply submission to a foreign government, for voluntarily serving a foreign government or accepting foreign decorations without permission of Congress, and for rendering assistance to a foreigner or to a foreign country against the nation in any diplomatic claim or before an international tribunal. The distinction between nationality and citizenship was also referred to in

often used interchangeably, the term 'citizen' is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons – such as those belonging to territories and possessions which are not among the states forming the Union – are described as 'nationals'. They owe allegiance to the United States and are United States nationals in the contemplation of international law; they do not possess full rights of citizenship in the United States.[25] It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the Commonwealth it is the citizenship of the individual states of the Commonwealth which is primarily of importance for international law, while the quality of a 'British subject' or 'Commonwealth citizen' is primarily relevant only as a matter of the internal law of the countries concerned.[26]

'Nationality', in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race.[27]

§ 379 Function of nationality Nationality is the principal link between individuals and international law. This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home state, especially on account of one particular right and one particular duty of every state towards all other states. The right is that of protection over its nationals abroad which every state holds, and occasionally vigorously exercises, as against other states; it will be discussed in detail below.[1] The duty is that of receiving on its territory such of its nationals as are not allowed to remain[2] on the territory of other states.[3] Since

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Romano v Comma, AD, 3 (1925–26), No 195, at p 266. In *Procureur de la République v Gova* (1972), ILR, 73, p 565, a French court noted that nationality represented the link between an individual from a particular territory and the international person exercising exclusive authority over it, even though that state accords a special status to inhabitants of certain of its possessions.

25 See s 204 of the Nationality Act 1940, where some persons were described as 'nationals but not [as] citizens'. See also McGovney, in *Legal Essays* (eds Radin and Kidd, 1935), pp 333–74, and in Calif Law Rev, 22 (1933–34), pp 593–635. and Hyde, iii, § 342. The Nationality and Immigration Act 1952 substantially reduced the numbers of nationals who were not citizens, but, in s 308, retained that status for certain limited categories of persons born 'in an outlying possession of the United States'. For an illustration of the distinction between citizenship and nationality in the law of the USA, see *Re Bautista* (1960), ILR, 31, p 323; see also *Van Der Schelling v US News and World Report, Inc* (1963), ILR, 34, p 99. As to the limited status of persons who were formerly 'Italian Libyan citizens', as opposed to full Italian citizens, see *Minister of Home Affairs v Kemali* (1962), ILR, 40, p 191. See also on the distinction between nationality and citizenship, UN Juridical YB (1980), pp 189–91.

26 See § 385.

27 See *Ealing London Borough Council v Race Relations Board* [1972] AC 342, in which the House of Lords distinguished 'national origin' from 'nationality': on which case see Hucker, ICLQ, 24 (1975), pp 284–304. And see Lustgarten, ICLQ, 23 (1970), pp 221–40.

1 § 410. There are exceptional cases in which individuals may be internationally protected otherwise than by the state of which they are nationals: see § 411.

2 See §§ 413–14.

3 See generally Weis, *Nationality and Statelessness*, pp 45–59; Plender, *International Migration Law* (1972), Ch 2; Higgins, *International Affairs*, 49 (1973), pp 344–50; Lung-Chu Chen, *AS Proceedings*, 67 (1973), pp 127–32; Lapidoth, *Israel Year Book on Human Rights*, 16 (1986), pp

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C. Kreß. “The International Court of Justice and the Elements of the Crime of Genocide”, *European Journal of International Law*, Vol. 18 No. 4, 619–629 (2007) (extract)

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The International Court of Justice and the Elements of the Crime of Genocide

Claus Kreß*

Abstract

This article seeks to identify the contribution made by the International Court of Justice (ICJ or Court) to the international criminal law on genocide in its judgment of 26 February 2007 on the Case concerning the Application of the Convention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).[1] *The overall assessment is as follows: while the judgment contains welcome clarification and consolidation of the international criminal law on genocide in several respects, the Court did not fully apprehend the complex structure of the crime. Most importantly, the Court did not provide a coherent explanation for its characterization of the atrocities committed in Srebrenica as genocide. This note will not deal in any detail with the concept of a state act of genocide constituting an internationally wrongful act, the ICJ's factual findings, or its approach to admitting and weighing evidence.*

1 The Court's Self-restraint Regarding International *Criminal* Law

Regarding the sad chain of events that occurred in Bosnia and Herzegovina between 1992 and 1995, the Court declared that it attaches 'the utmost importance to the … legal findings made by the ICTY'.[2] This statement of self-restraint would appear to be part of the Court's judicial policy in responding to what may be called the '*Tadic*

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1 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007 (hereinafter '*Genocide*' case or judgment).

2 *Ibid.*, at para. 403.

EJIL (2007), Vol. 18 No. 4, 619–629 doi: 10.1093/ejil/chm039

groups themselves'.[6] This view mirrors the horrifying historical backdrop to the Genocide Convention[7] – the Holocaust – which is clearly reflected in the *travaux préparatoires* of the Convention.[8] It is not just the history and genesis of genocide, however, that cautions against bringing the isolated perpetrator within the scope of the crime – exceptional circumstances apart. The crime's status as a crime under general *international* law also suggests that a clear *international* dimension must exist in respect of the underlying conduct. This dimension will normally be absent in the case of the lone individual. Equally, categorizing the conduct of a lone individual as genocide would disconnect the crime of genocide from its historical roots as a crime against humanity. The requisite contextual element of all crimes against humanity is that they must occur as part of a systematic or widespread attack against any civilian population.[9] Such a disconnection would not only be highly implausible in light of the historical development of the law, but also for reasons of coherency within the corpus of crimes under international law. Indeed, it would be an oddity to dispense with a context requirement for the crime of genocide, while at the same time emphasizing the special stigma that attaches to this crime.[10]

The general exclusion of the lone perpetrator from the scope of the international crime of genocide is broadly in line with the Genocide Convention case law, and subsequent practice. For example, the District Court of Jerusalem inquired into the overall genocidal campaign masterminded by the Nazi leadership,[11] the Chambers of the International Criminal Tribunal for Rwanda (ICTR) concerned themselves with the question of whether or not there was a 'nationwide' genocide in Rwanda in 1994,[12] and the competent Trial Chamber in the groundbreaking ICTY judgment on the charge of the commission of genocide in Bosnia considered it necessary to make a determination regarding the overall 'criminal enterprise'.[13] This mode of analysis was endorsed by states parties when they adopted the Elements of Crimes under the Statute of the International Criminal Court (ICC Elements).[14] The states parties decided to place the conduct of the individual perpetrator 'in the context of a manifest pattern of similar

6 R. Lemkin, *Axis Rule in Occupied Europe* (1944), at 79 (emphasis added).

7 Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948 (entry into force on 12 Jan. 1951), 78 UNTS 277.

8 In that respect, reference is made to the Summary Records of the meetings of the Sixth Committee of the General Assembly, UNGAOR, 6th Committee, 3rd session, 1948.

9 See in particular Art. 7 of the ICC Statute as the first comprehensive codification of crimes against humanity.

10 In *Prosecutor v. Krstic*, IT-98-33-A, judgment, 19 Apr. 2004, at para. 36, the ICTY Appeals Chamber expressed the following generally held view: '[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium'. This mirrors the characterization of genocide as the 'crime of crimes' in *Prosecutor v. Kambanda*, ICTR-97-23-S, judgment and sentence, 4 Sept. 1998, at para. 16.

11 *Attorney-General of the Government of Israel v. Eichmann*, Judgment of 12 Dec. 1961, 36 *Int'l L Rep* (1968) 79.

12 See the groundbreaking judgment in *Prosecutor v. Akayesu*, ICTR-96-4-T, judgment, 2 Sept. 1998, at para. 469.

13 *Prosecutor v. Krstic*, IT-98-33-T, judgment, 2 Aug. 2001, at para. 549.

14 ICC-ASP/1/3, Pt. II,; pursuant to Art. 9 of the ICC Statute, the Elements of Crimes are to assist the Court in the interpretation and application of Arts 6, 7, and 8.

Annex 39

Thant Myint-U, *Where China Meets India: Burma and the New Crossroads of Asia* (2011) (extract)

WHERE CHINA MEETS INDIA

BURMA AND THE NEW CROSSROADS OF ASIA

THANT MYINT-U

FARRAR, STRAUS AND GIROUX NEW YORK

this way Rangoon grew rich. The Shwedagon remained at the centre of the new, sprawling city, with its tree-lined avenues, lakes and gardens, and the many and handsome homes of its official and business elite. Along the river to the south was a modern downtown, carefully laid out on a grid pattern, with its government and commercial offices, colonnaded shops and hotels, and rows of apartment blocks. A largely English administrative class presided over the colonial apparatus; Scots dominated trade. The big companies of the day – Steel Brothers (rice), the Bombay Burmah Trading Corporation (timber), Burmah Oil, and the Irrawaddy Flotilla Company, were all in Glaswegian hands. And millions of Indians, from every part of the subcontinent, streamed into Rangoon in search of new lives and new opportunities.

The British had initially hoped that Burma might be a back door to China. But for the Burmese, British rule led instead to a much closer connection with India than ever before. Rather than making Burma a separate colony (like Ceylon, now Sri Lanka), the one-time kingdom was annexed to British India, and governed as just another province, no different than, say, Bengal or the Punjab.

In the early twentieth century, Burma enjoyed a higher standard of living than India and was far less densely populated. And as the economy grew, there was a need for cheap labour as well as entrepreneurial and professional skills. All this came from India, with movement into Burma unchecked and for a long time positively encouraged. By the late 1920s Rangoon even exceeded New York as the greatest immigrant port in the world and this influx turned Rangoon into an Indian city, with the Burmese reduced to a minority. There was a mingling of peoples from every part of the subcontinent, from Bengali schoolteachers and Gujarati bankers, to Sikh policemen and Tamil merchants. There were Chinese too, and smaller communities of Europeans, Americans and even Latin Americans (the Chilean poet Pablo Neruda lived in Rangoon briefly in the 1920s). The Cambridge political economist and long-time Burma civil servant J. S. Furnivall invented the term 'plural society' to describe Rangoon's mix of nationalities. Steam ships fastened Rangoon to Calcutta and then, with the start of air travel, Rangoon became a hub for all of Asia. Flights to Sydney from London on British Imperial Airways, or to Jakarta from Amsterdam on KLM, were all routed via Rangoon. World-class schools and a top-notch university helped create a cosmopolitan and politically active middle class.

But then this world came crashing down. First came the Japanese invasion and four years of bitter fighting, including the aerial bombing of Rangoon. Hundreds of thousands of Indians fled. Then in 1948 came independence from Britain, followed immediately by civil war, Rangoon itself at one point being

Annex 40

W. Kaleck and C. Tewindt, “Non-Governmental Organisation Fact-Work: Not Only a Technical Problem”, in M. Bergsmo (ed.), *Quality Control in Fact-Finding* (TOAEP 2013), pp. 403-426 (extract)

Available at:

https://www.fichl.org/fileadmin/fichl/documents/FICHL_19_Web.pdf

Quality Control in Fact-Finding

Morten Bergsmo (editor)

Quality Control in Fact-Finding

Morten Bergsmo (editor)

2013
Torkel Opsahl Academic EPublisher
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and other serious human rights violations, might already qualify as 'genocide'.[54]

On 1 July 1994, the day after the Rwandan Patriotic Front took effective control over the country after halting the genocide, the Security Council established the Commission of Experts on Rwanda[55] to provide the Secretary-General with "its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide".[56] The Commission of Experts on Rwanda, which was serviced by OHCHR in Geneva, gathered information from the UN Human Rights Field Operation in Rwanda (which in late 1994 consisted of only a few human rights officers deployed in Rwanda), the UN Special Rapporteur on Rwanda ('UNAMIR'), and "from the two parties to the conflict thousands of pages of documents, letters, written complaints, testimony and other items (sound and audio-visual recordings) instancing serious violations of international humanitarian law", the value of which varied widely. The Commission of Experts noted that "[s]ome of these documents contain non-exhaustive lists of the principal suspects".[57] The interim report recommended prosecution of the perpetrators of genocide and associated violations by an international criminal tribunal, a recommendation that was acted on by the Security Council on 8 November 1994 by way of resolution 955 establishing the ICTR.[58] As in the former Yugoslavia, information from UN human rights sources provided an early indication of the scale and character of crimes under international law, the parties responsible for the genocide, the relationship between perpetrators and victims in terms of legally designated ethnicity, as well as the names of a certain number of criminal suspects, several months before the ICTR was set up and prosecutors could commence investigations.

It must be recalled that the Security Council investigations differ from investigations deployed under the auspices of the Commission on

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54 *Ibid.*, at para. 79.

55 UN Security Council Resolution 935 *adopted unanimously* on 1 July 1994; S/RES/1994.

56 *Ibid.*

57 Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994); UN Doc. S/1994/1405 of 9 December 1994 at para. 54.

58 *See generally* Lyal S. Sunga, "The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda / A Note, in Human Rights Law Journal", 1995, vol. 16, no. 1–3, pp. 121–124.

McCarthy asked whether NGOs should adopt formal fact-finding procedures.[9] Also in the early 1980s, the Netherlands Institute of Human Rights ('SIM') organised a conference on human rights fact-finding in which they especially focused on NGOs and the development of procedural rules to improve future fact-finding efforts.[10] Thus, the problems with NGO fact-finding, the lack of uniform standards and the possible need for them have been discussed for a few decades already, even though literature on the topic has been scarce.[11]

The emergence of the international criminal tribunals and extraterritorial cases in domestic courts has introduced a different standard for doing human rights fact-work internationally and added a new layer to this debate. Fact-finders now have to face the questions of whether, how, and to what extent their fact-work could or should be compatible with such criminal justice standards. For example, Talsma has undertaken a study comparing the rules of evidence of the *ad hoc* criminal courts to the rules adopted by UN human rights fact-finding missions. She found that while fact-finding missions admit almost all evidence, stricter rules apply in the court.[12] Since starting to co-operate with the prosecutors at international tribunals, NGOs now face this dilemma of managing this difference as well.

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9 D. Weissbrodt and J. McCarthy, "Fact-Finding by International Nongovernmental Human Rights Organizations", in *Virginia Journal of International Law*, 1981, vol. 22, no. 1.

10 Studie en Informatiecentrum Mensenrechten, SIM Newsletter, 1984, no. 6, p. 1; a more in-depth discussion of the report can be found in Robert Charles Blitt, "Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation", in *Buffalo Human Rights Law Review*, 2004, vol. 10, pp. 334–339.

11 Regarding governmental fact-finding, former UN Rapporteur Philip Alston specifically calls for more engagement with the topic, pointing out that the proliferation of fact-finding missions might be viewed as a development as significant for the human rights field as the establishment of international and mixed criminal courts. Philip Alston, "Commissions of Inquiry into Armed Conflict, Breaches of The Laws of War, and Human Rights Abuses: Process, Standards, and Lessons Learned", in *American Society of International Law Proceedings*, 2011, vol. 105, p. 84.

12 Lara Talsma, "UN Human Rights Fact-Finding: Establishing Individual Criminal Responsibility?", in *Florida Journal of International Law*, 2012, vol. 24.

Efforts have been made to adapt criminal investigation principles for the purposes of human rights fact-finders.[13] Others have attempted to grapple with the different evidentiary standards generally adopted in fact-finding missions and in a criminal courtroom.[14] From such manuals, NGOs can learn technical advice about how to estimate the credibility of their reports, to develop a witness statement file, how to document a physical injury, or how to maintain a 'chain of custody' for possibly forensic evidence (that is, including dates, places, and signatures from everyone that has been in possession of the material, as well as a label where the evidence is from, with appropriate packaging material). The ICTY, for example, has developed the following concrete advice for NGOs that want to contribute to their criminal investigations:

> [I]nstitutions and agencies should be encouraged to record the details of potential witnesses, including and especially their future contact information, but should be encouraged not to attempt to take comprehensive witness statements. Rather, they should simply record in a general way the statements of potential witnesses based on their own direct experiences, and they should understand that the taking of statements is a professional process that is best left to the criminal justice system and to trained investigators.[15]

While such manuals can give guidance to NGOs when they want their materials to contribute to courtroom procedures, it is recognised that NGOs will have to determine whether such guidelines indeed suit them in the particular situation that they are in.[16] Clearly, fact-work in preparation for a legal case is different from fact-work done for the traditional purposes of human rights NGOs. Two full days may be required

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[13] Dermot Groome, *The Handbook of Human Rights Investigation: A Comprehensive Guide to the Investigation and Documentation of Violent Human Rights Abuses,* Northborough, MA, Human Rights Press, 2001.

[14] Stephen Wilkinson, "Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions", Geneva Academy of International Humanitarian Law and Human Rights, p. 5, available at http://www.geneva-academy.ch/docs/Standards%20of%20proo%20report.pdf, last accessed on 23 August 2013.

[15] ICTY, "Manual on Developed Practices", UNICRI Publisher, Turin, Italy, 2009, p. 16, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf, last accessed on 23 August 2013.

[16] In his introduction, Groome explicitly writes that NGOs will have to decide whether to adopt the advice. Groome, 2001, see *supra* note 13.

Annex 41

D. Ghosh, "Burma–Bengal Crossings: Intercolonial Connections in Pre-Independence India", *Asian Studies Review*, vol. 40 (2016), pp. 156-172 (extract)

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Burma–Bengal Crossings: Intercolonial Connections in Pre-Independence India

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ABSTRACT

The large-scale movement of people between Burma and Bengal in the early twentieth century has been explored recently by authors such as Sugata Bose and Sunil Amrith who locate Burma within the wider migratory culture of the Indian Ocean, the Bay of Bengal and Southeast Asia. This article argues that the long and historical connections between Bengalis and Burmese were transformed by the British colonisation of the region. Through an analysis of selected literary texts in Bengali, some by well-known and others by obscure writers, this article shows that, for Indians, Burma constituted an elsewhere where the fantastic and superhuman were within reach, and caste and religious constraints could be circumvented and radical possibilities enabled by masquerade and disguise.

KEYWORDS

Bengal; Burma; Saratchandra Chattopadhyay; cultural studies; anti-colonialism; migration; diasporas

> This is Burma and it is unlike any land you know about.
>
> Rudyard Kipling, *Letters from the East* (1898)

Introduction

Burma is a spectre that haunts the story of the east coast of India. Its geographical placement as one of India's closest neighbours, sharing a thousand kilometres of common borders, is in contradiction to the elusive shadow that it intermittently casts on the emotional cartography of eastern India and, for the purposes of this paper, particularly Bengal. This lacuna in the shared and layered histories of the Eastern Indian Ocean has as much to do with shared colonial pasts as with the tendency of modern nation-states to treat relatively recent borders as sacred and inviolable, thereby denying all of the flows, movements, connections, fluidities and uncertainties that are the very stuff of human history and the imbrication of social, cultural and emotional worlds.

Yet these absences may be riven with traces that emerge vividly from family and oral histories, memories and stories of people who lived or grew up in Burma before returning or being forced to repatriate to India. I grew up knowing that my father, who had run away from home in Dhaka, Bangladesh to avoid a medical career, ended up in Burma teaching

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destinations for well-off Burmese (Myint-U, 2013, p. 251). Much later, Aung San Suu Kyi herself was educated at the Lady Shri Ram College in Delhi (Nobelprize.org, 2014). The unstable administrative structures and political uncertainties in the mid-nineteenth century prompted British administrators to try to centralise the bureaucracies of Bengal and Burma; thus Judson College and Rangoon College were both affiliated with Calcutta University. The monk U Ottama, who opposed the separation of Burma from British India (Ottama, 1931), was associated with the Bengal National College and had studied in Calcutta for three years before travelling around India. He also introduced the wearing of clothes made from handwoven Burmese cloth, or *pini*, inspired by Gandhi's promotion of *khadi* (Sengupta, 2012, p. 116). It was through him that much of the contact between the Burmese and the Bengali nationalists (such as those affiliated with the Indian National Congress) was maintained.

By 1911, more than 100,000 people were arriving in Burma from India every year by steamship from various eastern ports, doing everything from pulling rickshaws, working in docks and rice mills, trading in rice and other commodities, staffing railways and customs offices, and financing the development of rice paddy cultivation throughout the Irrawaddy River delta (Amrith, 2013, p. 104; Pandian & Mariappan, 2014, p. 49). Historian Thant Myint-U writes:

> At the beginning of the 20th century, Indians were arriving in Burma at the rate of no less than a quarter million per year. The numbers rose steadily until the peak year of 1927, [when] immigration reached 480,000 people, with Rangoon exceeding New York City as the greatest immigration port in the world. This was out of a total population of only 13 million; it was equivalent to the United Kingdom today taking 2 million people a year. (Myint-U, 2006, pp. 185–187)

By then, in most of the largest cities in Burma – Rangoon (Yangon), Akyab (Sittwe), Bassein (Pathein), Moulmein – the Indian immigrants formed a majority of the population. By 1900, Rangoon was more or less an Indian city, and it remained so until the 1930s. More Indian migrants travelled to Burma than any other destination, between 12 and 15 million in the decades between 1880 and 1940 (Amrith, 2013, p. 122).

Colonial Fictions and the "Golden Land"

Just like my father and my school principal, all of these people had stories that disappeared into the ebb and flow of history. Yet some resonances sound down the decades, not only in these family remembrances but also in the literature of the period. British bureaucrats, travellers and explorers, of whom Orwell is perhaps the most famous, wrote of Burma. The first European explorers who visited Burma during the sixteenth and seventeenth centuries described in their ships' logs and private journals societies and cultures quite different from any they had encountered before (Selth, 2012, p. 5). Their exoticisation of Burma portrayed a land of mighty rivers, swaying palm trees, golden pagodas and gentle people.

George Orwell, later renowned as the author of *Animal Farm* and *1984*, served with the Indian Imperial Police in Burma for five years and was one of the few writers of the early twentieth century who found the experience of imperialism in Burma perplexing and unsettling. In his famous story *Shooting an Elephant*, he recalls being "hated by large numbers of people – the only time in my life that I have been important enough for this to happen to me". Theoretically, and secretly, he was for the Burmese and against the British. Nevertheless,

Annex 42

F. D'Alessandra, "The Accountability Turn in Third Wave Human Rights Fact-Finding", *Utrecht Journal of International and European Law*, vol. 33 (2017) (extract)

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RESEARCH ARTICLE

The Accountability Turn in Third Wave Human Rights Fact-Finding

Federica D'Alessandra*

Whereas the characteristics of human rights fact-finding largely vary depending on the typology and scope of the entity that carries it out, consensus seems to be developing that a common set of challenges to human rights fact-finding exists. This is especially so when carried out under United Nations auspices. For example, it has long been acknowledged that the very nature of the institution, sitting as it does at the crossroads of international politics, as well as the seemingly irresolvable tension between calls for human rights protection on the one hand, and State sovereignty on the other, present some structural challenges to human rights fact-finding. Furthermore, issues of coordination between the United Nations and other institutions (such as international governmental and non-governmental organisations, or international tribunals), as well as what some have called a 'lack of institutional memory' arguably often feature as regular traits among fact-finding mechanisms. In recent years, a further set of challenges has been added to the mix by additional requirements, featuring increasingly often in mandates, that instruct fact-finding mechanisms to make further determinations of facts (concerning, *e.g.*, the identity of those most responsible for the violations being documented, or the existence of an armed conflict) and even consider questions of law (*e.g.* the qualification of the violations as crimes under international law). Building on an expanding body of scholarship on the subject, as well as the author's own experience with fact-finding efforts sitting at the intersection between traditional international human rights law and international criminal justice, this article argues: (i) that human rights fact-finding has evolved in three waves; (ii) that the third wave of human rights fact-finding is characterised by an "accountability turn"; and that (iii) this turn has brought about an additional set of challenges to the already thin-stretched capacity of UN human rights inquiries. By virtue of the arguments advanced in this article, the author posits that updating and solidifying the human rights fact-finding methodology can assist United Nations inquiries and other human rights fact-finders in strengthening the credibility of their findings.

Keywords: Fact-finding; Human rights; International criminal law; Humanitarian law; United Nations; OHCHR; Human Rights Council; Security Council; Methodology; Standards; Best-practices; Investigations; Accountability

I. Introduction: Contextualising Human Rights Documentation

As widely recognised in transitional justice scholarship, since the late 1980s and early 1990s transitional justice has emerged as a new field of study, presenting the fields of democratisation and atrocity prevention with a new set of policy tools.[1] Against this background, the role of testimony and the documentation of human rights

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[1] Ruti G Teitel, *Transitional Justice* (OUP 2000); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Company 2011); Ruti G Teitel, *Globalizing Transitional Justice* (OUP 2014); M Cherif Bassiouni, 'Editorial' (2014) 8 International Journal of Transitional Justice 325; Laurel E Fletcher and Harvey M Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals' (2015) 7 Journal of Human Rights Practice 177; Scott Strauss, *Fundamentals of Genocide and Mass Atrocity Prevention* (US Holocaust Memorial Museum 2016). See also The White House Office of the Press Secretary, 'Presidential Study Directive on Mass Atrocities (PSD-10)' (4 August 2011)

process, thus conditioning the upholding of these values to political oversight'.[56] This reality impacts both mandates and resources. The strength of the mandate conferred upon these investigative mechanisms, for example, (as well as the adequacy of the resources they will receive), largely depends upon whether the mandate is truly intended to be carried out, or whether the fact-finding mechanisms has been established as a gag-measure in response to a crisis.[57] Bassiouni offers an explanation of why this might be the case, 'because the values of truth and justice have become part of the tools of *realpolitik*'.[58] He observed:

> (…) nothing can be done to overtly contradict these values. Consequently, less than obvious ways must be devised to ensure that these missions will, when politically convenient, give only the appearance of pursuing these values while at the same time not generating politically unwanted results.[59]

The best way to do this is to ensure that the mechanism is chronically understaffed and under-resourced. Most fact-finding missions have in fact very limited resources, sometimes none at all,[60] and are supported by staff often on a part-time basis.[61] This under-staffing and under-resourcing has to impact their *modus operandi*:

> (…) these missions seldom have the resources or the ability to do effective field-work or empirical research. Consequently, they rely heavily on the NGOs, government reports, and the media. Many rapporteurs, or whatever their actual designation may be, produce reports even though they never set foot in the territory where their investigation takes place. (…) The Security Council may establish a Commission because it sees the need, at that time, for that issue to go through a particular process, (…) function (…) essentially window dressing [it].[62]

The mostly *ad hoc* issuance of the mandates, however, causes arbitrariness and unpredictability concerning decisions to issue, extend, amend or terminate mandates,[63] and infrequent continuity in follow-up to missions.[64]

VI. The Challenges of Third Generation United Nations Human Rights Fact-finding

At first glance, it appears uncanny how little has changed since Bassiouni addressed these issues more than fifteen years ago. Whilst the lack of significant progress, at least institutionally, may speak at length as of the importance the international community of States places on human rights fact-finding and investigative missions, a closer look reveals that some things have begun in fact to change. While Bassiouni found that there was 'no standard operating procedure for fact-finding missions, [that] no manual existed to describe how an investigation should be conducted and, there [was] no standard, though adaptable, computer program to input collected data', in recent years (and to its credit) the Office of the High Commissioner for Human Rights has both standardised its data collection (especially insofar as computerised systems are concerned), and issued guidance in the form of guidelines to commissions of inquiries.[65] What is more, a

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[56] Bassiouni, 'Justice-Related Fact-Finding' (n 6) 55.

[57] See eg Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability' in M Bergsmo (ed), *Quality Control in Fact-Finding* (TOA ePublishing 2012) 9; Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (2015) 20 Journal of Conflict Security Law 27.

[58] Bassiouni, 'Justice-Related Fact-Finding' (n 6) 55.

[59] id.

[60] Like it was the case for the 1992 Yugoslavia Commission, see Hagan (n 28).

[61] See Rob Grace and Claude Bruderlein, 'On Monitoring, Reporting, and Fact-finding Mechanisms' (2012) 1 ESIL Reflections 1; Rob Grace and Claude Bruderlein, 'Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms' (2012) HPCR Working Paper <http://dx.doi.org/10.2139/ssrn.2038854> accessed 27 February 2017; Bassiouni, *International Criminal Law* (n 33).

[62] id.

[63] Which seem 'essentially contingent upon political and extraneous circumstances', see Bassiouni, 'Justice-Related Fact-Finding' (n 6) 42.

[64] id. See also Rob Grace, 'Recommendations and Follow-Up Measures in Monitoring, Reporting, and Fact-Finding Missions' (2014) HCPR Working Paper <https://ssrn.com/abstract=2480824> accessed 27 February 2017.

[65] See Bassiouni, 'Justice-Related Fact-Finding' (n 6) 40. Even though already in 1991 the UN had included a Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (the 'Minnesota Protocol') in its *United Nations Manual on the Effective Prevention* (UN 1991); UNOHCHR, *Commissions of Inquiry* (n 29). The OHCHR has also launched a process to update the Minnesota Protocol, see UNOHCHR, 'Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol)' <http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx> accessed 27 February 2017.

Annex 43

Dr Myint Khine, *Depeyin History* (2017-2018) (extract)

Unofficial Translation

Depeyin History

Origin and Annex

Dr. Myint Khine (OggarNyo)

Chapter on U Myae

Page number (236-239)

Myanmar year 1379-1380 **AD 2017-2018**

Unofficial Translation

U Mye

During the 19th century, European countries extended their power not only in security, and administration sectors but also in sectors of economic, military, communication. Likewise, they also extended their market by producing products from factories and industries with modern science and advanced technology that could change the era.

For military purposes, they subjugated subordinate countries, and there were competitions in business and attacks against subordinate areas. Myanmar was also invaded and was enslaved under colonial rule. Moreover, Myanmar had fallen into the vortex of blood-sucking economic manipulation.

According to the situation of the period and region, as the successive Myanmar Kings mainly focused on the security and administration of the state, they ignored not only the intellectual development of the citizens but also the economic development. The evidence is that as they were pleased with gems and jewels, old mines, silver mines, amber, etc., Myanmar was defeated in the first, second, and third Anglo-Burmese wars as a consequence.

The individuals who prioritised the progress and development of the country had emerged so as not to experience this bitterness of loss. They were Mindon Min and his younger brother Kanaung Mintha Gyi. There is no such thing as being late when striving for an opportunity. Those persons were Mindon Min Taya Gyi, Crown Prince Kanaung Mintha Gyi, Thibaw Min, Yaw Atwinwun U Phoe Hlaing, Atwinwun of the Royal Treasury U Hla Buu, the Duke of Myaung Hla @ the Burmese ambassador Maha Min Hla Sithu, U Myuu, Magway Mingyi @ Thadoe Mingyi Maha Min Hla Khaung U Soe, General U Shwe Maung from (Lower river course) Navy and General U Chet of Taungoo Navy.

To build a new modern nation, technology from the developed countries was acquired, scholars were sent for further studies, and 90 people who were thoughtful and had desire to carry out for the country development were selected as foreign scholars for the first phase.

It is described that the scholars who were sent in the first phase were-

(1) U Mye

(2) U Khe

(3) U Phan

(4) U Shwe Oh

(5) U Aung Thu.

U Mye was Nay Myo Theikdi Kyaw Htin U Mye, who was also known as Depeyin Wun Htauk and Depeyin Governor.

To build Myanmar as a modern developed nation, Crown Prince Kanaung Mintha Gyi consulted with Yaw Min Gyi U Phoe Hlaing and sent about 90 young adults who were more intelligent and had a mature national spirit to foreign countries such as England, France and Italy since1222 to study weapons manufacturing and engineering studies. In the first batch, U Mye and his younger brother U Khe were involved out of five scholars.

As U Mye was a intimate disciple of Kinwun Mingyi, he involved in the whole excursion when Kinwun Mingyi and the diplomatic group went on a diplomatic expedition to London. So, due to the invitation of General Doo Si, he was included in the study tour of the shooting range (gun range), the underground waterways, and the railway factory.

U Mye was selected as the first foreign scholar in that era because of his unique personality. It can be assumed that his good appearance, his good health, his high intellect, his patriotic spirit which guaranteed the development of the nation, his enthusiasm to explore more knowledge and his strong belief in building a developed nation through industry were U Mye's talents.

The English invaded and occupied the whole of Myanmar after King Thibaw had been taken on the 9th Wanning Tazaungmone in 1247 Myanmar Year. As Myanmar nationals revolutionized with their indomitable spirit and any available weapons, the Sangha Union, Young Men's Buddhist Association, General Council of Burmese Associations and Dobama Asiayone emerged. It was already known that the rebellions of U Wizaya, U Ottama, Bo Aung Kyaw, the Oil field labour and Sayar San continuously emerged.

Unofficial Translation

Among the organizations, not only did GCBA take the leading role but it also had the most members in force. On October 21, 1921 (Friday), which corresponds to the fifth day following Thadingyut's full moon day, 1283 as in Myanmar calendar), the 9th annual conference of GCBA took place in Tarye Tan, Mandalay, and it was a special event.

There were about 100,000 members from over 5000 teams in the entire Myanmar and several monks attended the conference with active patriotism.

At the conference, ***De Pae Yin*** Wun Htauk **U** Mye, who was awarded the title Nay Myo Theikdi Kyaw Htin, was a chairperson. He bravely delivered speeches to promote the nationalism**,** and to respond the insults on the religion and nationality. This conference was held for four days, discussing politics, economics, education, and social affairs.

In the speech of U Mye, he said, "We are now in slavery. Until we get independence, there was no prosperity and peace. We cannot be in slavery forever, and we will get genuine independence one day. How can we struggle for the independence? Virtue has never come easily without venture. Only if we venture, can we enjoy the result of the effort. Since we, our Myanmar Nationality, are renowned in history, we should not step back in this critical time. We have a responsibility to venture."

In his speech, he continued urging to use and wear only local products, and to strike against the foreign-made products. He also said that farms were seized from farmers' hands and salt suppliers from Myanmar lost their business due to the import of salt from foreign countries. Regarding the education sector, a total of about 90 National schools were founded nationwide within six months while we were facing lots of opportunities in education, and hence, those activities will widely have to be conducted."

Unofficial Translation

As a result, patriotism became stronger and more active, and it was a motivation of national independence and revolution against British. In U Mye's speech, his word "The earth cannot swallow a race to extinction but another race can." remained in the audience's mind.

GCBA is the most reliable core organization of the entire Myanmar which struggled to gain independence from British colony, by revolutionizing the injustice and the oppression in the era of taking one's advantage. In that period, the invaders oppressed with their power and their traitors also tortured people according to the proverb "**After relying on Master, slave tries to bully others."**

Therefore, in Myanmar history, **De Pae Yin** Wun Htauk U Mye, who was awarded the title *Nay Myo Theikdi Kyaw Htin,* was regarded as the pioneer and ideal person because of his patriotism, his incitement for national spirit, and his courage to fight, together with the penal members of GCBA: U Chit Hlaing, U Ba Pe, U Pu, U Ba Si, Tharyawaddy U Pu, U Ba Hlaing, U Kyaw Yen, U Htun Aung Kyaw, U Loon, against the unfairness of the British colonial government.[1]

[1] Dr. Mynit Khine (OggarNyo), Depeyin History: Origin and Annex, 2017-2018, p-236-239

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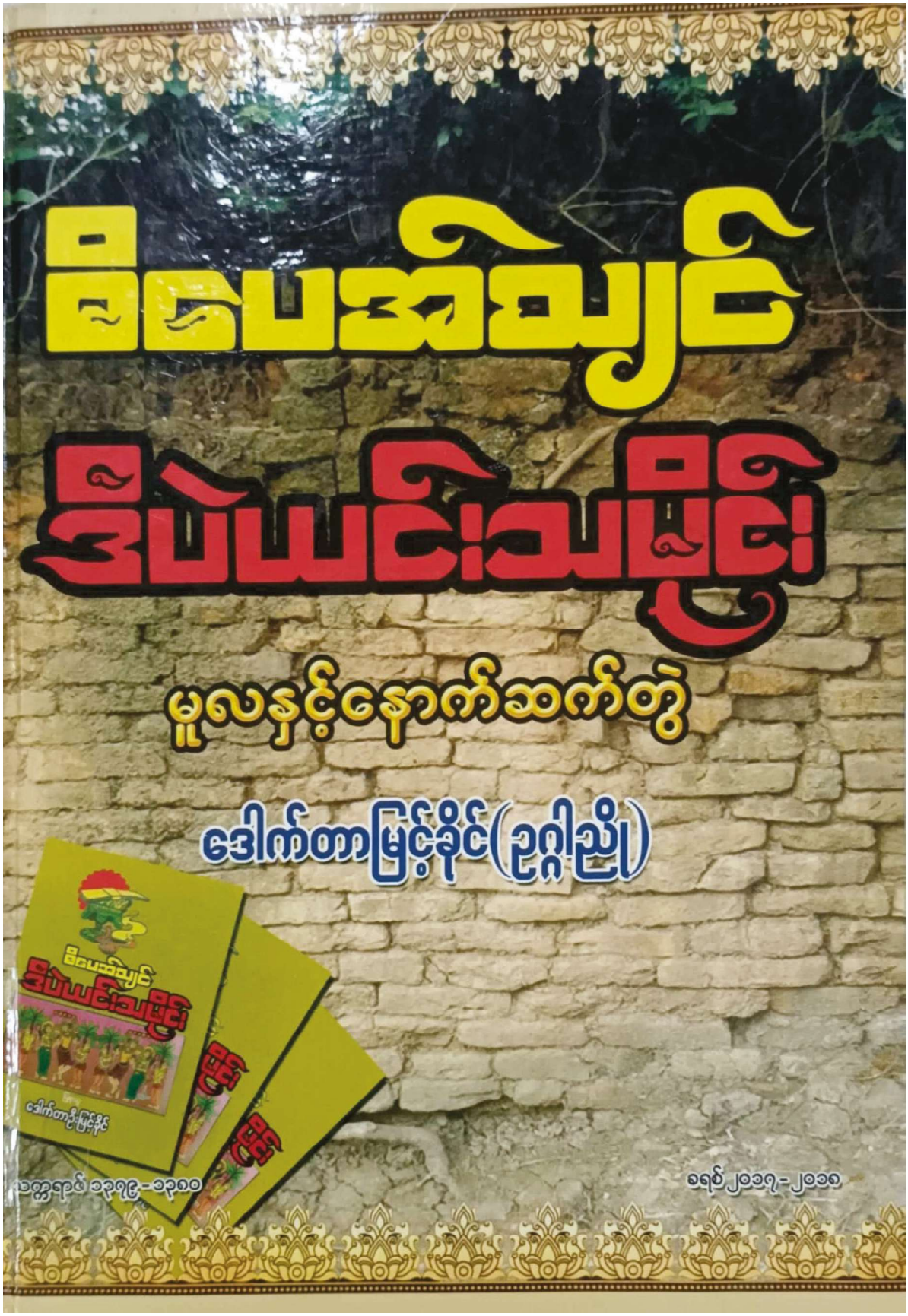
ဒီပေအဲသျင်
ဒီပဲယင်းသပြိုင်း
မူလနှင့်နောက်ဆက်တွဲ
ဒေါက်တာမြင့်ခိုင်(ဥဂ္ဂါညီ)
ဒီပေအဲသျင်
ဒီပဲယင်းသပြိုင်း
ဒေါက်တာမြင့်ခိုင်
ရရှစ် ၂၀၁၇ - ၂၀၁၈

ဦးမြဲ

၁၉ ရာစုအတွင်း၊ ဥရောပနိုင်ငံများစွာတို့သည် လုံခြုံရေး၊ အုပ်ချုပ်ရေးတို့သာမက၊ စီးပွားရေး၊ စစ်ရေး၊ ဆက်သွယ်ရေးနှင့်တကွ ခေတ်ကိုပြောင်းလဲစေသော ခေတ်မီသိပ္ပံပညာ၊ နည်းပညာတို့ဖြင့် စက်ရုံ၊ အလုပ်ရုံကြီးများမှ ထုတ်ကုန်ပစ္စည်းများထုတ်လုပ်၍ ဈေးကွက်နယ်ပယ်တိုးချဲ့ထွင်နိုင်သမျှ ချဲ့ ထွင်နေကြ၏။

စစ်ရေးအတွက် လက်အောက်ခံနိုင်ငံများသို့ သိမ်းသွင်းသကဲ့သို့ စီးပွားရေးအတွက်လည်း ပြိုင်ဆိုင်သူအချင်းချင်းနှင့် ဒေသခံတိုင်းပြည်နယ်ပယ်တို့ကိုပါ တိုက်ခိုက်ချေမှုန်းအားပြိုင်လျက် ရှိကြရာ မြန်မာနိုင်ငံသည်လည်း စစ်ရေးအရကျူးကျော်၍ ကိုလိုနီလက်အောက်ခံကျွန်ပြုခံရခြင်း။ စီးပွားရေးအရ သွေးစုပ်ခြယ်လှယ်ခြင်း၊ ဝဂယက်အတွင်းသို့ကျရောက်ခဲ့ရပါသည်။

ကာလ၊ ဒေသ၊ ပယောဂ၊ အခြေအနေလျော်စွာ မြန်မာဘုရင်အဆက်ဆက်တို့သည် နိုင်ငံတော်လုံခြုံရေးနှင့် အုပ်ချုပ်ရေးကိုသာ ပဓာနပြုရင်း နိုင်ငံသူ၊ နိုင်ငံသားတို့၏ အသိဉာဏ်ပညာတိုးတက်ရေး၊ နိုင်ငံတော်၏ စီးပွားရေးတိုးတက်ရေးတို့ကို လျစ်လျူရှုခဲ့ကြ၏။ ရွှေတွင်း၊ ငွေတွင်း၊ ပယင်းဒုတ္ထာ စသည်တို့ဖြင့်သာ မိန်းမောနေခဲ့ကြရာ၊ သက်ရောက်မှုကား၊ ပထမ၊ ဒုတိယ၊ တတိယ အင်္ဂလိပ် - မြန်မာစစ်ပွဲ သုံးရပ်စလုံး၌ ဗုန်းဗုန်းကြီးလဲကျ၊ အရှုံးကြီးရှုံးရသည်က သက်သေသာဓကပေတည်း။

ဤမည်သော ခါးသီးလှသည့် ဆုံးရှုံးမှုကြီးမျိုးကို မကြုံရလေအောင် ကြိုတင်မျှော်မှန်းသော နိုင်ငံတော်၏ တိုးတက်ဖွံ့ဖြိုးရေးကို ပဓာနပြုသော ပုဂ္ဂိုလ်များပေါ်ထွက်ခဲ့ပေပြီ။ မင်းတုန်း မင်းနှင့် ညီတော်ကနောင်မင်းသားကြီးတို့ဖြစ်၏။ အခွင့်အလမ်းကို ရယူရန် ကြိုးစားအားထုတ်မှုသည် နောက်ကျရိုးမရှိခြေ၊ မင်းတုန်းမင်းတြားကြီးနှင့် အိမ်ရှေ့ဥပရာဇာကနောင်မင်းသားကြီးတို့နှင့်တကွ သီပေါမင်း၊ ယောအတွင်းဝန် ဦးဘိုးလှိုင်၊ ရွှေတိုက်အတွင်းဝန် ဦးလှဘူး၊ မြောင်လှမြို့စား နိုင်ငံခြားဝန်ထောက် မင်းကြီးမဟာမင်းလှစည်သူ၊ ဦးမြူး၊ မကွေးမင်းကြီး သတိုးမင်းကြီး မဟာမင်းလှခေါင်ဦးစိုး၊ အောက်မြစ်စဉ်ရေကြောင်း ဗိုလ်ချုပ် ဦးရွှေမောင်၊ တောင်ငူရေကြောင်းဗိုလ်ချုပ် ဦးချက်အစထားသော ပုဂ္ဂိုလ်များပင်တည်း။

ခေတ်မီနိုင်ငံတော်သစ်ကြီး ပေါ်ထွန်းရေးအတွက် အရင်းခံကာ တိုးတက်ဖွံ့ဖြိုးနေသည် နိုင်ငံများမှ နည်းပညာကိုရယူခြင်း၊ ပညာဆက်သင်ခွေလွှတ်ခြင်း၊ အတွေးအခေါ် ရင့်သန်၍ တိုင်းပြည်ကို တိုးတက်စေရန် ဆောင်ရွက်မည့် ပုဂ္ဂိုလ်များကို နိုင်ငံခြားပညာတော်သင်အဖြစ် ပထမအသုတ် လူ (၉၀) ကိုရွေးချယ်ခဲ့ပါသည်။

ပထမအသုတ်စေလွှတ်သူများကား

(၁) ဦးမြဲ
(၂) ဦးခဲ
(၃) ဦးဖန်
(၄) ဦးရွှေအိုး
(၅) ဦးအောင်သူဟူ၍ ဖော်ပြထားပါသည်။

ဦးမြဲဆိုသူကား ဒီပဲယင်းဝန်ထောက်ဟူ၍လည်းကောင်း၊ ဒီပဲယင်းမြို့ဝန်ဟူ၍လည်းကောင်း လူသိများသော နေမျိုးသိဒ္ဓိကျော်ထင် ဦးမြဲဖြစ်ပါသည်။

မြန်မာနိုင်ငံတော်ကြီးအား ခေတ်မီတိုးတက်သော နိုင်ငံတော်အဖြစ် ထူထောင်ရန် အိမ်ရှေ့ပရာဇာ ကနောင်မင်းသားကြီးသည် ယောမင်းကြီးဦးဘိုးလှိုင်နှင့် တိုင်ပင်၍ ဉာဏ်ပညာထက်မြက်၍ အမျိုးသားရေးစိတ်ဓာတ်ရင့်ကျက်သူ လူငယ်လူရွယ် ၉၀ ခန့်ကို ၁၂၂၂ ခုနှစ်မှစ၍ အင်္ဂလန်၊ ပြင်သစ်၊ အီတလီ အစရှိသော နိုင်ငံများသို့ စေလွှတ်၍ စစ်လက်နက်ထုတ်လုပ်သည့် အတတ်ပညာ၊ စက်မှုအတတ်ပညာများကို စေလွှတ်သင်ကြားစေခဲ့ရာ ဦးမြဲသည် ညီ ဦးခဲနှင့်အတူ ပထမအသုတ် ပညာတော်သင် (၅) ဦးတွင် အပါအဝင် ဖြစ်ပါသည်။

ကင်းဝန်မင်းကြီး၏ လက်ရင်းတပည့်ဖြစ်ရာ ကင်းဝန်မင်းကြီးနှင့် သံအဖွဲ့လန်ဒန်သို့ သံခင်းတမန်ခင်းကိစ္စ လေ့လာရေးခရီးကိစ္စလေ့လာရေးခရီးစဉ်၌ အစအဆုံးလိုက်ပါရသူဖြစ်၍ ဗိုလ်ချုပ်ကျင်နယ်ရယ်လ် ဒူးစီး၏ ဖိတ်ကြားချက်အရ သေနတ်ပစ်ကွင်း (စက်ပစ်ကွင်း) သို့ သွားရောက်လေ့လာခြင်း၊ မြစ်အောက်သွားလမ်းလေ့လာရေး၊ မီးရထားစက်ရုံလေ့လာရေး ခရီးစဉ်တို့၌ လိုက်ပါခဲ့ပါသည်။

ထိုခေတ်ကာလ၌ ပထမဆုံးနိုင်ငံခြားပညာတော်သင်အဖြစ် ရွေးချယ်ခံရခြင်းကား ဦးမြဲ၏ အများထက် ထူးခြားသော ကိုယ်ရည်ကိုယ်သွေးပေတည်း။ ရူပနိကာယ်ကောင်းမွန်၍ ကျန်းမာခြင်း၊ ဉာဏ်ရည်ဉာဏ်သွေးထက်မြက်ခြင်း၊ တိုင်းပြည်တိုးတက်ရေးအတွက် အမာခံဖြစ်သော မျိုးချစ်စိတ်ဓာတ်ထက်သန်ခြင်း၊ လေ့လာသင်ကြားမှတ်သားလိုသော ဗဟုသုတရှာမှီးလိုစိတ်အားကောင်းခြင်း၊ စက်မှုလုပ်ငန်းဖြင့် နိုင်ငံတော်ကို အမြန်ဆုံးတိုးတက်လာအောင် ဆောင်ရွက်နိုင်မည်ဟု ယုံကြည်ချက် ခိုင်မာခြင်းတို့ကား ဦးမြဲ၏ အရည်အသွေးဟု ခန့်မှန်းနိုင်ပေသည်။

သက္ကရာဇ် ၁၂၄၇ ခု တန်ဆောင်မုန်းလျှုပ် (၈) ရက်နေ့တွင် သီပေါဘုရင်ပါတော်မူသည်မှစ၍ မြန်မာတစ်နိုင်ငံလုံး အင်္ဂလိပ်တို့၏ ကျူးကျော်သိမ်းပိုက်ခြင်းကိုခံခဲ့ရရာ သူကျွန်မခံအလံမလွဲသော စိတ်ဓာတ်ဖြင့် မြန်မာအမျိုးသားတို့သည် ရရာလက်နက်စွဲကိုင်၍ ပြန်လည်တော်လှန်တိုက်ခိုက်လျက်ရှိသကဲ့သို့ သံဃာသမဂ္ဂ၊ ဗုဒ္ဓဘာသာကလျာဏယုဝအသင်း၊ ဂျီစီဘီအေတို့မှအစ တို့ဗမာအစည်းအရုံးတို့ပေါ်ပေါက်ခဲ့ရ၏။ ဦးဝိစာရအရေး၊ ဦးဥတ္တမအရေး၊ ဗိုလ်အောင်ကျော်အရေး၊ ရေနံမြေအလုပ်သမား

အရေးစသည်တို့နှင့်တကွ ဆရာစံအရေးတော်ပုံတို့ဆက်တိုက်ပေါ်ပေါက်ခဲ့ရကြောင်း သိရှိခဲ့ကြပြီးဖြစ်ပါသည်။

ယင်းတို့အနက် GCBAအသင်းကြီးအား အသင်းအားလုံးတို့၏ ဦးဆောင်ဖြစ်ရာ အသင်းဝင်အင်အားလည် အများဆုံးဖြစ်၏။ အထူးမှတ်တမ်းတင်ဖြစ်ရပ်ကား မြန်မာသက္ကရာဇ် ၁၂၈၃ ခု သီတင်းကျွတ်လပြည့်ကျော် (၅) ရက် သောကြာနေ့ (၂၁ · ၁၀ · ၁၉၂၁) တွင် ကျင်းပသော ဂျီစီဘီအေ အသင်းကြီး၏ နဝမအကြိမ် နှစ်ပတ်လည် ကွန်ဖရင့်အစည်းအဝေးကြီးကို မန္တလေးမြို့ တာရဲတန်းတွင် ကျင်းပခြင်းတည်း။

မြန်မာတစ်နိုင်ငံလုံးရှိ အသင်းပေါင်း (၅၀၀၀) ကျော်မှ အဖွဲ့ဝင်ပေါင်း (၁၀၀၀၀၀) ကျော်နှင့် သံဃာတော် အများအပြားတို့ အမျိုးသားရေးနိုးကြားသောစိတ်ဓာတ်ဖြင့် တက်ကြွစွာ တက်ရောက်ကြခြင်းပေတည်း။

ဤကွန်ဖရင့်ကြီး၌ ပထမနေ့ညီလာခံသဘာပတိဖြစ်သူ နေမျိုသိဒ္ဓိကျော်ထင်ဘွဲ့ရ ဒီပဲယင်းဝန်ဦးမြ့ သဘာပတိအဖြစ် ဆောင်ရွက်၍ အမျိုးသားရေးအတွက် နိုးကြားတက်ကြရေး၊ အမျိုးဘာသာ သာသနာရေးကို ဖိနှိပ်စော်ကားနေသည်များကို ပြန်လည်တုံ့ပြန်ရေးတို့ကို ရဲရဲတောက် ဟောကြားခဲ့ပါသည်။ (၄) ရက်ကြာမျှကျင်းပခဲ့သော ဤအစည်းအဝေးကြီး၌ နိုင်ငံရေး၊ စီးပွားရေး၊ပညာရေး လူမှုရေး ကိစ္စရပ်များကို ဆွေးနွေးဆုံးဖြတ်နိုင်ခဲ့ကြပါသည်။

ဦးမြ၏ မိန့်ခွန်းတွင် -

'ကျွန်ုပ်တို့သည် ကျွန်ဘဝ၌ တည်ကြရကုန်သည်။ လွတ်လပ်ရေး မရမချင်း ချမ်းသာနိုင်ရန် အကြောင်းမရှိ။ ကျွန်ုပ်တို့ကို အစဉ်ထာဝရ၊ ကျွန်ဘဝ၌ မထားနိုင်၊ တစ်နေ့တွင် လွတ်လပ်ခြင်း စစ်စစ်ကို ရရှိကြပေမည်။ သို့သော် လွတ်လပ်ရေးကို ရအောင်မည်သို့ ကြဲဆောင်ကြမည်နည်း၊ မွန်မြတ်ထူးကဲသောအရာဟူသမျှကို မည်သည့်အခါမျှမစွန့်စားဘဲ လွယ်လင့်တကူ ရရှိဖူးသည်မရှိ။ စွန့်စွန့်စားစား အားထုတ်ဆောင်ရွက်ခြင်းဖြင့်သာ အကျိုးကျေးဇူးကိုခံစားကြရပေမည်။ ကျွန်ုပ်တို့ မြန်မာလူမျိုးတို့သည် ရာဇဝင်တွင်ထင်ပေါ်ကျော်စောသာလူမျိုးများဖြစ်သည်နှင့် လျော်ညီစွာ ယခုကဲ့သို့ အရေးကြီးသောအချိန်အခါတွင် လက်လျှော့နောက်ဆုတ်ရန် မသင့်။ ရဲရဲဝံ့ဝံ့ စွန့်စွန့်စားစားဆောင်ရွက်ရန် ဝတ္တရားရှိကြပါသည်'

ဆက်လက်၍ 'နိုင်ငံခြားဖြစ် အဝတ်အထည်များကို ကုန်ပစ္စည်းများကို သပိတ်မှောက်၍ ပြည်တွင်းဖြစ်အထည်များကိုသာ သုံးစွဲဝတ်ဆင်ကြရန်၊ လယ်ယာမြေများကို လယ်သမားများ၏ လက်ဝယ်မှ သိမ်းယူနေခြင်းကိစ္စများ၊ နိုင်ငံခြားမှ ဆားတင်သွင်းသဖြင့် ဗမာဆားတောင်သူတို့ ထိခိုက်ဆုံးရှုံးနေခြင်းကိုလည်းကောင်း၊ ပညာရေးနှင့်ပတ်သက်၍ ကျွန်ပညာရေးစနစ်ကြောင့် အမျိုးသားတို့ ထိခိုက်နစ်နာနေရာ (၆) လအတွင်း တစ်နိုင်ငံလုံး၌ အမျိုးသားကျောင်းပေါင်း (၉၀) ခန့် တည်ထောင်ဖွင့်လှစ်နိုင်ခဲ့ပြီဖြစ်၍ ပိုမိုကျယ်ပြန့်စွာ ဆောင်ရွက်ကြရမည်ဖြစ်ကြောင်း' ပြောကြားခဲ့၏။

အကျိုးသက်ရောက်မှုကား အမျိုးသားရေးစိတ်ဓာတ်ခိုင်မာပိုမိုနိုးကြားတက်ကြွလာကြခြင်း၊ နယ်ချဲ့ ဆန့်ကျင်ရေး အမျိုးသားလွတ်မြောက်ရေးတို့အတွက် နှိုးဆော်ချက်ကြီးပင်ဖြစ်၏။

'မြေမျိုး၍ လူမျိုးမပြုတ်၊

လူမျိုးမျိုမှ လူမျိုးပြုတ်မည်' ဟူသော ဦးမြ၏ မိန့်ခွန်းကား လူထုနားထဲတွင် စွဲမြဲစွာတင် ကျန်ခဲ့ပါသည်။

အာဏာရှင် ကျူးကျော်သူတို့ အုပ်ချုပ်ရေးအာဏာဖြင့် ဖိနှိပ်၍ အမျိုးသားသစ္စာဖောက်တို့က သခင်အား၊ ကျွန်ပါးဝဖြင့် ပြည်သူအများအားနှိပ်စက်အနိုင်ကျင့်ခါ ကိုယ်ကျိုးရှာနေကြသော ခေတ်ကာလကြီးထဲ၌ မတရားမှုကို တော်လှန်၊ ဖိနှိပ်ချုပ်ချယ်မှုကို ဖီဆန်၍ မြန်မာတစ်နိုင်ငံလုံး ကျွန်ဘဝမှ လွတ်မြောက်အရေးအတွက် ကြိုးစားအားထုတ်လာသော GCBAအဖွဲ့ကြီးကား တစ်နိုင်ငံလုံး၏ ယုံကြည် အားထားရာပင်မအဖွဲ့အစည်းကြီးပေတည်း။

GCBA၏ ဥသျောင်အဖွဲ့ဝင် ဦးချစ်လှိုင်၊ ဦးဘဘေ၊ ဦးပု၊ ဦးဘစိ၊ သာယာဝတီ ဦးပု၊ ဦးဘလှိုင်၊ ဦးကျော်ရန်၊ ဦးထွန်းအောင်ကျော်၊ ဦးလွန်းစသော မြန်မာနိုင်ငံအရေး ခေါင်းဆောင်ကြီးများနှင့်အတူ နေမျိုးသိဒ္ဓိကျော်ထင်ဘွဲ့ခံ ဒီပဲယင်းဝန်ကြီး ဦးမြ၏ သူကျွန်မခံတော်လှန်သော စိတ်ဓာတ်၊ အမျိုးသားရေးကို နိုးကြားစေသော လှုံ့ဆော်ချက်၊ အာဏာရှင်အုပ်စိုးသူ ကိုလိုနီအစိုးရအား အနှံတု၍ မတရားမှုများကို ချေမှုန်းတိုက်ဖျက်လိုသော သတ္တိတို့သည်ကား မြန်မာရာဇဝင်သမိုင်းတွင် စာတင်ဂုဏ်ပြု နောင်လာမျိုးဆက်သစ်တို့ အတုယူဖွယ်ဖြစ်ကြောင်း ရှေ့ဆောင်ပုဂ္ဂိုလ်ကြီးအဖြစ် မှတ်တမ်းတင်လိုက်ရပါသတည်း။

Annex 44

K. Mačák, “Article 43” in A. Zimmermann and C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edn., 2019) (extract)

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A Commentary

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rounds.[553] The Court cannot curtail the right of parties to call witnesses and experts to testify personally by ordering the parties to embody the evidence of witnesses or experts in a properly authenticated deposition or written statement. This is so, even if the other party waives all rights to be present during the taking of such depositions or the preparation of such statements for any purpose, including the purpose of cross-examination.[554] Such a procedure, whereby the written statement would constitute a full and complete statement of evidence which such witnesses or experts would have adduced if personally in court, may be adopted only if the parties agree to it.[555] The parties may also agree not to call any witnesses or experts but, in view of Article 62, para. 1 of the Rules of Court, such an agreement will not be binding on the Court.[556]

137 The personal testimony of a large number of witnesses and experts in Court may cause considerable inconvenience, burden, and expense upon the other party whose agent, counsel, and advocates must be present in the courtroom and may put considerable strain on the Court's resources.[557] Faced with the prospect of a party calling hundreds of witnesses (which did not materialize), the Court in 2001 carried out a detailed study of the practical issues involved in hearing a large number of witnesses.[558] In such a situation, the way forward seems to be to make better use of Article 63, para. 2 of the Rules of Court which allows the Court, or the President if the Court is not sitting, to take the necessary steps for the examination of witnesses (but not experts) other than before the Court itself. The Court could delegate one or more of its members, nominate a commission of inquiry in the sense of Article 50,[559] or entrust the parties to take the testimony.[560]

138 In the practice of the Court, expert or witness testimony seems to be of questionable value: in some cases it has been superfluous, as the decision was reached on separate legal grounds,[561] in other cases, the technical evidence either neutralized itself because of its complexity or lack of distinctness, or was neutralized or rendered irrelevant for purposes of the decision by the production of counter-evidence.[562] In any event, as the Court has highlighted on several occasions, the responsibility to determine which facts are to be

[553] *Cf.* Kolb, *ICJ*, p. 973; Quintana, *ICJ Litigation*, pp. 352–3; Shaw, *Rosenne's Law and Practice*, vol. III, p. 1348.

[554] *Cf. South West Africa* cases, Pleadings, vol. VIII, p. 42 and vol. X, p. 514 and *ICJ Yearbook* (1964–1965), p. 88. For such a proposal by Ethiopia and Liberia, *cf. ibid.*, Pleadings, vol. IX, pp. 122–3.

[555] *Cf. e.g., Kasikili/Sedudu Island*, where a Joint Team of Technical Experts had examined seventy-three witnesses prior to the proceedings before the Court. The agreed transcript of the hearings of oral evidence was submitted to the Court by Namibia in vols. II and III of its memorial of 28 February 1997. Both parties referred to the oral evidence submitted to the Court in their pleadings.

[556] For such an agreement *cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 114–5, para. 8.

[557] In the *South West Africa* cases, public hearings and some two months' time were devoted to the hearing of 13 witness-experts and one expert, *cf.* Pleadings, vol. VIII, pp. 56–84.

[558] Speech by President Guillaume to the UN General Assembly, UN Doc. A/56/PV.32 (2001), p. 8. Serbia and Montenegro had indicated that it would call hundreds of witnesses in the merits phase of the *Bosnian Genocide* case. In the end, Serbia and Montenegro called only seven witnesses and witness-experts; see *ibid.*, Judgment, ICJ Reports (2007), pp. 43, 61, para. 58.

[559] On which see further Tams/Devaney on Art. 50 MN 16–17.

[560] *Cf.* PCIJ, Series D, third addendum to No. 2, pp. 216–27, 770, 825, 873 and Series D, No. 2, pp. 145–6.

[561] For an analysis by the Court of the expert evidence produced, however, *cf. Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 16–7.

[562] *Cf.* Bedjaoui, *Pace YIL* (1991), pp. 45–6; Highet, *AJIL* (1997), p. 22, and on oral evidence in general *ibid.*, pp. 20–8. But *cf.* Statement by President Tomka to the Sixth Committee of the General Assembly, 31 October 2014, p. 2 (noting that testimonial evidence adduced by the parties may play an important role in establishing the factual record before the Court).

Annex 45

G. Mettraux, *International Crimes: The Law and the Practice, Volume 1: Genocide* (Oxford University Press, 2019) (extract)

International Crimes

Law and Practice

VOLUME 1: GENOCIDE

GUÉNAËL METTRAUX

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Article I of the Convention,[146] and in regard to the question of jurisdictional competence under Article VI.[147]

These conflicting approaches do not only reflect the fact that genocide is at once criminal law and treaty law and, thus, subject to different rules of interpretation. They also reflect a fundamental tension between the desire to protect the core identity of the notion of genocide whilst making it broadly relevant and effective in preventing and punishing such acts. A rather strict approach to its interpretation has thus generally prevailed when interpreting the words of the Convention and the intentions of the drafters.[148] This is apparent from the view taken that the list of protected groups and the list of underlying crimes under the Convention are exhaustive.[149] It is also apparent from the view that the notion of 'destruction' is limited to physical or biological destruction, that 'a part' of the group must mean a *substantial* part, and that for an act to come within the scope of the listed genocidal offences it must be capable of making a contribution to the intended goal of destruction of the group or part thereof.[150] In contrast, a more liberal approach to the process of interpretation has been adopted where the Convention has left normative ambiguities or uncertainties that the interpretative process can co-opt to expand the reach of the law. For instance, such normative uncertainties enabled international criminal tribunals to take

[146] The humanitarian and civilizing purposes of the Genocide Convention was material to the conclusion of the International Court of Justice that Article I of the Convention creates obligations (to prevent and punish genocide) distinct from those appearing in subsequent articles. See ICJ *Bosnia-Serb* 2007 Judgment (n 6) para. 162:

> Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I—the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. [...] Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

See also Shany, 'The Road to the Genocide Convention and Beyond' (n 8) 3, 15.

[147] See ICJ *Bosnia-Serbia* 2007 Judgment (n 6) para. 445 ('[I]t would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter.').

[148] See, for an illustration, *Blagojević & Jokić* Trial Judgment (n 41) para. 663, citing UN Commission of Experts Report on Yugoslavia (n 2) para. 94:

> The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.)

The ECtHR has pointed out, however, that states are not prevented by the international law to adopt a definition broader in scope than the one provided for in the Genocide Convention. See, generally, *Vasiliauskas* Judgment (n 108) para. 181 ('The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively.').

[149] See, *infra*, 8.4.4.6. See also *Prosecutor v. Paulov* (Karl-Leonhard), Case No. 3-1-1-31-00, Cassation Judgment (Estonian Supreme Court, 21 March 2000).

[150] See *infra*, respectively 8.2.2, 8.3.3.1.1, and 10.1.2.

the view that modes of participation and inchoate offences provided for in Article III of the Convention were not exhaustive in character, and that a culpable contribution could be made to the commission of acts of genocide in ways and manners not expressly foreseen by the Convention.[151] This also enabled international criminal tribunals to adopt the view that genocidal intent was not a prerequisite for all modes of participation in an act of genocide and that certain modes of liability not foreseen in the Convention (e.g., aiding and abetting or command responsibility) could entail individual criminal responsibility without proof of genocidal intent on the part of the accused.[152] A similarly liberal approach also allowed for an interpretation of the jurisdictional provisions of the Convention that did not foreclose the possibility for national courts to exercise their jurisdiction over acts of genocide beyond the confines of the territorial competence foreseen by the Convention.[153]

3.7.2 Interpreting the notion of genocide at the ICC

The crime of genocide raises particular problems of interpretation before the International Criminal Court (ICC). As with other crimes under the Court's jurisdiction, the interpretation of the crime of genocide is subject to the requirement of strict interpretation provided for in Article 22(2) of the Rome Statute.[154] However, strict adherence to Article 22(2) has not been all that apparent when it comes to the crime of genocide. This is perhaps most evident in the approach adopted by the Court in the *Bashir* proceedings. The question arose in this case about the consistency and compatibility of the definition of genocide found in the Statute and the distinct definition foreseen in the ICC's *Elements of Crimes*. The *Elements* are deemed to serve as interpretative guidance of the terms of the Statute. However, instead of bringing clarity to the definition of genocide contained in Article 6 of the Statute, it brings its own ambiguity and interpretative challenges, not least in its visible inconsistencies with the Statute.[155] Therefore, when seeking to establish the definition of genocide for the purpose of its proceedings, the Pre-Trial Chamber in the *Bashir* case was forced first to interpret its own interpretative aid in order to then interpret its Statute in a manner deemed consistent with the *Elements*.[156] This went far beyond what could reasonably be understood as the required strict construction and instead resulted in reshaping the notion of genocide away from the terms of the Statute and away from the definition of that crime under customary law.[157]

[151] See, e.g., *Akayesu* Trial Judgment (n 117) para. 546; *Krstić* Appeal Judgment (n 41) paras 138–139. See also, *infra*, 11.1.1 and 11.7.

[152] See, *infra*, 11.1.3. [153] *Infra*, 4.1.2 and 4.2.

[154] See also *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Judgment on Appeal Against 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9', 15 June 2017 (hereafter *Ntaganda* Appeal Decision on Jurisdiction), para. 48, fn 112, citing Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996, UN Doc. A/AC-249/1 (8 May 1996), 9: 'There was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality.'

[155] See, *infra*, 7.2.

[156] *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), paras 117–147.

[157] See *infra*, 7.2.2.

The interpretation of the crime of genocide before the ICC is also complicated by the fact that, in the application of that regime, three sets of provisions will be relevant to identifying the applicable *mens rea* of participants in the commission of such acts: Article 6, Articles 25/28, and Article 30. This is the result of the drafters' decision (i) not to adopt a provision similar to Article III of the Convention, (ii) to multiply the modes of liability relevant to ICC proceedings (including a dual regime of command responsibility), and (iii) to adopt a residual provision (Article 30) dealing specifically with the question of the 'mental element' of statutory crimes. This regime complicates the process of interpretation of the crime of genocide and creates uncertainties about the applicable level of *mens rea* required for certain forms of participation in genocidal offences.[158]

3.8 Exclusion from Refugee Status

It is generally accepted that genocide suspects are not entitled to refugee status.[159] In relation to the events of Rwanda, the UN Security Council thus noted that:

[158] See *infra*, 7.2.3 and 11.7.2.8.4.

[159] UNHCR Standing Committee, Note on the Exclusion Clauses, UN Doc. EC/47/SC/CRP.29, 30 May 1997 (hereafter UN Doc. EC/47/SC/CRP.29) (suggesting that genocide can be said to be covered and implied by Article 1(F)(a) of the 1951 Refugee Convention); UNHCR, Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UN Doc. HCR/GIP/03/05, 4 September 2003 (hereafter UN Doc. HCR/GIP/03/05) (to the same effect); Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art. 1(F)(a) (referring explicitly only to war crimes and crimes against humanity); Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Projects and a Lawyers Committee for Human Rights Perspective' (2000) 12 International Journal of Refugee Law 317 (hereafter Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees'), 322; Canada, Immigration and Refugee Protection Act (2001, as amended), s 35; Uruguay, Law on the Cooperation with the ICC (2006), art. 6; *Nikuze v. Canada (Minister of Citizenship and Immigration)*, Case No. 2013 FC 33, Reasons for Judgment and Judgment of 15 January 2003 (hereafter *Nikuze* Federal Court Judgment), paras 37–42; *Canada (Minister of Public Safety and Emergency Preparedness) v. Habinshuti*, Case No. TB2-11256, Reasons and Decision of 9 April 2013 (hereafter *Habinshuti* Immigration and Refugee Board Decision); UN General Assembly, Resolution 3074 (XXVIII): Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (3 December 1973) (hereafter UNGA, Principles of International Cooperation), para. 7 (regarding war crimes and crimes against humanity); UN General Assembly, Resolution 2312 (XXII): Declaration on Territorial Asylum (14 December 1967) (hereafter UNGA, Declaration on Territorial Asylum). For legal literature, see also Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters Publishing 2012); Schabas, *Genocide in International Law*, 482 fn 479; Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) (hereafter Saul, 'Implementation of Genocide'), 58, at 71–72 (pointing out that states are entitled in principle to legislate to exclude suspected génocidaires from protection from 'persecution' as refugees in accordance with Article 1(F) of the 1951 Refugee Convention); D Orentlicher, Report of the Independent Update the Set of Principles to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 of 8 February 2005, principle 25 ('Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.'); Yao Li, *Exclusion from Protection as a Refugee: An Approach to Harmonizing Interpretation in International Law* (Brill 2017) (hereafter Li, *Exclusion from Protection as a Refugee*), 319. See *contra*, Andreas Zimmermann and Philipp Wennholz, 'Article 1 F 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) (hereafter Zimmermann &

those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice [and] that persons involved in such acts cannot achieve immunity from prosecution by fleeing the country and notes that the provisions of the Convention relating to the status of refugees do not apply to such persons.[160]

Wennholz, 'Article 1 F'), 594 (noting that Article 1(F)(a)'s exclusion does not expressly refer to genocide but entertaining the possibility that genocidal acts could, in some cases, come within the scope of Article 1(F)(b) or (c) of the Refugee Convention or qualify as war crimes or crime against humanity for purposes of Article 1(F)(a)).

[160] UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/1994/59, 14 October 1994 (hereafter UN Doc. S/PRST/1994/59), 2.

Annex 46

R.C. Reis-Beattie, “Fear and Loathing in Post 9/11 America: Public Perceptions of Terrorism as Shaped by News Media and the Politics of Fear”, (2020) Doctoral Dissertations, 2502

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Fear and Loathing in Post 9/11 America: Public Perceptions of Terrorism as Shaped by News Media and the Politics of Fear

By

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DISSERTATION

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historical xenophobic tendencies, now focused on people of Middle Eastern, North African, and Central/South Asian backgrounds (i.e. "Muslims"). The recent wave of anti-Muslim sentiment in the US which developed out of this period, encouraged by political leaders and media outlets, culminated in the 2016 Presidential race in which Donald Trump famously called for a ban on Muslims entering the US. The present dissertation argues that public fear of terrorism is a proxy measure for racial and other identity-based anxieties and one of many perceived threats to the dominant culture in America posed by non-white foreigners. This is fueled by nearly two decades of propaganda efforts and media portrayals of terrorists as a foreign, Arab, Muslim threat to the US homeland and way of life.

Specifically, I argue that members of the public develop and reinforce their perceptions of terrorism by consuming mass media and interacting with political parties, that fear of terrorism in the US is shaped by media coverage and attention from political elites as much as it is influenced by actual terrorist attacks, and that the content of news coverage of mass violence is racially biased, focusing on violence perpetrated by Muslims. I employ a mixed-methods design to address my research objectives, drawing on New Hampshire survey data, publicly available national polls, and broadcast news media stories about suspected terrorists and the propaganda efforts employed to capitalize on this fear.

My dissertation research points to politics and mass media as the primary social institutions which shapes the public's perception about issues such as terrorism. Mass media does this by setting agendas and deciding what is newsworthy, by framing events and providing the language and imagery used to understand what is happening in society, and increasingly by reinforcing previously existing beliefs through selective media exposure. Media effects, and

Annex 47

G-J.A. Knoops and S. Pedroso, “The Evidentiary Value of NGO and IO Reports in International Criminal Proceedings”, in G.Z. Capaldo (ed.), *The Global Community: Yearbook of International Law and Jurisprudence 2022* (Oxford University Press, 2023) (extract)

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The Evidentiary Value of NGO and IO Reports in International Criminal Proceedings

BY GEERT-JAN ALEXANDER KNOOPS* & SARA PEDROSO**

Abstract
This article examines a subject matter which has so far yielded little attention in academic literature, namely, the evidentiary value within international criminal proceedings of reports drafted by non-governmental and international organisations, for instance, about a conflict situation. Most often these reports do not disclose the identity nor information about the sources upon which the information is based, which amounts to anonymous hearsay. The question arises whether non-governmental organisation or international organisation reports are admissible in international criminal trials in light of the unverifiability of sources by both the parties and the judges. This article reviews the existing case law of the various international criminal tribunals on this subject, with a focus on the International Criminal Court.

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IV. CONCLUSION

In conclusion, there seems to be a consensus among international criminal tribunals, such as the ICC, that caution must be exercised in assessing NGO/IO reports. Such reports, used as evidence, most often stand at odds with an accused's right to confront the evidence presented against him or her, which is an essential requirement of a fair trial.[42] The evidentiary value of such reports should be assessed with extreme caution due to the absence of any opportunity for the participants in these proceedings to know the source of the information, the identity of which may be vital for the truth. Moreover, as the ICC jurisprudence has shown, caution must also be exercised and demonstrated by the judges with respect to reliance on NGO/IO reports for corroborative purposes. In addition, hearsay where the source is known should be distinguished from anonymous hearsay, given the latter, as opposed to the former, cannot be verified, by either the parties to a trial or by the judges.

In addition, the potential use of anonymous hearsay at the pre-trial and trial stages at the ICC may be distinguished. If anonymous hearsay evidence may at times, be used, as an "introduction to the historical context of a conflict situation," or to corroborate other evidence at the pre-trial stage, this cannot be true at the trial stage, where the evidentiary threshold is much higher. At the trial phase, anonymous hearsay evidence should be excluded altogether, or given extremely little to no weight by the Chamber in its determination of guilt or innocence. Reliance on NGO/IO reports in international criminal proceedings may contaminate the truth-finding mandate of international courts and tribunals.

[42] ICC Prosecutor v. Gbagbo and Blé Goudé, No. ICC-02/11-01/15-466-Conf-Anx, Separate Opinion of Judge Henderson annexed to "Decision on the Prosecutor's Application to protect the confidentiality of the sources of P-0369" (21 March 2016), para. 8.

Annex 48

M. Tanha et al., “Rohingya refugees and its impact on informal economy: Cox’s Bazar, Bangladesh” (2023) *Journal of Governance and Accountability Studies*, p. 63 (extract)

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Rohingya refugees and its impact on informal economy: Cox's Bazar, Bangladesh

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Abstract
Purpose: The purpose of this study is to determine whether refugees in Cox's Bazar area of Bangladesh can successfully integrate into the informal economic sector. This evaluation was carried out by comparing the actions of refugees in the labor market with those of the local population.
Research methodology: This study used survey data from two population groupings. The sample size included 300 Rohingya refugees and 300 locals from Coxs' Bazar, where they are now living. ANOVA was employed to compare the category mean differences owing to the limited sample size. The calculations would include wealth, occupation, language, religion, and race as labor market barriers.
Results: The data indicated significant disparities in both types of occupations and monthly incomes between local workers and refugee workers. Furthermore, the findings also suggest that Rohingya refugees encounter greater challenges when entering the job market than local workers.
Limitations: Refugees in Bangladesh are unable to work. They must stay at local and international NGO (Ministry of Foreign Affairs 2014). No Bangladeshi labor legislation has protected them. Bangladeshi authorities can also imprison refugees on illicit travel. A good Rohingya refugee policy in Bangladesh is crucial to human rights.
Contribution: The Rohingya Muslim population in Myanmar has been subjected to genocide, resulting in their expulsion and subsequent migration to neighboring countries. Bangladesh is the primary host nation for the Rohingya group from Myanmar, which has sought safety there as refugees for many years. Due to their lack of legal employment opportunities in Bangladesh, these refugees engage in informal economic operations and participate in various criminal activities inside the place where they reside.
Keywords: *Rohingya refugees, Economy, Bangladesh*
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1. Introduction

In recent years, global population displacement has been a consequence of bloodsheds and civil conflict in several nations. According to the 2017 United Nations High Commissioner for Refugees (UNHCR)

aid from the international community through grants and monetary assistance. This funding is intended to help these nations operate refugee camps and to support refugees. However, some refugees chose to leave these camps due to insufficient government assistance, leading them to become undocumented migrants.

To assess the influence of migration on the labor market, Pischke and Velling (1997) studied the employment outcomes of German workers affected by migration. This study employed the difference-in-differences approach to analyze the employment outcomes of German workers before and after migration. The results indicate that migration has no discernible influence on German workers' employability. However, several studies present conflicting perspectives in contrast to previous scholarly works. According to Borjas and Katz (2007), immigrants' educational attainment may hurt native individuals. The researchers examined the impact of Mexican migration on the local United States population and discovered that less-educated natives experience competition when educated Mexican migrants are present.

A separate study conducted in the United States found minimal interchangeability between immigrants and native individuals, with similar levels of education and experience. Ottaviano and Peri (2012) employ various nested-CES models to examine the demand elasticities of native workers while migrant workers are at the same level. According to another study on integrating local and migrant workers into the labor market in Malaysia, migrants enhance the job prospects of native workers in the nation. Hence, the effective assimilation of migrants in the receiving nation is contingent on the labor market requirements of a particular locality (Ozden & Wagner, 2014).

An empirical investigation examines the influence of refugee inflows on individual firms' productivity. This study focuses on Syrian refugees' integration into the Turkish job sector. The study demonstrated that a 1% increase in the proportion of refugees in the entire population leads to a 0.3% decrease in the likelihood of people obtaining work. However, the arrival of migrants leads to a rise in local company output at the community level, as refugees take the position of native workers in the informal labor market, intensifying competition for low-wage employment. This subsequently decreases the labor expenses for the companies and enhances the marginal output (Altındağ, Bakış, & Rozo, 2020).

According to certain studies, there is no discernible disparity in labor market integration between native individuals and immigrants due to migration. Consequently, it can be inferred that immigrants may have limited access to the job market, as employers tend to prioritize and provide preferential benefits to native individuals. The literature presents a contrasting perspective. Desiderio (2016) found that the average employability of refugees or asylum beneficiaries in Europe is much lower than that of local or family migrants. The author contends that the absence of measures to tackle refugee difficulties places these individuals at a disadvantage in the job market, affecting their socioeconomic well-being.

2.2 Integration of Rohingya refugees in Bangladesh

According to Mukta (2020), Rohingya refugees are primarily located in shelter camps in Cox's Bazar District, which were established by local and international non-governmental organizations (NGOs). They rely on the assistance that these NGOs offer and a small number of government subsidies. These are insufficient for providing a minimal survival level in humanitarian terms. Consequently, many refugees escaped camps and assimilated them into the local population. The native dialect spoken in Cox's Bazar area resembles the Rohingya language, which facilitates seamless communication and integration with the local population. However, these immigrants must become more familiar with the state language Bengali, the official language used in employment sectors, offices, and even low-paying occupations. The underlying cause of their departure from camps remains mostly unaltered. They continue to need help in integrating themselves into the work market. Mukta (2020) examined refugees' labor market entry by considering factors such as their degree of education, duration of stay in Bangladesh, and language proficiency. The findings indicate a positive correlation between the duration of stay in the host nation and the likelihood of integration into the job market. The survey also revealed that educational level and language had a minimal impact on access to the labor market.

Annex 49

C. Tams *et al*., *The Genocide Convention: Article-by-Article Commentary* (2nd edition, 2023) (extract)

The Genocide Convention

Article-by-Article Commentary

by

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Lars Berster
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but not certain knowledge that genocide would take place. The duty to act is activated even where uncertainty about the future conduct of the perpetrators remains – as long as, in the circumstances of the case, the serious risk of genocidal violence 'might at least have been surmised'.[118]

(3) The substantive dimension. Finally, clarification is necessary regarding **precisely what is required to be prevented**. At some level, the answer to this question is obvious: state parties are required to prevent *acts of genocide* from occurring. The question is whether the duty to prevent extends to cover the acts mentioned in Article III lit. (b) to (e), namely conspiracy, incitement, attempt and complicity. The wording of Article I does not support such an extensive interpretation: it refers to the prevention of 'genocide', not of attempted genocide, complicity in genocide or similar. That in itself does not settle the matter, though; as has been shown above, the duty to punish (perpetrators of) 'genocide' is equally construed to encompass the other acts mentioned in Article III.[119] Yet there is a difference: as regards the duty to punish, Articles VI and IV mandate such an extensive interpretation. As they concretise the duty to punish, their express wording ('[p]ersons charged with genocide or any of the other acts mentioned in Article III') informs the interpretation of Article I. No equivalent argument exists for the duty to prevent genocide, which is only mentioned in Article I. In fact, the preceding considerations[120] indicate that the recognition of a global duty to act against impending acts of genocide is controversial. To read it to cover preparatory or inchoate acts would be a further extension. What is more, at least for some of the acts mentioned in Article III, such an extension would be difficult to construe. How could, to give just one example, a risk of conspiracy to commit genocide be construed meaningfully? And could such an extension of a duty to act be justified by reference to the overarching aim of the Convention, viz. to prevent (acts of) genocide (not conspiracy to commit genocide)? Finally, it is instructive to see that under other treaties recognising duties of prevention, the duty to act is triggered by the risk of actual abuses, not preparatory or inchoate acts.[121] All this suggests that **the duty to prevent imposed by Article I is a duty to prevent acts of genocide in the sense of Articles II, III lit. (a);** not less, not more. 42

cc) The content of the duty. Given the universal reach of the duty, and the relevance of subjective factors (awareness; knowledge), it is no surprise that **the content of the duty is not static.** A global duty to prevent acts of genocide, irrespective of where they occur – imposed upon a state party with respect to criminal conduct on its territory, just as on all other treaty members with respect to threats of genocide, wherever they materialise – needs to be differentiated and context-dependent. **What is required, varies depending on the circumstances and on the identity of the duty-bearer.** This in itself raises no principled concerns; in fact, content-dependent obligations are a common phenomenon in international law. They are formalised in regimes based on the notion of 'differentiated responsibility', and a common feature of treaties imposing upon state parties obligations in the socio-economic sphere, in which (as *Simma* notes) 'the interpretation of economic and social [human] rights as well as of environmental 43

of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other'.

[118] ICJ Reports 2007, 43, para. 438.

[119] → mn. 25.

[120] → mns 35–8.

[121] By way of illustration, see Article 2, lit (a) of the Convention against Torture: 'Each State Party shall take effective legislative, administrative, judicial or other measures *to prevent acts of torture*' (emphasis added).

Third, **conduct of private persons or entities can be attributed to a state if it was in fact carried out under the instructions of that state or if the state directed or controlled it.** As the prohibition against genocide applies globally, this third category of attribution potentially covers state conduct 'by proxy' in foreign countries. Not surprisingly, there is much debate, notably about the threshold required for private conduct to be attributed to a state *controlling* it.[226] Before assessing the matter, it is worth noting that the two other forms of state involvement ('instructions' or 'direction') are less controversial. Both are rather closely related: in both instances, the state orders private individuals or entities to acts in a way that violates international law. This presupposes state influence over the violation. It also is necessary for the state to influence the specific operation in which international law was violated.[227] If this happens, the state – by giving instructions or directions – will typically violate the prohibitions against incitement or conspiracy to commit genocide. If the act in question is carried out, the state is also responsible for the actual act of genocide.[228] 79

Compared to 'direction' or 'instruction' (both rather specific) 'control' seems to denote a more general form of influence over conduct. The requirement of attribution *qua* 'control' is controversial. Typically, the debate is presented as a choice between two opposed approaches: the test favoured by the ICJ and ILC, and that put forward by the ICTY in *Tadić*.[229] The former emphasises the need to establish control over specific violations: as noted by the ICJ in the *Nicaragua case*, '[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.[230] By contrast, in *Tadić*, the ICTY was willing to accept that, where violations were carried out by paramilitary units with an autonomous command structure, 'control' over specific acts could be inferred if a state exercised 'overall' or 'global' control 'in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[231] Given the heated character of the debate, it is important to note that the difference between the two approaches is gradual, not categorical. Under both approaches, **effective control – and thus attribution – can be inferred from circumstantial evidence**, including evidence about the general relationship between the state and its proxy: close involvement of state organs in decision-making processes of the actual perpetrators will be a factor, just as their geographical proximity to the site of the crime.[232] 80

[226] See e.g. de Frouville in Crawford/Pellet/Olleson, International Responsibility, p. 257; Talmon, *ICLQ* 58 (2009), 493; as well as – with particular focus on the Genocide Convention and the *Bosnian Genocide case* – Spinedi *JIntCrimJust* 5 (2007), 829; Cassese *EJIL* 18 (2007), 649; Milanovic *EJIL* 18 (2007), especially at 575–88 and 597–601.

[227] Cassese *EJIL* 18 (2007), 663. In para. 7 of its commentary to Article 8 ASR, the ILC distinguished two grounds for attribution: 'specific directions' and 'exercising control' (YbILC 2001, vol. II/2, 48).

[228] In the *Bosnian Genocide case*, the ICJ suggested that instructions must have been given 'in respect of each operation in which the alleged violations occur, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations': see ICJ Reports 2007, 43, para. 400. As Crawford notes, where a state has given 'ambiguous or open-ended' instructions, conduct that is 'conceivably within the expressed ambit' may be attributable: Crawford, State Responsibility, p. 145.

[229] Including by the ICJ in the *Bosnian Genocide case:* see ICJ Reports 2007, 43, paras 401–2. For a clear account, see Crawford, State Responsibility, p. 146–56.

[230] ICJ Reports 1986, 14, para. 15. Two decades later, the Court stated that '"effective control" [must be] exercised … in respect of each operation in which the alleged violations occurred' (ICJ Reports 2007, 43, para. 400).

[231] See ICJ Reports 2007, 43, para. 400; and see ICTY, *Tadić*, AC, 14 July 1999, paras 115–45.

[232] To give just one example, in *Nicaragua*, the ICJ – operating under the more specific test – did not ignore the United States' general control; it merely held it would have to be corroborated by evidence of control over the specific operations: 'the general control by the respondent State over a force with a high

Stronger evidence exists that the delegates of the Sixth Committee widely acknowledged the concept of 'co-perpetration' as a variant of the commission of genocide under Article III lit. (a). During the 87th meeting, the delegate from Luxembourg (*Pescatore*) drew upon the difference between complicity and co-perpetration in order to support an argument against extending the Convention to complicity in attempted genocide. According to *Pescatore*, complicity meant the rendering of accessory or secondary aid, or simply of facilities, to the perpetrator of an offence, whereas a person who rendered essential, principal or indispensable aid was termed a co-perpetrator. In regards to punishment, co-perpetrators were placed on the same footing as the main perpetrator. Therefore, *Pescatore* argued, even if accomplices in attempted genocide escaped conviction, essential contributors would still be liable as co-perpetrators of attempted genocide.[9]

Pescatore's remarks were met with some approval. Others voiced some critique but did not speak against the idea of co-perpetration, which indicates a general feeling of acceptance towards that concept.

II. Conspiracy to commit genocide

The Secretariat Draft cites '**conspiracy to commit acts of genocide**' as a punishable act. The accompanying commentary explains that genocide can hardly be committed on a large scale without any form of agreement.[10] The *Ad Hoc* Committee shared this view, noting that 'conspiracy to commit genocide must be punished both in view of the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons.'[11] The concept of conspiracy being unknown in many civil law systems, the need for notional clarification arose during the negotiations. *Maktos* of the United States, who chaired the *Ad Hoc* Committee, explained that in the Anglo-Saxon legal tradition, 'conspiracy' meant an offence consisting of the agreement of two or more persons to effect any unlawful purpose.[12] The Soviet and the French delegates (*Morozov* and *Ordonneau*) expressed their understanding of conspiracy as an agreement to commit a crime, whether or not the parties to the agreement had begun to carry out their design.[13] Slightly altering his previous statement, *Maktos* then defined conspiracy as the 'agreement between two or more persons to commit an unlawful act.'[14] According to *Raafat* of Egypt, conspiracy meant 'the connivance of several persons to commit a crime, whether the crime was successful or not.' 4

Notwithstanding such broad consensus concerning the contents of 'conspiracy', finding notional equivalents in all authentic languages proved to be more difficult. Venezuela remarked that in Spanish the word '*conspiracion*' was narrower and meant a conspiracy against the Government, while the English term 'conspiracy' was rendered in Spanish by '*asociacion*', association for the purpose of committing a crime.[15] In the Sixth Committee, Belgium (*Kaeckenbeeck*) moved to have the initial term '*entente*' replaced by '*complot*', as the former was too vague and unknown in Belgian and French law. *Kaeckenbeeck* acknowledged that the word *complot* (plot- 5

[9] UN Doc. E/AC.25/SR.87, p. 254.
[10] Secretariat Draft Commentary (UN Doc. E/447).
[11] *Ad Hoc* Draft Commentary (UN Doc. E/794).
[12] UN Doc. E/AC.25/SR.16.
[13] UN Doc. E/AC.25/SR.16.
[14] UN Doc. E/AC.25/SR.84, p. 212.
[15] UN Doc. E/AC.25/SR.16 (Pérez Perozo, Venezuela).

ting) was more restrictive than the term 'conspiracy' but felt that it was impossible to find a perfect equivalent in French.[16]

III. Direct and public incitement to commit genocide

6 The Secretariat Draft recommended criminalising not only 'direct public incitement to any act of genocide, whether the incitement be successful or not' (Article II (II) para. 2 Secretariat Draft), but also '[A]ll forms of **public propaganda** tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act' (Article III Secretariat Draft).[17] Against the backdrop of their traditionally expansive understanding of the **freedom of speech**, the USA soon pushed for the limitation of the proposed provisions. In a governmental comment on the Secretariat Draft, the USA considered that only such 'propaganda' should be punishable as is constituent of 'a clear and present danger' for the protected group. However, in such instances, it was further argued that 'propaganda' takes on the character of incitement and is sufficiently covered by the previous article. Therefore, Article III should be deleted. In addition, the USA proposed that direct and public incitement only be criminalised when taking place 'under circumstances which may reasonably result in the commission of acts of genocide.'[18] The extreme counterposition was taken by the delegate of Soviet Union in the *Ad Hoc* Committee, who strongly favoured the criminalisation of any sort of propaganda aimed at stirring up hatred against protected groups and designed to provoke genocidal acts.[19] A compromise was eventually reached through the integration of a proposal put forth by France, which suggested that only *direct* incitement should be subject to legal punishment.[20] Additionally, the Committee considered a proposition from Venezuela, proposing that both public and private incitement should be criminalised regardless of the actual outcome of such incitement.[21] Consequently, the finalised version of the *Ad Hoc* Committee's Draft mandated the penalisation of any instance of 'direct incitement in public or in private to commit genocide whether such incitement be successful or not.'

7 In the Sixth Committee, this controversy persisted with the USA then attempting to procure the complete deletion of incitement to commit genocide.[22] After lengthy discussions, a **majority agreed** to a formulation, which in essence consisted of the deletion of the Venezuelan *addenda*. In regards to incitement 'in private', Iran sub-

[16] UN Doc. E/AC.25/SR.84, p. 207, 211 (Kaeckenbeeck, Belgium). In French and Belgian penal law, the crime of '*complot*' constitutes an inchoate crime against the state's government or security. In French law, the agreement alone is not sufficient but has to be manifested in the form of certain overt acts. In Belgian criminal law, such manifestation merely constitutes an aggravating factor. See: French Penal Code, Article 412-2: 'Constitue un complot la résolution arrêtée entre plusieurs personnes de commettre un attentat [i.e. actes de violence de nature à mettre en péril les institutions de la République ou à porter atteinte à l'intégrité du territoire national – 412-1] lorsque cette résolution est concrétisée par un ou plusieurs actes matériels.'
Belgian Penal Code, Article 106: 'Le complot contre la vie ou contre la personne du Roi sera puni de quinze ans à vingt ans de réclusion, s'il a été suivi d'un acte commis pour en préparer l'exécution, et de dix ans à quinze ans de la même peine, dans le cas contraire.'

[17] Secretariat Draft (UN Doc. E/447).

[18] UN Doc. E/623.

[19] UN Doc. E/AC.25/7, Basic Principle No. VI: 'The convention should make it a punishable offence to engage in any form of propaganda for genocide (the press, radio, cinema, etc.) aimed at inciting racial, national or religious enmity or hatred and also designed to provoke the commission of acts of genocide.'

[20] UN Doc. E/AC.25/SR 15; E/AC.25/SR 16.

[21] UN Doc. E/AC.25/SR 16.

[22] UN Doc. A/C.6/SR.84, p. 213; A/C.6/SR.85, p. 224 (Maktos; United States).

employed veiled language, such as circumscriptions, metaphors, or euphemisms, partly to make their cause more acceptable to the audience and partly to conceal their true intentions from foreign observers. A striking illustration of this phenomenon is evident in the Rwandan context, where inciters made use of a coded term, 'cockroaches,' during radio announcements to allude to the Tutsi population as the intended targets of the planned massacres.[87] According to existing international case law, the discourse must be interpreted from the perspective of the offender's intended audience, in due consideration of the specific context, in particular the recipients' cultural background, the nuances of the employed language, and the political and community affiliation of the inciter.[88]

31 In whichever form the incitement appears, it must be **'direct'**. This term involves three aspects. Firstly, the incitement must not consist of an 'indirect suggestion'[89], which means that it must not be left to the addressee to conclude whether or not a group should be destroyed by means contained in Article II lit. (a)–(e). As a consequence, a line must be drawn between incitement to commit genocide and mere 'hate-speeches', which aim to spread contempt or anger against a group but leaves it to the recipient to decide if action should be taken.

32 Secondly, the term 'directness' also involves an aspect of **clarity**. A discourse which remains ambiguous even after being subjected to interpretation in accordance with the aforementioned principles, therefore, does not qualify as incitement to commit genocide.[90]

33 Thirdly, **proximity of time** must be read into the term 'directness'. In the accompanying commentary to its Draft Code of 1996, the ILC explained that '[t]he element of direct incitement requires specifically urging another individual to take *immediate* criminal action rather than merely making a vague or indirect suggestion.'[91] Directness would, thus, also require that the author call for immediate or at least timely action against the protected group. Appeals for genocidal action at a future time would, hence, not suffice, regardless of how clear they may be.

34 Incitement is conducted in a **'public'** manner when the inciting utterances are expressed before or made available to an *indeterminate* plurality of persons.[92] In contrast, a message addressed to a set of *individualizable* persons would not qualify as public. This demarcation line between public and private forms of incitement is crucial, as it concretises the underlying reason for the punishablility of the crime. Directing inflammatory calls to an indeterminate group of recipients is particularly dangerous, as the author may trigger a chain of events which they cannot control, unlike utterances in private context.[93] It is this increased danger that warrants the

[87] ICTR Akayesu, TC, 2 September 1998, paras 556 et seq.; Cassese/Gaeta et al., Cassese's Int'l Criminal Law (3rd edn), p. 203.

[88] ICTR Nahimana et al., AC, 28 November 2007, para. 698; ICTR Kalimanzira, TC, 22 June 2009, para. 514; ICTR Bikindi, TC, 2 December 2008, para. 387; ICTR Niyitegeka, TC, 16 May 2003, para. 431; ICTR Akayesu, TC, 2 September 1998, paras 557 et seq.

[89] ICTR Nzabonimana, TC, 31 May 2012, para. 1752; ICTR Nahimana et al., AC, 28 November 2007, para. 692.

[90] ICTR Nahimana et al., AC, 28 November 2007, para. 701. The Chamber did not deem the absence of ambiguity a notional component of 'directness', though, but formulated the evidentiary rule that in view of an ambiguous discourse, direct [and public] incitement could not be proven beyond reasonable doubt.

[91] ILC Draft Code (1996) Commentary, Article 2 para. 16 (22) (emphasis added).

[92] In Kalimanzira (22 June 2009, para. 515) the ICTR Trial Chamber provided a number of examples, holding that '[i]ncitement is public when conducted through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.'

[93] Werle/Jeßberger, Principles (4th edn), paras 960, 963.

Annex 50

L. Fransman and A. Berry, *Fransman's British Nationality Law* (4th edn. 2024) (extract)

LexisNexis

4.7 Status tracing

Fransman's British Nationality Law > Part II British Subjects to British Citizens: Section A – British Nationality Law Prior to 1983 > Chapter 4 Introduction: preliminary concepts and 'status tracing'

The purpose of status tracing is to determine whether not a person already possesses some form of British nationality. Often, the answer will be clear at an early stage. The person will then be advised how to pursue his claim or, if he has none, whether he can apply to be registered or naturalised.

Where a person's status, if any, under British nationality law is unclear, a status tracing exercise must be undertaken. To trace status, one determines the status acquired by a person at birth and then traces the evolution of that status.

To assist with status tracing, charts at the end of this chapter plot the development of the law with particular emphasis on automatic/retrospective provisions and the 1948/49 re-classification.

Two examples of status tracing are given below. In these examples, the relevant law is simply applied and not explained; for explanations, see the later chapters.

Example 1

Facts

Mohammed was born on 17 June 1948 in Rangoon, Burma. His father was born in the same place on 14 April 1920, while Mohammed's paternal grandfather was born in Calcutta, India, on 3 December 1894. Mohammed has never applied for or renounced any citizenship or nationality but now wants to know if he can obtain a British passport. He has never been to the UK.

Status trace

On 1.1.1915	Grandfather remained a British subject by birth.
From 1.1.1915–31.12.1948	Burma became a foreign country on 4.1.1948. Prior to this, Rangoon was part of British Burma. Mohammed acquired nothing by birth. But Mohammed's father was a British subject by birth and retained this status on Burma's independence (Burma Independence Act 1947, Sch 1, para 2(1)(a)). Mohammed therefore became a British subject by descent at the time of birth (BNSAA 1914, s 1(1)(b)(i), as amended by 1922 Act) and remained a British subject immediately prior to 1.1.1949.
On 1.1.1949	On this day, he did not become an actual citizen of a country listed in

	BNA 1948, s 1(3). His nearest male ancestor to become a British subject other than by descent was his father, born in Burma. As Burma did not become a s 1(3) country, Mohammed did not become a potential citizen under s 32(7) and, therefore, he was re-classified as a CUKC (s 12(4)) by descent (s 12(8)).
From 1.1.1949–31.12.1982	Mohammed remained a CUKC by descent.
On 1.1.1973	Became a non-patrial CUKC.
From 1.1.1973–31.12.1982	Remained a non-patrial CUKC.
On 1.1.1983	Re-classified as a BOC (BNA 1981, s 26).
From 1.1.1983 onwards	Remained a BOC and so is entitled to a British passport describing him as such. This does not complete the enquiry: if Mohammed holds no other nationality or citizenship and fulfils the conditions of BNA 1981, s 4B, as amended by NIAA 2002, s 12, he is entitled to be registered as a British citizen.

Example 2

Facts

John was born in Johannesburg, South Africa, on 28 April 1962. His sister, Mary, was born in Swaziland on 12 January 1968; but, when she was only two months old, she was taken back into South Africa and has lived there ever since with her brother and parents. The father was born in Cape Town on 8 March 1944, while the paternal grandfather was born in Edinburgh, Scotland, on 31 July 1901. The mother is a French national. John and Mary seek advice as to their status.

Status trace

On 1.1.1915	The grandfather was a British subject by birth.
From 1.1.1915–31.12.1948	Grandfather remained a British subject. Father was a British subject by birth (BNSAA 1914, s 1(1)(a)) and descent (s 1(1)(a), (b)(i), as amended by 1922 Act).
On 1.1.1949	Grandfather and father both re-classified as CUKCs; the former as a CUKC otherwise than by descent (BNA 1948, s 12(1)(a)), the latter as a CUKC by descent (s 12(2), (9)).
From 1.1.1949–31.12.1982	As a South African citizen by birth, John was *ipso facto* a British subject, but this status was extinguished as of 31.5.1962 (South Africa Act 1962, s 1(1)). John acquired nothing by descent, so then became an alien. Mary became a citizen of Swaziland by birth (1967 Constitution, s 127(a)) and *ipso facto* a statutory BPP (British Protectorates, Protected States and Protected Persons Order 1965, art 18(1)). She also became a CUKC (para (a) of proviso to s 5(1) of BNA 1948). On 6.9.1968, Mary remained a Swazi citizen (1968 Constitution, s 20), ceased to be a BPP, but remained a CUKC (Swaziland Independence Act 1968, s 4(1), (4), (5)). In 1973, she ceased to be a citizen of Swaziland (King's

4.7 Status tracing

	Order in Council 22/1974, s 3).
	On 31.12.1982, John was an alien and Mary was a CUKC.
On 1.1.1973	Mary became a patrial CUKC (IA 1971, s 2(1)(b)(ii)).
From 1.1.1973–31.12.1982	She remained a patrial CUKC.
On 1.1.1983	John remained an alien. Mary was re-classified as a British citizen (BNA 1981, s 11(1)) by descent (s 14(1)(b)).
From 1.1.1983 onwards	John remained an alien until becoming a Commonwealth citizen upon South Africa's re-admission. Mary is a British citizen by descent.

End of Document

LexisNexis

5.2 The nationality categories: British subjects, protected persons and aliens

Fransman's British Nationality Law > Part II British Subjects to British Citizens: Section A – British Nationality Law Prior to 1983 > Chapter 5 The law prior to 1915: the statute De natis ultra mare (1350) to the Naturalization Acts (1870–1895)

After the Act of Union 1707 joining England and Scotland, 'English subject' became 'British subject'. Those who were not British subjects were aliens. The category of British protected persons (BPPs) emerged in the late 1800s as a result of imperial protection being extended to certain places and their populations.[3] Protected persons were no more than aliens under protection; and protected places, unless or until annexed, were outside the Crown's dominions.[4] BPPs did not constitute a statutory nationality category until the mid-twentieth century.

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[3] See Nationality Guidance, 'Historical background information on nationality', version 1.0, 21 July 2017, p 6.

[4] For the meaning of 'within the Crown's dominions', see 3.3 above.

End of Document

5.3 Acquisition of British subject status: birth

Fransman's British Nationality Law > Part II British Subjects to British Citizens: Section A – British Nationality Law Prior to 1983 > Chapter 5 The law prior to 1915: the statute De natis ultra mare (1350) to the Naturalization Acts (1870–1895)

At common law, subject status was acquired by birth within the Crown's 'dominions and allegiance'. The term 'dominions' in this common law context referred to all the territories within the British Empire, save for protected places. The term 'dominions' should not be confused with 'Dominions', which were the forerunners of some of today's 'independent Commonwealth countries'.[5] Birth within the dominions usually, but not invariably, meant that the birth was within the Crown's 'allegiance', and therefore that the person was a subject. At common law, there were certain people who, although born in the dominions, would not owe allegiance. These were the children of foreign ambassadors (but not of other diplomats) on an official posting, and the children born to members of foreign, invading, armed forces.

The position at the end of 1914, immediately prior to the commencement of the Act of that year, was practically the same as it had been at common law: birth within the Crown's dominions *and* allegiance, in the senses described above, conferred British subject status 'by birth' (in modern parlance).

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[5] Eg Canada; see 3.3.2, 3.3.9. See also Part III and the former NIs, Vol 2, Section 2, Dominions.

End of Document

LexisNexis

6.2.1 Birth within dominions and allegiance

6.2 Acquisition of British subject status: birth

6.2.1 Birth within dominions and allegiance

Section 1(1)(a) of the 1914 Act provided that 'Any person born within His Majesty's dominions and allegiance' was a natural-born British subject (by birth). Use of the word 'person' rather than 'child' meant legitimacy was irrelevant: whereas a 'child' at common law had to be legitimate,[3] a 'person' was any individual. A person born in the Crown's dominions was normally, but not invariably, also born within the Crown's allegiance.[4] Although born within the dominions, the legitimate children of foreign sovereigns, heads of state and ambassadors were considered to be born within a foreign allegiance and so were not British subjects. The ambassadorial exception was not limited to actual ambassadors, but came to apply to anyone with diplomatic immunity.

A further exception concerned the children of members of foreign armies of invasion, and the children of enemy aliens entering the dominions during a period of enemy occupation. At the time of the Second World War, this exception caused certain practical problems in relation, for example, to the Channel Islands under German occupation. Few, if any, of those problems are likely to be current today.[5]

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[3] See 5.5.2.3.

[4] For persons born within the Crown's allegiance but *not* within the Crown's dominions, see 5.4 and 6.3.1.

[5] For a full analysis, see Mervyn Jones *British Nationality Law and Practice* (1947), pp 128–30.

ENCYCLOPEAEDIAS AND DICTIONARIES

Annex 51

Encyclopaedia Britannica, “ghetto”

Available at:

https://www.britannica.com/topic/ghetto

ghetto

Market in the Warsaw Ghetto, 1941.**ghetto**, formerly a street, or quarter, of a city set apart as a legally enforced residence area for Jews. One of the earliest forced segregations of Jews was in Muslim Morocco when, in 1280, they were transferred to segregated quarters called *millah*s. In some Muslim countries, rigid ghetto systems were enforced with restrictions on the sizes of houses and doors. Forced segregation of Jews spread throughout Europe during the 14th and 15th centuries. The ghettos of Frankfurt am Main and the Prague *Judenstadt* (German: "Jew town") were renowned. In Poland and Lithuania, Jews were numerous enough to constitute a majority of the population in many cities and towns in which they occupied entire quarters. The name *ghetto*, probably derived from an iron foundry in the neighbourhood, was first used in Venice in 1516. In that year an area for Jewish settlement was set aside, shut off from the rest of the city, and provided with Christian watchmen. It became a model for ghettos in Italy.

Customarily, the ghettos were enclosed with walls and gates and kept locked at night and during church festivals such as Holy Week, when anti-Semitic outbursts were particularly likely because of the alleged guilt of the Jews in the Crucifixion of Christ. Inside the ghetto the Jews were autonomous, with their own religious, judicial, charitable, and recreational institutions. Since lateral expansion of the ghetto was, as a rule, impossible, houses tended to be of unusual height, with consequent congestion, fire hazards, and unsanitary conditions. Outside the ghetto, Jews were obliged to wear an identifying badge (usually yellow), and they were in danger of bodily harm and harassment at all times.

Warsaw Ghetto Uprising

A family marching at the head of a column of Jews on their way to be deported during the Warsaw Ghetto Uprising in 1943.

The ghettos in western Europe were permanently abolished in the course of the 19th century. The last vestige disappeared with the occupation of Rome by the French in 1870. In Russia the Pale of Settlement (*see* pale), a restrictive area on the western provinces of the empire, lasted until the 1917 Revolution. Ghettos continued in some Islamic countries, such as Yemen, until the large-scale emigration to Israel in 1948. The ghettos revived by the Nazis during World War II were merely overcrowded holding places that served as preliminaries to extermination. The Warsaw ghetto was the foremost example.

More recently, the term *ghetto* has come to apply to any urban area exclusively settled by a minority group. In the United States, immigrant groups and African Americans were compelled to live in ghettos because of legal and illegal discrimination and economic and social pressures. The goal of modern legislation has been to dissipate ghettos, but enforcement of civil rights laws (e.g., the Civil Rights Act) passed from the 1960s onward has been hampered by some of the same social prejudices that brought the first ghettos into being.

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Annex 52

International Committee of the Red Cross, International Humanitarian Law Databases, Customary IHL Database, Rule 47, Attacks against Persons Hors de Combat

English version available at:

https://ihl-databases.icrc.org/en/customary-ihl/v1/rule47

French version available at:

https://ihl-databases.icrc.org/fr/customary-ihl/v1/rule47

Back to: : List of Rules

Rule 47.
Attacks against Persons Hors de Combat

Related practice →

Practice

Summary

International armed conflicts

Non-international armed conflicts

Specific categories of persons hors de combat

Quarter under unusual circumstances of combat

Loss of protection

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:
(a) anyone who is in the power of an adverse party;
(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
(c) anyone who clearly expresses an intention to surrender;
provided he or she abstains from any hostile act and does not attempt to escape.

Practice

Volume II, Chapter 15, Section B.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

This is a long-standing rule of customary international law already recognized in the Lieber Code, the Brussels Declaration and the Oxford Manual.[1] The Hague Regulations provide that it is especially forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion".[2] Additional Protocol I prohibits attacks against persons recognized as *hors de combat* and provides that such attacks constitute grave breaches of the Protocol.[3] Under the Statute of the International Criminal Court, "killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" is a war crime in international armed conflicts.[4]

The prohibition on attacking persons recognized as *hors de combat* is set forth in numerous military manuals.[5] Sweden's IHL Manual identifies the prohibition on attacking persons recognized as *hors de combat* in Article 41 of Additional Protocol I as a codification of customary international law.[6] Violation of this rule is an offence under the legislation of many States.[7] It is also referred to in military communiqués.[8] It is supported by official statements and reported practice.[9] The prohibition on attacking persons *hors de combat* has been upheld in case-law following the First and Second World Wars.[10]

Non-international armed conflicts

The rule is based on common Article 3 of the Geneva Conventions, which prohibits "violence to life and person, in particular murder of all kinds" against persons placed *hors de combat*.[11] This prohibition is repeated in Additional Protocol II, which adds that "it is prohibited to order that there shall be no survivors".[12] In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.[13]

Military manuals which are applicable in or have been applied in non-international armed conflicts prohibit attacks against persons recognized as *hors de combat*.[14] Such attacks are also defined as a war crime in the legislation of a number of States.[15] The rule has been applied in national case-law.[16] It is supported by official statements and other practice.[17]

Contrary practice collected by the Special Rapporteurs of the UN Commission on Human Rights and by the ICRC has been condemned as a violation of the rule.[18] The ICRC has called for respect for the prohibition of attacks on persons *hors de combat* in both international and non-international armed conflicts.[19]

Specific categories of persons hors de combat

A person *hors de combat* is a person who is no longer participating in hostilities, by choice or circumstance. Under customary international law, a person can be placed *hors de combat* in three situations arising in both international and non-international armed conflicts:

(i) Anyone who is in the power of an adverse party. It is uncontested that a person who is in the power of an adverse party is *hors de combat*. This rule is set forth in Additional Protocol I and is implicit in common Article 3 of the Geneva Conventions and in Additional Protocol II.[20] It has been confirmed in numerous military manuals.[21] Respect for and protection of persons who are in the power of an adverse party is a cornerstone of international humanitarian law as reflected in several provisions of the Geneva Conventions and Additional Protocols. Practice, therefore, focuses rather on the treatment to be given to such persons (see in particular Chapters 32 and 37).

(ii) Anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness. This category is based on the Hague Regulations, common Article 3 of the Geneva Conventions and Additional Protocol I, which prohibit attacks on defenceless persons.[22] It is found in numerous military manuals.[23] It is contained in the legislation of many States.[24] It is also supported by case-law, official statements and other practice, such as instructions to armed forces.[25] In addition, respect for and protection of the wounded, sick and shipwrecked is a cornerstone of international humanitarian law applicable in both international and non-international armed conflicts as reflected in several provisions of the Geneva Conventions and their Additional Protocols. Practice, therefore, focuses rather on the treatment to be given to such persons (see Chapter 34).

(iii) Anyone who clearly indicates an intention to surrender. This category is based on the Hague Regulations, common Article 3 of the Geneva Conventions and Additional Protocol I.[26] It is contained in numerous military manuals.[27] It is included in the national legislation of many States.[28] It is also supported by official statements and other practice, such as instructions to armed forces.[29] The general tenet that emerges from this practice is that a clear indication of unconditional surrender renders a person *hors de combat*. In land warfare, a clear intention to surrender is generally shown by laying down one's weapons and raising one's hands. Other examples, such as emerging from one's position displaying a white flag, are mentioned in many military manuals.[30] There are specific examples of ways of showing an intent to surrender in air and naval warfare.[31]

The ability to accept surrender under the particular circumstances of combat was discussed by the United Kingdom and the United States in the light of the war in the South Atlantic and the Gulf War respectively.[32] The United Kingdom pointed out that it may not be possible to accept surrender from a unit while under fire from another position. Hence, a party which "takes" surrender is not required to go out to receive surrender; instead, the party offering surrender has to come forward and submit to the control of the enemy forces. The United States took the position that an offer of surrender has to be made at a time when it can be received and properly acted upon and that a last-minute surrender to an onrushing force may be difficult to accept. The question remains, however, as to how to surrender when physical distance may make it difficult to indicate an intention to surrender or may subject one to charges of desertion. The United States also took the position that retreating combatants, if they do not communicate an offer of surrender, whether armed or not, are still subject to attack and that there is no obligation to offer an opportunity to surrender before an attack.

Quarter under unusual circumstances of combat

The prohibition on attacking a person recognized as *hors de combat* applies in all circumstances, even when it is difficult to keep or evacuate prisoners, for example, when a small patrol operating in isolation captures a combatant. Such practical difficulties must be overcome by disarming and releasing the persons concerned, according to Additional Protocol I.[33] This is restated in several military manuals.[34] The US Field Manual similarly states that:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill prisoners on grounds of self-preservation, even in the case of airborne or commando operations.[35]

Israel's Manual on the Laws of War and the UK Military Manual contain similar statements.[36] Additional Protocol I and several military manuals require that all feasible precautions be taken to ensure the safety of released prisoners.[37]

In the context of non-international armed conflicts, some armed opposition groups have raised difficulties in providing for detention, but the duty to give quarter has not been challenged *per se*.[38]

Practice recognizes that the duty to give quarter is to the benefit of every person taking a direct part in hostilities, whether entitled to prisoner-of-war status or not. This means that mercenaries, spies and saboteurs also have the right to receive quarter and cannot be summarily executed when captured (see also Rules 107–108).

Loss of protection

According to Additional Protocol I, immunity from attack is conditional on refraining from any hostile act or attempt to escape.[39] This is also set forth in several military manuals.[40] The commission of these acts signifies that the person in question is in fact no longer *hors de combat* and does not qualify for protection under this rule. The Third Geneva Convention specifies that "the use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances".[41] The Convention contains other specific rules applicable to the escape of prisoners of war.[42]

Hostile acts have not been defined, but the Commentary on the Additional Protocols gives examples such as resuming combat if the opportunity arises, attempting to communicate with one's own party and destroying installations of the enemy or one's own military equipment.[43]

[1] - Lieber Code, Article 71 (cited in Vol. II, Ch. 15, § 218); Brussels Declaration, Article 13(c) (*ibid.*, § 219); Oxford Manual, Article 9(b) (*ibid.*, § 220).

[2] - Hague Regulations, Article 23(c) (*ibid.*, § 214).

[3] - Additional Protocol I, Article 41(1) (adopted by consensus) (*ibid.*, § 119) and Article 85(3)(e) (adopted by consensus) (*ibid.*, § 120).

[4] - ICC Statute, Article 8(2)(b)(vi) (*ibid.*, § 217).

[5] - See, e.g., the military manuals of Argentina (*ibid.*, § 126), Australia (*ibid.*, §§ 127–128), Belgium (*ibid.*, §§ 129–130), Benin (*ibid.*, § 131), Cameroon (*ibid.*, § 132), Canada (*ibid.*, § 133), Colombia (*ibid.*, §§ 135–136), Croatia (*ibid.*, §§ 137–139), Ecuador (*ibid.*, § 140), France (*ibid.*, §§ 141–143), Hungary (*ibid.*, § 144), Israel (*ibid.*, §§ 145–146), Italy (*ibid.*, §§ 147–148), Kenya (*ibid.*, § 149), Madagascar (*ibid.*, § 150), Netherlands (*ibid.*, § 151), New Zealand (*ibid.*, § 152), Philippines (*ibid.*, § 153), Romania (*ibid.*, § 154), Russian Federation (*ibid.*, § 155), South Africa (*ibid.*, § 156), Spain (*ibid.*, § 157), Sweden (*ibid.*, § 158), Switzerland (*ibid.*, § 159), Togo (*ibid.*, § 160) and United States (*ibid.*, §§ 161–162).

[6] - Sweden, *IHL Manual* (*ibid.*, § 158).

[7] - See, e.g., the legislation of Armenia (*ibid.*, § 163), Australia (*ibid.*, §§ 164–165), Belarus (*ibid.*, § 166), Belgium (*ibid.*, § 167), Bosnia and Herzegovina (*ibid.*, § 168), Canada (*ibid.*, § 169), Colombia (*ibid.*,

§ 170), Cook Islands (*ibid.*, § 171), Croatia (*ibid.*, § 172), Cyprus (*ibid.*, § 173), Georgia (*ibid.*, § 175), Germany (*ibid.*, § 176), Ireland (*ibid.*, § 177), Moldova (*ibid.*, § 180), Netherlands (*ibid.*, § 181), New Zealand (*ibid.*, § 182), Niger (*ibid.*, § 184), Norway (*ibid.*, § 185), Slovenia (*ibid.*, § 186), Tajikistan (*ibid.*, § 187), United Kingdom (*ibid.*, § 188), Yemen (*ibid.*, § 189), Yugoslavia (*ibid.*, § 190) and Zimbabwe (*ibid.*, § 191); see also the draft legislation of El Salvador (*ibid.*, § 174), Jordan (*ibid.*, § 178), Lebanon (*ibid.*, § 179) and Nicaragua (*ibid.*, § 183).

[8] - See, e.g., Egypt, Military Communiqués Nos. 34 and 46 (*ibid.*, § 196); Iraq, Military Communiqués Nos. 973, 975 and 1902 (*ibid.*, § 199).

[9] - See, e.g., the statements of Chile (*ibid.*, § 194) and Syrian Arab Republic (*ibid.*, § 201) and the reported practice of Algeria (*ibid.*, § 193), Egypt (*ibid.*, § 195) and Jordan (*ibid.*, § 200).

[10] - See, e.g., Germany, Leipzig Court, *Stenger and Cruisus case* (*ibid.*, § 328) and Reichsgericht, *Llandovery Castle case* (*ibid.*, § 329); United Kingdom, Military Court at Hamburg, *Peleus case* (*ibid.*, § 331), Military Court at Elten, *Renoth case* (*ibid.*, § 332) and Military Court at Hamburg, *Von Ruchteschell case* (*ibid.*, § 333); United States, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case* (*ibid.*, § 192) and Military Commission at Rome, *Dostler case* (*ibid.*, § 334).

[11] - Geneva Conventions, common Article 3 (cited in Vol. II, Ch. 32, § 1).

[12] - Additional Protocol II, Article 4 (adopted by consensus) (cited in Vol. II, Ch. 15, § 4).

[13] - See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia, § 6 (*ibid.*, § 123); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, § 2.5 (*ibid.*, § 124).

[14] - See, e.g., the military manuals of Australia (*ibid.*, § 127), Benin (*ibid.*, § 131), Canada (*ibid.*, § 134), Colombia (*ibid.*, §§ 135–137), Croatia (*ibid.*, §§ 137–139), Ecuador (*ibid.*, § 140), Italy (*ibid.*, §§ 147–148), Kenya (*ibid.*, § 149), Madagascar (*ibid.*, § 150), Philippines (*ibid.*, § 153), South Africa (*ibid.*, § 156) and Togo (*ibid.*, § 160).

[15] - See, e.g., the legislation of Armenia (*ibid.*, § 163), Belarus (*ibid.*, § 166), Belgium (*ibid.*, § 167), Bosnia and Herzegovina (*ibid.*, § 168), Colombia (*ibid.*, § 170), Croatia (*ibid.*, § 172), Georgia (*ibid.*, § 175), Germany (*ibid.*, § 176), Moldova (*ibid.*, § 180), Niger (*ibid.*, § 184), Slovenia (*ibid.*, § 186), Tajikistan (*ibid.*, § 187), Yemen (*ibid.*, § 189) and Yugoslavia (*ibid.*, § 190); see also the draft legislation of El Salvador (*ibid.*, § 174), Jordan (*ibid.*, § 178) and Nicaragua (*ibid.*, § 183).

[16] - See, e.g., Argentina, National Court of Appeals, *Military Junta case* (*ibid.*, § 327); Nigeria, *Case of 3 September 1968* (*ibid.*, § 330).

[17] - See, e.g., the statement of Chile (*ibid.*, § 194), the practice of Colombia (*ibid.*, § 337) and Yugoslavia (*ibid.*, § 351) and the reported practice of China (*ibid.*, § 365) and Cuba (*ibid.*, § 338).

[18] - See, e.g., UN Commission on Human Rights, Reports of the Special Rapporteur on the Situation of Human Rights in Zaire (*ibid.*, § 202), Report of the Independent Expert on the Situation of Human Rights in Guatemala (*ibid.*, § 357) and Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (*ibid.*, § 358) and the practice collected in ICRC archive documents (*ibid.*, §§ 383–384, 387, 389 and 393–394).

[19] - ICRC, Conflict in Southern Africa: ICRC Appeal (*ibid.*, § 370), Conflict between Iraq and Islamic Republic of Iran: ICRC Appeal (*ibid.*, § 371), Appeal in behalf of civilians in Yugoslavia (*ibid.*, § 373), Press Release No. 1705 (*ibid.*, § 374), Press Releases Nos. 1712, 1724 and 1726 (*ibid.*, § 375), Press Release, Tajikistan: ICRC urges respect for humanitarian rules (*ibid.*, § 376), Memorandum on Respect for

International Humanitarian Law in Angola (*ibid.*, § 377), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise (*ibid.*, § 378), Press Release No. 1792 (*ibid.*, § 379), Press Release No. 1793 (*ibid.*, § 380), Communication to the Press No. 00/36 (*ibid.*, § 381) and Communication to the Press No. 01/58 (*ibid.*, § 382).

[20] - Geneva Conventions, common Article 3 (cited in Vol. II, Ch. 32, § 1); Additional Protocol I, Article 41(2) (adopted by consensus) (cited in Vol. II, Ch. 15, § 215); Additional Protocol II, Article 4 (adopted by consensus).

[21] - See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 15, § 224), Australia (*ibid.*, §§ 225–226), Burkina Faso (*ibid.*, § 233), Cameroon (*ibid.*, §§ 234–235), Canada (*ibid.*, § 236), Congo (*ibid.*, § 239), Croatia (*ibid.*, § 240), Dominican Republic (*ibid.*, § 243), Ecuador (*ibid.*, § 244), France (*ibid.*, §§ 246 and 248–249), Kenya (*ibid.*, § 256), Lebanon (*ibid.*, § 259), Madagascar (*ibid.*, § 260), Mali (*ibid.*, § 261), Morocco (*ibid.*, § 262), Netherlands (*ibid.*, § 26359), New Zealand (*ibid.*, § 266), Peru (*ibid.*, § 271), Senegal (*ibid.*, § 276), Spain (*ibid.*, § 278), Sweden (*ibid.*, § 279), Switzerland (*ibid.*, § 280), Uganda (*ibid.*, § 282), United Kingdom (*ibid.*, § 283) and United States (*ibid.*, §§ 287 and 291).

[22] - Hague Regulations, Article 23(c) (*ibid.*, § 214); Geneva Conventions, common Article 3 (cited in Vol. II, Ch. 32, § 1); Additional Protocol I, Article 41(2) (adopted by consensus) (cited in Vol. II, Ch. 15, § 215).

[23] - See, e.g., the military manuals of Argentina (*ibid.*, §§ 223–224), Australia (*ibid.*, §§ 225–226), Belgium (*ibid.*, §§ 228–230), Benin (*ibid.*, § 231), Cameroon (*ibid.*, § 235), Canada (*ibid.*, §§ 236–237), Croatia (*ibid.*, § 241), Dominican Republic (*ibid.*, § 243), Ecuador (*ibid.*, § 244), El Salvador (*ibid.*, § 245), France (*ibid.*, § 249), Germany (*ibid.*, § 250), Indonesia (*ibid.*, § 252), Israel (*ibid.*, § 253), Italy (*ibid.*, §§ 254–255), Kenya (*ibid.*, § 256), Republic of Korea (*ibid.*, § 257), Lebanon (*ibid.*, § 259), Madagascar (*ibid.*, § 260), Netherlands (*ibid.*, §§ 263–264), New Zealand (*ibid.*, § 266), Nigeria (*ibid.*, §§ 268 and 270), Peru (*ibid.*, § 271), Philippines (*ibid.*, § 273), Russian Federation (*ibid.*, § 274), South Africa (*ibid.*, § 277), Spain (*ibid.*, § 278), Sweden (*ibid.*, § 279), Switzerland (*ibid.*, § 280), Togo (*ibid.*, § 281), United Kingdom (*ibid.*, §§ 283–284), United States (*ibid.*, §§ 285–291) and Yugoslavia (*ibid.*, § 292).

[24] - See, e.g., the legislation of Azerbaijan (*ibid.*, § 293), Bosnia and Herzegovina (*ibid.*, § 294), Canada (*ibid.*, § 296), Colombia (*ibid.*, § 297), Congo (*ibid.*, § 298), Croatia (*ibid.*, § 299), Egypt (*ibid.*, § 300), Estonia (*ibid.*, § 302), Ethiopia (*ibid.*, § 303), Georgia (*ibid.*, § 304), Ireland (*ibid.*, § 306), Italy (*ibid.*, § 307), Lithuania (*ibid.*, § 308), Mali (*ibid.*, § 309), Netherlands (*ibid.*, § 310), New Zealand (*ibid.*, § 311), Nicaragua (*ibid.*, § 312), Norway (*ibid.*, § 314), Peru (*ibid.*, § 315), Poland (*ibid.*, § 316), Slovenia (*ibid.*, § 317), Spain (*ibid.*, § 319), Sweden (*ibid.*, § 320), Switzerland (*ibid.*, § 321), United Kingdom (*ibid.*, § 323), United States (*ibid.*, § 324) and Yugoslavia (*ibid.*, § 326); see also the draft legislation of Burundi (*ibid.*, § 295), El Salvador (*ibid.*, § 301), Nicaragua (*ibid.*, § 313) and Trinidad and Tobago (*ibid.*, § 322).

[25] - See, e.g., the case-law of Argentina (*ibid.*, § 327), Germany (*ibid.*, §§ 328–329) and United Kingdom (*ibid.*, § 331), the statement of the United States (*ibid.*, § 347) and the practice of Egypt (*ibid.*, § 339), Iraq (*ibid.*, § 341), United Kingdom (*ibid.*, § 344) and United States (*ibid.*, § 348).

[26] - Hague Regulations, Article 23(c) (*ibid.*, § 214); Geneva Conventions, common Article 3 (cited in Vol. II, Ch. 32, § 1); Additional Protocol I, Article 41(2) (adopted by consensus) (cited in Vol. II, Ch. 15, § 215).

[27] - See, e.g., the military manuals of Argentina (*ibid.*, §§ 223–224), Australia (*ibid.*, §§ 225–226), Belgium (*ibid.*, §§ 227–228), Benin (*ibid.*, § 231), Burkina Faso (*ibid.*, § 233), Cameroon (*ibid.*, §§ 234–235), Canada (*ibid.*, §§ 236–237), Colombia (*ibid.*, § 238), Congo (*ibid.*, § 239), Croatia (*ibid.*, §§ 241–242), Dominican Republic (*ibid.*, § 243), Ecuador (*ibid.*, § 244), El Salvador (*ibid.*, § 245), France (*ibid.*,

§§ 246–247), Germany (*ibid.*, §§ 250–251), Indonesia (*ibid.*, § 252), Israel (*ibid.*, § 253), Italy (*ibid.*, §§ 254–255), Kenya (*ibid.*, § 257), Republic of Korea (*ibid.*, § 258), Lebanon (*ibid.*, § 259), Madagascar (*ibid.*, § 260), Mali (*ibid.*, § 261), Morocco (*ibid.*, § 262), Netherlands (*ibid.*, §§ 263–265), New Zealand (*ibid.*, § 267), Nigeria (*ibid.*, §§ 267–270), Peru (*ibid.*, § 271), Philippines (*ibid.*, §§ 272–273), Romania (*ibid.*, § 274), Russian Federation (*ibid.*, § 275), Senegal (*ibid.*, § 276), South Africa (*ibid.*, § 277), Spain (*ibid.*, § 278), Sweden (*ibid.*, § 279), Switzerland (*ibid.*, § 280), Togo (*ibid.*, § 281), United Kingdom (*ibid.*, §§ 283–284), United States (*ibid.*, §§ 285–291) and Yugoslavia (*ibid.*, § 292).

[28] - See, e.g., the legislation of Azerbaijan (*ibid.*, § 293), Bosnia and Herzegovina (*ibid.*, § 294), Canada (*ibid.*, § 296), Congo (*ibid.*, § 298), Croatia (*ibid.*, § 299), Estonia (*ibid.*, § 302), Ethiopia (*ibid.*, § 303), Georgia (*ibid.*, § 304), Germany (*ibid.*, § 305), Ireland (*ibid.*, § 306), Italy (*ibid.*, § 307), Lithuania (*ibid.*, § 308), Mali (*ibid.*, § 309), Netherlands (*ibid.*, § 310), New Zealand (*ibid.*, § 311), Norway (*ibid.*, § 314), Peru (*ibid.*, § 315), Poland (*ibid.*, § 316), Slovenia (*ibid.*, § 317), Spain (*ibid.*, §§ 318–319), Switzerland (*ibid.*, § 321), United Kingdom (*ibid.*, § 323), United States (*ibid.*, § 324), Venezuela (*ibid.*, § 325) and Yugoslavia (*ibid.*, § 326); see also the draft legislation of Burundi (*ibid.*, § 295), El Salvador (*ibid.*, § 301), Nicaragua (*ibid.*, § 313) and Trinidad and Tobago (*ibid.*, § 322).

[29] - See, e.g., the statements of Australia (*ibid.*, § 336) and United States (*ibid.*, § 349), the practice of Colombia (*ibid.*, § 337), Egypt (*ibid.*, § 339), United Kingdom (*ibid.*, §§ 345–346), United States (*ibid.*, §§ 348–349) and Yugoslavia (*ibid.*, § 351) and the reported practice of Algeria (*ibid.*, § 335).

[30] - See, e.g., the military manuals of Belgium (*ibid.*, § 230), Benin (*ibid.*, § 231), Cameroon (*ibid.*, § 235), Canada (*ibid.*, § 237), Croatia (*ibid.*, § 241), Dominican Republic (*ibid.*, § 243), France (*ibid.*, § 249), Italy (*ibid.*, § 255), Kenya (*ibid.*, § 256), Madagascar (*ibid.*, § 260), Togo (*ibid.*, § 281) and United States (*ibid.*, § 287).

[31] - Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1619; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, 1995, § 47.57, p. 135.

[32] - See Report on UK Practice (cited in Vol. II, Ch. 15, § 411); United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War (*ibid.*, § 349).

[33] - Additional Protocol I, Article 41(3) (adopted by consensus) (*ibid.*, § 395).

[34] - See, e.g., the military manuals of Canada (*ibid.*, § 399), France (*ibid.*, § 400), Kenya (*ibid.*, § 402), Netherlands (*ibid.*, § 403), Spain (*ibid.*, § 404) and Switzerland (*ibid.*, § 405).

[35] - United States, *Field Manual* (*ibid.*, § 407).

[36] - Israel, *Manual on the Laws of War* (*ibid.*, § 401); United Kingdom, *Military Manual* (*ibid.*, § 406).

[37] - Additional Protocol I, Article 41(3) (adopted by consensus) (*ibid.*, § 395); the military manuals of Canada (*ibid.*, § 399), France (*ibid.*, § 400), Kenya (*ibid.*, § 402), Spain (*ibid.*, § 403) and United Kingdom (*ibid.*, § 406).

[38] - See the practice of armed opposition groups in ICRC archive documents (*ibid.*, §§ 418–420).

[39] - Additional Protocol I, Article 41 (adopted by consensus) (*ibid.*, § 215).

[40] - See, e.g., the military manuals of Argentina (*ibid.*, § 224), Australia (*ibid.*, §§ 225–226), Belgium (*ibid.*, § 230), Canada (*ibid.*, §§ 236–237), France (*ibid.*, § 249), Kenya (*ibid.*, § 256), Netherlands (*ibid.*, § 263), New Zealand (*ibid.*, § 266), Spain (*ibid.*, § 278), Switzerland (*ibid.*, § 280) and United Kingdom (*ibid.*, § 283).

[41] - Third Geneva Convention, Article 42 (cited in Vol. II, Ch. 32, § 659).

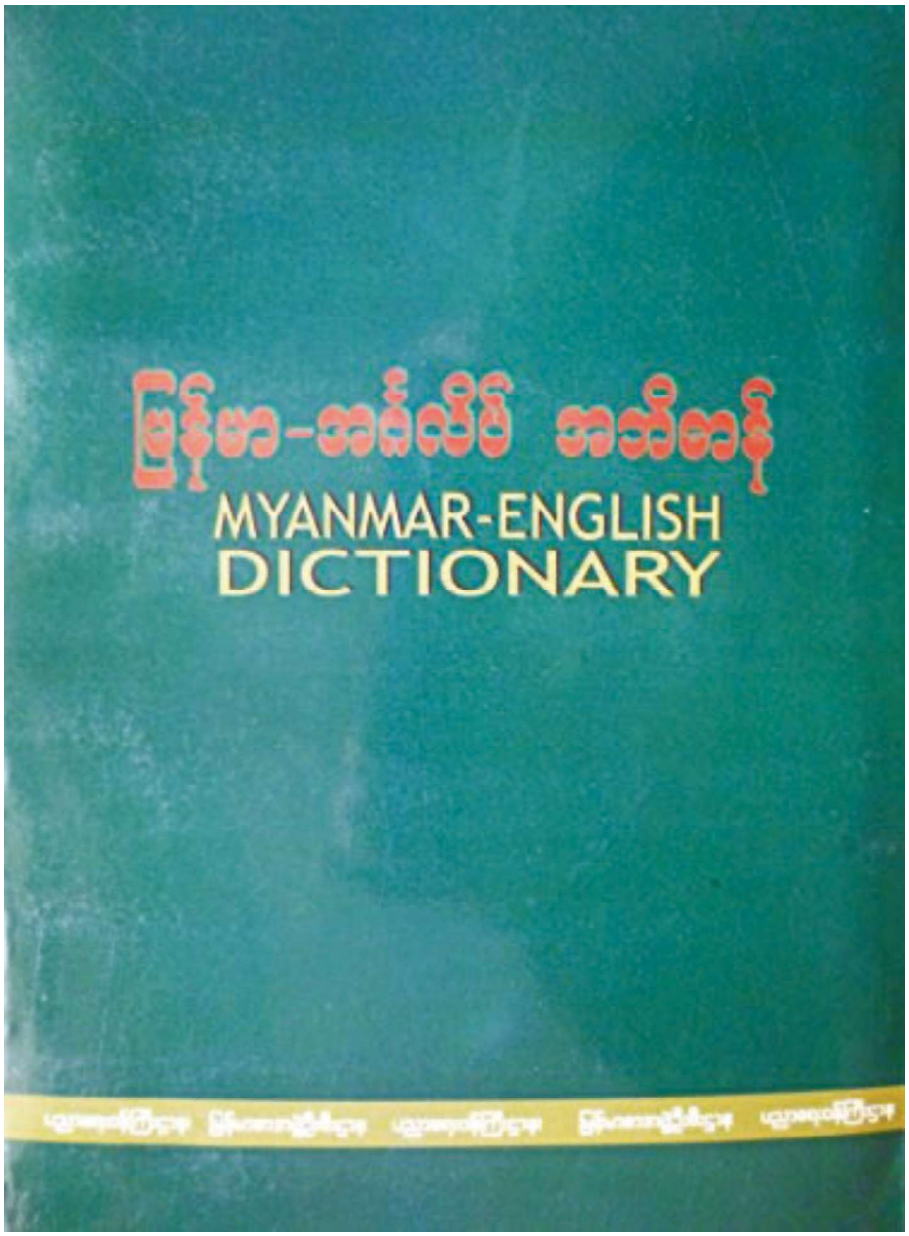
[42] - Third Geneva Convention, Articles 91–94.

[43] - Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1621–1622.

Annex 53

Myanmar-English Dictionary, Union of Myanmar, Ministry of Education, Department of the Myanmar Language Commission (2008) (extract), “kala”

Other extracts also included at CMM, Vol. III, Annex 82


မြန်မာ-အင်္ဂလိပ် အဘိဓာန်
MYANMAR-ENGLISH
DICTIONARY

ကုဒိ် / ku. di / *n* 1 chamber used for religious purposes. 2 water-closet for Buddhist monks. [Pali ကုဋိ]

ကုဋေ / gadei / *n* ten million. [Pali ကောဋိ]

ကုဋေကုဋာ / gadei gada / *n* millions and millions. [Pali ကောဋိ + ကောဋိ]

ကုတို / gadou. / *n* See ကူးတို *n*.

ကုဗ / ku. ba. / *n* cube (dimensions, power). *adj* cubic (as in ~ ပေ).[Eng *cube*]

ကုမုဒြာ / ku. mou' dara / *n* fabulous white water-lily which blooms in moonlight. [Sans ကုမုဒြ]

ကုလသမဂ္ဂ / ku. la. tha. me'ga. / *n* The United Nations Organization. [Pali ကုလ +သမဂ္ဂ]

ကုလား / kala: / *n* 1 native of the Indian subcontinent. 2 court-card; picture-card. *adj* of foreign origin. See also သင်္ဘော. [Pali ကုလ]

ကုလားကောက် / kalagau' / *n* curlew. *Numenius arquata orientalis*.

ကုလားစပါး / kala: zaba: / *n* Same as ဂျုံ *n*.

ကုလားဆင် / kalahsin / *n* person with Indian features.

ကုလားတည် / kalade / *n* pickle or preserve of fruit or vegetables (Indian style).

ကုလားထိုင် / kalahtain / *n* chair.

ကုလားထိုင်လု / kalahtain lu. / *v* [fig] scramble for position.

ကုလားပဲ / kalabe: / *n* gram; chick pea.

ကုလားဖန်တီး / kalahpan htou: / *v* 1 shuffle playing cards. 2 [fig] manipulate things for some purpose; create conditions for some question-

ကုလားရွေ / kalas
ကုလားသေကုလား
[fig] (sleep)
ကုလားဟင်း / kal
ကုလားအော် / kala
ကုလားဆုတ် / kal
ကုလားအုံးဆောင်း
rumen.

ကုသိုလ် / ku. dhou
ကုသလ]
ကုသိုလ်ကံ / ku.
ကုသိုလ်ရှင် / ku.

ကူ / ku / *v* help;
ကူငွေ / ku ngwei
of a charity or
ကူညီ / ku nji /
ကူဖော်လောင်ဖက်
and a help.
ကူသယ်ခေါက်သ
fro; back and f

ကူ / ku / *v* coo

ကူထိုးဖိုး / gu htou:
of ကယား . [K

ကူပွန် / ku pun / *n*

ကူရွှဲ / ku ju' / *n*
ancient times.

ကူရှင် / ku shin /

ကူလီ / ku li / *n* [o
လယ် ~). [Hin

ကူး / ku: / *v* 1 cros
~ –). 2 swim
a written scrip

Page (10)

ကုလား / Kala: / n (1) native of the Indian subcontinent; (2) court-card; picture-card; (adj) of foreign origin; see also **သဘော် [Pali ကုလ]**

Reference:

Myanmar-English Dictionary, Department of Myanmar Language Commission, Ministry of Education, 2nd Edition, 1993, page.10.

MYANMAR LEGISLATION

Annex 54

Myanmar, Code of Criminal Procedure, Section 401
(original in English)

THE CODE OF CRIMINAL PROCEDURE

[၀၁.၀၇.၁၈၉၈] [၂၄.၀၈.၂၀၂၁] [[INDIA ACT V, 1898.]] < Amendment 20.01.2016, 14.02.2021, 24.08.2021 >

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

Power to suspend or remit sentences.

401. (1) When any person has been sentenced to punishment for an offence, the President of the Union may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the President of the Union for the suspension or remission of a sentence, the President of the Union may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the President of the Union, not fulfilled, the President of the Union may cancel the suspension or remission, and there upon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police – officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a criminal Court under any section of this Court or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right [* * * *] of the President of the Union [* * * *] to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted [* * * *] by the President of the Union, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The President of the Union may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Annex 55

Myanmar, Defence Services Act, 1959, Sections 3, 71, 72, 128-129 and 182

THE DEFENCE SERVICES ACT, 1959

(ACT NO. XLIII OF 1959.)

It is hereby enacted as follows:-

CHAPTER I.

PRELIMINARY.

Title and Commencement.

1. (1) This Act may be called **the Defence Services Act, 1959**.

(2) It shall come into force on such date as the President may, by notification, appoint in this behalf.

Persons subject to this Act.

2. (1) The following persons shall be subject to this Act wherever they may be, namely:-

(a) officers of the Defence Services;

(b) persons enrolled under this Act;

(c) persons who were subject to the Burma Army Act or the Burma Naval Discipline Act, 1947, or the Burma Air Force (Discipline)Act, 1947, immediately before the commencement of this Act; and

(d) persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any frontier post specified by the President by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Defence Services.

(2) Every person subject to this Act under sub-section (1), clause (a), (b) or (c) shall remain so subject until his service is terminated or he is duly retired, discharged, removed, dismissed, or cashiered from the service.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context-

(a) **"active service"** as applied to a person subject to this Act, means the time during which such person–

(1) is attached to, or forms part of, a force which is engaged in military operations against an enemy, or

(2) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(3) is attached to or forms part of a force which is in military occupation of a foreign country;

(b) **"aircraft"** includes aeroplanes, balloons, kite balloons, air ships, gliders or other machines for flying;

(c) **"aircraft material"** includes any engines, fittings, guns, gear, instruments or apparatus for use in connection with aircraft, and any of its components and accessories and petrol, oil, and any other substance used for providing motive power for planes;

(d) **"air signal"** means any signal intended for the guidance of aircraft, whether given by flag, ground signal, light, wind indicator or in any manner whatsoever;

(e) **"civil offence"** means an offence which, if committed in the Union of Burma, would be triable by a criminal court;

(f) **"civil offence"** means any jail or place used for the detention of any criminal prisoner under the Prisons Act, or any other law for the time being in force;

(g) **"commanding officer"** used in relation to a person subject to this Act means the officer for the time being in command of the unit or detachment to which such person belongs or is attached, or any officer specified as such by the President;

(h) **"corps"** means any separate body of persons subject to this Act which is prescribed as a corps for the purposes of all or any of the provisions of this Act;

(i) **" court-martial"** means a court-martial held under this Act;

(j) **"Courts-Martial Appeal Court"** means the Courts-Martial Appeal Court constituted under Chapter XVII of this Act;

(k) **"criminal court"** means a court of ordinary criminal justice in the Union of Burma;

(l) **"Defence Services"** means the army, the navy, and the air force;

(m) **"department"** includes any division or branch of a department;

(n) **"enemy"** includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of a person subject to military law to act;

(o) **"military"** shall be construed to refer to any or all of the Defence Services;

(p) **"military custody"** means the arrest or confinement of a person according to the custom of the Defence Services;

(q) **"military prison"** means a military prison established under the provisions of section 180 of this Act and includes a military prison as notified by the President from time to time;

(r) **"military prison"** includes any gratuity or annuity for long service or good conduct, any good conduct pay, good service pay or pension, and any other military pecuniary reward;

70. Any person subject to this Act who abets the commission of any of the offences specified in sections 32 to 66 inclusive and punishable with imprisonment shall, on conviction by court-martial, if that offence be not committed in consequence of the abetment, and no express provision is made by this Act for the punishment of such abetment, be liable to suffer imprisonment for a term which may extend to one-half of the longest term provided for that offence or such less punishment as is in this Act mentioned.

Civil offences.

71. Subject to the provisions of section 72,any person subject to this Act, who at any place in or beyond the Union of Burma commits any civil offence shall be deemed to be guilty of an offen against this Act, and, if charged therewith under this section, shall be liable to be tried by a court-martial and on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in the Union of Burma with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned;and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in the Union of Burma, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.

Civil offerices not triable by court-martial.

72. A person subject to this Act who commits an offence of murder against a person not subject to military law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside the Union of Burma, or

(c) at a frontier post specified by the President by notification in this behalf.

CHAPTER VII.

PUNISHMENTS.

Punishments awardable by courts-martial.

(3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest, or in hospital during the period of arrest or suspension from duty, after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the Defence Services.

Liability of offender who ceases to be subject to the Act.

126. (1) Where an offence under this Act had been committed by any person subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within six months after he has ceased to be so subject to this Act:

Provided that nothing contained in this sub-section shall apply to the trial of any such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 36 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial.

(3) When a person subject to this Act is sentenced by a court-martial to transportation or imprisonment, this Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the service, or has otherwise ceased to be subject to this Act, and he may be kept in custody, removed, imprisoned and punished as if he continued to be subject to this Act.

(4) When a person subject to this Act is sentenced by a court-martial to death, this Act shall apply to him till the sentence is carried out.

Place of trial.

127. Any person subject to this Act who commits any offence under it may be tried and punished for such offence in any place whatever.

Choice between criminal court and court-martial.

128. When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer empowered to convene a general court-martial for the trial of the accused, or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted,

and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

Power of criminal court to require delivery of offender.

129. (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 128 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the President.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the President, whose order upon such reference shall be final.

(3) When an accused person subject to this Act is standing trial before a criminal court, or pending a decision by the President as to the form of court by which he is to be tried, the accused may be kept in military custody to be produced before such court as and when required.

Successive trials by a criminal court and court-martial.

130. (1) Nowithstanding anything contained in any other law for the time being in force a person convicted or acquitted by a court-martial may, with the previous sanction of the President, be tried again by a criminal court for the same offence, or on the same facts.

(2) If a person sentenced by a court-martial under this Act or punished under any of the sections 82,85,86 or 87 is afterwards tried and convicted by a criminal court for the same offence, or on the same facts, that court shall, in awarding punishment, have regard to the punishment he may already have undergone for the same offence.

CHAPTER XI.

PROCEDURE OF COURTS-MARTIAL.

Presiding officer.

131. At a general, district or summary general court-martial the senior member shall be the presiding officer.

Judge- Advocate.

132. Every general court-martial shall, and every district or summary general court-martial may, be attended by a Judge-Advocate, who shall be either an officer belonging to the Department of the Judge-Advocate-

THE DEFENCE SERVICES ACT, 1959

CHAPTER XIV.
PARDONS, REMISSIONS AND SUSPENSIONS.

Pardon and remission.

182. When any person subject to this Act has been convicted by a court–martial of any offence, the President or the Chief of Staff or, in the case of a sentence which he could have confirmed or which did not require confirmation, the officer commanding a formation not less than the brigade in the case of the army, a formation prescribed as equivalent to not less than a brigade (army) in the case of the navy or air force, in which such person at the time of conviction was serving, or the prescribed officer may,–

(a) either with or without conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or

(b) mitigate the punishment awarded; or

(c) commute such punishment for any less punishment or punishments mentioned in this Act;

Provided that a sentence of transportation shall not be commuted for a sentence of imprisonment for a term exceeding the term of transportation awarded by the court; or

(d) either with or without conditions which the person sentenced accepts, release the person on parole.

The Defence Services Act, 1959, Myanmar Version

၁၉၅၉ ခုနှစ်၊ တပ်မတော်အက်ဥပဒေ။
[၁၉၅၉ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၄၃။]

Section 3(e)

အဓိပ္ပါယ်ဖော်ပြချက်များ။

၃။ ။ ဤအက်ဥပဒေတွင် အကြောင်းအရာနှင့်ဖြစ်စေ၊ ရှေ့နောက်စကားတို့၏ အဓိပ္ပါယ်နှင့်ဖြစ်စေ၊ မဆန့်ကျင်လျှင်-

(c) "နယ်ဘက်ပြစ်မှု"ဆိုသည်မှာ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံအတွင်း ကျူးလွန်သည့်ပြစ်မှုဖြစ်လျှင်၊ ရာဇဝတ်တရားရုံးတရုံးက စစ်ဆေးစီရင်နိုင်သော ပြစ်မှုကိုဆိုလိုသည်။

Section 71-74

နယ်ဘက်ပြစ်မှုများ။

၇၁။ ။ ပုဒ်မ ၇၂ ပါ ပြဋ္ဌာန်းချက်များနှင့်မဆန့်ကျင်စေဘဲ၊ ဤအက်ဥပဒေကို လိုက်နာရသူတဦးဦးသည်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံအတွင်း၊ သို့တည်းမဟုတ် ပြင်ပရှိ မည်သည့်နေရာတွင်မဆို၊ နယ်ဘက်ပြစ်မှုတခုခုကိုကျူးလွန်လျှင်၊ ဤအက်ဥပဒေအရဖြစ်သော ပြစ်မှုတခုကိုကျူးလွန်သည်ဟု မှတ်ယူရမည်။ ထို့ပြင် ဤပုဒ်မအရ၊ ထိုပြစ်မှုအတွက်၊ စွဲချက်တင်ခြင်းခံရပါက၊ စစ်တရားရုံးဖြင့် စစ်ဆေးစီရင်ခြင်း ခံရ မည့်ပြင်၊ စစ်တရားရုံးက ပြစ်မှုထင်ရှားစီရင်သောအခါ-

(က) ထိုပြစ်မှုသည်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံအတွင်း၊ တည်ဆဲတရားဥပဒေတခုခုအရ သေဒဏ်၊ သို့တည်းမဟုတ် တကျွန်းပို့ဒဏ်ချမှတ်နိုင်သောပြစ်မှုတခုဖြစ်ပါက၊ ကြိမ်ဒဏ်မှအပ၊ အဆိုပါတရားဥပဒေ က ထိုပြစ်မှုအတွက် ပြဋ္ဌာန်းထားသော ပြစ်ဒဏ်အပြင် ဤအက်ဥပဒေတွင်ဖော်ပြထားသည့် လျော့သော ပြစ်ဒဏ်လည်း ထိုက်သင့်စေရမည်။ ထို့ပြင်

(ခ) အခြားပြစ်ဒဏ်ထိုက်သင့်သည့် ပြစ်မှုတခုခုအတွက်ဖြစ်ပါက၊ ကြိမ်ဒဏ်မှအပ၊ ပြည်ထောင်စုမြန်မာ နိုင်ငံအတွင်း တည်ဆဲတရားဥပဒေက ထိုပြစ်မှုအတွက်ပြဋ္ဌာန်းထားသောပြစ်ဒဏ်တခုခုဖြစ်စေ၊ ခုနစ်နှစ် ထိထောင်ဒဏ်ဖြစ်စေ၊ ဤအက်ဥပဒေတွင် ဖော်ပြထားသည့် လျော့သောပြစ်ဒဏ်ဖြစ်စေ၊ ထိုက်သင့်စေရ မည်။

စစ်တရားရုံးဖြင့်မစစ်ဆေးနိုင်သော နယ်ဘက်ပြစ်မှုများ။

၇၂။ ။ ဤအက်ဥပဒေကို လိုက်နာရသူတဦးသည်၊ စစ်ဘက်ဥပဒေကို မလိုက်နာရသူတဦးအား၊ လူသတ်မှုကိုသော်၎င်း၊ ထိုသို့မလိုက်နာရသူတဦးအား၊ လူသတ်မှုမမြောက်သော ရာဇဝတ်ပြစ်ဒဏ် ထိုက်သည့် လူသေမှုကိုသော်၎င်း၊ ထိုသို့မလိုက်နာရသူတဦးအား၊ မုဒိမ်းမှုကိုသော် ၎င်း၊ ကျူးလွန်ခြင်းမှာ-

(က) တန်းပြည့်စစ်မှုထမ်းချိန်တွင်၊ သို့တည်းမဟုတ်

(ခ) ပြည်ထောင်စု မြန်မာနိုင်ငံပြင်ပရှိ နေရာတခုခုတွင်၊ သို့တည်းမဟုတ်

(ဂ) တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်က အမိန့်ကြော်ငြာစာဖြင့်၊ ဤကိစ္စအလို့ငှါ၊ သီးခြားဖေါ်ပြထားသော နယ်စပ်စစ်စခန်းတွင်၊ ကျူးလွန်ခြင်းမဟုတ်လျှင်၊ ဤအက်ဥပဒေအရဖြစ်သော ပြစ်မှုတခုခုက ကျူးလွန်သည်ဟု မမှတ်ယူရ။ ထို့ပြင် ထိုပြစ်မှုကျူးလွန်သူအား စစ်တရားရုံးက စစ်ဆေးစီရင်ခြင်းလည်းမပြုရ။<ပြင်ဆင် 05.09.1960, 04.11.2010>

အခဏ်း ၇။

ပြစ်ဒဏ်များ။

စစ်တရားရုံးများကချမှတ်နိုင်သော ပြစ်ဒဏ်များ။

၇၃။ ။ ဤအက်ဥပဒေကို လိုက်နာရသူများသည်၊ မိမိတို့ကျူးလွန်သည့် ပြစ်မှုများအတွက်၊ စစ်တရားရုံး များက ပြစ်မှုထင်ရှားစီရင်သောအခါ၊ အောက်ပါအချို့အစားအတိုင်း ပြစ်ဒဏ်ထိုက်သင့်စေရမည်။

(က) သေဒဏ်။

(ခ) တသက်တကျွန်းဒဏ်၊ သို့တည်းမဟုတ် ခုနစ်နှစ်အောက်မလျော့သော တကျွန်းပို့ဒဏ်။

(ဂ) တဆယ့်လေးနှစ်ထက်မပိုသော အလုပ်ကြမ်းနှင့်၊ သို့တည်းမဟုတ် အလုပ်မဲ့ထောင်ဒဏ်။

(ဃ) အရာရှိများအတွက်ဖြစ်ပါက ရှုတ်ချ၍ အမြဲတမ်းထုတ်ပစ်ဒဏ်။

(င) စစ်မှုထမ်းခြင်းမှ အမြဲတမ်းထုတ်ပစ်ဒဏ်။

(စ) အရာခံဗိုလ်များအတွက်ဖြစ်ပါက၊ ပို၍နိမ့်သောအဆင့်၊ ပို၍နိမ့်သောအတန်း၊ ငင်းတို့၏အဆင့် စာရင်းတွင် ပို၍နိမ့်သောနေရာ၊ သို့တည်းမဟုတ် တပ်သားအဆင့်သို့လျော့ချဒဏ်။ ထို့ပြင် အကြပ်များ အတွက်ဖြစ်ပါက၊ ပို၍နိမ့်သောအဆင့်၊ သို့တည်းမဟုတ် တပ်သားအဆင့်သို့လျော့ချဒဏ်။ သို့ရာတွင် တပ်သားအဆင့်သို့ လျော့ချထားသော အရာခံဗိုလ်တဦးအား၊ ငင်း၏ဆန္ဒနှင့်ဆန့်ကျင်လျက် တပ်သား အဖြစ်ဖြင့် စစ်မှုမထမ်းစေရ။

(ဆ) အရာရှိများ၊ အရာခံဗိုလ်များနှင့် အကြပ်များအတွက်ဖြစ်ပါက၊ အဆင့်သက်တမ်းလျှော့ဒဏ်၊ ထို့ပြင် အဆင့်တိုးမြှင့်ရေးသည်၊ စစ်မှုထမ်းသက်တမ်းပေါ်တွင် အမှီပြုရသူများဖြစ်ပါက၊ အဆင့်တိုးမြှင့် ရေးကိစ္စအတွက်၊ ငင်းတို့၏စစ်မှုထမ်းသက်အားလုံး၊ သို့တည်းမဟုတ် တစိတ်တဒေသကို ဆုံးရှုံးစေသည့် ဒဏ်။

(ဇ) လစာတိုးမှုကိစ္စအတွက်သော်၎င်း၊ အငြိမ်းစားလစာအတွက်သော်၎င်း၊ အခြားသတ်မှတ်ထား သော ကိစ္စတရပ်ရပ်အတွက်သော်၎င်း၊ စစ်မှုထမ်းသက်လျှော့ဒဏ်။

(ဈ) အရာရှိများ၊ အရာခံဗိုလ်များနှင့် အကြပ်များအတွက်ဖြစ်ပါက၊ ပြင်းထန်စွာပြစ်တင်ရှုတ်ချဒဏ်၊ သို့တည်းမဟုတ် ပြစ်တင်ရှုတ်ချဒဏ်။

(ည) တန်းပြည့်စစ်မှုထမ်းချိန်တွင် ကျူးလွန်သောပြစ်မှုတခုအတွက်ဖြစ်ပါက၊ သုံးလထက်မပိုသော လစာနှင့် စရိတ်များကို ဖြတ်တောက်ဒဏ်။

(ဋ) ရှုတ်ချ၍ အမြဲတမ်းထုတ်ပစ်ဒဏ်၊ သို့တည်းမဟုတ် စစ်မှုထမ်းခြင်းမှ အမြဲတမ်းထုတ်ပစ်ဒဏ် ချမှတ်ခံရသူ တဦးအတွက်ဖြစ်ပါက၊ ယင်းသို့ရှုတ်ချ၍ အမြဲတမ်းထုတ်ပစ်ဒဏ်၊ သို့တည်းမဟုတ် စစ်မှု ထမ်းခြင်းမှ အမြဲတမ်းထုတ်ပစ်ဒဏ်ခံရချိန်တွင်၊ ထိုသူအားပေးရန်ကျန်ရှိနေသော လစာနှင့်စရိတ်များ အပြင်၊ အစိုးရထံမှ ထိုသူရထိုက်သော အခြားငွေအားလုံးသိမ်းယူရန်။

(၄) ထိုသူအား ပြစ်မှုထင်ရှား စီရင်ခြင်းခံရသည့် ပြစ်မှုကြောင့် ဆုံးရှုံးကြောင်း၊ သို့တည်းမဟုတ် ပျက်စီး နစ်နာကြောင်း ထင်ရှားသက်သေခံချက်ရှိသော ဆုံးရှုံးခြင်း၊ သို့တည်းမဟုတ် ပျက်စီးနစ်နာခြင်းတခုခု အတွက် လျော်ပေးပြီးသည်အထိ လစာနှင့်စရိတ်များ ရပ်စဲဒဏ်။

စစ်တရားရုံးက လွှဲပြောင်းချမှတ်နိုင်သော ပြစ်ဒဏ်များ။

၇၄။ ။ပုဒ်မ ၃၂ မှ ၇၀ ထိ၊ ထိုပုဒ်မနှစ်ခုလုံး အပါအဝင်ဖြစ်သော ပုဒ်မများတွင် သီးခြားဖေါ်ပြထားသော ပြစ်မှုများအနက်၊ ပြစ်မှုတခုခုကျူးလွန်သည့် ဤအက်ဥပဒေကို လိုက်နာရသူတဦးအား၊ ပြစ်မှုထင်ရှား စီရင်ရာတွင်၊ ဤအက်ဥပဒေပါ ပြဋ္ဌာန်းချက်များနှင့်မဆန့်ကျင်စေဘဲ၊ ပြစ်မှုအမျိုးအစားနှင့် အကြီး အငယ်ကိုထောက်ထားပြီး၊ ထိုပြစ်မှုအတွက်စီရင်နိုင်သည်ဟု အဆိုပါပုဒ်မများတွင် ဖေါ်ပြထားသော သီးခြားပြစ်ဒဏ်ကိုဖြစ်စေ၊ ထိုပြစ်ဒဏ်အစား ပုဒ်မ ၇၃ တွင်ဖေါ်ပြထားသော အချိုးအစားအောက်ပို၍ လျော့သောပြစ်ဒဏ်များအနက်၊ ပြစ်ဒဏ်တခုခုကိုဖြစ်စေ၊ စစ်တရားရုံးက ချမှတ်နိုင်သည်။

Section 128-129

ရာဇဝတ်တရားရုံးကိုဖြစ်စေ၊ စစ်တရားရုံးကိုဖြစ်စေ၊ ရွှေးချယ်ခြင်း။

၁၂၈။ ။ ရာဇဝတ်တရားရုံးနှင့် စစ်တရားရုံးမှာ၊ ပြစ်မှုတခုနှင့်စပ်လျဉ်း၍ စီရင်ပိုင်ခွင့်အာဏာ အသီးသီး ရှိနေသောအခါ၊ ထိုမှုခင်းကိစ္စကို မည်သည့်တရားရုံးကစစ်ဆေးစီရင်ရမည်ဟု၊ တရားခံအား၊ စစ်ဆေး ရန်အတွက်၊ စစ်တရားရုံးချုပ်ဖွဲ့စည်းနိုင်သည့် အခွင့်အာဏာရအရာရှိ၊ သို့တည်းမဟုတ် သတ်မှတ်ထား သည့် အခြားအရာရှိက မိမိ၏သဘောအတိုင်းဆုံးဖြတ်ပေးနိုင်သည်။ ထို့ပြင် ထိုအရာရှိသည် ထိုမှုခင်း ကိစ္စကို၊ စစ်တရားရုံးက စစ်ဆေးစီရင်ရမည်ဟု ဆုံးဖြတ်လျှင်၊ တရားခံအား စစ်ဘက်အချုပ်နှင့်ထားရ မည်ဟု၊ မိမိ၏သဘောအတိုင်းညွှန်ကြားနိုင်သည်။

ပြစ်မှုကျူးလွန်သူကို လက်ရောက်ပေးအပ်ရန် ရာဇဝတ်တရားရုံးက တောင်းဆိုနိုင်သည့်အာဏာ။

၁၂၉။ ။ (၁) စီရင်ပိုင်ခွင့်အာဏာရရှိထားသော ရာဇဝတ်တရားရုံးသည်၊ စွပ်စွဲထားသော ပြစ်မှုတခုခုနှင့် စပ်လျဉ်းသည့် မှုခင်းကိစ္စကို၊ မိမိရုံးတွင်ပင်စွဲဆိုရမည်ဟု ထင်မြင်ယူဆသည့်အခါ၊ ပြစ်မှုကျူးလွန်သူကို၊ အနီးဆုံးရာဇဝတ်တရားသူကြီးထံ တရားဥပဒေနှင့်အညီ ဆက်လက်အရေးယူရန် လက်ရောက်ပေးအပ် ခြင်းကိုဖြစ်စေ၊ တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်ထံ တင်ပြခြင်းကိစ္စမပြီးပြတ်မီ၊ မှုခင်းကိစ္စဆောင်ရွက်ချက်များ ရွှေ့ဆိုင်းထားခြင်းကိုဖြစ်စေ၊ ပုဒ်မ ၁၂၈ တွင်ရည်ညွှန်းထားသည့် အရာရှိအား၊ ၎င်း၏ သဘောအတိုင်း ဆောင်ရွက်ရန်၊ ထိုရာဇဝတ်တရားရုံးက နို့တစ်စာဖြင့်တောင်းဆိုနိုင်သည်။

(၂) အဆိုပါကိစ္စတိုင်းတွင်၊ ထိုအရာရှိသည်၊ တောင်းဆိုချက်အရ၊ လိုက်နာဆောင်ရွက်လျက် ပြစ်မှု ကျူးလွန်သူကို လက်ရောက်ပေးအပ်ရမည်၊ သို့တည်းမဟုတ် မှုခင်းကိစ္စ စွဲဆိုရမည့်ရုံး ရွှေးချယ်ရေး ပြဿနာကိုဆုံးဖြတ်ရန်၊ တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်ထံ ချက်ခြင်းတင်ပြရမည်။ ထိုသို့တင်ပြသည့် ကိစ္စနှင့် စပ်လျဉ်း၍၊ တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်၏ ဆုံးဖြတ်ချက်သည် အပြီးအပြတ်ဖြစ်စေရမည်။

(၃) ဤအက်ဥပဒေကို လိုက်နာရသည့် တရားခံတဦးသည်၊ ရာဇဝတ်တရားရုံးတွင် စစ်ဆေးစီရင်ခြင်းကို ခံနေရသောအခါ၊ သို့တည်းမဟုတ် ထိုတရားခံအား စစ်ဆေးစီရင်ရမည့်ရုံး အမျိုးအစားနှင့်စပ်လျဉ်း၍ တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်က ဆုံးဖြတ်ချက်မချရသေးမီ၊ ထိုတရားခံကို စစ်ဘက်အချုပ်နှင့်ထားနိုင်သည်။

စစ်ဆေးသည့်တရားရုံးက၊ ထိုတရားခံကိုခေါ်လာရမည်ဟု တောင်းဆိုသည့်အခါ၊ ထိုတရားရုံးရှေ့မှောက်သို့ပို့ရမည်။<ပြင်ဆင် 04.11.2010>

၁၉၅၉ ခုနှစ်၊ တပ်မတော်အက်ဥပဒေ။

[၂၉.၀၉.၁၉၅၉] [၂၆.၀၈.၂၀၂၀] [[၁၉၅၉ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၄၃။]] < ပြင်ဆင် 05.09.1960, 05.10.1961, 20.06.1962, 10.05.1989, 04.11.2010, 26.08.2020 >

အခန်း ၁၄။

ပြစ်ဒဏ်လွတ်ငြိမ်းချမ်းသာခွင့်များ၊ ပြစ်ဒဏ်လွတ်ငြိမ်းသက်သာခွင့်များနှင့် ပြစ်ဒဏ်ဆိုင်းငံ့ထားခြင်းများ။

ပြစ်ဒဏ်လွတ်ငြိမ်းချမ်းသာခွင့်နှင့် ပြစ်ဒဏ်လွတ်ငြိမ်း သက်သာခွင့်။

၁၈၂။ ။ တပ်မတော်ကာကွယ်ရေးဦးစီးချုပ်သည် ပြစ်မှုတစ်ခုခုအတွက် စစ်တရားရုံးက ပြစ်မှုထင်ရှားစီရင်ခြင်း ခံရသည့် သို့တည်းမဟုတ် စစ်ဘက်အယူခံတရားရုံးက အယူခံပယ်ခြင်းခံရသည့် ဤအက်ဥပဒေကို လိုက်နာရသူတစ်ဦးဦးအား-

(က) ပြစ်ဒဏ်ချမှတ်ခြင်းခံရသူက လက်ခံသော စည်းကမ်းချက်များနှင့်ဖြစ်စေ၊ ထိုစည်းကမ်းချက်များ မပါရှိဘဲဖြစ်စေ၊ ထိုသူအား ပြစ်ဒဏ်လွတ်ငြိမ်းချမ်းသာခွင့်ပေးနိုင်သည်၊ သို့တည်းမဟုတ် ချမှတ်သည့် ပြစ်ဒဏ်တခုလုံးကိုဖြစ်စေ၊ ထိုပြစ်ဒဏ်၏ တစိတ်တဒေသကိုဖြစ်စေ၊ လွတ်ငြိမ်းသက်သာခွင့်ပေးနိုင် သည်၊ သို့တည်းမဟုတ်

(ခ) ချမှတ်သောပြစ်ဒဏ်ကို ပေါ့လျော့စေနိုင်သည်၊ သို့တည်းမဟုတ်

(ဂ) ချမှတ်သော ပြစ်ဒဏ်ကို၊ ဤအက်ဥပဒေတွင် ဖေါ်ပြထားသည့် လျော့သောပြစ်ဒဏ်တခုခုနှင့်၊ သို့တည်းမဟုတ် လျော့သောပြစ်ဒဏ်များနှင့် လျော့ပေါ့ပြောင်းလဲနိုင်သည်။

သို့တည်းမဟုတ်

(ဃ) ပြစ်ဒဏ်ချမှတ်ခြင်းခံရသူက လက်ခံသောစည်းကမ်းချက်များနှင့်ဖြစ်စေ၊ ထိုစည်းကမ်းချက်များ မပါရှိဘဲဖြစ်စေ၊ ထိုသူအား ကတိထားစေ၍ လွှတ်နိုင်သည်။<ပြင်ဆင် 10.05.1989, 04.11.2010>

Annex 56

Myanmar, Penal Code, Sections 311A, 311B, 354, 376 and 509

Attempt to commit suicide.

309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Thug.

310. Whoever shall have been habitually associated with any other or others for the purpose of committing robbery or child - stealing by means of or accompanied with murder is a thug.

Punishment.

311. Whoever is a thug shall be punished with imprisonment for a term of twenty years, and shall also be liable to fine.

Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

<Amendment 07.01.2016>

"Of Genocide

311A. Whoever, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

(a) Kills members of the group; or

(b) Causes grievous hurt or serious mental harm to members of the group; or

(c) Deliberately inflicts on the group conditions of life calculated to bring its physical destruction in whole or in part; or

(d) Imposes measures, not in accordance with any existing laws, intended to prevent births within the group; or

(e) Forcibly transfers children of the group to another group, is said to have committed the offence of genocide.

<ပြင်ဆင် 24.08.2021>

311B. (1) Whoever commits the offence of genocide under subsection (a) of section 311 A, shall be punished with death and shall also be liable to fine.

(2) Whoever commits the offence of genocide under subsection (b), (c), (d), or (e) of section 311 A, shall be punished with imprisonment for life, and shall also be liable to fine."

<ပြင်ဆင် 24.08.2021>

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to fifty thousand kyats, or with both.

Explanation. - Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence is a question of fact.

<Amendment 07.01.2016>

Assault or criminal force to deter public servant from discharge of his duty.

353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force to woman with intent to outrage her modesty.

354. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception. - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

<Amendment 07.01.2016>

Punishment for rape.

376. (1) Whoever commits rape except the offences of rape contained in sub- sections (2) and (3), shall be punished with imprisonment for a term of twenty years, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever commits rape against a woman who is his own wife and is not under twelve years of age, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

(3) Whoever commits rape against a woman who is under twelve years of age shall be punished with imprisonment for life, or with imprisonment for a term of twenty years.

<Amendment 25.03.2019>

Of Unnatural Offences

Unnatural offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term of twenty years, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

<Amendment 07.01.2016>

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Of Theft

Theft.

378. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft.

to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) A sits dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(b) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

Word, gesture or act intended to insult the modesty of a woman.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heards, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Misconduct in public by a drunken person.

510. Whoever in a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to one thousand kyats, or with both.

<Amendment 07.01.2016>

CHAPTER XXIII

OF ATTEMPTS TO COMMIT OFFENCES

Punishment for attempting to commit offences punishable with imprisonment.

511. Whoever attempts to commit an offence punishable by this Code with imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence for a term of imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

[ဘာသာပြန်ချက်] ရာဇသတ်ကြီး

[၀၁.၀၅.၁၈၆၁] [၀၁.၀၅.၁၈၆၁] [(၁၈၆၀ ပြည့်နှစ်၊ အိန္ဒိယအက်ဥပဒေအမှတ် ၄၅)]

လူမျိုးသုဉ်းစေမှု

၃၁၁–က။ တိုင်းရင်းသား၊ လူမျိုး၊ မျိုးနွယ်စု သို့မဟုတ် ဘာသာရေးအုပ်စု တစ်စုလုံးကိုဖြစ်စေ၊ တစ်စိတ်တစ်ဒေသကိုဖြစ်စေ ပျက်စီးစေရန် ရည်ရွယ်ချက်ဖြင့်–

(က) ယင်းအုပ်စုဝင်များကို သတ်ဖြတ်သူ၊ သို့မဟုတ်

(ခ) ယင်းအုပ်စုဝင်များကို အပြင်းအထန်နာကျင်စေမှု သို့မဟုတ် စိတ်ပိုင်းဆိုင်ရာ အပြင်းအထန်နာကျင်စေမှု ဖြစ်စေသူ၊ သို့မဟုတ်

(ဂ) ယင်းအုပ်စု၏ ရုပ်ပိုင်းဆိုင်ရာတစ်ခုလုံးကိုဖြစ်စေ၊ တစ်စိတ်တစ်ဒေသကိုဖြစ်စေ ပျက်စီးစေရန် ရည်ရွယ်၍ ယင်းတို့၏လူမှုဘဝကို တမင်ဖျက်ဆီးသူ၊ သို့မဟုတ်

(ဃ) တည်ဆဲဥပဒေများနှင့်အညီမဟုတ်ဘဲ အဆိုပါအုပ်စုအတွင်းကလေးမွေးဖွားမှုကို တားမြစ် ရန် ကြံရွယ်၍ အစီအမံများချမှတ်သူ၊ သို့မဟုတ်

(င) ယင်းအုပ်စုတစ်ခုမှကလေးသူငယ်များကို အခြားအုပ်စုသို့အတင်းအကျပ်လွှဲပြောင်းပေးသူ မည်သူမဆို လူမျိုးသုဉ်းစေမှုကိုကျူးလွန်သည်မည်၏။

ပြစ်ဒဏ်

၃၁၁–ခ။ (၁) မည်သူမဆို ပုဒ်မ ၃၁၁–က၊ ပုဒ်မခွဲ (က) ပါ လူမျိုးသုန်းစေမှုကိုကျူးလွန်လျှင် ထိုသူကိုသေဒဏ်ချမှတ်ရမည့်ပြင် ငွေဒဏ်လည်းချမှတ်နိုင်သည်။

(၂) မည်သူမဆို ပုဒ်မ ၃၁၁–က၊ ပုဒ်မခွဲ (ခ)၊ (ဂ)၊ (ဃ) သို့မဟုတ် (င) ပါ လူမျိုးသုဉ်းစေမှုကို ကျူးလွန်လျှင် ထိုသူကိုထောင်ဒဏ်တစ်သက်ချမှတ်ရမည့်ပြင် ငွေဒဏ်လည်းချမှတ်နိုင်သည်။

မိန်းမ၏ ကာယန္ဒြေပျက်စီးစေရန် အကြံဖြင့်လက်ရောက်မှု သို့မဟုတ် ရာဇဝတ်မကင်းသော အနိုင်အထက် ပြုမှု။

၃၅၄။ မည်သူမဆို မိန်းမတစ်ဦး၏ ကာယန္ဒြေကိုပျက်စီးစေရန် အကြံဖြင့်သော်လည်းကောင်း၊ ကာယန္ဒြေပျက်စီးတန်ရာသည်ကို သိလျက်နှင့်သော်လည်းကောင်း၊ ထိုမိန်းမကို လက်ရောက်မှု ကျူးလွန်လျှင် သို့မဟုတ် ရာဇဝတ်မကင်းသော အနိုင်အထက်ပြုမှုကို ပြုလျှင် ထိုသူအား နှစ်နှစ်ထိထောင်ဒဏ် တစ်မျိုးမျိုးဖြစ်စေ၊ ငွေဒဏ်ဖြစ်စေ၊ ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ ချမှတ်ရမည်။

မုဒိမ်းမှုအတွက် ပြစ်ဒဏ်။

၃၇၆။ (၁) မည်သူမဆို ပုဒ်မခွဲ(၂) နှင့် (၃) တို့ပါ မုဒိမ်းမှုများမှတစ်ပါး မုဒိမ်းမှု ကျူးလွန်လျှင် ထောင်ဒဏ်နှစ် နှစ်ဆယ်ဖြစ်စေ၊ ဆယ်နှစ်ထိ ထောင်ဒဏ် တစ်မျိုးမျိုးဖြစ်စေ ချမှတ်ရမည့်ပြင် ငွေဒဏ်လည်းချမှတ် နိုင်သည်။

(၂) မည်သူမဆို အသက်ဆယ့်နှစ်နှစ်အောက်မဟုတ်သော မိမိ၏မယားကို မုဒိမ်းမှုကျူးလွန်လျှင် နှစ်နှစ်ထိ ထောင်ဒဏ်တစ်မျိုးမျိုးဖြစ်စေ၊ ငွေဒဏ်ဖြစ်စေ၊ ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ ချမှတ်ရမည်။

(၃) မည်သူမဆို အသက်ဆယ့်နှစ်နှစ်အောက်အမျိုးသမီးကို မုဒိမ်းမှုကျူးလွန်လျှင် ထောင်ဒဏ် တစ်သက် ဖြစ်စေ၊ ထောင်ဒဏ်နှစ် နှစ်ဆယ်ဖြစ်စေ ချမှတ်ရမည်။

မိန်းမ၏ကာယိန္ဒြေကို စော်ကားရန် ရည်ရွယ်သောစကား သို့မဟုတ် ကိုယ်အမူအရာ သို့မဟုတ် ပြုလုပ်မှု။

၅၀၉။ မည်သူမဆို မိန်းမတစ်ဦးဦး၏ ကာယိန္ဒြေကိုစော်ကားရန် ကြံရွယ်၍ ပြောဆိုခြင်းပြုသည်တွင် သို့မဟုတ် အသံပြုသည်တွင် သို့မဟုတ် ကိုယ်အမူအရာကို ပြသသည်တွင် သို့မဟုတ် အရာဝတ္ထုတစ်ခုခု ကိုပြသည်တွင် ပြောဆိုသောစကားကိုဖြစ်စေ၊ ပြုသောအသံကိုဖြစ်စေ ထိုမိန်းမအား ကြားစေရန် ကြံရွယ်လျှင် သို့မဟုတ် ပြုသောကိုယ်အမူအရာကိုဖြစ်စေ၊ ပြသောအရာဝတ္ထုကိုဖြစ်စေ ထိုမိန်းမအား မြင်စေရန် ကြံရွယ်လျှင် သို့မဟုတ် ထိုမိန်းမ၏ ကာယိန္ဒြေကို စော်ကားရန် ကြံရွယ်၍ ထိုမိန်းမ၏ ဆိတ်ကွယ်ရာသို့ ကျူးကျော်လျှင် ထိုသူကို တစ်နှစ်ထိ အလုပ်မဲ့ထောင်ဒဏ်ဖြစ်စေ၊ ငွေဒဏ်ဖြစ်စေ၊ ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ ချမှတ်ရမည်။