To The Judges of The International Court of Justice
The Peace Palace
The Hague
The Netherlands

22 August 1993

Your Excellencies:

During the course of the oral proceedings held on 2 April 1993 concerning our first Request for an indication of provisional measures, the former Acting Agent of the rump Yugoslavia (Serbia and Montenegro), Professor Rosenne attacked the jurisdiction of the Court under the Genocide Convention to adjudicate our case and our Request against the Respondent for violating the Genocide Convention. Needless to say, I was somewhat mystified, confused and perplexed by Professor Rosenne's objection to the Jurisdiction of the Court on the basis of the Genocide Convention. Most regretfully, I also note that similar objections to the jurisdiction of the Court on the basis of the Genocide Convention have also been made by the Respondent's Agent, Professor Etinski, in his "Observations" dated 9 August 1993. Therefore in order to clarify beyond a doubt that the Court does indeed have jurisdiction to hear our case, claims, and our second Request dated 27 July 1993 on the basis of the Genocide Convention, inter alia, I hereby submit to the Court a formal Memorandum of Law as to why the Court has the jurisdiction to adjudicate our case, claims and Second Request for provisional measures dated 27 July 1993. Consequently, I hereby supplement and amend our Application of 20 March 1993 and our Request of 27 July 1993 to incorporate this Memorandum by reference and as integral parts of both documents. A copy of this 44 page Memorandum is attached to this letter and is hereby incorporated by reference.

Please accept, Excellencies, the assurance of my highest consideration.

Francis A. Boyle

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Attachment

Memorandum of Law on Jurisdiction under the Genocide Convention

I. The International Court Of Justice Has Jurisdiction Under the Genocide Convention

A. Article VIII

The Genocide Convention provides for the jurisdiction of the International Court of Justice in Articles VIII and Article IX.

Article VIII states that any Contracting Party "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

The draft convention prepared by the Secretary-General at the request of the Economic and Social Council (E/447) in Article XII provides that the High Contracting Parties may call upon the "competent organs" of the United Nations to suppress or to prevent the crimes enumerated in the convention. States committing or suspected of committing genocide are "to give full effect to the intervention of the United Nations." The commentary to the Secretariat's draft stresses that Article XII is intended to facilitate preventive action by the United Nations "before the harm is done or before it has assumed wide proportions, for then it takes on the nature of a catastrophe, the effects of which are to a great extent irreparable." The Secretariat did not specify which United Nations organs should be involved since "this is a question of the general competence of the United Nations being applied in a particular case." The commentary also notes that "if preventive action is to have the maximum chance of success, the Members of the United Nations must not remain passive or indifferent. The Convention...should, therefore, bind the States to do everything in their power to support any action by the United Nations intended to prevent or stop these crimes." (Id. at 45, 46). Article XII of the Secretariat's draft clearly was intended to supplement, rather than to preempt, the application of other domestic and international mechanisms of prevention, suppression and redress. The text provides that the Article is applicable, "[i]rrespective of any provision in the foregoing articles"(Id. at 45).

This article, with some modification, was incorporated into the draft prepared by the Ad Hoc Committee On Genocide (E/794). Article VIII of the Ad Hoc Committee draft states that a party to the Convention "may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppresson of genocide" (E/794 at 12). The Ad Hoc Committee clearly contemplated that this provision would permit States Parties to submit disputes to the International Court of Justice. The Soviet Union unsuccessfully proposed that States should be required to report all cases of genocide and all breaches

of the obligations imposed by the Convention to the Security Council. The Council, pursuant to the Soviet amendment, was authorized to take action in accordance with Chapter VI of the United Nations Charter (See Union of Soviet Socialist Republics, BASIC PRINCIPLES OF A CONVENTION ON GENOCIDE, E/AC.25/7, at art. 10, 3). This provision was rejected on the grounds that it expanded the authority of the Security Council while restricting the competence of other United Nations organs, particularly the International Court (See E/AC. 25/SR.8, at 18-20). Mr. Azkoul of Lebanon stated that he could support the Soviet proposal provided that "[t]he procedure contemplated for submitting cases of genocide to the international court could therefore be carried out without impediment." He added "that if the members of the Committee were assured on that point, the main objections...would be eliminated (Id. at 26). The Chair, Mr. Martos, speaking as the representative of the United States, objected that the Soviet Provision would permit States to find "devious ways to refer to the Security Council cases which should have been brought before the international court." (E/AC.25/SR.8, at 27. See also, E/AC.25/SR. 9, at 5). Another Soviet amendment (to the Chinese draft, which formed the basis of Article VIII. See China, DRAFT ARTICLES FOR THE INCLUSION IN THE CONVENTION ON GENOCIDE PROPOSED BY THE DELEGATION OF CHINA, E/AC.25/9 at art.IV) which provided for obligatory communication with the Security Council in cases of genocide and violations of the Convention, also was rejected. Mr. Rudzinski of Poland observed that "a difficulty would arise if the amendment were adopted because violation of the Convention might have legal consequences which were not quite the same as suppression of genocide." (E/ AC.25/SR.20 at 4).

The Ad Hoc Committee provision formed the basis of Article VIII of the Sixth Committee draft which was incorporated into the Genocide Convention. Article VIII of the Sixth Committee draft clarifies that the United Nations organs are competent to take appropriate steps "for the prevention and suppression of acts of genocide as well as the other acts enumerated in article III." The Soviet Union again submitted a provision for the compulsory notification of the Security Council (See remarks of Mr. Morozov of the Soviet Union, 3 U.N. GAOR C.6 at 327-328). Committee Members again objected that the Soviet proposal was intended "to prevent any cases from being referred to an international court." (remarks of Mr. Maktos of the United States, id. at 328). During the discussion of a joint French-Soviet proposal to obligate States to submit all cases of genocide which endangered international peace to the Security Council, the United States delegate again expressed the fear that "States might try to avoid submitting their disputes to the International Court of Justice, where they would be settled on purely legal grounds, and might instead submit them to the Security Council, where they would be settled on political grounds with a view to causing embarrassment to other parties" (Id. at 413. Cf. remarks of Mr. Chaumont of France, id. at 415). Mr. Kaeckenbeeck of Belgium protested that "[i]n mentioning only the Security Council...the amendment implied that the Security Council

was the only organ that could be consulted in cases of genocide" (Id. 413). Mr. Maktos also was pointed out that such a provision risked extending the jurisdiction of the Security Council into disputes which were within the purview of the International Court of Justice (Id. at 411). Thus, Article VIII clearly authorizes any Contracting Party to call upon the International Court of Justice, to take appropriate action to prevent and suppress acts of genocide (For legislative history of Article VIII in the Sixth Committee, See Id. at 417, 423, 457).[1]

B. Article IX

Article IX of the Genocide Convention provides:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article XIV of the Secretary-General's draft states that "[d]isputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice"(E/447 at 50). The Secretary-General's report stresses that the prevention and suppression of genocide is an "essential interest" of the international community and that it is a "matter affecting all the parties to the Convention." Jurisdiction, over disputes relating to the interpretation or application of the Convention, according to the Secretariat, thus is appropriately vested in the International Court of Justice, whose prestige and decisions are recognized by all Members of the United Nations. The commentary proposes that the International Court's jurisdiction should extend to disputes regarding "'the interpretation of the Convention,' i.e. regarding the meaning of its provisions," as well as to disputes concerning "'the application' of the Convention, i.e. if it is to be ascertained whether one of the parties has faithfully discharged his obligations." (Id. at 50-51. This judicial determination of the textual requirements of the Genocide Convention is a complement to the wide-ranging provisions in the Secretary-General's draft for the criminal punishment of individual offenders. Universal as well as international penal jurisdiction are provided. See id. at articles VII, VIII, IX,8, X,9 and Annexes I,67 and II,77. Article XIII also obligates a State to compensate the victims of genocide. Id. at 9).

The Secretary-General's draft of Article XIV was incorporated into the convention formulated by the Ad Hoc Committee. Article X of the Ad Hoc Committee Draft, however, precludes the jurisdiction of the International Court in those cases in which the dispute is pending or had been considered by "a competent international criminal tribunal."(For discussion of Article X, See E/AC.25/SR.

20, at 6). However, unlike the Secretary-General's draft, no detailed provision is made for the establishment of such an international criminal court or for universal criminal jurisdiction (See, E/794 at Article VII, 11. But see, Ad Hoc Committee On Genocide, CASES IN WHICH INDIVIDUALS ARE TO BE SUMMONED BEFORE A CRIMINAL COURT UNDER THE CONVENTION ON GENOCIDE, E/AC.25/8 (1948)). The Ad Hoc Committee recognized that the crime of genocide generally entails the complicity or direct involvement of governments (See E/AC.25/SR.4, at 3-5) and that national courts likely will be reluctant or ineffective in adjudicating claims of State-sponsored genocide. A provision for some type of international jurisdiction thus was required (See remarks of Mr. Ordonneau of France, E/AC.25/SR.7, at 8-9; remarks of Mr. Martos of the United States, id. at 12-13). The Ad Hoc Committee voted to place primary reliance on the International Court to adjudicate the interpretation and application of the Genocide Convention (See E/AC.25/SR.20, at 6).

The Ad Hoc Committee's draft was modified by the Sixth Committee. At its 104th meeting, the Committee adopted a joint United Kingdom-Belgium amendment (A/C.6/258), as amended by the representative of India (3 U.N. GAOR C.6, at 447). This provision subsequently was incorporated as Article IX of the Genocide Convention. Article IX provides that disputes between the Contracting Parties "relating to the interpretation, application or fulfilment of the present convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Mr. Fitzmaurice noted that reference to the International Court did not preclude the submission of a case of genocide which threatened international peace and security to the Security Council (id. at 444, 457. See Australian amendment, id. at 454). However, Mr. Fitzmaurice stressed that Article IX was intended "to impose upon all States Parties to the convention the obligation to refer all disputes relating to cases of genocide to the International Court" (Id. at 430-431).

Article IX of the Sixth Committee's draft expanded the jurisdiction of the International Court to encompass "[d]isputes...relating to the...fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III" (See Joint Belgium and United Kingdom amendment, A/C.6/258). This additional language was inserted in order to permit a determination of State responsibility and liability for genocide.

Mr. Fitzmaurice of the United Kingdom explained that the modification of Article IX was a response to the fact "that the convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in articles II and [III]....[T]he representative of the United Kingdom had been impressed by the fact that all speakers had recognized that the responsibility of the State was almost always involved in all acts

of genocide; the Committee, therefore, could not reject a text mentioning the responsibility of the State and an international court empowered to try them." (Id. at 430. See also id. at 444. A number of speakers noted that genocide generally involved State complicity or responsibility. See, remarks of Mr. Chaumont of France, id. at 8; and that, as a result, that some form of international jurisdiction was required, see remarks of Mr. Kaeckenbeeck of Belgium, id. at 22-23; and the remarks of Mr. Raafat of Egypt, id. at 25. The Sixth Committee proposed that the International Law Commission study the question of international criminal jurisdiction. See E/760, at 12). A proposal to omit the term "responsibility" on the grounds that it would lead to vaque accusations which would increase tensions between States Parties was rejected (Id. at 690. See A/C.6/305. Various delegates clarified that under Article IX that the International Court was authorized to determine the civil, rather than the criminal responsibility of States for acts of genocide. See remarks of Mr. Chaumont of France and Mr. Raafat of Egypt id. at 431; and Mr. De Beus of the Netherlands, id. at 435-436).

The provision for the determination of State responsibilty was considered to be particularly vital given the absence of a detailed plan for the establishment of an international penal tribunal. Mr. Medeiros of Bolivia noted that the joint Belgian and United Kingdom amendment, which provided for the determination of State responsibility for genocide, "was all the more necessary since the Committee had refused to accept the principle of an international [criminal] tribunal." (remarks of Mr Medeiros of Bolivia id. at 439). It was noted that even if established, that such an international criminal court would lack compulsory jurisdiction (remarks of Mr. Chaumont of France, id. at 674. See A/760 at art. VI, 10). Mr. Kaeckenbeeck of Belgium stressed that there was no existing international criminal court or draft proposal for such an institution. The establishment of such a judicial organ was so involved that "[i]t was therefore necessary to be realistic, and make suitable use of the existing organs" (id. at 341). Mr. Kaeckenbeeck recognized that the International Court of Justice did not possess competence in the criminal sphere. However, "[i]t could establish the non-fulfilment, by a State, of its obligation to punish the acts enumerated in article IV, pass judgment on all disputes relating to the direct responsibility of a State for the commission of such acts, and prescribe measures to bring about the cessation of the imputed acts and to repair the damage they had caused" (id. at 338-339. See also remarks of Mr. De Beus of Netherlands, id. at 363-364).

Mr. Pescatore of Luxembourg observed that, as a consequence of the joint Belgium and United Kingdom amendment, that the International Court would be requested to determine whether "genocide was committed by a State in the territory of another State. In that case, the State which had suffered damage would have a right to reparation. The... [provision] gave the International Court of Justice the opportunity of deciding whether or not damages should be granted, and it would be for the plaintiff to prove the

injury sustained" (id. at 438. See also, remarks of Mr. Lachs of Poland, id. at 442-443 and Mr. Fitzmaurice of the United Kingdom, id. at 444). Mr. Gross of the United States noted that the phrase "responsibility of a State," when used in the traditional sense, meant "responsibility towards another State for damages inflicted, in violation of the principles of international law, to the subjects of the plantiff State (Id. at 704).[2]

Some added clarification of the term "responsiblity" is provided by a joint amendment proposed by Belgium, the United Kingdom and the United States which did not receive the two-thirds support required to be considered during the Sixth Committee's final consideration of the draft convention (Id. at 687. A/C.6/305. Belgium and the United Kingdom were co-sponsors of A/C.6/258 which forms the basis of Article IX). The amendment eliminated the term "responsible" and instead provided for jurisdiction by the International Court over acccusations that a crime of genocide had been committed in the territory of a High Contracting State ("disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties" Id. at 690).

Thus, the Convention clearly authorizes the International Court to determine whether a High Contracting Party is "responsible" for committing genocide in the territory of another State. The competence of the Court in such cases to enjoin acts of genocide and to order damages or reparations was emphasized by Mr. Fitzmaurice of the United Kingdom, co-sponsor of the amendment which forms the basis of Article IX. Mr. Fitzmaurice stated that "no punishment properly speaking could be meted out; an order to put an end to the offensive acts and pay reparations was the only measure which could be expected from the International Court of Justice" (Id. at 319).

In sum, pursuant to Articles VIII and IX, the International Court is authorized to clarify the text, determine whether the Convention is applicable and to adjudge whether a High Contracting Party has fulfilled its treaty obligations. In those instances in which a State is alleged to have committed acts of genocide, the Court is authorized to affix State responsibility, enjoin the continuance of acts of genocide and to award damages and or reparations to the aggrieved State Party. Absent the establishment of an international penal tribunal, the International Court Of Justice is the only judicial organ authorized and competent to make a legal determination as to accountability for acts of genocide and to enjoin and to provide redress to an aggrieved State and to the victims of such criminal acts. As Mr. Fitzmaurice of the United Kingdom observed.

> The United Kingdom delegation had always taken into account the enormous practical difficulties of bringing rulers and heads of States to justice, expect perphaps at the end of a war. In time of peace it was virtually impossible to exercise any effective international or

> national jurisdiction over rulers or heads of States. For that reason, the United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide (Id. at 444).

II. The Genocide Convention Should Be Broadly Interpreted

A treaty, in accordance with the Vienna Convention On The Law Of Treaties, is to be interpreted in "good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its [the treaty's] object and purpose" (U.N. Doc. A/CONF.39/27/ at 289 (1969), 1155 U.N.T.S. 331, art. 31). Recourse also may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances surronding the drafting of the instrument. (Id. at art. 32). The humanitarian object and purpose of the Genocide Convention and the international community's desire to insure the protection of all groups within the human family dictates that the Convention should be accorded a broad interpretation. Mr. Gross of the United States observed in the Sixth Committee that the General Assembly had declared that the suppression of genocide is "a matter of international concern, because the extermination of human groups endangered civilization itself" (3 UN GAOR C.6 at 91). Mr. Azkoul of Lebanon noted that "for the first time in an international or constitutional document, mention was made... of the protection of the human group...and not only of the individual...[t]he inherent value of the human group had at last been recognized as well as its contribution to the cultural heritage of the human race" (Id. at 33). In its 1951 advisory opinion in *Reservations To The Convention On The Prevention Of The Crime Of Genocide*, the International Court recognized the Convention's humanitarian and civilizing purpose:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th, 1946)....[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention)....

> The [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely , the accomplishment of those high purposes which are the *raison d' e'tre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions (Id. at 23).

In their joint dissenting opinion, Justices Guerrero, McNair, Read and Mo noted, in part, that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation" (Id. at 36). The International Court in the instant case is charged with a special responsibility to uphold the civilizing purpose of international law. Prosecutor Telford Taylor in the *Einsatzgruppen Case*, which involved the prosecution of the Nazi officers in charge of the genocidal killing squads, reminded an American war crimes tribunal of the threat posed by genocide to the international community :

> The defendants are not charged...with the crime of disagreeing with us on questions of international law... what they did was not only a crime against humanity under international penal law; it was a heinous crime under all civilized legal systems....The crime involved in this case is murder--deliberate, premeditated murder; murder on a gigantic scale; murder committed for the worst of all possible motives....No system of domestic or international penal law could possibly survive under which the determination of guilt for murder is governed by the...religious creed or racial origin of the victim. It is vitally important to the peace of the world that no such doctrine gain currency among nations. We earnestly suggest to the court that true judical wisdom...counsels firmness rather than leniency to those adjudged guility of this terrible crime against humanity. (United States of America v. Otto Ohlendorf, et. al. (Case No. 9), IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 383 (1950).

The International Court also should be mindful of the circumstances surronding the drafting and passage of the Genocide

Convention. The Convention was drafted and unanimously adopted in response to the atrocities committed by Nazi Germany and the other Axis Powers during World War II and constitutes an effort to prevent and punish the repetition of such barbarities. Mr. Maktos of the United States, Chair of the Ad Hoc Committee On Genocide, observed that the catalyst which had provoked the United Nations' effort to combat genocide "had been the systematic massacre of Jews by the nazi authorities during the course of the last war" (E/AC.25/SR.5 at 3). Mr. Ordonneau of France noted that the "stress on the problem of genocide unquestionably arose out of the last war....[I]t was the excessses committed by the Nazis and Fascists which had awakened the world's conscience" (E/AC.25/SR.7 at 7). Mr. Morozov of the Union of Soviet Socialist Republics, during the 1948 debate on the Genocide Convention, reminded the General Assembly of the costs and indignation aroused by the Nazi's policy of genocide:

> [O]ne of the worst crimes committed during the late war had been the organized mass destruction of racial and national groups, directed toward the complete elimination of certain races which had sprung up in the course of history. More than 12 million people had fallen victims to that abominable crime, not counting the victims of Japanese imperialism. It had aroused the indignation of all the civilized peoples of the world, and the United Nations had set itself the task of preventing it, and of ensuring that in future anyone guilty of such a crime should be punished (Officials Records Of The Third Session Of The General Assembly, Part I, Summary Records Of Meetings 21 September-12 December 1948, 178th Plenary Meeting, at 811).

Efforts were made to include specific reference to the Nazi and fascist acts of genocide in the preamble to the Convention (See E/794 at 2, Preamble adopted at E/AC.25/SR.23 at 4, 5; and A/C.6/215/Rev. 1; A/C.6/273). Mr. Morozov of the Union of Soviet Socialist Republics, during the Sixth Committee debates, noted that his country "attached great importance to a convention on genocide, which it felt was indissolubly linked with fascism, nazism and other systems propagating theories of racial hatred" (3 UN GAOR C.6 at 13). However, the majority of the Member States concluded that such a reference would detract from the Convention's primary purpose which was to prevent and punish the repetition of such State-sponsored genocide, whether committed in time of war or peace (See remarks of Mr. Gross of the United States, Official Records Of The Third Session Of the General Assembly, supra at 820. See also remarks of Mr. Dignam of Australia, id. at 822). Mr. Azkoul of Lebanon, during the Sixth Committee debates, agreed that some reference "should be made to the events of recent history which had moved the United Nations to draft a convention on genocide. However, he thought the wording...might be dangerous as it seemed to exclude from the convention genocide committed for reasons other than doctrines of racial superiority" (3 UN GAOR C.6 at 501. The Ad

Hoc Committee rejected a Soviet amendment which linked genocide to "Fascism-Nazism." See E/AC.25/SR. 22, at 3, 7. A related Lebanese proposal also was rejected. E/AC.25/SR.22, at 5,6). Mindful of the need to recognize the historic events which provoked the drafting of the Genocide Convention, the Sixth Committee did determine that the preamble should recognize that "at all periods of history genocide has inflicted great losses on humanity" and that "in order to liberate mankind from such an odious scourge, internatonal co-operation is required" (See 3 U.N. GAOR C.6 at 498-509. See A/C.6/261).

The International's Court interpretation of the Genocide Convention also should be guided by the "preparatory work of the treaty" (Vienna Convention On The Law Of Treaties supra at art. 32). During the Sixth Committee's consideration of the Ad Hoc Committee's draft convention, Mr. Kerno, Assistant Secretary-General in charge of the Legal Department, noted that "if differences of opinion arose in respect of any provision, the International Court of Justice would be the competent organ to give an interpretation of the text" (3 U.N. GAOR C.6 at 718). He went on to explain that the Court's analysis of the convention, to the extent possible, should be based upon the text. Mr. Kerno added that the interpretation of vague or ambiguous articles should be informed by a review of the summary records of the meetings at which the provisions were drafted and incorporated into the Convention.

> [I]t was the text of an amendment, regardless of any interpretation, which was put to the vote; the declarations of the various representatives appeared in the summary records of the meetings, and might be used by the competent organs which would have to take cognizance of "'disputes between the High Contracting Parties relating to the interpretation or application of this Convention" as stated in article [IX] of the draft convention (Id. at 134).

Mr. Kerno later again reiterated that "if the text were unambiguous, the [International] Court would base its opinion on an interpretation of the text according to the accepted principles of international law." However, "[i]f the text were ambiguous, the Court would no doubt consult the records of the discussion which had taken place on the text concerned" (Id. at 718). The "ambiguity" of the relevant provisions of the Genocide Convention necessitates that the Court consider the clarifying statements which were made during the drafting of the treaty text.

III. THE DEFINITION OF GENOCIDE UNDER ARTICLE II

A. The Elements Of Genocide

Article II defines genocide:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, a such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

B. The Motive Requirement Is Broadly Defined

The Secretariat's draft in Article I(II) defines genocide as "a criminal act directed against a racial, national, linguistic, religious or political group with the purpose of destroying it in whole or in part, or of preventing its preservation or development." The commentary notes that "[t]his means that [an act's] object must be the destruction of a group of human beings" (E/447, at 23). Physical genocide, according to the commentary, "involves acts intended to 'cause the death of members of a group, or injuring their health or physical integrity'" (Id. at 25).

The Ad Hoc Committee introduced a motive requirement by specifying that genocide must be "committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members" (E/794 at 5, art. II). Mr. Morozov of the Soviet Union stressed that "the definition of genocide should include two specific elements: the groups to be protected, and the motives behind the criminal act" (E/AC.25/SR.11 at 2). The United States proposed that Article II should specify that genocide entails "the intentional destruction, in whole or in part, of racial, national or religious groups as such." Mr. Martos expressed the fear that the inclusion of specific motives might result in an individual claiming "that a crime was committed for motives other than those specified. Political groups, for instance, might be eliminated on economic grounds" (E/AC.25/SR.11, at 1-2. See also remarks of Mr. Perez-Perozo of Venezuela, E/AC.25/SR.12 at 7). China also unsuccessfully sought to broaden the motive requirement (Id. at 2,7. See E/AC.25/9). However, the Ad Hoc Committee voted to define genocide "absolutely clearly so that judges could know exactly what was meant by the term." (remarks of Mr. Morozov, E/AC.25/SR.12, at 7). The Committee voted, with one absention, to specify that genocide against a national, racial, religious or political group must be based "on grounds of national or racial origin, religious belief or political opinion" (E/AC.25/SR. 13 at 4. See also E/AC.25/SR.12, at 12). The provision in the Secretariat's draft that genocide includes acts which are

directed at the prevention of the normal development of a group" was abandoned as "too wide and...to vague" (remarks of Mr. Morozov of the Soviet Union, E/AC.25/SR.12, at 3).

The Sixth Committee adopted a Venezuelan amendment which incorporated the American proposal for a broadly defined motive requirement. Venezuela objected to the enumeration of motives and proposed to substitute the phrase "as such" (See 3 UN GAOR C.6 at 117 and the Venezuelan amendment, A/C.6/231. See remarks of Mr. Pe'rez Perozo of Venezuela id. at 119, 124-125). Mr. Fizmaurice of the United Kingdom argued that the enumeration of motives "was not merely useless; it was dangerous, for its limitative nature would enable those who committed that crime 'one grounds of' one of the motives listed in the article" (Id. at 118). Mr. Pe'rez Perozo of Venezuela, also stressed "that an enumeration of motives was useless and even dangerous, as such a restrictive enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide. Their defenders would maintain that the crimes had been committed for other reasons than those listed in article II" (Id. at 124. Cf. remarks of Mr. Bartos of the "former Yugoslavia," id. 120; Mr. Paredes of the Philipppines, id. at 121).

The killing of members of a racial, ethnic, national or religious group (because they are members of that group) thus may reflect a range of motives, including the desire to expel the group from territory or from a State. Such acts thus need not be solely motivated by animus or hatred. As noted by Mr. Pe'rez Perozo in explaining the interpretation to be accorded to the phrase "as such":

> The purpose...was to specify that, for genocide to be committed, a group--for instance, a racial group--must be destroyed *qua* group. The Venezuelan amendment omitted the enumeration appearing in article II of the Ad Hoc Committee's draft, but re-introduced the motives for the crime without, however, doing so in a limitative form which admitted of no motives other than those which were listed. The aim of the amendment was to give wider powers of discretion to the judges who would be called upon to deal with cases of genocide. The General Assembly had manifested its intention to suppress genocide as fully as possible. The adoption of the Venezuelan amendment would enable the judges to take into account other motives than those listed in the Ad Hoc Committee's draft (Id. at 131.

The expansive interpretation which is to be given to the phrase "as such" was noted by Mr. Demesmin of Hati following his vote for the Venezuelan amendment. Mr. Demesmin stated that Hati had voted in favor of the Venezuelan amendment "because the author of that amendment had declared that his object was to provide for all motives instead of giving restrictive enumeration, as proposed by the Ad Hoc Committee....[I]t was impossible to vote for an

amendment which would be interpreted as tending to delete the statement of motives."(Id. at 133) The Hatian delegate noted that "[n]o one could define the meaning of the Venezuelan proposal more clearly than the Venezuelan representative who...had clearly stated that his amendment embodied all possible motives" (Id. at 137). Thus, while a statement of motives was considered to be necessary in order to distinguish genocide from homicide, the motive requirement is to be given an expansive interpretation. In order to constitute an act of genocide, the extermination of a group need not be animated exclusively by hatred or racism. Such atrocities, for example, may reflect a desire to achieve expansive political goals (See remarks of Mr. Ordonneau of France on the expansive interpretation of the motive requirement. A broad interpretation may include persecution for reasons of national security or economic necessity E/AC.25/SR.12, at 5).

During the World War II war crimes trials, German defendants frequently claimed that they had exterminated Jews and other groups because they believed that these groups were bearers of "Bolshevism." They argued that their acts were motivated by a desire to politically defend the German Nation against this "red menace" rather than by racial animus. The incorporation of the broad motive requirement of the Venezuelan amendment into the Genocide Convention prevents defendants from pleading that their acts constitute politically motivated homicide rather than genocide (See United States v. Otto Ohlendorf et. al. IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10 411, 476 (1950)).

The Sixth Committee voted to exclude "cultural genocide" from the Convention (See 3 UN GAOR C.6 at 206. But see E/794 at art.I(II)(3), 5-6; E/794 at art III, 6-7). Nevertheless, the committee members recognized that the prohibition against genocide was intended to protect both a group's physical existence and culture. The destruction of a culture fractured a group's unity, limited the diversity of the human family and exposed a group to anti-social influences (See remarks of Mr. Pe'rez Perozo of Venezuela, 3 U.N. GAOR C.6 at 195-197). General Assembly Resolution 96(I) of December 11, 1946, which constituted the foundation for the 1948 Genocide Convention, proclaimed that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these groups." In fact, the destruction of culture was one of the chief characteristics of the Nazi's genocidal policies (See remarks of Mr. Zourek of Czehoslovakia, 3 UN GAOR at 205).

Mr Sardar Bahadur Khan of Pakistan noted in the Sixth Committee that:

> Cultural genocide could not be divorced from physical and biological genocide, since the two crimes were complementary in so far as they had the same motive and the same object, namely, the destruction of a national, racial or religious group as such, either by exterminating its members or by destroying its special

> characteristics....[C]ultural genocide represented the end, whereas physical genocide was merely the means. The chief motive of genocide was a blind rage to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence. Thus the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not to do the same for cultural genocide (Id. at 193).

Nevertheless, it was determined that the prohibition against cultural genocide was best included within human rights instruments (See remarks of Mr. Fizmaurice of the United Kingdom, Official Records Of The Third Session Of The General Assembly, Part I, 1948, 179th Plenary Meeting, at 837. But see remarks of Mr. Ikramullah of Pakistan, id. at 818, 819). However, given the close relationship between physical and cultural genocide, it is clear that the destruction of religious monuments, edifices and historic objects by the client forces of "Yugoslavia (Serbia-Montenegro)" is strongly probative of a motive to destroy a group "as such" (See generally the remarks of Mr. Pe'rez Perozo of Venezuela, id. at 816-818).

B. The Entire Group Need Not Be Destroyed

The definition of genocide under the Genocide Convention requires an intention to destroy a group (See remarks of Mr. Gross of the United States, 3 U.N. GAOR C.6, at 91). However, it is not required that the entire group is destroyed.

This was clearly agreed upon by the Ad Hoc Commmittee. The Chinese draft convention, which forms the basis of the Ad Hoc Committee draft, specifies that genocide involves acts directed against a group for the purpose of "(D)estroying totally or partially the physical existence of such group" (E/AC.25/9 at art. I(1)). Article I(1) of the Chinese draft was subsequently modified and incorporated into the Ad Hoc Committee's draft Article II(1) which, in its amended form, prohibits the "(k)illing of members of the group" (E/AC.2/SR.13 at 8). The sponsor of this provision, Mr. Martos of the United States, explained in reply to a question posed by Mr. Rudzinski of Poland, that "the intention was the important factor and that the destruction of a fraction of the group would constitute genocide provided that the intention was to destroy the group totally" (E/AC.25/SR.13, at 6).

Article II(1) of the Ad Hoc Committee draft was retained in the Sixth Committee draft and appears in the Convention as Article II(a). The phrase, "in whole or in part," ("totally or partially" in the Chinese draft) was transferred to the introductory paragraph of Article II (See Norwegian Amendment A/C.6/228, 3 UN GAOR C.6 at 92, 97, which modified Article II to read, "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical,

racial or religious groups, as such"). Mr. Wikborg of Norway explained that his delegation, "simply wanted to point out...that it was not necessary to kill all the members of a group in order to commit genocide" (Id. at 93). Mr. Chaumont of France went so far as to propose that "(i)f a motive for the crime existed, genocide existed even if only a single individual were the victim" (Id. at 90-91. See French Amendment, A/C.6/224 which provided that genocide entailed "an attack on life directed against a human group, or aainst an individual as a member of a human group..."). Mr. Chaumont later withdrew his amendment in favor of the Norwegian proposal (Id. at 93) which, in his view, "expressed the same fundamental idea"(Id. at 95).

C. Genocide Does Not Require Premeditation

The definition of Gencocide contained within Article II does not require premeditation. Article II of the Ad Hoc Committee draft states that "genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members" (E/794 at article II, 5.

The Sixth Committee voted twenty-seven to ten with six abstentions to exclude the phrase "deliberate" from its draft. The basis for this deletion was that deliberation or premeditation does not constitute a mental element of the crime of genocide (See remarks of Mr. Dihgo of Cuba, 3 UN GAOR C.6 at 89 and Mr. Paredes of Philippines, id. at 90, explaining that the term "deliberate" connoted premeditation. See id. at 90, deleting the word "deliberate" from the text. See the commentary to the Report Of The Ad Hoc Committee On Genocide, E/794, at 5). Thus, genocide does not require "a persistent thought devoted to the attainment of a goal which one had set for oneself" (Remarks of Mr. Paredes of the Philippines, 3 UN GAOR at 90). Premeditaition, however, might be considered as an aggravating circumstance in setting the appropriate punishment (See remarks of Mr. Pe'rez Perozo of Venezuela, id. at 87; and remarks of Mr. Demesmin of Hati, id. at 86-87).

D. Genocide Requires A Specific Intent To Destroy A Human Group

The Sixth Committee accepted the language of Article II of Ad Hoc Committee draft which specifies that genocide " means any of the following...acts committed with the intent to destroy...." (E/794 at 5. See the commentary to the Report Of The Ad Hoc Committee Or Genocide, id. For the adoption of Article II by the Sixth Committee, see 3 U.N. GAOR C.6 at 192. See A/C.6/245). During the Sixth Committee's consideration of this provision, the Union of Soviet Socialist Republics proposed to substitute the words "aimed at the physical destruction" (See E/C.6/223. See also 3 UN GAOR at 97). Mr. Morozov explained that this would "eliminate everything

relating to the concept of responsibility" and impose liability for acts "'resulting in destruction.'" Otherwise, "[t]he perpetrators of acts of genocide would in certain cases be able to claim that they were not in fact guilty of genocide, having had no intent to destroy a given group, either wholly or partially; they might likewise assert that they had simply carried out superior orders and that they had been unable to do otherwise" (3 UN GAOR at 96). Mr. Gross of the United States objected that the "USSR amendment introduced a fundamental modification to the defintion of genocide. It was, indeed, the intent to destroy a group which differentiated the crime of genocide from the crime of simple homicide" (Id. at 96. See also remarks of Mr. Kaeckenbeeck of Belgium, id.). Mr. Bartos of the "former Yugoslavia" "thought that the main characteristic of genocide lay in the intent to attack a group. That particular charecteristic should be brought out, as in it lay the difference between an ordinary crime and genocide" (Id. at 93).

The Soviet amendment was rejected by thirty-six votes to eleven with four abstentions (Id. at 97). Mr. Amado of Brazi stressed the importance of retaining the notion of specific intent in the definition of genocide:

> Genocide was characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide....[I]t was important to retain the concept of *dolus specialis*....(Id. at 87).

E. The Genocide Convention Protects National, Ethnical, Racial And Religious Groups

General Assembly Resolution 96(I) of 1946 affirms that genocide is a crime under international law whether "committed on religious, racial, political or any other groups." Resolution 96(I) served as the basis for the Secretary-General's slightly more expansive draft which encompassed "racial, national, linguistic, religious or political groups of human beings" (E/447 at art. I(I), 20). The commentary notes that all these groups, with the exception of linguistic groups, were protected under General Assembly 96(I) and that the Secretary-General's draft was designed to offer the "widest possible formula" (Id. at 22).

The Ad Hoc Committee limited Article II's protection to national, racial, religious and political groups (E/794 at art. II, 5). While Member States were unanimous in their support for the

inclusion of national, racial and religious groups, political groups were included by a vote of four-to-three (Commentary, id. at 5. See E/AC.25/SR.13 at 4; E/AC.25/SR.3 at 10-12). Mr. Azkoul of Lebanon stressed the "essential difference between racial, national and religious groups, all of which bore an inalienable character, on [the] one hand and political groups, far less stable in character, on the other" (E/AC.25/SR.4 at 10). He later reiterated that a political group "was not permanent; it was based on a body of theoretical concepts whereas sentiment or tradition bound the members of a national, racial or religious group"(E/AC.25/SR.13 at 2). Mr. Rudzinski of Poland also noted that political groups were transitory and often disappeared with the demise of their leaders (E/AC.25/SR.4 at 10).

The Sixth Committee voted to exclude political groups from the protection of the Genocide Convention (3 UN GAOR at 663-664. See also id. at 115. The United States withdrew a proposal to include economic groups within the protection of Article II, id. at 114-115. See United States amendment, A/C.6/214). Mr. Amado of Brazil stated that "genocide must be defined *stricto sensu* as a specific crime against certain groups for racial, national or religious reasons" (Id. at 56). He emphasized that the crime of genocide could only be perpetrated against groups which were "stable and permanent" (id. at 57). Mr. Lachs of Poland also pointed out that racial, national or religious groups were distinguished by their "homogeneity" (Id. at 111).

Mr. Abdoh of Iran further clarified the rationale behind according protection to racial, religious or national groups while excluding political groups. He explained that the prohibition on genocide was intended to protect those groups in which membership was "inevitable."

> [T]here was a distinction between those groups, membership of which was inevitable, such as racial, religious or national groups, whose distinctive features were permanent; and those, membership of which was voluntary, such as political groups, whose distinctive features were not permanent, it must be admitted that the destruction of the first type appeared most heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together. Those persons should therefore be given a larger measure of protection. Although it was true that people could change their nationality or their religion, such changes did not in fact happen very often; national and religious groups therefore belonged to the category of groups, membership of which was inevitable (Id. at 99).

These sentiments were echoed by Mr. Lachs of Poland:

> [I]t [the Convention] should protect the individual where he was most vulnerable, which was within the group of

which he was a member in spite of himself.

The convention on genocide must seek to protect human beings, whatever the colour of their skin, the god they worshipped and the national groups to which they belonged. Those who needed protection most were those who could not alter their status. For the idea of equality was of the very greatest importance (Id. at 111).

The protection of racial religious, national and ethnic groups thus is based on the historic animosity directed against such groups as well as their cohesiveness, stability, inevitability of membership and tradition. The concepts of racial and religious groups are self-evident. A racial group, according to one UNESCO sponsored study cited by the Special Rapporteur on Genocide, is a population group which is characterized by some "'concentrations, relative as to frequency and distribution, of herditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and/or cultural isolation'"(cited in Study Of The Question Of The Prevention And Punishment Of The Crime Of Genocide, Study prepared by Mr. Nicode'me Ruhashyankiko, Special Rapporteur, E/CN.4/Sub.2/416 (July 4, 1978),at para. 74). Sir Hartley Shawcross of the United Kingdom noted during the Sixth Committee's consideration of the draft Genocide Convention that "[t]here was no doubt that racial groups should be included. No one should be persecuted because of the accident of his birth within a certain group" (3 UN GAOR at 60). Religious groups encompass both theistic, non-theistic and atheistic communities which are united by a single spiritual ideal (See Study Of The Question Of The Prevention And Punishment Of The Crime Of Genocide, supra at para. 77). There is little doubt that religious groups within the terms of Convention encompass Muslims. Mrs. Ikramullah of Pakistan emphasized that the protection of religious groups was particularly vital given that Muslims had been the victims of genocide in India (3 U.N. GAOR C.6 at 10).

What collectivities are encompassed within national and ethnical groups? The Ad Hoc Committee On Genocide voted to amend the Secretary-General's draft and to protect "national" groups (See E/AC.25/7, at art. I; E/AC.25/SR.3 at 10,12; E/AC.25/SR.4, at 2. See also E/AC.25/SR.10 at 15-16; and E/AC.25/SR.24 at 4). Member States viewed the term "national" as encompassing "not only...nationals of any country, but an ethnic group, whatever the nationality of its members." (Remarks of Mr. Azkoul of Lebanon, E/AC.25/SR.10 at 15. See also E/AC.25/SR.10 at 16).

Mr. Petren of Sweden, during the deliberations of the Sixth Committee, successfully proposed to add the word "'ethnical'" following the word "'national'" in Article II (See 3 UN GAOR at 98, 115 and A/C.6/230 and A/C.6/230/Corr.1). This proposal was intended to clarify that a "national" group referred to those whose primary identity rested on their affiliation with an established Nation-State while "ethnical" group referred to cultural, linguistic or other distinct groupings and minorities within or outside a State

(See generally remarks of Mr. Petren of Sweden, id. at 97-98. Mr. Petren queried whether the term "national group" meant "a group enjoying civic rights in a given State." He pointed out that the Convention then would not extend protection to such groups "if the State ceased to exist or if it were only in the process of formation." Some such groups, of course, might then be entitled to protection as racial or religious groups. However He noted that this would not protect all groups and that an additional category, "ethnical groups," was required. He pointed to Switzerland where "the whole of the traditions of a group, with its cultural and historical heritage, had to be taken into account. In other cases, the constituent factor of a group would be its language" id.).

Mr Morozov of the Union of Soviet Socialist Republics noted that "(a)n ethnical group was a sub-group of a national group; it was a smaller collectivity than the nation, but one whose existence could nevertheless be of benefit to humanity" (3 UN GAOR at 106). Mr. Raafat of Egypt disputed the need to clarify the concept of national group by incorporating the term ethnical. His statement, which nicely elucidates the scope of the term "ethnical group," used the illustration of the "well-known problem of the German minorities in Poland or of the Polish minorities in Germany, and the question of the Sudeten Germans, [which] showed that the idea of the national group was perfectly clear" (Id. at 99-100). Following the adoption of the Swedish amendment, Mr. Petren clarified that if a linguistic group were unconnected with an existing State, it would be protected as an ethnical rather than as a national group. In addition, he explained that the term ethnical group encompasses a group which is racially distinct, but whose dominating characteristic is its historical or cultural uniqueness (Id. at 115). Mr. Demesmin of Hati, in a statement which captures the situation in Bosnia-Hercezovina, added that the "intermingling between races in certain regions had made the problem of race so complicated that it might be impossible, in certain cases, to consider a given group as a racial group, although it could not be denied classification as an ethnical group" (Id. at 116).

Groups, of course, often are persecuted based on religion as well as nationality or race. The Soviet Union unsuccessfully proposed that the Convention limit religious genocide to those cases in which it is related to the persecution of a racial or national group (See Soviet amendment A/C.6/223, rejected id. at 117). Mr. Morozov, in explaining the Soviet proposal, noted that "in all known cases of genocide perpetrated on grounds of religion it had always been evident that nationality or race were concomitant reasons" (id. at 105). The Soviet proposal was rejected due to the fact that it would have precluded the protection of a religious group in those cases in which religious persecution was not inter-related to an attack on a racial or national group (See remarks of Mr. Raafat of Egypt, id. at 116). Nevertheless, the Soviet proposal highlights that in many cases that "the pretext of religious strife was used...to conceal the real aims pursued...[t]he struggle was between interests which were entirely different from the divergent interests of the religions concerned"

(Remarks of Mr. Morozov, id. at 117).

Bosnian Muslims and Catholics and all non-Serbian Bosnians clearly are being subjected to genocide by the Serbian forces based upon their religion and membership in ethnical groups within the meaning of the Genocide Convention. The client forces of "Yugoslavia (Serbia and Montenegro)" refuse to recognize and are intent on exterminating all non-Serbian nationals in Bosnia-Herzegovina. Religious persecution of ethnical groups, of course, is not new in "Yugoslavia (Serbia and Montenegro)." During the Sixth Committee debate, Mr. Bartos of "the former Yugoslavia" noted that "[T]here had been cases of genocide for religious motives within the same nation [the "former Yugoslavia"]. For those reasons, his country had had to include provisions in its legislation for the prevention and suppression of religious genocide as such" (Id. at 117).

F. Genocide May Entail Various Acts Which Destroy A Group In Whole Or In Part

Article II specifies that genocide entails "any of the following acts....

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

These acts were intended to be restrictive rather than illustrative. A Soviet Amendment in the Sixth Committee which characterized such acts as exemplary was rejected (3 UN GAOR C.6 at 173, 177. See A/C.6/223). A Chinese amendment to insert the words "'including the following'" before the enumeration of acts constituting genocide also was defeated (Id. at 145. A/C.6/232/Rev.1). Mr. Ti-tsun Li of China explained that "it was impossible to forsee to what means the perpetrators of the crime might resort when they wished to destroy given groups" (Id. at 143). The majority of Member States, however, insisted that individuals should be provided notice as to the acts constituting the crime of genocide. It also was feared that a failure to fully enumerate the acts constituting genocide would lead to a lack of uniformity between the provisions of various National criminal codes (See remarks of Mr. Manini Y Ri'os of Uruguay, Mr. Kaeckenbeeck of Belgium and Mr. Amado of Brazil id. at 143, 144).

The first sub-paragraph of the Genocide Convention prohibits killing members of a group. This is self-evident and entails intentionally killing members of a group with the motive to destroy

the group for reasons ranging from racial hatred to territorial acquisition.

The Secretary-General's draft prohibits "[c]ausing the death of members of a group or injuring their health or physical integrity by...group massacres or individual executions" (E/447 at art. I(II)(1)(a),6). The Ad Hoc Committee modified this clause and prohibited the "(k)illing members of the group" (E/794 at Article II(1) at 5 adopted at E/AC.25/SR.13). Mr. Ordonneau of France noted that this sub-paragraph "covered the murder of members of a group...[i]t did not provide for actions such as mutilation, or for any of the forms of violence which might lead to the death of members of a group" (E/AC.25/SR.13 at 10).

The Ad Hoc Committee provision was incorporated into the Sixth Committee draft (A/760 at art. II(a) adopted at 3 UN GAOR C.6 at 177). Mr. Pe'rez Perozo noted that the first sub-paragraph, as was intended by the Ad Hoc Committee, "included mass murder as well as individual executions...[T]he death of an individual could be considered as an act of genocide it if was part of a series of similar acts aiming at the destruction of the group to which the individual belonged"(3 UN GAOR C.6 at 176. See art. I(II)(1)(a) in Secretariat's draft, supra). Mr. Maktos of the United States, speaking as Chair of the Ad Hoc Commmittee, clarified that the Committee had selected the word "'killing'" because it felt that "the idea of intent had been made sufficiently clear in the first part of article II. It had never been a question of defining unpremeditated killing as an act of genocide" (This statement was made in reply to a question concerning the correspondence between the French and English texts of Article II(a), id. at 177).

The second sub-paragraph of the Genocide Convention prohibits "(c)ausing serious bodily or mental harm to members of the group." Article II(II)(1)(c) of the Secretariat's draft prohibits "[c]ausing the death of members of a group or injuring their health or physical integrity by...mutilations and biological experiments imposed for other than curative purposes" (E/447 at art. II(II)(1)(c), 6). Article II(2) of the Ad Hoc Committee Draft states that genocide encompasses "(i)mpairing the physical integrity of members of the group" (adopted at E/AC.25/SR.13 at 11-12). This article was adopted in response to the statement of Mr. Ordonneau of France that there was a need to "provide for actions such as mutilation, or for any of the forms of violence which might lead to the death of members of a group" (E/AC.25/SR.13 at 10. For the text of the proposed French amendment, see E/AC.25/SR.13 at 9). Mr. Ordonneau noted that while "item 1 covered the murder of members of a group. Item 2 should cover all actions directed against the corporal integrity of members of a group" (E/AC.25/SR.13 at 11).

In the Sixth Committee, this sub-paragraph was modified to encompass psychic as well as physical pain and was amended so as to prohibit "(c)ausing serious bodily or mental harm to members of the group" (See 3 U.N. GAOR C.6 at 179-180). The phrase "mental harm" was inserted in response to a Chinese proposal to include acts of genocide committed through the use of narcotics (Japan, according to the Chinese, had committed numerous such acts against the

Chinese population during World War II, id. at 175. See A/C.6/232/Rev.1. China had first proposed this amendment during the deliberations of the Ad Hoc Committee, see E/AC.25/SR.5 at 9. The Chinese proposal was adopted pursuant to an Indian modification of a United Kingdom amendment. The Indian proposal also substituted "serious harm" for "grievous harm". Id. at 179. See A/C.6/244). This addition was interpreted as extending the sub-paragraph to encompass the intentional infliction of mental harm that did not have physical repercussions (See remarks of Mr. Fitzmaurice of the United Kingdom, id. at 178).

Article II(c) of the Genocide Convention provides that genocide entails "(d)eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." This sub-paragraph is derived from the Secretary-General's draft which specifies that genocide, in part, consists of "[c]ausing the death of members of a group or injuring their health or physical integrity by...subjection to conditions of life which by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals..." (E/447 at article I(II)(1)(b)),6). The commentary to the Secretary-General's draft notes that this provision is intended to prohibit subjecting a group to a "'slow death.'" While in certain cases there may be ambiguity concerning whether there is the requisite intent to commit genocide, the commentary observes that "if members of a group of human beings are placed in concentration camps where the annual death rate is thirty per cent to forty per cent, the intention to commit genocide is unquestionable" (id. at 25).

Article II(3) of the Ad Hoc Committee's draft did not enumerate the conditions likely to result in death and states that genocide involves "(i)nflicting on members of the group measures or conditions of life aimed at causing their deaths"(E/794 at art.II(3),5 adopted at E/AC.25/SR.13 at 14. See remarks of Mr. Ordonneau of France, E/AC.25/SR.13 at 11). In contrast to the Secretary-General's draft, the Ad Hoc Committee's provision was limited to conditions which are aimed exclusively at causing the death of members of the group and does not encompass measures which are intended to weaken or enfeeble (See remarks of Mr. Martos of the United States, E/AC.25/Sr.13 at 10, 11). The purpose of this provision, according to Mr. Azkoul of Lebanon, was that "the idea of physical extermination must extend over the ...infliction on groups of the population of conditions of life leading to extermination (E/AC.25/SR.4 at 14. A requirement that such acts be premeditated was withdrawn by the the Soviet Union. See remarks of Mr. Morozov of the Union of Soviet Socialist Republics, E/AC.25/SR.13 at 12). Each and every member of the group need not be exposed to such conditions (Remarks of Mr. Perez-Perozo of Venezuela, E/AC.25/SR.13 at 13). The sub-paragraph also does not enumerate the conditions which might lead to the extermination of a group and is intended to be broadly interpreted (See remarks of Mr. Perez-Perozo of Venezueala, E/AC.25/SR.13 at 10 and at 13 amending the Soviet proposal and the remarks of Mr. Morozov of the

Soviet Socialist Republics, id. at 13. See also remarks of Mr. Morozov, E/AC.25/SR.4 at 15). Mr. Morozov offered an example of the type of conditions which are encompassed within this provision:

> [T]he ghetto, where the Jews were confined [by the Nazis] in conditions which, either by starvation or by illness accompanied by the absence of medical care, led to their extinction, must certainly be regarded as an instrument of genocide. If any group were placed on rations so short as to make its extinction inevitable, merely because it belonged to a certain nationality, race or religion, the fact would also come under the category of genocidal crime (E/Ac.25/SR.4 at 14).

The Secretariat and Ad Hoc Committee drafts form the basis of the article adopted by the Sixth Committee. Article II(c) of the Genocide Convention provides that genocide entails "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in while or in part" (A/760 at art. II(c),9 adopted at 3 UN GAOR C.6 at 183). The "central factor of the crime" is the intent to impose living conditions which are likely to result in death. The failure to enumerate such conditions is based on the realistic consideration that "it was impossible to provide for all measure which might be taken in order to create the living conditions contemplated" (Remarks of Mr. Morozov of the Soviet Socialist Republics, 3 UN GAOR C.6 at 180). Mr. Kaeckenbeeck of Belgium clarified that the word "deliberate" in the this sub-paragraph refers to the intentional creation of conditions of life rather than to intent to detroy a group or groups (Id. at 182. The word "'deliberate' in the first part of the article referred to the definite intent to destroy a group or groups. Id. The word "inflicting" was adopted "because...criminal responsibility could only be established in cases where measures or conditions of life had really been inflicted upon the group." Remarks of Mr. Kaeckenbeeck of Belgium, id. at 176). The Sixth Committee rejected an Urguayan amendment to include conditions which resulted in "'disease or a weakening'" of members of the group (Id. at 180 rejecting A/C.6/209).

Article II(c) provides that genocide entails "[i]mposing measures intended to prevent births within the group." The Secretary-General's draft provides that genocide encompasses "Restricting births by sterilization and/or compulsory abortion...segregation of the sexes...or obstacles to marriage" (E/447 at art. I(II)(2),6). The commentary refers to this as "'biological'" genocide or "measures aimed at the extinction of group of human beings by systematic restrictions on births without which the group cannot survive....These restrictions may be physical, legal or social" (id. at 26).

The provision drafted by the Ad Hoc Committee did not enumerate the constituient acts of "biological genocide." Article II(4) states that genocide includes "[i]mposing measures intended to prevent births within the group" (E/794 at art. II(4),5 adopted

at E/AC.25/SR.13 at 14). This Article is intended to be broadly interpreted so as to include the castration, compulsory abortion and the segregation of the sexes (See remarks of Mr. Azkoul of Lebanon, E/AC.25/SR.13 at 11, 14 and Mr. Rudzinski of Poland, id. at 13. See Article I(II)(2) of the Secretariat's draft, supra).

The Ad Hoc Committee's version was adopted by the Sixth Committee and was incorporated into the Genocide Convention (Adopted, 3 UN GAOR C.6 at 184). Mr. Abdoh of Iran noted that the Committee's draft, like the version adopted by the Ad Hoc Committee, is intended to be "general and comprehensive and could be interpreted as covering sterilization and compulsory abortion" (id. at 183).

Article II(e) provides that genocide includes the act of "[f]orcibly transferring children of the group to another group." The Secretary-General's draft, in Article I(II)(3)(a) includes within the definition of genocide, "[d]estroying the specific characteristics of the group by...forced transfer of children to another human group"(E/447 at 6). The commentary states that the separation of children from their parents results in "forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents'. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time" (Id. at 27). The Ad Hoc Committee did not include this provision within the definition of physical genocide. However, the transfer of children arguably may be encompassed within Article III's prohibition on cultural genocide (E/794 at 6. But see, E/AC.25/SR.14 at 14-16).

The prohibition on the forced transfer of children was reinsated during the Sixth Committee's proceedings pursuant to a Greek amendment (3 UN GAOR C.6 at 186 adopted id. at 190). Mr. Vallindas of Greece observed that "[t]he forced transfer of children could be as effective a means of destroying a human group as that of imposing measures intended to prevent births or inflicting conditions of life likely to cause death" (Id. at 186-187). Mr. Manni Y Ri'os of Uruguay noted that "(s)ince measures to prevent births had been condemned, there was reason also to condemn measures intended to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people" (Id. at 187). Mr. Martos of the United States queried "what difference there was from the point of view of the destruction of a group between measures to prevent birth half an hour before birth and abduction half an hour after the birth" (Id. at 187). He later observed that "in the eyes of a mother, there was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth" (Id. at 189). Pe'rez Perozo of Venezuela summarized the views of those Member States which supported the Greek proposal:

> [T]he forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and

> probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization...to a highly civilized group...yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed (Id. at 195).

The Sixth Committee rejected a Syrian proposal to extend Article II to include the "imposition of measures to oblige members of a group to abandon their home in order to escape the threat of subsequent ill-treatment" (A/C.6/234 was rejected, id. at 186. See generally E/447 at art. I (II)(3)(b)). Mr. Tarazi of Syria argued that measures intended to force a group from their homes were "far more serious than ill-treatment" (3 UN GAOR C.6 at 184). These sentiments were echoed by Mr. Bartos of "the former Yugoslavia" who noted that "the Nazis had dispersed a Slav majority from a certain part of [the former] Yugoslavia in order to establish a German majority there. That action was tantamount to the deliberate destruction of a group. Genocide could be committed by forcing members of a group to abandon their homes" (Id. at 184-185).

Most Member States condemned the expulsion of groups from their homes, but noted that such actions were not encompassed within the definition of genocide (See remarks of Mr. Fitzmaurice of the United Kingdom and Mr. Maktos of the United States, id. at 185). Mr. Morozov of the Union of Soviet Socialist Republics noted that "[m]easures compelling members of a group to abandon their homes...were rather a consequence of genocide" (Id. at 185). Nevertheless, the forced expulsion of a group from their homes certainly indicates a motive to "destroy" a group "in whole or in part." It also may constitute an act of genocide within the means of Articles II(b) and II(c) of the Convention.

There can be little doubt that acts of genocide are being directed against Bosnian Muslims, Catholics and non-Serbian Bosnians. Intentional mass killings and bombardments of civilian centers have been accompanied by the deliberate ghettoization, starvation torture and a denial of medical care to these populations. This terrorization, along with the policy of torture and abuse, have resulted in extraordinary mental harm. The systematic rape of women not only has resulted in mental harm, but has led these women to procure abortions or to abandon their babies. This, in effect, has prevented births within the group and has led to the transfer of children to Serbian families.

G. Individual Criminal Liability Is Broadly Defined So As To Prevent As Well As To Punish Acts Of Genocide

Article III of the Genocide Convention defines the scope of individual penal liability.

"The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

(a) *Genocide:* Sub-paragraph (a) provides for the punishment of genocide as defined in Article II. There is no provision in the Secretary-General's which explicitly penalizes genocide. The Ad Hoc Committee included a provision which punishes "[g]enocide as defined in Articles II and III." The inclusion of this Article was based on the belief that Article II should provide a comprehensive enumeration of all acts which are punishable under the Convention. The Committee concluded that it was logical to begin with the principal act of genocide (E/794 at 7-8 adopted E/AC.25/SR.17 at 9). This provision was modified and included without debate in the Sixth Committee draft (3 UN GAOR C.6 at 211).

(b) *Conspiracy:* The second sub-paragraph penalizes conspiracy to commit genocide. Conspiracy is punishable under both the Secretariat's and the Ad Hoc Committee's drafts (E/447, at art. II(II)(3), 7; E/794 at art. IV(b), 7). The commentary to the Secretary-General's draft observes that "(g)enocide can hardly be committed on a large scale without some form of agreement. Hence the mere fact of conspiracy should be punishable even if no 'preparatory act' has yet taken place" (E/447 at 31).

Article IV of the Ad Hoc Committee's draft punishes "[g]enocide"(E/794 at 7). The commentary notes that conspiracy to commit genocide must be punished "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"(Id. at 8). Mr. Morozov of the Union of Soviet Socialist Republics explained that a criminal conspiracy "included agreement to commit genocide, even if commission of the act had not begun" (E/AC.25/SR.16 at 4). Mr. Martos of the United States, speaking as Chair, elaborated that in Anglo-Saxon law that "'conspiracy' was an offence consisting in the agreement of two or more persons to effect any unlawful purpose" (Id.). This, of course, is consistent with the traditional definition which defines conspiracy as "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means" (See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 681 (3rd ed. 1982).There does not appear to be a requirement that an overt act was taken in furtherance of this illicit agreement.[3]

The Sixth Committee's draft also includes a prohibition on "[c]onspiracy to commit genocide" (A/760 at art. III(b), 10 adopted 3 UN GAOR C.6 at 212). Mr. Maktos of the United States reiterated that the "word 'conspiracy' has a very precise meaning in Anglo-Saxon law; it meant the agreement between two or more persons to commit an unlawful act" (Id. at 212). Mr. Raafat of Egypt noted that the notion of conspiracy had been introduced into Egyptian law and connoted "the connivance of several persons to commit a crime,

whether the crime was successful or not"(Id.).

Some insight into the expansive scope of liability under the charge of conspiracy is indicated by the American and British trials of the administration and staff of the Nazi concentration camps. These individuals were collectively prosecuted for the commission of specific criminal offenses as well as for having acted in pursuance of a common design which, the note to *The Dachau Concentration Camp Trial* observes, does not "differ materially" from conspiracy (other than the fact that no agreement need be demonstrated). In the *Dachau* trial, forty defendants were convicted of having actively and knowingly participated in a common enterprise to abuse, starve torture and murder the inmates of the camp. Defendants who administered, controlled or regimented inmates were adjudged to have abetted the common enterprise despite the fact that there was no demonstration that they had personally mistreated the inmates (The Trial Of Martin Gottfired Weiss And Thirty-Nine Others (Case No. 60) XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 5, 15 (1949)). In summarizing the evidence in the *Belsen Trial*, the British Judge Advocate outlined the basis of the charge against the forty-five defendants, all of whom were convicted of having knowingly acted in furtherance of a common design to abuse and exterminate the inmates of the Belsen Auschwitz death camps.

> [I]n Germany in the war years there was a system of concentration camps of which Auschwitz and Belsen were two; that in these camps it was the practice to treat people, especially the unfortunate Jews, as if they were of no account and had no rights whatsoever; that the staff of these concentration camps were deliberately taking part in a procedure which took no account of these wretched people's lives; that there was calculated mass murder such as at Auschwitz; that there was a calculated disregard of the ordinary duties which fell upon a staff to look after the well-being and health of people at Belsen; that throughout these camps the staff were made quite clearly to understand that the brutalities, ill-treatment, and matters of that kind would not be punished if they took place at the expense of the Jews; and that there was a common concerted design of the staff to do these terrible things (Trial of Josef Kramer And 44 Others (Case No. 10) II LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 121 (1949)).

The Secretary-General's draft includes under the "crime of genocide," so-called preparatory acts. These include studies and research for developing techniques of genocide as well as the setting up of installations, manufacturing, obtaining, possessing or the supplying of articles or substances with the knowledge that they are intended for genocide; and issuing instructions or orders and distributing tasks with a view to committing genocide (E/447 at art. II(2), 7). The commentary argues that preparatory acts should be punishable given that genocide is an "extremely grave" and

"irreparable" crime which usually requires extensive preparation by a comparatively large number of individuals (Id. at 30). The Ad Hoc Committee initially decided to punish (E/AC.25/SR.16 at 12. See Soviet draft, E/AC.25/7 at art. IV(2), 2; and E/AC.25/SR.15 at 2), and later deleted, preparatory acts from Article III (See E/AC.25/SR.16 at 6; E/AC.25/SR.17 at 7, 9). One objection was that such preparatory acts, when undertaken with the intent to commit genocide, may be punishable as an attempt or as complicity to commit genocide (See remarks of Mr. Ordonneau of France, E/AC.25/SR.17 at 3). Mr. Perez-Perozo of Venezuela noted that in Latin America that the "preparation of a crime was not punishable in itself. It had at least to be followed by a beginning of commission and thus become an attempt. If attempt and complicity were made punishable, there was no need to mention preparation" (E/AC.25/SR.17 at 4). The commentary to the Report Of The Ad Hoc Committee On Genocide notes that in the "most serious cases where it would be desirable to punish the authors" that preparatory acts could be punished as conspiracy or as complicity.

> If the construction of crematory ovens or the adaptation of motor-cars to the purpose of killing the occupants with noxious gases were at issue, such acts requiring the co-operation of a certain number of persons, would accordingly come under the heading of "conspiracy to commit genocide" even if genocide were not finally committed, and under the heading of "complicty" if genocide were committed (E/794 at 8).

During the Sixth Committee debates, the Soviet Union again proposed to prohibit those acts which constituted the direct preparation for the crime of genocide (A/C.6/215/Rev.1 at para 4(e), 3. See remarks of Mr. Morozov, 3 UN GAOR at 234). Mr. Bartos of "the former Yugoslavia" noted that the punishment of preparatory acts was necessary in order to prevent the type of genocide which had been carried out by Nazi forces against Slavs and Jews (Id. at 235). A number of Member States, however, stressed that such preparatory acts, when undertaken with the intent to commit genocide, were punishable as complicity, conspiracy, attempt or incitement to commit genocide (See remarks of Mr. Raafat of Egypt, id. at 237; Mr. Maktos of the United States, id.; Mr. Fitzmaurice, id. at 238; and Mr. Abdoh of Iran, id. at 240). Mr Raafat of Egypt noted that:

> Most of the acts enumerated in the amendment of the Soviet Union constituted, in the most serious cases, acts of conspiracy and complicity. Thus the setting up of installations and the manufacture or supply of substances were serious offences from the point of view of complicity; the act of giving instructions or assigning tasks constituted conspiracy (id. at 237).

Mr. Abdoh of Iran reiterated that "(t)he rejection of the USSR

amendment would not prevent the punishment of preparatory acts in the most serious cases, under the headings of complicty, attempt, incitement and, above all, conspiracy" (Id. at 240. See also remarks of Mr. Spiropoulos of Greece, id. at 238).

The Genocide Convention thus clearly anticipates that preparatory acts undertaken with the intent to commit genocide, such as "Yugoslavia's(Serbia and Montenegro)" supply of arms, troops and provisions, are punishable under the various provisions of Article III.

(c) *Incitement:* Sub-paragraph (c) punishes "(d)irect and public incitement to commit genocide." Article II (II)(2) of the Secretary-General's draft penalizes "direct public incitement to any act of genocide, whether the incitement be successful or not"(E/447 at art. II(II)(2), 7). The commentary clarifies that this provision encompasses "direct appeals to the public by means of speeches, radio or press, inciting it to genocide." Such appeals are punishable whether articulated as part of a systematic plan or merely are the expressions of a single individual (Id. at 31).

The Ad Hoc Committee draft, in Article IV(c), prohibits "(d)irect incitement in public or in private to commit genocide whether such incitement be successful or not" (Id. at 7). The Ad Hoc Committee attempted to clarify the scope of the Secretary-General's draft. A Venezuelan amendment was accepted which provided for the insertion of the words "'publicly or privately'" after the word "'directly'" and was intended to "obviate the need to insert further particulars, such as '"press, radio, etc" (Adopted at E/AC.25/SR.16 at 2. See remarks of Mr. Ordonnneau of France, id. at 11). An additional Venezuelan amendment added the words "whether the incitment be successful or not.'" According to Mr. Pe'rez Perozo the latter clarified that "the purpose of the Convention was not merely to punish the crime of genocide, but also to prevent it" (Id. at 3). A number of Member States noted that this modification was superfluous, but supported the Venezuelan amendment (See remarks of Mr. Ordonneau of France, id. at 2; Mr. Azkoul of Lebanon, id. at 3; Mr. Martos of the United States, id. at 3).

The Sixth Committee incorporated a provision based on the Secretary-General's draft which penalizes "(d)irect and public incitement to commit genocide" (A/760 at art. III(c), 10. The language "or in private" and of "whether such incitement be successful or not" were excluded pursuant to a Belgian amendment, (A/C.6/217, adopted 3 UN GAOR C.6 at 229-331. A United States amendment to omit the punishment of incitement as a violation of freedom of speech was rejected. See A/C.6/214 rejected, id. at 229. See also A/C.6/218). The language in the Ad Hoc draft, "whether such incitement be successful or not," was viewed as superfluous: "from the legal point of view. Even if that idea were not laid down specifically in the text, incitement would be punished in any case. Only if successful incitement were specifically included among the punishable acts would it follow that unsuccessful incitement was not punishable" (Remarks of Mr. Fitzmaurice of the United Kingdom, id. at 231). Mr. Bartos of the "former Yugoslavia" strongly supported the punishment of incitement to genocide:

> The peoples who had been victims of acts of genocide during the Second World War were anxious above all that such acts should never be repeated. Yet the first stage of those crimes had been the preparation and mobilization of the masses...[t]he first step in the campaign against genoicide would be to prevent incitement to the crime. States should be under the obligation to prevent and punish genocide. One way of preventing it was to state that liberty should be regulated so as to avoid anarchy (216).

Mr. Morozov of the Union of Soviet Socialist Republics queried "how...the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed" (Id. at 219). Mr. Federspiel of Denmark noted that "[i]t would not be sufficient to punish only intent, complicity and other preparatory acts alone in order to prevent genocide; it was essential to punish the guilty persons at the most dangerous stage of the crime, the stage of incitement" (Id. at 220). Mr. Maktos of the United States observed that although incitement is separably punishable, that incitement may comprise an attempt or an overt act of conspiracy to commit genocide (id. at 213).

Some indication of the scope of incitment under the Genocide Convention is illustrated by the prosecution and conviction of Nazi war criminal Julius Streicher. Streicher, one of the first members of the National Socialist Party and publisher of an anti-semitic weekly in Nazi Germany, was convicted by the International Military Tribunal at Nuremberg of Crimes against Humanity. Streicher incited hatred against Jews and called for the annihilation of the Jewish race. In December 1941 he wrote that "'[i]f the danger of the reproduction of that curse of God in Jewish blood is finally to come to an end, then there is only one way--the extermination of that people whose father is the devil.'" The Tribunal concluded that Streicher's incitement to murder and extermination "at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity" (XXII TRIAL OF THE MAJOR WAR CRIINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 548-549 (1948) (Judgment)). The Genocide Convention does not require that incitement to genocide must be connected with a War Crime or Crime against Peace. Under the terms of the Convention, the knowing and intentional advocacy of the "extermination" of a racial, religious, ethnic or national group constitutes a violation of Article III(c).

A conviction for incitement appears to require proof of a specific intent to provoke others to act. Hans Fritzche rose in the Nazi bureaucracy to the Head of the Radio Division of the Propaganda Ministry. The International Military Tribunal determined that Fritzsche made strong statements "of a propagandistic nature" in his radio broadcasts. However, the Tribuanal was not "prepared

to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort."(Id. at 584-585. It is significant that there was no evidence that Fritzche ever called for the extermination of Jews and other groups or that he was cognizant of the ongoing Nazi program of genocide (Id. at 584. A statement which is made with the intent to provoke and which may forseeably provoke genocide clearly consitutes incitement to genocide. No direct reference to killing or extermination is required).

Incitement to genocide through the mass media clearly is encompassed within Article III(c). Mr. Morozov of the Union of Soviet Socialist Republics attempted unsuccessfully during the proceedings of the Ad Hoc Committee On Genocide to include a separate article prohibiting propaganda in the media aimed at incitement to racial, national or religious enmity or hatred and at provoking the commission of the crime of genocide. He argued that the media was one of the most effective instruments for provoking people to engage in genocide (E/AC.25/SR.16 at 6-7. See E/447 at art. III, 7). Mr. Azkoul of Lebanon pointed out that "the Committee had already provided for it by declaring public incitement unlawful. The USSR amendment would therefore be superfluous"(E/AC.25/SR.16 at 9. The USSR proposal was rejected, id. at 11).

The Soviet Union again failed to gain passage of the amendment during the proceedings of the Sixth Committee (A/C.6/215/Rev.1 rejected 3 UN GAOR at 253). Mr. Bartos of the "former Yugoslavia" stated that "[p]ropaganda which stirred up hatred must be punished because it was at the very source of acts of genocide; and the campaign against that crime could be effectively organized unless the measures proposed in the amendment of the Soviet Union were adopted" (Id. at 250). However, Mr. Pe'rez Perozo of Venezuela pointed out that "it would be difficult to imagine propaganda in favour of genocide which would not at the same time constitute incitement to that crime [genocide]" (Id.).

High Contracting Parties also possess the legal obligation to disband organizations which are devoted to the incitement to genocide. Mr. Morozov of the Soviet Union unsuccessfully proposed an amendment which required States Parties to disband organizations aimed at inciting racial, national or religious hatred or the crime of genocide (E/AC.25/SR.6 at 7, 10 rejected id. at 12. See also E/447 at art. XI, 44). The Ad Hoc Committee concluded that Signatory States already were obligated under the Convention to disband organizations which incited to genocide. Mr. Azkoul of Lebanon stated "that if genocide were considered as a crime, any incitement to genocide would also be a crime. Consequently organizations provoking genocide must be disbanded" (E/AC.25/SR.6 at 11. See remarks of Mr. Pe'rez Perozo of Venezuela arguing that such organizations constituted illegal conspiracies, id. at 7).

The same proposal was rejected by the Sixth Committee (See A/C.6/215/Rev.1. at para. 10, 3 rejected 3 UN GAOR at 470). Mr.

Raafat of Egypt pointed out that such organizations constituted illegal conspiracies to commit genocide and were engaged in direct, public incitement in violation of the Convention (Id. at 464). Mr. Zourek of Czechoslovakia noted that High Contracting Parties were obligated to punish genocide and that Member States "should therefore 'enact the necessary legislation' for the eventual modification of their constitutions, to enable them to disband organizations whose purpose was to incite to the commission of acts of genocide"(Id. at 467). The Soviet proposal thus was regarded as superfluous. States Parties to the Genocide Convention clearly are required to to disband organizations engaged in incitement to genocide (See generally remarks of Mr. Fitzmaurice of the United Kingdom, id. at 460; and the remarks of Mr. Maktos of the United States, id. at 459-460).

(d). *Attempt:* Article III(d) prohibits "[a]ttempt to commit genocide." This provision was included without comment in the Secretary-General's draft (E/447 at art. II(I)(1), 7). The same language was incorporated into the Ad Hoc Committee Draft Convention (E/794 at art. IV(d), 7 adopted at E/AC.25/SR.16 at 12) and was then accepted without debate by the Sixth Committee (3 U.N. GAOR at 301). The definition of the criminal attempt is fairly uniform across legal systems and requires a substantial step towards a criminal offense with specific intent to commit that particular crime (PERKINS & BOYCE, supra at 611).

(e) *Complicity:* Article III(e) punishes "(c)omplicity in genocide." Article II(II)(1) of the Secretariat's draft penalizes "wilful participation in acts of genocide of whatever description"(E/447 at art. II(II)(1) at 7).This open-ended provision is intended to encompass involvement by both "principals and accessories" (Id. at 30).

The Ad Hoc Committee draft modified this sub-paragraph to punish "(c)omplicity in any of the acts enumerated in this Article" (E/794 at art. IV(e), 7). The Ad Hoc Committee Draft orginally provided for the punishment of "[c]omplicity or other forms of conspiracy for the commission of genocide" (See Union of Soviet Socialist Republics Basic Principles Of A Convention On Genocide, E/AC.25/7 at art. V(3),2). The Ad Hoc Committee voted to delete "'or any other form of complicty'" (E/AC.25/SR.16 at 5). Mr. Rudzinski of Poland, in explaining his vote, noted that complicity, meaning "'aiding and abetting,'" is distinct from conspiracy (Id. See E/AC.25/SR.16 at 12). Venezuela later successfully proposed to omit the punishment of "'preparatory acts'" and to substitute "complicity" (Remarks of Mr. Ordonneau of France, E/AC.25/SR.16 at 12; and remarks of Mr. Pe'rez Perozo of Venezuela, E/AC.25/SR.17 at 2. The Venezuelan proposal was adopted, E/AC.25/SR.17 at 7,9). Mr. Pe'rez Perozo of Venezuela explained that "[t]he idea of 'attempt' was in fact already covered; if 'complicity' were added it would it would be superfluous to mention 'preparatory acts'" (E/AC.25/SR.17 at 2. For the distinction between preparatory acts and complicity, see remarks of Mr. Ordonneau of France, id. at 3 and of Mr. Pe'rez Perozo of Venezuela, id. at 4). Mr. Rudzinski of Poland explained that complicity meant "'aiding and abetting'" (E/AC.25/SR.16 at 5).

The Commentary to the Ad Hoc Committee Draft records that:

> The United States representative stated that in agreeing to the inclusion of "complicity" in this Article, he understood it to refer to accessoryship before and after the fact and to aiding and abetting in the commission of crimes enumerated in this Article (E/794 at 8).

In the Sixth Committee, a United Kingdom amendment modified the Ad Hoc Committee's draft of Article III(e) and substituted "[c]omplicity in any act of genocide" (A/C.6/236 amended and adopted at 3 UN GAOR C.6 at 259. See remarks of Mr. Pescatore of Luxembourg, id. at 254-255. See also Belgian amendment, A/C.6/217)). Mr. Pescatore of Luxembourg noted that complicity entails "the rendering of accessory or secondary aid, or simply of facilities, to the perpetrator of an offense. Accomplices were punished only if the crime were actually committed" (id. at 254). Mr. Pe'rez Perozo of Venezuela also clarified the meaning of complicty within the Genocide Convention: "The complicity envisaged in sub-paragraph (e) should apply equally to acts carried out before the crime was committed and to those performed subsequently, that is, to acts assisting the culprits to escape the punishment they deserved" (Id. at 209).

The central elements of complicity (before the fact) are the provision of assistance or encouragement with the intent that such aid is used to commit a criminal offense. In the *Zyklon B* case, defendant Bruno Tesch was convicted and sentenced to death by a British Military Court for being an accessory to war crimes. Tesch was owner of a firm which provided Zyklon B Gas to German concentration camps such as Auschwitz, where as many as four and one-half million were killed. The evidence indicates that Tesch continued to supply as much as two tons of gas per month, even after acquiring knowledge that the gas was being used for mass extermination (Trial Of Bruno Tesch And Two Others (Case No. 9) 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 100-102 (1947)). In contrast, an American Court acquitted the executives of I.G. Farben whom they determined reasonably believed that the Zyklon B Gas which they shipped to the concentration camps was being employed to disinfect inmates and did not realize that the typhus vaccine which they provided was being used in medical experiments on inmates (United States v. Carl Krauch, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1081, 1168-1972 (1952)).

Accessory liability also attaches where an individual assists another to avoid apprehension, prosecution or punishment. This may arise in cases in which government officials fail to fulfill their duty to intervene to halt or to punish criminal activity. In December 1937, Japanese troops entered and committed numerous atrocities during the so-called "Rape of Nanking." Over two hundred thousand prisoners and non-combatants were killed and twenty thousand raped within the first six weeks of occupation (The Tokyo

War Crimes Trial (1948) in I THE LAW OF WAR A DOCUMENTARY HISTORY 1029 (Leon Friedman ed. 1972)). Foreign Minister Kiki Hirota received reports of these atrocities and was assurred by the War Ministry that these barbarities would be halted. Nevertheless, Hirota was aware that rape and murder continued unabated for over a month. The Tokyo War Crimes Tribunal ruled that "Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence" (Id. at 1134). Japanese War Minister and Premier Hikedi Tojo was convicted of War Crimes for knowingly and wilfully refusing to take adequate steps to punish those troops who abused and murdered Allied prisoners during the Bataan Death March and the construction of the Burma-Siam Railway. Despite the high death rate from malnutrition and other causes in prisoner of war camps, Premier Tojo took no action to insure that they received proper care (Id. at 1154-1155).

I. Individual And State Liability For Genocide

Article IV of the Genocide Convention defines the scope of liability under the Treaty and provides that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article V of the Secretariat's draft provides that "(t)hose committing genocide shall be punished, be they rulers, public officials or private individuals" (E/447 at 7. The commentary cites General Assembly Resolution 96(I) of December 11, 1946 which, in part, provides that "genocide is a crime under international law...for the commission of which principals and accomplices--whether private individuals, public officials or statesmen...are punishable" id. at 35). The commentary notes that genocide may result from the acts of "statesmen, officials or individuals." However, the greatest threat arises from governmental officials:

> The heaviest responsibility is that of statesmen or rulers in the broad sense of the word, that is to say, heads of state, ministers and members of legislative assemblies, whose duty it is to abstain from organizaing genocide personally and from provoking it and to prevent its commission by others (id. at 35).

The Secretariat's provision was incorporated, with some modification, into the Ad Hoc Committee Draft. The most conspicuous modification was the replacement of the phrase "constitutionally responsible rulers" with "heads of State"(E/794 at art. V,9. Article V states that "[t]hose committing genocide or any of the other acts enumerated in Article IV shall be punished, whether they are heads of State, public officials or private individuals"). A

Chinese draft provided "[f]or the commission of genocide, principals and accomplices, whether they are public officials or private individuals, shall be punishable" (E/AC.25/9 at art. II). This proposal, however, was considered to be overly restrictive. Mr. Morzov of the Union of Soviet Socialist Republics pointed out that in some States that the head of State was not considered a public official and that government officials were considered to be "'servants'" of the head of State (E/AC.25/SR.18, at 3). The Chair, Mr. Martos of the United States, noted that the American President was considered to be a "head of State." (E/AC.25/SR. 18 at 3). In the end, the Ad Hoc Committee amended the Chinese draft so as to incorporate the term "head of State" which had been employed in Article III of the Nuremberg Charter (See E/AC.25/SR.18 at 2-3. Mr. Martos rejected the Soviet proposal that Article V make reference to "rulers.').

The Sixth Committee further modified the Ad Hoc Committee's draft. Article IV states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Mr. Fitzmaurice of the United Kingdom queried what interpretation should be given to the word *gouvernants* in Article V of the French version of the Ad Hoc Committee's text. He noted that in the English translation, it appeared as "head of State." Yet, various national constitutions, accorded the head of State immunity from legal liability. (3 U.N. GAOR C. 6 at 302). The Swedish representative, Mr. Petren, noted that the Swedish Constitution provided the King constitutional immunity from criminal liability and proposed to delete the phrase "heads of State" from Article IV (Id. at 317. See A/C.6/247. See also the remarks of Mr. Fitzmaurice of the United Kingdom, id. at 314. A Belgium amendment would have substituted the phrase "agents of the State." See the remarks of Mr. Kaeckenbeeck of Belgium, id. at 316, 318. The Netherlands proposed that the phrase "responsible rulers" should be used, A/C.6/253. See the remarks of Mr. De Beus of the Netherlands, id. at 318). Mr. Morozov of the Soviet Union argued that the Ad Hoc Committee's language already excluded constitutional monarchs from liability and expressed the fear that the Swedish amendment would exclude constitutional rulers as well as heads of governments and ministers from criminal liability. Id. at 317-318). Others argued that constitutional monarchs should not be accorded criminal immunity under the Convention (See the remarks of Mr. Ingle's of the Philippines, id. at 340). In the end, the Sixth Committee accepted, without debate, the proposal of Siam to substitute the term "constitutionally responsible rulers" for "heads of State" (See the remarks of Prince Wan Waithayakon of Siam and the committee's acceptance of his proposal, id. at 343. See also vote on article V [IV of the Genocide Convention], id. at 357-358. An earlier proposal by Siam to incorporate the term ""heads of Governments,' id. at 341, was not deemed satisfactory. See the remarks of Mr. Fitzmaurice of the United Kingdom, id. at 352. De facto rulers were considered to fall within the existing text. See remarks of Mr. Spiropoulos of Greece on Syrian proposal, id. at

357).

Article IV clearly imposes criminal liability on all government ministers and officials, other than constitutional monarchs (See remarks of Mr. Sardar Bahadur Khan of Pakistan, id. at 304). This exclusion, as pointed out by Mr. De Beus of The Netherlands, is based on the fact that "according to the constitutions of the States concerned, heads of State were not responsible for the actions of the Government. They could thus not be held responsible for such actions on the international plane, and it should be stated, in some way or other, that the provisions of article [IV] did not apply to constitutional monarchs" (Id. at 342).

Acts of genocide by "organs of the State" or State officials which are acting in their official capacity, of course, are imputed to the State (See Draft Articles on State Responsibility, in I.L.C. Report To General Assembly, U.N. General Assembly, 35th Session, Supplement No. 10, p. 59, U.N. Doc. A/35/10 (1980), reprinted in I.L.C. Yearbook 1980, vol.. 2, p. 30, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2), art. 5-7). This responsibility, of course, is explicitly recognized in Article IX and constitutes a breach of the Convention. Mr. Correa of Ecuador, during the Sixth Committee's consideration of Article IV noted that "committing an act of genocide...in the name of a State was a breach of the convention...." (3 U.N. GAOR C.6, at 350). Mr. Petren of Sweden later added that "a State which committed an act of genocide on the territory of another State after having signed the convention, would undoubtedly be guilty of a violation of the convention" (Id. at 474). The Draft Articles on State Responsibility of the International Law Commission recognize that the "serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid" constitutes an "international delict," and in certain cases, may comprise an "international crime" (Draft Articles on State Responsibilit, supra at art. 19(2),19(3)(c), 19(4). Aid or assistance by a State to another State for the commission of an internationally wrongful act also constitutes an "internationally wrongful act." Id. at art. 27).

J. The Inadequate Mechanisms For The Adjudication Of Individual Liability Affirm The International Court's Obligation To Determine State Responsibility Under The Convention.

Article VI of the Genocide Convention provides for prosecution before the domestic tribunals of the State "in the territory of which the act was committed" as well as for enforcement "by such international penal tribunal, as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

During the debates over Article IV in the Sixth Committee, it was argued that there was little likelihood that public officials would be prosecuted by their own government and that there was only

a remote possibility that the international community would agree to create and accept the jurisdiction of an international criminal court. As a result, it was thought essential to vest jurisdiction in the International Court of Justice to determine State responsibility for genocide. Such a provision, of course, was later incorporated into Article IX (See remarks of Mr. Fitzmaurice of the United Kingdom, 3 U.N. GAOR at 319, 342 353-354 and United Kingdom amendment A/C.6/236/Corr.1. See also the remarks of Mr. Correa of Ecuador, id. at 350; Mr. Abdoh of Iran, id. at 351; and Mr. Kaeckenbeeck of Belgium, id. at 341 and Belgium amendment, A/C.6/252). Mr. Pescatore of Luxembourg added that genocide frequently resulted from the actions of an entire governmental apparatus and that it was difficult to establish individual liability. In such circumstances, it was appropriate to impose liability upon an entire State (See remarks of Mr. Pescatore of Luxembourg, id. at 349-350). Mr. Fitzmaurice of the United Kingdom, noting the difficulties of enforcing the provisions of Article IV, observed that:

> The advocates of that article [present Article IV concerning the liability of public officials and private individuals] started from the principle that an international penal court be set up. There was, however, no such court in existence, and were it to be established, it would probably be a long time before it was working effectively. Until that time, the provisions of article V [IV] would be of no practical use. But even when the court had been set up, how were rulers to be arraigned before it? Governments would certainly not hand their heads of State or their ministers over the court, and the idea of an armed force being sent to arrest the guilty parties was even less conceivable.
>
> In those circumstances, there was only one solution possible on a realistic basis: provision would have to be made for the arraignment of States or Governments before the International Court of Justice (id. at 321).

Mr. Fitzmaurice, later again stressed the need to provide for the adjudication of State responsibility for genocide before the International Court:

> In the case of a head of State being guilty of genocide, there were two possible hypotheses; either the was a despot, who would not be punished by his own national courts; or he was a ruler who acted only with the advice of his ministers, in which case, as the Government was the real culprit, the ruler would not be arraigned by the courts of his country. Since there was no international criminal court, the provisions of article V [IV] were meaningless as far as heads of State were concerned both on the national and on the international level....

> In those circumstances, the only provision that could be made was to arraign Governments guilty of genocide before the only existing court: the International Court of Justice, which would not pronounce sentence, but would order the cessation of the imputed acts, and the payment of reparations to the victims (Id. at 342).

The Sixth Committee, of course, did provide for the adjudication of State responsibility in Article IX (See rejection of the United Kingdom amendment to Article IV, id. at 355. For a legislative history of the United Kingdom's amendments, see remarks of Mr. Fitzmaurice, id. at 430). The strong support which was articulated for the inclusion of the adjudication of State responsibility before the International Court in Article IV affirms the International Court's central role in the enforcement of the Genocide Convention. The provisions pertaining to individual criminal liability clearly were viewed as a significant, but somewhat ineffective mechanism to prevent and punish the international crime of genocide. As a result, primary reliance was placed on the the adjudication of State responsibility before the international court. Mr. Kaeckenbeeck of Belgium noted:

> The ...[Convention] tried to make the best possible use of existing courts, that is, the domestic criminal courts and the International Court of Justice. At the moment there was no international court; there was not even a draft proposal for the institution of such a court. The establishment of a new international judicial organ involved so many difficulties that it might be assumed that it would be along time before an international criminal court began to function. It was therefore necessary to be realistc, and make suitable use of the existing organs (Id. at 341).

The vesting of jurisdiction in the International Court to adjudicate State responsibility was not merely viewed as a mechanism for enforcing the Convention. Mr. Correa of Ecuador stressed that the application of sanctions against High Contracting Parties may serve to deter acts of genocide which posed a threat to international peace (Id. at 350).

I. High Contracting Parties Possess An Affirmative Obligation To Prevent And To Punish Acts Of Genocide

General Assembly Resolution 96 (I) invites Member States to "enact the necessary legislation for the prevention and punishment of this crime [of genocide]" (See remarks of Sir Hartley Shawcross, 3 UN GAOR at 47-48).In the third paragraph of the preamble to the Secretariat's draft, the High Contracting Parties "pledge themselves to prevent and to repress such acts [of genocide] wherever they may occur" (E/447 at Preamble, 5). The last two

paragraphs of the preamble to the Ad Hoc Committee's draft also affirms that "Being the prevention and punishment of genocide requires international co-operation...[The High Contracting Parties] *Hereby agree to prevent and punish the crime of genocide as hereinafter provided*" (E/794 at 2 adopted at E/AC.25/SR.23 at 5. See also id. at 3-4). In the Sixth Committee Mr. Sundaram of India, "recalled that in the preamble...it was stated that the High Contracting Parties 'agree to prevent and punish' the crime of genocide. It was therefore obvious that if a State committed crimes of genocide, after having signed the convention, such an act would constitute a breach of the convention" (3 UN GAOR C.6 at 346).

There is little doubt that States possess an affirmative duty to prevent and to punish the crime of genocide. During the proceedings of the Sixth Committee, Mr. Kaeckenbeeck of Belgium received the Committee's support for his proposal that the wording of the final paragraph of the preamble to the Ad Hoc Committee draft, should be incorporated into Article I of the Genocide Convention (Id. at 38. Mr. Kaeckenbeeck was making reference to the requirement that High Contracting Parties "undertake to prevent and to punish" (genocide). This modification of the text was intended to strengthen the obligation of High Contracting Parties to prevent and punish the crime of genocide. Mr. Kaeckenbeeck of Belgium stated that the "Belgian proposal was to substitute for a purely declaratory statement a solemn commitment, of practical import, to prevent and suppress the crime" (Id. at 44). Mr. De Beus of the Netherlands argued that a "formal declaration by all States could not be obtained by a statement in the premable, and should therefore be embodied in a substantive article" (Remarks of Mr. Sundaram of India, id. at 46). Mr. Maktos of the United States noted that "if a lawyer had to rely on the preamble...he would have a more difficult task in court than if that statement were laid down in the operative part of the convention" (Id. at 50. Article I is "far from superfluous. Remarks of Mr. Dihigo of Cuba, id. at 41). Accordingly, Article I was modified to read: "The Contracting Parties confirm that genocide, whether commited in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (Adopted, id. at 53). The last paragraph of the preamble to the Convention reinforces the obligation imposed by Article I and proclaims that "international co-operation is required" in order "to liberate mankind" from the "odious scourge" of genocide.

Article V charges the High Contracting Parties with the affirmative obligation to "undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to prove effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

The Secretary-General's draft requires the High Contracting Parties to "make provision in their municipal law for acts of genocide" (E/447 at art VI,8). The commentary notes that "[i]t is essential that the Parties to the Convention should introduce into their criminal law provisions for the punishment of acts of

genocide as defined by the Convention.....[T]he penalties should be sufficiently rigorous to make punishment effective" (Id. at 37).

Article VI of the Ad Hoc Committee Draft elaborates upon this obligation and provides that "[t]he High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedures to give effect to the provisions of this Convention" (E/794 at art. VI, at 10, adopted, E/AC.25/SR.19 at 8). Mr. Azkoul of Lebanon noted that the Genocide Convention would be "useless" if the States Parties were not obligated to incorporate such legislation within their domestic legal codes (E/AC.25/SR.6 at 12). Mr. Morozov of the Union of Soviet Socialist Republics added that a failure to require the High Contracting Parties to promulgate laws for the prevention and punishment of the crime of genocide would signify a lack of commitment by the international community to suppress acts of genocide (Id. at 14). The language of the Ad Hoc Committee, draft, however, is not limited to requiring action in the penal sphere. Mr. Pe'rez Perozo noted that a High Contracting Party's obligation to combat genocide may entail the enactment of educational measures or a modification of extradition procedures (See remarks of Mr. Pe'rez Perozo of Venezuela, E/AC.25/SR.18 at 14; and of Mr. Azkoul of Lebanon, E/AC.25/SR.19 at 4).

The Ad Hoc Committee draft forms the basis of Article V of the Sixth Committee draft which was incorporated into the Convention. Article V recognizes that High Contracting Parties are required to enact both criminal and non-criminal measures to combat genocide. It also provides, as a concession to Federal States, that the obligation of a High Contracting Party is limited by its constitutional procedures and structure (See A/C.6/215/Rev. 1 at para. 6, 3 accepted 3 UN GAOR at 326. See also id. at 361). Nevertheless, it is clear that within their sphere of competence that, as Mr. Abdoh of Iran noted, that "States were under an obligation to take the legislative measures necessary to ensure the application of the provisions of the convention and particularly measures concerned with the prevention and suppression of genocide. The latter measures formed an essential part of the convention" (Id. at 325). A Soviet amendment was adopted which explicitly obligated States to provide effective penalties for acts of genocide" (Id. at 322, 324, 326. For State obligations under Article V, see the remarks of Mr. Kaeckenbeeck, id. at 325).

As a corollary to this legislative obligation, the High Contracting Parties are required under the language of Article VI of the Genocide Convention to prosecute persons charged with genocide before a "competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to these Contracting Parties which shall have accepted its jurisdiction." Article VII provides that genocide and the other acts enumerated in Article III "shall not be considered as political crimes for the purpose of extradition." The Contracting Parties "pledge themselves in such cases to grant extraditon in accordance with their laws and treaties in force."

Thus, in the absence of an international criminal court, Article VI requires that a State prosecute those over whom it has jurisdiction who have committed acts of genocide within its territory. Mr. Maktos of the United States, speaking as Chair of the Ad Hoc Committee, explained during the deliberations of the Sixth Committee that the text of Article VI does not restrict the authority of a State to punish their nationals for genocide committed in the territory of another State. He went on to stress that the "only obligation imposed on them [High Contracting Parties] by article VII [VI] was to punish crimes of genocide committed on their territory...." (3 U.N. GAOR at 407. See A/760 at 8, footnote. See also id. at 685). Mr. Guerreiro of Brazil observed that Article VI was not intended to solve questions of conflicting competence in regard to the trial of persons charged with genocide...[i]ts purpose was merely to establish the obligation of the State in which an act of genocide was committed" (Id. at 700. Article VI would appear to permit a State to exercise extra-territorial jurisdiction and to prosecute those who committed genocide against its nationals. See A/C.6/313 and id. at 691-701).

Article IV, when read in conjunction with Article I, arguably does create an obligation on a State to prosecute its own nationals for genocide committed within the territorial boundaries of other States. The Sixth Committee explicitly incorporated a footnote into its report which provides that Article IV "does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State" (A/760 at 8,footnote. See id. at 685-686).

In contrast to the duty to prosecute, the Genocide Convention does not impose an obligation upon States to extradite offenders. (See remarks of Mr. Fitzmaurice of the United Kingdom, 3 U.N. GAOR at 331 The "defect" of the Ad Hoc Committee provision was that "it made extradition too compulsory" Id.). Mr. Kackenbeeck of Belgium noted that the "phrase 'in accordance with its laws' in the second paragraph of article IX made it quite clear that no country would be obliged to extradite its own nationals, if its laws did not permit that." (Id. at 332).

"Yugoslavia (Serbia and Montenegro)", pursuant to articles I, V and VI, thus possesses an indisputable duty under the Genocide Convention to "undertake to prevent and to punish" genocide. It is obligated "to enact...the necessary legislation to give effect to the provisions of the present Convention." A strict duty also is imposed on "Yugoslavia (Serbia and Montenegro)" to prosecute those within its territorial jurisdiction who are liable as conspirators and accessories in acts of genocide. In addition, Articles I and Articles IV, when read in conjunction, arguably create a duty to prosecute 'Yugoslavian (Serbia and Montenegro) nationals who have committed genocide within the territory of other States. Instead, the rump Yugoslavia has persistently breached this obligation and has grossly flaunted its international obligations under the Genocide Convention.

IV. THE "FORMER YUGOSLAVIA" STRONGLY SUPPORTED THE GENOCIDE

CONVENTION

The "Former Yugoslavia" strenuously supported and urged the adoption of a strong and effective Convention against Genocide This stance is not surprising given that the "former Yugoslavia," "had suffered under acts of genocide" during World War II (Remarks of Mr. Bartos of "the former Yugoslavia," 3 UN GAOR C.6 at 228). Mr. Bartos noted during the proceedings of the Sixth Commitee that while countries "which had not been the victims of nazi and fascist atrocities could afford to forget the past; those who, like [the former] Yugoslavia, had suffered under acts of genocide could not do so" (Id. at 228). He opined that "[t]he peoples who had been victims of acts of genocide during the Second World War were anxious above all that such acts should never be repeated" (Id. at 216). During the opening session of the Sixth Committee's consideration of genocide, Mr. Bartos proclaimed his country's support for the Genocide Convention affirmed "the obligation of signatory States to prevent and suppress genocide" (Id. at 40 in support of Belgium amendment to incorporate the obligation to prevent and suppress genocide in Article I. See remarks of Mr. Kackenbeeck at 38). He stressed that ratification of the Convention was particularly vital given its contemporary relevance:

> The fact that the General Assembly had taken cognizance of the problem of genocide proved that all civilized peoples condemned that crime which was unworthy of modern civilization. That crime, however, was still being commmitted...against...peoples fighting for their freeedom. The question was therefore one of great importance at the present time. It was essential to draw up...a convention which would constitute a real code of international law forbidding genocide in general, not a text with loopholes....(Id. at 9).

During the Sixth Committee debates,"the former Yugoslavia" supported the prohibition on propaganda in support of hatred and genocide ("[T]he first stage of... [genocide] had been the preparation and mobilization of the masses, by means of theories disseminated through propaganda..."[t]he first step in the campaign against genocide would be to prevent incitement to the crime. States should be under the obligation to prevent and punish genocide. One way of preventing it was to state that liberty should be regulated so as to avoid anarchy." Id. at 216); the punishment of incitement to genocide ("By rejecting the provisions...the Committee would be putting another and a more powerful weapon into the hands of the criminals, as the deletion of the provision on incitement...would be still worse than the absence of any provision on the subject." Id. at 228) and the criminalization of preparatory acts ("The Ad Hoc Committee had concentrated chiefly on measures for punishment, but the peoples of the world demanded that genocide should never again be committed. The main preoccupation must therefore be to prevent it; and, to that end, all preparatory

acts must be punished....History showed beyond doubt that the punishment of preparatory acts was necessary to prevent the perpetration of the crime."Id. 235).

The "former Yugoslavia" also favored the imposition of a duty upon High Contracting Parties to disband organizations whose purpose was to promote hatred and genocide ("[T]he existence of fascist and nazi organizations...had made it possible for the crime [of genocide] to assume the monstrous proportions which had shocked the conscience of the world....Governments [do not] ...tolerate the existence, in their territory of associations which incited to acts which were crimes in common law, why should...[they not] disband[inc] organizations whose purpose was the perpetration of genocide?" Remarks of Mr. Kacijan, id. at 466).

The "former Yugoslavia" also voted for the explicit recognition of the principles of the Nuremberg Charter in the Genocide Convention, particularly the abrogation of the superior orders defense (Id. at 509) as well as for the inclusion of a prohibition on cultural genocide (Id. at 206). The "former Yugoslavia" took a broad view of the acts which should be enumerated as constituting acts of genocide (See proposal to include forcing people from their homes. "[T]he Nazis had dispersed a Slav majority from acertain part of Yugoslavia in order to establish a German majority there. That action was tantamount to the deliberate destruction of a group. Genocide could be committed by forcing members of a group to abandon their homes." Remarks of Mr. Bartos, id. at 184-185. See also proposal to include the forced transfer of children with a view to their inclusion into another group. Mr. Bartos voted against the proposal, but "was prepared...to agree that the forced transfer of individuals with a view to their assimilation into another group constituted cultural genocide." Id. at 191) and supported the inclusion in Article I of a duty upon States to take action to prevent and to suppress genocide as well as the retention of the language that genocide was an international crime whether committed "'in time of peace or in time of war" (Id. at 40, 50. "Genocide ws explicitly mentioned in the national legislation of the [former] Yugoslavia, and in the opinion of his delegation States which omitted to include genocide in their legislation failed in their duty." Id. at 50).

The "fomer Yugoslavia" abstained from voting in the Sixth Committee on the acceptance of the draft convention on genocide. This abstention was based on the belief that the draft convention was not sufficiently strong and that, as result, it would prove ineffective in combating genocide (Id. at 701). Mr. Kacijan regreted that his delegation had to refuse to vote for a text which failed to achieve the "real aim of the convention, namely, the prevention of genocide" (Id. at 707). He went on to state that he "could not vote in favour of a text which did not give sufficient guarantees against any future recurrence of genocide" (Id. at 708). The "former Yugoslavia, however, did vote for the Convention in the General Assembly (Official Records Of The Third Session Of The General Assembly, Part I, Plenary Meetings Of The General Assembly 851 (1948).

Given the "former Yugoslavia's" firm support for the Genocide Convention and strong condemnation of such atrocities, it is to be expected that "Yugoslavia (Serbia and Montenegro)" would welcome and support the International Court's jurisdiction and judgment in the present case.

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1. Article VIII was adopted as an Australian amendment to Article IX (A/760 at 6), according to Mr. Fitzmaurice of the United Kingdom, he voted for the Australian amendment in order to clarify that the joint United Kingdom-Belgium amendment to Article IX did not anticipate that "recourse might be had only to the International Court of Justice, to the exclusion of other competent organs of the United Nations" (id. at 457).

2. Mr. Sundaram of India noted that "the word 'application' included the study of circumstances in which the convention should or should not apply, while the word 'fulfilment' referred to the compliance or non-compliance of a party with the provisions of the convention. The world 'fulfilment' therefore had a much wider meaning." 3 U.N. GAOR C. 6 at 437. Mr. Gross the United States observed that "the words 'disputes...relating to the...fulfilment' referred to disputes concerning "the interests of subjects of the plaintiff State" (Id. at 704).

3. Perkins and Boyce state that it is sufficient that there is a meeting of the minds--a unity of design and purpose. A formal agreement need not be demonstrated. It is sufficient that the parties tacitly come to an understanding in regard to the unlawful purpose. Such an understanding may be inferred from "sufficiently significant circumstances." Where more than two are involved, it is not necessary that each conspirator must know the identity of all of the others. Those who, with knowledge of the conspiracy, aid or assist in carrying out its criminal purposes, thereby make themselves parties thereto and are liable as co-conspirators. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 683-684 (3rd ed. 1982).

4. The Sixth Committe did not debate the introductory clause of Article III which states that "[t]he following acts shall be punishable." However, Mr. Fitzmaurice of the United Kingdom drew the Committee's attention to the fact that the word punishment pertained to "individuals, as States could not be punished." Yet, he noted that genocide was customarily committed by States, Governments or by government institutions and suggested the substitution of a phrase which would "cover genocide perpetrated by States or Governments, as well as genocide committed by private individuals" (3 U.N. GAOR C.6 at 209. See also id. at 301).