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ORIGINAL : ENGLISH

AD HOC COMMITTEE ON GENOCIDE

SUMMARY RECORD OF THE EIGHTEENTH MEETING

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

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

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DRAFTING OF ARTICLES TO BE INCLUDED IN THE CONVENTION ON THE CRIME OF
GENOCIDE, (CONTINUATION OF THE DISCUSSION) ARTICLE III

The CHAIRMAN recalled that the Committee had agreed that the following acts should be punishable:

- "(a) Genocide as defined in Articles 1 and 2;
- "(b) conspiracy to commit genocide;
- "(c) direct incitement in public or in private to commit genocide whether such incitement be successful or not;
- "(d) complicity in any of the acts enumerated in this article."

He suggested that the phrase "whether such incitement be successful or not" be deleted from sub-paragraph (c), as he did not feel that it added to the provision. As several representatives, however, felt that the phrase lent clarification, he withdrew his suggestion.

ARTICLE IV DEALING WITH PERSONS LIABLE FOR COMMISSION OF GENOCIDE, WHETHER
RULERS, PUBLIC OFFICIALS OR PRIVATE INDIVIDUALS (DOCUMENT E/477, DOCUMENT
E/AC.25/9 and DOCUMENT E/AC.25/11)

The Chairman observed that the Committee had agreed on a text as to "principals and accomplices", but that it yet had to decide upon a text with regard to "public officials and private individuals". The Secretariat in its Memorandum listing substantive items to be discussed by the Committee (document E/AC.25/11) had suggested in Section III that the Committee might wish to consider whether the term "public officials", used in Article II of the Chinese draft (document E/AC.25/9) was sufficiently comprehensive to cover also "Heads of State". The Memorandum pointed out that during the discussions leading to the Charter of the International Military Tribunal (known as the Nurnberg Tribunal), some doubt had been expressed as to whether Heads of State could be held responsible for war crimes, crimes against humanity and crimes against peace, but that the question had been decided by the express provision of Article 7 of the Charter of the International Military Tribunal providing that the official position of defendants, whether as Heads of State
/or responsible

or responsible officials in government departments, should not be considered as freeing them from responsibility or mitigating punishment. The Secretariat Memorandum further pointed out that Article 4 of the Secretariat draft convention on genocide provided that those committing genocide should be punished, were they rulers (des gouvernants), public officials or private individuals.

Mr. MOROZOV (Union of Soviet Socialist Republics) expressed the view that Article II of the Chinese text (document E/AC.25/9) was not sufficiently explicit to cover the problem. For example, in some States the Head of State was not considered as a public official, and, on the contrary officials were considered as "servants" of the Head of State. He proposed that the Chinese text be amended to read:

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

His amendment was in accord with the principles adopted at Nurnberg and with the wording of Article IV of the Secretariat's draft convention. It was without ambiguity, as it directly established the liability of the Heads of State.

Mr. ORDONNEAU (France) remarked that in France rulers and public officials were not the same and that the USSR wording would be beneficial. He favoured the USSR proposal, but asked if the USSR representative would be agreeable to amending the provision to read "those who committed one of the acts enumerated in the preceding article".

Mr. PEREZ-PEROZO (Venezuela) said that he was in agreement with the substance of the USSR proposal. He remarked, however, that it was difficult for his country to distinguish between rulers and public officials, as the Head of the State had the status of an official.

The CHAIRMAN observed that in English, the appropriate term would be "heads of State", rather than "rulers". For example, the President of the United States was not a ruler.

/Mr. RUDZINSKI

Mr. RULZINSKI (Poland) supported the USSR proposal and felt that as the provision was meant to cover persons in power, and heads of State sometimes were merely figureheads, "rulers" was the better term

The following text based on the USSR proposal, was adopted unanimously:

"Those committing any of the acts enumerated in Article III shall be punished be they Heads of State, public officials or private individuals".

Mr. ORDONNEAU (France) stated that in the French version "Heads of State" should read : gouvernants.

The Committee progressed to the consideration of part 2 of the USSR proposal providing that genocide could not be justified by the command of the law or superior orders.

Mr. MOROZOV (Union of Soviet Socialist Republics) commented that there was some doubt whether or not the second portion of his proposal ought to be put into a separate paragraph. He felt, however, that the question should be defined clearly in Article IV. The principle had been recognized by the Nurnberg Charter. It was essential that the provision be included in order that the broad circle of people who might become participants and attempt to use superior orders as an excuse be covered and brought to justice.

He recalled that objections had been raised to the provision on the grounds that it might lead to mitigation of punishment and that the matter of mitigation should be determined by judges in accordance with individual cases and dealt with in national legislation. It had been argued also that as the Nurnberg Charter had been drawn between that Charter and the Convention on genocide.

The CHAIRMAN opposed the inclusion in the convention of the second portion of the USSR proposal. He took the position that since 1945, when the principle was set for by Article 8 of the Charter of International Military Tribunal, it had been an established rule that the fact that the

/defendant

defendant acted pursuant to a superior order did not free him from responsibility and the omission from the Convention of a specific reference could not change that rule of law. Therefore, there was no need for the inclusion of a reference. A defendant should be able to plead superior orders in mitigation, but were mitigation to be mentioned in the Convention, it might inspire offenders to use it as an excuse and by the most extreme analogy, eventually only the top official would be punishable.

Further, the provision might give rise to difficulties as certain representatives had expressed. He could foresee a situation in which a soldier, not knowing the consequences of his officer's act, would be faced with the dilemma of having to die at the hands of his superior officer, or at the hands of the authority enforcing the penalties for genocide, as defined in the provision.

He noted that the Secretariat's draft did not mention mitigation. It had been included in the principles established by the Nurnberg trials, but those trials were specific instances and the problem was not the same there as it was with regard to a convention.

He favoured leaving the matter to the judgment of the court in the light of the usual rules of law.

Mr. RUDZINSKI (Poland) supported the USSR proposal. He felt that as genocide was such a serious and atrocious crime, it should be made clear that no one could be excused on the basis of superior orders, as no order contrary to the precepts of elementary morals could be used as an excuse. He recalled that the principles of the Nurnberg Charter had been recognized by a resolution of the General Assembly, and he could not accept the argument that the Nurnberg trials were a special case and that the principles there accepted did not apply to the convention under consideration.

/Mr. PEREZ-PEROZO

Mr. PEREZ-PEROZO (Venezuela) opposed the second portion of the USSR proposal, explaining that his opposition was based on the fact that the inclusion would be contrary to the constitutional provisions of his country, as the legislature of his country had established a rule that those who had acted on superior orders were not subject to punishment.

Mr. LIN MOUSHENG (China) said that he was hesitant to support the proposal owing to the reason that although it was agreed that genocide was a crime which must be punished, it was at the same time essential that justice be done to the defendant. In view of the varied rules in different legal systems, it might be unwise to include the provision. He agreed with the Chairman that the Nurnberg trials were ad hoc instances, and therefore, the problem was not the same as it was with regard to a convention.

Mr. AZKOUL (Lebanon) expressed the view that the inclusion of the provision was unnecessary and felt that the situation was sufficiently covered by the definition of genocide. Genocide could not exist without a motive, and the provision might leave room for injustice to a person carrying out orders.

Mr. MCROZOV (Union of Soviet Socialist Republics) took the position that the principles under discussion should be included among the positive achievements of the United Nations, as they had been at the Nurnberg trials. Genocide was so significant a question that it could not be considered merely in the light of extreme individual instances, as the Chairman had cited in his opposing argument. The Committee must make it clear that no person for any reason could free himself from the responsibility for the crime. Viewing the problem from the opposite case from that given by the Chairman, it was owing to the participation of large numbers of persons that the crime of genocide had become apparent.

/There was

There was no document to the effect that such persons could be punished. A specific provision in the convention for the punishment of those persons would guard against repetition.

He recalled that the circumstance of superior orders did not always apply to the army and those crimes had been committed not only by military organizations, nor were those acts always carried out on direct orders. The problem was not that simple. Conscious measures had been taken for the creation of a social insanity and an atmosphere in which people were taught to believe that it was heroism to commit the crime of genocide. He urged that the provision be included in order to prevent the recurrence of that situation. The Committee could not exclude from the Convention important principles as to which the members of the Committee agreed in principle.

Mr. SCHWELB (Assistant Director of the Human Rights Division) read from the Charter of the International Military Tribunal Article 8, setting forth the provision that the fact that the defendant (at the Nurnberg trials) acted pursuant to order of his government or of a superior should not free him responsibility, but might be considered in mitigation of punishment. He observed further that according to the Charter of the Tribunal, the true text was whether or not moral choice was possible.

He recalled that there had been two resolutions of the General Assembly recognizing that the principles established at the Nurnberg trials laid down valid international law.

In response to a question posed by the representative of Venezuela as to whether the principles of the Nurnberg Charter applied only to crimes in time of war or also to peace-time crimes, Mr. Schwelb stated that the Nurnberg principles applied to crimes against peace, war crimes
/and crimes

and crimes against humanity, but that no jurisdiction existed for the punishment of crimes against humanity, unless such crimes were connected with crimes against peace or war crimes. He noted that minor officials in Germany were being punished under Law No. 10 of the Allied Control Commission (December 20, 1945), and that this Law did not contain a similar restriction.

The CHAIRMAN stated that the issue before the Committee was whether it should include a provision to the effect that superior orders were not excuse for a crime, which was an established principle, whether or not it were included in the Convention, or whether the inclusion of the principle would give rise to more difficulties, as certain representatives had indicated, than if it were excluded.

With regard to the relevant resolutions of the General Assembly, mentioned by the representative of Poland, it should be borne in mind that the recognition of Nurnberg principles meant only that there was to be a Codification Committee to deal with certain principles and all the work was not to be left to the Ad Hoc Committee on Genocide. The Assembly resolution referred not to all principles on which the judgment of the Nurnberg Tribunal was based, but only to principles of international law, and it was for the Codification Committee to ascertain the recognized principles of international law.

In reference to the remarks made by the USSR representative to the effect that the Chairman had chosen a specific case, he said that he ^{had} done so deliberately, as superior orders could be involved only in a field where an individual was under the control of others.

Mr. AZKOUL (Lebanon) asked the USSR representative whether persons who committed a crime on superior orders but did not share the motives of religious or racial hatred were subject to punishment. The

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essence of the provision was to guard against persons using superior orders as an excuse. In order that the Committee create a serious practical convention which would be a weapon against the crime of genocide, it was essential that the convention include the clauses necessary to the definition of the crime.

Mr. MOROZOV (Union of Soviet Socialist Republics) pointed out that during the debate only the question of superior orders had been discussed, whereas his proposal dealt also with the command of the law. He insisted that it was even more important to state in the convention that command of the domestic law could not be a defence for the crime of genocide.

Mr. RUDZINSKI (Poland) commented that command of the law was no defence to the commission of a crime so clearly established as to be beyond all doubt.

The CHAIRMAN felt that the phrase "command of the law" was superfluous, and domestic law could never be a defence to any obligation under a convention or a treaty. Therefore, if under the convention a State undertook certain obligations, the domestic law would not be a defence to a failure to fulfil such obligations.

The second portion of the USSR proposal to the effect that there be included in the convention the provision that genocide could not be justified by the command of the law or superior orders was put to a vote.

The proposal was rejected by two votes in favour, four against, with one abstention.

Mr. RUDZINSKI (Poland) expressed the feeling that he could have no responsibility for the convention as it appeared in its present form, as the object of such a convention was to fill in the gaps in the principles established by the Nurnberg trials. The exclusion of a

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provision stating that superior orders and command of the law could not justify the crime of genocide was a definite regression both as concerns the Charter of Nurnberg and the accepted principles of international law. He asked that this statement, made in the name and on behalf of his Government, should be recorded verbatim in the Report.

ARTICLE III OF THE CHINESE DRAFT (document E/AC.25/9)

The CHAIRMAN submitted an alternative draft prepared by the United States delegation, as follows:

"Genocide shall be punished by any competent tribunal of the State in the territory of which the crime is committed or by a competent international tribunal."

As would be seen, the word "may" in the Chinese draft had been changed to the word "shall" to make it more imperative; the phrase "or the offender is found" in the Chinese draft had been omitted, as the United States delegation did not consider universal jurisdiction of national courts desirable; and the words "by a competent international tribunal" had been substituted for the words "by such an international tribunal as may be established" in the Chinese draft, to give clearer recognition of the idea of international jurisdiction.

The CHAIRMAN proposed that the Chinese draft should be taken as a basis for discussion, and he invited other members to submit any further proposals.

Mr. MOROZOV (Union of Soviet Socialist Republics) speaking on a point of order, urged that before the Committee decided which Court was to be responsible for trying cases of genocide, it would be advisable to decide upon a question which was not included in the article in question, namely, the obligation of the High Contracting Parties to introduce into
/their national

their national legislation measures for the prevention and suppression of genocide and of incitement to racial, national and religious hatred. It was essential for the Committee to agree upon a minimum of responsibility on States to transfer the principles of the convention to their domestic legislation. He felt that such a provision should logically precede a provision dealing with competent courts, as it is necessary to state what law shall be applied by those courts.

Upon Mr. ORDONNEAU (France) pointing out that the question had already been discussed in principle, and that the Committee had decided against such a provision, the CHAIRMAN ruled that the question whether to reconsider the question of national legislation should be put to a vote.

Mr. MCROZOV (Union of Soviet Socialist Republics) saw no need for a vote. The vote already taken on the subject had been decided by a majority of only one, which indicated that there were varying points of view. There was no reason why a short exchange of views on the matter should be the object of a vote.

The CHAIRMAN explained that his only motive had been to prevent a long debate on the subject which had already been decided. In view of the USSR representative's objections, however, he would withdraw his suggestion.

Mr. ORDONNEAU (France) declared that in that case he would make the same motion. All members had agreed not to reopen discussions on general principles.

Mr. PEREZ-PEROZO (Venezuela) and Mr. AZKOUL (Lebanon) supported the opinion of the USSR representative that discussion of certain questions could be reopened.

/Mr. LIN MOUSHENG

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

Mr. ORLONNEAU (France) accepted that suggestion.

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

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

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

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

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

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

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"The High Contracting Parties shall make or recommend to their legislature such provision in their laws as required by their constitutional procedures for giving effect within their own borders to the purposes of the Convention for the punishment of the crime of genocide."

He pointed out that the words "recommend to their legislature" were taken from the 1929 Red Cross Convention of Geneva.

Mr. LIN MOUSHENG (China) proposed the following text:

"The High Contracting Parties undertake to enact such legislation for the prevention and punishment of genocide as may be necessary."

After a short discussion, the Committee decided to take the USSR proposal as the basic text, and to regard the other drafts as amendments.

Mr. MCROZOV (Union of Soviet Socialist Republics) pointed out that his draft contained two separate elements, first the obligation of States to provide legislation for the prevention of genocide and punishment of the crime, and secondly, to provide measures for the prevention of incitement to racial, national and religious hatred.

Incitement to hatred was one of the most significant factors in the development and justification of the crime of genocide. Cases of genocide that had occurred in the past had been closely linked with racial theories according to which so-called "superior" races had the right to destroy so-called "inferior" races. It was therefore essential for States to legislate against incitement to racial, national and religious hatred.

Mr. RUTZINSKI (Poland) proposed that the words "as defined in the present Convention" should follow the words "prevention and suppression of genocide" in the USSR draft, and that the words " as

/defined

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

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

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

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

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

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

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

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

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

/as may be

as may be necessary". That was in accordance with the General Assembly resolution 96 (I), which invited Member States "to enact the necessary legislation...". If genocide were unknown in a certain State, the parliament of that State should be allowed to decide not to undertake such legislation.

Mr. PEREZ-PEROZO (Venezuela) pointed out that the General Assembly resolution was only a recommendation, whereas the Convention would be a contract to which the ratifying States must pledge themselves.

The CHAIRMAN, speaking as the United States representative, declared that a Government ratifying the Convention could only recommend measures to its legislature. If it pledged itself to enact certain measures, the legislature might refuse to do so, and that State would thus be violating the Convention.

Mr. ORDONNEAU (France) considered the provision undesirable. There were already two General Assembly resolutions on the subject, and while they had, of course, only a moral value, it was obvious that a State which did not intend to abide by them would certainly not ratify the Convention. The provision, therefore, was only adding something which was not essential and which might well have the effect of making it difficult for certain States to accept the Convention.

He agreed with the United States representative that no government could undertake that its legislature would pass certain laws.

Mr. MOROZOV (Union of Soviet Socialist Republics) did not see how a State could ratify a Convention unless its legislature agreed to do so; by ratifying the Convention, therefore the legislature would undertake to fulfil the obligations contained in it.

/ Mr. RUDZINSKI

Mr. RUDZINSKI (Poland) urged that without the provision in question, the Convention would be void and ineffective.

The CHAIRMAN stated that he would have some amendments to propose at the following meeting, when the discussion would be continued.

The meeting rose at 6.30 p.m.