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GENOCIDE IN DARFUR

A Legal Analysis

September 2004

GENOCIDE IN DARFUR: A LEGAL ANALYSIS

Statement of Purpose

The purpose of this memorandum is to ascertain whether the acts of violence and aggression in Darfur, Sudan meet the legal standard for genocide as set forth in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The memorandum concludes there is sufficient evidence to meet the legal requirements for a determination that genocide is occurring in Darfur, Sudan.

The Elements of the Crime of Genocide

Article II of the 1948 United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* defines genocide as the following:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹

This language highlights three important elements. First, the victims must constitute a national, ethnical, racial, or religious group. Second, the Convention dictates that certain enumerated acts of harm or willful neglect must have been inflicted upon members of such a group. Third, those acts of harm must have been undertaken with the intent to destroy or partially destroy the group. Each of these three elements must be present to constitute genocide.

Are the victims of violence in Darfur members of a group, as defined by the Genocide Convention, which has been specifically targeted?

¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

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The first element of the crime of genocide is the group status of the victims. Article II of the Genocide Convention requires the victims to belong to a “national, ethnical, racial or religious group.” Neither the Convention nor any other international document defines these terms,² but international tribunals have stated that the concepts “partially overlap”³ and should be “assessed in the light of a particular political, social and cultural context.”⁴

In evaluating charges of genocide, the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) have offered definitions for the various Article II groups. In the *Akayesu* case, the ICTR found racial groups to be “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”⁵ The ICTR has also described an ethnic group to be “one whose members share a common language and culture.”⁶ In the *Jelusic* case, the ICTY argued that objective criteria alone were insufficient and believed it appropriate to evaluate group status “from the view of those persons who wish to single that group out from the rest of the community.”⁷

The Fur, Zaghawa, and Masaalit tribes of the Darfur region qualify as both a racial and an ethnic group under the Genocide Convention. All of the victims are black African as opposed to Arab Sudanese. In its September 2004 report “Documenting Atrocities in Darfur,” the State Department described the tribes as “non-Arab.” Each of the tribes in the Darfur region speaks a Nilo-Saharan language, distinct from that spoken by the Arab Sudanese.⁸ Further, each of the tribes settled in the Darfur region before the creation of the Sudanese state. As the Fur, Zaghawa, and Masaalit tribes share a common language, culture and ethnic identity, they qualify as a “group” for the purposes of the Genocide Convention.

A subjective analysis of group status reinforces this finding. Members of each tribe identify themselves as black and maintain a separate identity from the Arab

² *Prosecutor v. Bagilishema*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-95-1A-T, para. 65, June 7, 2001.

³ *Prosecutor v. Krstic*, International Criminal Tribunal for the Former Yugoslavia (ICTY), Case No. IT-98-33, para. 555, Aug. 2, 2001.

⁴ *Prosecutor v. Rutaganda*, ICTR, Case No. ICTR-96-3, para. 56, Dec. 6, 1999.

⁵ *Prosecutor v. Akayesu*, ICTR, Case No. ICTR-96-4-T, para. 514, Sept. 2, 1998.

⁶ *Prosecutor v. Kayishema and Ruzindana*, ICTR, Case No. ICTR-95-1-T, para. 98, May 21, 1999.

⁷ *Prosecutor v. Jelusic*, ICTY, Case No. IT-95-10, para. 70, Dec. 14, 1999.

⁸ The International Court of Justice discussed the terminology of a “group” in its “Reservations to the Convention on the Prevention and Punishment of Genocide,” Advisory Opinion, ICJ Reports (1951), p. 23. For the State Department report, see United States Department of State Bureau of Democracy, Human Rights, and Labor and the Bureau of Intelligence and Research, “Documenting Atrocities in Darfur,” Sept. 9, 2004, available at <http://www.state.gov/g/drl/rls/36028.htm> [hereinafter 2004 State Department Report].

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Sudanese. Periodic tensions between the black African tribes and the Arabs settled in the area can be traced back to the 1930s.⁹ During the current violence, a United Nations fact-finding mission discovered that many ethnically African villages had been targeted for destruction, while nearby Arabic villages remained unscathed.¹⁰ These facts demonstrate that both the victims and the perpetrators subjectively viewed the black African tribes as a distinct group, further affirming their group status under the Genocide Convention.

Have any of the acts enumerated in the Genocide Convention been perpetrated against the group?

The “enumerated acts” constitute the second requirement of genocide. Article II lists five acts that can satisfy the physical act element of the crime of genocide. Only one element needs to be present to determine genocide. The government of Sudan and the Janjaweed militia have committed four enumerated acts of genocide against the non-Arab peoples of Darfur: killing members of a group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.

(a) Killing members of the group: The legal definition of “killing” is relatively straightforward under the Genocide Convention. The term is interchangeable with “caused death.”¹¹ The ICTR identified two elements: a deceased, and an unlawful act or omission which causes the death.¹²

Numerous reports establish the presence of both of these elements in Darfur. The United States government, the United Nations, international organizations, and the media have all documented the killing of civilians in Darfur. According to a September 2004 State Department report, 61% of refugees interviewed reported seeing a family member killed, 67% reported seeing a non-family member killed, and 44% had witnessed a shooting.¹³ In total, the World Health Organization

⁹ Ted Dagne, “Sudan: the Crisis in Darfur,” *CRS Report for the United States Congress*, June 16, 2004, available at <http://www.fas.org/man/crs/RS21862.pdf>

¹⁰ United Nations Inter-Agency Fact Finding and Rapid Assessment Mission: Kaliek Town, South Darfur. UN Resident Coordinator. 04/25/04.

<http://www.reliefweb.int/w/rwb.nsf/0/8f4f1f5860913bacc1256e89002ea00f?OpenDocument>

¹¹ “Addendum: Part II – Finalized draft text of the Elements of Crimes,” *Report of the Preparatory Commission for the International Criminal Court*, p. 6, U.N. Doc. PCNICC/2000/1/Add.2, Nov. 2, 2000 [hereinafter U.N. Draft Elements].

¹² *Akayesu*, *supra* note 5, para. 588.

¹³ 2004 State Department Report, *supra* note 8.

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estimates that the Janjaweed and Sudanese government forces have killed 50,000 people in Darfur.¹⁴ The element of “killing” as defined by the Genocide Convention is clearly met in the case of Darfur.

(b) Causing serious bodily or mental harm to members of the group: “Serious bodily or mental harm” requires proof of actual harm, but the injury need not be permanent in nature.¹⁵ In the *Kayishema and Ruzindana* case, the ICTR defined this requirement as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”¹⁶ The ICTY also suggested that torture and degrading treatment may qualify as genocidal acts under Article II(b).¹⁷

Regarding mental harm, the Preparatory Committee of the International Criminal Court stated in a footnote to a draft provision on genocide that mental harm “is understood to mean more than the minor or temporary impairment of mental faculties.”¹⁸ In *Kayishema and Ruzindana*, the ICTR considered mental harm established only where “at the time of the act, the accused had the intention to inflict serious mental harm.” In *Akayesu*, the ICTR further stated that “rape . . . certainly constitutes infliction of serious bodily and mental harm.”¹⁹

The victims of violence in Darfur have suffered serious physical harm. Documented abuses against members of Darfur’s non-Arab communities include rape, beatings, ethnic humiliation, and destruction of property and basic necessities.²⁰ The 2004 State Department report stated that 21% of the Darfurian refugees interviewed had either experienced or witnessed a beating.²¹ An August 2004 report from Human Rights Watch further indicated that internally displaced persons (IDPs) in government-controlled towns faced constant threats of assault and detention.²²

¹⁴ “WHO says up to 10,000 refugees are dying each month in Darfur”, available at http://www.medbroadcast.com/health_news_details_pf.asp?news_id=4772&news_channel_id=1000.

¹⁵ *Akayesu*, *supra* note 5, para. 501.

¹⁶ *Kayishema and Ruzindana*, *supra* note 6, para. 109.

¹⁷ *Prosecutor v. Karadzic and Mladic*, ICTY, Case Nos. IT-95-5-R61 & IT-95-18-R61, July 11, 1996, Transcript of Hearing, p. 986, <http://www.un.org/icty/transe5&18/960711IT.htm>.

¹⁸ “Report of the Preparatory Committee on the Establishment of an International Criminal Court.” Part 2. Jurisdiction, Admissibility and Applicable Law, U.N. Doc. A/CONF. 183/2/Add.1, 14 April 1998, p. 11.

¹⁹ *Akayesu*, *supra* note 5, para. 731.

²⁰ 2004 State Department Report, *supra* note 8.

²¹ *Id.*

²² Human Rights Watch, “Empty Promises? Continuing Abuses in Darfur, Sudan,” Aug. 11, 2004, pp. 13-14 [hereinafter August 2004 Human Rights Watch Report].

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Many Darfurian women have suffered serious mental harm under the Genocide Convention. The 2004 State Department report found that 16% of the surveyed refugees had witnessed or experienced rape, and a July 2004 Amnesty International report stated that its observation team compiled a list of 250 rape victims from the refugee population of three Chadian camps. Further, the intent of the rapists in Darfur can be inferred from the nature of the crimes. The Amnesty International Report contains witness accounts of victims raped in public, as well as racially-motivated epithets during attacks, such as “You blacks, you have spoilt the country! . . . We will kill your husbands and sons and sleep with you! You will be our wives!” Given such express intent, these crimes constitute serious mental harm under the Genocide Convention.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part: Article II(c) applies to the infliction of conditions of life designed to destroy the group. Regardless of whether death actually occurs, this act is completed by imposing conditions that do not immediately kill, “but ultimately seek [the victims’] physical destruction.”²³ The U.N. Preparatory Commission for the International Criminal Court stated that this category may include “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”²⁴ The ICTR has stated that rape fits under this category as a “method of destruction which do[es] not immediately lead to the death of members of the group.”²⁵

The Sudanese government and the Janjaweed militias have deliberately inflicted conditions of life calculated to destroy the black African tribes of Darfur by systematically expelling civilians from their homes. The State Department report found that “as of August 2004, based on available information, more than 405 villages in Darfur had been completely destroyed, with an additional 123 substantially damaged, since February 2003.”²⁶ The UN Office for Coordination of Humanitarian Affairs estimates that there are 1.2 million civilians internally displaced in Sudan or in refugee camps in Chad because of forced expulsion from their homes and fear of attacks from militia or government forces.²⁷

The Sudanese government’s blockage of humanitarian aid compounds the effects of the displacement and further confirms a violation of Article II(c). A September

²³ *Akeyesu*, *supra* note 5, para. 505.

²⁴ U.N. Draft Elements, *supra* note 11, p.6, n.3.

²⁵ *Kayishema and Ruzindana*, *supra* note 6, para. 116.

²⁶ 2004 State Department Report, *supra* note 8.

²⁷ U.N. Office for the Coordination of Humanitarian Affairs, “Fact Sheet: Humanitarian Assistance for Darfur, Sudan,” June 24, 2004, available at <http://www.un.org/News/dh/sudan/humanassist.htm>.

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2004 report by the World Health Organization found the mortality rate among internally displaced persons (IDPs) from Darfur to exceed emergency levels and stated that between 6,000 and 10,000 people were dying every month from violence and disease in Darfur.²⁸ Despite its pledges to facilitate humanitarian access, the Sudanese government has also restricted such access to displaced refugees, according to an August 2004 United Nations report. Additionally, in response to a violent incident in the Kalma IDP camp, the government denied access for all humanitarian aid workers, effectively denying food and medical care to 50,000 civilians.²⁹

Finally, Sudanese troops and the Janjaweed have habitually stolen or killed cattle and other livestock, burned crops, and poisoned wells, which greatly inhibits the ability of non-Arab Darfurians to live on the land.³⁰ Patterns of such actions, in addition to the systematic displacement of civilians and the blockage of humanitarian aid, demonstrate the deliberate infliction of conditions calculated to destroy the non-Arab population of Darfur.

(d) Imposing measures intended to prevent births within the group: This enumerated act has two elements: the imposition of certain measures, and the intent of such measures to prevent births within the group.³¹ The measures need not destroy the group nor succeed in preventing births as the necessary act is the imposition of the measures itself. Both the ICTY and the ICTR have commented that the systematic rape of women constitutes a measure intended to prevent births within a group.³² This argument holds particular weight in patrilineal cultures, in which the ethnicity of the father determines the ethnicity of the child.³³

In Darfur, reports indicate that the Janjaweed militia is utilizing rape as a measure to prevent the births of non-Arab children. A July 2004 Amnesty International report identified 250 rape victims and discovered evidence of an additional 250

²⁸ World Health Organization, "Retrospective Mortality Survey Among the Internally Displaced Population, Greater Darfur, Sudan, August 2004," Sept. 15, 2004, available at <http://www.who.int/disasters/repo/14656.pdf>. Colum Lynch, "Death Rates in Sudan's Darfur Rising, WHO Says," *The Washington Post*, Sept. 15, 2004, p. A18.

²⁹ Report of the Secretary General pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004). United Nations Security Council, Aug. 30, 2004.

³⁰ Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights: Situation of human rights in the Darfur region of the Sudan, May 7, 2004 [hereinafter May 2004 UNHRC Report].

³¹ U.N. Draft Elements, *supra* note 11, p. 7.

³² *Karadzic and Mladic*, *supra* note 17, Transcript of Hearing, July 2, 1996, p. 959; *Akayesu*, *supra* note 5, para. 507.

³³ *Akayesu*, *supra* note 5, para. 507.

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cases of rape in three refugee camps in Chad.³⁴ The September 2004 State Department report found that 16% of the Darfurian refugees it surveyed had witnessed a rape, been told about a rape directly by a victim, or been raped themselves.³⁵ The Washington Post reported in June 2004 that, according to interviews of two dozen women in IDP camps in West Darfur, Arab militiamen were raping women so that they would bear Arab children. During the attacks, the militiamen called the women “black slaves” and told them that they would make Arab babies to take over the land.³⁶ Further, the culture of the Fur, Zaghawa, and Masaalit tribes is patrilineal, meaning that any children produced by the rapes will be viewed as Arab Sudanese.³⁷ Such acts clearly meet the standard for demonstrating that the perpetrators sought to use rape as a means for preventing births within the victim group.

The actions of the Sudanese government and the Janjaweed have resulted in civilian deaths, serious physical and mental harm, conditions which can bring about the destruction of an enumerated group, and the prevention of births within the group. These actions are more than adequate to fulfill the second requirement of genocide under international law.

Have any of the acts enumerated in the Genocide Convention been undertaken with the intent to destroy or partially destroy the group?

Intent represents the final element of the crime of genocide. Article II of the Genocide Convention requires not only the intent to engage one of the enumerated physical acts, but also the specific “intent to destroy” a group “in whole or in part.”

Intent to destroy: To commit genocide, a perpetrator must engage in an enumerated physical act with the intent of destroying the protected group, not merely the person or persons attacked or otherwise affected. Public statements calling for genocide or tangible documentation of genocidal plans can establish this specific intent, but the intent may also be inferred from the acts of the perpetrator.³⁸ The ICTY and the ICTR have considered a number of factors when evaluating

³⁴ Amnesty International, “Sudan: Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences,” July 19, 2004, p. 4.

³⁵ 2004 State Department Report, *supra* note 8.

³⁶ Emily Wax, “We Want to Make a Light Baby: Arab Militiamen in Sudan Said to Use Rape as a Weapon of Ethnic Cleansing,” *The Washington Post*, June 30, 2004, <http://www.washingtonpost.com>.

³⁷ *Id.*

³⁸ *Akayesu*, *supra* note 5, para. 523.

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charges of genocide in past cases. These factors include the scale of the atrocity, evidence of systematic planning, and statements of the perpetrators.³⁹

Ample evidence exists from which one could infer genocidal intent in Darfur. Not only has the human cost of the crisis in Darfur been drastic, but the U.N. Resident Humanitarian Coordinator stated in March 2004, “A predominant feature of this [war] is that the brunt of it is being borne by civilians. This includes women and children.”⁴⁰ The UN statement supports information from NGO studies that have learned that men, women, children, and infants have all been killed by the Janjaweed.⁴¹ Further, a State Department report released in September 2004 found evidence of the targeted killing of male babies in Darfur -- a practice singled out by the ICTR as indicative of genocidal intent.⁴² The intent to destroy the non-Arab population of Darfu is evident from the scope of the violence which extends to civilian men, women, and children.

Evidence of systematic planning also supports an inference of genocidal intent. A May 2004 report by the U.N. High Commissioner for Human Rights stated that there was a “remarkable consistency in the witness testimony received...from among individuals throughout Darfur who had been displaced both many months ago and more recently.”⁴³ U.N. officials had interviewed different groups of refugees who offered similar stories: air raids with bombers or helicopter gun ships, followed by ground attacks by the Janjaweed.⁴⁴ Further, a U.N. fact-finding mission found that Sudanese government and Janjaweed militia forces had destroyed numerous ethnically African villages but spared villages known to be occupied by Arabs.⁴⁵ Given the reported similarity of the attacks and the targeting of non-Arab villages, the pattern of attack is sufficient to infer genocidal intent.

Finally, numerous reports of racially-motivated statements accompanying the violence and displacement in Darfur strongly suggest genocidal intent. The September 2004 State Department report indicates that refugees often heard

³⁹ *Kayishema and Ruzindana*, *supra* note 6, para. 93.

⁴⁰ This statement was also referenced in the United States House of Representatives Concurrent Resolution 467 declaring genocide in Darfur. July 22, 2004.

⁴¹ *See generally* International Crisis Group, “Sudan, Now or Never in Darfur.” Africa Report No. 80, May 23, 2004, available at <http://www.icg.org/home/index.cfm?id=2765&l=1>; August 2004 Human Rights Watch Report, *supra* note 22.

⁴² 2004 State Department Report, *supra* note 8.

⁴³ May 2004 UNHRC Report, *supra* note 29.

⁴⁴ *Id.*

⁴⁵ United Nations Inter-Agency Fact Finding and Rapid Assessment Mission: Kaliek Town, South Darfur. UN Resident Coordinator, April 25, 2004, available at <http://www.reliefweb.int/w/rwb.nsf/0/8f4f1f5860913bacc1256e89002ea00f?OpenDocument>.

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Sudanese soldiers and Janjaweed militia forces using racial epithets during attacks. Examples of ethnically motivated statements include, “Kill the slaves” and “Blacks must leave.”⁴⁶ Roughly one-third of the refugees interviewed reported hearing racial epithets.⁴⁷ These statements demonstrate a manifest intent to destroy the non-Arab population in Darfur.

In whole or in part: The perpetrator need not intend to completely annihilate a group in all parts of the world. All that is necessary is an intent to destroy the group “in part.” The ICTR has interpreted this provision as requiring “the intent to destroy a considerable number of individuals,”⁴⁸ and the ICTY understands it to mean a “substantial” part.⁴⁹ However, the tribunals have not further defined “considerable” or “substantial,” and international law scholars believe the Genocide Convention drafters included the “in part” language largely to prevent perpetrators from claiming they intended only the partial destruction of a group, such as the total destruction of a group’s population within a given state.⁵⁰

The number and proportion of civilians affected by the violence in Darfur clearly satisfy this standard. Current estimates place the number of dead at 50,000.⁵¹ The 2004 State Department report indicates that over 500 villages in Darfur have been destroyed or heavily damaged,⁵² resulting in the flight of 200,000 refugees to Chad and creating an additional 1.2 million internally displaced persons.⁵³ The total population of Darfur, including both Arab and non-Arab peoples, is only 6 million.⁵⁴ Given the large number of people affected by the violence, the attacks in Darfur clearly manifest an intent to destroy the non-Arab population at least “in part.”

Internal conflict does not justify genocide

Genocide can occur in the midst of an internal conflict, and acts of genocide are not justified by such conflicts. In Rwanda, the ICTR ruled that the genocide undertaken by the Hutu against the Tutsi was “fundamentally different” from the

⁴⁶ 2004 State Department Report, *supra* note 8.

⁴⁷ *Id.*

⁴⁸ *Kayishema and Ruzindana*, *supra* note 6, para. 97.

⁴⁹ *Prosecutor v. Sikirica, et.al.*, ICTY, Case No. IT-95-8, Judgment on Defence Motions to Acquit, para. 65, Sept. 3, 2001.

⁵⁰ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p. 235.

⁵¹ *Supra* note 14.

⁵² 2004 State Department Report, *supra* note 8.

⁵³ May 2004 UNHRC Report, *supra* note 29.

⁵⁴ 2004 State Department Report, *supra* note 8.

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conflict between the Hutu-dominated Rwandan government (RAF) and the Tutsi-led Revolutionary Patriotic Front (RPF). The court found that “the fact that the genocide took place while the RAF was in conflict with the RPF can in no way be considered as an extenuating circumstance for it.”⁵⁵

Similarly, claims by the Sudanese government that the killing of civilians in Darfur is the result of internal conflict stemming from the rebellion of the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) do not rebut allegations of genocide. The Sudanese government has been specifically implicated in the attacks on the non-Arab residents of Darfur by supporting the Janjaweed and actively participating in attacks on civilians. Refugee testimony consistently indicates that air raids with bombers or helicopter gun ships would precede Janjaweed attacks on villages,⁵⁶ and many reports indicate the presence of Sudanese troops during ground attacks as well.⁵⁷ The armed conflict in Darfur does not mitigate the responsibility of the Sudanese government for the genocide occurring there – especially in light of the evidence that government forces are directly participating in the genocidal campaign.

Conclusion

A review of the nature of the attacks, rapes, killings and property destruction that have been widely reported indicates that there is sufficient evidence to satisfy the legal requirements for determining that genocide is occurring in Darfur, Sudan.

⁵⁵ *Akayesu*, *supra* note 5, para. 128.

⁵⁶ May 2004 UNHRC Report, *supra* note 29.

⁵⁷ 2004 State Department Report, *supra* note 8.

ABOUT THE PUBLIC INTERNATIONAL LAW & POLICY GROUP

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From 1996-1998, PILPG operated under the auspices of the Carnegie Endowment for International Peace. In July 1999, PILPG was granted official Non-Governmental Organizations status by the United Nations.

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