EDITORIAL COMMENT

THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations in Paris on December 9, 1948, and signed on behalf of the United States three days later, is now before the United States Senate for consideration.[1] It is expected that the Committee on Foreign Relations will hold hearings before making its report to the Senate.

The Convention was the subject of thorough consideration by the American Bar Association at its 72nd Annual Meeting in St. Louis, September 5–9, 1949. It came before the Association through two channels, the Association's Special Committee on Peace and Law Through United Nations and the Association's Section of International and Comparative Law. Both the Special Committee and the Section agreed that the Convention should not be ratified by the United States as submitted. For reasons stated below, the Special Committee did not suggest reservations, but the Section recommended a series of reservations which it thought would cure the Convention's defects. The House of Delegates of the Association appointed a committee of six, not including any members of the Special Committee or the Section, to consider both reports and make recommendations to the House. This action was taken in the hope of avoiding extended debate, but that expectation proved to be in vain. Delegations from the Special Committee and the Section appeared before the House committee and presented and argued their views during the whole of an afternoon. After they retired the House committee proceeded to make its recommendations to the House of Delegates in the form of a resolution. The Special Committee on Peace and Law Through United Nations accepted the resolution, but it was unacceptable to the representatives of the Section, who sought to substitute their own recommendations for the House committee resolution when the matter came before the House of Delegates as a special order

[1] Senate Executive O, 81st Cong., 1st Sess. Genocide is declared to be a crime under international law whether committed in time of peace or in time of war. The crime is defined as the commission of certain acts "with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Five categories of criminal acts are enumerated: killing or 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, prevention of birth within the group, and forcibly transferring children to another group. Made punishable are acts of genocide thus defined, as well as conspiracy, public incitement, attempts and complicity to commit them. Persons committing any of these acts are punishable "whether they are constitutionally responsible rulers, public officials or private individuals."

on the morning of September 7. A full-dress debate ensued, lasting the entire morning and well into the afternoon. Attempts to cut off debate were unsuccessful and everyone who had anything to say was given the opportunity to say it, including Honorable Philip B. Perlman, Solicitor General of the United States, who supported the Section report, and Honorable Frank E. Holman, the President of the Association, who supported the House committee report. When the vote was taken, the Section's substitute was rejected and the House committee report adopted by an overwhelming vote. The official action of the American Bar Association is recorded in the resolution adopted, which reads as follows:

> *Be it resolved,* that it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; that Genocide as thus understood should have the constant opposition of the government of the United States and of all its people.
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> *Be it further resolved,* that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions; that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of government.
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> *Therefore, be it resolved,* that the convention on Genocide now before the United States Senate be not approved as submitted.
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> *Be it resolved further,* that copies of the report of the Special Committee on Peace and Law Through United Nations and the suggested resolutions from the Section of International and Comparative Law be transmitted, together with a copy of this resolution, to the appropriate committees of the United States Senate and House of Representatives.

The views of the Special Committee on Peace and Law Through United Nations, whose recommendations were upheld by the American Bar Association, can be adequately obtained only by reading its printed report of 63 pages. During the preceding year regional conferences of the Bar were held in sixteen cities of the United States, and the Committee's report expressed the consensus of those meetings.

The criticism of the Convention touches both the basic principles upon which it was drafted and the procedure for enforcing it. Although the Convention purports to deal with the repetition anywhere of the shockingly atrocious crimes against humanity perpetrated by Nazi Germany, it fails essentially to do so. Its approach is that of individual crime and not of persecutions instigated by governments. It provides no international court before which governmental transgressions of the international law declared in the Convention may be challenged, but relies for the enforcement of that international law upon the punishment of individuals by national courts.

It foresees the eventual establishment of an international court, but for the purpose of trying individuals.

It was conceded by all in the debate before the American Bar Association that the Genocide Convention should deal only with mass killings and destruction of peoples which can only happen with official approval or complicity. One of the reservations proposed by the Section sought to amend the Convention in this respect by limiting its application to acts which "directly affect thousands of persons." How can it be expected that a government engaged in such a policy will voluntarily turn over its officials or citizens to any other government or international court for punishment for carrying out that policy? To take the accused by force would require an act of war. The Genocide Convention is an attempt to carry over into time of peace the so-called Nuremberg principle under which captured enemies were held personally liable for acts of aggression and crimes against humanity; but the Nuremberg Tribunal had the physical custody of the persons whose condemnation was demanded. In the debate at St. Louis the question remained unanswered: How is an international tribunal or foreign national court to obtain custody in time of peace of an accused genocidist?

The Convention is selective among the groups it would protect in whole or in part. Those singled out for preferred consideration are national, ethnical, racial and religious groups "as such." Political and economic groups were apparently not considered as needing or worthy of protection. Pressure is being brought to bear for the speedy ratification of the Genocide Convention on the ground that genocide is being committed behind the Iron Curtain; yet the Genocide Convention as submitted would not apply to many such cases. The Soviet Government and its Communist satellites, should they accept the Convention, which they have not done up till now, may liquidate property owners and others who believe in private enterprise on the ground that they are political enemies of the state and therefore are not covered by the Convention. The same action may be taken against any national, ethnical, racial or religious group, and the application of the Convention to them avoided by the claim that they are being proceeded against not as members of one of these groups as such, but as enemies of the state.[2] The religious persecutions which are taking place in Czechoslovakia, Hungary and Bulgaria on the ground that the clergy are enemies of the state would be apt examples of the meaninglessness of this Convention in such cases.

As pointed out in the report of the Committee on Peace and Law Through

[2] The American Jewish League Against Communism recently sent a letter to the Secretary General of the United Nations documenting a previous charge that "400,000 Jews were deported from the Ukraine and White Russia to Archangel and Siberia, because they were considered too pro-democratic to be left on the Soviet borders in case of possible war." (New York Times, Sept. 15, 1949, p. 24.)

United Nations, what is left of the Convention "is a code of domestic crimes which are already denominated in all countries as common law crimes." These the Convention undertakes to make international crimes. To reach agreement on this basis the Convention compromises the system of constitutional law prevailing in the United States. The protection of personal rights is vested principally in the States of the American Union. In certain matters there may be concurrent Federal jurisdiction. By ratification of the Genocide Convention as submitted, it will become the supreme law of the land and displace State constitutions and laws wherever they may conflict with the provisions of the Convention. Moreover, under the holding of the Supreme Court in the case of *Missouri* v. *Holland*,[3] the conclusion of a treaty by the Federal Government confers upon it authority in fields of action reserved to the States which the Federal Government would not have without such a treaty. The ratification of the Genocide Convention as submitted would therefore confer upon the Federal Government a large area of jurisdiction which it does not now possess under the Constitution.

In the debates on the Genocide Convention which took place in the Section of International and Comparative Law at St. Louis, former Governor Harold E. Stassen suggested the possible necessity, in order that the United States might be placed on a plane of equality in international coöperation, of amending the United States Constitution so that treaties shall not become the supreme law of the land unless and until they are implemented by an Act of Congress. It is understood that, with the exception of France, all other states require legislative implementation to give treaties the effect of law. The course suggested by Mr. Stassen might remove that particular constitutional difficulty. It would not meet the serious objection to proposals to amend the Constitution through the treaty-making power instead of through the means provided in the Constitution itself.

Great stress was laid in the debates at St. Louis upon the need of upholding the Government's policy of coöperation with the United Nations. The American Bar Association established its Special Committee on Peace and Law Through United Nations to promote such coöperation, and the duty to do so is reiterated in its present report. The Committee finds its duty also to point out that nothing contained in the Charter of the United Nations "shall authorize [it] to intervene in matters which are essentially within the domestic jurisdiction of any state." (Art. 2, par. 7.) When the Government of the United States accepted the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute, the Senate attached the Connally reservation which retained for the United States the determination of whether or not a matter is within its domestic jurisdiction. The Genocide Convention as submitted by-passes this reservation, as well as the Vandenberg reservation relating to the interpretation of multilateral

[3] 252 U. S. 416.

treaties, and confers jurisdiction upon the International Court of Justice in all disputes relating to the interpretation, application, or fulfillment of the convention at the request of any party to the dispute. (Art. IX.)

It should be remembered in this connection that, according to an advisory opinion of the Permanent Court of International Justice, a matter solely within the domestic jurisdiction of a state becomes a matter of international concern when a treaty is entered into on that subject.[4] This principle of international law must not be overlooked if we are to maintain the internal enforcement of our constitutional rights without risk of alien interference or submission to an international appellate jurisdiction.

The proposed Covenant on Human Rights was included in the subjects covered in the reports submitted to the American Bar Association. A completed covenant was not before the Association and no discussion took place. The report of the Committee of the House of Delegates on this subject was unanimously adopted as follows:

> *Resolved,* That the Special Committee on Peace and Law Through United Nations and the Section of International and Comparative Law be authorized in response to the request of the State Department of the United States, to transmit to it the written reports of the Special Committee and the Section and such other comments on the proposed Covenant on Human Rights as they may deem appropriate; also, to transmit such comments as they may have upon the Covenant to the appropriate authorities of the United Nations.

The undersigned, who is a member of the Special Committee on Peace and Law Through United Nations of the American Bar Association and also of its Section of International and Comparative Law, deeply regrets that the United States did not hold to the position with which it started to negotiate the Genocide Convention, namely, that the crime of genocide properly defined is inherently one committed at the instigation or with the complicity of the state. He also regrets the vain reliance placed upon the unrealistic and impracticable attempt to apply under the conditions existing in the world of today the concept that advance in the development of international law can be achieved only by making individuals the direct subjects of that law. As was pointed out in the debates at St. Louis, such a theory can be made effective only through the establishment of political institutions with power to take custody of offenders. Such institutions do not now exist, and the Genocide Convention makes no provision for them. In a recent address, Ambassador Warren R. Austin, Chief of the United States Mission to the United Nations, discussed proposals to transform the United Nations into a "world government" whose "laws shall govern individuals as well as states." He asked: "What will be the dividing line between the jurisdictions and judicial powers of the world

[4] Advisory Opinion No. 4, Tunis-Morocco Nationality Decrees. Hudson, World Court Reports, Vol. I, p. 145, at p. 156.

government and the several states? Is it as simple a problem as that of the United States, which required a civil war, and repeated judicial decisions, to determine?" He answered these questions as follows: "We should pause in contemplation of the risk of seeking to establish any world government now. We must deal with the world we have and the tools we have." He was persuaded by experience that such an agreement cannot be had "at this time or within the predictable future." [5]

It is no answer to argue that a state cannot be haled before an international court for violating international law. If that were true, the world might just as well give up all hope of preserving peace based on law and justice—but it is not true. States have been brought before international tribunals for violations of international law many times in the past, *i.e.*, the Alabama Tribunal at Geneva. As the undersigned has said on other occasions, a structural defect in the United Nations Charter is its failure to provide for the determination of acts of aggression by the International Court of Justice at The Hague. For the same reason, genocide should be defined to include primarily acts emanating from governmental policy or complicity for which the offending government should be made answerable before an international court of justice. Such jurisdiction would not involve war any more than the submission to the court of any other subject of international dispute. We would at the least have a judgment at the bar of public opinion, and have available many sanctions short of war.[6] If national governments wished to add the sanctions of their own law and courts by providing for the punishment of persons within their jurisdiction who might in some way be guilty of or implicated in such crimes, so much the better. The Special Committee included in its report the suggestion of Judge Orie L. Phillips, of the U. S. Circuit Court of Appeals at Denver, a member of the committee, that the wiser course would seem to be, if the offenses defined in the Genocide Convention are in fact international crimes, to enact domestic legislation under Section 8, Clause 10, Article I, of the Constitution of the United States, which expressly confers upon Congress the power "To define and punish . . . offenses against the law of nations." [7]

[5] Address at Lenox, Mass., Aug. 12, 1949. Department of State Bulletin, Vol. XXI, No. 530 (Aug. 29, 1949), p. 283.

[6] The Commercial Treaty of 1832 between the United States and Russia was terminated by the United States on Jan. 1, 1913, following a resolution adopted by the House of Representatives on Dec. 13, 1912, that Russia had violated the treaty by refusing to honor passports duly issued to American citizens of the Jewish race or religion. The House resolution declared: "That the people of the United States assert as a fundamental principle that the rights of its citizens shall not be impaired at home or abroad because of race or religion; that the Government of the United States concludes its treaties for the equal protection of all classes of its citizens, without regard to race or religion; that the Government of the United States will not be a party to any treaty which discriminates between American citizens on the ground of race or religion." For further information on this incident, see this JOURNAL, Vol. 6 (1912), p. 186.

[7] See American Bar Association Journal, August, 1949, p. 625.

The Special Committee on Peace and Law Through United Nations made earnest efforts to formulate reservations which would make the Genocide Convention acceptable as creating international obligations for the United States, and at the same time meet the constitutional situation in this country. This the Committee was unable to do. It could not see that the Section on International and Comparative Law had been any more successful in drafting the reservations it proposed. The Special Committee felt that the constitutional questions raised by the Convention could only be properly solved by action of both Houses of Congress, and not by the Senate alone. It was for this reason that the American Bar Association directed that copies of the reports submitted be transmitted to the appropriate committees of both the Senate and the House of Representatives.

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THE UNITED NATIONS CONVENTION ON GENOCIDE

On December 9, 1948, the General Assembly of the United Nations adopted at its Paris session a resolution approving the annexed Convention on the Prevention and Punishment of the Crime of Genocide [1] and proposing it for signature and ratification.

The new word "genocide" was coined by Raphael Lemkin [2] in his study of the Axis Powers' occupation of Europe.[3] The word was defined as the "destruction of a nation or ethnic group," "not only through mass killings, but also through a coördinated plan of different actions aiming at the destruction of essential foundations of the life of a national group, with the aim of annihilating the groups themselves." According to the difference of techniques, physical, political, social, cultural, biological, economic, religious and moral genocide were distinguished. In his book Dr. Lemkin treated genocide primarily as "a technique in German occupation practice during the Second World War."

Since that time Lemkin had been indefatigable in promoting his ideas.[4] His principal concern was that a government should no longer be allowed

[1] U. N. Doc. A/P.V. 179. The English text of the Convention has been often reprinted: Department of State Bulletin, Vol XIX, No. 494 (Dec. 19, 1948), pp. 756–757; Department of State Publication No. 3416 (International Organization and Conference Series III, 25) Feb., 1949, pp. 47–52; The New York Times, Dec. 2, 1948, p. 12; American Bar Association Journal, January, 1949, pp. 57–58; Current History, January, 1949, pp. 42–44; International Organization, Vol. III, No. 1 (Feb., 1949), pp. 206–208.

[2] See his proposals of 1933 to create two new *delicta juris gentium*, named "barbarity" and "vandalism" (*Actes de la V^e Conférence Internationale pour l'Unification du Droit Pénal* (Paris, 1935), pp. 48–56). *Idem: Akte der Barbarei und des Vandalismus als delicta juris gentium* (*Internationales Anwaltsblatt*, Vienna, November, 1933).

[3] Lemkin, Axis Rule in Occupied Europe (Washington, 1944), Ch. IX: Genocide, pp. 79–95 and *passim*.

[4] See his articles on Genocide in The American Scholar, Vol. XV, No. 2 (April, 1946), and in this JOURNAL, Vol. 41 (January, 1947), pp. 145–151.