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.

GEORGE A. FINCH

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.

to destroy with impunity *its own* citizens. The Nuremberg Judgment of October 1, 1946, refers in some places [5] to what Lemkin in his book of 1944 had defined as physical, social and political genocide, but deals with "crimes against humanity," a concept which is not identical with that of genocide.

It was also Lemkin who drafted a resolution on genocide, sponsored at the second part of the first session of the General Assembly at Lake Success by the representatives of Cuba, India and Panama, and then placed on the agenda of the Assembly. It was adopted as Resolution 96 (I) of December 11, 1946. It affirms that genocide is a crime under international law which the civilized world condemns, and requests the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention. The Council instructed the Secretary General to prepare a draft convention on genocide [6] which should be considered by the Commission on Development and Codification of International Law.[7]

The General Assembly, at its second session, reaffirmed the former resolution by Resolution 180 (II) of November 21, 1947, and requested the Economic and Social Council to continue the work.[8] The Council [9] later appointed an *Ad Hoc* Committee, composed of the representatives of only seven Members,[10] to draft a convention.[11] The *Ad Hoc* Committee met from April 5 to May 10, 1948. It abandoned the former draft and adopted a proposal by China [12] as the basic text. This Committee unanimously adopted a draft convention and transmitted it to the Council.[13] By Resolution 153 (VII) of August 26, 1948, the Council decided to transmit the draft convention to the third session of the General Assembly.[14]

At its third session, the General Assembly referred the report of the *Ad Hoc* Committee to the Assembly's Sixth Committee, which devoted fifty-one meetings during two months to an examination and discussion of

[5] *Ibid.*, pp. 233, 234, 243–247.

[6] Resolution 47 (IV) of March 26, 1947 (U. N. Press Release, Economic and Social Council, March 29, 1947).

[7] The draft convention on genocide, drawn up by the Secretariat, came before the final session of this Commission on June 17, 1947, but the Commission had no time to express an opinion.

[8] U. N. Docs. A/510, A/512, A/514; A/P.V. 123.

[9] See first its Resolution, U. N. Doc. Dr. E/513, and Prevention and Punishment in the draft convention prepared by the Secretariat, Lake Success, N. Y., Doc. E/623, January 30, 1948.

[10] China, France, Lebanon, Poland, U. S. A., U.S.S.R. and Venezuela.

[11] U. N. Doc. E/734.

[12] U. N. Doc. E/AC.25/9.

[13] U. N. Doc. E/794, May 24, 1948. The *Ad Hoc* Committee studied also the relations between a convention on genocide and the formulation of the Nuremberg principles (U. N. Doc. E/AC.25/3/Rev., April 1, 1948).

[14] U. N. Docs. E/SR. 180, E/SR. 201, E/SR. 202, E/SR. 218, E/SR. 219.

the draft convention; a series of amendments was adopted.[15] On December 8, 1948, this Committee adopted the draft resolution with the annexed convention, as amended, by a vote of 36 to 0, with eight abstentions.[16] The next day the General Assembly rejected several Soviet amendments and adopted the resolution with the annexed convention, as submitted by the Sixth Committee, and two accompanying resolutions.[17] The vote was 55 to 0, no abstentions; Costa Rica, El Salvador, and the Union of South Africa were absent.

On December 11, 1948, the representatives of twenty Members [18] signed the Convention. Dr. Evatt of Australia, President of the General Assembly, praised it as "an epoch-making event in the development of international law." But among the signatories we find only two permanent members of the Security Council, only one West European state, only one state of the Soviet Bloc. The United States Government was at all times among the enthusiastic supporters of the Convention.[19] The American Bar Association, on the other hand, warned against any haste in its ratification.[20] The Bar saw in the Convention serious constitutional and legal difficulties, and poor drafting. The conflicting attitudes were also clearly seen in the discussion which took place at the 1949 annual meeting of the American Society of International Law.[21]

An objective and impartial appraisal presupposes a legal analysis of the Convention. We discuss, first, the technical Articles X–XIX. These articles indicate that there is nothing revolutionary in the Convention; they rather give the impression of being tentative. The Convention, which is equally authentic in the five United Nations languages (Article X), is open for signature until December 31, 1949; it is an open convention, open even for signature by non-members, if they are invited to sign by the General Assembly (Article XI). In order to come into force, the Convention must be ratified. After January 1, 1950, the Convention is open to accession also by non-members invited to do so (Article XI). Any

[15] Report of the Sixth Committee (*Rapporteur*, J. Spiropoulos, Greece): U. N. Doc. A/760, Dec. 3, 1948.

[16] U. N. Doc. A/C.6/SR. 133.

[17] U. N. Doc. A./P.V. 179.

[18] Australia, Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Haiti, Liberia, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, United States, Uruguay, Yugoslavia.

[19] See the speeches by Ernest A. Gross, then Legal Adviser, Department of State, in the Sixth Committee (Department of State Publication No. 3416 (February, 1949), pp. 36–43, 44–46).

[20] See the preliminary statement by William L. Ransom (American Bar Association Journal, January, 1949, pp. 56–57); resolution adopted unanimously by the House of Delegates at Chicago on Feb. 1, 1949 (*ibid.*, March, 1949, p. 197); and resolution adopted at St. Louis, Sept. 7, 1949. See also President Holman's statement (*ibid.*, p. 202) and Report of the Committee on International Law of the Bar of the City of New York.

[21] Proceedings of the American Society of International Law, 1949, pp. 46 ff.

contracting party may, at any time by notification to the Secretary General, extend the application to all or any territories for the conduct of whose foreign relations that contracting party is responsible (Article XII).[22] The special resolution (Annex C) [23] contains a recommendation that parties to the Convention should take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to "dependent territories"—a term not identical with that used in Article XII—administered by them.

The rather tentative character of the Convention is shown by three further provisions. It can come into force only on the ninetieth day following the date of deposit of the twentieth instrument of ratification or—an interesting proviso—accession (Article XIII). The Convention is not a permanent one. After having come into force, it shall remain in effect for ten years, and thereafter for successive periods of five years with regard to such parties as have not denounced it. Every party has a right to denounce the Convention by a written notification to the Secretary General of the United Nations at least six months before the expiration of the current period (Article XIV). Further—a proviso highly unusual in a multilateral convention—if, as a result of denunciations, the number of parties to the Convention should become less than sixteen, the whole Convention shall cease to be in force (Article XV). The Convention contains a specific revision clause (Article XVI). Every party can request a revision at any time; the General Assembly shall decide upon the steps, if any, to be taken in respect of such request. It is interesting to note that the General Assembly, composed of all the United Nations Members, whether they have ratified the Convention, or not, is instituted as the organ of revision.

The substantive law, pertaining to criminal law, is contained in Articles I–IV. Although the word "genocide" is new, the practice is an old one: the destruction of Carthage by the Romans, the extermination of the Indians in North America, pogroms in Czarist Russia, the Armenian massacres in Imperial Turkey are just a few examples. Although the present Convention and Lemkin's ideas have been provoked undoubtedly by the persecution of Jews and others by National Socialist Germany, the Convention is not a *lex specialis* like the Nuremberg Charter. The preamble expressly states that "at all times of history genocide has inflicted great losses on humanity."

Article I confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law. The word "confirm" has been chosen, because already Resolution 96 (I) of 1946 had "affirmed" that genocide is a crime under international law. But Resolution 96 (I),

[22] This article was added by the Sixth Committee upon the proposal of the United Kingdom (U. N. Doc. A/C.6/236).

[23] Adopted upon the proposal of Iran.

like resolutions in general, has no legally binding effect; it is merely a recommendation. In the Sixth Committee the delegate of the United Kingdom said that those who support the adoption of a convention on genocide do so on the ground that genocide would be illegal only if such a convention were concluded, whereas genocide has been illegal since the Nuremberg Trial. The American answer was that this overlooks the vital necessity of provisions for detailed definition and enforcement and that the Nuremberg Judgment did not cover genocide committed in time of peace. The British argument is not tenable. The Nuremberg Charter created only a *lex specialis* against a named group of men in the service of a conquered enemy. Genocide by a state against its own citizens was morally condemned, but it was "generally recognized that a state is entitled to treat its own citizens at discretion and that the manner in which it treats them is not a matter with which international law, as such, concerns itself.[24] And as to so-called humanitarian intervention, "there is general agreement that, by virtue of its personal and territorial supremacy, a state can treat its own nationals according to discretion"; in the previous editions of Oppenheim the view was expressed that "whether there is really a rule of the Law of Nations which admits such intervention may well be doubted."[25] Lauterpacht, in the latest edition, also recognizes that states had a disinclination to take responsibility for a humanitarian intervention and that, on the other hand, it has been abused for selfish purposes.[26] The Convention, therefore creates in this and other points new law binding only on the states which have ratified it.

The jurist, in the words of the Belgian philosopher of law, Jules Dabin, is primarily an artist of definitions; and good definitions are in no field more essential than in criminal law. Article II, giving the definition of genocide, is, therefore, the heart of the Convention. The Sixth Committee decided on a definition by way of enumeration. The five types of acts enumerated cover physical and biological genocide. Most subject to criticism is the phrase "causing serious mental harm" in paragraph (b). The addition of the words "serious mental harm" was adopted at the suggestion of China, which was thinking at acts of genocide committed through the use of narcotics. Nevertheless, the phrase "serious mental harm" as it now stands in the Convention is certainly vague. It is to be noted that all forms of cultural genocide have, after long debate, been eliminated.

[24] Oppenheim-Lauterpacht, International Law, Vol. I (7th ed., London, 1948), p. 583. *Cf.*, also, *"Nei propri territori la libertà di ciascun Stato è illimitata verso i propri cittadini secondo il diritto internazionale generale,"* in G. Balladore Pallieri, *Diritto Internazionale Pubblico* (5th ed., Milan, 1948), p. 382.

[25] Oppenheim-Lauterpacht, *op. cit.*, p. 279.

[26] Dr. Evatt in his speech in Paris also spoke of "occasional endeavors of humanitarian intervention in past centuries," and added that this was "diplomatic action and governments that undertook such interventions were frequently accused of pursuing other than humanitarian aims."

Equally, the protection of political groups has, after long debate, been eliminated, an elimination bitterly attacked by the minority report of the New York Bar Association.[27]

The acts discussed constitute only one element of the crime of genocide; the other element is a very specific criminal intent: those acts constitute genocide only if they are committed with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

It has been said that this specific criminal intent makes the Convention useless; that governments, less stupid than that of National Socialist Germany, will never admit the intent to destroy a group as such, but will tell the world that they are acting against traitors and so on. Yet the criminal intent is an integral element of crimes in general; and many crimes presuppose a specific intent; breaking and entering the dwelling-house of another by night, is burglary only if done with the specific intent to commit a felony. Naturally, as in all crimes presupposing specific criminal intent, the latter is the gist of the offense; it is this specific criminal intent which distinguishes genocide under Article II (a) from common law murder. As in all the crimes of this type, so in genocide the specific criminal intent must be proved by the prosecutor beyond a reasonable doubt; otherwise there must be acquittal.

Article III establishes four further crimes connected with genocide: conspiracy, attempt, complicity and direct and public incitement to commit genocide. This article gives no definitions at all, although the concepts used are extremely different in different municipal laws. What is "direct and public incitement"? A Soviet amendment to prohibit organizations inciting to racial, national or religious hatred was rejected. Where is the dividing line vis-à-vis the constitutionally guaranteed freedom of speech?[28]

Article IV deals with the authors of the crimes enumerated in Articles II and III: private individuals, public officials and constitutionally responsible rulers, which is practically equivalent to "governments."[29] Do public officials have in their favor the "plea of superior command"? A Soviet amendment[30] to exclude this plea was rejected by 28 votes to 15, with six abstentions.

Articles V–IX deal with problems of procedure. It is from this stand-

[27] "The excluded groups are the only ones that are presently in process or common danger of extermination. Compromise on a matter of principle is tantamount to abandoning the principle" (*Ibid.*, pp. 5, 6).

[28] See the recent five to four decision of the U. S. Supreme Court in the Terminiello case, 337 U. S. 1 (New York Times, May 17, 1949, pp. 1, 16).

[29] The French text said correctly: "*des gouvernements.*" The English text originally read: "Heads of States," but was changed because of the constitutional immunity of rulers in constitutional monarchies. A Syrian proposal (U. N. Doc. A./C.6/246) to include *de facto* heads of states was rejected, because it was felt that such persons are already included.

[30] U. N. Doc. A/C.6/215/Rev. 1.

point that most of the attacks by the American Bar Association come; the Association speaks of "novel and far-reaching constitutional and legal questions, some of them revolutionary," of "transfer to international jurisdiction of charges against our own State, local and national public officials, and even against our private citizens, as to matters traditionally within the domestic jurisdiction of our country."[31] But there is, it is submitted, a certain confusion. The Convention is entirely different from the law of the Nuremberg Trial and does not create at all an international criminal law nor international criminal courts; nor does it foresee an appeal from a highest municipal to an international court. The Convention is also entirely different from the proposed Covenant and Treaty of Implementation concerning Human Rights. The Convention does not make individuals subjects of international law, nor of international duties or international rights; it is, in this respect, a thoroughly old-fashioned, traditional treaty. The Convention invokes in the preamble not a supra-national authority, but "international coöperation." Under Article I it is the *states* which recognize that genocide is a crime under international law which *they*—not international law—undertake to prevent and punish. Under Article V the *states* are bound to enact corresponding domestic legislation, "in accordance with their respective constitutions." It is, therefore, to be doubted whether the Convention can be regarded as a self-executing treaty.[32] The Convention clearly does involve legislation. Articles II and III cannot be directly applied by a court, not only because of vague definitions or a lack of definitions in Article III, but also because of a complete lack of penalties. Domestic legislation will be necessary to be binding on the courts, although such domestic legislation is an international duty for all states which have ratified the Convention.[33] Incidentally, since Article II hardly gives an adequate definition of genocide and Article III contains no definitions at all, it is unavoidable that the crimes, as defined by the different domestic legislations, "are subject to certain varieties in many systems of criminal law," as the Swedish delegate pointed out in the Sixth Committee.

The states undertake to prevent and punish genocide; the states are bound to enact corresponding domestic legislation; finally, persons accused of one of the crimes under Articles II and III are, under Article VI of the Convention, to be tried by a competent *domestic* court. Under Article

[31] American Bar Association Journal, March, 1949, pp. 195, 197.

[32] See Chief Justice Marshall in Foster and Elam *v.* Nelson, 2 Pet. 253, 313, 7 L. Ed. 415; Robertson *v.* General Electric Co., U. S. C. C. A., 1929, 32 F. (2d) 495.

[33] This domestic legislation may involve constitutional problems. Whereas generally legislation in the field of criminal law is in the jurisdiction of State legislatures, Congress may be empowered to enact this criminal legislation in fulfillment of a treaty obligation (Missouri *v.* Holland, U. S. Supreme Court, 1920, 252 U. S. 416, 40 S. Ct. 382). Note also that conspiracy at common law is different from conspiracy as defined in the U. S. Criminal Code, Sec. 3.

VII the crimes under Articles II and III shall not be considered political crimes for the purpose of extradition.

There is nothing revolutionary in the Convention. The new crimes merely are an addition to the *delicta juris gentium*, such as piracy, slave trade, counterfeiting and so on. The crimes under Articles II and III are "crimes under international law," but not crimes against international law. These crimes are defined by international law; but individuals are only under a duty if and when the states enact the corresponding domestic legislation. The Convention gives criminal jurisdiction under its domestic law to the state in the territory of which the act was committed; in addition, as the Sixth Committee stated, Article VI "does not affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside of the state."

The legal situation is, therefore, the following one: Each contracting party is bound to try in its domestic courts under domestic law enacted in carrying out the Convention, any private individual, public official or constitutionally responsible ruler, whether a citizen or an alien, for any of the crimes of Articles II and III, committed in the territory of this state, whether against aliens or citizens; every contracting party is, further, entitled to try its own nationals for the same crimes committed abroad.

That these crimes shall not be considered political crimes for the purpose of extradition is nothing new;[34] and the parties pledge to grant extradition only "in accordance with their laws and treaties in force."

True, Article VI speaks of a domestic court or "such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."[35] This text is clearly the result of a political compromise, as it was feared that France would otherwise not adopt the Convention. But as no such international penal tribunal exists and as the creation of such tribunal would necessitate consent to a new treaty, this sentence in Article VI is legally irrelevant. Resolution (Annex) B[36] is not a part of the Convention.

While, therefore, the Convention is, under these aspects, thoroughly old-fashioned and traditional, it would be a mistake to assume that the Con-

[34] See, *e.g.*, the Belgian clause of 1856, the exclusion of anarchistic or terroristic acts from political crimes.

[35] The Sixth Committee first deleted the reference to an international tribunal, but later reconsidered the article and adopted the text as it now stands, primarily to satisfy the French. A later Soviet amendment to delete this reference was rejected.

[36] This resolution holds that the Convention "has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal"; invites the International Law Commission to study this problem; and requests it to pay attention to the possibility of establishing a criminal chamber of the International Court of Justice. But "the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or of individuals" (Manley O. Hudson, International Tribunals, Past and Future (Washington, 1944), p. 186).

vention does not contain real innovations in international law. The innovations consist in the fact that the crimes referred to in Articles II and III, which hitherto if committed by a government in its own territory against its own citizens, have been of no concern to international law, are made a matter of international concern and are, therefore, taken out of the "matters essentially within the domestic jurisdiction of any State," of Article II, paragraph 7 of the United Nations Charter. Although only contracting parties can invoke Articles VIII and IX of the Convention, United Nations organs are called to intervene.

Under Article IX, disputes between the contracting parties relating to the interpretation, application and *fulfillment* of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. Ratification of the Convention by the United States without reservation would repeal the reservations [37] made earlier by the United States. Article IX specifically includes disputes "relating to the responsibility of a state for genocide." This confirms our construction of the Convention. Individuals are criminally liable for genocide in a domestic court under domestic law, but they are not internationally liable. States alone are, under the general conditions of state responsibility, internationally responsible, but under international law, not under criminal law; only this international state responsibility includes—and here lies the innovation—genocide committed by a state against its own citizens.

Article VIII gives to any contracting party the right to call upon the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of the crimes named in Articles II and III.

A last point which is generally neglected must be mentioned: While the duty of the ratifying states to enact legislation to punish genocide is stressed, hardly anything is said of the fact that the ratifying states are also bound to enact legislation to *prevent* these crimes. Such legislation does not belong to the field of criminal law; for the latter deals exactly with men after they have committed the crime, and even the police is only an agency of forcible prevention at the crisis of action. The duty to enact domestic legislation to *prevent* the crimes of Articles II and III is of a different character and poses many problems.

JOSEF L. KUNZ

INTERNATIONAL LAW AND GUILT BY ASSOCIATION

Advanced systems of criminal law accept the principle that guilt is personal. Guilt is established by evidence that the acts and intentions of the

[37] S. Res. 196, 79th Cong., 2d Sess. In signing the Pact of Bogotá, the United States made a reservation upholding all the earlier reservations.