

to penal servitude for life or not less than ten years for persons so altering the *Grundordnung* of either the Federation or a *Land*, or depriving the Federal President of the powers accorded to him by the *Grundgesetz*, or by force or the threat of danger compelling him to exercise his powers in a specific manner or not at all, or preventing the exercise of his powers. The same penalty constitutionally extends to separatists, *i.e.*, those who may in future "deprive the Federation or a Land of a territory." In the light of the public attitude revealed in the Rhineland a decade before the Nazis towards those lending themselves to separatist agitation, this is indeed the lesser penalty. However, public incitation to do any of the other things covered by the article incurs mandatorily the ten-year prison penalty, while less serious cases incur not less than a two-year penalty; while every inducement is held out to co-conspirators, by the promise of immunity, to turn state's evidence.

Whether these constitutional stipulations will be any more successful in dealing with the Left than the numerous instances of the complete outlawry of Communism a decade or more ago in countries now operating under Communist régimes remains, from a historical standpoint, dubious. And whether the deliberate multiplication of localized administrations in regions that have known and obeyed a single central authority will be workable in practice seems even more so. It will require a political miracle greater than the refitting of the skeletons in Ezekiel's Valley of Dry Bones to make effective against an *Einheitswille* the tedious division of competences between *Bund* and *Länder*. While the text of the *Grundgesetz* posits a measure of international personality for the *Länder*, it is almost incredible to assume that the German people would, even in their extremest separatism, attempt to revert to 1849 and be content with a confederal stage of development in which the individual *Länder* maintained official diplomatic relations with neighboring states.

In sum, the Bonn instrument is a document to ingratiate Germans in the Western areas with their temporary occupants and to keep open and unsettled the form of a future Germany. Seen in this perspective, the new text hardly warrants detailed commentary and exegesis. In all essentials, its fate depends far more on forces operating outside Germany than on the bickering splinter parties characteristic of a defeated country.

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THE GENOCIDE CONVENTION AND STATE RIGHTS

The assumption is sometimes made that the Convention on the Prevention and Punishment of Genocide is in some way connected with the proposed Covenant and Declaration on Human Rights. Indeed, it has been asserted that it presents for consideration many of the same basic questions. Objection has been made to the Declaration of Human Rights on the ground that

it would impose by treaty, legislation reserved to Congress or to the separate States and that this also applies to the Genocide Convention. We believe that this is an erroneous identification which has probably arisen because both conventions were approved during the same session of the General Assembly held in Paris in December, 1948.

The crime of genocide comes within the category of offenses described in Article 6(c) of the Charter of the International Military Tribunal as "crimes against humanity," or to use the more precise phraseology employed by the General Assembly, "offenses against the peace and security of mankind." The convention should not be classified as one for the protection of human rights, but for the preservation of international peace. Its purposes are objective, not subjective. Genocide was described by the General Assembly on December 11, 1948, as "a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world." Under Article I, the Contracting Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." It is defined as meaning any of a number of acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Persons committing genocide or attempting or conspiring to commit genocide shall be punishable "whether they are constitutionally responsible rulers, public officials or private individuals" (Arts. II-IV). The convention would require national legislation to give it effect, because persons charged with genocide are to be tried by a competent tribunal of the state in which the act was committed, and the parties agree to grant extradition in accordance with existing laws and treaties without the crime being considered "political" under the usual rules relating to extradition (Arts. V-VII).

The convention contemplates that a permanent international penal tribunal may be set up later by special agreement. This was suggested as early as September, 1947, by the representatives of the United States to the Secretary General of the United Nations. The convention does not provide for such a tribunal nor is any nation bound to accept its jurisdiction. Of course, if it is created, it may have concurrent jurisdiction with respect to those Contracting Parties who have accepted it. On the other hand, the convention provides that any dispute relating to the interpretation, application or fulfillment of the terms of the convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The International Military Tribunal at Nuremberg followed the rule that criminal acts committed by an accused prior to the declaration of war could not be considered a means of executing a conspiracy against the peace of the world unless it was directly connected with the plan for making war. However, it recognized that many criminal acts committed after the declaration

of war presented the double character of war crimes and crimes against humanity. The Tribunal thus recognized a category of crimes against humanity without defining such crimes and without distinguishing them from war crimes in the strict sense. This applies particularly to genocide. After the close of the war, the conscience of the world was shaken by confirmation, theretofore deemed incredible, of the enormous scope of the mass exterminations carried out on racial, religious and political grounds by the Hitler régime. It became necessary to give a name to and define this abominable crime and to make it punishable whether committed in peace or in war.

There is nothing new in thus recognizing by multilateral treaty certain offenses which would often go unpunished if left to the jurisdiction of any one nation. Thus piracy

derives its internationally illegal character from the will of the international society. That society, by common understanding, reflected in the practice of states generally, yields to each of its members jurisdiction to penalize any individuals who, regardless of their nationality, commit certain acts within certain places. . . . National authorization of the commission of piratical acts could not free them from their internationally illegal aspect.¹

To a limited extent, the slave trade, the traffic in women and the opium traffic have likewise been placed under international cognizance by special agreement. All these offenses are considered to be matters of international concern.

At the annual meeting of the American Society of International Law on April 19, 1907, Mr. Elihu Root, President of the Society, who was at that time Secretary of State, said :

It is, of course, conceivable that, under pretense of exercising the treaty-making power, the President and Senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of State rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question.²

The distinction made under the rules regulating the Nuremberg Tribunal between genocide committed in time of war and the same crime committed by a nation against its own subjects in time of peace is understandable in view of the conditions under which the Tribunal was to operate. Fundamentally, the distinction is an artificial one. Mass extermination of populations in war or in peace with intent to destroy national, ethnical, or religious groups, constitutes an offense of international concern and a serious threat

¹ Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev. ed., 1945), Vol. I, § 231.

² *Proceedings of the American Society of International Law, 1907*, pp. 49–50.

to the maintenance of peace. Even before the conscience of mankind had reached its present state of awareness, mass exterminations were recognized as creating a spirit of vengeance continuing for generations and even for centuries both within the state and in other states where related groups seek action to revenge the crime. One has only to think of events like the massacre of Bartholomew's Night and others committed in periods between religious wars, the Armenian massacres and those of our own day, to realize that genocide is a threatening danger to peace and the source of international wars and civil hostilities.

It should be remembered that notwithstanding the reference of the General Assembly to genocide as an international crime, the nations of the world do not yet consist of a society of individuals all subject to the authority of a definite legal order. The world may well be progressing toward that end, but it is a gradual process. Even with respect to piracy, all that the customary or conventional law assumes to do is to establish an extraordinary jurisdiction and fix the duties of the several states *inter se*, leaving to each state the decision how, through its own law, it will exercise its rights and powers.³ So with respect to genocide, the effective establishment of a special rule of jurisdiction requires international coöperation in order to pursue those charged with genocide beyond the borders of a single state in exchange for reciprocal powers granted to the other parties. Only the treaty-making power can accomplish this result. From the very nature of our Government, the treaty-making power must reside centrally or nowhere. State rights cannot be an obstacle to the participation of the United States in a genocide convention, otherwise the power of the nation would be prevented from acting effectively to combat this threat to the peace and security of all nations and the establishment of a civilized standard of international life.

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THE STATUTE OF THE COUNCIL OF EUROPE

Both logic and history demonstrate that European federal union is at once more obvious and more difficult than world federation. At the same time, as Dean Kayser has recently suggested,¹ it is one of the older projects which may yet become fact.

The draft Statute of the Council of Europe was signed in London on May 5, 1949.² It is to go into operation (Article 42) among the ratifying signatories when seven of them have acted. The signatories included Bel-

³ See Harvard Law School Research in International Law, Drafts of Conventions (Cambridge, Mass., 1932), Introduction to the subject of Piracy. This JOURNAL, Supp., Vol. 26 (1932), p. 760.

¹ World Affairs, Vol. 112, No. 1 (Spring, 1949), p. 7.

² The Times (London), May 6, 1949, pp. 4, 5.