1-1-1972

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GENOCIDE: AN UNCONSTITUTIONAL HUMAN RIGHTS CONVENTION?

John M. Raymond*

INTRODUCTION

Over twenty years ago, the United States signed the Genocide Convention. Since that time, two Presidents, Truman and Nixon, have urged the Senate to advise and consent to its ratification, but the Senate has not yet done so. The reasons for the Senate's failure to ratify the convention provide the thesis of this article. At the outset, I will discuss the basic arguments in favor of ratification. This will be followed by a careful examination of the primary objections to ratification.

The approach followed is a bit unusual. Genocide is usually thought of as a human rights matter. There is certainly a close relationship between the arguments for and against ratification of the Genocide Convention as well as the arguments concerning the ratification of other human rights conventions. Accordingly, both concepts will be discussed simultaneously. I will first endeavor to review briefly the significant historical developments which have brought the Genocide Convention and the other human rights conventions to their present posture. This will be followed by consideration of the basic objectives sought to be achieved by human rights conventions generally and their ineffectiveness in bringing about the desired result. Attention will then be given to the basic legal difficulty facing the United States in employing a treaty to deal with such problems—a constitutional issue of fundamental importance. Finally, I intend to direct attention specifically to the Genocide Convention in order to examine to what extent it may differ from the rest of the human rights conventions, and whether such differences as do exist significantly affect the practical and legal difficulties previously discussed.

The Historical Perspective

All the world stood aghast at the monstrous and tragic atrocities committed in the fourth and fifth decades of this century by the
Nazis in their attempt to exterminate certain non-Aryan groups, notably the Jews. Adolph Eichmann, who was in charge of this program, estimated 6,000,000 Jews were killed, 4,000,000 of them in extermination institutions.\(^2\) Genocide had been impressively demonstrated for all people to ponder.

The first action taken to prevent any recurrence of such a tragedy was the agreement of August 8, 1945, between the United States, the United Kingdom, France, and the Soviet Union, which established the Charter of the Nuremberg Tribunal. This Charter set forth certain crimes which the Tribunal was to try, including “crimes against humanity: . . . persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal,”\(^3\) that is, in execution of, or in connection with, launching or carrying on a war of aggression or committing war crimes. The Tribunal proceeded to try the hierarchy of Nazi officialdom who were responsible for the program of eliminating the Jews. However, it considered only those acts committed in connection with the war, and not the notorious persecutions that had taken place within Germany before 1939.\(^4\)

Clearly, it was time that genocide be condemned in general terms, not limiting it to wartime conditions. It was not only appropriate but highly desirable for the United States to join in a resolution of the General Assembly of the United Nations\(^5\) which affirmed that genocide was a crime under international law, whether committed in war or in peace. The resolution defined genocide as: “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings”; and it recited that “[m]any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.”\(^6\)

Soon thereafter, the United Nations prompted the preparation of an international convention which: (1) defined genocide as the commission of certain acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” (“political” was omitted because of Soviet objection);\(^7\) (2) declared genocide to be

\(^2\) Nuremberg Judgment 1 Trial of the Major War Criminals before the International Military Tribunal 171, 252-53 (Nuremberg 1947) [hereinafter cited as Judgment].
\(^3\) 59 Stat. 1544, 1547, at art. 6(c).
\(^4\) Judgment at 252-53.
\(^5\) G.A. Res. 96 (Dec. 11, 1946). See also 11 Whitman, Digest of International Law 848 (1968).
\(^6\) Id.
\(^7\) Hearings on Exec. 0, 81st Cong. 1st Sess. before a Subcomm. of the Senate Comm. on Foreign Relations, 92nd Cong., 1st Sess. 19 (1971).
a crime under international law; (3) committed parties to the convention to make genocide punishable under their own law; and, (4) provided for extradition of those committing genocide to the site of their crime. President Truman submitted this convention to the Senate in 1949 for its consent to ratification. The Foreign Relations Committee, to which it was referred, held hearings, but nothing further happened. Finally, after being prodded by President Nixon, the Committee gave the Convention a favorable report in 1971. The full Senate has taken no action with respect to the Report.

In a broader aspect, those who gathered at San Francisco in 1945 to draft the Charter of the United Nations determined that it should be one of the purposes of that organization "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." Pursuant thereto, the General Assembly, approximately twenty years ago, set forth certain agreed principles concerning human rights in a document known as the Universal Declaration of Human Rights. The United States quite rightly joined in approving the Declaration. The General Assembly then proceeded to put these principles into treaty form, and a number of international conventions were drafted, including the one concerning genocide. Generally speaking, these conventions set forth certain human rights to which all persons, or all in a specified group, were said to be entitled; and, they were drafted in such a way as to make parties to them legally bound to accept and follow such principles.

Two of these conventions, together with a third in the field of human rights prepared by the International Labor Organization, were submitted to the Senate by President Kennedy in 1963. The

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8 Id. at 7.
9 Id. at 2.
10 S. Comm. on Foreign Relations, Legislative Calendar 6 (April 11, 1968).
15 See, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and The Convention on the Political Rights of Women. The texts appear in 1 Int'l Lawyer 590, 597 (1966-67). See also 1 Int'l Lawyer at 620-23 for other human rights conventions in process or approved. Of these, the texts of the two principal human rights conventions, that on Economic, Social and Cultural Rights, and Civil and Political Rights, may be found in 61 Am. J. Int'l L. 861, 870 (1967).
convention prepared by the International Labor Organization concerned the Abolition of Forced Labor. Each state that became a party undertook "to suppress and not to make use of any form of forced or compulsory labor" for certain specified purposes, and "to take effective measures to secure the immediate and complete abolition of forced or compulsory labor" for those purposes. The second convention, the U.N. Convention on the Political Rights of Women, reads like a statute: "Women shall be entitled to vote in all elections on equal terms with men . . . . Women shall be eligible for election to all publicly elected bodies . . . . on equal terms with men . . . . Women shall be entitled to hold public office and to exercise all public functions . . . on equal terms with men . . . ." In 1967, the Senate declined to ratify these two conventions.

The third of the conventions submitted by President Kennedy, the Supplementary Convention to Suppress Slavery and the Slave Trade, was designed to intensify efforts to eliminate the international trade of slaves, the practice of slavery, and similar institutions. It supplemented a 1926 convention on the same subject to which the United States had been a part since 1929. In 1967, the Senate gave its advice and consent to the ratification of this convention, and the President promptly ratified it.

Despite the sluggish response of the Senate, the arguments in favor of U.S. ratification of genocide and the other human rights conventions do have a strong emotional appeal. In 1950, Dean Rusk, then Deputy Undersecretary of State, testifying in favor of ratification of the Genocide Convention, stated:

... The history of our own civilization begins with the deliberate mass extermination of Christians by the imperial government of Rome. But the worst atrocities of Nero against the Christians failed to reach the level of those perpetrated by Hitler against the Jews. . . . These events so shocked the conscience of civilized men that, after World War II, it had come to be accepted that such conduct could no longer be tolerated in civilized society and that it should be prohibited by the international community. . . .

... I can only express, on behalf of the State Department, our earnest hope that the Senate of the United States, by giving its advice and consent to the ratification of this convention, will demonstrate to the rest of the world that the United States is determined to maintain its moral leadership in international affairs and to participate in the development of international law on the basis of human justice.
After President Kennedy had submitted the three above-mentioned human rights conventions to the Senate, Harlan Cleveland, then Assistant Secretary of State, put forward the case for ratification of such conventions:

Dozens and even scores of countries have already ratified some of these human rights conventions. Even though the rights covered in these international conventions are fully secured by our Federal and State laws, we should feel uncomfortable standing aside from the internationalization of social doctrine which we ourselves hold among our most cherished national assets. There is, after all, something otherworldly about the spectacle of a United States Government too squeamish or too indifferent to take a stand against human slavery or forced labor.23

In the face of appeals such as these, one senses that he must be a renegade or a racist when he lifts his voice in opposition to ratification of the genocide and human rights conventions. Yet, there are, in fact, a great many members of the American bar who see problems that merit serious consideration before any such step is taken. Indeed, some believe that there are compelling reasons for not joining in such conventions.

Twice the American Bar Association has voted to recommend against ratification of the Genocide Convention, although by a much smaller margin in 1970 than in 1949.24 In 1967, it opposed United States ratification of two of the three human rights conventions then under consideration by the Senate.25 The third, which the Bar favored, was the Supplementary Convention to Suppress Slavery and the Slave Trade, which, as noted above, the United States has since ratified. This consistent opposition voiced by a responsible organization is not opposition to the punishment of genocide nor opposition to the protection and promotion of human rights. On the contrary, the resolutions of the American Bar Association against ratification,26 have explicitly declared support for the principles expressed in the resolution of the General Assembly on Genocide and in the Universal Declaration of Human Rights.

Why, then, opposition to the conventions? The opposition does not strike at the objectives or premises underlying the conventions but rather at the method used to achieve them. The opposition has two aspects: the impracticability of the method to achieve the desired ends, and the illegality of the use of the treaty-power in a way which would render an unconstitutional result in this country.

26 See note 24, supra.
GENOCIDE AND THE CONSTITUTION

HUMAN RIGHTS CONVENTION

Ineffectiveness of the Method

What do the advocates of ratification see as the objective of human rights conventions? It appears that the aim of these conventions is to get other nations which have undesirable practices in the field of human rights to undertake by treaty to change their ways. No one has advanced the argument or attempted to claim that human rights in this country would be improved by our ratifying any of these treaties, for the United States has already done substantially everything provided for by the conventions. Why, then, should the United States ratify them?

The argument for ratification is that put forth by our former Ambassador to the United Nations, Arthur Goldberg: "[I]f we do not consider it important to sign the conventions, why should [other nations]? Or, more important, why should they implement the conventions?" This would seem, also, to be the thought underlying the arguments of Dean Rusk and Harlan Cleveland that the United States should "maintain its moral leadership" for "we should feel uncomfortable standing aside." The argument is a bit more fully developed in the Restatement of the Foreign Relations Law of the United States, which reads as follows:

Although such conventions generally specify standards already observed in the United States, it has an interest in seeing that they are observed by as many states as possible, not merely to protect its own standards but to promote conditions abroad that will foster economic development and democratic institutions that are conducive to prosperity in the United States and achievement of its foreign policy objectives. It cannot effectively urge other states to adhere to such conventions without doing so itself.

But neither the Restatement, Goldberg, Rusk, nor Cleveland explain how ratification by the United States will achieve any reforms in other countries where human rights are being infringed. The view of these advocates of ratification tacitly assumes that, if we ratify, the countries which have objectionable practices will then become parties to the conventions, and thereupon institute internal reform. But consider the situation. Let us say Country A does not let women vote, or that it persecutes a minority group of another tribe living within its borders, and that the practice is traditional and is not questioned by the vast majority of the people. If the

28 11 Whitman, supra note 14, at 862.
United States now joins in these conventions, and urges Country A to do the same, what may we anticipate? The most probable result would be that Country A would say that it does not care to change its ways, and, in any event, it could not do so without a long period of time to reeducate its population. Therefore, Country A would not want to join in the conventions and assume obligations that it might not be able to keep.

But suppose that, by diplomatic pressures, we convince Country A to agree to sign and ratify. Will Country A implement the terms of the conventions by enacting the required legislation or by taking the appropriate executive action to make the reforms? Or, will it ignore its treaty obligations? Might it interpret them in a way to excuse continuing its practices? Certainly, if it is not ready and willing to reform its institutions it will not do so. But, on the other hand, if it should be ready and willing to reform, joining in a convention which imposes the obligation to do so will not be the cause but rather the result of the change of heart. One of the foremost advocates of U.S. ratification, Professor Richard N. Gardner, has said: “The positive consequences of United States adherence are hard to measure.”31 In point of fact, they are completely illusory.

Many believe the proper technique to achieve the desired result is through education and persuasion.32 To repeat, the United States may educate and attempt to persuade Country A to change its ways, but unless it is actually persuaded, it will not ratify the conventions; or, if it does ratify, it certainly will not implement them. If, on the other hand, Country A should be persuaded to change its ways, its joinder in the conventions is merely gilding the lily of its conversion to the faith.

The fundamental reason that the convention method of attempting to secure human rights will be futile is that the problem of the denial of such rights arises from the way a government treats its own subjects or permits them to be treated by others within its own territory. Therefore, the only way the situation can be changed is by that government itself taking action to change its own internal legislation, and/or its own executive practices. It will not be accomplished by international agreements, no matter how well-intentioned. Only Country A can stop the persecutions within its borders, just as only Country A can give the vote to its women.

31 Gardner, note 27 supra.
32 Secretary of State John Foster Dulles testified on April 6, 1953, that it was the intention “to encourage the promotion everywhere of human rights and individual freedoms, but to favor methods of persuasion, education, and example rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community, which has different standards.” 12 WHITEMAN, supra note 14, at 668.
Some may argue that an international convention is a contract legally binding between the states that are parties, and, therefore, it can be enforceable against any delinquent state. True, there are legal obligations created when a state joins in a convention, but enforcement is another matter. Only with a state's consent can it be hauled into court, national or international. But, assuming this obstacle is overcome, there remains another—a political—difficulty that is practically insurmountable. How do you get another state that is a party to the convention to take the necessary steps to bring suit? Or, as a more likely alternative, how do you get another state to exert diplomatic pressure to secure compliance?

Whatever their protestations of concern may be with regard to respect for human rights, governments are very sensitive about interference by other governments in matters involving the way they deal with their own subjects. Moreover, they are very reluctant to bring pressure to bear on another government when such matters are involved, either for fear of retaliation or out of appreciation for another government's domestic sensitivities. Ambassador Richardson of Jamaica put the problem very simply:

What does the average citizen want of international law in this area [of human rights]? He wants to procure what the legislation of his own state has not done. He wants effective protection and effective remedies. [But], remedies . . . are unavailable unless the victim can get a state other than his own to make a complaint against his government. To do this would usually be highly prejudicial to the interests of the other state, and the situation is therefore highly prejudicial to the victim's own interests.

Professor John Carey, who served on the U.N. Commission on Human Rights, notes that, even when sanctions are invoked, if the delinquent government does not wish to change its ways, it will not do so. He points out that economic sanctions were invoked by the United Nations against Rhodesia, but Rhodesia did not change its white supremacy policies. Further, various U.N. resolutions of condemnation and demands for change were used to persuade South Africa to abandon its apartheid policy, but without success. Carey comments: "Coercion is unreliable not just because it usually fails to compel but also because states fail to use it fully. Too many influences affect third-party governments besides the plight of the victims." Again, to quote Ambassador Richardson: "[I]t is impos-
sible to attain effective outside coercion. Only a nation's own people are able to establish the necessary remedies.186

On the same point, to attempt to control by international agreement internal matters that only the individual state can control is not only futile, it is extremely unwise. If a hypothetical treaty dealt with a matter in which the United States were forced to change existing practices—for example, a treaty requiring states to enfranchise all citizens 16 years of age—we would look on such an attempt by other states to control our voting age as being intervention in our internal affairs. In short, we would resent this sort of intermeddling by other nations. Former Secretary of State, John Foster Dulles, looking at the effect of a human rights treaty on the people of this country, put it this way: "[T]he relations of our people as between themselves and as between themselves and their [g]overnment are not properly a concern of other people and do not have any direct bearing upon our conduct in the society of nations."187

It is futile, unwise, and hence quite wrong to employ a treaty for the sole purpose of attempting to control the relations between a government and its own people, or the relations of those people among themselves. This is a specific aspect of a broad political reality. It "is an uphill struggle to attempt to regulate through law conduct that states simply are not yet ready or willing to have regulated . . . . [A] ton of treaties will not solve a problem as to which an essentially political consensus has not previously been reached . . . ."188

The Basic Legal Objection

Let us now turn to consideration of the legal questions involved if the United States were to join in a treaty designed to solve human rights problems that exist in other countries. And, in particular, let us examine the legal problem which the United States may face under its own Constitution.

Human rights conventions are legal documents drafted to create legal rights and obligations for the states that become parties to them. Some of these conventions would be self-executing, that is, they would automatically become the law of the United States upon their ratification by virtue of the provisions of Article VI, clause 2 of the Constitution which makes treaties "the law of the land." Others would create legally-binding obligations between the parties requiring them to implement the provisions of the conventions by

38 Richardson, note 34 supra, at 114.
enacting legislation which would then create domestic law. But, they are all designed to establish, directly or indirectly, domestic law for the states that become parties. Obviously, treaties are of a different character from a simple declaration of principles, which merely declares standards that all nations should strive to follow. To state principles that should guide all mankind is one thing; but to contemplate entering into international legal obligations, and making law for the United States, raises new and serious questions.

One point is undoubtedly clear. Our ratification of a human rights treaty would not make law for any other country. It would not even create a treaty obligation for any other country to enact the necessary reforms. Ratification by the United States would have no effect whatsoever as a binding force of the treaty on the delinquent state and would in no way assist the latter's solution of its problem. Our act would be superfluous and of no value in accomplishing the desired objectives of the human rights conventions.

What our ratification would, in fact, accomplish is quite different. It would either make law for the United States (if the treaty were self-executing), or it would create an international obligation on our part to enact legislation which would implement the treaty provisions. Thus, directly or indirectly, ratification would make law for this country. It would accomplish nothing else. This brings the basic constitutional issue into focus. Is this a proper use of our treaty-making power?

The Constitution of the United States contains two provisions which establish the fundamental scheme of legislative power. Article I, Section 1, states: "All legislative Powers herein granted [to the Federal Government] shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The Tenth Amendment to the United States Constitution reads: "The powers not delegated to the United States by the Constitution,

89 The distinction between self-executing and non-self-executing treaties was pointed out by Chief Justice Marshall in Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829):

A treaty is, in its nature, a contract between two nations, not a legislative act. . . . In the United States . . . [the] constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

In a number of countries no treaty has the effect of domestic law until implemented by legislation. This is true, for example, of the British Commonwealth countries. See Attorney General for Canada v. Attorney General for Ontario, [1937] 1 D.L.R. 687 (1937).
nor prohibited by it to the States, are reserved to the States respectively, or to the people." The scheme of authority to legislate in this country is thus prescribed: Congress, and not the Senate alone, or in conjunction with the President, can enact federal legislation; all other legislation must be enacted by the States of the Union, or by the people. To employ the treaty power, which is exercised by the President with the advise and consent of the Senate and without consulting the House of Representatives, solely to enact a law for the country would appear to be clearly unconstitutional.40

It is, of course, true that Article VI, clause 2, of the Constitution provides: "[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." But this provision is merely stating the effect of self-executing treaties that are properly ratified. Article II, Section 2, clause 2, states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ." These two provisions are not to be read as creating still a third way that may be employed, whenever desired, to enact legislation. To adopt such a construction would be to disregard the constitutionally-specified boundaries, the traditional and accepted form of legislative action of our country, and would seem certainly to be beyond the scope of the treaty power.41 Rather, these provisions should be read as meaning that when a matter is proper for handling by treaty, appropriate provisions of a treaty made by the President with the advice and consent of the Senate will become the law of this country. The advocates of ratification of human rights treaties have not argued otherwise, and it is believed that there is no real difference of opinion on this point.

We are thus led to the question: When is a matter proper for handling by treaty? This was discussed many years ago by a very distinguished jurist and statesman, Charles Evans Hughes, who was at that time a Judge of the Permanent Court of International Justice and the President of the American Society of International Law, a former Secretary of State, and soon to become the Chief Justice of

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40 "I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." Secretary of State Dulles, quoted with approval in Power Authority of the State of New York v. Federal Power Comm'n, 247 F.2d 538, 543 (D.C. Cir. 1957).

41 A frequently quoted statement of the Supreme Court of the United States seems to support this conclusion:

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints . . . arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize . . . a change in the character of the government or in that of one of the States . . . .

the United States Supreme Court. Advocates of ratification quote and rely on his statement that the treaty power "is to deal with foreign nations with regard to matters of international concern." They point to the Charter of the United Nations which, in a number of places, talks of respect for and promotion of human rights, and they argue that human rights have therefore become a "matter of international concern." They conclude that the conventions are within the treaty power.

But this is to take Hughes' statement out of context. What he had in mind is disclosed as one reads further in his statement. He proceeded to say that,

if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.

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44 See U.N. Charter Preamble, 2nd cl.; art. 1, para. 3; art. 13, para. 1(b); arts. 55-59; art. 62, 59 Stat. 1033 et. seq.
45 See note 43, supra.
46 See note 42, supra.
It has already been shown that human rights are matters that concern the relations between a government and its subjects, or between the people themselves, and that they can only be dealt with by internal action of the country concerned. They "do not have any direct bearing upon our conduct in the society of nations." They cannot, by any stretch of meaning, be included in the terms "external relations" or "foreign affairs." External relations and foreign affairs deal with matters between states of the world, not those between a government and its subjects.

To illustrate, a current example of a problem in the field of foreign affairs is the international traffic of narcotics. We cannot hope to control our own narcotics problems without the cooperation of other nations. They must control the source of supply abroad and stem the flow of such drugs into this country through international transport. International agreement on a cooperative solution of this problem is clearly within the ambit of foreign affairs.

Contrast this situation with the problems of granting the vote to women in another country, or stemming persecutions which are being carried out by a foreign country within its own borders. The solution of such problems requires only the action of the state involved. International cooperation is in no way required or useful. United States ratification of conventions which seek to put an end

47 See note 37 and accompanying text, supra.
48 See the various narcotics conventions listed in Treaties in Force 328-31 (1971).

A similar situation is that dealt with by the Convention to Suppress Slavery and the Slave Trade, and the Supplementary Convention on the same subject. These treaties were designed to stop the international traffic in slaves as well as to suppress the practice of slavery within States where it still existed. The Parties agreed to prohibit the transport of slaves on their ships and aircraft as well as the embarkation and disembarkation of slaves in their ports; and they agreed to abolish slavery and forms of forced labor akin to slavery in territories under their respective jurisdictions. These two conventions are at best close cases, and many believe that we should not have joined in them; but they do have an international aspect in dealing with the transport of slaves, which, as in the case of the narcotics problem, was an essential element in the solution.

49 Another argument advanced by advocates of ratification is that the Supreme Court has held that a treaty may be used to secure protection of migratory birds, so it certainly can be employed to protect human beings. See Gardner, A Costly Anachronism, 53 A.B.A.J. 907, 910 (1967). But this overlooks the factual situation in the case being decided (Missouri v. Holland, 252 U.S. 416 (1920)) and the rationale of the Court. In that case, the Court pointed out that the treaty "recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection." Id. at 431. The treaty prescribed for each state cooperative measures of conservation and protection. The Court said that there was "a national interest of very nearly the first magnitude [which] can be protected only by national action in concert with that of another power." (Emphasis supplied.) Id. at 435. Here was a problem of concern to both states which neither could handle without the cooperation of the other. It was clearly a matter of foreign affairs.
to such practices would only have an effect within the United States; it could not possibly advance the solution of these problems abroad.  

In short, to employ the phraseology of Hughes, our ratification would be a use of the treaty power "to deal with matters which did not pertain to our external relations . . . to foreign affairs . . ." and it would only have one result: it would "make laws for the people of the United States in their internal concerns"—matters which normally and appropriately were within the local jurisdiction of the United States. This is precisely what the distinguished Chief Justice said was not a proper use of the treaty power.  

Opponents of ratification therefore contend that consideration of the constitutional provisions discussed above and reflection upon the views of a former Chief Justice of the United States raise most serious constitutional doubts about the validity of using the treaty power to deal with genocide and human rights. Inasmuch as these doubts exist, such action should not be taken when nothing can be contributed to the desired solution of the problem by U.S. ratification.

THE GENOCIDE CONVENTION

The foregoing discussion generally presents the basic constitutional objection to ratification of the human rights conventions. However, it is, of course, true that each treaty should be examined in detail to be sure that it in fact presents a case to which this objection applies, as well as to see whether there are other legal objections. The Genocide Convention, therefore, must be examined with these purposes in mind.

The Scheme Of The Convention

There is one noticeable difference between the Genocide Convention and the other human rights conventions. The Genocide Convention is aimed at deterrence by making genocide punishable, while other human rights treaties are generally aimed at achieving internal reforms by prescribing standards which would eliminate or prevent objectionable practices. The Genocide Convention defines genocide and declares that the following acts "shall be punishable": the commission of genocide, conspiracy to commit it, direct and public incitement to commit it, and complicity in genocide.  But it

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50 Secretary of State Dulles, an able international lawyer, said the treaty power may not be exercised with respect to matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal." See note 37, supra.


52 See Appendix at arts. II, III, IV. See also 11 Whiteman, supra note 14, at 849-50.
does not purport to be self-executing. Rather, it imposes an obligation on the parties "to enact . . . the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide."

The other significant obligation of the Convention is found in Articles VI and VII which state: "[t]he Contracting Parties pledge themselves . . . to grant extradition in accordance with their laws and treaties" of persons who commit genocide abroad in order to return them for trial in the country where their crime was committed. In point of fact, the obligation is to provide by treaty or law for such extradition.

Thus, the scheme of the Convention is that each state that is a party shall, by appropriate measures, make the specified acts punishable when committed within its jurisdiction, and extraditable when committed within the jurisdiction of any other party.

The Impracticability Of The Method

It should be noted that the Genocide Convention would probably be just as ineffective a method to prevent genocide as the Convention on the Political Rights of Women would be to secure the vote for women. Genocide is committed because of a policy decision to destroy, in whole or in part, a certain group of human beings. As for genocide in peace time within a particular country, only the government of that country can prevent or stop it. The reason for this has already been set forth above, especially in connection with the example of Country A persecuting members of a hostile tribe who are living within its borders. There is no need to repeat it here. It is inconceivable that Nero would have withheld his persecution of the Christians because of a treaty.

Insofar as genocide may occur in time of war, can anyone believe that Hitler would have been deterred from his policies regarding the extermination of the Jews by a convention declaring it a crime? He was not deterred by numerous treaties which proscribed the very things that he did, including those outlawing aggressive war and those defining the conventional war crimes. The Nuremberg Tribunal's opinion and those of other tribunals that tried and convicted war criminals of the Nazi regime have set forth the details so that the world may know exactly what happened. Those who

53 See Appendix at art. V. See also Tate, Deputy Legal Adviser, Dept. of State, 22 DEPT. STATE BULL. 91-92 (1950), reprinted in 14 WHITEMAN, supra note 14, at 313-14.
54 See 11 WHITEMAN at 848 et seq, supra note 14.
55 See text accompanying note 31, supra.
56 See Judgment, supra note 2. See also the twelve cases reported in TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL.
read them can see for themselves that treaties do not prevent such crimes in time of war when a government or its leaders adopts a policy in contravention of them. To take even more modern situations, would Nigeria have refrained from eliminating Biafra, or would the needless slaughter of human beings in East Pakistan, now Bangladesh, have been avoided had the Genocide Convention been in force for the parties to the struggle? Treaties are not an appropriate means to control such highly-charged situations.

Let us revert again to the hypothetical case of Country A which is persecuting a minority group within its borders. Even if a treaty might have some deterrent effect, ratification by the United States of the Genocide Convention would not make genocide punishable in Country A. Only the enactment of appropriate legislation by Country A and its own enforcement thereof would punish the offender. Nor will our ratification permit us to extradite to Country A one who has committed genocide there. Only the making of a bilateral extradition treaty by Country A with the United States will permit this. Our ratification of the Convention would, of course, give other parties to the Convention the right to demand that we enter into extradition treaties with them covering genocide. However, if we are prepared to become a party to the Convention, we must be prepared to make such extradition treaties. Our ratification would give other states nothing that they would not have in any event. Hence, our ratification would have no significant effect abroad.

Thus, we see that the Genocide Convention is unlikely to be of any value in deterring genocide, and ratification of the Convention by the United States will not make genocide punishable anywhere else in the world. Hence, without further action by the particular foreign government concerned, it will not even lay the foundation for us to extradite to that country persons who may be wanted there for committing genocide.

The Implementation Of The Convention In The United States

If, in spite of the foregoing considerations, we decide to join in the Convention, the question arises as to whether we can implement its provisions. Mr. Justice Holmes said in Missouri v. Holland: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8 [of the Federal Constitution] as a necessary and proper means to execute the powers of the Government."57


57 252 U. S. at 432.
But we must look further. The Report of the Senate Foreign Relations Committee states that its consent to ratification is conditioned upon the United States not depositing its instrument of ratification until after such legislation has been enacted. This raises the question of whether Congress has the power to enact a statute where it is not done to implement any existing treaty of the United States.

Article I, Section 8, clause 10, of the Constitution provides: “The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .” If genocide, is indeed, an “offence against the law of nations,” that is, an offense under international law, the authority is clear.

The Charter of the Nuremberg Tribunal declared: “The following acts . . . are crimes . . . for which there shall be individual responsibility: . . . CRIMES AGAINST HUMANITY: . . . persecutions on political, racial or religious grounds in execution of or in connection with” the launching or carrying on of a war of aggression or the commission of war crimes. This obviously did not make similar actions crimes under international law when committed in peace time. Does it make such acts, committed in connection with war, crimes under international law? Can four nations by agreement make international law for the rest of the world? In the North Sea Continental Shelf Cases, the International Court of Justice held that a new principle of law set forth in a convention to which thirty-nine states were parties was not legally binding on a state that was not a party. It would seem clear that the Four-Power Nuremberg Charter did not make international law for the world, although it did declare law of limited application for those that were parties to it.

Did the Resolution of the General Assembly of the United Nations which “affirms that genocide is a crime under international law” make new international law for the world? Decidedly not, for the General Assembly is not a legislative body empowered to make law.

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59 1 Trial of Major War Criminals Before the International Military Tribunal 10 (Nuremberg 1947); 59 Stat. 1544, 1547, at art. 6(c).
61 G.A. Res. 96 (Dec. 11, 1946); 11 Whiteman, supra note 14, at 848.
62 “Of course we all know that the Assembly is not a legislature . . .” Chayes, The Legal Adviser, Dept. of State, 48 Dept. State Bull. 835, 837 (1963). In drafting the United Nations Charter, it “was clearly decided . . . that the General Assembly should not be given the function of international legislation.” Sloan, The Binding Force of a “Recommendation” of the General Assembly of the United Nations, XXV Brit. Y.B. Int’l L. 1, 6-7 (1948). See also other authorities collected in 13 Whiteman, supra note 14, at 548-52.
But that is not the complete answer. An expressed consensus of a substantial number of nations regarding a point of international law has been considered evidence of existing international law. Specifically, the fact that the General Assembly unanimously affirmed by its Resolution that genocide was a crime under international law was thought by one tribunal to be "persuasive evidence of the fact," and it added: "We approve and adopt its conclusions." Furthermore, the International Court of Justice made reference to the action of the United Nations in unanimously approving the Genocide Convention, which called genocide "a crime under international law"; and in the light of this, it concluded that the principles underlying the Convention were principles "which are recognized by civilized nations as binding on States, even without any conventional obligation." This appears to be a clear pronouncement by the International Court that "genocide has been recognized as a crime under international law in the full legal meaning of this term"—to use the language of an Israeli court, which so interpreted the decision of the International Court in convicting Eichmann for his part in trying to eliminate the Jews. The United States, by becoming a party to the Charter of the Nuremberg Tribunal, by voting in favor of the General Assembly Resolution on genocide, and by signing the Genocide Convention, would seem to be committed to this view. In the light of all these circumstances, there is little doubt that Congress has the authority to enact legislation making genocide a crime when committed in the United States, since it would be defining and punishing a crime against the law of nations. This appears to have been the view of the Foreign Relations Committee in recommending that Congress pass such legislation before the Convention was ratified.

The other principal obligation that we would assume should we

ratify the Genocide Convention would be to provide means for the extradition of those who commit genocide. Extradition in this country has traditionally been handled under bilateral extradition treaties. It cannot be demanded of us, as of right, or granted by our Government, in the absence of a treaty.

It should be noted that the Genocide Convention is not a multilateral extradition treaty: it is a multilateral treaty by which we would agree to make new, or amend existing, bilateral extradition treaties to provide extradition for the crime of genocide. Once Congress enacts a statute making genocide a crime under our law, there would appear to be no difficulty in our amending existing treaties or in making new extradition treaties to cover it.

The novel feature for us is that the Genocide Convention would bar any claim that an act of genocide was a political offense. We have considered political offenses as non-extraditable, and our treaties provide accordingly. However, this is believed to be a matter of policy, giving effect to our tradition of offering political asylum in this country to those fearing political persecution at home. To suggest changing this position raises a very serious policy question. It was for this very reason that the United Kingdom also declined to ratify the Convention. Nevertheless, should we decide to change our long-standing policy in this respect, no constitutional difficulty is perceived in the adoption of statutes or treaties providing for the extradition of political offenders. Furthermore, "there does not appear to be any generally recognized rule of international law that a State may not surrender . . . political offenders if it chooses to do so."

Just as we found that Congress has the authority to enact a statute making genocide a punishable crime, there is also the authority to enter into bilateral extradition treaties making genocide an extraditable offense. This can be done, if we choose, even though there be a claim that it was a political offense.

67 Our only multilateral extradition treaty "is presently inoperative." See TREATIES IN FORCE 293, n.1 (1971).
69 See Appendix at art. VII; 11 WHITEMAN, supra note 14, at 848, 850.
70 British Lord Privy Seal Heath, quoted in 11 WHITEMAN, supra note 14, at 871.
71 6 WHITEMAN, supra note 14, at 853. See also authorities quoted, at 799-857. The United States has just signed a treaty with Canada which excludes from the "political offense" exception those charged with hijacking aircraft or with kidnapping, murder or assault committed against persons to whom we have a duty, under international law, to give special protection. See art. 4(2) of this treaty in 65 DEPT. STATE BULL. 743 (1971).
The Basic Legal Question.

Since there is authority to carry out the obligations imposed by the Convention, we are brought again to the basic legal question: Is there a constitutional objection to the United States becoming a party? As we saw in the discussion of the basic legal objection to other human rights treaties, the issue involves consideration of the objectives and techniques of the treaty. What is the objective of the Convention, and how would the technique employed affect the United States? Is it dealing with matters in the field of external relations and foreign affairs? Would it merely be making law for this country in its relations between the Government and its people regarding matters which are essentially internal?

The Senate Foreign Relations Committee says the objective of the Convention is "to make genocide an international crime, whether committed during peace or war." However, we have seen that genocide is already a crime under international law "even without any conventional obligation." The Convention itself takes this view, for it does not purport to "make" genocide a crime, but instead, it "confirms" that it already "is" one. Rather, the objective of the Convention is to have the parties make genocide a punishable crime under their own domestic law, and an extraditable offense under their bilateral extradition treaties.

This technique can hardly be said to be dealing with "international" problems which require international agreement between States for solution. The fact that every country that becomes a party to the Convention must conform its domestic criminal law to a prescribed standard is not making international law or resolving an international problem. It is making uniform domestic law for the parties, and it is done in order to resolve their parallel but separate domestic problems. It is a technique closely allied to that employed in other human rights conventions, discussed above.

It may be argued by some that there can be no objection to our ratification of the Convention, since it would obligate us to enter into extradition treaties on genocide, and extradition clearly deals

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72 See text accompanying notes 39-51, supra.
74 See Appendix at art. I: "The Contracting Parties confirm that genocide . . . is a crime under international law." See also 11 Whiteman, supra note 14, at 848-49.
75 Id.
76 See text accompanying notes 39-51, supra.
77 See text accompanying note 39, supra. See also Tate, Deputy Legal Adviser, Dept. of State, 22 Dept. State Bull. 91-92 (1950), reprinted in 14 Whiteman, supra note 14, at 313-14.
with a matter between states. But that is not the correct analysis of the problem posed by the Convention. The Genocide Convention is neither a multilateral nor a bilateral extradition treaty. Rather, the question posed is whether the United States should enter, not into an extradition treaty, but into a treaty requiring us to make an extradition treaty. This would in turn require us to change our domestic legal situation. It is this precise situation under domestic law to which the Convention addresses itself.

In any event, extradition is merely a procedure ancillary to the main purpose of the Convention. The fundamental purpose is to have a statutory basis established for the punishment of genocide, and thus, in the words of the preamble, "liberate mankind from such an odious scourge . . . ." Even if the extradition requirement in other circumstances might be unobjectionable, it can hardly remedy a constitutional objection to the main purpose of the Convention, or, validate what would otherwise be an unconstitutional act.

Although the provisions of the Convention are not self-executing, the United States would be assuming an international obligation to enact a new criminal statute and hence change the law of this country. Our extradition treaties are self-executing. To assume an obligation to enter into such treaties again is an obligation to change our law. Undoubtedly, the Convention would be interpreted as requiring us to keep in force our laws which have the effect of implementing the Convention. But an obligation not to change a law, even if we desire to do so, would cause the law to continue in force, and thus, again make law for the United States. As in the case of other human rights treaties, our ratification of the Genocide Convention would have no appreciable effect abroad; its only effect would be to make law here.

Furthermore, the changes in the law would concern our domestic treatment of people within our territory. We would assume an obligation to set forth in our law methods for handling those who commit genocide within our jurisdiction, and a further obligation to cover by our bilateral extradition treaties (and hence by our law) how we would deal with those found within our borders who have committed genocide abroad. These matters concern the relations between the Government and its people, and they "do not have any direct bearing upon our conduct in the society of nations"; they are

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78 11 WHITEMAN, supra note 14, at 849.
79 See notes 52-53 and accompanying text, supra.
80 See note 39, supra.
81 See text accompanying notes 30-38, supra.
82 See Appendix at art. V. See also 11 WHITEMAN, supra note 14, at 850.
83 See text accompanying note 37, supra.
matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal" within the meaning of John Foster Dulles.

The Constitution prescribes that the Congress is to legislate on federal matters; the State legislatures, or the people themselves, on all other matters. The only significant effect, of our ratification of the Genocide Convention would be to "make laws for the people of the United States in their internal concerns," within the meaning of Charles Evans Hughes, and such action would therefore breach the limitations of the treaty power which he sets forth. Again, as Dulles declared: the treaty power should not be employed when to do so would "circumvent the constitutional procedure established in relation to what are essentially matters of domestic concern."

Ratification of the Genocide Convention would circumvent these very specific prescriptions of the Constitution of the United States, and violate the precepts of experienced and respected authorities. Such a step should not be taken.

CONCLUSION

As to human rights treaties in general, let us not make the mistake of writing law for this country by treaty unless there exists a problem in the field of external relations for which such action is essential to an equitable solution. Let us pause for a moment to realize what it means to take such a step. Human rights involves the relations between a government and its people. Our ratification of a human rights treaty would result only in writing the law for the United States regarding a matter that is entirely within our domestic jurisdiction. This action would be law made by an agreement with other nations designed to solve their domestic problems rather than ours, but which we would then have to honor and enforce as our law. Our cooperation in this respect would contribute absolutely nothing to the solution of the problem where it may exist abroad. This use of a treaty would be a world-law-making technique which has no advantage for us, and by which we accomplish nothing for others. It is not a method of law-making which the Constitution envisages, and its use would circumvent the procedures which the Constitution prescribes. It should be rejected as being an unconstitutional as well as an unwise employment of the treaty power.

The Genocide Convention in essence obligates its parties to

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84 See note 50, supra.
85 U. S. Const. art. I, § 1; U. S. Const. amend. X.
86 See text accompanying notes 46-47, supra.
87 See note 40, supra.
create and to maintain legislation (including that created by extradition treaties) making genocide a punishable and extraditable crime. Such legislation would be dealing with questions concerning how the Government of the United States is to deal with people within its territory. What acts, within its jurisdiction, will it treat as criminal? Will it extradite foreigners for such acts committed abroad by them? Such questions essentially involve only the relations of the Government to its people. They are not in the field of foreign affairs but are internal matters. There is ample authority to deal with them if we so desire without assuming any treaty obligations.

Ratification of the Genocide Convention by the United States would therefore be an unconstitutional use of the treaty power. To employ the language of the distinguished lawyers and statesmen quoted above: "[T]he relations of our people . . . as between themselves and their government are not properly a concern of other people and do not have any direct bearing upon our conduct in the society of nations."88 "Treaties should only be employed to deal with matters which "pertain to our external relations . . . to foreign affairs and not to make laws for the people of the United States in their internal concerns . . . ."89 They ought not to "be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern"90 which appropriately are within the local jurisdiction.

The conclusion seems clear. The United States should not join as a party to the Genocide Convention.

APPENDIX A

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

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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.

ARTICLE II

In the present Convention, 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.

ARTICLE III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.
ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.