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## THE GENOCIDE CONVENTION AND THE CONSTITUTION

MYRES S. McDOUGAL \* AND RICHARD ARENS †

Shocked by the Nazis' barbaric mass-murder of millions of Jews, Poles and Gypsies just because they were Jews, Poles and Gypsies,<sup>1</sup> a tense world threatened by new violence seeks in the Genocide Convention to mobilize the conscience of mankind, to create a new crime, and to outlaw under the laws of all mankind, the intentional destruction of racial, ethnical, national and religious groups. By this Convention, after recognizing "that at all periods of history genocide has inflicted great losses on humanity" and "that international cooperation is required" to "liberate mankind from such an odious scourge,"<sup>2</sup> the contracting states "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."<sup>3</sup> Genocide is defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such": "killing members of the group," "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births within the group," "forcibly transferring children of the group to another group."<sup>4</sup> In addition to "genocide," so defined, other acts are made

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1. The Nazis killed "six million Jews, two and one-half million Slavs and practically all the Gypsies of Europe." Turlington, *The Genocide Convention Should Be Ratified*, in A.B.A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW, PROCEEDINGS 26 (1949). See also 22 TRIAL OF THE MAJOR WAR CRIMINALS 491-96 (Nuremberg, 1948); Lemkin, *The U.N. Genocide Convention*, 95 CONG. REC. A 1224 (1949).

It is significant that the Nuremberg International Military Tribunal held that it did not have jurisdiction over these offenses save in cases where they were linked to aggressive war. This immunized the majority of crimes committed before the outbreak of the war. In the words of the tribunal: "The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime." 22 TRIAL OF THE MAJOR WAR CRIMINALS 498 (Nuremberg, 1948).

2. Preamble to CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. The Convention is found in U.N. Doc. A/760/corr. 2, p. 9 (Dec. 3, 1948). The votes and discussion of the United Nations General Assembly are found in U.N. Doc. A/PV 178 (Dec. 9, 1948), A/PV 179 (Dec. 9, 1948). The Convention will hereafter be cited by article only.

3. Art. I.

4. Art. II.

punishable: "conspiracy to commit genocide," "direct and public incitement to commit genocide," "attempt to commit genocide," and "complicity in genocide."<sup>5</sup> All persons "whether they are constitutionally responsible rulers, public officials or private individuals" who commit "genocide or any of the other [enumerated] acts" are to be punished<sup>6</sup> and the "Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect" to the Convention and to provide "effective penalties."<sup>7</sup> Trial is to be "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."<sup>8</sup> Disputes as to "interpretation, application or fulfillment" are to be "submitted to the International Court of Justice at the request of any of the parties to the dispute"<sup>9</sup> and "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 prevention or suppression of the crime.<sup>10</sup>

Spokesmen for the American Bar Association have urged that this Convention should not be ratified by the United States. At its September, 1949, meeting in the House of Delegates of the Bar Association resolved "that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions" and "that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of Government" and, therefore, recommended "that the convention on Genocide now before the United States Senate be not approved as submitted."<sup>11</sup> This action was based upon a report of the Bar Association's ironically named Special Committee on Peace and Law Through United Nations. In this Report the Genocide Convention is condemned and rejected as a proposal "by the action of the President, consented to by two-thirds of the Senators present when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their prevention, suppression and punishment and for the trial of persons accused thereof either in our domestic courts or in an international court."<sup>12</sup> From ratification of the

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5. Art. III.

6. Art. IV.

7. Art. V.

8. Art. VI.

9. Art. IX.

10. Art. VIII.

11. This resolution appears in A.B.A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT AND RECOMMENDATIONS (1949) and in A.B.A. SPECIAL COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS, REPORT (1949).

12. A.B.A. SPECIAL COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS, REPORT 10 (1949). Contrast the general tenor of the Report of the Section of International

Convention the Report imagines a flow of many horrors: "Endless confusion in the dual system of the United States" would be inevitable, with "the same crime" being "murder in state law" and "genocide in the federal and international fields," and race riots and lynching being both local crimes and genocide, depending "on the intent and extent of participation."<sup>13</sup> Freedom of speech and press might be denied as incitement to genocide.<sup>14</sup> Persons might be charged with unanticipated criminality because of the imprecision of "destroy," "mental harm," or, "in whole or in part."<sup>15</sup> American citizens might eventually come to be triable "by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime."<sup>16</sup> And so on. "To impose a great new body of treaty law which will become the domestic law of the United States" is described as "a tremendous change in the structure of the relation of the states and the federal government" of doubtful constitutionality.<sup>17</sup> "To deprive the states of a great field of criminal jurisprudence and place it in the federal field alone, or under the jurisdiction of an international court, is," so the Report runs, "truly revolutionary, not to be effected without an amendment of our Constitution."<sup>18</sup> Action by the President and the Senate, it is even urged in ancillary argument, is of doubtful constitutionality as incompatible with the power of the Congress "to define and punish . . . offenses against the law of nations."<sup>19</sup> This country is peculiarly vulnerable, another theme asserts, because the Convention, if constitutional, must, despite its express terms, be regarded as self-executing and the law of our land, before other nation-states perform.<sup>20</sup>

In the lead editorial of the last number of the *American Journal of International Law* the Resolution of the House of Delegates of the American Bar Association and the Report of the Association's Special Committee on Peace and Law through United Nations are approved and justified by that *Journal's* distinguished Editor-in-Chief, Mr. George A. Finch.<sup>21</sup> Mr. Finch also finds that the Genocide Convention undertakes to make "international crimes" of "a code of domestic crimes,"<sup>22</sup> and since the "protection of personal rights is vested principally in the States of the American Union," "compromises the system of constitutional law prevailing in the United States."<sup>23</sup> "The ratifi-

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and Comparative Law, *supra* note 11, though even this Report is somewhat meticulous in its suggestions of unnecessary reservations.

13. A.B.A. SPECIAL COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS, REPORT 12 (1949).

14. *Id.* at 13.

15. *Id.* at 15.

16. *Id.* at 12.

17. *Ibid.*

18. *Ibid.*

19. *Id.* at 14.

20. *Id.* at 12.

21. 43 AM. J. INT'L L. 732 (1949).

22. *Id.* at 735.

23. *Ibid.*

cation of the Genocide Convention as submitted would therefore," Mr. Finch summarizes, "confer upon the Federal Government a large area of jurisdiction which it does not now possess under the Constitution."<sup>24</sup>

The issues raised by the Bar spokesmen and Mr. Finch transcend the Genocide Convention. The Genocide Convention is but the first of several conventions being designed better to secure fundamental human rights and security throughout the world community; and, if the nations of the world ever decide to establish effective restraint upon preparation for atomic and bacteriological warfare, imposition of the negative sanctions of criminal law upon individuals and international enforcement will most certainly be indispensable components of such restraint. It may not therefore be amiss, whatever the pending action of the Senate on the Genocide Convention,<sup>25</sup> to explore in brief detail the assumptions and arguments of the Bar spokesmen and Mr. Finch and to ascertain whether the American people are in fact precluded by their Constitution from adhering to international agreements which they may on policy grounds deem wise or even indispensable.

## I

It is doubted by no responsible observer today that the treaty-making power is sufficiently broad and expansible to cover effective action on all matters of genuine international concern, under whatever changing conditions a changing world may impose.<sup>26</sup> The framers of our Constitution thought "it most safe," in Madison's words, to leave the treaty power without enumeration "to be exercised as contingencies may arise."<sup>27</sup> Madison emphasized:

"I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might and probably would be defective. They might be restrained by such a definition from exercising the authority where it could be essential to the interest and safety of the community."<sup>28</sup>

The classic modern statement is that of Chief Justice Hughes:

"It seems to me that, whatever doubt there may originally have been or may yet linger in some minds in regard to the scope of the treaty-making power, *so far as it relates to the external concerns of the nation there is no question for discussion*. I think it perfectly idle to consider that the Supreme Court would ever hold that any

24. *Ibid.*

25. As we write in mid-February, 1950, the Senate has taken no action and the record of the hearings before the Sub-committee of Committee on Foreign Relations is still unavailable.

26. For full documentation see McDougal and Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 14 *LAW & CONTEMP. PROB.* 490, 515 (1949), 59 *YALE L.J.* 60, 90 (1949). [Citation hereafter will be made only to the *Yale Law Journal*]. Similar views and further authorities appear in Hyman, *Constitutional Aspects of the Covenant*, 14 *LAW & CONTEMP. PROB.* 451 (1949).

27. 3 *ELLIOTT'S DEBATES* 515 (2d ed. 1836).

28. *Id.* at 514-15.

treaty made in a constitutional manner *in relation to external concerns of the nation* is beyond the power of the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated."<sup>29</sup>

This broad conception of the power has been many times accepted and expounded by the Supreme Court. A much honored pronouncement is that in *Geofroy v. Riggs* in 1890:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those 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 what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."<sup>30</sup>

The case commonly regarded as leading is *Missouri v. Holland*<sup>31</sup> in which the Court sustained an act of Congress as "necessary and proper" to implement a treaty for the protection of birds migrating between the United States and Canada, though two lower courts had held unconstitutional an earlier act designed to secure the same end but not in aid of a treaty.<sup>32</sup> Mr. Justice Holmes, speaking for the Court, insisted that "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found" and that the "case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."<sup>33</sup>

Whether a matter is of genuine international concern for determining the scope of the treaty power may, accordingly, safely be assumed to be a question, not of derivation from some ageless absolute, but of *contemporary fact*.<sup>34</sup> It can scarcely be suggested in the light of the many recorded "humanitarian interventions" on behalf of minorities,<sup>35</sup> of the known relation between the Nazis' internal and external violence,<sup>36</sup> of the ease with which under modern conditions models of disrespect for human dignity anywhere can

29. Hughes, in 23 PROC. AM. SOC'Y INT'L L. 194 (1929) (italics supplied).

30. 133 U.S. 258, 267, 10 Sup. Ct. 295, 33 L. Ed. 642 (1890).

31. 252 U.S. 416, 40 Sup. Ct. 382, 64 L. Ed. 641 (1920).

32. See *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915); *United States v. Shauver*, 214 Fed. 154 (E.D. Ark. 1914).

33. 252 U.S. at 433.

34. The theme is further developed in Boyd, *The Expanding Treaty Power*, 6 N.C.L. REV. 428 (1928).

35. 1 HYDE, INTERNATIONAL LAW 249, 209, 211 (2d ed. 1945); 1 OPPENHEIM, INTERNATIONAL LAW 280 (Lauterpacht ed. 1948); Hudson, *The International Law of the Future*, 30 A.B.A.J. 560 (1944).

36. Judgment of the International Military Tribunal in 22 TRIAL OF THE MAJOR WAR CRIMINALS 427 (Nuremberg 1948); Marx, *Totalitarian Politics*, 82 PROC. AM. PHIL. SOC. 1 (1940); and Marx, *Effects of International Tension on Liberty Under Law*, 48 COL. L. REV. 555 (1948).

affect peoples' consciences everywhere,<sup>37</sup> of the now generally recognized world-wide interdependences of all peoples for human rights and security and other values,<sup>38</sup> of the repeated obligations for the protection of human rights undertaken in the United Nations Charter,<sup>39</sup> of the unanimous resolution of the General Assembly of the United Nations that genocide is a crime under international law against all humanity,<sup>40</sup> of the unanimously adopted Universal Declaration of Human Rights,<sup>41</sup> and of the several international conventions for the protection of human rights presently being drafted<sup>42</sup> that the subject matter of the Genocide Convention is not properly within the realm of such international concern. Even the Resolution, presently criticized, of the American Bar Association's House of Delegates begins with the recitals "that it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples)," "that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong," and "that Genocide as thus understood should have the constant opposition of the government of the United States and of all its people."<sup>43</sup> From such assumptions, it is incredible contradiction to urge that the United States Government and its people cannot constitutionally express their opposition through international agreement.

The reiterated, though obscure, emphasis of the Bar spokesmen upon "revolutionary" or "tremendous" changes in our "form of government" bears the inference that they assume that the constitutional powers reserved to our several states in some way limit the powers of the Federal Government to

37. Under conditions of contemporary communication such personality dynamisms as are described in ALEXANDER, *OUR AGE OF UNREASON* (1932); LASSWELL, *POWER AND PERSONALITY* (1948), and other comparable books are global in their scope. Note especially Alexander's chapter on *The Emotional Structure of Totalitarianism*.

38. See McDougal and Leighton, *supra* note 26, for the broad outlines of the context in which the Genocide Convention is being proposed. Cf. McDougal, *The Role of Law in World Politics*, 20 *MISS. L.J.* 253, 273 (1949).

39. The Charter contains no less than seven specific references to human rights. McDougal and Leighton, *supra* note 26, at 67, offer itemization and summary. Article 55 pledges all subscribing states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion," and Article 56 to "joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." See, generally, GOODRICH AND HAMBRO, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* (2d rev. ed. 1949); and Cohen, *Human Rights Under the United Nations Charter*, 14 *LAW & CONTEMP. PROB.* 430 (1949).

40. See U.N. Doc. No. A/PV 179, at 70 (Dec. 9, 1948). There were no abstentions.

41. See U.N. Doc. No. A/PV 183, 161-65 (Dec. 10, 1948), A/PV 183/corr. 1 (Jan. 11, 1949). Byelorussia, Czechoslovakia, Poland, Saudi Arabia, Ukraine, South Africa, Soviet Russia and Yugoslavia abstained.

42. See *Symposium on International Human Rights*, 14 *LAW AND CONTEMP. PROB.* 411-650 (1949).

43. See A.B.A. SPECIAL COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS, REPORT 3 (1949).

make treaties or other international agreements. The consistent decisions of the Supreme Court, the practice of all branches of the government, and the opinions of leading authorities since the beginning of the country make it clear, however, that the powers of the states in no way limit the powers of the Federal Government to make international agreements. Among the prime factors leading to the call of the Constitutional Convention were the intolerable difficulties of conducting foreign affairs under the Articles of Confederation<sup>44</sup> and the framers sought in Article VI(2) of the new Constitution to make this nation "one" as to all external concerns by providing that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

In the celebrated case of *Ware v. Hylton*,<sup>45</sup> the Supreme Court applied this clause to hold the Treaty of Peace with Great Britain in 1783, preserving debts owed by American citizens to British creditors, paramount to a Virginia statute purporting to discharge such debts. Mr. Justice Chase, for the Court said: "It is the declared will of *the people* of the *United States* that every treaty made by the authority of the *United States* shall be superior to the *constitution* and *laws* of *any individual state*; and their will alone is to decide."<sup>46</sup> In the application of this principle the Supreme Court has upheld national supremacy with reference to such other matters ordinarily left to state regulation as "title to land, escheat and inheritance, statutes of limitation, local taxation, administration of alien estates, prohibition of employment of foreign labor, and the limitation of pawn-brokerage to citizens."<sup>47</sup> In statesmanlike summary Professor Borcharad long ago observed:

"It is within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign government. With the continued drawing together of the world by increased facilities for travel and communication, the subjects of common interest which require international regulation will continue to grow in extent and variety. Uniformity of legislation by withdrawal from state legislative control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary federal treaty power."<sup>48</sup>

Even if it be assumed, as the Bar spokesmen wrongly assume that the Geno-

44. See FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 42-52 (1923).

45. 3 Dall. 199, 1 L. Ed. 568 (U.S. 1796).

46. 3 Dall. at 237.

47. See McDougal and Leighton, *supra* note 26, at 95, 96, and cases cited.

48. Note, *Treaty-Making Power as Support for Federal Legislation*, 29 *YALE L.J.* 445, 449 (1920).



cide Convention embodies only "domestic crimes" under present state control, from a federal power so broadly conceived and so expansible it is hardly possible, certainly not rational, to except genocide.

The Tenth Amendment, it may be added for full measure of doctrine, in no way detracts from federal power to make international agreements. The irrelevance of this Amendment is implicit in all of the decisions indicated above and in *Missouri v. Holland*,<sup>49</sup> Mr. Justice Holmes explicitly rejects the notion that some "invisible radiation from the general terms of the Tenth Amendment"<sup>50</sup> limits the treaty power.

"We must consider," he writes, "what this country has become in deciding what that Amendment has reserved. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power."<sup>51</sup>

Fortunately the Amendment has since been recognized by the Supreme Court as equally a superfluous truism with respect to the powers of the whole Congress and the President.<sup>52</sup>

The suggestion of the Bar spokesmen that approval of the Genocide Convention by the Senate as a treaty would be incompatible with the power of the whole Congress "to define and punish . . . offenses against the law of nations" is similarly without foundation. Historic answer was formulated in the Versailles Treaty debate by Senator Kellogg:

"The argument is as old as the history of treaties in this country. It was presented with great ability by the opponents of the Jay treaty and overcome by the able statesmen of that day, foremost among whom was Alexander Hamilton. From that day to the present time the question has been frequently raised in connection with treaties for the payment of money, regulating commerce, fixing import duties, regulating rights of trade with foreign countries, fixing boundaries, and various other subjects, the objection being that as the power to legislate in relation to these matters was in the entire Congress, any treaty made by the President and the Senate was therefore void. But these objections have proved unavailing and a large number of treaties have been

49. 252 U.S. 416, 40 Sup. Ct. 382, 64 L. Ed. 641 (1920).

50. 252 U.S. at 434.

51. *Ibid.*

52. *United States v. Darby*, 312 U.S. 100, 124, 61 Sup. Ct. 451, 85 L. Ed. 609 (1940); *Pink v. United States*, 315 U.S. 203, 62 Sup. Ct. 552, 86 L. Ed. 796 (1942). In the former case Mr. Justice Stone, speaking for the Court, said: "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it has been established by the constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." 312 U.S. at 124. See also Feller, *The Tenth Amendment Retires*, 27 A.B.A.J. 223 (1941).

made and ratified by the Senate where legislation was necessary to carry them into operation." 53

Throughout our history the treaty power and the powers of the whole Congress have in fact been exercised concurrently,<sup>54</sup> the latest expression prevailing,<sup>55</sup> over the same events of the greatest variety in our international affairs: witness treaties and statutes on the regulation of commerce, trademarks and copyrights, armaments, taxation, traffic in women, trade in dangerous drugs, commercial aviation, and so on.<sup>56</sup> No good reason has been, or can be, given to justify treating this one particular power of the Congress, the power "to define and punish . . . offenses against the law of nations," as exclusive with respect to this one particular treaty, the Genocide Convention.<sup>57</sup> The real relevance of this particular power of the Congress is not to establish the disability of the President and the Senate, but rather to affirm

53. See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 12 (1943).

54. See BURR, *Treaty-Making Power*, 51 PROC. AM. PHIL. SOC'Y 271, 306 (1912); 5 MOORE, DIGEST OF INTERNATIONAL LAW 164 (1906); WEINFELD, LABOR TREATIES AND LABOR CONTRACTS 5 (1937).

55. See *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415 (U.S. 1829) for the proposition that treaties may supersede prior Congressional acts, and *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227 (U.S. 1870) for the converse proposition that, from the point of view of domestic law, an act of Congress may override an earlier treaty.

56. McDougal and Leighton, *supra* note 26, at 98.

57. Penal sanctions have been invoked time and again "pursuant to international agreement." Even a partial history of such legislation establishes the existence of a traditional pattern.

An international convention for the protection of submarine cables [See 24 STAT. 989 (1884)] was followed by criminal legislation for its enforcement. See 47 U.S.C.A. § 21 (1928), first enacted in 1888.

International accord for the suppression of the white slave traffic [see 35 STAT. 1979 (1904)] resulted in speedy federal criminal legislation. See 18 U.S.C. § 242 (1948); *cf.* 18 U.S.C.A. § 402 (1927), first enacted in 1910.

Early international agreement in the field of opium control [38 STAT. 1912 (1912)] brought federal regulatory change accompanied by criminal sanctions. See 21 U.S.C.A. § 182 (1927); section added in 1914.

Penal legislation as recent as 1942 was enacted "pursuant to international agreement" in the field of opium control. See 21 U.S.C.A. § 188 (Supp. 1949). Infinitely broader in its application to domestic events than the Genocide Convention, it provided for rigid federal controls over individuals and business enterprises engaged in opium manufacture, by means of a licensing system. This was partially based on the treaty power. In the case of *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal. 1944), this use of the treaty power was endorsed by the federal court. In the words of the court: "The competency of the United States to enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit forming drugs is not questioned. The obligations of the United States . . . were lawfully undertaken in the proper exercise of its treaty making power. And Congress is constitutionally empowered to enact whatever legislation is necessary and proper for carrying into execution the treaty making power of the United States." *Id.* at 813.

Sanctions have further been invoked for international offenses without benefit of formal international agreement. Thus, for example, the United States has penalized the counterfeiting of foreign currency [see 18 U.S.C. § 482 (1948); *cf.* 23 STAT. 22 (1884)] solely for the reason that the "law of nations requires every government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof." *United States v. Arjona*, 120 U.S. 479, 484, 7 Sup. Ct. 628, 30 L. Ed. 728 (1887).

beyond reasonable doubt that there is a perfectly constitutional alternative to the treaty-making procedure for approving the Genocide Convention.<sup>58</sup>

The fact is, moreover—wholly contrary to the suggestions of the Bar spokesmen—that this particular Convention, as submitted by the President to the Senate, expressly reserves to the whole Congress the power to define, and to fix the punishment for, the offense created. By its very terms the Convention is made non-self-executing. In Article V the contracting parties merely “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.” Article VI requires, further, the legislative designation of competent tribunals. As long ago as *Foster v. Neilson*,<sup>59</sup> Chief Justice Marshall, in considering whether the treaty by which Florida was acquired from Spain was self-executing, announced a doctrine, not since disputed, that “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.”<sup>60</sup> The words of the Genocide Convention, and its “legislative history,” would seem to bring it clearly within this principle.<sup>61</sup> Whatever possible doubt anyone might entertain could be removed by the Senate attaching a reservation that this government interprets the Convention to be non-self-executing.

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58. The equivalence with the treaty power of the powers of the whole Congress and the President is developed in McDougal and Lans, *Treaties and Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 *YALE L.J.* 181, 534 (1945); CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 8 (1944); McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); Wright, *The United States and International Agreements*, 38 *AM. J. INT'L L.* 341 (1944).

The power to “define and punish piracies and felonies committed on the high seas and offenses against the law of nations” (U.S. CONST. Art. I, § 8) lends itself to the accommodation of an expanding concept of international criminality under a contemporary law of nations with remarkable ease. A power that has been sufficiently flexible to cover as diverse a group of offenders as pirates [*United States v. Smith*, 5 *Wheat.* 153, 5 *L. Ed.* 57 (U.S. 1820)], assailants of diplomats [*Republica v. Longchamps*, 1 *Dall.* 111, 1 *L. Ed.* 59 (Pa. 1784)] counterfeiters [*United States v. Arjona*, 120 *U.S.* 479, 7 *Sup. Ct.* 628, 30 *L. Ed.* 728 (1887)] and war criminals [*Ex parte Quirin*, 317 *U.S.* 1, 63 *Sup. Ct.* 1, 87 *L. Ed.* 3 (1942)], would seem capable of extension to perpetrators of genocide. For further support of congressional authority there is, as the articles above indicate, a whole array of other relevant powers specifically granted to the Congress.

In 1818, the United States Government assumed the right to punish an international offense on foreign soil on no other theory than that a duty of action devolved on the outside world in the face of the helplessness of domestic authority against the offenders. In an official communication to the French Minister in Washington, Secretary of State Adams explained the American position as follows: “When an island is occupied by a nest of pirates, harassing the commerce of the United States, they may be pursued and driven from it by authority of the United States, even though such island were nominally under the jurisdiction of Spain, Spain not exercising over it any control.” 2 *MOORE, DIGEST OF INTERNATIONAL LAW* 408 (1906).

59. 2 *Pet.* 253, 7 *L. Ed.* 415 (U.S. 1829).

60. 2 *Pet.* at 314.

61. Rusk, *The Place of the Genocide Convention in the General Pattern of U.S. Foreign Relations*, 22 *STATE DEP'T BULL.* 163, 164 (1950).

From these explicit provisions in the Genocide Convention requiring legislation by the contracting parties "in accordance with their respective constitutions"<sup>62</sup> to make the Convention internally effective—provisions which can be made even more explicit if the Senate so desires—it is further apparent that the contention of the Bar spokesmen that the United States would be peculiarly vulnerable in adhering to the Convention, on the theory that the Convention might become enforceable within this country before being implemented in other countries, is completely unreal. The suggestion of the Bar spokesmen that the plain terms of a treaty cannot preclude its "automatic operation" under the supremacy clause, that no way can be devised to prevent the inexorable operation of this clause, is sheer fantasy, belied by a long and continuous record of governmental practice and judicial decision.<sup>63</sup> Nothing in the Constitution requires a treaty or other international agreement to be self-executing. The supremacy clause does nothing more than make the terms of an international agreement, whatever the terms are, the law of the land: it prescribes no particular terms. This government can stipulate with other governments for an agreement to become effective, internally as well as externally, at whatever time and subject to whatever conditions it chooses. It is difficult, furthermore, to see what this country could lose in prohibiting such an infamous crime as genocide even if other countries failed to honor their commitments. We have had no genocide in this country as the proposed Convention defines it and our democratic values preclude our planning any new genocide. In case of bad faith by other governments, the Congress may of course always promptly abrogate any internal obligation we may have effected; and well-hallowed doctrines of international law, such as *rebus sic stantibus*<sup>64</sup> and abrogation for failure of performance, are available to discharge any international obligation assumed.

## II

It is clear that the Genocide Convention, as submitted to the Senate, in no way commits the United States to future acceptance of an international criminal court. Trial is to be by "such international penal tribunal as may have jurisdiction" only "with respect to those Contracting Parties which shall have accepted its jurisdiction."<sup>65</sup> Since, however, the Convention does

62. Art. V.

63. For conclusive development of the point see Chafee, *Legal Problems of Freedom of Information in the United Nations*, 14 *LAW & CONTEMP. PROB.* 545, 560 (1949). See also Dickinson, *Are the Liquor Treaties Self-Executing?* 20 *AM. J. INT'L L.* 444 (1926). Without benefit of any saving provisions, treaties providing for money payments and treaties which are penal in character have been regarded as non-self-executing by the courts. See, e.g., *Turner v. American Baptist Missionary Society*, 24 *Fed. Cas.* 344, No. 14,251 (C.C. Mich. 1852); and *The Over The Top*, 5 *F.2d* 838 (D. Conn. 1925).

64. BRIGGS, *THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES* 477 (1938); *HARVARD RESEARCH IN INTERNATIONAL LAW, LAW OF TREATIES* 1077, 1096 (1935).

65. Art. VI.

contemplate the creation of an international tribunal and since, as observed above, a world criminal court may become a necessity not only for punishing genocide but for policing other crimes, such as violation of atomic energy regulations, inimical to world security,<sup>66</sup> it may be worthwhile to look more closely at the spectre of foreign inquisition raised by the Bar spokesmen and to examine whether a world criminal court is in fact incompatible with our Constitution and alien to our traditions.

One hundred and fifty-five years ago, when the Jay Treaty was before the country, a spokesman of that day declaimed:

"If they can create new crimes by treaty, and define the punishment of them, the whole criminal code is subjected to the will of the president and senate. . . . And to begin with the sixth article. By this article commissioners are to be appointed, two by the British king, two by the president and senate; the fifth by the other four, or by lot. These commissioners are to sit *as a court*, to determine questions relative to the demands of the British . . . They are to examine the parties on oath, to fix their *own* rules of evidence, and to decide not by the laws of the country, but according to their ideas of justice and equity. Their decision is to be both *arbitrary and final*. . . . What power then exists either in the president and senate, or even in the legislature to assume this right, which the Union has vested in a judiciary . . . Or will it be said, that the power of making treaties, implies a right to trample under foot every check that the constitution has provided against the abuses of either branch of government?"<sup>67</sup>

Today the Bar spokesmen say:

"When it is borne in mind that the rights as embodied in the first ten amendments are a restraint on our federal government—rights which every citizen inherently has against the United States and which it does not possess and cannot give away—how can that government by treaty, or otherwise, delegate the punishment of a crime, which can become such only by act of Congress, to an international tribunal?"<sup>68</sup>

Decisively rejected when first made, the argument has today even less basis in our Constitution and even less relevance to the national interest.

It cannot today reasonably be doubted that the United States has the power to join in the establishment of international courts with jurisdiction over events that are the proper subjects of international negotiation.<sup>69</sup> The power has been too many times exercised, with the support of all branches of the government, and never denied. Witness the participation by the United States in a whole host of international arbitration tribunals<sup>70</sup> and in the

66. One of the best general statements of the need for a world court with real power is Kelsen, *Peace Through Law* (1944).

67. "Cato," No. XIII, in 1 *AMERICAN REMEMBRANCER* 248-52 (1795).

68. A.B.A. SPECIAL COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS, REPORT 12 (1949).

69. 2 HYDE, *INTERNATIONAL LAW* § 504 (2d ed. 1945).

70. See HUDSON, *INTERNATIONAL TRIBUNALS* (1944); MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* (1898); CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946); Hackworth, *Fundamental Principles Governing International Claims*, 17 *A.B.A.J.* 193 (1931).

recent international war crimes courts,<sup>71</sup> all supported by the Congress and sustained by the Supreme Court,<sup>72</sup> and our contemporary adherence to the International Court of Justice.<sup>73</sup> Article III (1) of the Constitution, providing that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," has never been held to exclude the establishment, under a wide variety of federal powers, of other courts, both national and international, not subject to direct review by the regular courts established under that Article.<sup>74</sup> The Supreme Court has, furthermore, repeatedly held that these other courts are not bound to compliance *ipsis verbis* with constitutional limitations imposed by the Bill of Rights upon criminal proceedings in the regular federal courts: it is enough, it opens no floodgates to arbitrary power, if these courts, like the regular state courts exercising concurrent jurisdiction with the federal courts, comply, not with the letter of the various amendments, but with the substance of "due process."<sup>75</sup> A similar conclusion could easily obtain with respect to an international court established with jurisdiction over genocide or other international crimes committed within this country. It is not constitutionally necessary for the United States to force the rest of the world, in order to secure an effective international criminal jurisdiction, to adopt an exact replica of eighteenth-century American institutions designed to limit the power of regular federal courts. The Supreme Court could, without strain of precedent or reason, hold constitutional our participation in an international court whose charter and procedures incorporated the substantial elements of fairness which those institutions were designed to secure.<sup>76</sup> For any abuse by international officials of such charter

71. See *Hirota v. MacArthur*, 338 U.S. 197, 69 Sup. Ct. 197 (1948), Note, 47 MICH. L. REV. 835 (1949); *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), cert. denied, 338 U.S. 879 (1949); Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

72. See *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108 (U.S. 1828); *Frelinghuysen v. Key*, 110 U.S. 63, 3 Sup. Ct. 462, 28 L. Ed. 71 (1884); and cases cited *supra*, note 71.

73. See U.N. CHARTER, c. 14; GOODRICH AND HAMDRÖ, CHARTER OF THE UNITED NATIONS 606 (2d rev. ed. 1949); Hudson, *The World Court: America's Declaration Accepting Jurisdiction*, 32 A.B.A.J. 832 (1946).

74. Illustrations are offered in the text below. See MOORE, JUDICIAL CODE—COMMENTARY ¶ 0.03(2) (1949); *In re Ross*, 140 U.S. 453, 11 Sup. Ct. 846, 35 L. Ed. 581 (1891); *In re Yamashita*, 327 U.S. 1, 66 Sup. Ct. 340, 90 L. Ed. 499 (1946); *Hirota v. MacArthur*, 338 U.S. 197, 69 Sup. Ct. 197 (1948); cf. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242 (U.S. 1828). On the nonexclusiveness of Article III for other purposes see *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 Sup. Ct. 1173 (1949), Note, 3 VAND. L. REV. 271 (1950).

75. Full documentation follows in the text. See *Ex parte Quirin*, 317 U.S. 1, 40, 63 Sup. Ct. 1, 87 L. Ed. 3 (1942): "In the light of long continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions." Cf. *In re Ross*, 140 U.S. 453, 11 Sup. Ct. 846, 35 L. Ed. 581 (1891); *In re Vidal*, 179 U.S. 126, 21 Sup. Ct. 48, 45 L. Ed. 118 (1900).

76. For similar brief presentation see Hyman, *Constitutional Aspects of the Covenant*, 14 LAW & CONTEMP. PROB. 451, 462 (1949). An early authoritative exposition is Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AM. J. INT'L L. 64, 70, 85 (1918).

and procedures, if spectres should become real dangers, the United States could always effect, by express reservation if regarded as necessary, a speedy withdrawal from the court.

The extent to which the United States has participated in international arbitration, free from direct review by national courts, needs no new recounting. It is common knowledge how the Jay Treaty of 1794<sup>77</sup> between the United States and Great Britain "gave impetus to a revival of the judicial process of arbitration which had fallen into disuse during the eighteenth century."<sup>78</sup> This treaty established an international commission with the power of administering oaths, hearing witnesses, and making binding awards upon the complaints of "divers merchants."<sup>79</sup> The attack upon the treaty was, as indicated above, almost indistinguishable in tenor and words from the attack by contemporary Bar spokesmen upon the Genocide Convention. With little difficulty, however, this attack was swept aside, and arbitration treaties granting international tribunals authority to adjudicate over transactions within the jurisdiction of the United States,<sup>80</sup> and commonly affecting private claims,<sup>81</sup> became our accepted governmental practice. Today a preference for

77. See 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES 245 (Miller, 1931).

78. HUDSON, INTERNATIONAL TRIBUNALS 3 (1944).

79. See note 77, *supra*, 249-51.

80. As the Jay Treaty, *supra* note 78, clearly did. See 2 HYDE, INTERNATIONAL LAW, 1586 *et seq.* (2d ed. 1945); HUDSON, INTERNATIONAL TRIBUNALS 196 (1944). The question of national liability, arising out of the injury of aliens on United States soil provides another outstanding example. See BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 214, 215 (1919).

It may be observed that an irrational emphasis is sometimes placed upon the physical *locus* of an event and upon outmoded notions about a "territorial" basis of Jurisdiction. For full discussion see COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942). The important fact for a nation, as well as for its individual citizens, is not simply where an event takes place but rather the total effect of the event upon all the values of the nation and its citizens. Thus, in recognition of this importance of total effect, nation-states have claimed jurisdiction upon a great variety of bases. These are summarized in the Harvard Research under "five general principles": "first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and, fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense." HARVARD RESEARCH IN INTERNATIONAL LAW, JURISDICTION WITH RESPECT TO CRIME (1935). The United States has undertaken to exercise jurisdiction over acts taking place beyond its boundaries but having effects within its boundaries. *Ford v. United States*, 273 U.S. 593, 47 Sup. Ct. 531, 71 L. Ed. 793 (1926). Holding an agreement made in Canada to violate our Antitrust Act, Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) states: "[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443. It should be obvious that unless nation-states are willing to yield to any international court they create concessions on "territorial" notions of jurisdiction comparable to those they independently claim for themselves, no very effective controls can be established over crimes against world security.

81. See *Frelinghuysen v. Key*, 110 U.S. 63, 3 Sup. Ct. 462, 28 L. Ed. 71 (1884). A convention had been concluded between Mexico and the United States for the adjustment of the property claims of citizens of either country against the other under the auspices

international arbitration is national policy,<sup>82</sup> even though the traditional procedure of arbitration tribunals is at variance from that constitutionally required of our regular courts.<sup>83</sup>

The power of the United States to participate in the establishment of international courts, free from direct review by national courts and not restrained by the literal prescriptions of the Bill of Rights, has received recent and dramatic confirmation in the decisions of the Supreme Court declining to review the judgments of the World War II international war crimes tribunals.<sup>84</sup> Thus in *Hirota v. General of the Army MacArthur*,<sup>85</sup> though the petitioners, Japanese military commanders and officials who had been found guilty of war crimes against humanity by the International Military Tribunal for the Far East, sought leave to file petitions for writs of habeas corpus to test the legality of their detention, the Supreme Court found that "the tribunal sentencing these petitioners is not a tribunal of the United States" but a military tribunal "set up by General MacArthur as the agent of the Allied Powers" and, hence, that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners."<sup>86</sup> In a special concurrence, Mr. Justice Douglas questioned whether the Supreme Court should stop short with the finding that the tribunal had been set up by the Allied Powers and insisted that "we would ascertain whether, so far as American participation is concerned there was authority to try the defendants for the precise crimes with which they are charged,"<sup>87</sup> but he assumed that the Court had "no authority to review the judgment of an international tribunal" and concluded that the Tokyo Tribunal in question was not a "judicial tribunal" but "solely an instrument of political power," with respect to which "the President as Commander-

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of an international arbitration commission whose decision was to be considered final. An award was made in due course on the claim of a Benjamin Weil, an American citizen, and the Mexican government began paying installments to the United States Government for distribution to the claimant. Upon representations by the Mexican government that the award had been fraudulently procured, the United States Government, notwithstanding continued Mexican payments under the award, suspended distribution to the claimant and entered into negotiations with the Mexican government for a rehearing of the case. Suit to obtain mandamus requiring continued distribution under the award was brought on the theory that the award had vested an absolute property right which neither the United States singly, nor the United States and Mexico jointly could divest. The suit was dismissed. "As to the right of the United States to treat with Mexico for a retrial," said the Supreme Court, "we entertain no doubt." 110 U.S. at 72. See also *United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183 (1891); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223 (1899); *The La Ninfa*, 75 Fed. 513 (9th Cir. 1896).

82. See 22 U.S.C.A. § 261 (1927): "It is hereby declared to be the policy of the United States to adjust and settle its international disputes through arbitration."

83. See BISHOP, *INTERNATIONAL ARBITRAL PROCEDURE* (1930); CARLSTON, *op. cit. supra* note 70; RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (1926) (Supp. 1936).

84. See *supra*, note 71. The cases are collected by Mr. Justice Jackson in *Hirota v. MacArthur*, 338 U.S. 197, 69 Sup. Ct. 197 (1948).

85. 338 U.S. 197, 69 Sup. Ct. 197 (1948).

86. 338 U.S. at 198.

87. *Id.* at 205.



in-Chief, and as spokesman for the nation in foreign affairs, had the final say.”<sup>88</sup> The relevance of this precedent may be emphasized by recalling that the Fifth and Sixth Amendments, when applicable, are generally held to protect aliens and citizens alike.<sup>89</sup>

Early precedent in the penal sphere for according international adjudication, in the sense of universal jurisdiction, over events, touching American citizens and otherwise within the jurisdiction of the United States, may be found with respect to the crime of piracy, long regarded as an offense against all nations. “Piracy is by the law of nations,” states the Harvard Research, “a special, common basis of jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to interests under the states’ protection.”<sup>90</sup> Because “pirates are enemies of the human race . . . every state participates in a common jurisdiction to capture pirates and their ships on the high sea, and to prosecute and punish for piracy persons who lawfully are seized and against whom there is proper ground for prosecution.”<sup>91</sup> To these traditional conceptions of international law the Congress has given specific legislative implementation.<sup>92</sup> It should require no greater stretch in human sympathy or of the Constitution to extend authoritative doctrines and policies created for controlling robbers on the high seas, as “enemies of the human race,” to the apprehension and punishment of mass-murderers on land.

Further historic precedent, less well remembered today, can be found in measures undertaken by the United States in collaboration with other governments to suppress the slave trade, a crime analogous to genocide. Here a tempestuous course of Anglo-American diplomacy was climaxed by our ultimate acceptance of the principle of international penal jurisdiction over individuals for acts committed within unquestioned United States jurisdiction. Following after the establishment of international tribunals for the suppres-

88. *Id.* at 204, 215.

89. The withdrawal of such procedural safeguards as grand jury indictment and jury trial from aliens facing—*e.g.*, deportation proceedings—has been justified solely by the assumption that since no criminal punishment is involved, the Fifth and Sixth Amendments are inapplicable. See *Wong Wing v. United States*, 163 U.S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140 (1896); *cf. Bridges v. Wixon*, 326 U.S. 135, 65 Sup. Ct. 1443, 89 L. Ed. 2103 (1945). That aliens are among the direct beneficiaries of the Bill of Rights has been repeatedly proclaimed by the Supreme Court. “To be sure,” said Mr. Justice Douglas, speaking for the Court, “aliens as well as citizens are entitled to the protection of the Fifth Amendment.” *United States v. Pink*, 315 U.S. 203, 228, 62 Sup. Ct. 552, 86 L. Ed. 796 (1942). Similarly, aliens as well as citizens have been held entitled to freedom of speech and press. *Bridges v. California*, 314 U.S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192, 159 A.L.R. 1346 (1941); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 Sup. Ct. 1443, 89 L. Ed. 2103 (1945). In the field of state legislation, aliens as well as citizens are deemed to be within the protection of the Fourteenth Amendment. *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 Sup. Ct. 1138, 92 L. Ed. 1478 (1948).

90. HARVARD RESEARCH IN INTERNATIONAL LAW, PIRACY 757 (1932).

91. *Ibid.*; *cf. The Marianna Flora*, 11 Wheat. 1, 40, 6 L. Ed. 405 (U.S. 1826); *United States v. Palmer*, 3 Wheat. 610, 630, 631, 4 L. Ed. 471 (U.S. 1818).

92. See 18 U.S.C.A. § 1651 (1948) for the most recent legislative implementation.

sion of the slave trade by England and other countries,<sup>93</sup> an Anglo-American treaty, signed on March 13, 1824,<sup>94</sup> declared the slave trade to be piracy at least between the two contracting parties who were accorded the reciprocal right of search on the high seas coupled with the duty of escorting guilty vessels and crews for surrender to the jurisdiction of the tribunals of the country to which they belonged. The action was punitive, indistinguishable from search and arrest under municipal police auspices. Approved in the Senate in the same year,<sup>95</sup> this treaty had gathered decisive support in the House well in advance of its ratification. As early as 1823, the House by resolution, had urged the President to enter into negotiations with other states with a view to declaring the slave trade piracy by the law of nations<sup>96</sup> and therefore punishable on the basis of universal jurisdiction. Eloquent testimony to the overwhelming support for this measure of international punishment was given by no less formidable an opponent than John Quincy Adams: "But as to the right of search, in the bitterness of my soul I say it was conceded by all the authorities of this nation."<sup>97</sup>

The continuity of national policy on slave trading was emphasized in 1890 when the reciprocal right of search was conceded by this country in conjunction with all of the major powers by the Act of Brussels.<sup>98</sup> Long before, however, United States recognition of the principle of international criminality and of the jurisdiction of international penal tribunals over individual citizens

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93. International tribunals were established by treaty shortly after an Eight Power Declaration at the Congress of Vienna in February, 1815, had called for the abolition of the slave trade as "repugnant to the principles of humanity and universal morality." 3 STATE PAPERS 971. Their function was to determine, without appeal, the legality of detention of vessels brought into their jurisdiction by war ships of the parties. Condemnation followed a positive finding. See British treaties with Spain, 4 STATE PAPERS 33-53 (1817); Brazil, 14 STATE PAPERS 609 (1826); Netherlands, 5 STATE PAPERS 125 (1818); Sweden, 12 STATE PAPERS 3 (1824). The treaty with Sweden is particularly significant in establishing the punitive nature of the operation. As explained in the treaty, the two contracting parties "mutually consent that the Ships of their Royal Navies . . . shall visit such merchant-vessels of the two Nations as may be suspected . . . of being concerned in the Traffick of Slaves, contrary to the provisions of this Treaty, and, in case thereof, may detain and bring away such Vessels, in order that they may be brought to trial." 12 STATE PAPERS 6. The Mixed International Courts of Justice, with the duty of receiving the depositions of the crews, decided upon the legality of detention and had powers of condemnation. By this treaty, a captain facing such an international tribunal was granted the right of retaining counsel "*to conduct his defense.*" *Id.* at 20 (italics supplied). See also Quintuple Treaty, 30 STATE PAPERS 269 (1841). See generally JACKSON, EUROPEAN POWERS AND SOUTH-EAST AFRICA (1942); MATHIESON, GREAT BRITAIN AND THE SLAVE TRADE (1929); SOULSBY, THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS (1933).

94. 12 STATE PAPERS 838 (1824).

95. Because of geographical restrictions placed upon the right of search by the Senate, the treaty was subsequently rejected by Great Britain. See *id.* at 853-58.

96. Text of House resolution, carried by a vote of 131 to 9 on Feb. 28, 1823, 40 ANNALS OF CONG. 1147 (1823): "*Resolved*, That the President of the United States be requested to enter upon and prosecute, from time to time, such Negotiations with the several maritime powers of Europe and America, as he may deem expedient for the effectual abolition of the African slave trade, and its ultimate denunciation, as Piracy, under the law of nations, by the consent of the civilized world."

97. CONG. GLOBE, 27th Cong., 2d Sess. 424 (1842).

98. U.S. TREATY SER. No. 383 (Dep't State 1890).

for acts committed within United States jurisdiction had become final. By the treaty of 1862 between this country and Great Britain.<sup>99</sup> the reciprocal right of arrest, detention and search was authoritatively reiterated. This was supplemented by delegation of partial punishment of the offense to three "Mixed Courts of Justice, formed of an equal number of individuals of the two nations," using a procedure at variance from that of the federal or state courts, and authorized to pronounce judgment without appeal.<sup>100</sup> The scope of the punishment by order of the Mixed Courts of Justice was restricted to a property forfeiture: the condemnation and breaking up of the guilty vessel.<sup>101</sup> Additional pains and penalties could be inflicted by domestic tribunals. Further internationalization of the criminal process was effected by the treaty's imposing the requirement that "in so far as it may not be attended with grievous expense and inconvenience, the master and crew of any vessel which may be condemned by a sentence of one of the Mixed Courts of Justice . . . [should] be sent and delivered up to the jurisdiction of the nation under whose flag the condemned vessel was sailing . . . and that the witnesses and proofs necessary to establish . . . guilt . . . [should] also be sent with them."<sup>102</sup> To the Mixed Court infliction of punishment by severe property forfeitures, we see thus added internationalization of the criminal process in arrest, search, detention and the collection of incriminating evidence for further penal action elsewhere. The right of detention alone carries with it an exhaustive criminal jurisdiction over the person. Infractions, whether they be misdemeanors or felonies, when committed in the course of a detention authorized by treaty, may give rise to individual criminal prosecution in a foreign state which has established that right. Over and above arrest and detention, the mere act of accusation constitutes an undeniable punishment.<sup>103</sup> Nor can there be any doubt about the penal nature of condemnation. Forfeiture of property has traditionally been regarded as severely punitive and was so regarded at the time of the treaty.<sup>104</sup> Condemnation of the guilty vessel was linked to the

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99. 8 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 753 (Miller, 1948).

100. *Id.* at 755-56.

101. *Id.* at 766.

102. *Id.* at 759.

103. For a contemporary view, see Frank, J., in *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947): "[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently the public remembers the accusation, and suspects guilt, even after an acquittal."

104. See the characterization of condemnation proceedings in *The Burdett*, 9 Pet. 682, 690, 9 L. Ed. 273 (U.S. 1835): "This prosecution . . . is a highly penal one, and the penalty should not be inflicted unless the infractions of the law should be established beyond reasonable doubt." A modification of the Supreme Court view of the standard of proof required in a proceeding *in rem* to enforce a forfeiture took place well after the treaty of 1862, without directly overruling *The Burdett*. See *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 24 L. Ed. 901 (1877); and *United States v. Regan*, 232 U.S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494 (1914).

infliction of the death penalty in "An Act to protect the commerce of the United States, and punish the crime of piracy," passed in 1819.<sup>105</sup> In this context, at least, it was dubbed "harsh punishment" by the Supreme Court at a time when the slave trade had long been denominated piracy.<sup>106</sup> Against this background, condemnation by the Mixed Courts embodied the full equivalent of judicial obloquy for crime, as well as a material deprivation, both commonly accepted ingredients of criminal sanction.<sup>107</sup> The conclusion is inescapable that the treaty of 1862 invoked criminal punishment of formidable proportions and consciously and deliberately authorized the infliction of this punishment upon United States citizens by an international tribunal. Senate approval was "without dissent."<sup>108</sup> Senator Sumner, the chief proponent of the treaty in the Senate, had demolished any opposition as follows:

"But whatever doubts might have prevailed at an earlier period, when the question was less understood, it is plain now that this objection is wholly superficial and untenable. . . . To insist that the restrictions of the Constitution, evidently intended for the national judicature, are applicable to these outlying tribunals, is to limit the treaty power and to curtail the means of justice. . . . Mixed courts are familiar to International Law, and our country cannot afford to reject them, least of all on a discarded technicality which would leave us isolated among nations. . . . A moment lost is a concession to crime."<sup>109</sup>

Still other precedents for courts not established under Article III (1) of the Constitution and not subject to the exact letter of the Bill of Rights with respect to the conduct of criminal proceedings may be found in various United States national courts. Consular courts, established by treaty to except American nationals from certain foreign jurisdiction, offer one example. The constitutionality of such courts was sustained by the Supreme Court in the leading case of *In re Ross*.<sup>110</sup> In this case the defendant was found guilty of the crime of murder committed aboard an American vessel anchored in Japanese waters, by an American consular court in Japan and sentenced to death. The sentence was commuted to life imprisonment and the defendant shipped to the United States to serve his sentence. Nearly ten years afterwards, the defendant applied for his discharge on habeas corpus on the ground that the crime was cognizable only before the domestic tribunals of the United States and that he had been denied the right of trial by jury as guaranteed by the Constitution. Motion for discharge was denied by the circuit court and the order was affirmed by a unanimous Supreme Court. While it was clear

105. 3 STAT. 510, 513-14 (1819).

106. *The Marianna Flora*, 11 Wheat. 1, 40, 6 L. Ed. 405 (U.S. 1826).

107. For the contemporary view of the scope of sanctions, see DESSION, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER* (1948); MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* (1946); VON HENTIG, *PUNISHMENT* (1937) and DESSION, *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8 (1947).

108. 4 PIERCE, *MEMOIRS AND LETTERS OF CHARLES SUMNER* 68 (1893).

109. 6 SUMNER, *WORKS* 483-85 (1874).

110. 140 U.S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581 (1891).

that United States courts would have had jurisdiction over the offense, no improper jurisdiction, it was held, had been exercised by the consular court. Patently, the jurisdiction given to United States courts over such offenses by the Constitution, was not exclusive of lawful jurisdiction, residing elsewhere. Nor was violence done to the Bill of Rights in subjecting the defendant to a procedure at variance from that obtaining within the United States. He had been accorded the elements of fairness under the federal legislation establishing consular courts in pursuance of treaty obligations:

"The jurisdiction of the consular tribunal . . . is to be exercised . . . in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offense he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates . . . it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. . . . It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court."<sup>111</sup>

Military commissions, commonly justified by the exigencies of national security, offer another example. For present purposes it is not necessary to attempt to mark out the exact conditions under which such commissions are constitutional or the precise scope of their jurisdiction; it suffices to indicate that such commissions have been held constitutional on many occasions to try citizens and aliens, civilians and soldiers, for a great variety of offenses.<sup>112</sup> The conspirators who plotted Lincoln's assassination<sup>113</sup> and the eight saboteurs of World War II were so tried.<sup>114</sup> It is traditional that the regular civil courts both decline direct review of the judgments of such military commissions and confine themselves when considering collateral attack by way of habeas corpus to questions of "jurisdiction."<sup>115</sup> Only very recently in certain court martial cases have some lower federal courts begun to impose tests of substantial fairness upon military tribunals.<sup>116</sup> In the classic Civil War case

111. 140 U.S. at 470.

112. FAIRMAN, *THE LAW OF MARTIAL RULE* c. 10 (2d ed. 1943); WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* c. 8 (1940). For more controversial issues see Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 *YALE L.J.* 27 (1947); Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 *HARV. L. REV.* 833 (1946); Frank, *Ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 *COL. L. REV.* 638 (1944).

113. See *Trial of the Conspirators to Assassinate President Lincoln*, 8 *Am. State Trials* 25-652 (1865); *Ex parte Mudd*, 17 *Fed. Cas.* 954, No. 9,899 (S.D. Fla. 1868).

114. *Ex parte Quirin*, 317 U.S. 1, 63 *Sup. Ct.* 1, 87 *L. Ed.* 3 (1942).

115. Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 *U. OF PA. L. REV.* 119 (1943); Stein, *Judicial Review of Determinations of Federal Military Tribunals*, 11 *BROOKLYN L. REV.* 30 (1941); cf. *In re Vidal*, 179 U.S. 126, 127, 21 *Sup. Ct.* 48, 45 *L. Ed.* 118 (1900); *Ex parte Quirin*, 317 U.S. 1, 63 *Sup. Ct.* 1, 87 *L. Ed.* 3 (1942); *In re Yamashita*, 317 U.S. 1, 66 *Sup. Ct.* 340, 90 *L. Ed.* 449 (1946).

116. Note, 13 *U. OF CHI. L. REV.* 494 (1946). An as yet unpublished paper by Leon

of *Ex parte Vallandigham*,<sup>117</sup> the claim was that, the defendant charged with disloyal utterance, "had been arrested without due process of law, without a warrant from any judicial officer; that he was then in a military prison, and had been served with a charge and specifications, as in a court-martial or military commission; that he was not either in the land or naval forces of the United States, nor in the militia in the actual service of the United States, and, therefore, not triable for any cause by any such court; that he was subject, by the express terms of the Constitution, to arrest only by due process of law or judicial warrant . . . ; that he was entitled to be tried on an indictment or presentment of a grand jury. . . ." <sup>118</sup> Only the legal conclusions of this claim were denied by the government. The Supreme Court held that the acts of the military commission were not "judicial" in the sense of Article III (1) of the Constitution and that there was no "original jurisdiction" in the Supreme Court to "review or reverse" the commission's proceedings.<sup>119</sup>

The most important example is, however, to be found in state court procedure within the United States.<sup>120</sup> With individual justices invoking either "independent determination" of substantive due process or Fourteenth Amendment "selective" or "*in toto*" incorporation of the rest of the Bill of Rights, the Supreme Court assumes to set national standards for our state court procedures; but it is now clear that these standards do not, despite the literal universality of various parts of the Bill of Rights, require the states, even when exercising jurisdiction concurrent with the federal courts over events within the scope of federal power, to adopt the specific institutional practices constitutionally required of the regular federal courts.<sup>121</sup> It is enough

Alexander, third-year student in the Yale Law School, collects a number of such lower court opinions.

117. 1 Wall. 243, 17 L. Ed. 589 (U.S. 1863).

118. 1 Wall. at 246.

119. *Id.* at 253. We cite this case, not to approve it or to suggest that on its facts a military commission would today be held to have jurisdiction, but only to indicate the latitude the Supreme Court has allowed to military commissions in matters of procedure.

120. Another example that might be adduced is that of the territorial courts. Thus in *Hawaii v. Mankichi*, 190 U.S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016 (1902), Mr. Justice Brown, for the Court, wrote: "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." 190 U.S. at 217-18.

121. For discussion and collection of cases see Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Green, *The Supreme Court, The Bill of Rights and the States*, 97 U. OF PA. L. REV. 608 (1949); Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. OF CHI. L. REV. 266 (1945); 96 U. OF PA. L. REV. 272 (1947). It appears even that Mr. Justice Black, the principal proponent of the Fourteenth Amendment's incorporation of the Bill of Rights *in toto*, and the justices who agree with him, might be able, consistently with their position, to reject some specific institutional practices as archaisms. See Note, 58 YALE L.J. 268, 277 n.53 (1949). The opinions are somewhat ambiguous on this point. Note Mr. Justice Black's concurrence in *Wolf v. Colorado*, 338 U.S. 25, 39-40, 69 Sup.

that state procedure complies with the fundamental fairness for which such specific institutional practices were shaped. "The State is free," wrote Chief Justice Hughes for a unanimous Court, "to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" <sup>122</sup> No specific form of trial is held essential and many deviations from required federal practice are allowed to escape the Court's ban.<sup>123</sup> Concise summary appears in the opinion of Mr. Justice Cardozo for a unanimous Court in *Palko v. Connecticut*, which allowed Connecticut officials somewhat greater freedom from the double jeopardy restraint than might have been granted to federal officials:

"The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. . . . This too might be lost, and justice still be done."<sup>124</sup>

The cases in recent years are legion and we invoke them, not to approve of specific decisions, but rather to indicate contemporary attitudes in the interpretation of the relevant sections of the Constitution.<sup>125</sup>

It appears reasonable, therefore, to conclude that the establishment of an international court, with jurisdiction over crimes against world security wherever committed, would pose no insurmountable constitutional difficulties for the United States and would be well within our national traditions. So long as the charter and procedures of such a court were required to conform to the substance of due process, our participation would be attended by no dangers of exposing individuals to arbitrary power. With all deference to parochialism, it may be added that in the proceedings before the International Military Tribunal at Nuremberg, representing an amalgam of national procedures, the defendant was not infrequently the beneficiary of foreign safe-

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Ct. 1359 (1948), admitting evidence though obtained through unreasonable search and seizure, and in *Hirota v. MacArthur*, 338 U.S. 197, 69 Sup. Ct. 197 (1948).

122. *Brown v. Mississippi*, 297 U.S. 278, 285, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).

123. For summary see articles cited note 121, *supra*.

124. 302 U.S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

125. In *Wolf v. Colorado*, 338 U.S. 25, 69 Sup. Ct. 1359 (1948), Mr. Justice Frankfurter, for the Court, offers eloquent statement of an attitude indispensable to survival: "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." 338 U.S. at 27.

guards. Thus Mr. Justice Jackson has pointed out that "as to advance information and copies and help and service" the defendants received "much more than any citizen of the United States gets on trial in the courts of the United States."<sup>126</sup>

### III

The charge of the Bar spokesmen that implementation of the Genocide Convention would convert crimes traditionally "domestic" into federal or international crimes and hence "deprive the states of a great field of criminal jurisprudence" is groundless. Genocide is not a traditional domestic crime and has not enjoyed a "great field" of practice within the United States; and murder will remain murder, punishable as before, even after genocide becomes federal or even international crime. Genocide may include some of the same events as murder or lynching or other violence traditionally regarded as "domestic" crime but it also requires something more. What distinguishes genocide from domestic crime is the necessity for proof of a specific intent "to destroy in whole or in part, a national, ethnical, racial or religious group as such."<sup>127</sup> What the Genocide Convention does is to provide a new remedy when such intent and the prescribed acts of destruction can be shown. Unless deliberately planned as part of a grand design for race extermination, lynching and rioting or other local violence, would not constitute genocide and could not be punished as such.<sup>128</sup> This differentiation between crimes by different requirements of *specific intent*, which must be proved and cannot be presumed,<sup>129</sup> is traditional in American law and has been found to afford defendants adequate safeguards against abuse.<sup>130</sup> The history of this country reveals no record of mass-murder, lynchings or riots as planned instruments of group extermination. So far from projecting itself into the field of our

126. See 2 TRIAL OF THE MAJOR WAR CRIMINALS 438 (Nuremberg, 1947). Cf. JACKSON, THE NÜRNBERG CASE vi-vii (1947). In *Hurtado v. California*, 110 U.S. 516, 531, 4 Sup. Ct. 111, 292, 28 L. Ed. 232 (1884), Mr. Justice Matthews, for the Court remarked: ". . . while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe."

127. Art. II.

128. To the obvious difficulty in proving the necessary specific intent, may be added the well known fact that mobs are characterized by a relaxation of conscious controls, comparable to that achieved in intoxication. CANTRIL, THE PSYCHOLOGY OF SOCIAL MOVEMENTS (1941); MARTIN, THE BEHAVIOUR OF CROWDS (1920); cf. LEE AND HUMPHREY, RACE RIOT (1943).

129. See MILLER, CRIMINAL LAW 60 (1934): "When by the common law or by statute a specific intent is essential to a crime, such an intent cannot be presumed from the mere commission of the act, but it must be expressly proved." Cf. 1 WHEARTON, CRIMINAL LAW 200 (11th ed., Kerr, 1912).

130. *Specific intent* has long been an essential element of a vast catalogue of crime. See MILLER, CRIMINAL LAW 59-60 (1934). Its effect has been to add heavily to the burden of proof upon the government. See *Screws v. United States*, 325 U.S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330 (1945). It has been regarded as a technique of mitigation. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 447-48 (1947).



domestic crime, the Genocide Convention by its terms severely restricts its operation to situations of mass extermination, exemplified in recent times only in the totalitarian areas of Europe and Asia.

The fear by the Bar spokesmen of "endless confusion in the dual system of the United States" is, even assuming genocide to become a common practice in this country, no more real. It is belied by a long history of effective federal and state cooperation, including concurrent criminal jurisdiction over the same acts, to secure both national and local interests.<sup>131</sup> Federal legislation is commonly invoked to protect the national interest notwithstanding previous state regulation of the same events and, conversely, state legislation remains competent to secure local interests save where the field is exclusively pre-empted by the Congress.<sup>132</sup> With respect to concurrent criminal jurisdiction, the constitutional point was well made by Chief Justice Taft, speaking for a unanimous Court, in *United States v. Lanza* (upholding prosecution under the National Prohibition Act for identical acts for which a judgment had been entered against the defendants under state statute) :

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . .

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. . . . Here the same act was an offense against the State of Washington because a violation of its law, and also an offense against the United States under the National Prohibition Act.<sup>1</sup> The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States. . . ." <sup>133</sup>

Similarly, in holding a defendant answerable for the same act of "harboring and secreting a Negro slave" to federal and state jurisdiction alike, the Supreme Court, through Mr. Justice Grier, said:

"Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States,

131. The case for such cooperation is well met in *United States v. McClellan*, 127 Fed. 971 (S.D. Ga. 1904). Sustaining the right of federal prosecution for violation of the federal antipeonage statute enacted pursuant to the Thirteenth Amendment, over the argument, reminiscent of that of the bar leaders in the case of genocide, that it infringed upon state jurisdiction, the court said: "it is urged that the courts of the state have jurisdiction of this crime, under the name of 'kidnapping and false imprisonment.' So they have, and no word we say ought to discourage their officers in the performance of their duty to prosecute and convict. So they have jurisdiction of the burglary of a post office, but that does not nullify the jurisdiction of the national courts to try the same crime. The jurisdiction of both courts is here concurrent, and no man would be quicker than the presiding judge of this court to applaud righteous convictions for these crimes in the courts of the state." *Id.* at 979.

132. Grant, *The Scope and Nature of Concurrent Power*, 34 COL. L. REV. 995 (1934).

133. 260 U.S. 377, 382, 43 Sup. Ct. 141, 67 L. Ed. 314 (1922); cf. *Hebert v. Louisiana*, 272 U.S. 312, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926).

for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted."<sup>134</sup>

Almost unwavering in its position,<sup>135</sup> the Supreme Court has upheld concurrent jurisdiction on matters as diverse as election controls,<sup>136</sup> cattle inspection,<sup>137</sup> assault involving obstruction of public lands,<sup>138</sup> forgery,<sup>139</sup> derailing a train carrying federal mail,<sup>140</sup> sedition,<sup>141</sup> gambling transactions,<sup>142</sup> and the regulation of motor transport.<sup>143</sup> The state courts, for their part, have accepted the doctrine in a great variety of cases, of which a random sampling includes manslaughter,<sup>144</sup> larceny,<sup>145</sup> post-office burglary,<sup>146</sup> forgery,<sup>147</sup> and uttering counterfeit banknotes.<sup>148</sup> Appropriate recognition of national and local interdependences appears in an opinion of the New Jersey Court, upholding a state prosecution for the crime of sedition directed against the federal government:

"In the pending case the crime is sedition. Primarily sedition against the United States

134. *Moore v. Illinois*, 14 How. 13, 20, 14 L. Ed. 306 (U.S. 1852).

135. In what now appear to have been a few aberrational decisions, the theory that state and national governments could separately punish the same criminal act was rejected by the Supreme Court. See, e.g., *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19 (U.S. 1820); *Matter of Heff*, 197 U.S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848 (1905). The Supreme Court has since definitely abandoned this position. See Grant, *The Scope and Nature of Concurrent Power*, 34 Col. L. Rev. 995, 1013 (1934).

136. See *Ex parte Siebold*, 100 U.S. 371, 387-89, 25 L. Ed. 717 (1879): "As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them. . . . [E]ach government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account." Cf. *Ex parte Clarke*, 100 U.S. 399, 25 L. Ed. 715 (1879).

137. *Asbell v. Kansas*, 209 U.S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778 (1908).

138. *McKelvey v. United States*, 260 U.S. 353, 43 Sup. Ct. 132, 67 L. Ed. 301 (1922).

139. *Cross v. North Carolina*, 132 U.S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287 (1889);

cf. *Pettibone v. United States*, 148 U.S. 197, 209, 13 Sup. Ct. 542, 37 L. Ed. 414 (1893).

140. *Crossley v. California*, 168 U.S. 640, 18 Sup. Ct. 242, 42 L. Ed. 610 (1898).

141. *Gilbert v. Minnesota*, 254 U.S. 325, 41 Sup. Ct. 125, 65 L. Ed. 287 (1920).

142. *Dickson v. Uhlmann Grain Co.*, 288 U.S. 188, 53 Sup. Ct. 362, 77 L. Ed. 691, 83 A.L.R. 492 (1933).

143. *California v. Zook*, 336 U.S. 725, 69 Sup. Ct. 841 (1949).

144. See *People v. Welch*, 141 N.Y. 266, 275, 36 N.E. 328, 330 (1894) (dealing with manslaughter and arising out of a tugboat collision): "The crime of which the defendant was convicted was primarily a crime against the peace and good order of the state. It was only a crime against the United States because Congress, in the interest of navigation, had seen fit to enact a law making one species of homicide, when committed by an officer, pilot, etc., manslaughter punishable in the courts of the United States. There is nothing in the enactment itself which makes the jurisdiction exclusive. There is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide."

145. *State v. Coss*, 12 Wash. 673, 42 Pac. 127 (1895).

146. *People v. Burke*, 161 Mich. 397, 126 N.W. 446 (1910).

147. *Jett v. Commonwealth*, 18 Gratt. 933 (Va. 1867).

148. *People v. Fury*, 279 N.Y. 433, 98 N.E.2d 650 (1939); cf. *White v. Commonwealth*, 4 Binn. 418 (Pa. 1812).

is a crime against the federal government, which is the direct subject of attack; but under our system the federal and state governments are so closely interwoven that an attack on the former may imperil the existence of the latter."<sup>149</sup>

It is, furthermore, illusion to urge, as the Bar spokesmen do, that ratification of the Genocide Convention would effect any real, much less a "revolutionary," shift in constitutional power from the states to the nation. The "protection of personal rights" is *not*, except in terms of simple quantity of administration, now "vested principally in the States of the American Union," as Mr. Finch urges.<sup>150</sup> There are a Bill of Rights, including a Fourteenth Amendment, establishing national standards which the states cannot contravene, and wide Congressional powers for the positive promotion of human rights in the federal constitution.<sup>151</sup> The clear trend of decision in the Supreme Court, in response to a growing sense of national interdependence with respect to all rights, is to give wider and wider scope to these federally secured individual rights and to the positive federal powers.<sup>152</sup> The same forces that are operating on a global scale to make the world one for security, economic development, human rights, enlightenment and other values, are operating even more intensely to make the nation one for these same values, and constitutional interpretation and practice move, without violence to the words of the document or framers' intent, at an accelerating tempo toward a structure rationally designed to secure the national interest.<sup>153</sup> Ratification of the Genocide Convention would serve only to put into practice powers that the federal government now possesses, to seek the honoring on a global scale of standards of human decency which within this country we have always professed and honored, both as nation and locality.

The suggestion of the Bar spokesmen that the provisions of the Genocide Convention making "direct and public incitement to commit genocide" punishable might be so applied as to infringe freedom of speech and press is unnecessary fearfulness. The Congressional act which implements the Convention can, if regarded as necessary, make clear what is meant by incitement in this context. Incitement or solicitation to commit crime has traditionally been punishable as crime by both common law and statute in this country.<sup>154</sup> Thus

149. *State v. Tachin*, 92 N.J.L. 269, 106 Atl. 145, 147 (1919).

150. 43 AM. J. INT'L L. 732, 735 (1949).

151. See generally, CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* (1947); KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* (1947); TO SECURE THESE RIGHTS: REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947); Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. OF CHI. L. REV. 266 (1946); Note, 57 YALE L.J. 855 (1948).

152. For summary and citations, see McDougal and Leighton, *supra* note 26, at 111-14.

153. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942); McDougal and Leighton, *supra* note 26, at 110.

154. See MILLER, *CRIMINAL LAW* 105, 106 (1934); Note, *Solicitations*, 41 DICK. L. REV. 225 (1937); *cf.* *United States v. Galleanni*, 245 Fed. 977 (D. Mass. 1917); *State v. Schleifer*, 99 Conn. 432, 121 Atl. 805 (1923), and cases cited therein.

in *Gitlow v. New York*,<sup>155</sup> the famous "criminal anarchy" case after World War I which established that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States,"<sup>156</sup> Mr. Justice Sanford, speaking for the Court, summarized:

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."<sup>157</sup>

What is traditional for common crimes can scarcely be oppressive innovation for mass-murder. Even freedom of communication is not, furthermore, an absolute in democratic preference: security and human decency must likewise have their place.<sup>158</sup>

It is no little irony that argument must be made in support of a convention to suppress genocide. "The spectacle," writes a contemporary journal of opinion, "of modern man explaining his right to existence is an odd one."<sup>159</sup> The Genocide Convention is but one of many interrelated measures in a world-wide program to secure peace and respect for the dignity of the individual human being.<sup>160</sup> Rational appraisal of this Convention requires both a perspective of the centuries of man's long struggle for freedom and security by promulgating doctrine and balancing power and a realistic orientation in the contemporary interdependences of peoples everywhere in securing and maintaining a minimum of security and basic human rights.<sup>161</sup> Even in a

155. 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).

156. 268 U.S. at 666.

157. *Id.* at 667.

158. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 Sup. Ct. 766, 86 L. Ed. 1031 (1942); *Schenck v. United States*, 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919). The decision in *Terminiello v. Chicago*, 337 U.S. 1, 69 Sup. Ct. 894 (1949), invoked by the Bar spokesmen, raises no difficulties for the Genocide Convention. Mr. Justice Douglas, for the Court, wrote: "That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 337 U.S. at 4. But mass-murder and the incitement thereto obviously rise above mere "inconvenience, annoyance, or unrest."

159. *The New Yorker*, Feb. 11, 1950, p. 56.

160. The relationship between internal mass-murder and external aggression has already been indicated. See also LEWIN, *RESOLVING SOCIAL CONFLICTS, SELECTED PAPERS ON GROUP DYNAMICS* 44 (1948): "Millions of helpless children, women, and men have been exterminated by suffocation or other means in the occupied countries. . . . Tens of thousands of Germans must have become accustomed to serve as a matter of routine on the extermination squads or elsewhere in the large organization dedicated to this purpose. This systematic extermination has been carried out with the expressed purpose of securing in the generations to come German supremacy in the surrounding countries. For the question of international relations and of safeguarding the peace, it is particularly dangerous that such killing is considered the natural right of the victor over the vanquished or of the *Herrenvolk* over lower races." Cf. FROMM, *ESCAPE FROM FREEDOM*, 207-39 (1941).

161. See McDougal and Leighton, *supra* note 26, for the outlines of such perspective and orientation. Mr. Justice Rutledge, in a characteristic dissent in *In re Yamashita*,

world where nations are feverishly inventing and creating new instruments for mass-murder of hitherto unimaginable scope, it may still serve some purpose for peoples seeking survival to take this opportunity to restate their demand for fundamental human dignity, to reannouce their consensus on behalf of all mankind, and to recelebrate the identifications of all free peoples with each other. Unless this ideal is kept constantly at the focus of public attention there may be no fire in men's hearts to preserve it.

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327 U.S. 1, 81, 66 Sup. Ct. 340, 90 L. Ed. 449 (1946), invokes 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Foner ed. 1945): "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."