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**AD HOC COMMITTEE ON GENOCIDE**  
**COMMENTARY ON ARTICLES ADOPTED BY THE COMMITTEE (Continued)**

ARTICLE 5

(Obligation for Contracting Parties to harmonize their domestic legislation with the Convention)

"The High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedure to give effect to the provisions of the Convention."

COMMENTS

When a State becomes Party to a Convention, it is under obligation to take every measure necessary for the performance of its obligations under the Convention. Especially in the case of a Convention dealing with repression of crimes it must revise its domestic criminal law, if necessary, so that criminals defined by the Convention may be prosecuted and sentenced by its domestic courts.

The question was raised of the necessity of a special provision to this effect in the Convention. It was contended that States were under the obvious obligation to take every measure for the proper performance of the obligations to which they subscribe. Moreover, the facts constituting genocide are already dealt with by domestic criminal laws (manslaughter, etc.....). Moreover, a delegate remarked that in certain countries where the danger of genocide does not exist, it would not be appropriate to ask that domestic legislation to be revised on the subject. Therefore, he proposed that legislative reform be required only if necessary in the particular instance under consideration. This proposition was finally withdrawn by its author when his attention was called to the danger of an obligation qualified by condition, which would then cease to be a real obligation. It was also contended that the provisions of such an article might prevent certain countries from

becoming parties to the Convention owing to the difficulty of obtaining the passing of the necessary legislation. This obstacle is particularly serious in federal States where criminal law is in the sphere of

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The answer was that such a provision exists in conventions dealing with crimes in international law <sup>(1)</sup> and that it was inserted with the specific purpose of reminding States of an essential duty. It is immaterial whether States have no or little legislative reform to make.

The answer to the argument that national legislation might prevent certain States from becoming parties to the Convention, was that, if a State is not in a position to perform its obligations under the Convention, then it is better that it should abstain. If the government fears that the legislature might not support it, then it should ascertain the fact before ratifying or joining the Convention. Nevertheless, to give satisfaction to the delegates who were pre-occupied with the situation of federal States, it was agreed to word as follows the provision concerning the necessary legislative reforms: "in conformity with their constitutional procedure".

During the discussion on the particular purpose of the measures under consideration, it was debated whether the text should read "for the prevention and repression of genocide" or "to give effect to the provisions of the Convention". The second wording was deemed preferable because it dealt with all the obligations of the States under the Convention and not merely with penal measures. The amendment was adopted by 4 votes against 3.

The article as a whole was adopted unanimously.

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(1) For example: 'The convention for the prevention of traffic in women and children, Geneva, Sept: 30, 1921; convention for the repression of forgery of the currency, Geneva, April 28, 1929, etc.

- ARTICLE 6 -

(Courts of  
jurisdiction)

"Any of the acts enumerated in Article 3 shall be punished by any competent tribunal of the State in the territory of which the act is committed or by a competent international tribunal".

Comments

Several problems were solved directly or indirectly by this article which deals with repression by the national courts and by an international court.

A - Repression by the national courts -

1. All members of the committee agreed to recognize the jurisdiction of the Courts of <sup>the</sup> State on the territory of which the offense was committed.

The first part of the article, up to "...on the territory of which the offense was committed..." was voted by all seven members of the Committee.

2. The extra-territorial jurisdiction of national court over individuals who had committed genocide abroad was discussed when they considered the fundamental principles of the Convention.

Those in favour of extra-territorial jurisdiction held that genocide would be committed most of the time by the State authorities themselves or that these authorities would have aided and abetted. Obviously in this case the national courts of that State would not enforce repression of genocide. Therefore, whenever the authorities of another State had occasion to arrest the offenders they should turn them over to their Courts. The tenets of extra-territorial jurisdiction added that, so long as genocide became a crime

in international law, it was natural to apply extra-territorial jurisdiction. They quoted conventions on the repression of international offenses such as traffic in women and children, forgery of currency, etc...

The opposite view held that extra-territorial jurisdiction was against the traditional principles of international law and that permitting the Courts of one State to punish crimes committed abroad by foreigners was against the sovereignty of the State. They added that, as genocide generally implied the responsibility of the State on the territory of which it was committed, the principle of extra-territorial jurisdiction would lead national courts to judge the acts of foreign Governments. Dangerous international tension might result.

A member of the Committee, while he accepted that the right to exercise repression should not be left exclusively to the Courts of the country where genocide had been committed, declared himself opposed to the principle of extra-territorial jurisdiction in the case of genocide. It is a fact, he said, that the Courts of the various countries of the world do not offer the same guaranty. Moreover, genocide as against other international crimes (traffic in women, traffic in narcotic drugs, forgery of currency) has a distinct political character. Therefore, there is a danger that territorial jurisdiction might lead national Courts to exercise a biased and arbitrary authority over foreigners. This delegate therefore, proposed that jurisdiction be given to an international Court which would impose itself to all and to which States would turn the authors of genocide committed abroad whom they had arrested and whom they would be unwilling to extradite.

The principle of extra-territorial jurisdiction was rejected by the Committee in the course of discussion by four votes against two, with one abstention. (Eighth meeting - Tuesday, 13 April). During the discussion of Article 6 the proposal to reverse the foregoing decision was rejected by four votes against two with one abstention. (Twentieth meeting - Monday April 26)

B - Repression by an International Court -

The set-up of an international jurisdiction gave rise to a lengthy discussion.

For some delegates the granting of jurisdiction to an international Court was an essential element of the Convention. They claimed that in almost every serious case of genocide it would be impossible to rely on the Courts of the States where genocide had been committed to exercise effective repression because the government itself would have been guilty, unless it had been, in fact, powerless. The principle of extra-territorial jurisdiction having been set aside for the reasons indicated above, the absence of an international Court would result in fact, in immunity for the offenders. The supporters of an international Court merely requested that the international jurisdiction be expressly provided for by the Convention without the latter setting up the actual organization of the Court.

The opposition first declared that the intervention of an international Court would defeat the principle of the sovereignty of the State because this Court would be substituted for a national Court.

Secondly, they claimed that mere reference in the Convention to an international Court would have no practical

value. What would this Court be? There is for the moment no international Court with criminal jurisdiction. It would be necessary either to create a new Court or to add a new criminal chamber to the international Court of Justice and all the members of the Committee had agreed that they had neither the qualifications nor the time necessary for settling these problems.

During the discussion of principles, the Committee adopted by four votes against two, with one abstention, the principle of an international criminal jurisdiction. (Eighth meeting - Tuesday 13 April)

The Committee voted by four votes against three (twentieth meeting - Monday, 26 April) the final provision of Article 6 "or by a competent international tribunal".

It was understood that the latter provision would not be a mere expression of opinion but would have the authority of a rule. It would later suffice to determine what would be the international Court called upon to judge the authors of genocide.

Regarding jurisdiction of the international Court, the Committee during the discussion of questions of principle decided by four votes and three abstentions that the international Court would have jurisdiction when the national Court would not be in a position to enforce repression. (Eighth meeting - Tuesday, 13 April)

The U.S. delegate proposed the following additional paragraph to Article 6:

"Assumption of jurisdiction by the international tribunal shall be subject to a finding by the tribunal that the State in which the crime was committed has failed to take adequate measures to punish the crime."

This proposal was rejected by five votes against one with one abstention.

It was then decided by four votes against three that the report would mention the text. The reasons for which the provision in question was not inserted in the Convention are that for certain sponsors of the international Court the jurisdiction defined above merely represented a minimum beyond which they considered it necessary to go and that in any case the precise jurisdiction of the international Court would be determined later when the organization and the procedure of the Court were set up.