

AD HOC COMMITTEE ON GENOCIDE

CASES IN WHICH INDIVIDUALS ARE TO BE SUMMONED BEFORE  
A CRIMINAL COURT UNDER THE CONVENTION ON GENOCIDE

The purpose of this memorandum is to explain the question of the determination of the jurisdiction called upon to punish genocide.

It is important to know which individuals should, under the Convention, be summoned before a national or international criminal court and in what circumstances they might have been arrested for prosecution purposes.

This memorandum describes the various cases which may arise.

I. GENOCIDE BY MEMBERS OF GOVERNMENTS

1. How would the offenders be arrested?

In practice, offenders could be captured in only three instances:

- (a) If they fell in enemy hands during war or owing to defeat;
- (b) If they were arrested in the course of international police action organized by the Security Council;
- (c) If, having fled from their country on being overthrown (adverse elections or revolution) they were arrested abroad.

Remark: There is also the possibility of offenders not having been captured at all (either because still in power or because their place of hiding would be unknown). In this case, it might still seem advisable to judge them in absentia.

2. What court would have jurisdiction?

In all cases, signatory States would have the right and even the duty to capture the offenders and turn them over to a court.

This court would be either international or national.

A. International Court

- (a) It could be an ad hoc international court set up for the occasion by agreement of the Powers principally interested. Such is the case of the Nuremberg Tribunal
- (b) It could be an international court, organized under the Convention for the prevention and punishment of genocide. (Special permanent court for genocide - ad hoc court - international criminal court with general jurisdiction)

/B. National Court

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B. National Court

(a) The Court could be one of the national courts of the country the police force of which had captured the offending members of governments. In this case, the State would take the initiative of turning them over to its own courts.

(b) The Court could be the national court of a State which the Powers concerned had decided to entrust with the task of repression.

There might be various reasons for this choice: one instance might be that the principal victims of the acts of genocide were nationals of the country of the jurisdiction or under its protection.

II. GENOCIDE BY OTHER THAN MEMBERS OF GOVERNMENTS

In this case the offenders would be individuals or government agents, guilty of genocide, attempted genocide, or preparation for or instigation to genocide, etc...

1. How would offenders be arrested?

There could in fact be three cases:

(a) They might be caught by the authorities of the State where the offence was committed;

(b) They might be caught on the territory of a State other than the one where the offence was committed. Or they might have fled abroad to escape international justice or for other reasons;

(c) Offenders might be captured during a war or at the end of the war by the adverse forces.

2. What courts would have jurisdiction?

First case - The offenders have been captured by the agents of the State where the offence has been committed.

The State is under the obligation, under the Convention and the general principles of law, to punish genocide acts committed on its territory. If it complies with this duty its national courts have jurisdiction irrespective of the nationality of offenders.

Second case - Agents of the State have captured offenders who committed their crime in another country.

These individuals are either refugees trying to escape from the State where they committed their crimes, who happen to be abroad.

The agents of the State did their duty in capturing the offenders. They must see to it that they are turned over to a court of criminal jurisdiction. For this purpose the State will grant extradition of the offenders to the State where the crime was committed. Should extradition not be requested or granted, the State where they were

/arrested

arrested will turn them over to its own courts. In either case, national courts will be called upon to pass judgment. The authors of several conventions organizing international repression have considered this situation and have determined the rules governing the jurisdiction of the various national courts.\*

The case may arise where a State, having captured the offenders, while desirous to see them punished, and because it so desires, would be reluctant to grant extradition or to turn them over to its own courts. This is the case dealt with by the authors of the Convention for the creation of an international penal court signed in Geneva on 16 November 1937.\*\* (Article 2)

They considered that a State would be unwilling to extradite because the application coming from a State which connived in the offence or from a weak State might be an attempt to save the offenders. They considered that a State might be unwilling to turn them over to its own courts fearing that these (and the jury in particular), being beyond Government action, might give a bad sentence and hold the offenders not guilty. In either case the State would fulfill its obligations to ensure trial of the offenders by turning them over to an international court. It would thus be discharged of its liability.

Third case - The offenders have been captured by the adverse Powers during a war or at the end of war.

In this case one may consider action either of national or international courts.

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- \* International Convention for the Suppression of the Traffic in Women and Children - Geneva - 30 September 1921
  - International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications - Geneva, 12 September 1923
  - Convention concerning Slavery - Geneva, 25 September 1926
  - Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929
  - Convention for the Suppression of the Traffic in Women of Full Age, Geneva, 11 October 1933
  - Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 28 June 1936.

- \*\* This Convention, signed by thirteen countries, has not been ratified and is therefore not in force. The reasons for non-ratification are immaterial. It may be noted however that the international convention for the repression of terrorism signed the same day met with a similar fate and was ratified by only one country.

A. National Courts

They may be the courts of the State which captured the offenders, or the courts of the country to which the victims belonged and to which the offenders have been turned over. It might also be the courts of the vanquished State, assuming that it could inflict punishment after a change of regime.

B. International Courts

(a) If the victims belong to several States, the court might be an ad hoc international State organized by the several States to which the victims belonged.

(b) As in the case of members of governments, the offenders may be turned over to an international court organized especially by the Convention on Genocide or by an international court of general jurisdiction. But conditions of repression would differ from those in the case of members of government because, for instance, the number of offenders may be very large.

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