

ABSTRACT

“The United Kingdom Genocide Act of 1969:
Origins and Significance”

by

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ABSTRACT

In his judgment on the Pinochet extradition case of 28 October 1998, Lord Chief Justice Thomas Bingham granted immunity from criminal and civil process to General Augusto Pinochet on the grounds that “a former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions.” Justice Bingham contended that Parliament had signified this intention by deliberately omitting Article IV of the United Nations Convention for the Prevention and Punishment of the Crime of Genocide from the 1969 United Kingdom Genocide Act. It was Article IV which provided that “Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” This paper seeks to demonstrate that the provisions of the 1969 United Kingdom Genocide Act actually provided for the extradition and punishment of former heads of state and that key provisions of the Act were drafted by its authors to give effect to that principle. Based on archival research in the records of the Home Office, the Foreign Office, the Parliamentary Counsel Office, and the British Cabinet, as well as the Debates of Parliament, it proposes that the 1969 United Kingdom Genocide Act had always furnished adequate grounds for the extradition of former heads of state when *prima facie* evidence was submitted that they had committed the crime of genocide. In fact, Justice Bingham’s decision harked back to an earlier tradition in British law that the wording of the 1969 Genocide Act was intended to replace. While Pinochet was probably not guilty of the crime of genocide as it is defined by the United Nations Genocide Convention, Justice Bingham’s argument on the intentions of Parliament regarding Article IV, reiterated by Law Lords Slynn and Hadley in their opinions, and unchallenged by either the Crown Prosecution Service or the Law Lords who favored the extradition of General Pinochet, threatened to undermine one of Britain’s landmark legislative acts.

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Please do not quote or attribute material from this workshop paper, which is under revision by the author. This draft is intended to set out the narrative for readers interested in the archival record of the debate over the drafting of the U.K. Genocide Act and its relevance to the arguments in the Pinochet extradition case. Further papers will present an explicit analytical framework, fewer quotations from the sources, and a more concise narrative. In later versions, the author will also examine the discussion of the legislation in 1968 and 1969 by Parliament and the public. Permission to employ specific quotes from the records at the PRO, the Home Office, and the Parliamentary Counsel Office will be requested prior to normal scholarly publication.

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British diplomats played an important role in the debates that led the United Nations in 1948 to adopt the Convention for the Prevention and Punishment of the Crime of Genocide.¹ But like the United States, Great Britain failed to give effect to the Genocide Convention in its domestic law until many years after its promulgation, and this despite Article V of the Convention, which stipulated that:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.²

It was not until 1969, eighteen years after the Convention came into force in 1951, that Parliament passed “An Act to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide.”³ This eighteen year interval was hardly the consequence of an oversight. Rather, it reflected the difficulty of achieving the

¹ The United Nations Convention for the Prevention and Punishment of the Crime of Genocide is hereafter referred to as the UNGC. For an excellent and comprehensive discussion of the role of the British diplomats, and an in-depth review of the major debates to which they contributed at the United Nations, consult William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), most especially pp. 44, 58, 59-60, 72, 74, 159-160, 233, 248-251, 269, 289, 373-374, 403, 419-423, and 513-514.

² “Convention on the Prevention and Punishment of the Crime of Genocide,” United Nations, 9 December 1948, reprinted in Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990), p.45.

³ See *Genocide Act 1969, Halsbury’s Statutes of England*, 4th ed., vol. 12 (1994), pp. 541-543. It took the United States Senate even longer than Britain—thirty-five years—to ratify the Genocide Convention.. See “U.S. Senate Ratification of the UN Genocide Convention,” 19 February, 1986, *ibid.*, pp. 49-50. The American law entered the Criminal Code of the United States in 1988. A retirement present from his colleagues for Senator William Proxmire (Dem-Wisconsin), who arose in every Congressional session to call for ratification, key provisions of the Act severely limited the application of the Convention in the United States by such means as narrowing the definitions in the Convention of terms like “incites” and “substantial part,” *ibid.*, pp. 51-53.

breakthrough in British legal thinking that was needed before the British Government became willing to name genocide as a crime in British law. The radical alteration of British law symbolized by the 1969 Genocide Act barely penetrated public consciousness and was drafted in such a way that in 1998 Chief Justice Thomas Bingham of the Divisional Court in London could declare in his judgment denying Spain's request for the extradition of General Augusto Pinochet that it was never the intention of Parliament to permit the extradition of former heads of state, even including those accused of a crime as horrific as genocide.⁴ Some of the responsibility for this lay in the opaque and concise wording of the United Kingdom Genocide legislation. The high priority assigned to economy in phrasing by the crafters of laws was a cardinal problem of the 1953 and the 1968 drafts of the Act. Thought to minimize the chance of anyone reading unintended implications into the Act, concision obscured from public view the intended meaning of a key provision of the Act.

The Pinochet extradition case had its origin in October 1998 when Spanish Judge Balthazar Garzon requested General Augusto Pinochet's extradition from the UK based on several charges against Pinochet, one of which was that of genocide intended to eliminate certain political and social groups in Chile and Argentina.⁵ Since some of those killed were citizens of Spain, Garzon claimed that Spanish courts had the right to try General Pinochet under Spanish and international law. Garzon based his charge of genocide on a convoluted legal interpretation of Spain's domestic laws of genocide. He dropped the charge of genocide from the second of two provisional warrants for extradition presented to the High Court of Justice in London by the Crown Prosecution Service on behalf of Spain, but the original charge resonated throughout the hearing before Lord Chief Justice Thomas Bingham of Cornhill, and was referred to in the decision which he wrote, joined by Justice Collins and Justice Richards, concluding that Pinochet could not be extradited to Spain because he was a former head of state and was protected in the United Kingdom by British laws granting immunity from extradition to diplomats and serving public officials, as well as former heads of state. In Justice Bingham's words: "a former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions."⁶

In his judgment, Justice Bingham noted that Mr. Jones of the Crown Prosecution Service pointed out, "In support of his argument that crimes such as genocide have a peculiar quality of horror" and that Article IV of the UNGC provided for the punishment of persons committing genocide "whether they are constitutionally responsible rulers, public officials, or private individuals." But, continued Justice Bingham, "the difficulty for Mr. Jones' argument is . . . that when partial effect was given to the Convention in the United Kingdom by the Genocide Act, 1969, Article IV [of the UNGC] was not incorporated in the statute."⁷

The subsequent appeal decisions of the British courts and the opinions of the Law Lords of the British Parliament several times referred to the omission of the criminal liability for genocide of former heads of state under the UK Genocide Act of 1969. Although the

⁴ *R. v. Bartle, ex parte Pinochet*, Divisional Court, Queen's Bench Division, 28 October 1998, para. 63 (retrieved from the Internet on 14 January 2002 at the following site: <<http://www.cerifog.org/documentacion/dossiers/pinochet/houseoflords.htm>>) [hereinafter *Ex Parte Pinochet (DC)*].

⁵ For a useful summary of Judge Garzon's extradition requests and his reasoning, see, Margarita Lacabe (Executive Director of Derechos Human Rights), "The Criminal Procedures against Chilean and Argentinean Repressors in Spain: A Short Summary," Revision One, November 11, 1998 (retrieved from the Internet on 14 January 2002 at the following site: <<http://www.derechos.net/marga/papers/spain.html>>).

⁶ *Ex Parte Pinochet (DC)*, para. 63.

⁷ *Ibid.*, paras. 63-65. In Justice Bingham's decision, Article IV is written with an Arabic numeral, although most authors use the Roman numeral. I have chosen to adhere to the form found in the document I am quoting.

Pinochet extradition case was ultimately decided by reference to the terms of Britain's accession to the International Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Jack Straw, Britain's Home Secretary, decided against extradition on grounds of Gen. Pinochet's age and poor health, several British judges and Law Lords referred to the paramountcy of the extradition principles of the British Genocide Act as the ultimate standard where extradition for crimes against humanity were concerned.⁸

Thus, it has become important to understand the drafting of the 1969 UK Genocide Act and the philosophy of law which had guided its architects in the British Government. Had Parliament actually intended to grant immunity from prosecution or extradition to former heads of state by omitting Article IV of the UNGC from the 1969 UK Genocide Act? What were the goals and the intentions of British Government lawyers in regard to public officials who had committed crimes against humanity such as genocide?⁹

When the UNGC was first put to a vote in the Legal Committee of the UN General Assembly in 1948, the United Kingdom abstained on legal grounds. It voted for the UNGC on political grounds in the Plenary session. The UK delegate announced that His Majesty's Government "could not without further examination commit themselves to changes in British domestic laws which might be needed to give effect to the provisions of the United Kingdom." The British Government "could not commit themselves to action which would prejudice their traditional right of granting asylum to persons charged with political offences." The position of the Foreign Office in 1952 regarding reservations was based on the Government's "consistent policy of not making reservations to multilateral conventions unless these reservations are accepted by all other States parties to the Convention, and there are, therefore, objections to acceding to the Genocide Convention with reservations."¹⁰

Serious differences had emerged in 1951 between the Foreign Office and the Home Office over Britain's accession to the UNGC.

⁸ The first Law Lords decision is found in House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment of 25 November 1998 (retrieved from the Internet on 25 November 1998 at the following site: <<http://www.parliament.the-stationery-office.co.uk>> [hereinafter *Ex Parte Pinochet* (HL 1)]. The second Law Lords decision is House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment of 24 March 1999 (retrieved from the Internet on 24 March 1999 at the following site: <<http://www.parliament.the-stationery-office.co.uk>>)[hereinafter *Ex Parte Pinochet* (HL 2)]. Jack Straw's decision to drop extradition proceedings against Pinochet is reported in Clifford Krauss, "Freed by Britain, Pinochet Faces New Legal Battles at Home," *New York Times*, 3 March 2000 (retrieved from the Internet on 3 March 2000 at the following site: <<http://www.nytimes.com/library/world/americas>>).

⁹ There was a time when the intentions of the Government and Parliament in drafting and submitting legislation carried no weight in the interpretation of British law. However, the Law Lords have decreed that when the text of an Act requires clarification as a consequence of ambiguity, obscurity, or absurdity, reference may be made to Hansard and to other Parliamentary materials. See the decision of the Law Lords in the case of *Pepper vs. Hart* (1993).

¹⁰ For a contemporary account, written from the point of view of the Foreign Office, see D. N. Royce, Minute, 29 January 1952, FO371/101409, Convention on Genocide, UP259/1, Public Record Office (Kew), hereafter referred to as PRO.

“Before the General Election, a draft Cabinet Paper had been prepared to lay before the Cabinet the differing views of the then Home Secretary [Labor’s James Chuter Ede], who opposed accession, and the then Secretary of State who was prepared to agree to accession for political reasons. This Paper did not reach the Cabinet.”¹¹

When Sir David Maxwell Fyfe, a Conservative, became the new Home Secretary in November 1951, he took a fresh look at the problem and asked the Home Office “to draft a Cabinet Paper seeking authority for drafting the legislation needed to give effect to the Convention in the United Kingdom.”¹²

Credit for shaming the British Government for turning its back on the UNGC in the 1950s and 1960s belongs to Barnett Janner, a Labor M.P. (Leicester, North-West), who consistently badgered the prime ministers of Britain for failing to accede to the UNGC. He prodded the Labor government of Prime Minister Clement Attlee on 8 May 1950 and 20 November 1950, and he discomfited the Conservative Government of Winston Churchill on 30 January 1952, after the International Court of Justice issued a ruling permitting reservations to the Convention and leaving it up to each country to interpret their meaning. Having declared that it could not accede to the UNGC until the International Court of Justice had taken a position on reservations, the Court’s decision deprived the British Government of its best excuse for delay.

Raphael Lemkin, the father of the UNGC, also lobbied the British Government, writing to Sir David Maxwell Fyfe, the Minister for Home Affairs, on 17 January 1952. Lemkin had met Fyfe during the Nuremberg war crimes trials, where Fyfe served as a prosecutor, and recalled his interest in the problem of genocide. Pointing out that the UNGC had already been ratified by 31 nations and that several more nations were about to deposit their documents of ratification, he urged the British Government to ratify the Convention, even if it could only do so after introducing Britain’s own reservations in respect to the right of asylum for political crimes. “We need badly the humanitarian leadership of Great Britain in the matter of the genocide convention,” Lemkin declared, especially at a time “when we hear of genocide being perpetrated in Hungary, in the Baltic states and in other countries behind the Iron Curtain.”¹³

Within the Foreign Office, where support for British accession to the UNGC was growing, Lemkin’s letter struck the wrong note, first because the department opposed on principle entering reservations to an international convention, and, second, because its view of Lemkin was less than favorable. In a long handwritten minute, Sir Gerald Fitzmaurice, Second Legal Advisor to the Foreign Office, one of Britain’s leading experts on international law, and a participant in the early debates on the UNGC at the United Nations, condemned Lemkin’s suggestions:

I deplore Dr. Lemkin’s interventions. He has been mainly instrumental (a) in having a thoroughly bad Convention foisted on the world (b) in getting this Reservations question into its present muddle (this is a long story which I will not enlarge on here). His reference to this last matter in his letter clearly shows what has for some time been apparent from other [unclear word: indications?], that he attaches more value to nominal, paper, acceptances of the Convention even if accompanied by reservations of substance, than to the question whether the accepting country is really going to carry the thing out.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Raphael Lemkin to Sir David Maxwell Fyfe, 17 January 1952, FO371/101409, Convention on Genocide, UP259/9, PRO; Lemkin’s letter was sent to Royce, at the Foreign Office on 25 February 1952. See N. Cairncross, Home Office, to D. N. Royce, Foreign Office, 25 February 1952, *ibid.*

He is hopelessly unrealistic if he imagines there is anything in this Convention which will stop what is going on behind the Iron Curtain (and I believe several Soviet-bloc countries are (nominally) parties to the Convention). [unclear word: He's?] more so if he thinks U.K. accession will produce the smallest effect on these or any other countries.¹⁴

But Lemkin's timing was fortuitous. As the Foreign Office worked on a draft genocide bill with the Home Office, it discovered that the attitude of the Home Office had become more favorable to accession since the arrival of Sir David Maxwell Fyfe as minister. D. F. Duncan reported that:

"Since the election [of 25 October 1951] the new Home Secretary has taken a somewhat different line from his predecessor and the views of the Home Office and the Foreign Office on the matter now appear to be similar. The Home Secretary has asked for a draft Cabinet Paper to be prepared seeking authority for drafting the legislation needed to give effect to the Convention in the United Kingdom and we have agreed at departmental level that a joint Paper by the Home Secretary and the Foreign Secretary should be prepared."¹⁵

G. P. Hope reinforced Duncan's optimistic scenario. "Briefly," he minuted his Foreign Office colleagues, "the Home Office are in a slight difficulty in that the official view (namely that it would not be possible to accede to the Convention because of the difficulties and the unpopularity of amendments to domestic law which this would entail) has now been overridden by new Ministers, so that from their point of view the Home Office can hardly serve up a paper which discusses the merits of acceding or not acceding."¹⁶

The reality of the Home Office's reluctance to accede to any Convention which would infringe upon Britain's tradition of political asylum, especially in the case of politically motivated extradition requests, soured the collaboration between the two government departments. The Minister of Home Affairs quickly succumbed to the doubts of his civil servants. As Sir Frank Newsam of the Home Office later explained the manner in which he brought his Minister around to his view to Sir William Strang of the Foreign Office,

"Soon after the Home Secretary took office I ascertained his general views on the Genocide Convention. They were, to put it shortly, that it would be wrong for us to decline to accede to the Convention on the ground that it would involve us in difficult legislation. He asked that a paper should be prepared for circulation to the Cabinet and there has been correspondence between our departments about the contents of the paper."¹⁷

But Newsam noticed when the first draft paper appeared that "there was one important matter which was tending to go by default—namely, whether we should abandon our traditional policy of granting political asylum." As Newsam read it, "The draft paper suggests that we are prepared to throw overboard all our rights of political asylum." Thus, "I asked the Home Secretary whether this was his intention and he said it was not; he thought that we should aim at accepting the principle of Article VII of the Convention by recognising that the political nature of the offence should not be an absolute bar to

¹⁴ G. G. Fitzmaurice, Minute, no date but probably 5 or 6 March 1952, FO371/101409, UP259/9, PRO.

¹⁵ D. F. Duncan, Genocide Convention, memo for the file, 27 February 1952, FO371/101409, UP259/9, PRO.

¹⁶ C. P. Hope, Minute, 7 March 1952, FO371/101409, UP259/11, PRO.

¹⁷ Frank Newsam, Home Office, to Sir William Strang, Foreign Office, 24 May 1952, FO371/101409, UP259/21, PRO.

extradition for genocide, but asked that consideration should be given to retaining a discretion to the Home Secretary or the courts, or both, to refuse to surrender the fugitive." The advantage of retaining discretion would be that "it would ensure than an unscrupulous foreign government could not take advantage of the provision about political offences for the purpose of furthering a political persecution of such a type that the handing over of the fugitive would shock public opinion in this country."¹⁸

At the Foreign Office, however, Cold War considerations generated increasing enthusiasm for British adherence to the Genocide Convention. On 11 March 1952, the Home Office had forwarded its draft of the Joint Cabinet Paper on the Genocide Convention to the Foreign Office. This draft asked that the Cabinet grant authority to draft a genocide bill in order to see what problems it revealed. The Foreign Office immediately determined that the Home Office draft contained no arguments in favor of accession, but several against it. It responded on 18 March 1952 by requesting that the draft be revised to include the case for acceding to the UNGC. The argument for acceding was that:

"the Convention is laudable in intention and commands considerable support at home and abroad. Her Majesty's Government should not give the appearance of failing to support a measure which, for all its limitations, has already been ratified by thirty-three states. Her Majesty's Government would thus give a useful propaganda weapon to the Communists. The legal difficulties involved in accession might easily be ignored by the public whilst any failure to accede would be exploited by the ill-disposed and might confuse the ill-informed with regard to Her Majesty's Government's attitude to the crime of Genocide. There has been criticism of Her Majesty's Government's delay in acceding to the Convention and a number of Parliamentary Questions have been asked. Unless action is taken soon, criticism both at home and abroad is likely to mount and this may well prove embarrassing. We therefore recommend that Her Majesty's Government should accede to the Convention if the difficulties involved in our accession can be overcome."¹⁹

Lack of enthusiasm for the UNGC among the lawyers of the Home Office produced foot dragging and delay. Having heard nothing from the Home Office in reply to its suggestions, the Foreign Office inquired on 21 April if the Home Office was ready to respond.²⁰ Once more, Janner's persistence provided the essential catalyst for action. On 22 May, Royce minuted that he had learned from Cairncross that Janner's notice of intent to ask a question in Parliament on 19 May about the Government's inaction had caused Sir Frank Newsam to ask him to prepare a new draft. Peter Hope minuted in response to this news: "The H. O. have at last been stimulated into taking action."²¹ P. Mason, the Parliamentary Under-Secretary for Foreign Affairs, minuted on 16 May: "It is most unsatisfactory that this should have been so held up, and the best answer will not be much good. But the H. O. draft is deplorable . . ."²²

On 24 May 1952, Sir Frank Newsam of the Home Office wrote to Sir William Strang of the Foreign Office explaining how he had led the new Home Secretary to appreciate the dangers of Article VII of the UNGC and proposing that Britain enter a reservation to Article

¹⁸ *Ibid.*

¹⁹ N. Cairncross, Home Office, to C. P. Hope, Foreign Office, 11 March 1952, conveying draft of the Cabinet Paper on the International Convention on Genocide, Joint Memorandum by the Foreign Secretary and Home Secretary; and David Royce, Foreign Office, to N. F. Cairncross, Home Office, 18 March 1952, FO371/101409, UP259/12, PRO.

²⁰ D. N. Royce, Foreign Office, to N. F. Cairncross, Home Office, 21 April 1952, FO371/101409, UP259/12, PRO.

²¹ Minutes by D. N. Royce and Peter Hope, 22 May 1952, FO371/101409, UP259/20, PRO.

²² P. Mason, Parliamentary Under Secretary, Foreign Affairs, 16 May 1952, FO371/101409, UP259/20, PRO.

VII of the UNGC providing that the Home Secretary and/or the British Courts would have the right to refuse to surrender a fugitive for extradition if they were convinced that the real aim of the requesting government was the political persecution of the fugitive. If the Foreign Office agreed to this reservation, Newsam continued, the Home Secretary “would prefer that the matter of ratifying the Convention should be submitted to the Cabinet on this basis.”²³

G. G. Fitzmaurice captured the frustration of the Foreign Office on receiving Newsam’s letter in a minute: “This is extremely tiresome of the Home Office, and puts the Foreign Office in rather a dilemma since, on the one hand, we would wish, on general grounds, to accede to the Genocide Convention but, on the other hand, we are opposed in principle to the making of unilateral reservations.” Fitzmaurice feared that the British Government would look “rather foolish” in the future if, having entered a reservation to Article VII, it then objected to reservations made by other countries. Moreover, he believed that the reservation which the Home Office had in mind went directly counter to the purpose of the Genocide Convention and that other countries would object to it. For him, “The upshot of all this is that while it would be technically possible for us to make the proposed reservation without having to positively eat our previous words, it would be embarrassing and be likely to lead to a very awkward situation.” He was convinced that the Home Office’s real objection was to “the kind of case where a foreigner seeks asylum in this country and an attempt is made to procure his extradition on a trumped-up charge of genocide and on the plea that the charge being genocide, extradition cannot be refused on political grounds.” As he understood Article VII, however, it “would not, even as it now stands, oblige extradition to be effected in those circumstances.” Before any extradition would be approved, the British Government would have to be “convinced of the bona fides of the charge.”²⁴

On 11 June 1952, Sir William Strang wrote to Sir Frank Newsam expressing the Foreign Office’s surprise that the Home Office did indeed want Britain to enter a reservation on Article VII of the UNGC. The Foreign Office held to the view that no reservation was necessary and put forward Fitzmaurice’s argument that no British government would have to grant extradition if it was “not convinced of the bona fides of the charge.” The Foreign Office would always support the Home Office in refusing to “hand over an individual if it appeared that the motive of the request was political and not a bona fide charge of Genocide,” he assured the Home Office, and it was willing to put that promise in writing.²⁵

More than a month after sending its offer to the Home Office, the Foreign Office still had no reply. Trying to precipitate a decision, Selwyn Lloyd, the Under-Secretary for Foreign Affairs, wrote directly to Sir David Maxwell Fyfe hoping “that it will be possible for you to complete your consideration of the problem in the near future.” Recalling the promises of a reply he had made to Janner, Brigadier Medliccott and Mr. A. L. Easterman of the World Jewish Congress office in London, Lloyd added: “I feel those who are pressing us to make up our minds already have genuine cause for complaint, and I would not wish to have to put them off again.”²⁶

Easterman, representing the Political Department of the World Jewish Congress office in London, had written to Selwyn Lloyd on 29 May 1952 asking that the United

²³ Sir Frank Newsam, Home Office, to Sir William Strang, Foreign Office, 24 May 1952, FO371/101409, UP259/21, PRO.

²⁴ G. G. Fitzmaurice, Minute, 28 May 1952, FO371/101409, UP259/21, PRO.

²⁵ Sir William Strang, Foreign Office, to Sir Frank Newsam, Home Office, 11 June 1952, FO371/101409, UP259/21, PRO.

²⁶ Selwyn Lloyd to David Maxwell Fyfe, 16 July 1952, FO371, 101409, UP259/21, PRO.

Kingdom accede to the Genocide Convention. This stirred up G. G. Fitzmaurice of the Foreign Office. He minuted on 18 June 1952:

I also feel that people of Mr. Easterman's way of thinking ought not to be allowed to get entirely away with a para. like his third para. without explaining just how H. M. G.'s accession to a genocide Convention (had one existed in 1938) would have prevented Hitlerite Germany genociding the Jews in Central Europe—or how it would prevent the Russians and Hungarians doing the same thing now.²⁷ If Mr. Easterman and his ilk had devoted their energies to preventing Russia and the satellites from making reservations on the one article in the Convention that has any teeth in it, they might have been doing something that was practical. Instead, what they do is go for poor old [unclear word: Sandy?] who doesn't commit or allow genocide anyway!²⁸

On 25 July 1952, C. P. Hope of the Foreign Office received notice from Cairncross of the Home Office that it had requested that the Genocide Convention issue be placed on the Cabinet agenda for 1 August. Cairncross hoped to send over to the Foreign Office the latest Home Office draft of the joint Cabinet paper within the next few days. In the meantime, he noted, "Mr. Janner has returned to the charge in the House, and we have been asked to prepare a reply to yet another Parliamentary Question." Especially difficult to answer, Hope noted, was Janner's question about "why the Secretary of State has not yet ratified it." The Home Office had already hinted to Hope of the possibility that the "bill drafted by Parliamentary Counsel will look so awkward that the Cabinet may not feel inclined to put it to Parliament."²⁹

On 28 July 1952, the Foreign Office received the Home Office's draft of the joint Cabinet Paper on the Genocide Bill. Sir Frank Newsham of the Home Office wrote that: "The gist of the paper is that we should accede to the Convention despite the difficulties, but that a draft Bill should be prepared before a final decision is taken."³⁰ From the point of view of the Foreign Office, the new Home Office draft was still problematic because, as M. S. Williams put it in a minute, "the bias seems to be rather in favour of not ratifying the Convention and the Home Office have not accepted our view in regard to the problem raised by Article VII of the Convention (the Article which deals with the extradition of those accused of the crime of genocide.)" Nevertheless, Williams and his Foreign Office colleagues agreed to concur in the paper. There was not enough time to convince the Home Office about Article VII and, Williams commented, "The real tussle with the Home Office will come when the draft Bill is submitted to the Cabinet and we wish to secure its approval."³¹

The joint memorandum to the Cabinet of 29 July 1952, signed by Anthony Eden, the Secretary State for Foreign Affairs, and Sir David Maxwell Fyfe, the Secretary of State for the Home Office and Wales, never marshalled more than half-hearted enthusiasm for introducing an accession bill to Parliament. Eden and Maxwell Fyfe began by raising "the

²⁷ Easterman's third paragraph read: "It has been a source of disappointment to us that the British Government should, for so long a time after the adoption of the Convention, not have seen their way to recommend to Parliament the ratification of this most important international instrument, designed to protect groups against such crimes as mass annihilation, which the German Nazi regime committed against the Jews and other groups in Europe." Easterman to Selwyn Lloyd, Minister of State, Foreign Office, 29 May 1952, FO371, 101409, UP259/21, PRO.

²⁸ G. G. Fitzmaurice, Minute, 18 June 1952, FO371, 101409, UP259/21, PRO.

²⁹ C. P. Hope, Foreign Office, Minute on "Cabinet Paper on Genocide," 25 July 1952, FO371, 101409, UP259/27, PRO.

³⁰ Sir F. A. Newsam to Sir William Strang, 25 (?date to be checked) July 1952, FO371, 101409, UP259/28, PRO.

³¹ M. S. Williams, Minute, "Genocide Convention," 25 (?) July 1952, FO371, 101409, UP259/28, PRO.

question whether we should accede to the Convention for the Prevention and Punishment of the Crime of Genocide,” noting in passing that 38 states had ratified or acceded to the Convention and that the Government was already under fire at home and abroad for its delay in acceding to the UNGC.³² But their memorandum gave much more prominence to readings of Article VII which might require the violation of the British tradition of granting political asylum and refusing to extradite persons accused of political crimes.

In their memorandum for the Cabinet, Eden and Maxwell-Fyfe rejected the possibility of Britain’s acceding to the UNGC with a reservation on Article VII insisting that the Home Secretary retained the right to refuse the surrender of a fugitive:

“we fear that other parties to the Convention might well maintain that such a reservation was not compatible with the object of the Convention, which was intended to brand genocide as a crime which nothing, and certainly not political motives, can excuse”³³

For this reason, they had concluded “that the decision must be either to accede or not to accede.”³⁴

A further reason for careful scrutiny of the UNGC was that since governments were the most likely perpetrators of genocide, a government that was intent on genocide was “not likely to be restrained by the provisions of the Convention. The Convention indeed is not likely to have much practical effect,” the two secretaries observed.³⁵

More complex still was the issue of extradition from Britain of persons who had served in a government that committed genocide, but had been overthrown by politicians “of a different complexion.”³⁶ The memorandum asked the Cabinet members to consider the difficult hypothetical situation in which:

Suppose, for example, a political leader in a country with which we had an extradition treaty were driven out of power and sought refuge in this country, it is not inconceivable that a request might be made by the new Government for his surrender for an offence of genocide, and if adequate prima facie evidence were supplied of such an offence, it might well be difficult to refuse to surrender him, whatever we thought about the motive behind the request for his surrender. It may **[? check word]** well be, however, that public opinion would be much disturbed by the surrender of a fugitive in such circumstances.³⁷

The Government might have to pay a political price for failure to accede to the UNGC, they noted, first in the propaganda war against communism, and second, by handing domestic political opponents the opportunity to suggest that the Government had refused to take necessary action against the crime of genocide. In the latter case, “A failure

³² “International Convention on Genocide,” Memorandum by the Foreign Secretary [Anthony Eden] and the Home Secretary [David Maxwell Fyfe], 29 July 1952, Confidential, C. (52) 271, CAB129/054 or 69 **[to be checked further]**, PRO, paras. 1, 3 and 5c.

³³ *Ibid.*, para. 4.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 5a.

³⁶ *Ibid.*, para. 5b.

³⁷ *Ibid.*

to accede might be exploited by the ill-disposed, and might confuse the ill-informed, with regard to the Government's attitude"³⁸

Eden and Fyfe concluded that "on balance, it would be right to accede to the Convention," but first, before a final decision was taken by the Cabinet, "a Bill should be drafted so that the Cabinet can see exactly what legislation would be necessary to enable this country to accede to the Convention." They recommended that "a decision on the question whether we should accede to the Convention should be deferred until then."³⁹

On 4 September 1952, Churchill's Cabinet accepted the recommendation by Eden and Maxwell-Fyfe, inviting the "Home Secretary to prepare a draft of the Bill which would be required if the United Kingdom acceded to the International Convention on Genocide and then to bring the matter before the Cabinet again."⁴⁰ Churchill had sounded the only positive note in the discussion, stating "it would no doubt be necessary to accede to the Convention;" but he despaired of finding room for the enabling legislation in the next session of Parliament, which "was already overloaded with many more important Bills."⁴¹

A new institutional actor entered the debate over British accession to the UNGC in September 1952. This was the Parliamentary Counsel Office, then a relatively obscure branch of the British Treasury responsible for drafting Government Bills for introduction in Parliament and assessing their potential costs to the Treasury. Created in 1869, in the 1950s and 1960s it shared with the Home Office the job of drafting government bills, amendments, and motions for Parliament and of giving "legal advice on matters relating to Parliamentary bills."⁴²

The basic approach to the draft legislation favored by the Home Office was outlined in a letter from L. S. Brass of the Home Office to Sir Alan Ellis of the Parliamentary Counsel Office on 5 November 1952. Acknowledging that the Parliamentary Counsel Office would draft the Bill, Brass contributed his understanding of the significance of the legislation:

³⁸ *Ibid.*, para. 5c.

³⁹ *Ibid.*, paras. 6, 7 and 8.

⁴⁰ Conclusion of a Meeting of the Cabinet held on Thursday, 4 September 1952 at 3:30 pm, C.C. (52) 78th Conclusions, CAB128/25, PRO.

⁴¹ *Ibid.*

⁴² Quoted from the Public Record Office's computerized description of government offices, accessed September 2000 at Kew and from the Internet site of the Parliamentary Counsel Office <http://www.cabinet-office.gov.uk/parliamentary_counsel>. On 23 September 1952, [Lyn Russell?], the Secretary of the Treasury Chambers, wrote to the Parliamentary Counsel, conveying a letter of 15 September from P. Allen of the Home Office on the Genocide Convention, and asking that the Parliamentary Counsel Office place itself in communication with the Home Office "with a view to examining the Bill and drafting any necessary legislation." Lyn Russell? to Parliamentary Counsel, 22 September 1952, Misc. 1968-69, H.P.R., Parliamentary Counsel Office. The letter from the Home Office reported that "on 4th September the Cabinet considered whether the United Kingdom should accede to the International Convention on the Prevention and Punishment of Genocide. They invited Sir David Maxwell Fyfe to cause to be prepared a draft of the Bill that would be required if the United Kingdom were to accede to the Convention and to bring the matter before them again. The Bill would propose to create certain new criminal offences and to amend the law relating to extradition." P. Allen to the Secretary of the Treasury, 15 September 1952, 959571, Misc. 1968-69, H.P.R., Parliamentary Counsels Office. The initials H.P.R. apparently stand for the name of the First Parliamentary Counsel in 1968-1969, H. P. Rowe. The records of the PCO are retained by the Parliamentary Counsel Office and, in this case, were bound into black leather volumes with gold lettering. Despite the 1950s provenance of the quoted documents on the preparation of a draft UK genocide act, they are held in the volumes marked 1968-1969. Virtually none of these documents are available at the PRO or listed in their records, and I was only able to locate and examine them thanks to the generous assistance of archival assistants at the Home Office, and with the permission of the Departmental Records Officer of the PCO.

“It seems to us that it will be desirable to make genocide a new felony in English law notwithstanding that a person who perpetrates an act of genocide will probably in most cases be punishable for some offence or other under the existing law, but this may not be so in all cases, particularly as regards measures to prevent births. Making genocide a crime in English law will be specifically useful for extradition purposes; we shall wish to be able to extradite for genocide *eo nomine* and it is a fundamental principle of extradition that a person is not surrendered except for an act or omission which is a crime according to the law of the surrendering state and further the United Kingdom cannot extradite a person to a foreign state unless that state undertakes by legislation or treaty not to detain or try him for any offence committed prior to the surrender other than the extradition crime for which he was surrendered—see paragraph (2) of section 3 of the Extradition Act, 1870 (c.52). It is accordingly suggested that the Convention or the relevant articles should be scheduled to the Bill; the punishment for killing members of a group should be death and for the other acts mentioned in Article II imprisonment not exceeding fourteen years.”

Regarding Article II of the UNGC, Brass believed that “if genocide is made a felony, the existing law about conspiracy, attempts, aiding and abetting will be sufficient to cover heads (b) to (e) in Article III.” Article VII regarding extradition, he continued, would be regarded

“as a supplementary extradition treaty between the Contracting Parties. Should any Contracting Party not have an extradition treaty with the United Kingdom, the view is taken that the United Kingdom will be under no obligation to extradite to that Party. The Article being regarded as a supplementary treaty, genocide and conspiracy to commit genocide and attempts to do so should be made extradition crimes; in other words, they should be added to the First Schedule to the Act of 1870. In view of section 3 of the Extradition Act, 1873, (c.60), it is not necessary to make incitement or complicity extradition crimes. The Extradition Act, 1932 (c.39), affords a precedent for adding offences to the said First Schedule.”

Brass next turned to the most important precedent which the Genocide bill would set in British law: a clause refusing the right of the accused to claim in an extradition proceeding that the crime committed was political in character. It would be necessary, he stated,

“to provide that genocide shall not be regarded for extradition purposes as an offence of a political character, and in this connection reference is invited to paragraph (1) of section 3 and sections 7 and 9 of the Act of 1870. In order to complete the picture we think provision should also be made that genocide shall not be regarded as a criminal matter of a political character for the purposes of section 5 of the Extradition Act, 1873, which section enables evidence to be taken for the purpose of criminal matters pending in foreign states.”

Arriving at Article IV of the UNGC providing that public officials enjoyed no immunity from prosecution for acts of genocide, Brass threw up his hands, anticipating Justice Bingham’s position in his 1998 Pinochet judgment that Parliament had not included Article IV of the UNGC in the UK Genocide Act (1969). “No provision in the Bill seems desirable for the purposes of Article IV (which was probably not intended to mean exactly what it says),” he declared, “and as the United Kingdom does not intend to send persons to an international penal tribunal such as is mentioned in Article VI, no provision about it is needed.”⁴³ But, as we shall see, Brass was not to have the final word on this crucial matter.

⁴³ L. S. Brass, Home Office, to Sir Alan Ellis, K.C.B., Q.C., Parliamentary Counsel Office, 5 November 1952, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

As the Parliamentary Counsel Office began work on the draft bill, an official with the initials G. C. or E. placed a three page, handwritten minute in the file, attacking many of Brass's suggestions and questioning the entire purpose of the bill. "I am a stranger to this region of cloud-cuckoo land," he remarked archly, "so you must forgive me if my preliminary comments are slightly bemused and defeatist." This minute speaks volumes about the philosophical and legal perspective of many of the British Government's lawyers in 1952 and it deserves to be quoted verbatim:

"I cannot believe that Brass means to be taken seriously when he suggests making genocide a new felony in English law, for it seems that over a large part of the field genocide is an offence which in its nature can hardly be committed by an individual. Taking the heads of Article I, it may be admitted that an individual could be guilty of genocide under (a) but only in circumstances where he would also be guilty of murder: to legislate to the effect that a person who commits murder of a particular kind (e.g. murdering a Jew simply because he is a Jew and with intent to make one Jew less in the world) shall be punished in a particular way seems to be fantastic, especially when you cannot make his punishment any severer than it is already. The same applies to (b): you could, I suppose, say that to cause grievous bodily harm to a person is to be punished more severely if there is an accompanying intent to harm a racial etc. group, but all you can add to the existing law is an increase in the penalty—i.e. to make the offences under ss. 11, 14, 15, 18 etc. of the Offences against the Person Act, 1861, punishable with death instead of imprisonment for life, if committed with a certain intent and against a certain class of victim. But is anyone going to stand for this? Mental harm, incidentally, seems to be an offence unknown to our criminal law, though I have not pursued all the authorities. I suppose you could not cause mental harm without also committing some other offence for which the law provides a penalty. But if a new offence is to be created, it would be odd to confine it only to the genocide class of activities; and if we are to do it generally, you would I think be reluctant to set about it without very full instructions and consultations."

"It is when we come to (c), (d) and (e) of Article II that we land in the realm of pure fantasy. To spell out of (c) any specific offence which in the circumstances of to-day an individual could commit without the authority of statute is to give (c) an intensely absurd construction: it can only refer to state policy and if we are to legislate about it we are in effect to say that if at any time Parliament passes an Act which expressly or implicitly authorises this sort of activity, then anyone acting in the execution of the Act is to be punishable as a felon. Perhaps I am overstating this: you could, I suppose, commit the offence of "incitement to commit genocide" by publicly urging all shopkeepers to refuse to sell the means of subsistence to Jews, but I doubt whether a single shopkeeper by so refusing could be guilty of "deliberately inflicting conditions of life." With a little ingenuity one could think of several cases but they are hopelessly unreal. Perhaps the Minister of Food might so adapt its rationing scheme as to make it difficult or impossible for Jews to get their rations, but they could only do so with the authority of a valid legislative document, so how do you prohibit and punish it?"

"As to (d), I do not know how you would set about "imposing measures intended to prevent births". Here again by its wording the convention forbids states to make certain laws—and which Brass says is to be a felony. The only authority which could impose such measures is Parliament. If (d) is given a very wide meaning so as to include the taking of steps by individuals, great ingenuity is again needed to see how an individual could do any such thing. By urging or threatening Jews not to copulate or to use contraceptive while doing so? By urging him or threatening him to take such drugs as will render him sterile or provide abortions in their women. By urging or threatening doctors not to treat Jewish maternity cases, hospitals to refuse them admission and landlords to evict them? It makes no sense."

“The same observations apply to (c) and if the legislation under this head is to be directed at individuals, we shall be asking Parliament to prohibit, on pain of special penalties, activities which could only take place in circumstances amounting to a major civil disturbance, extending over a considerable period of time. It is impossible to imagine acts contrary (c) taking place otherwise than under the authority of law or under conditions amounting to complete usurpation of the civil power.”

“Unless we can clear our heads on the above, it seems hardly worth while to go on to the extradition point, but I am doing so.”⁴⁴

Harold Simcox Kent,⁴⁵ of the Parliamentary Counsel Office, had a profound impact on the issue of including Article IV of the UNGC in the drafts of the United Kingdom Genocide Act and his outlook is worth examining in detail. It was Kent who prepared a first draft of a “Genocide Convention” bill, dated 28 November 1952, and sent 12 copies to the Home Office to give it an idea of what such a bill would look like, on the assumption, as he wrote to Leslie Brass, that “you wanted me to draft, and to argue about it afterwards.” In an accompanying letter of seven typed pages, dated 1 December 1952, Kent responded to Leslie Brass’s suggestions containing the Home Office’s specifications for the bill. He noted that “a good deal of what I have said in this letter falls outside the province of a draftsman, but this is a very novel kind of a Bill and I have been thinking about it a good deal during the last three weeks, so perhaps you will bear with me.”⁴⁶

Kent challenged entirely the idea that the United Kingdom ought to incorporate genocide as a specially named crime in its criminal code. “You seem to think that the clause will fill some gaps in our criminal law, but I cannot find any real ones,” he observed.

“The first possible gap-filler seems to be the offence of ‘causing mental harm to members of the group.’ I do not profess to be very clear what these words mean or what circumstances they contemplate, but in the context they suggest to me the deliberate breaking down of mental faculties by some process of mental torture or the use of drugs, e.g. as in the case of the victims of public trials in Communist countries. They would not in my opinion include the causing of mental distress by a campaign of insults and abuse in public streets etc. or in the Press, although such things might result in mental disorders in the victims. So far as mental torture is concerned, this could not very well happen without some degree of physical duress involving false imprisonment or some other offences against the person.”⁴⁷

⁴⁴ GC or GE, Memorandum for H. S. Kent, 10 October 1952, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

⁴⁵ Kent was born on 11 November 1903 in Tientsin, China, the son of a barrister who specialized in Anglo-Chinese commerce. A graduate of Rugby and Merton College, Oxford, he sought work as a junior Parliamentary Counsel and wrote mystery novels to supplement his income. During the Second World War, he wrote a good deal of the emergency legislation. He was also the drafter of many nationalisation bills introduced by the government of Clement Attlee after 1945, as well as the Act which created the National Health Service. In 1953, Kent started 10 years of service as Procurator-General and Treasury Solicitor, and in 1963 went on to serve the Vassall Tribunal, which investigated the case of an Admiralty clerk, John Vassall, who had been blackmailed into working for the KGB. Retiring from the Government in 1963, Kent became the first Standing Counsel of the Church of England. He died on 4 December 1998 at the age of 95. Obituary for Sir Harold Kent (retrieved from the Parliamentary Counsel Internet site on 17 January 2002 at the following site: <<http://www.cabinet-office.gov.uk/parliamentary-counsel/Obits/kent.htm>>

⁴⁶ H. S. Kent to Leslie Brass, 1 December 1952, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

⁴⁷ *Ibid.*

Similarly, he argued, compulsion to take dangerous drugs “would involve a criminal offence.”

Kent also supposed that items c, d, and e of the definition of genocide would “involve criminal offences unless they are carried out by a government in pursuance of legal powers.” And this became one of Kent’s major arguments against a law criminalizing genocide in the UK:

“Genocide cannot happen in this country because the law prevents it and public opinion is behind the law. Surely the enactment of a special penal law for the protection of racial and religious groups would not merely be futile, but would be a step in the wrong direction. A country whose ordinary law adequately protects groups and minorities so that special legislation is unnecessary has reached a much more satisfactory position than a country which needs such legislation. It is better that a Jew-baiter should be punished by the ordinary law of the land than by a special law for the protection of Jews: I mean better from the point of view of the Jews. If you try a criminal for genocide, he will have an opportunity for propagating his ideas, and passions will be aroused on all sides. If he is dealt with prosaically but effectively by the ordinary criminal law, the whole thing is debunked.”⁴⁸

Next, Kent took up the issue of extradition in the Genocide bill. He assumed that Brass’s reason for wishing to make genocide a crime in UK law was to provide a foundation for extradition:

“The argument is that you may want to extradite a man who committed genocide when he was in power in his own country, possibly in accordance with the then existing law of that country, and to be able to say: “Oh yes, that is all right, genocide is a crime in this country under the Genocide Convention Act, and it is in the Schedule to the 1870 Act.” But there seems to me to be two doubts unresolved. The first is whether an act is a “crime” at all within the meaning of the 1870 Act if it was legal in the country concerned at the time of its commission. A court in this country might be reluctant to treat it as such, especially if it was committed by a subordinate official acting under orders and public opinion here was divided on the political issues. The second difficulty is whether, even with clause 1, you could always say that the “crime”—I mean the sort of act which could not possibly be committed here without legal authority—would have been a crime here. Suppose, for example, that a foreign country passed a law for the suppression of a religious sect of a violent mind (something like Mau Mau) and in pursuance of that law a general in command of regular troops in that country rounded up members of the sect and hanged or flogged them in accordance with the law, because they were members of the sect. The motive would be, not merely to secure order, but to suppress the sect, and would in my view fall within the definition of “genocide” (I return to the point of construction later). It would be difficult to say that the act of the commanding officer, which could not have been committed here without a corresponding legal authority, would have been a crime in this country. It wouldn’t have happened unless it had ceased to be a crime. In order to fit the present plan of the Extradition Acts—no extradition for crimes which are not crimes here—you need to create a new kind of crime viz. Crime by Act of Parliament.”⁴⁹

Rather than engage in such foolishness, Kent preferred a clause in the Genocide Bill,

“providing that the various acts comprised in the definition of genocide in the Convention are to be included as extradition crimes whether or not they were

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

contrary to the law of the country concerned when they were committed, and to leave out the requirement that they must correspond with crimes under our law. This would not doubt raise difficult issues with Parliament, but they are inherent in the Convention and cannot be escaped.”⁵⁰

Then Kent came to Article IV and confronted the issue of prosecuting or extraditing former heads of state. Kent strongly disagreed with Brass’s contention that the UN never intended Article IV, authorizing prosecution of public officials for acts of genocide, to be taken seriously: “It is all very well for you to say that the authors of the Convention didn’t mean Article IV,” he observed:

“Perhaps they didn’t mean that constitutional rulers were to be punished while they were still ruling, for that would be impossible; but they must have meant that rulers were to be punished as soon as someone could lay his hands on them. From our point of view that is the only practical point to be legislated about and the Bill must be firm on it.”⁵¹

If the extradition aims of the genocide bill could be accomplished without making genocide a named crime in British law, and if Brass agreed that Britain’s criminal law and judicial system were adequate bulwarks against genocide in Britain (“I am told that we haven’t had a pogrom in this country since Richard I staged one to finance the Crusades!,” he remarked), why was it necessary to go any farther than the extradition provisions of the bill, Kent asked.⁵²

Should the UK accede to the Convention at all, Kent wondered in the final section of his long letter. Lurking beneath Kent’s question was his fear that the definition of genocide in Article II of the Convention:

“might cover some of the things we are doing in East Africa to suppress Mau Mau. My knowledge of Mau Mau is only derived from the newspapers but I gather that its rites are of a primitive religious character—one cannot distinguish (for the purpose of the Convention) between good religions and bad ones, the essence of the matter is that all religions must be allowed to flourish. Assuming that Mau Mau is a religious group—it may even be a racial one—, I would think that severe measures designed to suppress it would come within the words of Article II. Suppose, for example, that Mau Mau leaders were hanged in circumstances designed to secure the maximum deterrent effect on other members of the organization. No doubt their crime would be complicity in, or at least incitement to commit, murder, but might not the severity and circumstances of the punishment indicate that the motive was not only to punish a crime, or even to restore law and order, but to root out this particular organisation. If flogging were introduced for the offence of taking part in Mau Mau ceremonies (as I think has been suggested in the papers), would that not be within paragraph (b) of Article II?”⁵³

Kent acknowledged that his argument pivoted on the meaning of “the word “destroy” in Article II covering, not only the physical destruction of members of a group, but also the destruction of the character of a group as such by persecution or repressive measures.” He feared that paragraph (c) of Article II of the Convention barring “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

whole or in part” would be seen to “be particularly applicable in the case of a religious group.” Most importantly, he felt that the “express reference in paragraph (c) to ‘physical destruction’ suggests that paragraph (b) [causing serious bodily or mental harm to members of the group] is aimed at something else.” His concern over the status of Britain’s anti-Mau Mau campaign in Kenya would be misplaced, he admitted, if he was wrong about the intended difference between clauses b and c. “If I am wrong about this, the Mau Mau argument falls. I am not suggesting that anything done in East Africa is intended to destroy physically a part of a group, although the meaning of ‘part’ in Article II is highly obscure.”⁵⁴

Kent summarized his concerns as follows:

“I would say that if this Bill is only dealing with mass-murder on the Hitler model, it is unnecessary and wrong to make it part of our domestic law and the effective way to deal with extradition is to provide quite clearly that we can extradite future Hitlers after they have been deposed, without any pretence that it is the kind of ‘crime’ than can happen here. If the Bill is dealing with the suppression of religious or national sects as well as genocide proper, we ought to think pretty carefully where we are getting to.”⁵⁵

Early in January, Kent met with lawyers at the Home Office and it was agreed that he should draft an alternative bill dealing solely with extradition from Britain for genocide crimes committed in other countries. The alternative bill would not make genocide a crime under the laws of the UK. Under this compromise procedure, the original draft of the bill would remain on the table for further consideration. Kent believed that “the two versions might in due course be submitted to the Home Secretary for his decision.”⁵⁶

Kent’s draft for a genocide bill was titled “Extension of Extradition Acts to genocide”. It provided that “the expression ‘fugitive criminal’ in the Extradition Acts, 1870 to 1895 shall include any person accused or convicted of an act of genocide committed within the jurisdiction of any foreign state who is in or suspected of being in some part of Her Majesty’s Dominions” For the purposes of the act, genocide was defined in accordance with Article II of the UNGC. To satisfy the requirement of double criminality, Article III of Kent’s draft bill stipulated that

“Subsection (1) of this section shall apply whether or not the act of which the person in question is accused or alleged to have committed was, at the time when it was committed, lawful under the law of the state in which it was committed, and whether or not it is or then was an act punishable under the criminal law of any part of the United Kingdom.”

Kent’s further provided that genocide was not to be treated as an offence of a political character when extradition of a suspect was requested.⁵⁷

Kent sent 12 copies of his alternative bill to Brass at the Home Office on 4 February 1953. In a covering letter, he explained the thinking behind the various portions of his draft, including the stipulation that persons were liable to prosecution for “an act which was lawful at the time when it was committed.” He particularly emphasized the importance of

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ File memorandum, H. S. Kent, “(not a contemporary note.),” no date, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

⁵⁷ Kent’s draft of the bill, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

incorporating in the United Kingdom Genocide Bill words that incorporated the meaning of Article IV of the UNGC:

“In effect, the words in square brackets [“whether or not the act was, at the time when it was committed or contemplated, rendered lawful or justified by any law of the place in which it was committed or to be committed”] correspond with Article IV of the Convention (although you allege that the authors did not mean what they said in this Article), and ensure that the Ministers and officials of genocidal regimes are brought to book after the regime is overthrown. My own view is that this is the kind of case that the Convention is aimed at and that, if the Bill does not cover it, it is fairly futile. I would therefore like to keep the words in square brackets, even though they may not be strictly necessary and are bound to give trouble in Parliament.”⁵⁸

While Kent jostled with lawyers and administrators at the Home Office, the Foreign Office continued to be embarrassed by having to give stalling answers to questions in the House of Commons from M.P. Barnett Janner regarding the Government’s intentions in respect to United Kingdom accession to the UNGC. Selwyn Lloyd expressed the exasperation of his Foreign Office colleagues by asking the Home Office if it could not at least join his department in drafting a joint Cabinet Paper setting out a common position. Selwyn Lloyd favored UK accession to the UNGC and lamented the Home Office’s inability to overcome its doubts and hesitation over the need to qualify British legal practice by providing an exception to the principle that political offenses were not extraditable.⁵⁹

On 2 February 1953, D. N. Royce of the Foreign Office recorded his frustration with the Home Office’s inability to come up with the wording of the final draft of a bill approving UK accession to the UNGC:

[1.] Since the Cabinet decided on the 4th September 1952 to invite the Home Secretary to prepare a draft of the Bill which would be required if the United Kingdom acceded to the International Convention on Genocide and then to bring the matter before the Cabinet again, I have at intervals spoken to Mr. Cairncross in the Home Office who has each time told me that he was having difficulty in securing agreement with the Parliamentary draftsmen on the text of the Bill. I last spoke to him last week when he told me the same story and also that he was about to hand over his duties to Mr. R. R. Pittam.

2. We can hardly hope that Mr. Janner will continue to hold off this question though perhaps the Home Secretary may have spoken to him as suggested in Mr. Mason’s minute on the P.Q. at UP.259/39.

3. In any case, you may now wish to jolt the Home Office into some action. I submit a draft.⁶⁰

On 5 February 1953, M.S. Williams of the Foreign Office delivered the recommended “jolt” in a letter to F.L.T. Graham-Harrison of the Home Office.⁶¹ “You will recall,” he

⁵⁸ H. S. Kent, Parliamentary Counsel Office, to Brass, 4 February 1953, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

⁵⁹ UP254/2 in FO371/107080, PRO.

⁶⁰ *Ibid.*

⁶¹ Francis Graham-Harrison, born 14 October 1914, graduated from Eton and Magdalen College, Oxford. His father, Sir William Montagu Graham-Harrison, had served as a parliamentary draftsman and a legal advisor to the Home Office. While at Oxford, Francis Graham-Harrison befriended Isaiah Berlin, Philip Toynbee and other men destined to become leading British intellectuals. From 1946 to 1949, he served as assistant private secretary to Prime Minister

observed, "that at their 78th meeting on the 4th September last year, the Cabinet invited the Home Secretary to prepare a draft of the Bill which would be required if the United Kingdom acceded to the International Convention on Genocide and then to bring the matter before the Cabinet again." Williams acknowledged that the Home Office had encountered "difficulties in securing agreement with the Parliamentary draftsmen on a text which we could discuss with them." He then proceeded to complain:

"We are rather unhappy about the delay. As you know the Foreign Office have been compelled on a number of occasions, the last time on the 8th December[,] to return stalling answers to Parliamentary questions by Mr. Janner when he has asked why we have not acceded to the Convention. I think he could well claim to have genuine grievance if he were again to ask a question and again to receive an answer which is neither positive nor negative."⁶²

Wishing to avoid further embarrassment, Williams proposed that the two departments:

"should try to at least reach an agreed view on whether the draft Bill should be submitted to Parliament or not. This would provide us with a new answer to Parliamentary pressure since questioners would surely see the strength of a plea that delay was caused by the Parliamentary timetable rather than by our inability to decide what we want to do."

Williams hinted that delay would contradict the wishes of Prime Minister Churchill, noting "If having seen the text the Cabinet decide not to proceed with our accession we should at least know where we are, though in view of the Prime Minister's views as recorded in the Cabinet conclusions it is perhaps unlikely that we shall not ultimately go ahead." Omitted from Williams' letter was the strong sentence drafted for him by Royce which threatened: "I believe that Ministers here would feel very much inclined to ask your Ministers to take any further questions since we feel the Foreign Office can hardly be held accountable for the time the H. M. Government are taking to make up their minds."⁶³

Williams hope that his toned down letter would suffice to jolt the Home Office into action was doomed to disappointment. The Home Office was still enmeshed in its debate with Kent at the Parliamentary Counsel Office. On 20 February 1953, Graham-Harrison replied, and, while recognizing "the embarrassing position in which your Ministers may be placed if they have to give further temporising answers to Parliamentary Questions on this subject . . .," he reported that the drafting of the Bill "presents peculiar difficulties both to the Home Office and to Parliamentary Counsel." The Home Office had just received a new draft from Parliamentary Counsel, but, he reported, "it is quite clear that it will require a great deal of detailed consideration."⁶⁴

Clement Attlee. In the view of Conservative Home Secretary Rab Butler, Graham-Harrison was "the brightest man in the Home Office . . . his brain is like the engine of a Rolls Royce." In 1949, Graham-Harrison became Secretary to the Royal Commission on Capital Punishment and was the author of its report. It was said that he would have come in first among the candidates who sat the Home Office entrance exam in 1937, except for his terrible handwriting. After coming in second and starting his work at the Home Office, "he was told by the then Home Secretary 'never to write more than one sentence in your own hand.'" See "Quiet Mandarin at the Heart of Whitehall Machine for 30 Years," Obituary of Francis Graham-Harrison by Jon Snow, *The Guardian*, 7 January 2002 (retrieved from the Internet on 22 January 2002 at the following site: <<http://politics.guardian.co.uk/Print/0,3858,4330222,00.html>> We shall encounter Graham-Harrison once more in the 1960s, for he worked as Deputy Under-Secretary of State at the Home Office from 1963 to 1974.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

In March 1953, the Foreign Office resumed its pressure for British accession to the UNGC, taking the opportunity offered by the Cabinet Office when it circulated a list of Bills to be considered at the next session of Parliament. The Future Legislation Committee of the Cabinet had put the Genocide Bill in "Category D, i.e. possible Bills to which little priority would be given." Anthony Nutting, Parliamentary Under-Secretary for the Foreign Office, sent a letter to Sir Hugh Lucas-Tooth, M.P. of the Home Office, asking him to expedite the drafting of the Bill and, if the Cabinet decided to proceed with it, "suggest that the Genocide Bill should tentatively be placed in a higher category by the Future Legislation Committee." Nutting noted that more than 41 countries had acceded to or ratified the UNGC and that "Our own inability hitherto to take a decision one way or the other about accession to the Convention is becoming more difficult to defend" This new Foreign Office gambit had no more success than its earlier needling. Lucas-Tooth replied evasively on 8 April 1953 that "I think it would be premature to ask the Cabinet Office to put the Bill in a high category when it has not been decided whether there is to be a Bill at all" ⁶⁵

Barnett Janner continued to pepper the Government with questions about British accession to the UNGC on the floor of the House of Commons. On 27 April 1953, he asked Foreign Secretary Selwyn Lloyd, "how many nations have now ratified the United Nations Convention relating to genocide: which of our Dominions are included in this number: and what reasons now impel him to refrain from ratifying the Convention." The delays at the Home Office forced Lloyd to give another one of his stalling replies, including his rather plaintive assurance that "I am doing the best I can to see that this legislation is prepared and that an opportunity may be found for a discussion in the House."⁶⁶

In the meantime, the verbal battle between Kent at the Parliamentary Counsel Office, and Brass at the Home Office showed no signs of coming to a conclusion. On 18 April 1953, Leslie Brass responded negatively to Kent's draft extradition bill. The Home Office disagreed that an extradition bill would suffice due to the requirement of double criminality in British extradition law:

"If the Convention is ratified the United Kingdom will be under an obligation to extradite persons for genocide committed abroad, and it is in the view of the Home Office important to maintain as a principle of United Kingdom extradition practice that a person is not extraditable for a crime unless that crime would be one here and that the foreign Government cannot try a surrendered person for any other crime than that for which he was surrendered."⁶⁷

Brass's reply reached the Parliamentary Counsel Office just as Kent was "laying down my office as a Parliamentary Counsel." In future, Krusin would be dealing with the issue for his office, but since Kent was still the only staff member with a good command of the issue, he would reply on behalf of Parliamentary Counsel. Kent questioned Brass's reasoning in favor of making genocide a crime under British law, noting wryly, "I appreciate, of course, that my alternative Bill would be a headache for the people who have to go and argue about these matters at international conferences . . . ," but:

"The reason why I like the alternative Bill better is that it seems to me to be based on the realities of the situation. The real crimes we are after are crimes committed by Governments and cannot be made punishable under their own law at the time

⁶⁵ UP254/5 in FO371/107080, PRO.

⁶⁶ *Ibid.*

⁶⁷ L. S. Brass, Home Office, to Sir Alan Ellis, Parliamentary Counsel Office, 18 April 1953, Misc. 1968-69, H.P.R., Parliamentary Counsel Office. Brass wrote to Ellis because "I am told that he [Kent] has already quitted Old Palace Yard. . . ."

when they are committed. When the Governments are deposed, their past crimes are made punishable by their successors and at that point it is desirable that no asylum should be afforded to them in other countries. If we have a genocidal regime here, we shall have to pass a retrospective Genocide Bill when the regime is deposed (I can see no escape from that because the regime will have swept aside any previous legislation standing in their way), and then, if the other nations have passed Acts on the lines of my alternative Bill, the genocides will not escape.”⁶⁸

Kent had made his last case. At the Home Office in 1953, there was no sympathy for his position. It should be noted here that the 1953 draft Genocide Bill ultimately went up to the British Cabinet without his revision designed to ensure that deposed senior members of governments accused of genocide could be extradited from Britain just as Article IV of the UNGC provided. But Kent’s proposal did not disappear from the debate. In 1967, fourteen years after his departure from the Parliamentary Counsel Office to spend 10 years as Treasury Solicitor, his arguments would once more echo in the corridors of the Home Office. And in 1969, whether by design or by accident we cannot yet say, the clause he crafted to implement Article IV of the UNGC would find its way into the United Kingdom’s first genocide act. How that happened and under what circumstances is an important story, for it helps to explain Justice Bingham’s mistaken claim that Parliament omitted Article IV of the UNGC from the 1969 British Genocide Act.

In the spring of 1953, on 3 June 1953, the Home Office sent to the Foreign Office for its reactions a copy of the draft Genocide Bill and a Cabinet Paper, written by a Mr. Taylor, containing the comments of the Home Office.⁶⁹ It was immediately clear to Foreign Office officials in the UN Department that the Home Office, to quote a minute of 5 June by M. L. Cahill, “was not setting out to encourage the Cabinet to accede.”⁷⁰ The officials at the Foreign Office, noting the hostility toward incorporating the UNGC in British law manifested by the Home Office, now recommended to Selwyn Lloyd, the Minister of State, that their department should agree to a joint memorandum to the Cabinet “only if we can agree to the terms of the draft bill and if the memorandum urges the U.K.’s accession to the Convention.”⁷¹ However, noting that the draft Bill itself was acceptable, the recommendation of Gerald Fitzmaurice of the Foreign Office to “concur in it” and “circulate a separate Foreign Office paper putting forward the political considerations in favour of accession” carried the day with his civil service colleagues.⁷² Moreover, the civil servants further recommended to the Minister of State that the Genocide bill could be put off for two years, to the Parliamentary session after next, since “there is no great urgency about the introduction of legislation.”⁷³

Selwyn Lloyd disagreed with the civil servants advice to abandon the idea of a joint Foreign Office/Home Office memorandum. “I do not agree with this line,” he wrote in a

⁶⁸ H. S. Kent, Parl. Counsel Office, to Sir Leslie Brass, Home Office, 23 April 1953, Misc. 1968-69, H.P.R., Parliamentary Counsel Office.

⁶⁹ Genocide Convention, Draft of A Bill to Enable Effect to Be Given to the Convention on the Prevention and the Punishment of the Crime of Genocide, CCLXXXIX-J(3), 27 March 1953. The accompanying Cabinet Paper has been removed from this file, a fact explained in a statement stamped on the file cover: “Cabinet Document removed and destroyed in accordance with Cabinet Office instructions; the original should be found in the Cabinet Office records.” UP254/9 in FO371/107080, PRO. A copy of the document is found in the Cabinet Papers.

⁷⁰ UP254/9 in FO371/107080, PRO.

⁷¹ C. L. S. Cope, UP254/9 in FO371/107080, PRO.

⁷² Minute by G. G. Maurice, 9 June 1953, UP254/9 in FO371/107080, PRO.

⁷³ Minute, M. S. Williams, 13 June 1953, in UP254/9 in FO371/107080, PRO.

minute on 22 June 1953. "I think it would be much better that we should do a joint and less gloomy memorandum so as to tie down the Home Secretary." Although recognizing that a delay in introducing the legislation might be necessary in order to secure passage of the legislation, he urged his officials to remember that "the important thing is to accede, and to say that we have the necessary legislation ready; always assuming that we are committed as a matter of policy to accession."⁷⁴ At a meeting with Messers. Nutting, Mason and Williams on 25 June, the three civil servants persuaded Lloyd of the futility of pursuing the chimera of a joint memorandum with the Home Office. "The Minister decided that he would circulate a short memorandum to the Cabinet, recommending accession," Williams noted in a Minute, although Eden would not press for the legislation to be introduced in the next session. Lloyd and his colleagues at the Foreign Office hoped for "a decision in principle" at the Cabinet to accede to the Convention, confident that once this had been achieved the legislation would eventually come before Parliament. Williams noted in passing that Selwyn Lloyd had gone "rather further than he or any other Foreign Office spokesman had gone before towards a commitment to accede if it had proved practicable to introduce legislation."⁷⁵

In his strong support for British accession to the Genocide Convention, Selwyn Lloyd nudged Great Britain towards waters that the United States in 1953 still refused to navigate. In answer to a query dispatched to the British Embassy in Washington, the Foreign Office's United Nations Department in London learned on 27 June that although the United States had long ago signed the Genocide Convention, the Eisenhower Administration and Congress were unlikely to take any measures in the foreseeable future to ratify it.⁷⁶

Clearing the way for the Foreign Office to act independently of the Home Office, F. J. Leishman sent a memorandum on behalf of the Foreign Office on 2 July 1953 to R. J. Whittick of the Home Office announcing that the Foreign Office preferred "to circulate a separate memorandum recommending accession," and on 16 July the Home Office replied, acknowledging an informal agreement to disagree and to circulate separate papers to the Cabinet.⁷⁷

On 23 July 1953, the Foreign Office's Cabinet Paper recommending Britain's accession to the UNGC went forward to the Cabinet Office. In the Paper, Selwn Lloyd tackled head on the Home Office's qualms about the Bill:

"The principal objection to accession is that it implies in respect of crimes of genocide a partial surrender of the traditional right of political asylum. The crime of genocide as defined in the International Convention is, however, of a very repugnant character and I imagine that no government in this country would be likely to wish to refuse extradition in the case of persons who really appeared prima facie to have been guilty of it. A sufficient safeguard against the possibility that foreign states might seek to abuse their right to demand extradition resides in the undoubted right of the Home Secretary to refuse extradition in cases where he is not convinced of the bona fides of the charge. The government is moreover morally bound to Parliament to accede to the Convention, provided that the legal difficulties which have been explained to Parliament can be overcome. The draft bill now circulated by the Home Secretary shows that this can be done and further delay

⁷⁴ Selwyn Lloyd Minute, 22 June 1953, UP254/9 in FO371/107080, PRO.

⁷⁵ Minute, M. S. Williams, 26 June 1953, UP254/9 in FO371/107080, PRO.

⁷⁶ M. A. Wenner, British Embassy, Washington, 24 June 1953, to United Nations (Political) Department, Foreign Office, London, UP254/11 in FO371/107080, PRO.

⁷⁷ P. J. Taylor, Home Office, to F. J. Leishman, Foreign Office, 16 July 1953, UP254/13 in FO371/107080, PRO.

in reaching a decision could not be easily explained in Parliament and would certainly cause us difficulty in the United Nations.”

Lloyd concluded his Cabinet Paper by proposing that the Cabinet accede to the Convention and announce the Government’s position in Parliament, followed by taking whatever measures it could to find time for the bill in the next session or the following session of Parliament.⁷⁸

On 28 July 1953, the Cabinet considered the memoranda of the Home Secretary and of Selwyn Lloyd, acting on behalf of the Foreign Office, regarding the issue of acceding to the UNGC. Unfortunately for the Foreign Office’s new found enthusiasm for accession to the UNGC, Lloyd’s Minister, Anthony Eden, could not attend; indeed, he would not appear at another Cabinet meeting until 2 October due to illness. But Sir David Maxwell Fyfe, the Secretary of State for the Home Department and Minister for Welsh Affairs, did attend and introduced his Department’s memorandum setting forth its “objections to adding new offences to the criminal law of the United Kingdom in this way.” In particular, Fyfe pointed out,

“To make genocide an extradition crime, and to remove from persons alleged to have committed it the protection given by the existing law to those accused or convicted abroad of an offence of a political character, would mean abandoning, to this extent, our traditional policy of granting asylum to persons who are accused in their own countries of political offences. This is inevitable if we accede to the Convention, since Article VII provides that genocide, conspiracy, attempts and direct or public incitement to commit genocide, and complicity in genocide, shall not be considered as political crimes for the purpose of extradition.”

Fyfe concluded by noting that although 42 countries had acceded to the Convention, “the United States of America have not done so and I understand that it is now a matter of some doubt whether it will.”⁷⁹

The Home Secretary won the debate. Discussion in the Cabinet focused on reasons that would justify not acceding to the UNGC for the time being. The United States’ refusal to ratify the Convention figured prominently in the discussion of these reasons and some Cabinet members believed it would be best to “defer further action until it was clear whether the United States intended to accede to the Convention.” A new factor which emerged in the discussion was the view that “it might be inexpedient at a time when the Royal Commission on Capital Punishment was about to present its Report, to bring forward legislation creating a new offence [of genocide] carrying the death penalty.” On the other hand, the Cabinet heard that, “In the House of Commons there was a small group of Members who were interested in this Convention and it was possible that they might work up some public feeling in favour of it.” Bringing the discussion to an end, the Cabinet “Agreed to defer for the time being their decision on the question whether legislation should be introduced for the purpose of enabling the United Kingdom to accede to the International Convention on Genocide.” The “time being” proved to last a long time. It would not be until 1969 that a British Cabinet would revisit the issue and submit a new bill to Parliament proposing British accession to the UNGC.⁸⁰

⁷⁸ Memorandum by the Minister of State, Selwyn Lloyd, International Convention on Genocide, UP254/9 in FO371/107080, PRO.

⁷⁹ Conclusions of a Meeting of the Cabinet on Tuesday, 28 July 1953, C.C. (53) 46th Conclusions, CAB128/26, 353, PRO.

⁸⁰ *Ibid.*

With the postponement of further consideration of a Genocide Bill, the Conservative Government of Winston Churchill stripped away the figleaf protecting the Foreign Office from criticism of Britain's failure to accede to the UNGC. This proved to be an embarrassment, but one which the Foreign Office would withstand. In November 1953, preparing for the visit of a deputation from the Human Rights Working Group of the United Nations Association, M. L. Cahill of the Foreign Office's United Nations Political Bureau acknowledged that the Minister's statement before Parliament in April_ "We are doing our best to see that it [i.e. the necessary legislation] is prepared and when it is prepared it will be brought before the House"—would no longer suffice. Cahill suggested that the deputation should be reminded that Britain already adhered to the spirit of the UNGC. It was unwilling however "to prejudice our traditional policy in respect of political refugees in favour of an immediate adherence to the 'letter' of the Convention to which we already adhere 'in spirit'".⁸¹

Despite its setback at the Cabinet, the Foreign Office continued to press for British accession to the UNGC, while the Home Office steadily refused to abandon its position that:

"if a request for extradition is made on the basis of a charge of genocide and prima facie evidence is produced that the person sought committed the offence of genocide, extradition cannot, under Article VII of the Convention, be refused on the ground that the offence was political."⁸²

The Foreign Office grew increasingly exasperated by the insistence of the Home Office's lawyers that future British governments would forfeit their right to refuse extradition on the grounds that the extradition requests were politically motivated unless Her Majesty's Government entered a reservation against Article VII of the UNGC at the time it acceded to the Convention. A minute by G. T. Marshall of the United Nations Department of the Foreign Office on 8 March 1960 explained the situation:

"The Home Office have at long last replied to Mr. Dugdale's letter of November 21, 1958.

2. They still disagree with our views. The legal niceties escape me but it is evident that they cannot swallow our argument that Article VII of the Convention was never intended to be used to contend that a false charge of genocide could not be resisted by showing that it was a pretext for an essentially political charge. They suggest that it would be hard to disprove the genuineness of a request for extradition in such a case.
3. Secondly they pose the case where a charge is both genocidal and political and argue that in these circumstances there could no longer be a bar to extradition after effect had been given to Article VII of the Convention."⁸³

Sir Gerald Fitzmaurice, leading the United Nations Department's campaign for accession on behalf of the Foreign Office in 1960, totally rejected any notion of a British reservation to Article VII and attacked the Home Office for blatantly ignoring the enormity of the crime of genocide. In his view, the horrendous nature of genocide nullified Home Office arguments for not acceding to the UNGC based on the fact that genocide was almost

⁸¹ Minute by M. L. Cahill, United Nations Political Bureau, 19 November 1953 London, UP254/35, FO371/107080, PRO.

⁸² Joyce Ollett for Sir Samuel Hoare, International Division, Home Office, to A. C. Dugdale, Foreign Office, 1 March 1960, UN1643/2, FO371/153555, PRO.

⁸³ Minute, G. T. Marshall, 8 March 1960, FO371/153555, Convention on Genocide: Disagreement with Foreign Office View, UN1643/2, PRO.

always politically motivated. In a vigorously written Minute entered in the file on 19 August 1960, following his return to London from overseas, he caustically observed:

“2. This seems to me to be a very odd letter from the Home Office. In fact I think they do concede the main point made in our last letter, namely that Article VII of the Genocide Convention would not prevent us from refusing extradition where there was ground for thinking that the charge of genocide was trumped up. What they appear to be worried about is the case where the charge is genuine, and they want to preserve the right to refuse extradition even in that case.”⁸⁴

Fitzmaurice was appalled by the possibility that Home Office lawyers thought a person who was a fugitive from genocide charges should be granted political asylum in Britain simply because his acts of genocide were politically-motivated:

“3. They point out that there are some cases in which there is a double element. For instance, an act may be both murder and political assassination. This is true, and one can see reasons why even murder could be regarded as non-extraditable if political elements were involved. I cannot myself see however that there would ever be a case in which one would want to protect anyone from the consequences of genuine acts of genocide merely because there were political aspects, given the particularly revolting character of this offence, which really cannot in any circumstances be mitigated, merely because it has some political motive or what might, in other circumstances, have been a political justification.”⁸⁵

Finally, Fitzmaurice argued, the UK had “always maintained the view that it is both morally wrong and legally invalid to make reservations on articles of substance which go to the root of the Convention. It means obtaining the kudos of becoming a party, while contracting out of an essential part of the bargain.” Article VII of the UNGC was essential to the Genocide Convention:

“There is no doubt I think that Article VII is an essential element of the Genocide Convention, because genocide is peculiarly liable to have a political tinge or to be involved with political elements. This is precisely why Article VII was put in, because without it would always be possible to take the line that the crime, however dastardly, was nevertheless a political one, and that extradition need not be effected. Anyone who reserves on Article VII virtually proclaims that he is reserving the right not to extradite, however unquestionably a case of genocide the given case may be.”⁸⁶

Moving beyond Fitzmaurice’s argument, A. C. Dugdale refuted the Home Office’s case:

“You appear in substance to concede our point that, if an accusation of genocide is put up as a pretext for securing the extradition of a person whom it is intended to try for another (political) offence, extradition could be refused notwithstanding the Convention. Your real worry appears to be over the case where the charge of genocide is in fact genuine, but arises from acts committed in the course of a

⁸⁴ Minute, G. G. Fitzmaurice, 19 August 1960, FO371/153555, Convention on Genocide: Disagreement with Foreign Office View, UN1643/2, PRO.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

conflict between two factions, when the winners, who may be just as guilty of genocide as the losers, are seeking vengeance.”⁸⁷

But the Foreign Office would not accept this reasoning:

“It seems to us that the answer to this lies in the scope of the offence of genocide as defined in the Convention. It is defined in Article II as meaning acts committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.” There would therefore not be a case of genocide where the conflict was between political factions as such, for the two sides would be trying, not to exterminate but to defeat each other. Furthermore, it is normally the case that civil wars and similar conflicts between opposing factions are of a political character and not of a “national, ethnical, racial or religious character”, and therefore the type of case which you fear is unlikely to arise in practice.”⁸⁸

Given the enormity of the crime of genocide, the Foreign Office urged the Home Office to accept the risk that might arise in the instance of borderline cases since:

“After all, although genuine genocide may be rare, where it does occur it is a crime of so dreadful a character that surely no-one would wish to protect or give asylum to the perpetrators, whether or not some political element was involved. It is this thought, I think, which was partly responsible for Article VII of the Convention. Moreover, it must surely be the case that the idea behind the right to refuse extradition for political offences, even if these also constitute common crimes, is that the political circumstances can sometimes be held, if not to justify the crime as such, at any rate to render it reasonable not to surrender the person concerned to local justice. Could this ever be said of any genuine case of genocide, or if it could, would not the occurrence be so rare that the risk could be accepted?”⁸⁹

Once it was admitted that extradition could be refused in cases of politically-motivated and false accusations, Dugdale continued, one should consider the instance of a genuine perpetrator of genocide. The Eichmann case was instructive, in his view:

“The Israelis did not request Eichmann’s extradition, but supposing they had done, would it then have been defensible for the Argentineans to have refused it on the ground that the Israelis had political motives in wanting to try him (which they undoubtedly have) and despite the fact that he has been about as clearly guilty of genocide or attempted genocide as any man could be.”

Letting his indignation over the Home Office position show, Dugdale concluded: “Frankly, it does seem to us that you push the matter to an extreme in wanting to preserve the right of non-extradition even in this type of case.”⁹⁰

Dugdale’s exposition of the Foreign Office’s position forced Hoare to the wall and led him to reveal the historical and contemporary concerns underlying his reasoning. When he did, on 14 August 1960, Dugdale demolished his position. Hoare began by explaining that the Home Office had in mind situations in which during the course of a civil war both sides

⁸⁷ A. C. Dugdale, Foreign Office, to Sir Samuel Hoare, Home Office, 25 August 1960, UN1643/2, FO371/153555, PRO.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

committed genocide, resulting in a demand at a later date by one side for the extradition to its custody of an asylum-seeking belligerent from the other side. "You ask whether it would ever be reasonable to refuse to surrender someone, on the ground of the political nature of the offence, in a genuine case of genocide," Hoare reminded Dugdale. "The answer is Yes, if the surrender were requested by persons who had been equally concerned in a genuine case of genocide; and this is the case we are discussing."⁹¹

Hoare had principally in mind the experience of the Spanish Civil War, which showed, he argued, "that civil wars (like religious wars) tend to become, particularly if they are prolonged, wars of extermination." Elaborating his case, he continued:

"One side terms the other rebels who are not entitled under the laws of war to any treatment but shooting at sight; the other retaliates by applying the same treatment to the side in power."⁹²

The vagueness of the criminal acts listed in Article II of the UNGC, Hoare complained, made it quite likely that British courts hearing extradition cases resulting from civil wars would be forced to conclude acts of genocide had been committed. Even if there was proof that the side requesting the extradition was also guilty of genocide, there would be no basis, under Article VII of the UNGC, for a British court to refuse the writ "since the only ground under our extradition law would be that the offence was really of a political character, and this ground is expressly removed by Article VII of the Convention."⁹³

To clinch his case, Hoare offered for Dugan's consideration some contemporary examples drawn from the Middle East and the Congo:

"I would enquire . . . whether the Foreign Office believes that a full-dress war between Israel and the Arabs would be conducted without the commission of acts which would amount to genocide within the meaning of the Convention, and whether they would be happy to see H.M.G. hand over the perpetrators of such acts on one side to the other, whichever side that might be?"

Another salient example, Hoare noted, was the recent murder of defenseless Baluba men, women and children by the Congolese National Army, an act which Dag Hammarskjold, the Secretary-General of the UN, had labeled "genocide, since they appear to be directed toward the extermination of a specific ethnic group, the Baluba tribe." The situation in the Congo was typical, Hoare insisted: "If you are going to tell me that this was a conflict between primitive and savage people and has no relevance to what might occur in other civil wars, I am afraid I shall have to say that you are indulging in wishful thinking."⁹⁴

Dugdale's reply exposed the legal fallacy in Hoare's reasoning: "you suggest that if both sides have been guilty of such acts, or of acts of attempted genocide, then the pot being as black as the kettle, one would not wish to surrender the kettle to the pot, however much the charge of genocide appeared to be made out on a *prima facie* basis." But if such an extradition was ordered by a British court, Dugdale retorted, "It would at least result in one of the two sets of genociders getting punished, though, of course, for the wrong reasons; whereas if your course of no extradition were followed, the only result would be that neither set would get punished."⁹⁵

⁹¹ Sir Samuel Hoare to A. C. Dugdale, 14 September 1960, UN1643/6, FO371/153555, PRO.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ A. C. Dugdale to Sir Samuel Hoare, 31 October 1960, UN1643/6, FO371/153555, PRO.

Nor would Dugdale agree that Hoare's examples captured the likely results of civil wars. "For obvious reasons," he argued, "the contestants are not trying to wipe each other out on any scale or in any sense that could reasonably be called genocide, but simply to win. It may be that when one side does win, it will then kill off a number of persons on the other side, but such acts have a political and not a genocidal character." Dugdale threw the example of the Spanish Civil War back at Hoare: "The Spanish civil war was about as representative of the sort of thing that happens as anything that has occurred in modern times, and it is the fact not only that neither side aimed at exterminating any part of the Spanish population as such, but that when Franco won, all further exterminations, beyond, no doubt, the execution of a number of political opponents, ceased." Moreover, Dugdale declared, the Foreign Office would always oppose extraditions supported with evidence trumped up by governments whose "real object was merely to get hold of the persons concerned in order to liquidate them on political grounds. . . ." ⁹⁶

The overall implication of Hoare's argument, Dugdale insisted, is "that we should remain permanently outside the Genocide Convention, despite the fact that it has now been ratified by a very large number of countries, merely because of the somewhat remote possibility that we might thereby find ourselves obliged to extradite some genociders in a case when the people wanting them had also been guilty of genocide." The Foreign Office would never accept that argument and, Dugdale suggested, neither would "people outside Government circles . . . who would consider an explanation on these lines as anything else than a pretext for unwillingness to assume the obligations of the Convention." ⁹⁷

Deadlocked over the conundrum of Article VII, the Foreign Office and the Home Office made no progress towards drafting a United Kingdom Genocide Bill until the General Election of 31 March 1966, during which the Labor Party pledged that following a Labor victory Britain would accede to the UNGC. Harold Wilson's landslide victory put the UNGC on Parliament's agenda for the first time. Labor's sweeping mandate injected new energy and direction from above into the stalled negotiations between the Home Office and the Foreign Office.

The opening of a new Home Office file on 27 September 1967 by Gordon Rudd signaled the start of technical preparations to draft a UK Genocide Bill. But the title of the file—"Genocide Convention Bill—Instructions for Drafting"—is slightly misleading. ⁹⁸ In reality, the Criminal Division of the Home Office needed many months to sort out several issues that would determine the ultimate approach and contents of the bill. Rudd's file-opening minute states simply:

"I have been informed by Mr. Morris (Parliamentary Section) that the Genocide Convention Bill is provisionally listed for the 1968/69 session of Parliament. Since 1968 is "Human Rights Year", E.4 Division consider that the Foreign Office would see advantage in our introducing the Bill before the end of the year if possible." ⁹⁹

In September and October 1968, Rudd had solved the basic problems of coordinating Great Britain's genocide legislation with its remaining dependencies in a

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Rudd, Minute, 28 September 1967, HO291/1537, PRO.

⁹⁹ Rudd, Minute, 28 September 1967, HO291/1537.

manner that conformed to Britain's extradition legislation and its requirement of "double criminality."¹⁰⁰ In late September, Rudd also sent a draft of the drafting instructions he would ultimately send to the Parliamentary Counsel Office to several ministries which shared an interest in the matter, including the Foreign Office, the Commonwealth Office, the Scottish Home and Health Department, and to the Legal Advisers Department, as well as E.2 and E.4 divisions, of the Home Office. The aim of the new bill would be to "enable the United Kingdom to accede to the United Nations' Genocide Convention. According to Rudd's memorandum,

"Accession involves two major requirements:-(1) that genocide and the other acts enumerated in Article III of the Convention shall be made offences under our law; and (2) that the said acts shall not be treated as political crimes for the purposes of extradition."¹⁰¹

Rudd had no reason to reinvent the wheel. He had inherited a fairly complete file and noted that "A draft bill to give effect to these requirements was prepared by Parliamentary Counsel in 1953 (CCLXXXIX-J(3)), but this will require some modification in the light of subsequent developments in the fields of criminal justice and extradition." Initially, Rudd set out simply to update the 1953 draft bill by accommodating in it laws passed in the United Kingdom after 1953 and by clarifying some of its technical details.¹⁰² Virtually all of the changes which Rudd set out in September 1967 were minor in nature and non-controversial. "[A]ny act falling within the definition of 'genocide' in Article II of the Convention shall be punishable on indictment [and, Rudd added to the 1953 draft] shall be an arrestable offence] under the law of England and Wales." Instead of the death penalty for the commission of acts of genocide, which was stipulated in the 1953 draft, Rudd inserted life imprisonment where death was caused, modifying the draft to take account of the restriction on the use of the death penalty introduced by the British Parliament in 1965.¹⁰³ The stipulation that genocide crimes which did not cause death would be punishable by up to 14 years imprisonment was carried over from the 1953 draft. "[T]o ensure that genocide shall not be treated as an offence of a political character for the purpose of those Acts," Rudd noted that it would not only be necessary to "bring the acts of genocide, incitement to genocide and complicity therein within the scope of the Extradition Act 1870," but also to modify the recently passed Fugitive Offenders Act 1967, the Extradition Act 1873 and the Backing of Warrants (Republic of Ireland) Act 1965.¹⁰⁴

¹⁰⁰ *Ibid.*; Rudd, Minute, 25 October 1967, HO291/1537.

¹⁰¹ Rudd, Minute, 28 September 1967, HO291/1537, PRO.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* What is curious about this is that the reform of the death penalty legislation introduced by Parliament in 1965 abolished the death penalty in cases of murder. Left out of that reform was the abolition of the death penalty for treason and arson in the Royal Dockyards, offences whose revocations were judged likely to take a long time and to delay the reform of the death penalty for murder. In a memorandum to Rudd, a lawyer in the C.1 division of the Home Office advised that "capital punishment is to be reconsidered in 1969/1970 and we shall take account of the provisions of the Genocide Convention Bill in reviewing policy." Thus, in my opinion, by setting life imprisonment rather than death as the penalty for genocide crimes involving actual deaths, Home Office lawyers were strengthening the argument for abolishing the death penalty in cases of treason or arson in the Royal Dockyards. If genocide was punished by life imprisonment, their argument might have run, surely crimes such as treason should not be punished by death. Name illegible, C. 1 division, Home Office, to Gordon Rudd, C.3 division, Home Office, Genocide Convention Bill, 26 February 1968, HO291/1537/p.16.

¹⁰⁴ Rudd, Memo on Draft Heads of Instructions for Parliamentary Counsel, ca. 27 September 1967. HO291/1537, PRO.

On 18 January 1968, replies received from the relevant government ministries to which Rudd had sent his original draft of the instructions for the crafting of the genocide bill made it clear that its terms were “broadly acceptable.” Speeding up the drafting process was the veritable barrage of questions fired in the House of Commons at Richard Crossman and other government leaders by Barnett Janner, the persistent Labor M.P. On 15 February 1968, Janner demanded to know:

“Is the right hon. Friend aware that it was said in answer to a Question by me that the Government had categorically come to the conclusion that they should accede to the Genocide Convention and that, in Human Rights Year, it has not been acceded to? Will he take immediate steps to ensure that the undertaking then given is put into effect?”¹⁰⁵

To this sally, the Home Office replied to the Parliamentary Whip on 21 February that it had already prepared the heads of instructions for Parliamentary Counsel and only awaited assurance from the Lord President of the Council (R.H. Crossman) that the genocide bill “has a firm place in the [Government’s] programme . . .” to submit the draft bill to Parliamentary Counsel for the next step in preparing the legislation.¹⁰⁶ When Janner returned to the field again on 22 February, declaring hyperbolically in the House of Commons that a United Kingdom genocide bill would “enable the vicious crime of genocide to be removed from the annals of history altogether by our setting a proper example in accepting the Convention and acceding to it,” Crossman attempted to brush him off with an assurance that the matter would be reviewed when the government was “considering next Session’s legislation.”¹⁰⁷

Earlier, in November 1966, Janner had used the dismissal of accused Nazi perpetrators in Austria as an opportunity to pressure the government to accede to the Genocide Convention, and in June 1967 he had asked for Government introduction of a United Kingdom genocide bill in view of “the continuous threat to ‘commit genocide’ against the people of Israel.”¹⁰⁸ Janner, sometimes joined by another Labor M.P., Peter Archer (Rowley Regis and Tipton), also broached the matter of British accession to the UNGC in the House of Commons on 26 January 1967 and 14 December 1967.¹⁰⁹

In April 1968, the beleaguered Crossman was quite ready to place a genocide bill on the Parliamentary agenda. Meeting with the Secretary of State of Home Affairs, James Callaghan, on the morning of 4 April, Crossman “said that he was anxious to find a place in the programme for the Genocide Bill. This was a short Bill; and he thought it appropriate that it should be brought before Parliament in Human Rights Year.” Crossman asked how much work would be involved in the drafting and if the bill could be introduced in the House of Lords.¹¹⁰ But neither Janner’s pressure in the House of Commons nor the apparent

¹⁰⁵ House of Commons, Debates, 15 February 1968, 1587-1588.

¹⁰⁶ Notes for the Leader of the House on the Genocide Bill, Home Office Memo, 21 February 1968.

¹⁰⁷ House of Commons, Debates, 22 February 1968, [Page number to be checked].

¹⁰⁸ House of Commons, Debates, 22 June 1967, 312.

¹⁰⁹ House of Commons, Debates, 26 January 1967, 1751-1753; and House of Commons, Debates, 14 December 1967, [Page number to be checked].

¹¹⁰ Sir Philip Allen, Minute for Mr. Graham-Harrison, 4 April 1968, HO291/1537, p.17, PRO.

readiness of the Home Office move ahead succeeded in bringing the Genocide Bill to the floor of Parliament in 1968. The crowded programme of Parliament led to postponement of its submission to 1969. On 19 April 1969, Frederick Peart, M.P. the Lord Privy Seal and Leader of the House of Commons, informed Peter Archer, M.P., the Parliamentary Private Secretary for the Law Officer's Department, that although "Jim Callaghan did in fact discuss this with my predecessor," there was "no prospect of including such a Bill in the programme for the current session; we are already full up." But he held out hope that the Bill would be introduced "early in the new session to get it into law during the year."¹¹¹

The Home Office attended to putting the final touches on the Genocide Bill while awaiting its introduction in Parliament. It convened a consultative meeting on 2 May 1968 attended by lawyers from the Foreign Office and the Commonwealth Office, as well as its own specialists.¹¹² At the start of the meeting Rudd confirmed that the Bill would be introduced in the House of Lords before the end of 1968. A consensus emerged covering all the key issues before the meeting. Life imprisonment would be the penalty for genocide where death was caused and up to 14 years imprisonment would be the penalty for other genocide crimes. It was noted in the minutes that this followed the pattern of the Geneva Conventions Act 1957. Incitement to commit genocide that resulted in deaths would be punishable by life imprisonment and incitements that did not cause death by up to 14 years in prison. It was also agreed that the proposal to deny treatment of genocide and related offences as political offences would not bar the Secretary of State from refusing "to allow the return of a person under the relevant subsections [(1) (b) and (c) of section 4] of the Fugitive Offenders Act 1967. On the matter of extension of the British legislation to its islands, colonies, dependent territories, associated states and protected states a series of technical solutions was devised, aided by the fact that the Insular Authorities had already agreed that the Genocide Bill would be extended to include them and that a comparable extension clause would be introduced "to apply the Bill by Order in Council to certain dependencies."¹¹³

The problem which Rudd had raised—"The fact that certain dependencies to which our Extradition Treaties extend might not have enacted comparable legislation by the time our own legislation acceding to the Convention became law gave rise to the difficulty that a person would thereafter theoretically be extradited for genocide from a territory where genocide was not a criminal offence under domestic law"—would be overcome by two remedies:

"(a) our making the necessary Orders for the extension of the Act to territories under United Kingdom sovereignty before acceding to the Convention, and (b) providing, by Orders in council under the Extradition Acts, that the extension of our Extradition Treaties with other signatories to the Genocide Convention should apply only as regards those dependencies covered by our instrument of accession.

¹¹¹ Frederick Peart to Peter Archer, M.P., House of Commons, 19 April 1968, HO291/1537, p.20, PRO.

¹¹² Those present were G.V. Hart, Legal Adviser's Branch, Home Office, who chaired the meeting; C. H. Prior, Criminal Department, HO; G. T. Rudd, Criminal Department, HO; J. Chilcot, General Department, HO; J. Freeland, Legal Adviser's Branch, Foreign Office; O. E. Goddard, Commonwealth Office; D. Roberts, Criminal Department, HO; and A. Hewins, Criminal Department, HO, who was only present for the discussion of penalties. See the "Minutes of a meeting at the Home Office on 2nd May 1968 to discuss the instructions to be sent to Parliamentary Counsel for the preparation of the Genocide Convention Bill," HO291/1537, p. 23, PRO. Hereafter cited as Minutes, 2 May 1968.

¹¹³ *Ibid.*

Further Orders in Council could be made to embrace the Associated States as and when they themselves acceded to the Convention.”

The needed amendments to the Extradition Act 1873 would apply directly to the Islands and would “be extended by Order in Council to the dependencies.” The Fugitive Offenders Act 1967 would be revised by separate amendments to the Orders in Council for the individual dependencies “to include genocide in the schedule of offences.”¹¹⁴ The success of the meeting was marked by asking G. V. Hart of the Legal Adviser’s Branch to “draft the necessary instructions to Parliamentary Counsel” and to circulate them for any further comments to the relevant departments and divisions.¹¹⁵

The pace of the drafting process increased further in the month of May 1968, spurred on once again by Janner, who renewed his forays in favor of a genocide bill on the very day of the drafting meeting at the Home Office, 2 May 1968. This time he cited “the shocking rise, once again, of neo-Nazism in Germany” to justify yet another question in the House of Commons reminding the government of its tardiness. On 27 May, Frederick Peart authorized James Callaghan to forward to the Parliamentary Counsel the instructions for drafting the Genocide Bill devised by the Home Office.¹¹⁶ Callaghan set 17 June as the deadline for his staff to place its instructions in the hands of the Parliamentary Counsel.¹¹⁷

Hart now set about to draft instructions based on the consensus reached at the meeting of 2 May, as he understood it. Initially, his draft letter to Parliamentary Counsel reflected the points that were agreed on at that meeting, but he deliberately veered off that safe and well-travelled road into a mine field, unexpectedly raising the issue of the retrospectivity of genocide as an extradition crime. Hart excused himself in advance for tackling vital issues that had not been coordinated with his colleagues by writing a minute for the file in which he lamented:

“Here is a draft letter to Parliamentary Counsel with instructions. It raises some difficult questions, and there may be some departures, in the part about retrospectivity in parags. 13-14, from the ideas of the meeting on 2 May.”¹¹⁸

Hart justified these departures by referring to them as needed after his examination of the correspondence with Parliamentary Counsel in 1952-1953. Then Hart observed,

“I should have liked to discuss these questions more fully before drafting the instructions, but we have to send them to Parliamentary Counsel by 17th June, so—unless decisions of substance contrary to the sense of the instructions can be taken very quickly—I suggest that the instructions should be sent and the questions

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* On 29 April 1968, O.E. Goddard of the Commonwealth Office, had confirmed that it supported the precedent set by the extension of the Geneva Convention for the Protection of War Victims by Order in Council under an Act of 1957 to apply the Genocide Convention to the territories by similar means. See O.E. Goddard to P. Carter, U.N. (E. & S.) Department, Foreign Office, 29 April 1968, HO291/1537, p. 21, PRO.

¹¹⁶ Lord Privy Seal to James Callaghan, 27 May 1968, HO291/1537, 25, PRO.

¹¹⁷ Mr. Graham-Harrison to Hart, Rudd, and Evans, 29 May 1968, HO291/1537, 26a, PRO.

¹¹⁸ G. V. Hart, Minute, 13 June 1968, HO291/1537, PRO.

about retrospectivity considered with the assistance of Parliamentary Counsel on the draft bill.”

In his memorandum, Hart stated flatly that “The provision creating the offence should not be retrospective.” He admitted that laws creating extraditable offences generally made the offences retrospective, but, he observed about the instance of the Genocide Bill,

“in previous cases the conduct in question was already, in most if not in all respects, criminal according to English law, and, since the general rule is that a person should not be extradited for conduct which was not an offence against the law of both countries at the time when it took place, it is proposed that the provisions for extradition should not be retrospective.”¹¹⁹

Not content with these observations and recommendations, Hart then proposed that a person should not be extradited if the genocidal act in question was

“lawful according to the law of that country at the time when it was done, e.g. an act done by a person who was at the time a member, or acting under the authority, of the then government of the country (it being assumed that the government has since fallen and that its successors have applied for extradition).”¹²⁰

Although he never mentioned Article IV of the UNGC by name, Hart was proposing nothing less than deleting the key words which H. S. Kent had inserted in his 1953 draft to ensure that Article IV became part of the United Kingdom Genocide Bill.

Astonishingly undisturbed by the implication of his recommendation that “if the Bill is drafted in the way suggested above, it seems that this [category of persons] will not be extraditable,” nor by his admission that “this limitation would reduce such effectiveness as the Bill might have for the suppression of genocide . . .,” Hart contented himself with the conclusion that “there does not seem to be a clear obligation under the [United Nations Genocide] convention to provide for the case mentioned, and it seems best not to do so but to resolve to provide for the matter, if necessary, by amending legislation.”¹²¹

Hart also carefully outlined the alternative to his preferred path. That alternative was “to provide that an offence should be extraditable even if it was lawful under the law of the country in question when committed.” Admitting that H. S. Kent, of Parliamentary Counsel, had, in 1953, said “that the Bill would be ‘fairly futile’” without the provision whose inclusion Hart opposed, Hart revealed the underlying premise that had guided his recommendations:

“Since the likelihood of a trial in the United Kingdom, or of extradition, for genocide is slight, the main purpose of the Bill is to enable the United Kingdom to accede to the convention without doing too much violence to the criminal law.”

He acknowledged that the Genocide Bill, though “a novel kind of Bill,” was “less so now that the Geneva Conventions Act 1957 has intervened” and pronounced himself ready “to

¹¹⁹ Draft letter to Parliamentary Counsel, prepared by G. V. Hart (Legal Adviser’s Branch, Home Office), undated, but certainly written between 2 May and 14 June 1968, HO291/1537, 27, PRO.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

come and discuss the matter” with the Parliamentary Counsel. In that event, he would be the lawyer, and “Prior and Rudd the administrators.”¹²²

Hart’s assumption of the prerogative to set the Home Office on a path that had barely been touched on in his discussions with his colleagues in the years 1967 and 1968 reflected the disdain many lawyers in his milieu felt towards the emerging revolution in international criminal law heralded by the Geneva Conventions Act of 1957. It is likely that Hart felt empowered by an earlier consensus within the Home Office that international conventions seeking to punish crimes against humanity and war crimes posed a challenge to the mainstream of the British legal tradition and that he expected his colleagues to support his recommendations that the provisions for extradition offences should not be retrospective and that persons should not be extraditable for actions that were lawful under the law of their country when committed. If so, Hart was in for a huge surprise when he met with his colleagues—Prior, Rudd, and D. Roberts—on 14 June.

The only matter on the agenda of the meeting of 14 June 1968, chaired by Hart, was “A draft letter to Parliamentary Counsel, prepared by Mr. Hart, and containing instructions for the preparation of the Bill.” It is clear from the two single-spaced pages of minutes that ninety percent of the meeting was devoted to the discussion of “Retrospectivity for the purpose of extradition,” and that Hart’s recommendations were considered under two points: “(1) Was there any objection in principle to retrospectivity? [and] (2) How should it operate in relation to inhuman acts which were lawful at the time of commission?” Those attending the meeting reached agreement that although genocide would be a new crime under United Kingdom law, “the facts which gave rise to it would, for the most part, have been offences under other descriptions in the past.” On that basis,

“It was agreed that, in the circumstances, there was no objection of principle to the addition of ‘genocide’ to the list of extradition crimes in the usual way, which would enable it to apply to offences committed before the new Act came into operation.”¹²³

The remaining issue was that of retrospectivity in “cases where genocide was rendered lawful by the law of the place where it was committed” This proved a much tougher nut to crack than the first issue or, as the minutes put it, “The other problem was more intractable.” The issue at stake was carefully framed at the meeting:

“Genocide would normally be committed by or on behalf of a government in power against a minority group within the state. Any such government would normally take care to legitimate its actions, which would not, therefore, at the time when they were committed, be offences under the law of that state. If the government were then overthrown and its successors applied for the extradition of persons concerned with those acts, a court in this country might feel compelled to refuse the application on the grounds that the ‘double criminality rule’ did not apply.”¹²⁴

Those attending the meeting with Hart heard, too, that the problem had been confronted by Kent of Parliamentary Counsel in one of the versions of a United Kingdom Genocide Bill that he had drafted in 1953. Kent had addressed the point in the 1953 draft,

¹²² *Ibid.*

¹²³ “Notes of a Meeting in the Home Office on 14th June to discuss the instructions to Parliamentary Counsel for the preparation of the Genocide Convention Bill,” HO291/1535, 28, PRO.

¹²⁴ *Ibid.*

“by adding to the definition of ‘act of genocide’ the words ‘(whether or not the act was, at the time when it was committed or contemplated, rendered lawful or justified by any law of the place in which it was committed or to be committed).”

But the Home Office, in 1953, “had not adopted this proposal, thinking it preferable to preserve the ‘double criminality rule,’ although without explanation, and the provision was dropped from the next print of the Bill.”¹²⁵

The issue was discussed at the meeting as a dilemma requiring a choice between two unsatisfactory options. On the one hand,

“if the present Bill was to be effective, some such provision might once more have to be included at the expense of the principle of ‘double criminality’. This might be justified on the grounds that the offence of genocide was so grave that the principles of humanity demanded the pursuit of those who committed it, irrespective of whether their own law had sought to justify it at the material time.”

But,

“On the other hand, the definition of ‘genocide’ in the Convention was very wide, and the insertion of such a provision in the Bill would carry with it the disadvantage that extradition proceedings might be permissible in respect of only marginally culpable actions which had been permitted by legislation at the time when they were committed. The confidence of the citizen in the protective value of the law might thus be undermined.”¹²⁶

Those attending the meeting then listed the three possibilities before the Home Office:

“(1) That Mr. Kent’s formula [of 1953] should be included in the Bill, thus enabling extradition to be carried out for an offence of genocide even where this had been lawful in the place where it was committed at the material time.

(2) That genocide should be placed on the same footing as any other extraditable offence, so that extradition could not take place where the act constituting the offence had been lawful at the time of its commission.

(3) That there should be no retrospectivity in respect of ‘lawful’ genocide, but that in future cases where genocide was rendered lawful by the law of the place where it was committed, extradition should still be possible and the ‘double criminality’ rule should not apply. The last of these possibilities was felt to be difficult to justify, but the choice between the first two raised difficulties.”¹²⁷

Deeply divided and unable to reach a consensus about which of these paths to follow, those attending the meeting:

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

“agreed that instructions should be sent to Parliamentary Counsel for the preparation of the Bill, asking for alternative provisions pending a decision (which might be remitted to Legislation Committee).”

The meeting “invited Mr. Hart to re-draft the relevant paragraphs of the letter to Parliamentary Counsel and send the instructions.”¹²⁸

With several strokes of his pen, Hart had reopened the debate of 1953 over retrospectivity and the extraditability of perpetrators who had used their status as heads of state and senior members of their governments to authorize their genocidal murders. Without ever mentioning Article IV of the UNGC or the issue of the diplomatic immunity of former heads of state, lawyers at the Home Office, the Foreign Office, and the Parliamentary Counsel Office would debate the matter until Home Office Under-Secretary Graham-Harrison and Home Office Secretary James Callaghan finally settled it.

On 17 June, the instructions to Parliamentary Counsel on the drafting of the Genocide Convention Bill, drafted by Hart, were sent under the signature of Sir Kenneth Jones, the Legal Adviser of the Home Office to Sir Noël Hutton of the Parliamentary Counsel Office at 36 Whitehall. On retrospectivity, Hart wrote:

“The provision creating the offence should not be retrospective. It is proposed that the provisions for extradition should be retrospective.”

But,

“Owing to the definition of ‘extradition crime’ in s.26 of the Extradition Act 1870 (c.52) it seems that it will not be necessary to provide expressly that the provisions concerning extradition should be retrospective. [FC: That definition states: “The term ‘extradition crime’ means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule of this Act”.¹²⁹

One presumes that Hart now reasoned as follows:

(1) The provisions for extradition were to be retrospective;

(2) Under the United Kingdom Genocide Bill, the crime of genocide would be listed in the First Schedule of the revised Extradition Act as one of the crimes which, if committed in England or within English jurisdiction, was a crime in England and wherever England had jurisdiction.¹³⁰

¹²⁸ *Ibid.*

¹²⁹ Kenneth Jones, Home Office, to Sir Noel Hutton, Office of the Parliamentary Counsel, 17 June 1968, Misc. 1968-69, H.P.R., Parliamentary Counsel Office. See the Extradition Act, 1870 in *The Public General Acts Passed in the Thirty-Third and Thirty-Fourth Years of the Reign of Her Majesty Queen Victoria; being the Second Session of the Twentieth Parliament of the United Kingdom of Great Britain and Ireland with An Index and Tables Showing the Effect of the Year's Legislation* (London: George Edward and William Spottiswoode, 1870), CH. 52, Extradition, p. 9.

¹³⁰ Indeed, the First Schedule of the Extradition Act 1870 (c.52), as revised after 1969, includes a note to the following effect: “Sch. I extended by . . . Genocide Act 1969 (c.12), s.2(1) . . .” See *Statutes in Force, Official Revised Edition, Extradition Act 1870 (33 and 34 Vict. c.52) Revised to 30th September 1978* (London: Her Majesty's Stationery Office, 1979). The most recent version of the United Kingdom Extradition Act at the time of this writing was the Extradition Act 1989, chapter 33.

(3) Therefore, no explicit mention of the retrospectivity of the crime of genocide needed to be made in the Genocide Bill, and that included any mention of the fact that genocide crimes committed by officials under a government that had legalized genocide were extraditable under British law. One may also speculate that explicit reference to the provision of Article IV of the UN Genocide Convention specifying that public officials were liable for prosecution for genocide crimes committed while they were in office, and implying that their acts were crimes whether or not they were legalized and/or carried out in their role as public officials, was also omitted from the United Kingdom Genocide Bill of 1969 because such retrospectivity was introduced more delicately by listing genocide crimes in Schedule I of the revised Extradition Act. In that way, the British drafters of the Genocide Bill avoided the necessity of making explicit in the Bill their departure from the rule of double criminality. We have already seen how painful that departure was to some of the legal draftsmen who played a leading role in drawing up the terms of the 1969 Act and who insisted that genocide had always been a crime in Britain and all other civilized countries.

Hart summarized the issues around the question of retrospectivity and noted Kent's insistence in 1953 that "the Bill would be 'fairly futile' without the provision" making persons criminally liable for genocide crimes committed in countries that had legalized such acts. Hart went on to admit that "It may be embarrassing either to provide that this conduct should be extraditable or to provide that it should not; and a decision has not yet been taken on the question." He asked that the Parliamentary Counsel include alternative provisions, presumably so that the wording of that portion of the Bill would be available in both forms when a final decision was taken.¹³¹

Up to this point in time, the Foreign Office had played hardly any role in the drafting of the 1969 Genocide Bill. On 21 June, four days following the dispatch of the instructions to Parliamentary Counsel, D. Roberts of the Home Office wrote a very important, but curiously timed letter to A. J. Coles of the United Nations Department of the Foreign Office. While conveying two copies of the Home Office's instructions, Roberts underlined his department's dilemma over how to treat the question of retrospectivity in the draft bill.

"We have not yet reached a decision as to whether the extreme gravity of the offence of genocide would justify a departure from this principle to enable extradition proceedings to be instituted for acts constituting an offence of genocide even when such acts were, at the time of their commission, rendered lawful by the law of the country in which they were committed."

Then, in a sentence that eventually fell on fertile soil, Roberts solicited whatever advice Coles and his colleagues at the Foreign Office might have to offer on the matter, writing: "This is, of course, primarily our problem, but I should be grateful for any observation you may have."¹³² It should be noted that nothing in the files indicates that anyone asked Roberts to seek the advice of the Foreign Office at this time. His cryptic minute in the file reads simply: "I have sent copies of Sir Kenneth Jones' letter to Mr. Coles at the Foreign Office and to Miss Field at the Ministry of Defence." The consultation of the Defence

¹³¹ Sir Kenneth Jones to Sir Noel Hutton, Parliamentary Counsel Office, 17 June 1968, HO291/1535/ 29. **[to be checked]**

¹³² D. Roberts, Home Office, to A. J. Coles, United Nations Department, Foreign Office, 21 June 1968, HO291/1535, 30, PRO.

Ministry had nothing to do with retrospectivity. The issue there was the inclusion of the offence of genocide in the Army and Air Force Acts of 1955. One can only speculate on whether Roberts deliberately opened the door to a strong intervention by the Foreign Office because he opposed Hart's direction. The simple truth may be that he was just being thorough and completing one final check with relevant departments while the Parliamentary Counsel went to work on the draft Bill. Yet his letter set the cat among the pigeons and it is likely that he anticipated a powerful intervention by the Foreign Office.

Rudd got to work attempting to chart a course for the Home Office on the issue of retrospectivity in the interval between the dispatch of its instructions to Parliamentary Counsel in June and the receipt of a reply from the Foreign Office in August. In a memorandum drafted in early July on the "Operation of [the] Double Criminality Rule," he sought to square the circle formed by Home Office and British legal tradition, on the one hand, and the dawning age of international criminal law intended to prevent the commission of further crimes against humanity, on the other. Introducing the subject, Rudd recalled that

"It is a cardinal principle of extradition practice that an offence for which return is sought must be an offence against the laws of both Parties."

In the United Kingdom, the principle of double criminality was embedded "in section 26 of the Extradition Act 1870 (in the definition of 'extradition crime' and 'fugitive criminal'), section 3 (1) of the Fugitive Offenders Act 1967 and section 2(2) of the Backing of Warrants (Republic of Ireland) Act 1965."¹³³

The underlying principle of double criminality was that "the offence must have been an offence against the laws of both Parties at the time of its commission." The reason for this pivoted on British legal principles regarding fairness to the individual. As Rudd explained it,

"To introduce a new offence with retrospective effect would mean that a person who had been carrying on a perfectly legitimate operation which was subsequently made unlawful would become imperiled in respect of actions which were lawful at the time when they were performed. This would be indefensible, and the double criminality rule operates so that an injustice of this kind cannot be carried into the field of extradition."¹³⁴

But the crime of genocide, which often times was initiated and legally sanctioned by the state, posed a challenge to this British legal tradition. If observed, the requirement of double criminality would lead to injustice in the case of such genocide crimes. As Rudd observed,

"When, however, one is dealing with an offence which may be initiated by a government, such as genocide, the double criminality rule may operate to secure injustice rather than justice. A government which deliberately espouses a course of action which offends against the normal tenets of civilised behaviour is likely to take care to legitimate its actions, e.g. by legalising concentration camps, experimental surgery, etc. A person engaging in these activities may, therefore, be behaving

¹³³ Gordon Rudd, Memorandum, Operation of Double Criminality Rule, July 1968, HO291/1537, 32. For proof that Rudd was the author of this note, see D. Roberts, Minute, 4 July 1968, HO291, 1537, PRO.

¹³⁴ *Ibid.*

lawfully in relation to the law of his country at that time, however inhuman his acts may be.”¹³⁵

Rudd therefore concluded that

“Unless, therefore, the legislation which we propose to introduce to enable H. M. Government to accede to the United Nations Convention on Genocide is, in its extradition aspect, to be a complete dead letter, it would seem necessary to depart from the double criminality rule so far as genocidal acts are concerned, i.e. to provide that such offences should be extraditable even if they were lawful under the law of the country in question when they were committed.”¹³⁶

But Rudd believed that the suspension of British extradition principles in the interests of justice could give rise to a new set of injustices to individuals, of which he was acutely aware. As he viewed the matter:

“The definition of ‘genocide’ contained in the Convention (see Annex) is very wide, and complicity in some of the activities falling within the definition might extend to only marginally culpable acts, the propriety of which might well not have been questioned at the time. It must be recognised, therefore, that any waiver of the double criminality rule in relation to genocide would, unless restricted in some way, involve the removal of a very real safeguard, which it has been thought right to allow fugitives in the case of all other types of offence. Nor, in accordance with the provisions of the Convention, would the wanted person have available to him in this context the other customary safeguard of being able to claim that the offence was, in any event, one of a political character.”¹³⁷

The likelihood of creating potential injustices whichever path the Home Office chose persuaded Rudd to pursue an intermediate position based on

“limiting the waiver of the double criminality rule to those offences within the scope of the definition which are clearly so repugnant that no right-thinking person would commit them, whether legalised or not.”

This effect could be achieved, Rudd proposed,

“by providing that any ‘inhuman act’ within the definition of genocide, even if lawful when committed, should be an extradition crime.”

Noting the ambiguity of the term he would introduce into the Bill, Rudd admitted that this was deliberate:

“It would not be the intention to define an ‘inhuman act’. As in the case of ‘offence of a political character’, it would be left to the courts to interpret the provision in a common sense fashion in light of all the circumstances of the case.”¹³⁸

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

Rudd recognized that his compromise could create a new set of problems and injustices. For example,

“It could be argued that, in arriving at their definition of genocide, the United Nations had determined what offences fell to be dealt with under that head, and that it would be wrong for us to limit that definition in any way in its practical application.”

But, he argued, his compromise wording would

“clearly bite on all the serious, and intentional, crimes within the definition, and at the same time it would furnish an answer to the countervailing argument that the man in the street cannot be expected to scrutinise his every action against the possibility that it might be construed as criminal at some indeterminate future date.”¹³⁹

In mid-August 1968, before any action was taken on Rudd’s proposal, the Foreign Office’s reply to Robert’s solicitation of advice on retrospectivity in the Genocide Bill arrived at the Home Office. The Foreign Office was clearly dismayed by the possibility that the new British Genocide Bill would prevent the punishment of genocide crimes committed in countries that had legalized them. Moreover, it feared embarrassment of the Government before the International Court of Justice if Hart’s narrow approach was sustained. Writing on behalf of the Foreign Office, A. J. Coles informed Roberts:

“Our lawyers are far from satisfied that it would be right to regard the ‘dual criminality’ principle as requiring a genocidal act to be treated as non-extraditable merely because the act did not, at the time when it was committed, contravene the domestic law in force in the foreign country concerned.”

While the principle of dual criminality was undoubtedly worth upholding in “the usual run of extradition crimes, in the present case it seems to us that we must also take account of the question of criminality under international law.”¹⁴⁰

It was indisputable, Coles emphasized, that genocide was already a crime under international law. The International Court of Justice had already ruled, he pointed out, quoting the decision, that “the principles underlying the Convention are principles which are recognised by civilised nations as binding on states, even without any conventional obligation.” In this view, the UNGC simply defined the genocidal acts in law and established procedures for bringing the perpetrators to justice. The crime of genocide already existed at the time that the Convention was written.¹⁴¹

What had to be avoided, Coles maintained, was a situation in which the United Kingdom refused to extradite an alleged perpetrator of genocide because his actions were protected by the principle of double criminality. In the view of the Foreign Office, he explained

¹³⁹ *Ibid.*

¹⁴⁰ A. J. Coles, United Nations Department, Foreign Office, to D. Roberts, Home Office, 13 August 1968, HO291/1537, 52, PRO.

¹⁴¹ *Ibid.*

“we might well find ourselves in considerable difficulty if circumstances were to arise in which, after genocidal acts have been carried out in a foreign country without contravention of the domestic law in force there (as they were in Nazi Germany), we were to decline on the ground of lack of criminality under that law to grant a request by [a] successor government for extradition.”

Rather than limiting the application of the UNGC, the Foreign Office had concluded that “the further our genocidal bill is seen to go in the direction of providing for the more effective provision and punishment of genocide the better.”¹⁴²

A further consideration was the danger that “if we do not provide that the offence of genocide should be extraditable in the circumstances under discussion, a case may arise later when our view on this is challenged internationally.” Coles reminded Roberts that under Article IX of the UNGC, disputes over the interpretation of the Convention could be referred to the International Court of Justice, and he hoped that this risk would be taken into account by the Home Office.¹⁴³

On 5 August 1968, even before the Foreign Office had alerted the Home Office to its strong desire to override the requirement of double criminality, Gordon Rudd wrote a detailed commentary on the first print of the Genocide Bill, which the Parliamentary Counsel had now drafted. He noted that “Clause 2(1) adds genocide to the list of offences set out in the Extradition Act 1870 and the Fugitive Offenders Act 1967,” and that

“An extension in these terms provides for offences falling within the definition to be extraditable even if they were committed before the new Act becomes law. This, therefore, contains the element of retrospectivity which we asked Parliamentary Counsel to provide.”

Curiously, the Parliamentary Counsel had submitted only one version of the clause directly pertaining to double criminality rather than the several which the Home Office had requested. This was clause 2(3) which read:

“It shall not be an objection to any proceedings taken against a person by virtue of the preceding provisions of this section that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished therefor.”

These were virtually the same words that H. S. Kent had crafted in 1953 to embody Article IV of the UNGC. Worried that the word “taken” would be understood to mean that “an objection to proceedings may arise only after the proceedings have been taken here—but the objection is likely to arise either during or even before the proceedings,” Rudd recommended modifying that wording by stating:

“Proceedings against a person by virtue of the preceding provisions of this section shall not be precluded by reason of the fact that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished therefor.”

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

Such a provision would not be needed at all, he noted, “should we decide that the double criminality rule must continue to be observed.”¹⁴⁴

On 14 August, the Home Office convened another large meeting on the Genocide Bill, chaired jointly by G. V. Hart and P. N. S. Farrell of the Legal Adviser’s Branch. The main item on the agenda was the Parliamentary Counsel’s first print and how to respond to it. Once more the operation of the double criminality rule received considerable attention. The meeting heard that four of the five countries asked about their practice in this regard—Australia, Canada, Denmark, and France— “replied that the question of departing from the rule had not been considered when they had signed the Convention.” The fifth, the Federal Republic of Germany, was yet to send its reply. It was thought that in these countries “it would be left to the courts to determine whether an application for extradition for genocide could be admitted for an act which had been rendered unlawful after its commission.” That solution was not satisfactory for the United Kingdom, it was said, because it would leave to the courts “settling a principle which should have been determined by Parliament.” Article VII of the European Convention on Human Rights¹⁴⁵ could be understood to have set a precedent for setting aside the rule of double criminality “in respect of inhuman acts,” but overriding the rule was “less desirable in the cases of persons whose complicity in an offence of genocide might be only marginal or even unintentional.” The Attorney General would be consulted by the Parliamentary Counsel for his views on this matter, and the issue would be brought to the attention of Mr. Graham-Harrison, the Deputy Under-Secretary of State.¹⁴⁶

The Home Office finally took a position on the requirement of double criminality and retrospectivity at the end of September. In a four page memorandum to Graham-Harrison devoted entirely to that problem, C. H. Prior of the Criminal Department, the Home Office endorsed the view of the Foreign Office that “as genocide is a crime under international law, the double criminality rule ought not as a matter of principle to apply, and that the further the Bill is seen to go in the direction of providing for the more effective punishment of genocide the better.” As Prior phrased it, “As a matter of general principle, we see no reason to dissent from this view.” Though hardly a ringing endorsement, he went on to note that there was already a precedent for setting aside double accountability in Article VII of the European Convention on Human Rights, which excluded from such protection “acts which were ‘criminal according to the general principles of law recognised by civilised nations.’”¹⁴⁷

¹⁴⁴ Gordon Rudd, Genocide Bill, Notes on first print, 5 August 1968, HO291/1539, 2, PRO.

¹⁴⁵ Article VII of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations” While Britain is a party to the European Convention on Human Rights, and had signed it, it did not incorporate its provisions in British domestic law. Although individuals seeking redress under the Convention were not able to have their Convention rights adjudicated upon directly in United Kingdom courts, beginning in 1966 the British Government allowed individuals who had exhausted their remedies in British courts to file individual petitions before the European Court of Human Rights under the Convention. See Mary Baber, Home Affairs Section, House of Commons Library, “The Human Rights Bill: Bill 119 of 1997-98,” Research Paper 98/24 (13 February 1998), pp. 7-8.

¹⁴⁶ Note of a meeting on the 14th August 1968 in the Home Office to discuss the first print of the Genocide Bill, HO291/1539, 11, PRO. Also present at the meeting were Prior, Rudd, and Roberts of the Criminal Department.)

¹⁴⁷ [Charles Prior] to Mr. Graham-Harrison, Genocide Bill, 30 September 1968, HO291/1539, 21, PRO.

Noting that the Home Office had considered the adoption of a provision suspending the double criminality requirement only in cases of “an offence which was so utterly contrary to normal civilised behaviour that no right-thinking person would willingly commit it, whether legalised or not,” and that such a provision would protect an individual “who was technically culpable (in that a *prima facie* case could be mounted against him on a minor charge) but was in reality the subject of a vindictive application,” Prior discouraged that solution since “it would involve importing degrees of seriousness into an offence of the utmost gravity . . .” and “like most compromises, it would, in the event, probably satisfy no-one.”¹⁴⁸

It would be best, Prior concluded, to nullify the requirement of double criminality in the final version of the UK Genocide Bill unless the Attorney General had some objection. “On balance . . .,” he summarized his judgment,

“despite the absence of a precedent in other countries’ legislation, we are disposed to the view that, since extradition applications under the legislation are likely to be exceedingly rare, so that the prospect of embarrassing individual cases is remote, and that it will be necessary in Parliament to satisfy the strong advocates of the Convention rather than to appease those who would object to any departure from a strict application of the rule of law (in the shape of the double criminality rule and strict reciprocity in our extradition arrangements with other countries), the best course would be to include in the Bill a provision on the lines of Clause 2(3).”¹⁴⁹

As late as 4 October 1968, the Home Office lawyers had not yet decided whether to include the provision eliminating the requirement of double criminality in the extradition section of the Genocide Bill.¹⁵⁰ The decision to breach tradition and drop the requirement of double criminality was only taken several days later when Deputy Under-Secretary of State Graham-Harrison, of the Home Office, decided that Clause 2(3) should remain part of the Bill. According to Rudd’s minute, Graham-Harrison “did not consider it necessary to submit the matter to Ministers in advance of the Legislation Committee memorandum, unless Parliamentary Counsel should, for his part, think it necessary to approach the Attorney General in advance.”¹⁵¹

It now behooved the Parliamentary Counsel Office to notify the Attorney-General, Elwyn Jones, that the Genocide Bill would be considered by the Legislation Committee on 15 October, and to inform him of its contents, particularly in respect to the issue of double criminality, which had become its most controversial provision. H. P. Rowe, representing the Parliamentary Counsel Office, wrote to the Attorney General on 8 October, setting out the manner in which the draft Bill settled that issue. He began by noting the circumstances under which the Bill had been drafted:

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ G. V. Hart to H. P. Rowe, Office of the Parliamentary Counsel, 4 October 1968, 23., PRO.

¹⁵¹ Gordon Rudd, Minute, 7 October 1968, HO291/1539, PRO. For a description of Graham-Harrison’s enormous stature in the Home Office, see note 59.

“Nobody seriously believes that if any acts described in the Schedule were committed or attempted in the United Kingdom our criminal law would be inadequate to deal with the offender. Nor is there any reason to think that we could not hand over any fugitive from justice who had been accused or convicted of such an offence.”

The sole reason for the drafting of the Bill was that

“the Genocide Convention treats genocide as such as a distinct crime and expressly requires the contracting parties to enact the necessary legislation to give effect to it (Article V). Hence this Bill.”¹⁵²

Parliamentary Counsel had kept the Bill “as short and simple as possible.” It had “concentrated on avoiding any implication that it needed an Act of Parliament to make genocide unlawful in the United Kingdom.” Section 2(3) of the Bill, eliminating the requirement of double criminality for extradition under the Genocide Bill, was necessary because “In the nature of things those in a position to commit crimes of genocide would have to wield such power that they could not be touched under the law of their own country.” The issue of extradition “would only arise after they had been replaced by a constitutional and civilised government.” Clause 2(3) could not be regarded as “retrospective legislation” because Article I of the Genocide Convention “‘confirms’ that genocide is a crime,” it did not construct genocide as a new crime.¹⁵³

The next day, 9 October, a memorandum on the Genocide Bill was drafted for the Legislation Committee of the United Kingdom Cabinet and was signed by James Callaghan, the Minister of Home Affairs. Callaghan explained that the Bill had three main features:

“(1) genocide, as defined in the Convention, will be made an offence, *per se*, under the laws of the United Kingdom;

(2) acts falling within the definition will become returnable offences for extradition purposes, not only to foreign countries, but to other Commonwealth countries and the Irish Republic;

(3) such offences will not attract the safeguards attaching to ‘offences of a political character’ in extradition legislation.”¹⁵⁴

Callaghan pointed out that “The only unusual feature of the Bill is clause 2(3).” That clause

“will enable an extradition application charging genocide to be entertained notwithstanding that the acts in question may have been lawful in the place concerned at the time of their commission.”

He acknowledged that

¹⁵² H. P. Rowe, Counsel, Parliamentary Counsel, to Elwyn Jones, Attorney General, 8 October 1968, HO291/1539, between 26 and 27, PRO.

¹⁵³ *Ibid.*

¹⁵⁴ James Callaghan, Minister of Home Affairs, Memorandum, Cabinet, Legislation Committee, Genocide Bill, 9 October 1968, HO291/1539, 27, PRO.

“This departs from one of the recognised principles of extradition practice, whereby surrender is precluded unless the offence for which extradition is sought was, at the time of its commission, an offence under the laws of both the requesting and the requested states.”

The reason for this departure in British legal principle was the enormity of the crime of genocide.

“Genocide is, however, already internationally recognised as criminal and is so utterly contrary to civilised behaviour that it would be indefensible to allow a person who had committed this crime to escape justice because the regime which he served had taken care to legitimate it.”

Callaghan asked his Cabinet colleagues to approve the draft Bill and its introduction in the House of Lords early in the next Parliamentary Session. He would seek the agreement of the Conservative Opposition to the Bill going to the Second Reading Committee. It was especially important that Britain “should be seen to be taking steps to accede to the Convention” because 1968 was Human Rights Year.¹⁵⁵

Also on 9 October, a memorandum went forward from the Home Office to Richard Crossman, Lord President of the Privy Council, calling his attention to the main features of the Genocide Bill, which was due to be considered by the Legislation Committee six days hence. “Only one point of difficulty has arisen,” Callaghan noted. “This concerns the operation, in relation to genocide, of the ‘double criminality’ rule.” The relevant clause of the Bill, 2(3), read:

“It shall not be an objection to any proceedings taken against a person by virtue of the preceding provisions of this section that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished therefor.”

This clause excepted genocide from the double criminality rule, as the memorandum explained.

“This has been done deliberately. We agree with the Foreign Office argument that, since a country which initiates the crime of genocide is likely to have taken care to legitimate its actions under its own domestic law, the value of the extradition provisions of the Bill would be greatly diminished without some provision of this kind. We think that a departure from the general rule referred to can be justified in the special case of genocide”

Callaghan referred to Article VII of the European Convention on Human Rights, which excluded from the protection of the double criminality requirement “acts which are ‘criminal according to the general principles of law recognised by civilised nations’” and added, “This clearly applies to genocide.”¹⁵⁶

¹⁵⁵ *Ibid.*

¹⁵⁶ James Callaghan to Richard Crossman, Genocide Bill, October 1968, HO291/1540, 28, PRO. Identification of the author and the addressee are based on circumstantial evidence, including the location of the document in the file and the handwritten note in the upper right hand corner of the document, “Approved by S. of S. RCC 8.10.68.”

Against the argument that the nullification of the requirement of double criminality for extradition “could operate harshly in relation to the ‘little man’ who played only a minor part in carrying out a genocidal policy and was not aware of the full enormity of his act at the time when he committed it,” Callaghan adduced the view that “it would seem impossible to import degrees of gravity into an offence such as complicity in genocide, and we think that, in practice, no embarrassment will arise.” The Home Office assumed that extradition applications under the Genocide Bill would be “exceedingly rare,” and that “the need to establish a *prima facie* case should provide a sufficient safeguard against the purely vindictive application.” Clause 2(3) was the only point likely to arouse discussion at the Legislation Committee and thus it had been treated extensively in the draft memorandum attached. Callaghan asked Crossman to circulate the Bill for consideration at the Committee meeting on 15 October.¹⁵⁷

In late October 1968, Gordon Rudd prepared draft notes on the clauses of the Genocide Bill for circulation to the House of Lords before the second reading debate. These notes were vetted in the Home Office, revised and sent to the Parliamentary Clerk for duplication and circulation.¹⁵⁸ Paragraph 2 of the “Introductory Note” to this document makes it clear that the Home Office and Parliament understood that Article IV of the UN Genocide Convention was implicitly covered by the United Kingdom Genocide Bill. It read:

During its first session in 1946 the General Assembly of the United Nations approved two resolutions. In the first, it affirmed the principles of the Charter of the Nuremberg Tribunal. In the second, the Assembly affirmed that genocide was a crime under international law and that those guilty of it, whoever they were and for whatever reason they committed it, were punishable.¹⁵⁹

In a later section of the Notes devoted to a discussion of clause 2(3) pertaining to double criminality, after summarizing the major points developed in earlier Home Office briefs, the Home Office came down firmly on the side of extraditing persons who had committed genocide crimes under color of legality in their home countries:

“The most likely situation for the commission of genocide, moreover, is one where the genocidal acts are initiated by some controlling authority within a country which will have taken care to legitimate its actions under the domestic law of that country, e.g. by legalising concentration camps, experimental surgery, etc.

(3) In the view of H.M. Government any practical value of the extradition provisions of the Bill would be substantially impaired if extradition could be avoided in these circumstances. While therefore the Genocide Convention does not expressly require such a provision, it has been thought right to provide that offences of genocide should be extraditable even if they were lawful under the law of the country where they were committed at the time of their commission.”¹⁶⁰

¹⁵⁷ *Ibid.*

¹⁵⁸ Minute, Gordon Rudd, 1 November 1968, HO291/1540, Genocide Convention Bill—Notes on Clauses, PRO.

¹⁵⁹ Introductory Note, Genocide Bill, House of Lords, Notes on Clauses, mimeographed document, HO291/1540, original and copy at 3, PRO.

¹⁶⁰ *Ibid.*

With these words, and employing the terms incorporated into the Genocide Bill at clause 2(3), the Home Office decisively sought to establish in British law that the officials of a government who committed the crime of genocide involving acts which they had legalized while public officials were liable to extradition from the United Kingdom for the commission of their crimes. Pushed and prodded by its own lawyers and lawyers from the Foreign Office, pulled away from their traditional refusal to extradite persons citing the political nature of their crimes, and driven by Barnett Janner's nagging insistence that Britain accede to the UNGC, the Home Office finally abandoned its old principles and embraced new ones, commensurate with a new international human rights regime. Implicitly, at the same time, the Home Office affirmed that former officials of a government that had legalized and committed the crime of genocide were liable to extradition for their crime. These developments represented a fundamental change in the tradition of British law.

P. G. Henderson, an official of the House of Lords, caught the surprise with which some members of the British legal establishment greeted the introduction of the Genocide Act in a letter to H. P. Rowe of the Parliamentary Counsel Office on 18 October 1968. He wrote:

“Dear Rowe, Thank you for your letter of the 16th October together with a copy of this Bill, which I must say I never expected to see the light of day. I agree that there is no money in it and no need for Queen's Consent.”¹⁶¹

¹⁶¹ P. G. Henderson, House of Lords, to H. P. Rowe, Office of the Parliamentary Counsel, 18 October 1968, Misc. 1968-69, H.P.R., Parliamentary Counsel Office: Genocide Bill.

APPENDIX

ARTICLE IV, UNITED NATIONS GENOCIDE CONVENTION (1948)

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

KENT, PARLIAMENTARY COUNSEL OFFICE (1953)

“Subsection (1) of this section shall apply whether or not the act of which the person in question is accused or alleged to have committed was, at the time when it was committed, lawful under the law of the state in which it was committed, and whether or not it is or then was an act punishable under the criminal law of any part of the United Kingdom.”

Kent particularly emphasized the importance of incorporating in the United Kingdom Genocide Bill words that incorporated the meaning of Article IV of the UNGC:

“In effect, the words in square brackets [“whether or not the act was, at the time when it was committed or contemplated, rendered lawful or justified by any law of the place in which it was committed or to be committed”] correspond with Article IV of the Convention (although you allege that the authors did not mean what they said in this Article), and ensure that the Ministers and officials of genocidal regimes are brought to book after the regime is overthrown. My own view is that this is the kind of case that the Convention is aimed at and that, if the Bill does not cover it, it is fairly futile. I would therefore like to keep the words in square brackets, even though they may not be strictly necessary and are bound to give trouble in Parliament.” (H. S. Kent, Parliamentary Counsel Office, to Brass, 4 February 1953, Misc. 1968-69, H.P.R., Parliamentary Counsel Office)

RUDD (Home Office, 1968):

“Proceedings against a person by virtue of the preceding provisions of this section shall not be precluded by reason of the fact that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished therefor.”

Such a provision would not be needed at all, he noted, “should we decide that the double criminality rule must continue to be observed. (Gordon Rudd, Genocide Bill, Notes on first print, 5 August 1968, HO291/1539, 2.)

UNITED KINGDOM GENOCIDE ACT, 1969

“(2) It shall not be an objection to any proceedings against a person under this Act in respect of an offence which, if committed in the United Kingdom, would be punishable as an offence of genocide or as an attempt, conspiracy or incitement to commit such an offence that under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he was convicted he could not have been punished for it.”