

## THE PROBLEM OF "MENTAL HARM" IN THE GENOCIDE CONVENTION

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One of the most significant issues that have been raised by prominent American legal authorities in connection with the Genocide<sup>1</sup> Convention<sup>2</sup> centers around the concept of "mental harm."<sup>3</sup> What is meant by "mental harm" in the convention? Can "mental anguish," "humiliation," "mental distress," discrimination of any kind be considered to constitute "mental harm"? Can the concept of "mental harm" be understood to mean the "disintegration of the mind"<sup>4</sup> or is it rather identical with "permanent physical injury to mental faculties"?<sup>5</sup> What are the necessary criteria, if any, of those acts which the Convention intends to punish in connection with mental harm? Since there seems to be no direct answer in the Convention to these very important issues, the authorities go even further by raising the question, how can the United States Senate give its consent to the ratification<sup>6</sup> of this Convention and undertake by it to punish

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1. Genocide is a new term coined by Professor Raphael Lemkin from the ancient Greek word *genos* meaning "race" or "tribe" and the Latin word *caedere* meaning "to kill." See LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944). The word "genocide" could be translated literally as "race-murder" but it is race-murder of a particular kind; it purports to describe the crime of mass-annihilation of religious, racial, national and ethnical groups.

2. The Convention on the Prevention and Punishment of the Crime of Genocide was unanimously adopted by the General Assembly of the United Nations; see General Assembly, 3rd Session, Official Records, 178th Meeting, U.N. Doc. A/PV 179, at 70 (Dec. 9, 1948). Up to October 14, 1950 the Convention had been ratified by more than 20 states and went into effect on January 12, 1951 among the ratifying states. See U.N. BULL., Vol. IX, No. 9 478 (November 1, 1950). The U.S. has not ratified the Convention as yet. For text of the Convention see U.N. Doc. A/PV 178 (Dec. 9, 1948).

3. Article II of the Convention reads: ". . . genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . (b) causing serious bodily or mental harm to members of the group . . ." (Italics added.)

4. See Statement of E. Turlington, *The Genocide Convention, Hearings before a Subcommittee of the Committee on Foreign Relations, U.S. Senate, 81st Cong., 2nd Sess.* 250 (1950).

5. See Resolution offered by the Section of International and Comparative Law on the Genocide Convention to the House of Delegates of the American Bar Association (September 8, 1949), 35 A.B.A.J. 957 (1949).

6. On June 16, 1949 President Truman transmitted to the Senate of the United States the Genocide Convention with a view to receiving the advice

a crime, the meaning of which appears to be too elusive and vague?

An inquiry into the fundamental issues relating to the concept of mental harm and a comparison between this concept as established by the Convention and somewhat similar notions of "mental anguish, "grief," "humiliation," "mental distress," etc.,—well-known through a number of American court decisions and a series of international arbitral awards,—is of paramount importance not only from the viewpoint of clarifying the intention of the Contracting Parties, but also from the viewpoint of any future judicial interpretation.

The problem of the concept of mental harm in the Genocide Convention necessarily involves considerations of a divergent nature. One part of these considerations is indispensably bound up with the intention of the Contracting Parties, with all the preliminary negotiations, arguments and counterarguments over detailed matters relating to the concept of mental harm,—in other words, with the whole spirit and objective of the Convention in which this intention is made manifest. An investigation of these basic considerations which justified and made it necessary for the Contracting Parties to include the concept of mental harm in the Genocide Convention is the prerequisite of any study which may involve the interpretation of this notion. The other part of these considerations covers those vast fields of already crystallized judicial and arbitral practices which, although in a more perfect and developed system of law and in a different sphere, have formulated seemingly similar concepts. An examination of these considerations is both necessary and useful for the international jurist or judge, since it enables him to distinguish or draw analogy—as the case may be—between concepts established and applied in different domains of the law.

The concept of genocide is defined in Article II of the Convention which enumerates five acts, the commission of any of which is to constitute genocide, provided that it is committed with the specific intent to destroy a national, ethnical, racial, or religious group as such in whole or in part.

These acts are:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Since the entire phrasing of sub-paragraph (b) which touches on the concept of mental harm is closely interrelated, it seems advisable to compare the whole wording of this sub-paragraph with the text of the Draft Convention<sup>7</sup> as revised and adopted by the Ad Hoc Committee.<sup>8</sup> The corresponding text<sup>9</sup> of the revised Draft Convention reads, "Impairing the physical integrity of members of the group."<sup>10</sup>

Although there is no mention of mental harm in this sub-paragraph, it should be noted that, in the course of the sessions of the Ad Hoc Committee, the representative of China had already called the attention of the Committee to the fact that during the second World War the Japanese built a huge opium extraction plant in Mukden, which could process some 400 tons of opium annually, producing fifty tons of heroin—at least fifty times the legitimate world requirements. This quantity, according to medical authorities, would be enough to administer lethal doses to from 200 to 400 million persons.<sup>11</sup> The representatives of China pointed out that the Japanese had intended to commit and had actually committed genocide by debauching the Chinese popula-

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and consent of the Senate to ratification. See 21 DEP'T STATE BULL. 844 (1949). In view of the Korean crisis he urged Senate approval of the Convention. See 23 DEP'T STATE BULL. 379, 380 (1950).

7. U.N. Doc. E/794, at 13.

8. In accordance with the General Assembly's Resolution of December 11, 1946 in which the General Assembly affirmed that genocide is a crime under international law the punishment of which is a matter of international concern, the Economic and Social Council instructed in its resolution of March 28, 1947 the Secretary-General of the United Nations to submit a draft convention on the crime of genocide. See Economic and Social Council, 4th Sess. Resolutions, U.N. Doc. E/437, pp. 33-34. In pursuance of the Economic and Social Council's Resolution the Secretariat, with the help of experts in international and criminal law, prepared a Draft Convention which was revised by an Ad Hoc Committee of the Economic and Social Council. See Economic and Social Council, Summary Records of the Ad Hoc Committee on Genocide, U.N. Doc. E/AC.25/SR.1-28 (Apr. 7 - June 9, 1948).

9. Article II sub-paragraph (2) in the Ad Hoc Committee's Draft Convention.

10. U.N. Doc. E/794, at 13.

11. U.N. Doc. E/794 at 15.

tion with narcotics. He considered this to be the most sinister and monstrous conspiracy known in history. He emphasized the fact that narcotic drugs could be used as instruments of genocide, and he wished it to be understood that Article II sub-paragraph (2) would cover genocide by narcotics, if narcotic drugs were not specifically mentioned in the Convention.<sup>12</sup> Furthermore, he suggested that sub-paragraph (2) should be amended to read, "impairing the physical integrity or mental capacity of members of the group," or "impairing the health of members of the group." Such an amendment would make it certain that narcotic drugs would be covered by the Convention.<sup>13</sup>

When the Draft Convention was discussed by the Sixth Committee of the General Assembly,<sup>14</sup> the Chinese delegate submitted similar amendments<sup>15</sup> referring to the crimes committed by Japan against the Chinese race through the use of narcotics. He pointed out that with the appearance of synthetic drugs the potential results which could be envisaged would be even more horrifying. One object of the Convention was to protect the human race against that type of crime. The use of atomic weapons was to be regulated by a special convention, and the Commission on Narcotic Drugs had proposed<sup>16</sup> in a resolution submitted to the Economic and Social Council, that the use of narcotic drugs for such crimes should be covered by the Convention on genocide.<sup>17</sup>

In course of the Eighty-first Meeting of the Sixth Committee the Chinese delegate recalled<sup>18</sup> that his delegation had drawn the Ad Hoc Committee's attention to the fact that Japan had committed numerous acts of genocide against the Chinese population.<sup>19</sup> If those acts were not as spectacular as Hitlerite

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12. *Ibid.*

13. *Ibid.*

14. General Assembly, 3rd Sess., Official Records, Part I, Sixth Committee, Summary Records of Meetings (September 21 - December 10, 1948).

15. Amendment to Article II of the Draft Convention, U.N. Doc. A/C. 6/221 (October 6, 1948): "Amend sub-paragraph (2) to read as follows: Impairing the physical or mental health of members of the group." Cf. also U.N. Doc. A/C. 6/232.

16. Economic and Social Council, Third Year, 7th Sess. Official Records, Supplement No. 9, Doc. E/799.

17. General Assembly, 3rd Sess. Official Records, Part I, Sixth Committee, Summary Records of Meetings (September 21 - December 10, 1948), 69th Meeting pp. 59-60.

18. *Id.*, 81st Meeting, at 175.

19. Economic and Social Council, Official Records, Third Year, 7th Sess. Supplement No. 6, p. 6.

killings in gas-chambers, their effect had been no less destructive. In drawing up a convention of universal scope it was appropriate to keep in mind not only the atrocities committed by Nazis and fascists, but also the horrible crimes of which the Japanese had been guilty in China.<sup>20</sup> He could not share the view of the delegates who felt that the text proposed by the Ad Hoc Committee was adequate; he thought that the concept of impairing the physical integrity was not broad enough to include the harm done by the Japanese people through the use of narcotics.<sup>21</sup>

The representative of the United Kingdom understood perfectly well the reasons which had prompted the Chinese delegation to submit its amendment. He felt, however, that to introduce into the Convention the notion of impairment of mental health might give rise to some misunderstanding. He pointed out that if such impairment produced repercussions on physical health the case would be covered by the present text. If there were no repercussions on physical health, it could not be said that a group had been physically destroyed, that is to say, that the crime of genocide had not been committed in the sense of Article II of the Draft Convention.<sup>22</sup>

The arguments put forward by the delegate of Egypt were along similar lines. He noted that the text submitted by the Ad Hoc Committee met the demands of the Chinese delegation in the light of previous understanding that the expression "physical integrity" could be interpreted as implying mental integrity as well. He thought that a clarification of that point should, therefore, be sufficient to satisfy the Chinese delegation.<sup>23</sup> Since the Chinese delegation wished its amendment to stand, it was put to vote but in the proposed form it was rejected.<sup>24</sup> The United States delegate had voted for the Chinese amendment on the instruction of his delegation, although its view was that physical integrity also included mental integrity.<sup>25</sup>

At the same meeting the United Kingdom representative pointed out that the wording of sub-paragraph (2) of the Draft

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20. General Assembly, 3rd Sess. Official Records, Part I Sixth Committee, Summary Records of Meetings (September 21 - December 10, 1948), 81st Meeting, p. 175.

21. *Id.* at 177.

22. *Id.* at 178.

23. *Id.* at 178.

24. *Id.* at 179.

25. *Id.* at 179.

Convention was rather vague and proposed that it should be replaced by the following text: "Causing grievous bodily harm to members of the group."<sup>26</sup> He felt that it would not be appropriate to include in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to physical destruction of the group.<sup>27</sup> He also emphasized that in proposing the addition of the word "grievous" his delegation aimed to give greater clarity to the text, since that word had a very precise meaning in English law.<sup>28</sup> In fact, this was one of the most important amendments, since it proposed adding the word "grievous" to define the kind of physical integrity that was to be affected.

The Indian representative agreed with the United Kingdom delegate that the wording of sub-paragraph (2) was not clear. As the United Kingdom representative was willing to delete the word "grievous" in his amendment, if desired by the committee, the Indian representative suggested that the basic idea of the amendment could be retained if the word "serious" were inserted.<sup>29</sup> On the whole he supported the United Kingdom amendment but wished, in order to meet the desire of the Chinese delegation, that the text submitted by the United Kingdom representative should be amended by adding the words "or mental" after the word "physical"<sup>30</sup> as indicated in his delegation's amendment.<sup>31</sup>

Finally, the Indian amendment altering the United Kingdom proposal, *i. e.*, that the words "or mental" should be inserted in the United Kingdom amendment and that the word "grievous" should be replaced by the word "serious" was adopted by 14 votes to 10, with 14 abstentions.<sup>32</sup>

From the preceding record of discussions and arguments of representatives of the Contracting Parties in drawing up the Genocide Convention, the precise intention of the Parties and the basic considerations which led to the inclusion of the concept of

26. *Id.* at 175; see also U.N. Doc. A/C. 6/222.

27. *Id.* at 175.

28. *Id.* at 178.

29. *Id.* at 179.

30. *Id.* at 179.

31. U.N.Doc. A/C. 6/244.

32. General Assembly, 3rd Sess., Official Records, Part I, Sixth Committee, Summary Records of Meetings, 81st Meeting, p. 175 (September 21-December 10, 1948).

mental harm in the Convention can clearly be established. Those who voted against the inclusion of mental harm did so, not because they had not considered acts seriously affecting mental integrity of a given group as genocide, but because they thought physical integrity also included mental integrity.<sup>33</sup>

The common law has long been reluctant to give general and independent legal protection to one's peace of mind.<sup>34</sup> "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone," said Lord Wensleydale in *Lynch v. Knight*.<sup>35</sup> This obviously reflects the notion that mental pain caused by a negligent act is something too intangible and too elusive for the hardheaded workaday common law to handle.<sup>36</sup> The early cases in England<sup>37</sup> and in the United States<sup>38</sup> denied recovery for injuries arising out of fright occasioned by negligent acts of the defendant where there was no physical "impact" concurrent with the fright. This rule was soon repudiated in England<sup>39</sup> but in the United States a considerable minority of courts, following *Lynch v. Knight*, have refused to permit recovery unless the mental pain was accompanied by contemporaneous impact<sup>40</sup> or was caused intentionally<sup>41</sup> or was the natural consequence of certain types of breaches of contract.<sup>42</sup> In general, recovery has been allowed for

33. *Id.* at 178.

34. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1035 (1936). This reluctance has of course been more pronounced where the defendant's conduct is merely negligent.

35. 9 H.L. Cas. 577, 598 (1861).

36. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); *Cf.* also Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 266 (1921), "The mere temporary emotion of fright not resulting from in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action."

37. *Victorian Railways Commissioners v. Coultas*, 13 A.C. 222 (1888).

38. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Lehman v. Brooklyn City R. Co.*, 47 Hun. 355 (N.Y. 1888).

39. *Dulieu v. White* 2 K.B. 669 (1901).

40. The majority of courts have allowed recovery for injuries sustained through fright although the fright is unaccompanied by physical impact. *See Cashin v. Northern P. R. Co.*, 96 Mont. 92, 28 P.2d 862 (1934); *Fraree v. Western Dairy Products*, 182 Wash. 578, 47 P.2d 1037 (1935).

41. *See Holdorf v. Holdorf*, 185 Iowa 838, 169 N.W. 737 (1918), "The rule . . . denying liability for injuries resulting from fright caused by negligence, where no physical injury is shown, cannot be invoked where it is shown that the fright was due to a wilful act." *See also Stiles v. Municipal Council of City of Lowell*, 233 Mass. 174, 123 N. E. 615 (1919).

42. *See* I SEDGWICK, DAMAGES § 45 (9th ed. 1912); HARPER, LAW OF TORTS § 67 (1933); MCCORMICK, DAMAGES §§ 88, 89 (1935).

"mental suffering" by the courts, in cases of illegal arrest,<sup>43</sup> assault,<sup>44</sup> malicious prosecution,<sup>45</sup> seduction,<sup>46</sup> and a number of courts have permitted recovery against a telegraph company for negligent transmission of messages, provided the defendant knew or should have known the character of the message.<sup>47</sup>

In all these decisions where legal protection is given to one's mental integrity, the courts use a variety of terms. "Mental anguish" is a high degree of mental suffering and not a mere disappointment or regret.<sup>48</sup> "Mental distress" includes sorrow and grief.<sup>49</sup> "Mental cruelty" is cruel treatment that produces a degree of mental distress which threatens at least to impair the health of the injured party.<sup>50</sup> "Humiliation" and "mortification" are simple phases of mental anguish.<sup>51</sup> The general trend of recent decisions<sup>52</sup> clearly shows that the courts have drifted progressively further and further away<sup>53</sup> from the rule established in the *Mitchell* case<sup>54</sup> in the direction of a more liberal doctrine affording protection to one's mental and emotional well-being.<sup>55</sup>

43 *Young v. Gormley*, 120 Iowa. 372, 94 N.W. 922 (1903).

44 *McKinley v. C & N.W. R. Co.*, 44 Iowa 314 (1876).

45 *Parkhurst v. Masteller*, 57 Iowa 474, 10 N.W. 864 (1881).

46 *Hawn v. Banghart*, 76 Iowa 683, 39 N.W. 251 (1888).

47 *McCORMICK, DAMAGES* § 145 (1935); *PROSSER, TORTS* 216 (1941).

48 *Southwestern Bell Telephone Co. v. Cook*, 30 S.W.2d 497, 499, 500 (Tex. 1930); *Gerock v. Western Union Tel. Co.*, 147 N.C. 1, 7, 60 S.E. 637, 646 (1908). As to the ambiguity of the term "mental suffering" see *I SEDGWICK, DAMAGES* § 43a (9th ed. 1912): "... mental suffering may consist of annoyance, distress or anxiety. It may . . . become nervous shock or nervous prostration. . . . Under the head of mental suffering come also injuries to the feelings and affections — shame, humiliation, and grief."

49 *Davis v. Hill* 291 S.W. 681, 684 (Tex. 1927).

50 *Eastman v. Eastman*, 75 Tex. 473, 12 S.W. 1107 (1889).

51 *Perkins v. Ogilvie*, 148 Ky. 309, 314, 146 S.W. 735 (1912).

52 *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Aetna Life Ins. Co. v. Burton*, 104 Ind. 269, 12 N.E.2d 360 (1933); *In Reed v. Real Detective Pub. Co.*, 162 P.2d 133 (Ariz. 1945) it was held that: ". . . the mind of an individual, his feelings, and mental processes, are as much a part of his person as his observable physical members. An injury, therefore, which affects the sensibilities is equally an injury to the person as an injury to the body would be." See also *Emien v. Vike*, 198 P.2d 696 (Cal. App. 1948).

53 Professor Hallen says in 19 VA. LAW REV. 271 (1933): "The older negligence rule which denied recovery without impact now seems to have become a minority doctrine and the courts which still adhere to that rule are quick to find some slight impact, and permit recovery, although it seems apparent that the injuries were caused by the fright and not by the touch." Cf. *Goodrich, Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922): "The cases which do allow recovery for physical injuries sustained through fright, negligently inflicted, even without physical impact, seem emphatically right."

54 See note 38 *supra*.

55 Cf. *Goodrich, supra note 53*, at 513: ". . . the law has already recog-

A brief examination of international arbitral awards likewise indicates that International Arbitral Tribunals have followed similar patterns. Umpire Parker in the *Lusitania* cases<sup>56</sup> discussed this subject at length. He said:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury.<sup>57</sup>

Although it is difficult to lay down any rule for measuring injury to the feelings, humiliation, shame or mental suffering, nevertheless, these factors are generally taken into consideration by International Tribunals in awarding compensatory damages.<sup>58</sup> In a number of cases Arbitral Tribunals included in their awards indemnity on account of "grave anxiety of mind,"<sup>59</sup> "mental suffering,"<sup>60</sup> "grief,"<sup>61</sup> "shock,"<sup>62</sup> "indignity,"<sup>63</sup> and the like.

In all these decisions, however, no mention or reference can

nized the possession of a peaceful mental state as a subject for protection. . . . That is the way the common law grows."

56. Mixed Claims Commission, United States and Germany, established under the agreement of August 10, 1922, DECISIONS AND OPINIONS (1925).

57. *Id.* at 27; Cf. GROTIUS, DE JURE BELLI AC PACIS, translation of the 1646 ed., CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (1925), bk. II, ch. XVII sec. XII, p. 433: ". . . the one who is liable for an act is at the same time liable for the consequences resulting from the force of the act."

58. Cf. I WHITEMAN, DAMAGES IN INTERNATIONAL LAW 627 (1937).

59. Shufeldt Claim (U.S. v. Guatemala), DEP'T STATE ARBITRATION SER. 3, 881 (1932). See also the May Claim (U.S. v. Guatemala), 1900 FOR. REL. 648, 674.

60. Claim of Antoine Fabiani (France v. Venezuela) Ralston's Report 81 (1906). See also the Claim of Julia Groves Magill Lucas (U.S. v. Mexico), Report to the Secretary of State, DEP'T STATE ARBITRATION SER. 7, 305 (1940).

61. In the classical case of *Laura M. B. Janes et al.* (U.S. v. Mexico) Opinions of the Commissioners, 108, 118 (1927) ]. damages were assessed on the basis of the individual "grief" and indignity suffered by claimants.

62. In the claim of Lancaster W. Parmenter [(U.S. v. Mexico), Report to the Secretary of State, DEP'T STATE ARBITRATION SER. 7, 223-224 (1940) ], it was held that though the claimant suffered no direct material loss in consequence of the death of his son, the grief and "shock" incident to his son's death, properly constitute a basis for an award. Cf. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 424 (1922).

63. See Teodoro Garcia (U.S. v. Mexico), Report to the Secretary of State, DEP'T STATE ARBITRATION SER. 7, pp. 163, 169 (1940); Agnes Connelly (U.S. v. Mexico), *Id.* at 159, 161 and *Laura M. B. Janes et al.* (U.S. v. Mexico), *Id.* at 108, 118. Cf. the claim of Charles L. Stephens and Bowman Stephens (U.S. v. Mexico), *Id.* at 397; BORCHARD, *op. cit. supra* note 62, at 423.

be found to the concept of "mental harm" as such. In fact, the words "mental harm" do not seem to occur in any judicial or arbitral decision, though court decisions reveal at least some indications as to separate connotations of these terms. The word "mental" in itself, describing the condition of a person, refers to his senses, perceptions, consciousness and ideas.<sup>64</sup> "Harm" as the term is used in the *Restatement of Torts*<sup>65</sup> is a loss or detriment of any kind to a person resulting from any cause<sup>66</sup> and is often used in connection with "serious bodily harm"<sup>67</sup> to describe a bodily harm the consequence of which is so grave or serious<sup>68</sup> that it is regarded as differing in kind and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a "serious bodily harm."<sup>69</sup>

The problem with respect to these various and somewhat similar terms presents itself when one compares or contrasts them with the concept of "mental harm." The issue then arises whether "mental harm" or more precisely "serious . . . mental harm" can be interpreted to mean "mental anguish," "humiliation," "mental distress," or can be contrasted with the concept of "serious bodily harm" as referred to above. In other words, how far can the process of analogy be applied in international law, and what are the limits, if any, on resorting to subsidiary sources for the purpose of interpreting international law?

Lauterpacht says in his excellent study on *Private Law Sources and Analogies of International Law*:

The process of analogy is in the first instance a means of interpreting and supplementing the law in accordance with its own principles. That means that in resorting to analogy for the purpose of interpreting and construing rules of international law, we must so far as possible take into ac-

64. *New York Mut. L. Ins. Co. v. Terry*, 15 Wall. 580, 588 (U.S. 1872).

65. II RESTATEMENT TORTS §§848, 902 (1939).

66. *Cf. Lawler v. People*, 74 Ill. 228, 231 (1874): "It is quite usual to substitute 'injury' for 'harm' and nobody ever thought of questioning it."

67. The same words are used in Art. II sub-paragraph (b) of the Genocide Convention and can be contrasted with the concept of "serious . . . mental harm."

68. The word "serious" in itself appears in the court decisions. It means "important," "weighty," "momentous and not trifling," in a grave manner, so as to give ground for apprehension and being the equivalent of "great". See *Lawler v. People*, 74 Ill. 228, 231 (1874); *Ward v. State*, 70 Tex. Cr. R. 393, 159 S.W. 272, 282 (1913).

69. I RESTATEMENT, TORTS § 63 b (1934).

count its actual rules and its spirit. Should, however, no help be forthcoming from those sources, the recourse to a subsidiary source is the proper way for an international judge or jurist to choose.<sup>70</sup>

In another passage<sup>71</sup> he continues by asserting:

There is no need to resort to rules of an extraneous system of law, so long as other avenues are open. For, international law, deficient and undeveloped as it is in many respects, constitutes nevertheless a system of law to which by necessity the general rules and methods of scientific interpretation and construction resorted to in other systems of law must apply.<sup>72</sup>

In Article 19 of the Draft Convention on the Law of Treaties prepared by the Research in International Law of the Harvard Law School it is said:

A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.<sup>73</sup>

It is also equally well settled that in case of ambiguity or doubt as to the meaning of the terms of a treaty it is appropriate to look to the purpose of the instrument as a whole and to inquire into the intention<sup>74</sup> of the negotiators. For this purpose refer-

70. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 84 (1924).

71. *Id.* at 85.

72. Cf. GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 2nd. ed., 1919); VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTS-GEMEINSCHAFT 69-75 (1926); I ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 104 et seq. (1928); Ruegger; *Privatrechtliche Begriffe im Völkerrecht*, 28 NIEMEYERS ZEITSCHRIFT FÜR INTERNATIONALES RECHT 426-502 (1920).

73. 29 AM. J. INT'L L., SUPP. 661 (1935). Cf. I OPPENHEIM, INTERNATIONAL LAW 862 (Lauterpacht's ed. 1948).

74. Cf. MCNAIR, LAW OF TREATIES 185 (1938): "The primary rule is that the tribunal should seek to ascertain from all the available evidence the intention of the parties in using the word or phrase being interpreted." I WESTLAKE, INTERNATIONAL LAW (2nd ed.) 293: "The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilized world." See also Ehrlich, *L'interprétation des traités*, 24 RECUEIL DES COURS 116-131 (1928); JOKL, DE L'INTERPRETATION DES TRAITES NORMATIFS D'APRES

ence is frequently made to the contemporary declarations made by the parties during the course of the negotiations and at the time of a signature, "not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty actually made but to determine the general object of the negotiations, the particular sense in which the terms, otherwise uncertain of application, were used at the time, or the conditions as they existed at the time of the conclusion of the treaty."<sup>75</sup>

It is in the light of these generally accepted rules of international law that the concept of mental harm has to be interpreted. It is clear that the Genocide Convention should be considered as a whole, and each of its parts in the light of all the others. The general object and the whole spirit of the Convention which is brilliantly described in the Preamble thereof,<sup>76</sup> and the prior negotiations and declarations leave no doubt as to the intention of the Contracting Parties and as to the criteria of those acts which the Convention intends to punish in connection with mental harm.<sup>77</sup>

The record of the deliberations of the Ad Hoc Committee makes it clear that the case that was specifically in mind was the claim of the Chinese with reference to the dissemination by the Japanese of opium drugs to the Chinese population. The indispensable necessity for outlawing mass exterminations by narcotics which were to serve the master-plan of genocide, was the very reason which called for a special provision to cover any

LA DOCTRINE ET LA JURISPRUDENCE INTERNATIONALES 114-153 (1936); FAUCHILLE, *Traité de droit international public* Tome I, Part 1, 64 (1922); RALSTON, *The Law and Procedure of International Tribunals* 27 (1926); II HYDE, *International Law* 1497 (1945); BRIERLY, *The Law of Nations* 234-235 (1949); GUGGENHEIM, *Lehrbuch des Völkerrechts* Bd. 1, 125-126 (1948); I SCHWARZENBERGER, *International Law* 193-208 (1945).

75. See CRANDALL, *Treaties, Their Making and Enforcement* 377 (2nd ed. 1916).

76. The Preamble of the Convention reads: ". . . Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required . . ."

77. See Statement of A. Fisher, *The Genocide Convention, Hearings before a Subcommittee of the Committee on Foreign Relations, U.S. Senate, 81st Cong. 2nd Sess.* 263-264 (1950). "It is clear from the legislative history of this language that what was meant was not just embarrassment or hurt feelings, or even the sense of outrage that comes from such action as racial discrimination or segregation, however, horrible those may be. What was meant was permanent impairment of mental faculty."

future recurrence of these sorts<sup>78</sup> of crimes. Moreover, the significance, in this respect, of the word "serious" in Article II sub-paragraph (b) must not be overlooked.<sup>79</sup> It is obviously meant to be important, since it reaffirms the Parties' intention that only acts with grave consequences can be considered as falling within the scope of this provision.

Should, however, further specification be needed as to what is meant by "serious mental harm," the answer could be easily deduced by contrasting this notion with the concept of "serious bodily harm," as described above. In the language of the Restatement "serious mental harm" would then be a mental harm, the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other mental harm. A mental harm which creates a substantial risk of fatal consequences would be a "serious mental harm."<sup>80</sup> Such an act, however, could only become a crime under the Genocide Convention if coupled with the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such."<sup>81</sup>

The text of Article II reveals that the gist of the crime of genocide lies in the requirement of this criminal intent, in the absence of which an act of imposing intoxicants on a certain group of people, or any other act which contains the necessary

78. The likely illustrations of this method of destruction are the use of stupefying drugs and torture. The history of the last years, however, has shown that there can be systematic and planned attempts to cause the destruction or the disintegration of the human mind without the use of drugs by psychological terror, by lack of sleep and the like. See Statement of A. Fisher, *The Genocide Convention, Hearings, supra* note 77, at 263, 264. See also Statement of T. Dodd, *id.* at 255. Cf. LEMKIN, *op. cit. supra* note 1, at 89 (1944).

The recent experiments by Paul Friedman on concentration camp psychology in Cyprus show that the Nazi terror wrought an enormous dislocation of spirit in the survivors of the camps. See, Friedman, *The Road Back for the D.P's*, 6 COMMENTARY 505 (1948). Cf. Friedman, *Some Aspects of Concentration Camp Psychology*, 105 AM. J. OF PSYCHIATRY 601-605 (1949), and Bettelheim, *Individual and Mass Behaviour in Extreme Situations*, 38 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 417-452 (1943).

79. The word "serious" refers both to bodily and mental harm.

80. Cf. RESTATEMENT, TORTS § 63 (1935).

81. See Article II of the Convention. Raphael Lemkin, the originator of the Genocide Convention, says in his monumental treatise, *AXIS RULE IN OCCUPIED EUROPE* 179 (1944): "It (genocide) is intended . . . to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."

criteria for the concept of "serious mental harm,"—"whatever the degree of atrocity of the act might be and however similar it might be to the acts described in the Convention—it could still not be called genocide."<sup>82</sup>

The foregoing array of considerations indicates some of the answers to the basic objection that has been leveled against the concept of mental harm with the implication that it is so broad a term as virtually to make the crime of genocide incapable of definition and that its interpretation could be stretched to the utmost.<sup>83</sup> From what has been said it becomes quite clear that such a criticism embodies an unfortunate misapprehension as to the purpose of the Genocide Convention, and as to the generally recognized rules of interpreting international law.<sup>84</sup>

If the concept of "serious mental harm" is interpreted according to and in the light of the Genocide Convention's clear and essential principles, and if the deliberations of the Contracting Parties and the final objective of the Convention are taken into consideration with due regard to the well-hallowed rules of international law, there can be little doubt as to the meaning and future scope of judicial application of this concept.

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82. General Assembly, 3rd Session, Official Records, Part I, Sixth Committee, Summary Records of Meetings (September 21 - December 10, 1948), 72nd Meeting, p. 87. Cf. Lemkin, *The UN Genocide Convention*, printed as an Extension of Remarks of Representative Celler of New York in 95 CONG. REC. APP. A. 1224 (1949): "Where . . . specific intent is lacking there is no genocide."

83. The arguments advanced by H. S. Bargar before the U. S. Senate against the ratification of the Genocide Convention refer to this extreme kind of interpretation by which "the doing of an act by an individual such as the refusal of employment, or blackballing a person for membership in a union or social club, or the publishing of any comment, no matter how mild, with respect to any member of a minority, could be deemed by the 'international penal tribunal' set up by this convention to constitute 'mental harm' and hence, under the clear provisions of the Genocide Convention, to be worthy of punishment." See Statement of H. S. Bargar, *The Genocide Convention, Hearings, supra* note 77 at 305.

84. Cf. Professor Myres S. McDougal's address at the forty-third annual meeting of the American Society of International Law: "[Opposition to the Convention] moves from a complete misconception of the conditions under which we live today, a complete misunderstanding of the nature and the role of international law, a complete misunderstanding of our constitutional requirements and of the obligations imposed by the United Nations Charter, and a tragic failure to consider what rational action calls for under the conditions of the present time." See Proceedings 65 (1949).