**Note**
**on the Draft-Convention of Genocide**

The secretary-general of the Council of Ministers has, by letter No. 344 dated 18th September 2490, forwarded the draft Convention on the crime of genocide as submitted by the Secretary-General of the United Nations and has requested the judicial and Legislative Council for observations, upon demand of the Ministry of Foreign Affairs, because this is a new matter in which the general policy of the Siamese Government should co-ordinate with that of the United Nations concerning human beings, so that if this Convention is adopted by the United Nations the Siamese Government may have to do something as regards legislation and steps may have to be taken to that effect.

The Legislative and Judicial Council ( Sub-Committee 2 ) have examined the draft and beg to submit their remarks as follows.

New Legislation.- The answer to the request of the Government is that new legislation will be necessary if Siam is to become a party to the Convention on the crime of Genocide,since this is a new offence not provided in our present Penal Laws.

Special Act.- It is assumed that the provisions for the new criminal offence of genocide should not be inserted in the Penal Code but in a special law. Firstly because genocide is a matter which obviously has arisen from contingent circumstances to which the recent war has given sensational importance but which may be otherwise valued when time has passed ( there have been many instances of that after the Treaty of Versailles) . Secondly because many of the proposed provisions are, on account of the same circumstances, exceptional and even divergent from the usual legal principles adopted in criminal law.

Article I.- Definition of genocide - A definition of the new offence appears in Article I (I). But is seems that article I (I) is insufficient because if fails to take in consideration the general evolution of human mind in culture and philosophy. It is suggested that the words “religious group” or “eligion” which are repeated often in the Draft, are too narrow. There may exist groups who have a philosophical culture not being of religious nature: e.g. a group of human beings professing atheism of other similar philosophy, of a group of human beings professing and applying nudism or other sexual doctrine different from the conventional morals. Under the present wording those groups would not come under the protection provided by article I (I), although their activities belong certainly to that freedom of conscience which is granted by almost all Constitutions in the world and cannot be mistaken with freedom

of religion or freedom of warship. Which the present and narrow wording, the denial of the right of existence of groups similar to those quotedas examples here above, could occur contrarily to the fundamental principle of the Convention. It is suggested consequently that the words religion or religions in the Draft, shall be replaced everywhere by "ideological or religious culture".

The above remarks are coherent with the method adopted and with the Assembly resolution 11th. December 1946 according to which the secretary-general "was to submit the widest possible formula" (see page 22 of the document of the Economic and Social Council).

The Legislative Adviser submits that in his opinion Genocide should apply also to any destruction "en masse" of apopulation, even in time of war, when the conditions make it impossible to discriminate between the combatants and the civil population especially including women and children.

It is unfortunately obvious that all the Powers, in this brutal XXe. century, are seeking similar dreadful means of destruction, and will undoubtedly find them, so contributing to that final self-destruction of mankind which was recently predicted by Professor Einstein in an address to the UNO and by Chemist Harold C. Vrey can be save from such disasters since new inventions may be more dreadful than the present ones possessed by it.

To rely merely upon the laws of war in order to forbid any such massacres, as seems the suggestion of the Report of the Economic and Social Council (page 17), is utterly unsatisfactory. New methods of that kind do no longer belong to the field of war legislation. When civil population is unavoidably and light-heatedly doomed to die by the use of those modern and terrific methods or implements, without and hope of escaped, this cannot be taken as an act of war as was understood in the old times: it becomes generally an act of genocide since it destroys "in part a group of human being" as is the very wording of the definition given by article I (II) (especially if the purpose is to spread terror in the remaining population).

Consequently it is proposed to complete Article I (II.l.a) as follows:

(a) group massacres including those of a portion of population even in time of war when there is no possible discrimination between combatants and non-combatants; or individual executions.

Article I (II.2.c).- the destruction of a group by obstacles to marriage seems to be closely connected with the legislation of some countries which prevent (even under penal sanction) marriage of their nationals with another racial group. This is an intolerable survival of the "color bar". It may eventually result in the extinction of a racial group, if female of that group are much less in number than male. It should be commendable to add to the words: "obstacles to marriage" the words "including racial prohibition".

Article I (II.3 b).- The Convention proposes wording concerning the destruction of the specific characteristics of a group by "forced and systematic exile of individuals representing the culture of a group". It appears from the document of the Conseil Economic et Social page 6 that a learned expert did propose as alternative: "systematic elimination of the individuals representing the culture of the group by acts of violence or infringement of personal liberty".- Preference should be given to the second wording, because "exile" in the first one is too narrow. It is obvious that other means may be used to make impossible the communication between the individuals here above mentioned and their friends, creating that systematic elimination which is mentioned. But the Committee are of opinion that "elimination" is too strong and would propose "systematic deprivation of intercourse"-.

Article I ( II.3 .c and d) .- The words "national languages" seem improper : there are specific languages of important groups which however are not nations (for instance the romansch in Canton des Grisons, Switzerland). Besides a "national language" evokes the idea of French language in France, Danish language in Denmark, etc. Which is certainly not the idea. It is suggested to say: "the language of the group".

Article II (I.1).- Attempts are punishable in the Siamese Penal Law (see art. 60 and fol.Penal Code).

Article II (I.2).- Preparatory Acts are punishable in Siamese Penal Law only when the law specifies if (see for instance sections lll,178,etc. Penal Code). The principle of the Draft Convention in that matter therefore is not contrary to Siamese law; but the description of the Draft-Convention is more limited and a specification shall be necessary.

Article II (II.1).- "Willful participation" is the case of the principal or of the accomplice. They are punished under the Siamese Penal Law as usual. No new legislation should be necessary, being understood that we shall keep our legal rules in the matter (see Penal Code sect.63,65,ctc.).

Article II (II.2).- Incitement to commit the offence is punishable in the Siamese Penal Code (see "abetment of offences" Sect.174 to 175) whether the incitement has been successful or not. No new legislation is necessary.

Article II (II.3).- Conspiracy is given a definition in the Penal Code (section 6 (8),and a special offence is committed in case of criminal associations (being conspiracy of five of more persons); the provision should be extended to Genocide by the law special thereto.

Article III.- Public Propaganda in favour of genocide.

Section l0 4 of the Penal Code, as amended B.E. 2 4 7 8 , provides punishment for those who publicly, by words or writings or printed documents or by any means whatsoever……instigatepeople to transgress the Law of the country. A Convention to which Siam is party becomes a law of the country: consequently section 1 0 4 should be sufficient. However section 1 0 4 has not been made for the purpose of genocide, and the public propaganda provided by Article III is something rather special and sui generis. It is assumed that the provisions of Article III should be reproduced in the special law on genocide.

Article IV.– Punishment of offenders should be provided in the new Act if it is decided that "Rulers" should be punished when genocide is committed. Since there can be no criminal offence unless there is intention, it is assumed that

the provision of article IV applies to offenders (even "Rulers") whose personal intention to perform or order genocide should be proved as usually. When it is not so, to punish the "Rulers" of a country indiscriminately because crimes of genocide have been committed by their own subjects, should, in the complications of modern politics or warfare, an unfair deplacement of liability in criminal law. The most essential principles in criminal law cannot be disregarded. Also it is understood that the Convention on genocide cannot cover criminal procedures against "Rulers" simply because they have prepared, declared or waged war against another country, this resorting to the highest policy of every free state.

Article V.– Command of the law or by superior Orders. the Draft–Convention proposes that such command is no legal excuse. The Siam Penal Code says in that matter (Section 52) that "a person shall not be punished for any act done in the case of carrying out a lawful command". The majority of the Committee are of opinion that acceptance of the penal system of the draft is unavoidable, because otherwise the effect of the Convention should be destroyed. In any case, explanations should be requested by the representative of the Government.

The Legislative Adviser submits a dissenting opinion as follows. The policy which makes lawful command a legal excuse for the offender is a progress of modern criminal law. The new draft Penal Code France art. 1 2 7 says expressly that no official or other agent of the Government is punishable "when he has orderes or performed any act which is punished by law if he justifies that he was acting by order of his Superiors, for objects in the scope of competency of the latter, concerning which he was bound to hierarchical obedience". This policy seems the latest in the matter ( 1 9 3 4 ) and a similar policy is found in the Penal Codes of many other countries (refer. Italy Code1931 art. 51,52; Switzerland section 32; Egypt sect. 63; India sect. 76; China sect. 21; Philippine sect. 11(6); Japan sect.35; Spain sect. 61; etc.). Similar provisions make it also an excuse in the case where the offender was compelled to (the offence) by irresistible force or by a threat to himself or relative

coupled with present danger to life or limb and not otherwise to be averted (Germany sect. 52; Poland sect. 19), this being certainly likely to occur when in fact a subordinate could not disobey the order of his superior unless by running the risk to be punished himself. In the English law. "The mere fact that a person does a criminal act in obedience to the order of a duty constituted superior does not excuse the person who does the act from criminal liability, but the fact that a person does an act in obedience to superior whom he is bound to obey, may exclude the inference of malice or wrongful intention which might otherwise follow from the act" (Halsbury's Laws of England vol.9 p.24).

The Siamese Penal Law has adopted the system followed in many countries as being a matter of common sense and logic. It may be pointed out that this argument is still much stronger and hardly questionable in most numerous cases of genocide, because (on account of the circumstances) it should appear utterly unfair, for instance, to prosecute and punish soldiers or officials (jails, etc.) who have merely executed orders and should probably have been shot themselves if they did disobey. It should not be less unfair to expect that those soldiers or officials may have such a knowledge of law which allow them to appreciate if an order of their superior is lawful or not. All this would necessarily place them between the devil and the deep sea. It would be both inhuman and impracticable.

It is consequently recommended that article V should be reconsidered, or that a Reservation should be made by the Government (in article XVII) in order to stick to our legislation and to adopt the principle that "person having committed genocide shall not be punished if his acts were done in carrying out a lawful command of a superior for objects in the scope of competency of the latter and which he was bound to obey". It is assumed that this should not destroy the effect of the Convention but reintroduce justice in a matter where it is highly necessary. Principles of justice are never destructive of anything: it is to disregard them which results in making finally a deal-latter of a provision.

Article VII. - This article provides that Siam, as a party to the Convention, should punish the offender within her territory:

a) irrespective of the nationality of the offender; this is merely the application of the principle that foreigners in Siam are subject to the judgments of Siamese Courts, and is nothing new;

b) Irrespective also of the place where the offence has been committed; this means that prosecution should be made if the offence has been committed outside Siam. It may be remembered that some offences committed outside the country are already punishable in Siam (under sect. 10 Penal Code; offences against the King and the State, relating to money, seals, stamps : piracy). The provision of the Convention would mean only an extension of section 10 of the crime of genocide and is not against our principles of criminally.

Article VIII.- According to that article, genocide should be a ground for claiming extradition of accuses (who are in another country) because genocide is not to be considered as a political crimes. The principle may be accepted because it appears from the definitions given in article I that the acts taken in consideration by the draft conventionare in fact offences of common penal law (namely murder, bodily harm, compulsory interventions to restrict sexual intercourse by using force, kidnapping children, outrages to human liberty affecting language, publications and culture, destruction of documents or objects). There can be no objection to consider the said criminal acts as being not political acts, owing to their nature. Of course this should not apply in the case of persons, especially Rulers, who were responsible merely for having prepared declared or waged war against another country for reasons of foreign policy, this being essentially a political question relating to and governed by highest political considerations of each free country.

The Comment of the document of the Economic and Social Council (page 39) mentions explanatorily that the two main contingencies in which a State would be justified in requesting extradition would be if the crime had been committed:

a) in its territory;-it is assumed that this supposesof course that the offenders have not yet been tried and theirliability adjudicated in the territory of their own country ofeventually of another country;

b) if the victim of genocide were its nationals even if the crime was not committed in its territory; this is subject to the same assumption.

Article IX.- If some International Court is created by the effect of the Convention (see article X), there is no objection of principle for Siam to commit offenders to that Court instead of dealing with them in Siam.

(No. 1) It may be noted that this transfer of juristic-tion to an International Court shall take place only upon the request of Siam herself, that is to say if Siam seems undesirable to try by her own Courts persons of foreign nationality or persons having committed the crime outside Siam which happen to live in Siam (article VII); being understood consequently that Siam is at liberty to try such persons in her own Courts; the alternative proposed may continently be useful in case of difficult situations.

The transfer of jurisdiction to the International Court in case of extradition to another State, being requested in preference by Siam, means also probably that Siam may be reluctant to grant extradition of persons living in her territory because she is afraid that the country claiming extradition as well as the Courts of that country may be too much prejudiced against the accused. In this case also, the transfer to the International Court may be satisfactory.

(No.2) is a more questionable point. If Siameseindividuals have acted as organs of the Siamese State or with support or toleration of the Siamese State, Siam should have no other alternative that to commit those persons to the International

Court. There cases may arise where the indictment proposed by foreign countries is in flagrant opposition to the highest legal principles of criminal law duly embodied in the Codes of our country, as it did occur recently when prosecutions were requested in case of offences which were not offences at the time when the Act was committed ( contrary to Sect. 7 Siamese Penal Code) . This provision is a very serious infringement of national sovereignty. It belongs to the Government to see if they think them bound to accept it or may make a reservation.

Article X. – This article seems to propose to the HighContraction Parties a choice ( which is not made yet) between two systems concerning the International Court,namely : either a Court appointed especially ad hoc when there are cases to be submitted to it ( case of article IX especially) or a permanent Court institute to try crimes of genocide.

There are arguments pro and coneach system, but the Committee fear ( as said an expert according to the document of the Counsel Economic and Social Council p.42) that a permanent Court should rapidly be short of matters te examine and would mean an addition for nothing to the international expenses incumbent to the small States.

Article XII. – This article provides that the High Contracting Parties may call upon the organ of the U.N.O to repress crimes of genocide ( Parag. one) . But as a consequence, all the contraction States may be required “to do everything in their power” to give full effect to the intervention (parag. two).

This provision seems to foresee any kind of measures, war being included, The difference with the famous article 16 of the Covenant of the League of Nations is that in the Covenant the signatory Powers were involved ipso facto in a war, whilst in this draft-Convention the interested partied shall call to the organs of the United Nations requesting measures to be taken, such measure having to be taken by the High Contracting Parties upon intervention of the U.N.O. It may be reminded that the said signatory States of the Covenant have made anything in their power.to evade the application of article 16 or to obtain its modification. Sensational instances have shown the futility of article 16. Consequently great care must be taken that no similar drawback shall occur in the case of Article XII.

Article XIII.– The beginning of this section is badly drafted. It should read: When genocide is committed in the country by the Government in power, or by sections of the population to which the Government fails to resist successfully, etc.

12 January 1948