

## IRELAND AND THE GENOCIDE CONVENTION: AN UNHURRIED MOVE TO ACCEDE (1948–1976)

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In his study on Britain and the Genocide Convention, Brian Simpson provided fascinating insights into the internal deliberations of British government departments on whether Britain should accede to the Genocide Convention and concluded that any general explanation for why States accede to international humanitarian treaties can be valuable only if based on empirical studies.<sup>1</sup> As Carty notes, political events involve a powerful blend of counter-positions and political spin, where State intentions are “state secrets except [when] the State itself chooses to disclose them, when recalcitrant officials leak them or journalists otherwise come... [upon them] (AOS)”.<sup>2</sup> Consequently, given the rhetoric used by States in international and domestic fora, the hidden practices are challenging to deduce or construct as they are “largely secret and one obtains only sporadic glimpses of [them]”.<sup>3</sup> Therefore, studies on contemporaneous State conduct are hampered by the very fact that the events are ongoing. However, when State archives reveal those hidden practices, they provide wonderfully rich empirical data on State conduct during critical historical moments.

Inspired by Simpson’s investigation, this paper divulges an empirical study of the internal deliberations of Irish government departments on Ireland’s accession to the Genocide Convention. Its aim is to elicit why Ireland delayed accession to the Genocide Convention for over two decades, why the Irish Cabinet eventually decided to accede in 1968 and why there was a continuing delay until ratification in 1976. It demonstrates how each of the critical elements, identified in Simpson’s study, varies in significance in the Irish case study. Here, in contrast to their British counterparts, Irish government departments were more cohesive on issues of doctrinal law and their perception of the Convention’s function. Irish government departments were also more influenced by status-oriented concerns than domestic interest groups in contrast to the British engagement. Bureaucratic politics and political leadership invariably played out differently as there was no interdepartmental dispute over doctrinal law, as happened between the Foreign Office and Home Office. Ultimately, the Irish Cabinet decision to accede was brought about only after changed attitudes among certain officials in External Affairs combined with Ministerial leadership. Notwithstanding the Cabinet decision, further delay was precipitated by inertia from Justice and later the Attorney General’s Office in producing a final Genocide Bill. As Alvarez observes, theoretical models on State ratification can never fully capture “real world events” as ultimately State practice is “messy” and leaves observers with a “confusing muddle” of critical factors.<sup>4</sup>

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<sup>1</sup> A.W.B. Simpson, “Britain and the Genocide Convention” (2002) 73(1) *British Yearbook of International Law* 5. The author is sincerely grateful to Dr Stephanie Berry and Dr Tarik Kochi from Sussex Law School and to an anonymous reviewer for their very helpful and insightful comments. She is also very grateful to Mr Gregory O’Connor, Archivist National Archives Dublin, Ms Kate O’Malley, Assistant Editor of *Documents on Irish Foreign Policy* and Stephanie Breen, Assistant Librarian, Early Printed Books, Trinity College Library for their research assistance on civil servant biographical information.

<sup>2</sup> A. Carty, “Distance and Contemporaneity in exploring the practice of states: the British Archives in relation to the 1957 Oman and Muscat Incident” (2005) 9 *Singapore Yearbook of International Law* 75 at 76.

<sup>3</sup> Carty, “Distance and Contemporaneity” (2005) 9 *Singapore Yearbook of International Law* 75 at 78.

<sup>4</sup> J.E. Alvarez, “Do States Socialize?” (2004) 54 *Duke Law Journal* 961 at 968.

## I. CERTAIN HYPOTHESES ON WHY STATES ACCEDE TO THE GENOCIDE CONVENTION

In his study, Simpson detailed the interdepartmental dispute on doctrinal law between the Attorney General and the Home Office in the late 1940s. This centred on whether strict or mere substantive compliance with domestic law was required in order to be able to accede. The major stumbling block was over the obligation to remove the political offences exception for acts of genocide under art.VII of the Genocide Convention. The 1870 British Extradition Act prevented extradition for political offences<sup>5</sup> and the UK “had always insisted on its absolute right to grant asylum for ... political offences”.<sup>6</sup> While the English courts had authority to determine whether an offence was political in character, the Home Secretary retained a general discretion to refuse extradition subject to certain safeguards.<sup>7</sup> Yet both the Home Office and the Attorney General agreed that an English court could rule that an act of genocide was a political offence “in the absence of domestic legislation” that removed the political offences exception.<sup>8</sup> This conclusion obviously stemmed from the inconsistencies within the English courts’ jurisprudence on the legal test for determining whether an act is of political character.<sup>9</sup> In fact, a 1968 Home Office memo described this jurisprudence as being “in a very unsatisfactory state”.<sup>10</sup> Overall, Simpson argued that the interdepartmental dispute did not simply reflect disagreement over what constituted domestic law conformity with the Convention. Rather it appears to have been “more fundamentally a disagreement ... as to what the function of the Convention really was”.<sup>11</sup> From the competing views, the Convention was either merely “symbolic” or “primarily practical, to deter future acts of genocide”.<sup>12</sup> Despite the intense interdepartmental dispute over extradition, this key stumbling block has never been raised before English courts.<sup>13</sup> Along with issues of doctrinal law, other critical factors were revealed by Simpson’s study, such as domestic interest groups,<sup>14</sup> political leadership (or lack thereof), bureaucratic politics and to some extent, status-oriented concerns.<sup>15</sup>

Alvarez has read Simpson’s empirical study through the lens of three models of compliance mechanisms and this demonstrates how each model emphasises certain aspects of empirical data as being critical descriptors of State motivation and behaviour. Scholars adopting a coercive model of compliance (such as realist scholars) would conclude overall that Britain ratified only when it was in its material interest to do so.<sup>16</sup> Scholars adopting a persuasion model would focus on the influence of key domestic interest groups and how

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<sup>5</sup> Extradition Act 1870.

<sup>6</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 38.

<sup>7</sup> See s.11 of Extradition Act 1870.

<sup>8</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 38.

<sup>9</sup> Two key cases adopted different definitions of “political offence” yet it remained unclear if the later judgment *Re Meunier* was controlling. See *Re Castioni* [1891] 1 QB 149 at 165–166 and *Re Meunier* [1894] 2 QB 415 at 419.

<sup>10</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 45 (“few in number, in conflict with each other and in some cases very vague”).

<sup>11</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 64.

<sup>12</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 64.

<sup>13</sup> See *R v Evans and Bartle and the Secretary of State for the Home Department ex parte Augusto Pinochet* [1998] EWHC 1013 (Admin) (albeit British arrest warrant was issued over charge of murder).

<sup>14</sup> See Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 43–44, 49–50, 52–53, 58, 60.

<sup>15</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 48–49.

<sup>16</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 962. See Oberdoerster, “Why Ratify?” (2008) 61 *Vanderbilt Law Review* 681 at 686 (categorised as rationalism).

certain lawyers in the Home Office were conscious of those constituencies.<sup>17</sup> Scholars focusing on “status-oriented concerns” would conclude that the Foreign Office was influenced by the potential for embarrassment if Britain was left among a smaller number of non-ratifying States that included apartheid South Africa.<sup>18</sup> Nevertheless, Alvarez identifies how certain influential factors are not accounted for by these models, namely bureaucratic politics, personal leadership and doctrinal law. Bureaucratic politics highlighted how different government departments are “captured by certain interests, exhibit path-dependent behaviour, and prefer the status-quo”.<sup>19</sup> Political leadership underlines how certain personalities and their ability to persuade others are significant. Similarly, changes in government can lead to behavioural changes within departments. Finally, issues of doctrinal law are particularly influential.<sup>20</sup> In other words, none of these compliance models is able to fully capture “real world events” because state practice is “messy”—“observers are left with a confusing muddle in which everything matters, at least a little bit”.<sup>21</sup>

That said, where appropriate this paper draws on certain concepts within the persuasion and status-oriented models, in particular norm cascade and geographical proximity. “Norm cascade” is the “tipping point” when a “critical mass of relevant state actors adopt the norm” and this norm influence means other State actors follow suit in order to enhance their reputation.<sup>22</sup> Geographical proximity is where higher levels of ratification within a State’s wider geographical area increase the probability of ratification.<sup>23</sup> The latter continues to have supporters but “norm cascade” has been challenged in regards to the Genocide Convention. Greenhill and Strausz concluded that only after 1987 did the rate of probability of ratification by non-ratifying States increase in keeping with a typical case of “norm cascade”.<sup>24</sup> In their view, the Genocide Convention was a victim of its own success where internalisation of the norm decreased the impetus to ratify the treaty, especially in competition with more pressing human rights issues.<sup>25</sup> However, the Irish case study demonstrates the complexity of interacting factors for each state, which may accord with certain theoretical probability rates yet discord with others. In the Irish case, Ireland’s “hidden practices” accord with Greenhill and Strausz’ conclusion on common law states, as having a reluctance to ratify due to doctrinal law concerns. Yet these practices discord with their conclusion on new democratic states, as having no probability of ratification despite the expectation of a general desire to ratify human rights treaties.<sup>26</sup> Irish officials read the Genocide Convention as useful for Ireland’s general human rights treaty image and maintained an interest in acceding to the treaty when a norm cascade was evident. Overall, Alvarez’s concept of real world practice as “messiness” is more apt than a general explanation of behaviour.

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<sup>17</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 965. See Oberdoerster, “Why Ratify?” (2008) 61 *Vanderbilt Law Review* 681 at 692 (categorised as liberalism).

<sup>18</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 964 (categorised as constructivism, emphasising normative ideals and how moral positions and social structures influence state behaviour, including a “norm cascade”).

<sup>19</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 964.

<sup>20</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 965.

<sup>21</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 968. Alvarez’s criticism would also apply to integrated theories of ratification (that combine elements of the three models). See O. Hathaway, “Why do Countries Commit to Human Rights Treaties?” (2007) 51(4) *Journal of Conflict Resolution* 588.

<sup>22</sup> M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *International Organization* 887 at 895.

<sup>23</sup> Goodliffe and Hawkins, “Explaining Commitment” (2006) 68(2) *Journal of Politics* 358 at 364 (concurring with B. Simmons (2002)).

<sup>24</sup> Greenhill and Strausz, “Explaining Non-ratification” (2014) 10 *Foreign Policy Analysis* 371 at 372.

<sup>25</sup> Greenhill and Strausz, “Explaining Non-ratification” (2014) 10 *Foreign Policy Analysis* 371 at 374–375.

<sup>26</sup> Greenhill and Strausz, “Explaining Non-ratification” (2014) 10 *Foreign Policy Analysis* 371 at 384.

## II. WHY IRELAND DELAYED IN ITS DECISION TO ACCEDE: THE 1950S TO THE LATE 1960S

Ireland's failed application for United Nations membership meant that Ireland was excluded from participating in the UN General Assembly debates during the drafting of the Genocide Convention in 1948.<sup>27</sup> After World War II, Ireland's internationalist image in the League of Nations was replaced by a loss of goodwill due to its wartime neutrality and De Valera's signature of Hitler's book of condolences.<sup>28</sup> Ireland's application remained effectively suspended until the United States and the Soviet Union managed to negotiate the entry of a number of their allies in 1955.<sup>29</sup> Therefore, only in 1950 did External Affairs and Justice examine whether to accede to the Genocide Convention.<sup>30</sup> This was prompted by two visits to the Washington Embassy that led the Irish ambassador John Hearne to seek guidance on what was Ireland's position. In their respective visits, Raphael Lemkin<sup>31</sup> and the Korean ambassador Mr Chang strongly urged Ireland to accede with utmost haste.<sup>32</sup> In the latter case, the Korean War and the potential threat to the Christian population in the Communist-controlled entity in particular signalled a "new international need for the Genocide Convention".<sup>33</sup> In his request, the Irish Ambassador enclosed the statistics on ratifications; while there were 43 signatories, only 12 States had ratified.

External Affairs and Justice's examination was premised on the assumption that strict compliance with domestic law was necessary. One External Affairs official, in his advice to the Legal Adviser to the Department of External Affairs, elaborated the British Government's position in detail, indicating support for the British reservations. Iremonger recounted that Britain had abstained in UN Legal Committee<sup>34</sup> and in the final vote in the plenary in the UN General Assembly Britain had voted in favour with the proviso that it could not be seen as committing "to action which would prejudice the long established and traditional right... to grant asylum to persons charged with political offences".<sup>35</sup> Worryingly, Irish officials relied exclusively on the rhetoric of British officials. They did not investigate any further with their British counterparts who were at the time engaged in an interdepartmental dispute over strict

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<sup>27</sup> On the drafting history, see W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn (Oxford: Oxford University Press, 2009).

<sup>28</sup> M. Kennedy and J.M. Skelly, "The Study of Irish Foreign Policy" in M. Kennedy and J.M. Skelly, *Irish Foreign Policy* (Dublin: Four Courts Press, 2000), p.23.

<sup>29</sup> D. McMahon, "Our mendicant vigil is over: Ireland and the United Nations, 1946–55" in M. Kennedy and D. McMahon (eds), *Obligations and responsibilities: Ireland and the United Nations, 1955-2005: Essays Marking Fifty Years of Ireland's United Nations Membership* (Dublin: Institute of Public Administration, 2005), pp.5–24.

<sup>30</sup> DFA 417/65 Part I (Minute from Irish Ambassador to the US John Hearne, 8 June 1950). However, an earlier request was sent to Ireland from UN Secretary General in December 1949 without any response from External Affairs. See UNGA Res 368(IV) (3 December 1949).

<sup>31</sup> Raphael Lemkin was a Polish lawyer who in 1944 coined the term "genocide" by combining the Greek *genos* (race) with the Latin *cide* (killing) in his famous work *Axis Power in Occupied Europe*. In *Axis Power*, he chronicled Nazi atrocities in the Nazi-occupied territories and his research was an influential source for the Allied Prosecutors at the Nuremberg Trials. In 1946, he energetically lobbied States within the newly established United Nations General Assembly to adopt a Resolution on the Crime of Genocide and later, the UN Genocide Convention. See J. Cooper, *Raphael Lemkin and the struggle for the Genocide Convention*, (Basingstoke: Palgrave Macmillan, 2008); R. Lemkin, *Axis Rule in Occupied Europe* (Washington Carnegie Endowment in International Peace 1944 and U.N.G.A. Res. 96(I) of 9 December 1946).

<sup>32</sup> DFA 417/65 Part I. Minute from John Hearne, 8 June 1950 and Letter from Korean ambassador Chang 31 July 1950.

<sup>33</sup> DFA 417/65 Part I.

<sup>34</sup> DFA 417/65 II (Iremonger to the Legal Adviser Michael Rynne, 18 August 1950).

<sup>35</sup> DFA 417/65 II (Iremonger to the Legal Adviser). See generally Simpson, "Britain" (2002) 73(1) *British Yearbook of International Law* 5 at 32–35 and 475 *Hansard*, Cols 1501–1502 (18 May 1950).

or mere compliance. However, it is also evident that status-oriented concerns were not as influential. This appears to be due to the fact that key States had not yet ratified. However, it may also have been affected by Ireland's international focus at the time, which was directed towards its membership of the Council of Europe,<sup>36</sup> its desire to be part of the Marshall Plan and its negotiation of certain treaties, such as the European Convention on Human Rights.<sup>37</sup> Therefore, Iremonger advised that the current statistics on the Convention's ratifications indicated an overall "slowness" of States in ratifying the Genocide Convention. As the British reservations indicated, Iremonger suggested that States found it challenging to reconcile many of the Convention's obligations with their domestic laws.<sup>38</sup>

Given the evident difficulties for other common law States, Iremonger argued that Justice must be consulted.<sup>39</sup> However, the tone of his letter to Justice did not suggest any urgency and did not highlight any desirability for Ireland to accede.<sup>40</sup> In fact, the letter pointedly stressed the limited number of ratifications.<sup>41</sup> Meanwhile, Raphael Lemkin had once again visited the Irish ambassador, who again sought Ireland's position.<sup>42</sup> By now, Justice had replied to Iremonger and External Affairs could finally devise its policy.<sup>43</sup> Justice reported that the Minister for Justice was "strongly of the opinion that Ireland should not become a party to this Convention unless and until it is found that we are the *only country not ratifying or acceding to it*" (emphasis added).<sup>44</sup> The attached opinion from Justice is missing but some indications of Justice's reasons are among handwritten notes.<sup>45</sup> The Secretary of the Department of Justice explained to External Affairs that the Minister for Justice concurred with the British objections.<sup>46</sup> While not explicit in the notes, it would appear that the political offences exception was the key consideration as Irish government departments did not examine the issue of reservations in the same depth as their British counterparts.<sup>47</sup>

When one appreciates the considerable uncertainty surrounding Irish extradition law at the time, it is understandable why there was such a cause for concern. In fact, it is arguable that the extradition law issues were a greater stumbling block for Irish officials than for their British counterparts. The key challenge was an uncertainty as to whether previous extradition arrangements, based on British extradition law, had survived the 1937 Constitution at all.<sup>48</sup> If not, this would have required an overhaul of extradition arrangements *in general*. On extradition to Britain, the uncertainty was only resolved by judicial review in 1952. During the existence of the Irish Free State, the legal basis for extradition to Britain was governed by s.29 of the Petty Sessions (Ireland) Act 1851, whereby arrest warrants issued by English magistrates were "endorsed" and executed by Irish police officers.<sup>49</sup> In 1952, the Supreme

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<sup>36</sup> See E. Keane, "Coming out of the Cave: The First Inter-Party Government, the Council of Europe and NATO" (2004) 15 *Irish Studies in International Affairs* 167.

<sup>37</sup> W.A. Schabas and A. O'Sullivan, "Politics and poor weather: How Ireland sued the UK under the ECHR" (2007) 2 *Irish Yearbook of International Law* 3–29.

<sup>38</sup> DFA 417/65 II (Iremonger to Legal Adviser).

<sup>39</sup> DFA 417/65 II (Iremonger to Legal Adviser).

<sup>40</sup> DFA 417/65 Part I (Nunan to Berry, Secretary of the Department of Justice, 23 August 1950).

<sup>41</sup> DFA 417/65 Part I (Nunan to Berry).

<sup>42</sup> DFA 417/65 II (Hearne to External Affairs, 13 October 1950).

<sup>43</sup> DFA 417/65 II (Iremonger to Hearne, 15 October 1950).

<sup>44</sup> DFA 417/65 II (Minute from Minister of Justice, 22 September 1950).

<sup>45</sup> DFA 417/65 Part II (Waldron to Legal Adviser Fay, 9 December 1952) (note of the conversation is missing).

<sup>46</sup> DFA 417/65 Part I.

<sup>47</sup> External Affairs only discussed whether to submit observations to the International Court of Justice, and here Iremonger assumed that External Affairs would not wish to submit a written statement given the attitude towards the Genocide Convention. See DFA 417/65 II. (Iremonger to O'Reilly, 22 February 1951).

<sup>48</sup> Art.50 of *Bunreacht na hÉireann* ("subject to this Constitution and to the extent to which they are *not inconsistent therewith*").

<sup>49</sup> *State (Dowling) v Brennan and Kingston* [1937] I.R. 483.

Court ruled that s.29 survived the enactment of the 1937 Constitution and continued to have force of law.<sup>50</sup> On extradition to former British dominions, it was ruled in *State (Kennedy) v Little* that s.3 of the Fugitive Offenders Act (1881) continued to have force in the Irish Free State.<sup>51</sup> However, its consistency with the 1937 Constitution had not yet been judicially tested.<sup>52</sup> On extradition to States other than Britain and its former colonies, this appeared to be governed by the British Extradition Act 1870. However, prior to the Extradition Act 1965, this was rarely requested and as a result the Irish courts had not determined whether the terms of the 1870 Act were consistent with the 1937 Constitution.<sup>53</sup> On the critical issue of the political offences exception, the Supreme Court ruled in 1952 that this exception was not a “generally accepted principle of international law” according to Art.29(3) of the 1937 Constitution.<sup>54</sup> Rather, international law recognised a right of the State to apply the exception and this right was exercised under domestic law. In other words, the exception would have been incorporated in Irish law if the terms of the Extradition Act 1870 were consistent with the 1937 Constitution, an issue which remained uncertain. In turn, as this writer has noted, English jurisprudence over the definition of offences of a political character was “in an unsatisfactory state”.

It follows, then, that William Butler in External Affairs advised that Ireland “should not be in too great hurry to accede”.<sup>55</sup> He described the list of ratifications as not “impressive” because there were only 20 of the 60 United Nations Member States on the list and the “more important members of the United Nations” had not yet accepted it.<sup>56</sup> Therefore, for the time being, the Department of External Affairs should just keep the file up to date as new ratifications were deposited.<sup>57</sup> In light of this, Iremonger suggested to the Irish ambassador that the best reply to any further enquiries was that the matter was receiving “careful consideration by the Government”.<sup>58</sup>

#### *(a) Status-oriented concerns, geographical proximity and the “symbolic” Convention*

While status-oriented concerns did not become a critical influence on behaviour in the 1950s, External Affairs were alert to the fact that such concerns might become a critical factor at a later point. Therefore, they maintained an account of ratifications as well as any reservations.<sup>59</sup> External Affairs were particularly interested in how ratifying States were able to comply with the Convention’s obligations, with one official suggesting that the key States to keep an eye on were Australia, France and Norway.<sup>60</sup> Historical ties and a shared common

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<sup>50</sup> *State (Duggan) v Tapley* [1952] I.R. 62. See *State (Quinn) v Ryan* [1965] I.R. 70 (s.29 deemed unconstitutional).

<sup>51</sup> [1931] I.R. 39.

<sup>52</sup> G. Hogan and G. Whyte, *JM Kelly’s The Irish Constitution*, (Dublin: Butterworths, 2003), p.1646.

<sup>53</sup> Hogan and Whyte, *JM Kelly*, pp.1646–47.

<sup>54</sup> *State (Duggan)* [1952] I.R. 62.

<sup>55</sup> DFA 417/65 Part II. (Butler to Iremonger, 12 December 1950). From 1948 to 1951, William Butler was the First Secretary and Counsellor in the Department of External Affairs Headquarters, Dublin (and later from 1954 to 1957). He entered External Affairs as a Junior Executive Officer in March 1934, then as diplomatic Staff in Headquarters from 1941 and later served as Second Secretary in the Irish Legation, Berne (1944–1948), as Chargé d’Affaires in Canberra (1957) and was Irish Minister to Argentina. He was also a Knight Commander of the Order of St Gregory the Great. Thanks to Ms Kate O’Malley, Assistant Editor of the *Documents on Irish Foreign Policy*, for this information. See also Obituary Mr William B. Butler, *Irish Times*, 4 November 1961.

<sup>56</sup> DFA 417/65 Part II (Butler to Iremonger)(referring to the UK and the US, who ultimately acceded on 30 January 1970 and 25 November 1988 respectively).

<sup>57</sup> DFA 417/65 Part II (Butler to Iremonger) (Updating Justice of every new ratification).

<sup>58</sup> DFA 417/65 Part I (Iremonger to Hearne, 15 October 1950).

<sup>59</sup> DFA 417/65 Part II (O’K to Iremonger, 22 February 1951).

<sup>60</sup> DFA 417/65 Part II (Letter to Butler, 10 July 10 1951, signed SGM).

law legal heritage singled out Australia, while France and Norway were within Ireland's European network in the Organisation for European Economic Co-operation and the Council of Europe.<sup>61</sup> Meanwhile, External Affairs were potentially exposed to public criticism because there was no obvious move by Ireland to accede. Nevertheless, as mentioned above, although there was some activity by domestic interest groups in the early 1950s, there was no equivalent to the powerful advocacy in Parliament as witnessed in the British engagement. In December 1950, the Irish Association of Civil Liberties (IACL) enquired about Ireland's position and received a low-key response from External Affairs.<sup>62</sup> Although "sympathetic to the motives which inspired" the Genocide Convention, Ireland could not offer a definite reply pending the results of the examination of the political and legal aspects at present in progress.<sup>63</sup> When subsequently the IACL, in their 1951 report, pointed to Ireland's failure to accede to the Genocide Convention,<sup>64</sup> an External Affairs official wrote a somewhat emotional memo to the Legal Adviser that they should bring the Director of the IACL into the department and give him the low-down on why Ireland could not accede, albeit "unofficially".<sup>65</sup> He wrote:

"In view of all the malicious propaganda against this country during and after the last war about the harbouring of Nazis and fascists, it would hardly be wise... at this stage, to state our objections officially to the Association."<sup>66</sup>

His less melodramatic suggestion was to explain Ireland's difficulty with the removal of the political offences exception because if the IACL was "really interested" in human rights, the question of political asylum should be of interest to them.<sup>67</sup> In the end, the Legal Adviser adopted the final more subdued suggestion—that they ignore NGO interest and continue to monitor further developments.<sup>68</sup>

That said, the IACL Report had some effect because Butler requested Eoin MacWhite to draft a memo on the history, current ratifications and the pros and cons of Irish accession.<sup>69</sup> The result was the first tactical brief to be drafted within External Affairs. On whether the Convention is "symbolic" or practical, MacWhite concluded that the Genocide Convention was "quite useless and superfluous" because genocide was "only mass homicide" and therefore already proscribed in all States.<sup>70</sup> His position ignored the moral outrage embedded in the concept of genocide as the "denial of the right of existence" to certain groups<sup>71</sup> and therefore a unique form of destruction against a group rather than a large number of individual killings. As Arendt argued, "a different order is broken and an altogether different community is violated".<sup>72</sup> However, it is possible that MacWhite held the same reservations

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<sup>61</sup> DFA 417/65 Part II (Letter to Butler).

<sup>62</sup> DFA 417/65 Part I (Butler to Gore-Grimes, 4 December 1950).

<sup>63</sup> DFA 417/65 Part I (Butler to Gore-Grimes).

<sup>64</sup> DFA 417/65 Part II (Letter to Butler).

<sup>65</sup> DFA 417/65 Part II (Letter to Butler).

<sup>66</sup> DFA 417/65 Part II (Letter to Butler).

<sup>67</sup> DFA 417/65 Part II (Letter to Butler).

<sup>68</sup> DFA 417/65 Part II (Butler to Murphy, 13 July 1951).

<sup>69</sup> DFA 417/65 Part II (Butler to Murphy).

<sup>70</sup> DFA 417/65 Part I (MacWhite's Memo). Dr Eoin MacWhite became First Secretary to the Department of External Affairs in 1951 and later became Irish Ambassador to Australia, credited with "quite remarkable contribution to the history of Ireland in Australia" and Irish Ambassador to the Netherlands, where tragically he died in a car accident in August 1972. See Letter to the Editors, *Irish Times*, 7 August 1972 and "MacWhite: A Noted Scholar, Linguist", 1 August 1972.

<sup>71</sup> Preamble of Resolution 260(III).

<sup>72</sup> H. Arendt, *Eichmann in Jerusalem: Report on the Banality of Evil* (New York: Penguin Books, 2006), p.270.

as the Foreign Office, that is, the Convention needed to address State responsibility, rather than solely individual criminal responsibility.<sup>73</sup>

MacWhite argued further that any tribunal in practice would be rendered “impotent” as genocide is “only committed by Governments” and therefore, war would be the “only possible action” against genocide—“sanctions of an international court would not be very effective”.<sup>74</sup> While his view on “sanctions” could arguably have been confined to sentencing (and its deterrent effect), it could also refer to the effectiveness of a tribunal’s operation and here his concerns have subsequently proved to be well-founded and far-sighted.<sup>75</sup> As the current challenges facing the International Criminal Court demonstrate, international criminal trials are located within high stakes political contexts, facing consistent criticisms, and this, in turn, has led increasingly to potent critiques of the international criminal law project.<sup>76</sup> Similarly, applications to the International Court of Justice have had considerable emotive power but proved little by way of protective force.<sup>77</sup> Regarding MacWhite’s view that war would be the only true preventative measure,<sup>78</sup> this would now be reframed as the use of military force authorised by the UN Security Council under the concept of the Responsibility to Protect.<sup>79</sup> Contemporary practice indicates that his conclusion is less clairvoyant as the invocation of responsibility to protect has been controversial.<sup>80</sup> Nevertheless, MacWhite was overall “sympathetic on principle” because the Convention involved the condemnation of the crime of genocide and counted as international action by international accord.<sup>81</sup> Even if the Genocide Convention “might not go far enough, [it] is at least a step in the right direction”.<sup>82</sup>

On the Convention’s legal obligations, MacWhite’s tone is almost mournful. Nothing can be done regarding the provisions of the Genocide Convention and its purpose is penal rather than preventative and thus “inadequate”.<sup>83</sup> He read its “raison d’être” as purely to overcome accusations levelled against the Nuremberg Charter that its proscription of crimes against humanity under art.6(c) violated the generally recognised principles of legality, an argument used by the Nazi defence counsel.<sup>84</sup> Nevertheless, while this may be one of the motivations, there is clear evidence of humanitarian motives among drafters, not least Shawcross’ quiet diplomacy and the Australian Foreign Minister, H.V. Evatt’s steering during the final stages of the Convention’s drafting. One key criticism levelled at the Convention at the time of its drafting (and still) was the selectivity in the list of protected groups.<sup>85</sup> MacWhite felt that this selectivity would render the Convention ineffective in the

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<sup>73</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 25 and 29. See Arendt, *Eichmann in Jerusalem*, 2006, pp.294 and 298 (on paradox of trials over international crimes).

<sup>74</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 37.

<sup>75</sup> On the controversy over the arrest of President Al Bashir, see D. Tladi, “The ICC Decisions on Chad and Malawi on Co-operation, Immunities and Article 98” (2013) 11(1) *Journal of International Criminal Justice* 199.

<sup>76</sup> See C. Schwoebel (ed.), *Critical Approaches to International Criminal Law* (London: Routledge, 2014) and S.M.H. Nouwen and W.G. Werner, “Symposium” (2015) 1 *Journal of International Criminal Justice* 73.

<sup>77</sup> *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*[2007] I.C.J. Rep. 43.

<sup>78</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>79</sup> *A more secure world: Our shared responsibility*, Report of Secretary General’s High Level Panel on Threats, Challenges and Change (2003), UN Doc. A/59/565, para.203 and Outcome Document’, UN Doc. A/RES/60/1, para.139.

<sup>80</sup> S. Mohamed, “Taking Stock of the Responsibility to Protect” (2012) 48 *Stanford Journal of International Law* 63.

<sup>81</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>82</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>83</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>84</sup> See M.C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (Cambridge: Cambridge University Press 2014).

<sup>85</sup> See D. Nersessian, *Genocide and Political Groups*, (Oxford: Oxford University Press, 2010).



face of “the genocide of political groups in China and the liquidation of various ethnic groups in Russia”.<sup>86</sup> While he did not disagree with individual criminal responsibility per se, he concluded that, without the inclusion of political groups, “[the Convention’s] sole real use is as a protest”.<sup>87</sup> On the thorny issue of the removing the political offences exception, he argued that Ireland could avoid any difficulties by submitting a reservation to art.VII of the Genocide Convention.<sup>88</sup> However, MacWhite was clearly unaware that the International Court of Justice had just advised the UN General Assembly that while reservations were not prohibited, the Convention would not be binding as between reserving and objecting States where the reservation is incompatible with the object and purpose of the Convention.<sup>89</sup> If one draws inferences from references to international cooperation in the Preamble and art.I of the Genocide Convention, one evident object and purpose is effective State Party cooperation to ensure punishment. Therefore, it is arguable that a reservation to genocide’s exemption from the political offence exception would be incompatible with the Convention’s object and purpose.

*(b) Perception of “norm cascade”, symbolism and a defiant strict compliance*

Although MacWhite’s brief was tactical, it demonstrates that certain Irish officials viewed the Convention as merely symbolic. Given its tone, MacWhite’s brief did not lead to any immediate action. However, when the new Legal Adviser to External Affairs William Fay took up his post in 1953, he viewed the file very differently. Based on the limited material before him, Fay felt that Justice’s opinion was not sound and Irish accession should go ahead.<sup>90</sup> He tasked his Assistant Legal Adviser to undertake a detailed legal analysis that was the first article-by-article analysis within the Legal Section.<sup>91</sup> Waldron concurred with Fay’s changed stance as he viewed the current number of ratifications as “an imposing list”.<sup>92</sup> Even so, he noted that neither the United Kingdom nor the United States had become a party.<sup>93</sup> In other words, norm cascade had not yet happened. On the definition under art.II, Waldron believed that acts (b) to (e) involved assaults, if not battery, at common law, although the Attorney General’s views should be sought.<sup>94</sup> As observed below, ratifying States were also uncertain about their domestic law compatibility. Overall, Waldron shared MacWhite’s criticism of mere criminalisation; it was “inappropriate, if not inadequate, for their prevention”.<sup>95</sup> On the modes of liability under art.III, he considered legislation unnecessary with the exception of complicity.<sup>96</sup> Nevertheless, in the Genocide Act 1973, the Act

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<sup>86</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>87</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>88</sup> DFA 417/65 Part I (MacWhite’s Memo).

<sup>89</sup> *Reservations to the Genocide Convention, Advisory Opinion* (1951) I.C.J. Rep. 15 at 26.

<sup>90</sup> DFA 417/65 Part II (Fay to Waldron, 5 January 1953) (MacWhite’s memo, the Convention text, the Minister of Justice’s opinion and Iremonger’s memo).

<sup>91</sup> DFA 417/65 Part II (Waldron’s Memo, 13 January 1953).

<sup>92</sup> It currently stood at 35 ratifications. See Office of Legal Affairs, *Multilateral Treaties Deposited with the U.N. Secretary General*, Vol.21 (United Nations Treaty Series New York 2007). Dermot Waldron was Assistant Legal Adviser to the Department of External Affairs until 1954, and later became Chargé d’Affaires in the Irish legation in Rome, Legal Adviser to External Affairs and Irish Ambassador to Italy.

<sup>93</sup> DFA 417/65 Part II (Waldron’s Memo, 13 January 1953).

<sup>94</sup> DFA 417/65 Part II (Waldron’s Memo, 13 January 1953). Art.II of the Genocide Convention lists five acts of genocide: (a) killing, (b) causing serious bodily or mental harm, (c) deliberately inflicting on the group the 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. See art.II of the Genocide Convention, 78 UNTS 277.

<sup>95</sup> DFA 417/65 Part II (Waldron’s Memo, 13 January 1953).

<sup>96</sup> DFA 417/65 Part II (Waldron’s Memo, 13 January 1953).

reproduced the Convention as a Schedule rather than proscribing separately on certain modes of liability.<sup>97</sup>

On personal liability of Heads of State and other public officials, Waldron viewed this as covered by Art.40(1) of the Irish Constitution.<sup>98</sup> In Irish law, the issue of procedural immunity before foreign courts has not been judicially tested and has hardly been addressed in academic literature.<sup>99</sup> In the Sixth Committee of the UN General Assembly, the Irish delegation recently explained that there is no specific legislation on State immunity but Irish law accords with customary international law.<sup>100</sup> However, this sidesteps the considerable disagreement among international lawyers on immunities of State officials in international criminal law.<sup>101</sup> Therefore, Waldron's conclusion was somewhat unsophisticated. On jurisdiction, Waldron's only observation was that art.VI differed from the Geneva Convention, in that it did not require States Parties to criminalise acts of genocide committed extraterritorially.<sup>102</sup> While certain delegations had advocated for universal jurisdiction, this proposal was ultimately rejected during the Convention's drafting.<sup>103</sup> Waldron did not pass comment on whether this was acceptable.

It follows that the most detailed observation addresses the political offences exception to extradition. Waldron noted the British objections and that Justice was currently preparing a draft Extradition Bill. He advocated for the removal of the political offences exception for genocide within the proposed Bill. He justified the removal based on one theory among extradition lawyers that the political offences exception would not apply where the core crime predominates. Adhering to the strict compliance position, Waldron concluded that legislation was required to criminalise acts of genocide and to amend Irish extradition law before the Genocide Convention could be fully implemented. Therefore, he felt it might be desirable to delay accession until legislative measures had been taken.<sup>104</sup> There seems to be no response to Waldron's memorandum, apart from querying with their British counterparts whether there had been any further developments towards British accession. The Irish ambassador to Britain, Frederick Boland, queried Britain's general position and in particular sought to elicit answers to the following issues—the relationship between a legitimate declaration of war and genocide, the criminal proscription for genocide, the political offences exception and its attitude to States Parties' reservations.<sup>105</sup> In reply, British officials explained that the position was unchanged since it was outlined in Parliament in 1950. Therefore, the British Cabinet had not yet decided on accession. However, they were examining the extent of amendments to the existing law to enable Britain to ratify.<sup>106</sup> While this was factually true, of course, it failed to reveal the fractious interdepartmental dispute over strict or mere substantive compliance.

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<sup>97</sup> Section 2 and Schedule of Genocide Act 1973, Act No.28 of 1973.

<sup>98</sup> Art.40(1) of *Bunreacht na hÉireann* (all human persons as equal before the law).

<sup>99</sup> J. Anderson, "Par in Parem non habet imperium the problem of foreign sovereign immunity: an Irish perspective" (1997) 15(10) *Irish Law Times* 200.

<sup>100</sup> UN General Assembly, "Delegations Urge Expanded 'Foreign Criminal Jurisdiction' Immunity for Broader Range of State Officials" (5 November 2012) available at: [www.un.org/press/en/2012/gal3448.doc.htm](http://www.un.org/press/en/2012/gal3448.doc.htm) [Last accessed 22 September 2015].

<sup>101</sup> See H. Fox, *The Law of State Immunity*, 2nd edn (Oxford: Oxford University Press, 2008) and R. van Alebeek, *Immunity of States and their Officials in International Human Rights Law and International Criminal Law* (Oxford: Oxford University Press, 2008).

<sup>102</sup> DFA 417/65 Part II (Waldron's Memo, 13 January 1953).

<sup>103</sup> See Schabas, *Genocide*, 2nd edn, 2009, pp.411–415.

<sup>104</sup> DFA 417/65 Part II (Waldron's Memo, 13 January 1953).

<sup>105</sup> DFA 417/65 Part I (Telegram to Boland, 3 February 1953).

<sup>106</sup> DFA 417/65 Part I (Cleary to Molloy, 17 March 1953).

With this “unhelpful” response,<sup>107</sup> there was no further discussion until the following year, when Fay decided that External Affairs could elicit from ratifying States, with whom Ireland had diplomatic relations, the compatibility of their respective domestic laws with the Convention. Even the British could be contacted once more to check their progress, “if any”.<sup>108</sup> Waldron’s Note Verbal was sent to the missions in Australia, France, Norway, Belgium, Sweden, Canada, Italy and Turkey in April 1954.<sup>109</sup> At the same time, a separate telegram was sent to London.<sup>110</sup> The Note Verbal requested information on the Criminal Code and the legal means to remove the political offence exception.<sup>111</sup> From July onwards, the responses started to stream into External Affairs.<sup>112</sup> Only the Australian and Canadian examples will be tendered, as they both adopted the position of mere substantive compliance (despite common law systems) that clearly did not impress Irish officials.

The Australian officials first pulled out a “ready-made answer”<sup>113</sup> that explained how existing Australian law provides “substantially” for punishment and how adequate legal safeguards were in place to deal with anything arising under the Convention.<sup>114</sup> However, when Australian officials actually responded, it was somewhat less formal. A junior official in the Australian Department of External Affairs explained to the Irish Embassy in Canberra that it had been decided not to answer in written form and “that he preferred to give the information in confidence on the telephone”.<sup>115</sup> He explained that Australia had acceded at the instance of the then Minister for External Affairs, Dr Evatt, “without having given itself time to examine fully the implications” and, in particular, “before the Attorney-General’s Department had an opportunity of examining the Convention in detail”.<sup>116</sup> Notwithstanding the lack of preparation prior to ratification, it was felt that “nearly” every act within the genocide definition would be a criminal offence under existing Australian law.<sup>117</sup> Australian departments decided not to draft specific legislation because, under the Federal system, it would be too difficult to “cover with precision and certainty the acts which constitute the crime of genocide”.<sup>118</sup> It would also not be possible to list all the relevant provisions in Australian law as there were too many under State and Federal law to list. On the removal of the political offences exception, no method for resolving the obligation with Australian extradition law had been found.<sup>119</sup>

The Canadian response was in writing and lengthy. It divulged in detail the relevant sections of the Criminal Code but it is notably less certain whether criminal proceedings could actually be taken further down the list of acts under art.II.<sup>120</sup> On killing and causing serious bodily harm, the Canadian officials were confident of domestic compliance.<sup>121</sup> They were less confident regarding the act of causing serious... mental harm; if not covered under

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<sup>107</sup> DFA 417/65 Part II (Waldron to Fay, 29 April 1953).

<sup>108</sup> DFA 417/65 Part II (Fay to Waldron, 15 February 1954).

<sup>109</sup> DFA 417/65 Part II (Waldron to Fay, 1 April 1954).

<sup>110</sup> DFA 417/65 Part II (Waldron to Fay).

<sup>111</sup> DFA 417/65 Part I (Fay to all Missions, 29 April 1954).

<sup>112</sup> Responses received from Sweden (undated), Canada (5 July 1954), Belgium (28 July 1954) Norway (undated), Australia (12 August 1954) and France (3 September 1954).

<sup>113</sup> NAA A1838/930/2/15 Part 7 (Pyman).

<sup>114</sup> NAA A1838/930/2/15 Part 7. See also Scott Shirley, “Why Wasn’t Genocide a Crime in Australia? Accounting for the Half-century Delay in Australia Implementing the Genocide Convention” (2004) 10(2) *Australian Journal of Human Rights* 22.

<sup>115</sup> DFA 417/65 Part I (Note from the Irish ambassador to Australia, 12 August 1954).

<sup>116</sup> DFA 417/65 Part I (Note).

<sup>117</sup> DFA 417/65 Part I (Note).

<sup>118</sup> DFA 417/65 Part I (Note, 12 August 1954).

<sup>119</sup> DFA 417/65 Part I (Note, 12 August 1954).

<sup>120</sup> DFA 417/65 Part I (Wenshof, Canadian Department of External Affairs, 5 July 1954).

<sup>121</sup> DFA 417/65 Part I (Wenshof).

assault, homicide, letters threatening to kill, letters threatening property or kidnapping, unlawful imprisonment and similar matters, it would “probably” be included within the crime of conspiring to commit an indictable offence.<sup>122</sup> On “deliberately inflicting... conditions of life...”, this would “necessarily involve some form of assault”.<sup>123</sup> On “forcibly transferring of children...”, this would “appear to fall” under kidnapping, abduction or false imprisonment.<sup>124</sup> Notwithstanding, the Canadian Government was overall confident of its domestic law compatibility.<sup>125</sup> On the political offences exception, Canadian officials did not consider acts of genocide as political offences and, as a result, the exception did not arise.<sup>126</sup> In Dublin, this caused pause for thought as in the margin a large question mark was placed.<sup>127</sup>

Importantly, the British position came in which confirmed that little progress had been made apart from a decision at Cabinet that legislation would be required.<sup>128</sup> The attitude was that the genocide definition was “so loosely worded” as to raise doubts about how to produce a draft Bill that would be suitable for presentation to Parliament.<sup>129</sup> Another problem for the British was the removal of the political offences exception, which might oblige Britain to surrender a refugee on a charge of genocide whose “real crime was political e.g. the leader of the defeated party in a civil war”. This would remove its right to grant asylum to “bona fide political refugees”.<sup>130</sup> This was, however, public rhetoric, as in early 1953 the Home Office had produced three alternative bills and, by late 1953, had reduced this to one final draft. In the end, all these answers were correlated for Justice.<sup>131</sup> Although there is no evident response from Justice among the papers, Justice’s position against accession was probably maintained. However, the Legal Section of External Affairs began to slowly change its position and adopted a more positive attitude towards accession if, in the event, strict compliance was guaranteed. Here, the unresolved difficulties for other common law States would not have been very reassuring. Nevertheless, given its more positive stance, External Affairs adapted its policy to the undesirability of belonging within a small minority of non-ratifying States (rather than one of complete isolation).<sup>132</sup> Therefore, External Affairs continued to monitor ratifications. By the end of 1954 there were 48,<sup>133</sup> and this left a sufficient number of non-ratifying States to continue to delay accession.<sup>134</sup>

*(c) A defiant Strict Compliance position... and yet failing to legislate*

That said, success on Ireland’s application for UN membership in 1955 meant that there was some brief interest in Ireland’s position in early 1956. The Legal Adviser Sean Morrissey asked his officials to “not lose sight of our position” and at the earliest possibility to reconsider Justice’s reasons for not acceding.<sup>135</sup> As part of this reconsideration, he queried

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<sup>122</sup> DFA 417/65 Part I (Wenshof).

<sup>123</sup> DFA 417/65 Part I (Wenshof). On art.IV of the Genocide Convention, “measures intended to prevent births within the group” would require some interference with the person to be prosecutable.

<sup>124</sup> DFA 417/65 Part I (Wenshof).

<sup>125</sup> DFA 417/65 Part I (Wenshof).

<sup>126</sup> DFA 417/65 Part I (Wenshof).

<sup>127</sup> DFA 417/65 Part I (Wenshof).

<sup>128</sup> DFA 417/65 Part I (Telegram, 28 July 1954).

<sup>129</sup> DFA 417/65 Part I (Telegram).

<sup>130</sup> DFA 417/65 Part I (Telegram).

<sup>131</sup> DFA 417/65 I (Fay to Berry in Justice, 27 August 1954).

<sup>132</sup> DFA 417/65 Part II (Kennedy to Lennon).

<sup>133</sup> DFA 417/65 Part II (E. to Kennedy, 18 December 1954).

<sup>134</sup> DFA 417/65 Part II (Kennedy to Lennon, 20 December 1954).

<sup>135</sup> DFA 417/65 Part II (Legal Adviser to de Paor, 23 March 1956). Sean Morrissey became Assistant Legal Adviser in 1954 and then Legal Adviser in 1955.

whether the UK and US had acceded. However, in the end, this brief interest made little difference apart from updating the list of ratifications.<sup>136</sup> Thereafter, the file appears to have been untouched by either the Political or Legal Section until March 1959<sup>137</sup> and, even then, it was simply to update the list and pass it on to Justice.<sup>138</sup> Nothing more could be done without a new Extradition Act.<sup>139</sup> Yet uncertainty over Irish extradition law became an increasingly critical issue and provided External Affairs' with leverage over other departments. In September 1959, there was a meeting between the Minister for External Affairs, Frank Aiken, the Legal Adviser to External Affairs, Sean Morrissey, and the Attorney General.<sup>140</sup> This brought to the fore the departmental turf war between External Affairs and Justice over extradition law reform. The Attorney General believed that the Fugitive Offenders Act 1881 probably applied in Irish law as he did not consider that the 1937 Constitution would fundamentally alter the reasoning of a 1931 Irish Free State judgment.<sup>141</sup> As there had been no further extradition treaties since 1922, extradition arrangements would have to depend on the Government's attitude towards pre-1922 British concluded treaties.<sup>142</sup> The Legal Adviser complained about how the lack of extradition law reform had prevented Ireland from ratifying humanitarian Conventions, such as the four Geneva Conventions and the Genocide Convention. Despite urging Justice to complete an Extradition Act, nothing had been forthcoming. In support, the Minister for External Affairs interjected that the Fugitive Offenders Act would only resolve extradition arrangements vis-à-vis Commonwealth States but did not resolve the global question. The Attorney General understood the Irish Government's objection to the Genocide Convention to be its potential effect on its relationship with Britain, one that would oblige the Irish Government "to return fugitive offenders from the six counties" (Northern Ireland). But, he added, the political exception continued to apply and it was for Irish courts to determine if the acts of violence were political offences.<sup>143</sup> This is the first reference to a Northern Ireland dimension.

It follows, then, that the Government had decided in the early 1950s to examine the criminal and extradition codes with a view to reform. Nevertheless, since then, no progress had been made by Justice. The Legal Section of External Affairs considered itself understaffed and, this being so, the Attorney General agreed to arrange a meeting between his Office, Justice and External Affairs to see what progress could be made on the introduction of legislation.<sup>144</sup> Although there is no record of the interdepartmental meeting, a June 1960 letter to the Secretary General in Justice cites countless letters from the Legal Section concerning the need for extradition legislation and emphasising the urgency of the problem.<sup>145</sup> It stressed how Justice was aware that many States enquired regarding Ireland's position on extradition and that Ireland was now one of the few remaining States that had failed to ratify the Geneva Conventions (1949) despite the Taoiseach expressing the desire for Ireland to become a State Party.<sup>146</sup> It also stressed that the Attorney General regarded the matter as one of urgency and that the desired ratification of humanitarian Conventions necessitated urgent action.<sup>147</sup>

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<sup>136</sup> DFA 417/65 Part II (de Paor to the Legal Adviser Morrissey, 27 April 1956).

<sup>137</sup> DFA 417/65 Part II. (Morrissey to Registry, 31 July 1958).

<sup>138</sup> DFA 417/65 Part II. (Morrissey to Registry).

<sup>139</sup> DFA 417/65 Part II. (Morrissey to Registry).

<sup>140</sup> DFA 417/65 Part II (Report, 8 September 1959).

<sup>141</sup> DFA 417/65 Part II (Report, 8 September 1959). See also Fugitive Offenders Act 1881, 44 and 45 Vic. c.57 and *State (Kennedy) v Little* (1931) I.R. 483.

<sup>142</sup> DFA 417/65 Part II (Report, 8 September 1959).

<sup>143</sup> DFA 417/65 Part II (Report, 8 September 1959).

<sup>144</sup> DFA 417/65 Part II (Report, 8 September 1959).

<sup>145</sup> DFA 417/65 Part II (Morrissey to Berry, 13 June 1960).

<sup>146</sup> DFA 417/65 Part II (Morrissey to Berry), para.3.

<sup>147</sup> DFA 417/65 Part II (Morrissey to Berry), para.2.

Interestingly, even though the Genocide Convention was one of the prompts for law reform, the Extradition Act (1965)<sup>148</sup> did not remove the political offences exception for the crime of genocide.<sup>149</sup>

### III. WHY IRELAND DECIDED TO ACCEDE? THE INTERNATIONAL YEAR OF HUMAN RIGHTS 1968 AND THE AFTERMATH

The UN General Assembly designated 1968 as the International Year of Human Rights,<sup>150</sup> recommending that Member States should ratify all human rights Conventions before 1968.<sup>151</sup> In 1966, some officials argued that it would permit Ireland to “improve on our record in human rights”.<sup>152</sup> On the Genocide Convention, the Assistant Legal Adviser Mahon Hayes pointed out that the key legal and policy obstacles remained.<sup>153</sup> The Extradition Act 1965 maintained the political offences exception for ordinary criminal offences<sup>154</sup> and the political view was to wait until Ireland was one of a small minority of non-ratifying States.<sup>155</sup> Without political leadership, nothing would be done except to continue tracking the number of ratifications.

This cut developments short until July 1967 when, it seems, enquiries were made to the Irish Permanent Mission to the UN on whether Ireland would accede.<sup>156</sup> In reply, the Legal Section’s conclusions from the year before remained unchanged and, coupled with the “attitude” of Justice, accession was “extremely unlikely” until Ireland was within a small minority of non-ratifying states.<sup>157</sup> This led to further queries from the Irish Permanent Representative to the UN, Con Cremin.<sup>158</sup> Was the sole problem extradition? And did the External Affairs’ minute imply that Justice “declined to insert an appropriate provision to cover the point [in the Extradition Bill]”?<sup>159</sup> It seems that Cremin was correct, because the Legal Adviser replied that the Secretary General in External Affairs had sent the Legal Section’s comments on the Genocide Convention to Justice in 1962, as the latter examined its Extradition Bill.<sup>160</sup> But the Minister for External Affairs Frank Aiken had included a caveat. He was not suggesting that appropriate legislation regarding genocide was required at this time.<sup>161</sup> In other words, it was at Justice’s discretion whether or not to contend with the issue. Clearly, on extradition law reform the real focus for External Affairs was on extradition arrangements in global terms and the ratification of the 1949 Geneva Conventions.

That said, Cremin also added some wry observations on the current list of ratifications. Although the current list (71 States), may appear to be still limited, he observed how this stemmed from inaction by States, predominately African, who had recently acquired their independence.<sup>162</sup> He noted that, aside from the inaction of African States, there was only

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<sup>148</sup> Extradition Act (1965), Act no. 17/1965. See also ETS No. 24.

<sup>149</sup> See art.3(1) and (2) of the European Convention on Extradition.

<sup>150</sup> UN GAOR Res. 1961 (XVIII) (12 December 1963).

<sup>151</sup> UN GAOR Res. 2081 (XX) (20 December 1968).

<sup>152</sup> DFA 417/65 Part II (Minute to Legal Adviser Waldron, 30 September 1966). Waldron became Legal Adviser in 1962.

<sup>153</sup> DFA 417/65 Part II (Hayes to Howard, 10 October 1966).

<sup>154</sup> DFA 417/65 Part II (Hayes to Howard).

<sup>155</sup> DFA 417/65 Part II (Hayes to Howard).

<sup>156</sup> DFA 417/65 Part II (de Paor on behalf of Permanent Representative to the UN, Con Cremin to McCann, 31 July 1967).

<sup>157</sup> DFA 417/65 Part II (Hearne to Permanent Mission to the United Nations, 31 August 1967).

<sup>158</sup> See N. Keogh, *Con Cremin: Ireland's Wartime Diplomat*, (Cork: Mercier Press, 2006).

<sup>159</sup> DFA 417/65 Part II (de Paor to Waldron, 20 September 1967).

<sup>160</sup> DFA 417/65 Part II (Waldron to de Paor, 27 September 1967).

<sup>161</sup> DFA 417/65 Part II (Waldron).

<sup>162</sup> DFA 417/65 Part II (Waldron).

a limited number of UN members that had not yet acceded. Ten were former British possessions, another a former Dutch possession (Indonesia), all of whom had recently gained independence, and then the following 10 countries: Britain, Ireland, Japan, Luxembourg, Nepal, Portugal, South Africa, Spain, Thailand and Yemen.<sup>163</sup> This showed how the gap comprising a “small minority of states” was actually narrowing a lot faster than External Affairs had fully appreciated. Cremin then quoted from an “interesting article” on the failure of successive US Presidents to secure the agreement of Congress and the Senate to accede to the Genocide Convention.<sup>164</sup> This failure to accede had caused serious embarrassment to the United States in the United Nations.<sup>165</sup> Every time the United States endorsed a particular question of human rights protection, the Soviet Union forcefully challenged the former’s commitment<sup>166</sup> because the United States had failed to accede to *any* human rights treaty.<sup>167</sup> United States’ pronouncements were often “branded as brazen hypocrisy” and its actual values inferred from the “kind of company we keep”, that is, other non-ratifying States, such as Apartheid South Africa and Franco’s Spain.<sup>168</sup> This was an obvious comparator as Ireland’s human rights treaty record was nearly identical to that of the United States.<sup>169</sup> It followed that the Soviet challenge could equally cause difficulty for the Irish Permanent Mission in its pronouncements.

With the dawn of the International Year of Human Rights and Cremin’s astute observations, External Affairs was anxious that an active civil society could potentially cause public embarrassment. This injected some life back into the idea of accession. In early January, the Minister for External Affairs had obviously been quizzed about accession to the Convention. Thus, Waldron advised the Secretary General that as Justice was urgently considering amendments to the Extradition Act, External Affairs should propose that they include consideration of the removal of the political offence exception for genocide.<sup>170</sup> This would permit the Minister to claim, somewhat justifiably, that the matter was under “active consideration”.<sup>171</sup> On 24 January 1968, External Affairs announced its measures to mark the International Year of Human Rights. These included giving “consideration” to legal and other steps required to enable Ireland to ratify as many human rights treaties as possible, to which Ireland was not already a party.<sup>172</sup> To an astute observer, this was all but the European Convention on Human Rights (and a Council of Europe treaty). This desire to present a more positive human rights treaty record may have been inspired to some extent by contemporary events in Northern Ireland, where the Northern Ireland Civil Rights Association and other civil rights groups had begun a series of civil rights marches in the summer of 1968.<sup>173</sup>

Significantly, there was a shift in terms of political leadership in Justice in early August and the Legal Section of External Affairs was told that Justice was prepared to sponsor legislation to enable accession.<sup>174</sup> Unsurprisingly, a markedly different attitude was taken in the Justice’s Memorandum for Government and this was transferred to External

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<sup>163</sup> DFA 417/65 Part II (Waldron (Britain, Ireland, Japan, Luxembourg, Nepal, Portugal, South Africa, Spain, Thailand and Yemen).

<sup>164</sup> W. Korey, “Human Rights Treaties: Why is the U.S. stalling”, (1967) 5(3) *Foreign Affairs* 414.

<sup>165</sup> Korey, “Human Rights Treaties” (1967) 5(3) *Foreign Affairs* 414.

<sup>166</sup> Korey, “Human Rights Treaties” (1967) 5(3) *Foreign Affairs* 414 at 415.

<sup>167</sup> Korey, “Human Rights Treaties” (1967) 5(3) *Foreign Affairs* 414 at 415.

<sup>168</sup> Korey, “Human Rights Treaties” (1967) 5(3) *Foreign Affairs* 414 at 415.

<sup>169</sup> The European Convention on Human Rights was ratified in February 1953 and the Convention on the Elimination of Racial Discrimination was signed in 1968.

<sup>170</sup> DFA 417/65 Part II (Waldron to McCann, 11 January 1968).

<sup>171</sup> DFA 417/65 Part II (Waldron to McCann). See also AGO 2006/40/335 (M. Hayes to P. Berry, 29 January 1968 and Hayes to Attorney General, 29 January 1968).

<sup>172</sup> DFA 417/65 Part II (Waldron to McCann).

<sup>173</sup> T. Hennessy, *A history of Northern Ireland: 1920-1966*, (London: MacMillan, 1997), p.138.

<sup>174</sup> DFA 417/65 Part II (Hayes to Justice, 9 August 1968).

Affairs in November and travelled through the Legal and Political Sections.<sup>175</sup> This memorandum was conciliatory and portrayed a sense of urgency to accede. It emphasised Ireland's isolation as a non-party State; "many States, including most of the States of Western Europe", excluding Ireland and the United Kingdom.<sup>176</sup> Ireland, it suggested, must move swiftly as the Minister for External Affairs wants Ireland to accede during the International Year of Human Rights and the British Cabinet have now produced a bill.<sup>177</sup> However, Justice sought to allay any fears of Cabinet Ministers given the "imprecise" genocide definition and the probable dispute over its correct interpretation. Such difficulties were of little import as Ireland would never be "embarrassed" by the Convention.<sup>178</sup> The Genocide Bill would simply criminalise acts of genocide under art.II which would carry a maximum sentence of life-imprisonment for murder and 14 years for all other offences. It would remove the political offences exception and require the Attorney General's consent for any proceedings undertaken.<sup>179</sup> It is interesting that no comment was made on the precondition of the AG's consent, given the general recognition that "acts of genocide would almost invariably occur with connivance of the government".<sup>180</sup> Finally, criminalising the modes of liability<sup>181</sup> would be undertaken only if deemed necessary.<sup>182</sup> Therefore, Waldron's uncertainty was not shared as sharply by Justice. There were no observations from External Affairs as the proposed Bill would implement most of the provisions of the Genocide Convention into law when enacted.<sup>183</sup> On 26 November, the Cabinet approved the Minister for Justice's general scheme and authorised drafting.<sup>184</sup>

*(a) Why a continuing delay? Interdepartmental "turf wars" and inertia*

After the Irish Cabinet decision, the Attorney General was asked to arrange for the drafting of the Genocide Bill and a photostat of the recently enacted British Bill was included for inspiration.<sup>185</sup> Nevertheless, the sense of urgency had subsided considerably, owing in some part to its being close to the end of the International Year of Human Rights. It was no longer "practicable" to enact the Genocide Bill by the end of the year.<sup>186</sup> But Justice had since discovered that External Affairs would be satisfied by conveying to the United Nations how Ireland was preparing the necessary legislation.<sup>187</sup> Notwithstanding, the Parliamentary Draftsman undertook the work within a month and sent the draft Bill to the Attorney General,<sup>188</sup> who forwarded it immediately to Justice.<sup>189</sup> Following this, there is no further development until November 1969. This can probably be explained by the deepening crisis in Northern Ireland and the intense schism within the Irish Cabinet over whether to pursue

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<sup>175</sup> DFA 417/65 Part II (Hayes to Justice).

<sup>176</sup> AGO 2006/40/335 (Justice Memorandum, 15 November 1968, para.1).

<sup>177</sup> AGO 2006/40/335 (Justice Memorandum).

<sup>178</sup> AGO 2006/40/335 (Justice Memorandum).

<sup>179</sup> AGO 2006/40/335 (Justice Memorandum, Appendix I).

<sup>180</sup> Simpson, "Britain" (2002) 73(1) *British Yearbook of International Law* 5 at 62.

<sup>181</sup> Art.III provides for (b) conspiracy to commit genocide, (c) direct and public incitement to commit genocide and (d) attempt to commit genocide.

<sup>182</sup> AGO 2006/40/335 (Justice Memorandum, Appendix I).

<sup>183</sup> AGO 2006/40/335 (Justice Memorandum, Appendix I).

<sup>184</sup> AGO 2006/40/335 (O'Nolan to Berry, 26 November 1968).

<sup>185</sup> AGO 2006/40/335 (Berry to Attorney General, 2 December 1968).

<sup>186</sup> AGO 2006/40/335 (Berry to Attorney General).

<sup>187</sup> AGO 2006/40/335 (Berry to Attorney General).

<sup>188</sup> AGO 2006/40/335 (Assistant Parliamentary Draftsman, to Attorney General, 3 January 1969).

<sup>189</sup> AGO 2006/40/335 (Attorney General to Berry, 6 January 1969).



political avenues only or to include a military response.<sup>190</sup> This schism became more acute after the violence of the “Battle of the Bogside” in August 1969 and the deployment of the British Army to support the Stormont administration.<sup>191</sup> As part of maintaining a “peaceful approach”, the Irish Defence Forces were ordered to establish field hospitals along the border and the Taoiseach made a televised address calling for a UN peacekeeping force. In fact, the Minister for Foreign Affairs was dispatched to try (unsuccessfully) to secure an item on the UN Security Council and General Assembly agendas.<sup>192</sup>

That said, Cabinet approval of a Genocide Bill was a convenient truth on which to pivot the credibility of the celebration of the International Year of Human Rights. Consequently, the Minister for External Affairs trumpeted the Cabinet’s approval for accession in his foreign policy speech to Parliament.<sup>193</sup> Notwithstanding, the Irish Permanent Mission to the United Nations and certain embassies still kept a watchful eye on the number of ratifications to keep up the pressure. De Paor, in the Irish Permanent Mission, noted that Britain became the 75th State Party on 30 January 1970,<sup>194</sup> while Swift, in the Irish Embassy in Canada, described the passage of the Canadian hate propaganda and genocide legislation in the Canadian House of Commons.<sup>195</sup> All this information was forwarded to Justice yet no response from Justice was forthcoming from April to the end of August 1970. At this point, the Assistant Legal Adviser, Mahon Hayes, discussed the matter with Mr Olden from Justice, who could not understand or explain the delay. When further enquiries were made on Mahon Hayes’ behalf, no response was forthcoming. This led Mahon Hayes to request External Affairs’ staff to send a series of pointed reminders to Justice between October 1970 and January 1971.<sup>196</sup> Justice’s silence may have had to do with more pressing matters at the end of 1970, that is, its entanglement in the infamous Arms Trial, where the Minister for Justice and other Cabinet Ministers were on trial for allegedly having organised a plot to smuggle arms for the Provisional IRA campaign.<sup>197</sup>

Pressure began to intensify from early 1971 as status-oriented concerns became a critical issue. The Irish Permanent Mission reported that the United States might become a State Party because the Sub-Committee of the Senate’s Foreign Relations Committee was considering placing the Convention before the plenary Senate.<sup>198</sup> This made it appear that Ireland was losing all her influential friends among the non-ratifying States. Nevertheless, a whole year passed, with newly-named Foreign Affairs<sup>199</sup> reminding Justice in November 1971<sup>200</sup> and January 1972.<sup>201</sup> There is clear frustration at Justice’s inertness in Foreign Affairs’ correspondence in January and February 1972, particularly as Foreign Affairs started to look at their future EEC partners and wished to concur with their position. At that time, the

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<sup>190</sup> M. Kennedy, *Division and Consensus: the politics of cross-border relations in Ireland 1925-1969*, (Dublin: Institute of Public Administration, 2000), p.328.

<sup>191</sup> See P. Rose, *How the Troubles came to Ireland*, (Basingstoke: Palgrave, 2001) and R. Fanning, “Playing it Cool: The Response of the British and Irish Governments to the Crisis in Northern Ireland 1968–1969” (2001) 12 *Irish Studies in International Affairs* 57.

<sup>192</sup> See N. Dorrr, “1969: A United Nations peacekeeping force for Northern Ireland?”, Kennedy and McMahon (eds), *Obligations and Responsibilities* (Dublin: Institute of Public Administration, 2005).

<sup>193</sup> 241 *Dáil Éireann*, Col.1897 (28 October 1969) Minister for External Affairs Dr Hillery.

<sup>194</sup> DFA 417/65 Part II (de Paor to Waldron, 4 February 1970).

<sup>195</sup> DFA 417/65 Part II (Swift to Dublin, 29 April 1970).

<sup>196</sup> DFA 417/65 Part II (Letters 9 October 1970, 27 October 1970, 12 January 1971 and 15 January 1971).

<sup>197</sup> See J. O’Brien, *The Arms Trial* (Dublin: Gill and Macmillan, 2000) and B. Hanly and S. Millar, *The Lost Revolution: The Story of the Official IRA and the Workers’ Party* (Dublin: Penguin, 2009).

<sup>198</sup> DFA 417/65 Part II (de Paor to McCann, 27 January 1971).

<sup>199</sup> See External Affairs (Alternation of Name of Department and Title of Minister) Order 1971. See Statutory Instrument No. 158/1971.

<sup>200</sup> DFA 417/65 Part II (External Affairs to Berry, 29 November 21971).

<sup>201</sup> DFA 417/65 Part II (Letter to Durnin, 24 January 1972).

Political and Legal Sections were involved in the enormous undertaking of negotiating Ireland's accession to the EEC, which led to the signature of the accession treaty in January 1972.<sup>202</sup> James Sharkey explained to the Assistant Secretary of Foreign Affairs that the general feeling of the Political Section was "that Ireland should not lag behind her future European Economic Community partners on matters of this kind".<sup>203</sup> If the EEC Member States had shown "little interest" in ratifying the Genocide Convention, Sharkey considered this to be a different matter entirely.<sup>204</sup>

Research indicated that, within the 75 States Parties, all Western European States had acceded, except Ireland, Luxembourg, Portugal, Malta and New Zealand.<sup>205</sup> Within the 10 EEC Member States, Ireland and Luxembourg were the only non-ratifying States.<sup>206</sup> Keating advocated that Justice should be again alerted to the Foreign Affairs position, that it would be undesirable for Ireland to be among a small minority of non-ratifying States.<sup>207</sup> Thus, geographical proximity was critical for the Political Section at this point and, given Ireland's EEC partners' near universal acceptance of the norm, Ireland should follow suit. Another dimension was "the situation in Northern Ireland",<sup>208</sup> which implies that the Political Section (clearly without legal analysis) considered the possibility of invoking the Genocide Convention against the United Kingdom over killings of members of the nationalist (Catholic) community by British security forces in Northern Ireland. The involvement of the Political Section meant significantly that there were more voices pushing for accession than the Legal Section and the Irish Permanent Mission to United Nations.<sup>209</sup> Notwithstanding, from February 1972 to 1973, there was no Foreign Affairs reprimand of Justice's slowness. But Foreign Affairs had three major political issues to contend with at the time—its response to the conflict in Northern Ireland, the fractious Anglo-Irish relationship and Ireland's membership of the EEC.

#### *(b) Critical influence of UN Human Rights Programmes*

Political leadership and interest groups played a greater role from the end of 1972 onwards. In Parliament, Dr O'Connell asked whether the Government intended to ratify the International Covenant on Civil and Political Rights<sup>210</sup> and this reopened an old wound about Ireland's human rights image. In response, Foreign Affairs turned back to a convenient pre-prepared option, the Genocide Bill. They were told that the Minister for Justice hoped to introduce the Bill before the Summer Recess.<sup>211</sup> With an election and Government change in March 1973, the new Minister for Foreign Affairs Garret Fitzgerald was even more eager to make progress. An opportune prompt was provided by the 25th anniversary of the Universal

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<sup>202</sup> Treaty relative to the accession to the European Economic Community, Official Journal L73 of 27 March 1972. See also art.2 of the Accession Treaty (entering into force in January 1973).

<sup>203</sup> DFA 417/65 Part II (Sharkey to Keating, 25 January 1972). James A. Sharkey joined Foreign Affairs in 1970 as Third Secretary, becoming First Secretary in the Political Section from 1971 to 1974, including acting as a delegate to the Conference on Security and Cooperation in Europe. He was later Ambassador to Australia, Japan, Denmark, Russia and Switzerland. He was also appointed as Permanent Representative to the Council of Europe, Strasbourg.

<sup>204</sup> DFA 417/65 Part II (Sharkey to Keating).

<sup>205</sup> DFA 417/65 Part II (Keating to McColgan, 25 January 1972).

<sup>206</sup> DFA 417/65 Part II (Keating to McColgan).

<sup>207</sup> DFA 417/65 Part II (Keating to McColgan).

<sup>208</sup> DFA 417/65 Part II (External Affairs to Justice, 28 January 1972).

<sup>209</sup> DFA 417/65 Part II (McColgan to Durnin, 25 January 1972).

<sup>210</sup> 264 *Dáil Éireann Debates*, Col.1142 (12 December 1972). Dr John O'Connell was Fianna Fáil TD for Dublin South Central from 1965 to 1997, with the exception of the period 1987–1992 when he was nominated by the Taoiseach to Seanad Éireann.

<sup>211</sup> DFA 417/65 Part II (Justice to Foreign Affairs, 1 February 1973).

Declaration of Human Rights in 1973, a new UN mark of encouragement.<sup>212</sup> Garret Fitzgerald wanted a “strong effort” to ratify as many Human Rights Conventions as possible.<sup>213</sup> He told Justice that the Government (in particular Foreign Affairs) had been “under considerable pressure” from NGOs and private organisations and, as a result, the Minister was “particularly anxious” that the Government pursue this policy.<sup>214</sup> Although the final draft of Fitzgerald’s letter is missing, it seems probable that he advocated urgent action by Justice. However, Justice’s reply raised further confusion over doctrinal law and this delayed matters further. Justice asked about military court jurisdiction and the Legal Section in Foreign Affairs had to research the issue.<sup>215</sup> The International Organisations Section stressed the desirability of disposing the matter “speedily, in order not to give... Justice an excuse for further delay”.<sup>216</sup> Research by the Assistant Legal Adviser Charles Lysaght took two months because the relevant files were “rescued from the Registry only after a month’s search”.<sup>217</sup> His research revealed that the Geneva Conventions Bill was submitted to Cabinet without any observations from the Department of Defence and with no reference to courts martial among Justice’s observations.<sup>218</sup> Rather the Bill had been “prepared in great haste” at the behest of the Taoiseach and it was “not inconceivable” that the issue was overlooked.<sup>219</sup> Foreign Affairs passed on Lysaght’s research to Justice, agreeing that clarification was desirable. Justice must have clarified this internally as the Genocide Bill extended the jurisdiction of military courts to genocide.<sup>220</sup>

In the end, the frame of the 1973 Bill was very similar to the 1969 Memo for Government and, in turn, this accorded in general with Waldron’s suggestions in 1953. This being so, the 1973 Bill criminalised the acts under art.II of the Convention,<sup>221</sup> with the same sentencing maximums as the 1969 Memo.<sup>222</sup> Criminal jurisdiction was extended to the Central Criminal Court<sup>223</sup> and criminal proceedings could be instituted only by or with the consent of the Attorney General.<sup>224</sup> Genocide was also deemed an offence against military law by amending the Defence Act (1954)<sup>225</sup> and military jurisdiction was extended to genocide.<sup>226</sup> Lastly, the main stumbling block, genocide and associated ancillary offences would not be considered as political offences for the purposes of the Extradition Act 1965.<sup>227</sup> In a related vein, the rule of double criminality in extradition law was also excluded.<sup>228</sup> With the Genocide Bill completed, Justice submitted its Memorandum for Government in September.<sup>229</sup> The memo stressed Ireland’s isolated position; Great Britain and most Western European States were already States Parties.<sup>230</sup> It also stressed that the Minister for Foreign Affairs was eager to accede during the 25th Anniversary of the Universal Declaration of

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<sup>212</sup> DFA 417/65 Part II (Draft letter to Finance, Justice and Health).

<sup>213</sup> DFA 417/65 Part II (Draft letter to Finance, Justice and Health).

<sup>214</sup> DFA 417/65 Part II (Draft letter).

<sup>215</sup> DFA 417/65 Part II (Lysaght to Legal Adviser, 11 June 1973).

<sup>216</sup> DFA 417/65 Part II (de Paor to Hayes, 30 April 1973).

<sup>217</sup> DFA 417/65 Part II (Lysaght to Hayes, dated 11 June 1973).

<sup>218</sup> DFA 417/65 Part II (Lysaght to Hayes).

<sup>219</sup> DFA 417/65 Part II (Lysaght to Hayes).

<sup>220</sup> DFA 417/65 Part II (Reply to Justice, 18 June 1973).

<sup>221</sup> DFA 417/65 Part II (Memorandum, para.5. Art.2(1) of the Genocide Bill (1973).

<sup>222</sup> DFA 417/65 Part II (Memorandum, para.5. Art.2(2)(a)).

<sup>223</sup> DFA 417/65 Part II (Memorandum, para.5. Art.2(4)).

<sup>224</sup> DFA 417/65 Part II (Memorandum, para.5. Art.2(3)).

<sup>225</sup> DFA 417/65 Part II (Memorandum, para.5. Art.4).

<sup>226</sup> DFA 417/65 Part II (Memorandum, para.5. Art.5).

<sup>227</sup> DFA 417/65 Part II (Memorandum, para.5. Art.3(1)).

<sup>228</sup> See s.3(2) of the Genocide Act 1973, No.28 of 1973.

<sup>229</sup> DFA 417/65 Part II (Memorandum, para.1).

<sup>230</sup> DFA 417/65 Part II (Memorandum, para.2).

Human Rights.<sup>231</sup> At the Cabinet meeting on 11 October, the Government approved the Genocide Bill and authorised the Minister for Justice to introduce the Bill to the Dáil.<sup>232</sup> The Bill was passed through both Houses of the Oireachtas without objection despite introducing a number of critical changes in Irish law.<sup>233</sup> The Genocide Act was then signed into law on 19 December 1973, just in time to fulfil the Minister for Foreign Affairs' policy and improve the Government's image on human rights treaty acceptance.<sup>234</sup> One immediate benefit of the Genocide Act was that Foreign Affairs could reply more meaningfully to a recent questionnaire for the UN Study on the Prevention and Punishment of Genocide. Ireland had enacted the Genocide Act 1973, would accede shortly and there had been no prosecutions yet under the Act.<sup>235</sup>

*(c) More interdepartmental "turf wars" and inertia*

The next move was to secure Cabinet approval for the instrument of ratification. Preparation included an update of the number of States Parties, with heavy emphasis being placed on the numbers of Western European States.<sup>236</sup> It also involved coaxing other departments to respond to the draft Memorandum of Foreign Affairs. This time, it was the Attorney General's Office that stalled matters. Requests for its observations were sent by Foreign Affairs on 3 May,<sup>237</sup> 11 June,<sup>238</sup> 17 July,<sup>239</sup> 21 August<sup>240</sup> and 21 October 1974.<sup>241</sup> On 29 September 1975, Foreign Affairs wrote a curt note to the Attorney General's Office to deal with the matter "on a priority basis".<sup>242</sup> Assistant Legal Adviser Declan Quigley replied with a short handwritten note explaining that the delay was due to s.3(1) of the Genocide Act (the removal of the political offence exception) without any further elaboration.<sup>243</sup> It is unclear what the problem was exactly, especially when on review on the same day both Declan Quigley and the Attorney General Declan Costello concluded that the Genocide Act 1973 permitted accession.<sup>244</sup> Unfortunately, the Attorney General's advice has not been kept.<sup>245</sup> With the Attorney General's support and no objection from Justice or Finance, Foreign Affairs could finalise its memorandum, which was submitted to Cabinet on 23 December.<sup>246</sup>

The final memorandum explained how the delay in accession was due to difficulties involving the giving of legislative effect to the definition of genocide, drafted in "very wide terms" and the caution over removing the political offence exception.<sup>247</sup> It then highlighted how the previous Government approved the drafting of necessary legislation in November 1968, "mindful of the impression of lack of respect for the objects of the Convention to

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<sup>231</sup> DFA 417/65 Part II (Memorandum, para.2).

<sup>232</sup> DT 2004/20/1 (Cabinet Minutes, 16 October 1973).

<sup>233</sup> See 268 *Dáil Éireann*, Cols 498–513 (24 October 1973) and 76 *Seanad Éireann*, Col.59 (11 November 1973) and Col.272 (14 November 1973).

<sup>234</sup> DFA 417/65 Part II (Note from Regan to McNicholas, 19 December 1973).

<sup>235</sup> DFA 417/65 Part II (Justice to Foreign Affairs, 22 May 1974).

<sup>236</sup> DFA 417/65 Part II (Draft Memorandum, January 1974).

<sup>237</sup> AGO 2006/40/335 (External Affairs to Attorney General Costello, 3 May 1974).

<sup>238</sup> AGO 2006/40/335 (External Affairs to Attorney General, 21 August 1974) (noting 11 June and 17 July letters).

<sup>239</sup> AGO 2006/40/335 (External Affairs to Attorney General).

<sup>240</sup> AGO 2006/40/335 (External Affairs to Attorney General).

<sup>241</sup> AGO 2006/40/335 (External Affairs to Attorney General, 21 October 1974).

<sup>242</sup> AGO 2006/40/335 (McCann to Attorney General, 2 September 1975).

<sup>243</sup> AGO 2006/40/335 (Quigley to Attorney General, 7 October 1975).

<sup>244</sup> AGO 2006/40/335 (Quigley to Attorney General) and (Handwritten by Attorney General, 13 October 1975).

<sup>245</sup> AGO 2006/40/335 (Attorney General to Foreign Affairs, October 14<sup>th</sup> 1975).

<sup>246</sup> DFA 417/65 Part II (Memorandum, 23 December 1975, para.1).

<sup>247</sup> DFA 417/65 Part II (Memorandum, para.2).

which our continued non-accession could give rise”.<sup>248</sup> A draft Memorandum of May 1974 spoke more plainly. There was hesitancy in the light of Ireland’s refusal to surrender war criminals after World War II and an objection to countenancing the extradition of political offenders.<sup>249</sup> A handwritten version of this draft Memorandum referred to a “radical departure” from Ireland’s previous policy.<sup>250</sup> As noted earlier by this writer, the “vagueness” of the genocide definition was never the critical stumbling block. Rather, once the “radical departure” from previous policy was chosen, the previous Government (in particular Justice) assumed that the Convention would never be actually invoked in Ireland in any case. On 9 January 1976, the Cabinet agreed to permit the Minister for Foreign Affairs to accede<sup>251</sup> and on 2 February 1976 Ireland deposited her instrument of ratification, without reservations, to the United Nations Secretary General Kurt Waldheim.<sup>252</sup>

## CONCLUSION

Ireland’s delayed accession demonstrates the untidiness of state practice—a “messy” jumble of persuasion, status-oriented concerns, material interest, bureaucracy, political leadership and doctrinal law.<sup>253</sup> The writer observed that Irish government departments maintained a unified position that strict compliance with domestic law was necessary and, in general, that they were agreed on doctrinal law concerns. The major stumbling block was the uncertainty over compatibility with domestic extradition arrangements. This was particularly challenging as Irish officials were uncertain whether the 1870 British Extradition Act had survived the 1937 Constitution. Quietly, officials read the removal of the political offences exception as a “radical departure” from Ireland’s post-World War II policy. Given the legal (and political) difficulties, there was little political leadership on this major stumbling block until 1968, when External Affairs sought to exhibit a positive human rights treaty image. In fact, External Affairs had earlier only causally mentioned the issue to Justice when Justice was completing its Extradition Bill and ultimately it was unaddressed by the Extradition Act 1965. It has also been noted that most Irish officials were agreed that the Convention was politically useless and thereby agreed more fundamentally about “what the function of the Convention really was”, that is, as “symbolic” rather than “practical, to deter future acts of genocide”.<sup>254</sup> It is also evident that External (later Foreign) Affairs was acutely influenced by status-oriented concerns. Its officials periodically updated the account of ratifications and later changed the original interdepartmental policy of complete isolation into an External Affairs policy of a “small minority of non-ratifying states”. In the end, they successfully persuaded Justice and the Attorney General’s Office to follow their preferred policy, arguing that Ireland’s standing within regional and global communities was critical and dependent on a more positive human rights treaty image. It was further noted by the writer that while domestic interests groups played a very limited role until the 1970s, political pressure exerted by them was useful for coaxing other departments and, ultimately, the Cabinet to follow Foreign Affairs’ policy. Finally, despite political leadership from Foreign Affairs (and Governmental change), Justice and later the Attorney General’s Office engaged in “familiar paper shuffling tactics”<sup>255</sup> that delayed the completion of the Genocide Bill and, in turn, the

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<sup>248</sup> DFA 417/65 Part II (Memorandum, 23 December 1975, para.3).

<sup>249</sup> DFA 417/65 Part II (Draft Memorandum, May 1974, para.2).

<sup>250</sup> DFA 417/65 Part II (Draft Memorandum, May 1974).

<sup>251</sup> AGO 2006/40/335 (Secretary to the Government to the Minister for Foreign Affairs, cc’d to the Attorney General).

<sup>252</sup> DFA 417/65 Part II (Instrument of Accession, 2 February 1976).

<sup>253</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 968.

<sup>254</sup> Simpson, “Britain” (2002) 73(1) *British Yearbook of International Law* 5 at 64.

<sup>255</sup> Alvarez, “Socialize?” (2004) 54 *Duke Law Journal* 961 at 964.

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