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GENOCIDE TREATY

(EXECUTIVE O)

Status:

On May 24th and 26th, 1977, the Senate Foreign Relations Committee will hold hearings on the Convention on the Presentation and Punishment of the Crime of Genocide. In his speech before the United Nations, President Carter pledged to support passage of this treaty in the current Congress. Once hearings are completed the treaty may be reported to the Senate by the Foreign Relations Committee at any time. As a treaty the Genocide Convention would require a two-thirds affirmative vote of all Senators present. This Issue Bulletin deals with the contents and some of the controversies surrounding this proposal.

History:

Following the attempted extermination of Jews in Germany, the United Nations adopted a resolution in the form of a treaty called the Genocide Convention. Initiated in 1948, it entered into force on January 12, 1951, after being ratified by twenty nations.

With the support of the Truman administration, the Senate Foreign Relations Committee held hearings on the treaty in 1950. After carefully studying the document and its possible implications, the Committee refused to send the treaty to the Senate floor. Neither Eisenhower, Kennedy, nor Johnson revived the treaty. Not until February, 1970, under President Nixon, did an administration again send the treaty to the Senate for ratification.

Another series of hearings were held in 1970 and 1971 before the Senate Foreign Relations Committee. Finally, on March 6, 1973, the Committee approved the treaty with three supplementary understandings and one declaration. The Senate debated the merits of the treaty for one week in February, 1974, but by votes of 55-36 and 55-38 failed to invoke cloture and vote on the treaty itself. At that time over one-third of the Senators indicated they would vote against ratification.

Without holding any additional hearings, the Senate Foreign Relations Committee again recommended that the Senate advise and consent to ratification of the treaty on April 13, 1976. The Senate failed to take any action on the measure in the remainder of the session.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Purpose:

As the Senate report in 1973 states; "The purpose of the treaty is to make genocide an international crime, whether committed during peace or war."

Provisions of the Convention:

The treaty consists of 19 separate articles. Only the first nine of these deal with terms of the treaty with the final ten being entirely procedural in nature. Since controversy surrounds each of the first nine articles, each will be considered separately below.

I. Article I simply states

> The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

The questions concerning both prudence and jurisdiction have arisen about the Article. The Senate Foreign Relations Committee Report in 1973 stated that genocide would simply be added to a list of other international agreements such "as protection of submarine cables, pelagic sealing, oil pollution, and antisocial conduct like slave trading, and production and trade in narcotics."

Basically the critics have contended that matters involving human rights questions should be a matter of essentially domestic jurisdiction and that the use of the treaty-making power in such areas is inappropriate.

In September, 1949 the A.B.A. House of Delegates found

> That the suppression and punishment of genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions which the proposed convention...does not resolve...in a manner consistent with our form of government. (Hearings, 1971, p. 16)

II. Article II defines the "Acts Constituting Genocide" in the following manner:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;

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

1. Due to the vagueness of the terminology used in this section, the Foreign Relations appended two understandings to this Article by stating the "intent to destroy" section must "affect a substantial part of the group concerned" and that "mental harm" meant "permanent impairment of mental facilities."

2. Placing such understandings or reservations on the treaty have been questioned by some authorities. In testimony on the treaty, Alfred J. Schweppe, of the A.B.A., stated that the "substantial part of the group" understanding "is in direct negation of the text." Moreover, he noted that in 1950 the State Department itself "admitted or agreed that part of a group could be a single individual." (Hearings, 1971, pp. 55-56) Rather than have such understandings which "so emasculated the convention as to leave nothing substantial" he said the A.B.A.'s Peace and Law Committee believed "it would be better to have the convention sent back to the United Nations for appropriate changes." (Hearings, 1971, p.69)

3. The key word, according to the Committee Report, in this section is "intent" and thus it states that "allegations that school busing, birth control clinics, lynchings, police actions with respect to Black Panthers and the incidents at My Lai constitute genocide" have no merit. Without proof of intent to destroy the entire group the genocide convention is inapplicable.

The issue of whether the treaty could apply to actions in wartime has been a principal source of contention. Since the agreement applies to soldiers in wartime who intend as a part of their mission to destroy "in part" another nation, critics contend that the soldiers may be charged and tried for genocide by the enemy country in which they are fighting. Thus the country, such as North Vietnam several years ago, could point to this treaty signed by the United States as justification for prosecuting American servicemen for genocide. On the other hand, treaty supporters say such rationalizations could be made without the treaty itself.

4. Section (b) of Article II has caused still more controversy. In order to clarify the nature of the charge of causing "mental harm" the Committee added their understanding on "permanent impairment of mental facilities."

Nonetheless, Sen. Ervin continued to object to the vague language:

> What mental harm means in this context is totally incomprehensible, and what psychological acts or omissions are made punishable in this context are left in obscurity.

In order to illustrate the nature of the terminological problems, some have cited the 1954 Brown v. Board of Education decision, in which the Supreme Court ruled that separation of black children

> may effect their hearts and minds in a way unlikely ever to be undone...and has a tendency to retard their education and mental development.

Thus using our own judicial opinions as a handle, Eberhard P. Deutsch of the A.B.A. contended that an international tribunal could contend "that any form of local segregation is within the definition of the international crime of genocide under the convention. (Hearings, 1971, p. 19)

5. A final question raised in conjunction with the definition of genocide is the absence of certain categories of crimes. In the history of negotiating the precise terminology of the agreement, certain key phrases were eliminated and others added. The United States strongly advocated including the phrase "with the complicity of government" in the definition. Moreover, the original United Nations declaration against genocide adopted in December, 1946, referred to genocide "committed on religious, political or any other grounds."

In the aftermath of the experience in Germany, many people felt that the "complicity of the government" in genocidal actions should be specifically prohibited. Similarly, the attempt to exterminate an entire group for purely political reasons seemed an appropriate area to cover in the treaty. However, the Soviet Union and other communist governments so strongly objected that the Western nations agreed not only to exclude these particular categories of crimes, but also included the phrases "part of a group" and "mental harm."

Since the governments in Communist countries pervade every aspect of society and the principal crimes allegedly committed against the state are "political," many authorities felt that the Soviet Union and her allies effectively isolated themselves from any future prosecution under the terms of the agreement.

Speaking on behalf of the treaty as drafted, former Supreme Court Justice Arthur Goldberg agreed that the term "political" should have been included, but in the end "we settled for the best treaty possible." (Hearings, 1971, p.115.)

Alfred Schweppe of the A.B.A. summarized the treaty negotiations in this manner:

> All in all, ours was a pathetic performance. Out came a convention that the Soviets could readily approve, and which surely will cause us, if it becomes the supreme law of the land (superseding state laws and constitutions and existing laws of Congress), endless trouble. (Hearings, 1971, p. 62.)

III. Article III of the convention lists the following acts as punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Sections (c) and (e) under this article have raised questions concerning possible conflicts with the American Bill of Rights. The Committee Report dealt with this problem by noting that the Supreme Court drew a clear line "between protected speech and prohibited direct and immediate incitement to action." Thus the Court said in the 1969 case of Brandenburg v. Ohio that speech could not be proscribed or forbidden by a State "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Committee felt the Genocide provisions would not conflict with this interpretation (Report, p.8). At the time of the drafting of the document, representatives of the United States attempted to delete section (c) but were defeated.

Senator Ervin has cited other Supreme Court decisions and raised questions about the precise meaning of language in this Article:

> If the convention is ratified, public officials and private citizens of our land will be subject to punishment in Federal courts or possibly in international penal tribunals to be established under Article VI if they are guilty of the undefined offense designated as "complicity in genocide." What is "complicity in genocide?" The convention does not say (Hearings, 1971, p.6).

When the genocide convention originally came before the Senate Foreign Relations Committee in 1950, it attached the following reservation to this section which has subsequently been removed:

> That the United States Government understands and construes the words 'complicity in genocide' appearing in Article III of this convention to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide (Hearings, 1971, p.6).

IV. Article IV deals with the punishment of persons:

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

This section has simply revived the controversy over the scope of the entire treaty. The Senate Committee felt that "the convention would have been stronger" if "directed at governments as well as individuals." But the Committee went on to note "that there exists no present means in international law to punish a government in power." If you can take no action against a government, except if it has surrendered unconditionally in war, then critics contend that the treaty becomes virtually meaningless as an effective preventative instrument and thus may be used for only propoganda purposes.

V. Article V provides that all governments adopting the Genocide Convention will enact "the necessary legislation to give effect to the provisions. . . and provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III."

This led the Committee to incorporate in the resolution of ratification a declaration that the United States "will not deposit its instrument of ratification until after the implementing legislation. . . has been enacted."

As the Committee Report states, this section would require the United States to add "certain acts as Federal crimes." A draft of implementing legislation was proposed by Senator Javits in the 2nd session of the 92nd Congress in the form of S.3182.

Justice Goldberg and others have stated that through the implementing legislation all of the questions raised about the treaty can be resolved to the satisfaction of the critics. However, unlike the treaty itself, the implementing legislation will have to pass both the Senate and the House, but then only a simple majority approval will be required. Thus opponents of the sections of the treaty can prevail with one-third of the votes now but will need majority support to clarify the agreement through the implementing legislation.

VI. Article VI provides that persons under the convention will be tried for their offenses

> by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Once again the Senate felt compelled to add a clarifying understanding so "that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State." (Report, p.10)

However, the spokesman for the American Bar Association submitted

> that such an understanding would, under no circumstances, deprive any other country of its concurrent jurisdiction over the trial of such individuals, especially since the understanding pointedly fails to negate the obligation of the United States, under Article VII, to grant extradition of its citizens for trail in other countries with which it has extradition treaties.

Since under this article individuals are tried in the country in which the alleged offense has been committed, critics have contended that Americans charged under the treaty would not necessarily have the same legal safeguards they have under American law. Moreover, considerable concern has surrounded the possible creation of an international penal tribunal whose composition could turn it into more of a political than legal body. This could be created by executive order.

Due to this section, Senator Ervin said that Americans, for example, captured by the North Vietnamese could have been tried and punished in the courts of North Vietnam. "No sophistry can erase this obvious interpretation of the Genocide Convention." (Hearings, p.7)

Finally, the question of concurrent jurisdiction has arisen. Different agencies could presumably bring different charges for the same offense that would lead to apparently overlapping jurisdiction. On cannot be subject to the same charge in two jurisdictions; but one could, e.g., be tried for murder in a State but at the same time charged before an international forum for genocide.

The main protection against such apparent double jeopardy, or in general the denial of conventional civil liberties, would be the failure of one country to extradite an individual to the scene of the alleged crime. As the Senate understanding emphasizes, the

State retains the right to try individuals "for acts committed outside the State."

VII. Nonetheless, Article VII provides for extradition of individuals charged with crimes covered by the Genocide Convention. This article asserts that the crimes cannot be excluded from possible extradition proceedings for political reasons. Thus "the Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

During the Senate consideration of this section, Senator Cooper offered a reservation to prevent the extradition of any U.S. Citizen "unless the Secretary of State determines such person is guaranteed all the constitutional rights of an accused under our Federal laws."

The full Committee voted 7-6 to table this proposed addition. Opponents of this provision contended that such a stipulation should be placed in the implementing legislation rather than as a reservation on the treaty itself.

VIII. Article VIII provides a role for the United Nations in carrying out the treaty:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

At the time of initial consideration of the treaty, the United Nations undoubtedly had much greater prestige and moral force than it does at this point in time. The Committee Report stated that genocide in the form of mass murder "would either jeopardize human rights provisions of the charter or pose a threat to world peace." In either instance, jurisdiction of the U.N. in this area would be appropriate. Nonetheless, the Committee felt that the scope for U.N. action would be limited by Article 2, section 7 of the Charter of the United Nations. This provision proscribed intervention "in matters which are essentially within the domestic jurisdiction of any state. . ." (Report, p.12)

In recent years, critics point out, the composition of the United Nations has changed drastically and actions taken by the U.N., particularly in reference to Israel, have often been completely irresponsible.

The Committee Report noted that "spurious charges" could be made in the U.N. with or without the American accession to the Genocide Treaty. But Eberhard Deutsch of the A.B.A. drew a distinction in the hearings by stating that

> a mere resolution condemning us is one thing, but under the convention they may take such other action against the United States by way of sanctions or otherwise, if we were parties to that convention and such a situation arose. (Hearings, 1971, p. 82)

IX. The final source of dispute deals with Article IX concerning the "Settlement of Disputes" under the Genocide Convention. Article IX reads as follows:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The Committee Report noted that such cases would fall under Article 36(1) of the Court's statute and not under Article 36(2). Thus the Connally amendment which only related to Article 36(2) would not apply to any cases arising under the Genocide Convention. Critics of the treaty dissent from this Article on precisely the grounds that it

> clearly overrides the Connally Amendment, and subjects the United States to the unreserved jurisidiction of the International Court of Justices as to all matters involving the 'interpretation, application or fulfillment' of the Genocide Convention. (Hearings, 1971, p.46)

Supporters of the treaty note that all Communist-bloc countries have objected to Article IX and thus "the United States could invoke the Communist-bloc reservation in its own behalf in cases brought by members of the bloc." (Senate Foreign Relations Committee Report, 1971, p.13) Furthermore, the Committee Report noted that only states can bring cases before the World Court and that the Court has no enforcement powers.

Nonetheless, Senator Ervin has argued that

> Under this Article the International Court of Justice would be empowered to decree that the President of the United States, as Chief Executive Officer of the United States, had interpreted and applied the provisions of the convention incorrectly and by so doing impose upon the President of the United States its notions as

> to how the convention should be interpreted and enforced; the power to adjudge that legislation enacted by Congress to give effect to the provisions of the convention was insufficient to fulfill the obligation imposed upon it by the convention; and the power to adjudge that the Supreme Court of the United States and Federal courts inferior to it had interpreted and applied the provisions of the convention incorrectly and by so doing require these tribunals to apply its notions as to how such provisions should be interpreted and applied to future cases coming before them.

Moreover, if the United States would simply ignore any adverse rulings from the World Court, as some have contended, then Ervin believes the United States would also be ignoring her solemn obligation under Article 94 of the U.N. Charter which provides that "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." (Hearings, 1971, p.8)

Supplementary Considerations Concerning the Genocide Convention:

A. Supporters of ratification give several general reasons for affirmative action by the Senate:

1. The treaty is regarded as a major step in the direction "of expanding international law" according to Justice Goldberg.

2. Over eighty other countries have ratified the agreement and the United States is conspicuous by her absence.

3. In twenty-five years of operation no one has been prosecuted under this Convention and no new international tribunal has been established.

4. The United States should ratify the treaty to advance the cause of human rights in the world.

5. The treaty would make a substantial contribution to setting "a higher standard of international morality" according to the Committee Report.

B. Opponents of ratification either believe the treaty should be rejected outright or returned to the United Nations for substantial modification for the following reasons:

1. Grand moral principles have no place in a legal document that will be used more for propoganda

purposes than as an effective deterrent.

2. Although genocide has taken place during the years in which the treaty has been in effect, such as Cambodia during the past year, no actions have ever been taken against the perpetrators of mass slaughters.

3. The treaty must mesh with our own complicated legal structure otherwise it should be rejected. It may coincide with other nations' systems of justice that do not make treaties an organic part of their constitution.

4. Although eighty-three countries have ratified the agreement, this represents only five additional nations in the past three years and only slightly more than half of the countries of the world. Besides the United States, three of the other five largest countries in the world have refused to ratify the agreement. Over thirty nations, including all Communist countries, only adopted the convention with such severe reservations as to make the document meaningless.

5. The general drift of opinion in the United Nations and other international bodies has been away from democracy and constitutional law; thus adoption of the Genocide Convention quite likely would simply be used by other countries for propoganda purposes against the United States.

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