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## WHY THE GENOCIDE TREATY TRIVIALIZES THE HORROR OF GENOCIDE

### INTRODUCTION

A fierce fight is expected before Majority Leader Robert Dole (R-KS) brings The International Convention on the Prevention and Punishment of the Crime of Genocide to the Senate floor, soon after the current congressional recess. To its American supporters, the "Genocide Treaty" is a symbolic and overdue expression of revulsion against this heinous crime and its practitioners. But to its critics, the Genocide Treaty is a seriously flawed document which, if ratified, could undermine U.S. constitutional safeguards. It also would not cover such contemporary atrocities as those committed by the Khmer Rouge in Cambodia, the Soviet Union in Afghanistan, and Mainland China in Tibet. Counsels columnist George Will, "How, you ask, can anyone oppose a treaty opposing genocide? Easily, if you start by reading it."<sup>1</sup>

Conservative critics, led in the Senate by Steve Symms (R-ID), Strom Thurmond (R-SC), and Orrin Hatch (R-UT), maintain that the document is a legal disaster and riddled with loopholes. Beyond that, they fear that U.S. ratification would allow hostile nations to use the Genocide Treaty against the U.S. for propaganda purposes. A package of reservations crafted by Republican Senators Richard Lugar of Indiana and Jesse Helms of North Carolina and attached to the treaty by the Senate Foreign Relations Committee in May 1985 improved the treaty somewhat, but still leaves the U.S. vulnerable to unjustified and unwarranted harassment.

This, in fact, is the painful lesson that the U.S. has learned from its experience with the World Court. The U.S. joined the Court in 1946, but only after the Senate imposed

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<sup>1</sup> The Washington Post, September 20, 1984, p. A19.

strict reservations regarding the Court's jurisdiction over the U.S. Yet whenever the U.S. invokes these reservations, as the Reagan Administration did in 1984 regarding Nicaragua's attempt to drag the U.S. before the Court, liberals accuse the U.S. of undermining the rule of law allegedly symbolized by the World Court. Apparently forgotten is the fact that the Senate allowed the U.S. to join the Court only if the reservations were accepted. Instead, Washington immediately is placed on the defensive when it does what it is entitled to do--invoke the reservations.

The same thing is sure to happen with the Genocide Treaty. While the Senate may feel that its reservations will protect the U.S., in reality the U.S. will pay a price every time it uses the reservations to limit the Genocide Treaty's reach. Some experts acknowledge that the treaty is seriously flawed but argue that it is symbolically important for the U.S. to sign it. The contrary is true. If the U.S. signs the treaty, the U.S. will suffer repeated symbolic damage every time it invokes the reservations.

The Genocide Treaty will not prevent genocide nor will it punish those who commit genocide. Instead it will be an empty document whose intrinsic impotence will make a mockery of the civilized world's condemnation of genocide. It will be a document, moreover, which will be used to harass and assault those democratic nations which take seriously their signatures on treaties and which must contend with unfettered domestic public opinion. It will be ignored by those nations which scorn democracy and are, in fact, those most likely to commit genocide. To oppose the Genocide Treaty is not to support genocide. To oppose the treaty is to reject a flawed document which trivializes the horror of genocide. To truly oppose genocide is to oppose the treaty.

#### SENATE RESERVATIONS

The United Nations General Assembly adopted the Genocide Treaty in 1948. Since then, 96 nations have signed it. Because many American experts have complained that the accord was too broad and clashed with U.S. constitutional safeguards, the Senate has refused, since 1949, to ratify the treaty. The Senate Foreign Relations Committee in 1976 recommended that a series of "understandings" be attached to the treaty. These were designed to tighten the language of some of the treaty's more ambiguous definitions and eliminate salient constitutional conflicts. The Carter Administration embraced the treaty the following year. The Senate Foreign Relations Committee held hearings on May 24, 1977, but took no further action.

Former Secretary of State Alexander Haig, during his 1981 confirmation hearings, pledged to review the treaty. Late that year, the Senate Foreign Relations Committee again held hearings. On September 5, 1984, the Reagan Administration announced its support of the Genocide Treaty. On October 10, 1984, Senator Christopher Dodd, the Connecticut Democrat, introduced a resolution urging Senate ratification. It passed unanimously.

Yet there were serious reservations. Republican Senator Strom Thurmond of South Carolina feared that the treaty would fuel an ongoing explosion in international law that penalizes the U.S., its citizens, and Constitution. Warned Thurmond: "Able lawyers have expressed the fear that Article VI [of the Genocide Treaty pertaining to jurisdiction] imposes upon the Congress an implied commitment to support the creation of an international court for trials of American citizens for genocide. I find myself in complete harmony with their opposition to subjecting our citizens and other persons within our territorial jurisdiction to trial, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they might not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime."

Added Senator Orrin Hatch, the Utah Republican: "Many proponents of the United Nations have been working increasingly to create a body of treaty law at the international level which would require adherence of member states and increase the power of the World Court. In the process, our national sovereignty was to be diluted and provisions of the U.S. Constitution were to be subordinated."

Statements by Genocide Treaty supporters fail to diminish these fears. Speaking for the treaty before the Senate Foreign Relations Committee in 1981, John Norton Moore, Vice Chairman of the American Bar Association's Division of Public International Law, stated, "The essence of this commitment is our devotion to an ordered existence governed by universally accepted rules and procedures--the rule of law."<sup>2</sup> Senator Dodd was more explicit: "The simple fact is that the first step to an international legal order has to be agreement on certain fundamental, universal objections"<sup>3</sup> Here Dodd makes no attempt to hide the fact that he endorses elevating what he calls "an international legal order" above the U.S. Constitution.

Extremely troubling to the treaty's critics is the treaty's definition of genocide. It defines genocide as "the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such." But it exempts political genocide. The United States originally had insisted on including the term "political," but bowed in 1947 to Soviet bloc pressure and agreed on its exclusion. The Soviet Union and other totalitarian regimes do not view the destruction of the political opposition as genocide.

Initially, the U.S. also wanted the term "complicity of government" attached to the definition of genocide. Historically, as in the case of Nazi Germany, government complicity provides the means by which genocide is accomplished. "Complicity of government" also was dropped after East bloc complaints.

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<sup>2</sup> Congressional Digest, December 1984, p. 312.

<sup>3</sup> Senate Floor, October 10, 1984, Congressional Digest, p. 304.

## PROVISIONS OF THE GENOCIDE TREATY

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which must be prevented or punished.

Article II

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- 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.

Article III

The following shall be 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.

Article IV

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.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, legislation to give effect

to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

#### Article VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried 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.

#### Article VII

Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

#### Article VIII

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.

#### Article IX

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.<sup>4</sup>

#### Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1946.

#### Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and

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<sup>4</sup> The Soviet Union and 15 other nations have exempted themselves from Article IX compliance, jurisdiction by The International Court of Justice.

of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

#### Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in Article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

#### Article XIV

The present Convention shall remain in effect for ten years from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

#### Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the

Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member states contemplated in Article XI of the following: (A) Signatures, ratifications and accessions received in accordance with Article XI; (B) Notifications received in accordance with Article XII; (C) The date upon which the present Convention comes into force in accordance with Article XIII; (D) The abrogation of the Convention in accordance with Article XV; (E) Notifications received in accordance with Article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

LINGERING QUESTIONS

On February 26, 1985, the Senate Judiciary Committee's Subcommittee on the Constitution held hearings to examine potential impact of Genocide Treaty ratification on the rights guaranteed by the U.S. Constitution. At those hearings, Robert Friedlander, professor of law at Pettit College at Ohio Northern University, testified,

...the Genocide Convention is wrong in its focus, confused in its substance, and unpredictable as to future applications. Individuals cannot and do not commit genocide. Only states or governments can perpetrate that barbaric activity when that activity is properly defined. The designation of genocide found in the convention is vague and overbroad, arbitrary, and capricious, and unreasonable in construction and composition. Genocide, as defined by the convention, can

apply to just about anyone, doing almost any act, posing almost any threat to virtually any type of victim. Article II provides the possibility that a single victim may suffice for a charge of genocide.

Testifying before the Senate Foreign Relations Committee on March 5, 1985, Grover Rees, an adjunct scholar at the Center for Judicial Studies, maintained treaty definitions were too broad and that other provisions posed serious conflicts with U.S. law regarding free speech, extradition, and liability. Rees told the committee that because of the way the treaty is worded, the U.S. could be charged with genocide for "policies deemed to have adverse effects on the birth rates, death rates, or distinct racial identity of indigenous minority groups; United States support for birth control programs in the Third World; police campaigns against the Black Panthers; the conduct by the United States in the war in Indochina; and Israeli policies toward the Palestinians on the West Bank and in Lebanon."

Rees and witnesses at the March 5th hearings voiced concern that the World Court, "which would have final authority to define the international obligation of the United States," would not appreciate domestic differentiations between "incitement" and "advocacy" with regard to free speech and mandate chaotic extradition requirements allowing for the arrest, detention, and extradition of foreign diplomats and dignitaries visiting the U.S. Israel would be particularly susceptible, as "the most frequent charges of genocide during the postwar period have been those against Israel."

Phyllis Schlafly, president of Eagle Forum, told the Senate committee on March 5, 1985, that the treaty could lead to such bizarre situations as:

Israel is tried for carrying out a preemptive raid against the Palestine Liberation Organization.

A U.S. Senator or Congressman who praises Israel's self-defense action is accused of "public incitement to commit genocide."

The Nestle Corporation is accused of "inflicting on the group conditions of life calculated to bring about physical destruction" because of its sale of infant formula to Third World countries.

Union Carbide is accused of "conspiracy" and "complicity" to commit genocide in India.

#### THE LUGAR-HELMS RESERVATIONS

On May 21, 1985, the Senate Foreign Relations Committee approved the Genocide Treaty by a 10 to 0 vote, with the provisos offered by Senators Lugar and Helms. Major reservations included:



- 1) In cases involving the U.S., the U.S. must consent to jurisdiction of the International Court of Justice before the case can be brought before that body.
- 2) Enabling legislation and other action required by the U.S. to comply with the treaty must not conflict with the U.S. Constitution.
- 3) Genocide means the destruction or intent to destroy a substantial part of a national, ethnical, racial, or religious group.
- 4) Mental harm (Article IIb) means permanent mental impairment through drugs, torture, or similar techniques.
- 5) Extradition is limited to acts criminal under the laws of the requesting and requested states. States retain the right to try offenders in their own courts.
- 6) Acts committed in the course of armed conflicts absent of actual intent to commit genocide are exempt.

The Lugar-Helms provisos passed by a thin 9 to 8 margin. Then 10 of the 17 committee members voted to send the treaty to the full Senate. Five members voted "present" and two were absent. Many Democrats seem determined to block the Lugar-Helms package. Led by Dodd, they plan to attempt to have Lugar-Helms removed once the treaty reaches the Senate floor.

Fearful of this, Helms moved to prevent consideration of the treaty by the full Senate last December 5. But Senator Dole, responding to pressure from Senate colleagues and the Reagan Administration, is expected to bring the treaty to the Senate floor on or shortly after February 18, 1986 but only in the form of a unanimous consent agreement. The Lugar-Helms reservations may not survive pre-agreement jockeying.

Conservatives, led by Senators Symms, McClure, and Denton, also are dissatisfied with the Lugar-Helms provisos. Symms complains that, even with Lugar-Helms, the treaty exempts political genocide and "complicity of government," allows extradition of U.S. citizens to foreign tribunals, and may actually make it more difficult to try international criminals.

More worrisome is a legal technicality. Several scholars have argued that U.S. reservations to the treaty are subject to approval by all 96 signatory nations, not just the U.S. Senate.

It was Helms who in March 1984 sounded perhaps the sternest warning to his colleagues about hasty ratification. "I say that we should pass a Genocide Convention, but only if we can make it work. We must make it work so that our domestic affairs are not subjected to the supervision of international bodies, and that our security interests, and those of our allies, are not jeopardized. If we do not find a way to do this, we will regret the ratification of this Convention for generations to come."

## CONCLUSION

Is the Genocide Treaty in the best interests of the United States? Elliott Abrams, when he was Assistant Secretary of State for Human Rights and Humanitarian Affairs, testified that "The [treaty] gives concrete expression to our opposition to the horrors of genocide and symbolizes that genocide is a crime against humanity which merits international censure."<sup>5</sup> Yet this is precisely what the treaty does not do. The treaty provides no "concrete expression" but offers only lip service. Such a limp reponse to the horrors of genocide trivializes U.S. determination to oppose genocide.

In truth, as a Heritage Foundation study noted in 1977:

- 1) The treaty will be used more for propaganda purposes than as an effective deterrent;
- 2) Actions have never been taken against those guilty of mass slaughter, such as in Cambodia, since the treaty's enactment;
- 3) The treaty does not mesh with the U.S. legal system;
- 4) The drift from democracy by the United Nations and other international bodies makes it almost certain that the treaty would be used by other countries against the United States for propaganda purposes.<sup>6</sup>

Americans are opposed to genocide. No other nation has made greater sacrifices in lives and resources to battle regimes primarily because of their evil nature and because they engaged in genocide. The U.S. need prove to no one its opposition to genocide; the record on this is clear. The Genocide Treaty in no way will toughen the U.S. stand against genocide. It may, in fact, trivialize it. As important, the treaty, even with the Lugar-Helms reservations, still raises troubling questions of conflict with the U.S. Constitution. And signing the treaty will not even prove of symbolic benefit to the U.S. To the contrary. It will shackle the U.S. with the burden of invoking reservations to avoid the treaty. Each time the U.S. does this, it will suffer symbolic injury.

As it has been since 1946, the Genocide Treaty is seriously flawed. As it has been since 1946, the Genocide Treaty does not merit United States support.

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<sup>5</sup> Senate Foreign Relations Committee, September 12, 1984.

<sup>6</sup> Jeffrey B. Gayner, "Genocide Treaty," Heritage Foundation Issue Bulletin No. 7, May 16, 1977, pp. 10-11.