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Case Western Reserve Journal of International Law

Volume 18 | Issue 2

1986

Counterpoint: Additional Views of Senators Pell, Biden, Sarbanes, Cranston, Mathias, Dodd, Eagleton and Kerry

Views of Eight Senators

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Recommended Citation

Views of Eight Senators, *Counterpoint: Additional Views of Senators Pell, Biden, Sarbanes, Cranston, Mathias, Dodd, Eagleton and Kerry*, 18 Case W. Res. J. Int'l L. 277 (1986)
Available at: https://scholarlycommons.law.case.edu/jil/vol18/iss2/3

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Counterpoint*

This is the sixth time that the Genocide Convention has been reported favorably by the Committee on Foreign Relations. On each prior occasion the Committee has urged the Senate to give its advice and consent to ratification along with three understandings and one declaration. Last September, after a three-year Administration review of the Convention, President Reagan announced that he would "vigorously support" ratification of the Genocide Convention. Representatives of the Departments of State and Justice urged the Senate to "finally provide its advice and consent to U.S. ratification" and testified that the package of three understandings and one declaration was sufficient to address all the legal questions that has been raised concerning ratification.

This year the Administration has done an about-face on the Genocide Convention. Six months after testifying in opposition to any limitation on U.S. acceptance of the World Court's jurisdiction, the State Department strongly supported an article IX reservation and left open the question of whether it would continue to support ratification in the absence of such a reservation. The change in position was attributed to the Court's decision in the case brought by Nicaragua against the United States for alleged violations of international law. The Administration also cited a "political judgment" that the Senate would not give its advice and consent to the Genocide Convention without an article IX reservation.

Subsequently Chairman Lugan and Senator Helms proposed a package of eight separate conditions, including the article IX reservation supported by the Administration. In offering the package, Chairman Lugar informed the Committee that he would not request floor time or support Senate approval of the Convention without these eight provisions.

On May 21, 1985 the Committee unanimously approved four Lugar-Helms conditions that are similar or identical to the provisions previously recommended by the Committee and the Administration. The full package of eight conditions proposed by Senators Lugar and Helms was narrowly adopted by a vote of 9-8. An amendment offered by Senator Dodd to modify the effect of the article IX reservation was defeated by a vote of 8-9. The Committee then voted 10-0 with seven Senators voting present to report the Convention favorably to the Senate

* For the reader's interest, the *Journal* has reproduced *Additional Views of Senators Pell, Biden, Sarbanes, Cranston, Mathias, Dodd, Eagleton, and Kerry* in SEN. COMM. ON FOR. RELS., GENOCIDE CONVENTION, S. REP. NO. 2, 99th Cong. 1st. Sess. 28-33 (1985).

subject to the Lugar-Helms package of two reservations, five understandings, and one declaration.

We believe the Committee has made a mistake in adopting conditions that would seriously compromise our ratification of the Genocide Convention. While several provisions in the new package merely restate understandings recommended by the Committee in 1970, 1971, 1973, 1976, and 1984, the package as a whole taints the political and moral prestige that the United States would otherwise gain by ratification of this landmark in international law. The reservations dealing with article IX and the U.S. Constitution are epecially unwise from the standpoint of policy and precedent, and they completely remove the practicial advantages in the advancement of human rights that will be gained by ratification without crippling reservations. We will press vigorously for the deletion of these two reservations when the Genocide Convention is considered by the full Senate.

ARTICLE IX: THE INTERNATIONAL COURT OF JUSTICE

The significance of the Genocide Convention lies in the fact that it forms part of a network of treaties which declare certain actions to be international crimes, justifying concerted action by the world community to bring the perpetrators to trail. A practical benefit of ratification would be the opportunity for the United States to advance its human rights policies by invoking article IX of the Convention to bring charges against foreign governments who fail to uphold their responsibility to prevent and punish instances of genocide. If the United States itself reserves authority under article IX, our ratification of the Convention becomes a purely symbolic gesture lacking the substance which would enable us to use the Convention as a valuable weapon for the advancement of human rights throughout the world.

If we adopt an article IX reservation, the international law doctrine of reciprocity would enable another country to assert our reservation against us, effectively blocking the United States from ever bringing charges in the World Court against countries that have failed to punish instances of genocide. (Conversely, the fact that nineteen nations, nearly all Communist-bloc countries, have themselves adopted article IX reservations would enable the U.S. to invoke these reservations as a check against baseless charges in the Court).

The proponents of an article IX reservation contend that without such a reservation the United States would be subject to trivial or baseless charges before the World Court. In fact there is nothing to prevent such charges from being brought before the World Court by any nation regardless of whether the court had jurisdiction and regardless of the merits of the charge. In response to a question submitted by Senator Pell

at the March 5 hearing the Administration stated that "there is nothing to prevent unfriendly nations which have accepted the compulsory jurisdiction of the World Court from attempting to bring trivial or frivolous charges in the Court." An article IX reservation is not a safeguard against baseless propaganda.

For the United States to reserve authority under article IX suggests that we are seriously concerned about the validity of charges which unfriendly nations might attempt to assert in the World Court. Instead of defensively embracing a shield that to date has largely been adopted only by countries that may well have reason to fear charges of genocide, the United States should take the initiative in identifying the perpetrators of genocide and bringing them to account under international law.

Finally, if we proceed to ratify the Genocide Convention with an article IX reservation, we can anticipate that some of our closest allies will condemn our action and may even refuse to recognize our ratification. A U.S. reservation to article IX would be circulated to all nations that have previously ratified the Genocide Convention. If any nation wished to object, it would be entitled to do so; the legal effect of the objection depends upon the statement of the objecting party. For example, the Netherlands has objected to article IX reservations as "incompatible with the object and purpose of the Genocide Convention." Moreover, the Netherlands has taken the position that it does not deem any state making such a reservation to be a party to the Convention. The United Kingdom has similarly stated that a reservation to article IX "is not the king of reservation which intending parties to the Convention have the right to make." Australia, Belgium, Brazil, and Ecuador have also formally objected to article IX reservations.

Only nine months ago the Adminstration testified before the Committee and made these same arguments in opposing an article IX reservation offered at that time by Senator Helms. Davis R. Robinson, then Legal Advisor to the State Department, noted that the United States is a party to more than eighty multilateral and bilateral treaties and other international agreements with dispute resolution clauses similar to article IX of the Genocide Convention. No concerns were raised by the Administration last September about the International Court of Justice, despite the fact that the Nicaragua case—later cited as the major reason for the reversal on article IX—had been before the Court for several months and a preliminary decision on the question of jurisdiction had been issued in May, 1984 (the preliminary decision rejected the U.S. arguments on jurisdiction and largely conformed with the final decision issued last November).

We reject the notion that the Court's decision in the Nicaragua case, or any other individual case for that matter, should form the basis for the United States to follow the lead of Communist-bloc nations in deciding

when we will agree to participate in ICJ proceedings. As a nation committed to the rule of the law and to the advancement of human rights, we have no need to erect artificial barriers against baseless propaganda charges. In opposing the proposed article IX reservation at the March 5 hearing, John C. Shephard, the President of the American Bar Association, urged the Committee to "join our allies in rejecting such a reservation as a flimsy crutch for a totalitarian regime." We concur with this view and will urge the Senate to delete the article IX reservation when the Genocide Convention is brought to the floor.

U.S. CONSTITUTION

As reported by the Committee, the resolution of ratification is further undermined by a reservation asserting that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The Genocide Convention has been the subject of thirty-six years of detailed legal analysis by numerous authorities. We do not believe there is any credible contention that the Genocide Convention is in conflict, or could be in conflict, with the U.S. Constitition. The Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid v. Covert*, 354 U.S. 1, (1957). In 1970, then Assistant Attorney General William H. Rehnquist testified that "there are no constitutional obstacles to U.S. ratification of the treaty." The rights of American citizens, he stated, would be fully protected under the Convention "because the Constitution is superior to a treaty no matter how interpreted." This position was fully reaffirmed by the Reagan Administration at hearings held by the Committee on Foreign Relations in September, 1984 and March, 1985.

The purpose of a state in asserting a reservation is to establish the limits of the obligations that are accepted by the reserving state in the treaty contract. The reservation adopted by the Committee in effect says that we ratify the Genocide Convention only insofar as we find no violation of our Constitution in the future. This kind of self-judging reservation is inconsistent with the rationale behind the international law doctrine that a state, once having ratified a treaty, may not invoke provisions in its Constitution or domestic law as an excuse for failure to perform its duties under the treaty contract. The lack of certitude as to our treaty obligation that is suggested by the reservation is contrary to treaty practice as well as disturbing to our allies who have undertaken an unqualified acceptance of the treaty's obligations.

Equally dangerous is the precedent this reservation creates regarding the treaty obligations of other states. The adoption of this kind of

self-judging reservation, particularly by other nations that can easily change their constitutions, would create major problems for the United States in enforcing treaty obligations that where it is very much in our interest to hold these nations to their treaty commitments.

This reservation, like the reservation to article IX, will seriously compromise the political and moral prestige the United States can otherwise attain in the world community by unqualified ratification of the Genocide Convention. It will hand our adversaries a propaganda tool to use against the United States and invite other nations to attach similar self-judging reservations that could be used to undermine treaty commitments. For these reasons we urge our colleagues in the Senate to delete this reservation from the resolution of ratification.

OTHER PROVISIONS

Of the remaining provisions in the package, three are essentially identical to those previously recommended by the Committee: the understandings regarding "intent" and "mental harm" and the declaration concerning implementing legislation. The Committee previously has recommended an understanding regarding the right of a state to bring to trial before its own tribunals any of its nationals for acts committed outside the state. To this provision the Committee has added new language stating that the pledge to grant extradition in accordance with a state's laws and treaties (article VII of the Convention) extends only to "acts which would be criminal under the laws of both the requesting and the requested state." This language is modeled on the principle of dual criminality as stated in extradition treaties recently concluded by the United States. Of course, the Genocide Convention, once ratified by the U.S., would not by itself require the extradition of any of our citizens. Once implementing legislation defining and punishing the crime of genocide is enacted, existing extradition treaties not patterned on the standard of dual criminality would have to be specifically amended to encompass the crime of genocide. While superfluous, we do not regard this understanding as harmful to current extradition practice.

A new understanding has been added stating that "acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention." Since it is obvious that any act committed without the specific intent required by article II is not sufficient to constitute genocide, a question arises as to what the United States is really seeking to accomplish by attaching this understanding. The language suggests that the United States fears it has something to hide. Moreover, the relatively imprecise definition "armed conflicts" in international law is an invitation to problems and will almost certainly draw adverse comments from

other nations trying to figure out what the language is intended to do. To call attention to our fears about being brought to account for acts committed in armed conflicts is really an embarrassment to the United States and should have no place in our ratification of the Genocide Convention.

Another new understanding states that "with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal by a treaty entered into specifically for that purpose with the advice and consent of the Senate." The idea of an international penal tribunal is truly a "dead letter" and had not received serious consideration by the United Nations in over thirty years because of the obvious problems of sovereignty and due process inherent in such a proposal. Moreover, it has always been the Committee's belief as well as the view of successive Administrations that in the unlikely event that a penal tribunal is established, a separate treaty would be required before the United States could accept its jurisdiction. Finally, it is very unclear whether this provision would have any legally binding effect on the action of future Presidents and Congresses. In our view it has no more binding authority than a "sense of the Senate" resolution.

CONCLUSION

Last October, faced with the prospect of a filibuster in the waning hours of the 98th Congress, the Senate, by a vote of 87-2, passed S. Res. 478, expressing support for the principles contained in the Genocide Convention and declaring its intention to act expeditiously in the first session of the 99th Congress. Consistent with that resolution, we believe the full Senate should be given the opportunity at the earliest possible time to give its advice and consent to the Genocide Convention. Prompt U.S. ratification, especially in this fortieth anniversary year of the liberation of the Nazi death camps, will enormously enhance the Convention's value as an instrument to fight human rights abuses around the world. That value should not be tarnished by reservations which compromise the meaning and obligations inherent in the Genocide Convention.

We urge our colleagues to ensure that the United States lends its undiluted support to the legal and moral authority of the Convention by rejecting the conditions adopted by the Committee on Foreign Relations and replacing them with the three understandings and one declaration that have been previously recommended by the Committee. These provisions are sufficient to clarify our Constitutional concerns and, unlike the conditions adopted by the Committee, are in harmony with the legal and moral treaty obligation that has been undertaken by our allies throughout the world.