

# The Potential for United States Adoption of the Genocide Convention and the Convention against Torture

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It is a great pleasure to be here, and I want to congratulate the organizers of the conference for what has already proven to be a very thorough, successful, and comprehensive roundtable. Much of what I had intended to say has already been covered in some detail. I thus think the most useful role I can play at this point is to put my prepared remarks aside and make a few comments in response to those which have already been made, and to tell you what has been happening recently with respect to the Genocide and Torture Conventions.

Let me say at the outset that I do not appear today to present an Administration position on the question whether the International Covenants (or other pending conventions) ought to be given priority after the Torture Convention has received Senate advice and consent to ratification. The current Administration strongly supports the Torture Convention and has actively been devoting its efforts to obtaining the Senate's approval. When the process of obtaining a favorable report from the Foreign Relations Committee and a favorable vote from the full Senate is over, and I am hopeful it will be soon, then the time will come for the Administration to take a position on the other treaties. It has not yet done so, and consequently my comments on the issue today are purely personal and do not necessarily reflect the views of the Department of State or the United States Government.

Nonetheless, it is altogether timely to renew the discussion about ratifying additional human rights treaties. The debate over the five conventions and covenants submitted by the Carter Administration occurred a little more than a decade ago and took place against a different backdrop in terms of human rights and administration policy. New legislation requiring a human rights component in our foreign policy had only recently been adopted. The policies reflected in that legislation were also relatively new and had not yet become

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fully rooted. They have now, and by comparison I do not think that one can say today that human rights concerns are not an integral part of American foreign policy. In the State Department they are institutionalized in the Bureau of Human Rights and Humanitarian Affairs, which coordinates issues on an inter-agency basis and each year produces for the combined Congressional foreign affairs committees the annual Country Reports on Human Rights Practices (in accordance with sections 116(d) and 502(B) of the Foreign Assistance Act of 1961, as amended). Those of you who are seriously involved in human rights issues certainly should have this document on the shelf. Just the fact that the State Department produces, on an annual basis, critiques of other countries in terms of human rights practices and performances is a substantial difference from the situation that obtained when the discussion over ratifying the treaties first started.

In my own view, the reasons for ratifying human rights treaties are, if anything, more compelling today than they were a decade ago. The case was ably made during the 1979 hearings that ratification was clearly in the national interest, both in terms of our domestic system of democratic values and in terms of United States foreign policy.<sup>1</sup> Concrete evidence of our support for and observance of human rights remains an important element of our leadership in the international community. Our continued non-adherence to the major multilateral human rights treaties prejudices that leadership; it undermines our credibility in international fora; it weakens our ability to participate in the development of international human rights law and mechanisms. Not only are we exposed to a charge of double standards, but our non-participation has an adverse effect on the actions of other countries, especially those whose commitment to human rights may not be as strong as ours from the outset.

Our international commitment to human rights and to the rule of law ought to be even stronger and more visible today than it was ten years ago. The breath-taking changes that have recently occurred in Eastern Europe and the Soviet Union provide an unparalleled opportunity for the advancement of democratic values and institutions. Fostering renewed respect for human rights, and the effective implementation of human rights mechanisms domestically as well as internationally, ought to be at the top of our agenda.

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<sup>1</sup> See Hearings on International Human Rights Treaties before the Senate Committee on Foreign Relations, 96th Congress, 1st Session, on Exec. C, D, E, and F, 95-2 - Four Treaties Relating to Human Rights, November 14, 15, 16, and 19, 1979.

At the same time, one has to acknowledge the difficult political situation that surrounds the issue of ratifying human rights treaties as a domestic matter. Mention has already been made of the problems which arose historically in connection with the negotiation of the International Covenants, leading to the so-called Bricker Amendment and the 1953 Dulles compact. That reticence continues today in some Senate quarters, and is one reason it took nearly forty years for the United States to become party to the Genocide Convention. However "inconceivable" it may seem to some that the United States has not yet become party to the International Covenant on Civil and Political Rights, there are others who do not view its ratification as a positive step. It is simply a fact that there are strong feelings in the Senate about legislating on domestic matters by treaty, about the scope of the treaty power and its effect on federal-state relationships, and—even today—about whether human rights are a proper object for the exercise of the treaty power.

Some have described this aversion to ratifying human rights treaties as "hypocritical paranoia" and "know nothing arrogance." In my judgment, such labels misapprehend the nature of the opposition and do not meaningfully advance the discussion of the serious underlying issues. Personally, I agree with those who find no constitutional objections to ratification of human rights treaties in general. And I think the reluctance to join the multilateral human rights mechanisms reflects a certain parochialism when it comes to international law, an unfortunate disinclination to subject our system to international scrutiny or to open it to the benefits of other systems. But the fact remains that, as a practical matter, one must deal with Senator Bricker's legacy in this area. The issues are not of first impression and are not analyzed solely on the merits or demerits of the particular treaty provisions.

Let me amplify the point with some additional information about the Genocide Convention. It has already been noted that one result of the Bricker controversy in the late 1940's and early 1950's was that negotiation of the Covenants went ahead without United States participation; consequently, United States ratification of the Covenants has become problematic. It has also been pointed out, I believe properly, that obtaining advice and consent to ratification of the 1948 Genocide Convention was a necessary political prerequisite to proceeding with any other of the human rights treaties. As you know, advice and consent was finally given in 1986, subject to two reservations, five understandings and one declaration—most of which were

necessary to obtain the agreement of those Senators of the Bricker persuasion.

The sole declaration contained an undertaking not to deposit the instrument of ratification until after the implementing legislation referred to in Article V of the Convention had been adopted. This, of course, responded to the concern that treaties should not become law directly but should only have effect through a specific act of Congress. The necessary legislation was in fact approved in 1988<sup>2</sup> and the instrument was adopted, so that the Convention is in force for the United States. The understandings concerned various definitional matters, the pledge to grant extradition, and the international penal tribunal referred to in Article IV.

For present purposes, the reservations are the more important. The first reservation concerned the jurisdiction of the International Court of Justice (ICJ) under Article IX of the Convention and stated that the specific consent of the United States is required in each case before a dispute can be submitted to the Court. The second reservation, the "sovereignty" or "son of Bricker" reservation, provided that "nothing in this 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."

Since United States ratification, both reservations have been the subject of objections filed with the United Nations depositary by a number of countries, primarily our Western European allies. This is a fairly recent development, the implications of which we are still considering. First, with respect to the ICJ reservation, some countries have consistently been unable to accept reservations of this nature; this is a well-known point of difference between our governments. As you may know, United States policy toward the Court at the moment is not to accept compulsory jurisdiction. Indeed, in the context of treaty negotiations, we always have to strive for a provision in the treaty itself which permits us to "opt out" of the Court's jurisdiction. Provisions like that are found in a number of recent multilateral conventions. A number of countries are not happy about it, and some on the Hill are not happy about it, but it is our policy.

Most significantly, countries have objected to the second reservation on the grounds that it creates uncertainty over the extent of the obligations which the United States is prepared to assume under the

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<sup>2</sup> See Pub. L. 100-606, Nov. 4, 1988, 102 Stat. 3045, the *Genocide Convention Implementation Act of 1987*.

Convention. Their basic contention is that it is impossible for other countries to know whether any provision in the Convention in fact requires unconstitutional legislation or other action. Consequently, they cannot judge the effect of the reservation on United States obligations under the Convention, nor can they rely on our apparent acceptance of those obligations if, at some future time, we might invoke our Constitution to avoid them.

As one previous speaker has said, the reservation itself is in the nature of a tautology. Nothing in the Convention does or properly could authorize or require legislation or other action which is unconstitutional. The point has also been made earlier today that the Constitution is the supreme law of the land and necessarily binds the Government; neither a treaty nor an executive agreement can authorize action inconsistent with it. This was unambiguously established by the Supreme Court in *Reid v. Covert*.<sup>3</sup> However, during Senate consideration, some concern was expressed over the possibility that the incitement provision in Article III might infringe on the exercise of free speech.<sup>4</sup> Recognizing explicitly the "no treaty can override or conflict with the Constitution,"<sup>5</sup> the Committee nonetheless felt a "Constitutional reservation" was appropriate given the "unique" nature of the Convention "in that it touches upon such fundamental matters as the relationship between criminal law and the right of free speech."

One might argue that a narrower, more focused reservation addressed only to the incitement provision itself would have been adequate and more appropriate than the broader, open-ended "sovereignty reservation" that was in fact adopted and potentially covers the entire Convention. From the international perspective, however, the issue is less the breadth of the reservation than the perception that the United States is claiming the right to invoke its domestic law to defeat its international obligations. Indeed, a majority of the states objecting to the reservation did so precisely on this ground, that a state may not invoke its national law, including its constitution, to justify its failure to carry out its obligations under the Convention.

The effect of these objections is important and is the reason why they are of particular concern. Under contemporary international law,

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<sup>3</sup> 354 U.S. 1 (1957).

<sup>4</sup> See, e.g., Exec. Rep. 99-2, Report of the Senate Committee on Foreign Relations on the Genocide Convention, July 18, 1985, at 19-21.

<sup>5</sup> *Id.* at 20.

an objection to a reservation to a multilateral treaty does not generally preclude the treaty relationship between the reserving and objecting parties, but does eliminate from the relationship those provisions covered by the objection and reservation. Thus, if the reservation had been directed specifically to the incitement provision, an objection would have nullified the treaty relationship only with respect to that provision. However, the "sovereignty" reservation attaches to the entire Convention, so that the objections leave the overall extent of legal obligations under the Convention unclear as between the objectors and ourselves. Moreover, the "sovereignty" reservation is available to all other treaty partners on a reciprocal basis, so that our ability to invoke treaty rights against them would be subject to invocation of their constitutions and, perhaps, other provisions of their domestic law. Finally, there is concern that other countries may follow the United States lead in conditioning their acceptance of the Convention upon their constitutions or internal law. Beyond signalling an ambiguous commitment on the part of the United States, it is argued, the reservation encourages other to hedge their international undertakings too, thus effectively nullifying the entire object and purpose of the Convention itself.

The damage, unfortunately, is not limited to the Genocide Convention, since the "sovereignty" provision has subsequently been attached (as an understanding) to various bilateral mutual legal assistance treaties (or "MLATs") as well as to the recently adopted United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>6</sup> At the recent hearing on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Senator Helms indicated his intent to attach a "sovereignty" reservation to that treaty as well.

Let me turn for a few moments to the current status of the Torture Convention, since the outcome of Senate consideration of this multilateral treaty will necessarily affect the decision on which covenants or conventions are pursued next and how they ought to be approached. As you know, the United States was actively involved in the negotiation of this Convention, which was adopted by the United Nations General Assembly in 1984. After extensive internal debate, the Reagan Administration signed and submitted the Torture Convention to the

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<sup>6</sup> See Exec. Rep. 101-15, Report of the Senate Committee on Foreign Relations on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Nov. 14, 1989.

Senate in May, 1988, together with a rather extensive "package" of proposed reservations, understandings, and declarations modeled to some extent on the provisos which had been proposed with respect to the International Covenants and those which had been attached to the Genocide Convention. That "package" met with substantial opposition from human rights groups and other interested parties, both as to its overall length and breadth and with respect to the specific understandings concerning the definition of torture.

At the request of the Chairman of the Senate Foreign Relations Committee, the Department agreed to review the original package to see if we could meet the most substantial criticisms and concerns voiced on the Hill, by the human rights organizations, and by members of the bar. As a result of this review, it was decided, in conjunction with the Departments of Justice and Defense, to make a number of revisions, to withdraw some of the proposals, and to offer a few new ones.

I will not take time this afternoon to go into the details, except to note that the more important changes included (a) accepting participation in the Committee Against Torture, as well as the Committee's competence to consider state-to-state complaints under Art. 21 (but not those brought by individuals under Art. 22), and (b) a modification to the understanding concerning the definition of torture specifying that to constitute torture an act must be specifically intended to inflict severe physical or mental pain and suffering, which we believe does not unduly raise the Convention threshold but at the same time is precise enough to meet constitutional requirements for a criminal statute.

We have also upgraded to a reservation the proposed understanding to Article 16, which would limit our obligation to prevent "cruel, inhuman or degrading treatment or punishment" to the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. The point is to underscore the possibility of a divergence between our courts' interpretation of those words as a constitutional matter and the interpretation that could be given to them by other tribunals, for example, the European Court of Human Rights in Strasbourg.

The concern here is not academic but is motivated in part by the recent decision of that court in the *Soering* case.<sup>7</sup> As you are probably

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<sup>7</sup> See *Soering Case*, 161 Eur. Ct. H.R. (ser. A) (1989).

aware, Jens Soering was accused of the particularly brutal murder of his girlfriend's parents in Virginia, evidently acting at the girlfriend's instigation. Both fled to England, where our law enforcement authorities located them and requested their extradition. She waived extradition, returned, pled guilty and received a very substantial sentence. He, instead, resisted extradition on the grounds that if convicted he would be subject to the death penalty in Virginia and, because our system provides for multiple appeals, he faced the prospect of spending many years on death row never quite knowing if the sentence was going to be carried out or not. While not holding the death penalty unlawful, the European Court of Human Rights did find that under the circumstances, in the face of the so-called "death row syndrome," his extradition to Virginia on capital felony charges would constitute a violation of his rights under Article 3 of the European Convention on Human Rights. That article, of course, concerns inhuman or degrading treatment or punishment, substantially the same formulation found in the Torture Convention.

In light of this decision, it seems appropriate for the United States to state that we will adhere to Article 16 only to the extent that it implicates the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments. This is, by comparison to the "sovereignty reservation," a more limited and precise approach based on specific concerns that ought not be objectionable to the international community.

Thus far, the Administration has said that it opposes adoption of a more general "sovereignty reservation" to the Torture Convention. The revised package does include a proposed declaration that Articles 1 to 16 of the Convention are not self-executing, a federal-state reservation, and a reservation to compulsory ICJ jurisdiction, together with a number of more technical understandings concerning the terms and definitions used in the Convention. In my own view, the revised package is an improvement, but it is not certain to be accepted by the Senate.

Finally, let me call your attention to the *Verdugo-Urquidez*<sup>8</sup> decision handed down last week by the Supreme Court. The decision purports to limit the extraterritorial application of the Constitution to aliens, more particularly in the context of the application of the Fourth Amendment to the search and seizure of an alien's property abroad

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<sup>8</sup> See *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990).

at the request and with the participation of United States law enforcement authorities. The case involved an alleged drug trafficker, a "kingpin" accused and subsequently convicted of complicity in the torture-murder of Kiki Camareno, the Drug Enforcement Agency (DEA) agent whose death is still very much an issue in our law-enforcement circles and whose murderers have not yet been brought to justice. At the request of the DEA, which obtained a United States arrest warrant, Mr. Verdugo was apprehended by the Mexican police and delivered into United States hands. Our law recognizes jurisdiction in such circumstances under the *Ker-Frisbee* doctrine,<sup>9</sup> although subsequently the Mexican policemen were accused of kidnapping.

After Mr. Verdugo was in United States custody, the DEA sought to obtain evidence from his Mexican residence. They approached the proper Mexican authorities to conduct the search and seizure with United States participation; that search was admittedly lawful under Mexican law. The DEA did not, however, ask the United States court with jurisdiction, before which Verdugo had been arraigned, for a search-and-seizure warrant. When the prosecutor sought to introduce the evidence obtained in the Mexican searches, the District Court suppressed it, holding that the Fourth Amendment applied but had not been satisfied, since no warrant had been issued and even if one had been obtained, the manner in which the search and seizure was carried out would have been unlawful. Admittedly, however, any warrant issued by the Court would not have had effect in Mexico.

The Court of Appeals affirmed with a lengthy discussion of the extraterritorial reach of the Constitution, essentially relying on the doctrines enunciated by *Reid v. Covert*,<sup>10</sup> that the Fifth and Sixth Amendments apply to the prosecution of United States citizens overseas by the United States Government, and by the *INS v. Lopez-Mendoza*<sup>11</sup> case, which held that illegal aliens in the United States have rights under the Fourth Amendment. By parity of reasoning, the Court said, the Fourth Amendment must apply to search and seizure of an alien's property overseas even where it was lawful under the applicable foreign law. The Court noted that it would be odd indeed to acknowledge that the respondent was entitled to trial-related rights under the Fifth and Sixth Amendments but not under the Fourth Amendment.

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<sup>9</sup> See *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519, *reh'g denied*, 343 U.S. 937 (1952).

<sup>10</sup> 354 U.S. 1 (1957).

<sup>11</sup> 468 U.S. 1032 (1984).

The Supreme Court disagreed, however, six to three. The plurality opinion by Chief Justice Rehnquist held that the Fourth Amendment does not apply to searches and seizures by United States agents of property located abroad which are owned by a non-resident alien, even when that alien is in United States custody facing criminal prosecution. The Court noted that any Fourth Amendment violation occurred solely in Mexico, at the time of the search and seizure; it distinguished Fourth Amendment rights from those arising under the Fifth and Sixth Amendments, including their applicability to citizens as opposed to aliens; and it noted that the Framers did not intend the Fourth Amendment to apply abroad. Finally, the Court said that the rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches and seizures" involving our national interest; any restrictions on such activities must be imposed by the political branches through diplomatic understanding, treaty, or legislation. There are strong dissents from Justices Brennan, Marshall, and Blackmun.