Congress and Genocide: They're not Going to Get Away with It

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Today at least, it is generally recognized that genocide is a crimen contra omnes, a crime under customary international law1 over which

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Genocide is now recognizably part of the broader category of "crimes against humanity," a concept that has an early history. For example, during the 1915 massacres of Armenians by Turks, the governments of Great Britain, France and Russia condemned the massacres as "crimes against humanity and civilization." See R. Wright, History of the United Nations War Crimes Commission 35 (1948). Later, a former U.S. Secretary of State wrote that the slave trade had become "a crime against humanity." See Lansing, Notes on World Sovereignty, 15 Am. J. Int'l L. 13, 25 (1921). The same phrase had also been used in connection with the slave trade as early as 1874. See 3 Orations and Addresses of George William Curtis 208 (C. Norton ed. 1894).

Those who argue against the existence of the crime of genocide often stress the fact that several violations have occurred at different times in human history, as if mere violations of a customary norm prove its nonexistence. What must also be measured, however, are patterns of practice in compliance (which are far more numerous) and relevant patterns of legal expectation or opinio juris. Even among law-violators patterns of expectation may well be that the conduct engaged in is unlawful. Additionally, among the many more who refrain from committing acts of genocide there may well be concomitant patterns of expectation that genocide is proscribed.
there is universal enforcement jurisdiction and responsibility.\textsuperscript{2} Indeed, it is commonly expected that the prohibition of genocide is a peremptory norm of customary international law, a \textit{jus cogens} allowing no form of derogation under domestic or treaty-based law.\textsuperscript{3} It is also

Among the best evidences of such patterns of expectation are official pronouncements (international, regional and domestic) and the views of textwriters when addressing the proscription generally or responding to particular violations, and these patterns reveal a nearly uniform condemnation of genocide. Obviously, the names documented in this footnote and their great number are useful for that very purpose. Additionally, no state has formally claimed the right to commit acts of genocide, at least since the Nazi regime in Germany.


3. See, e.g., \textsc{Restatement}, \textit{supra} note 1, § 702, comment n and reporters' note 11; A. Cassese, \textit{International Law in a Divided World} 179 (1986); L. Chen, \textit{supra} note 2, at 213-16; L. Henkin, R. Pugh, O. Schachter, H. Smit, \textit{supra} note 1, at 468, 470, 548 n.4; \textsc{Encyclopaedic Dictionary of International Law} 146 (C. Parry & J. Grant eds. 1986); Alexidine, \textit{Legal Nature of Jus Cogens in Contemporary International Law}, 172 \textsc{Recueil des Cours} 219, 262 (1981); de Arechaga, \textit{International Law in the Past Third of a Century}, 159 \textsc{Recueil des Cours} 1, 64 (1978); Beres, \textit{Politics, supra} note 1, at 330; Beres, \textit{Prevention, supra} note 1, at 54; Domb, \textit{Jus Cogens and Human Rights}, 6 Israel Y.B. Hum. Rts. 104, 113, 117-18 (1976); Edwards, \textit{Contributions of the Genocide Convention to the Development of International Law}, 8
commonly understood that the definition of genocide contained in the Convention on the Prevention and Punishment of the Crime of Geno-


More generally on human rights and jus cogens, see M. McDougal, H. Lasswell, L. Chen, supra note 1, at 274, 325-28, 338-50, and references cited. As early as 1867, Johann Bluntschli had written that "treaties the contents of which violate the generally recognized human right . . . are invalid." J. Bluntschli, Modern Law of Nations of Civilized States (1867), quoted in M. McDougal, H. Lasswell & L. Chen, supra note 1, at 341.
cidedefines that which is prohibited by customary *jus cogens*.5

Nonetheless, during a remarkable effort in the United States Senate to gain advice and consent to ratification of the Genocide Convention, attempts were made openly either to kill U.S. ratification of the treaty or to gut the treaty of any meaningful effect. As Senator Jesse Helms admitted, for example, his “chief object” was to “protect” the United States “from interference by an international regime of law.”6 Further, while providing its advice and consent in 1986, the Senate retained what had been a Lugar-Helms-Hatch proviso that ratification be conditioned by an “understanding” which seeks to redefine genocide in a manner substantially at odds with the Convention and thus also with customary *jus cogens*. It is evident, however, that the apparent attempt to limit substantially the terms and applicability of the Genocide Convention is impermissible and comes too late. First, the attempted “understanding” is fundamentally incompatible with the object and purpose of the treaty and will thereby be legally unacceptable. Second, the attempt to redefine genocide in such a radical manner has been obviated by the development of a customary international

4. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The definition is found in Article II of the Convention. The phrase “or in part” contained therein was also used in the historic 1946 U.N. resolution on genocide, a resolution also recognizing that genocide “is a crime under international law.” G.A. Res. 96 (I), 1 U.N. GAOR, U.N. Doc. A/64/Add. 1, at 188-89 (1947). No other definition is accepted as such in any General Assembly or Security Council resolution or I.C.J. decision prior or subsequent to the adoption of the Convention.


law independent of a long, abnegative effort of the Senate to allow the
United States to participate in the treaty process.

Part of the radical effort to gut the Convention of any functional
criminal effect hinged upon a blatant attempt to unilaterally rewrite
article II of the Convention. In particular, the treaty phrase “with
intent to destroy, in whole or in part,” appears in the Senate’s 1986
“understanding” as “[with] the specific intent to destroy, in whole or
in substantial part . . .” 7 The phrase “specific intent” actually is ap-
propriate under the circumstances, 8 but the threshold element of the
crime of genocide would be shifted by the last portion of such lan-
guage from the treaty’s lower threshold of intent to destroy a relevant
group 9 “in part” to the Senate’s nearly impossible threshold of intent
to destroy a relevant group “in substantial part.”

One can imagine the type of defenses that the Senate’s “under-
standing” might permit. For example, is a nuclear incineration of all
of the Jews in and around the state of Israel to be excused under such
an “understanding” merely because a “substantial part” of the Jews of
the world were not targeted? If Hitler himself had been prosecuted
under the Senate’s present version, a defense to what the world knows
as acts of genocide might have been: “Yes, I attempted to exterminate
Jews as such and thousands, even millions, of Jews, but I
never had the specific intent to destroy a ‘substantial’ part of such a group, nor
could I or my followers have done so — we never had control of even

added) [hereinafter Proviso II]. Such had been part of the Lugar-Helms-Hatch proviso; see also
Counterpoint, 18 Case W. Res. J. Int’l L. 277, 277-78 (1986); LeBlanc, supra note 6, at 280;
After 37 Years, Senate Ratifies Genocide Ban, Wash. Post, Feb. 20, 1986, at A27, col. 1. For apt
criticism of such an attempt to rewrite the Convention, see Schiller, Life in a Symbolic Universe:
Comments on the Genocide Convention and International Law, 9 Sw. U.L. Rev. 47, 85-66
(1977); U.S. & the 1948 Convention, supra note 1, at 691-93. Previously, the phrase “as to affect
a substantial part” was being considered in the Senate. See Edwards, supra note 3, at 312 n.72
(emphasis added). But such a qualification was obviously redundant.

Apparently, the “substantial part” threshold was not applied subsequently by the Senate
when condemning Iraq for using poison gas against some of the Kurds within Iraqi territory and
calling such acts ones of “genocide.” See Senate OKs Sanctions on Iraqis, Hous. Post, Sept. 10,
S15,425 (1988) (§ 102(a)(1)-(3) (only four of twenty million Kurds in Iraq)); see also id. at
S15,427 (statement of Sen. Helms: it is a “crime against humanity”). Similarly, the Senate could
not have applied the more difficult threshold of “destruction of the group as a viable entity.” See
infra text accompanying note 18. Nor did Congress appear to do so in 1978 in response to tribal

8. See, e.g., M. Bassiony, supra note 1, at 143; Clark, Does the Genocide Convention Go Far
Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of East Timor, 8

9. The convention describes a relevant group as “a national, ethnic, racial or religious
group. . . .” Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9,
half the Jews of the world.” Or take the putative defense of a member of the KKK in the United States: “Sure, I intended to exterminate as many blacks as I could get my sights on, but I never had more than 2,000 in my gun sights and never had the intent to destroy a ‘substantial’ part of such a group, nor could I physically do so.” Even nationwide conspirators in the KKK, each responsible for the known acts of co-conspirators, might defend: “We never intended to kill more than six million blacks and thus never intended to kill a ‘substantial’ part of the blacks in the U.S., much less in the world.” It is evident, therefore, that U.S. prosecutors (under the Senate’s present “understanding”) would have a nearly impossible burden in proving an intent to destroy a relevant group “in substantial part.” When half the persons within a large group were not even targeted by an accused, how could a prosecuting attorney prove that there was an intent to destroy a “substantial part” of such a group? Even if the phrase “substantial part” could theoretically include just more than one third, one fourth, or ten percent, why would we want such threshold quotas set against what the world still knows as acts of genocide? The significant evil involved (and the fundamental difference between murder and genocide) hinges not upon percentages of group extermination, but upon the singling out of victims of a certain group because they are members of such a group — the targeting of members of a group as such.10

10. Cf. F. Boyle, supra note 1, at 259-60; see generally R. Falk, supra note 5, at 23-24; Falk, Six Legal Dimensions of the United States Involvement in the Vietnam War, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 216, 252 n.5 (R. Falk ed. 1969); R. Lemkin, AXIS RULE IN OCCUPIED EUROPE 79 (1944); L. Sohn & T. Buergenthal, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 931-32 (1973); Edwards, supra note 3, at 302; Friedlander, supra note 1, at 270 & nn.14-15; Hannum, Cambodian Genocide, supra note 1, at 102-03, 108, 111; LeBlanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, 78 AM. J. INT’L L. 369, 371 (1984); Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. INT’L L. J. 1, 11, 40 (1985); Reisman, Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination, 1 DEN. J. INT’L L. & POLICY 29 (1971); Schiller, supra note 7, at 65; U.S. & the 1948 Convention, supra note 1, at 691-93; Study on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/416 at 14-15 (1978) (and “partial destruction” is “sufficient”); The Genocide Convention Implementation Act of 1988: Report of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 4 (1988) (statement of Sen. Proxmire) [hereinafter 1988 Report of the Senate Comm. on the Judiciary]; Genocide Convention: Hearing Before a Subcomm. of the Comm. on Foreign Relations, 92d Cong., 1st Sess. 55-56, 95 (1971) (statement of A. Schwepepe); see also N. Robinson, THE GENOCIDE CONVENTION: A COMMENTARY 63 (1960) (“portions of the population marked by specific racial, religious, national or ethnic features . . . . The addition of the words ‘in part’ indicates that Genocide has been committed when acts of homicide are joined with a connecting purpose, i.e., directed against persons with specific characteristics . . . . Therefore, the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group . . . . provided the number is substantial; the Convention is intended to deal with action against large numbers, not individuals . . . .”); M. Bassiouni, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 15, 21 (M. Bassiouni ed. 1986); Dinstein, supra note 1, at 212; Jorryn, supra note 1, at 443 (“group or parts of groups”); LeBlanc, supra note 6, at 289, 293; Freeman, Human
That evil is not merely against a particular group or its members. In the long run it involves an attack upon our common dignity, an attack upon us all.

The Senate also attempted to rewrite section b of article II of the treaty. The treaty prohibition of an intent to cause “serious . . . mental harm to members” of a relevant group would be changed by the present Senate “understanding” to an intent to cause “permanent impairment of mental faculties through drugs, torture or similar techniques.” Thus, it would be possible for alleged terrorists or Nazi war criminals to defend their actions with proof of the fact that intense fear or anxiety produced in the primary victims was not intended to be “permanent” but temporary. Indeed, how would prosecutors meet the even more difficult burden of proving beyond a reasonable doubt that an intent existed not merely to cause “serious” but “permanent” mental harm? It might also be alleged by an accused that specific terroristic tactics utilized did not equate with “torture or similar techniques” because the primary victims were never captured or under the control of the accused. Here again, U.S. prosecutors would be at a serious disadvantage and the object and purpose of the Convention would be needlessly thwarted.

Even more incredible was a 1987 bill in the House of Representatives designed supposedly “to implement” the Genocide Convention. A definitions portion of H.R. 807 would have redefined “substantial part” to mean “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity . . . .” How would a U.S. prosecutor prove such an element? If ninety-five percent of a group of thirty-five million men, women and children was brutally and systematically exterminated at the hands of some nation wide conspirators, would a defense be that the remaining five percent, now even more unified in its group identification and determination, was never targeted and still constitutes a viable entity? Under such a definition, must “the group as a

Rights and the Rights of Aliens, 1951 AM. SOC'Y INT'L. L. PROC. 134 (statement by Dr. Lemkin regarding the Armenians); H. TOLLEY, THE U.N. COMMISSION ON HUMAN RIGHTS 68, 177 (1987) (apartheid as genocide); 134 CONG. REC. H10,442 (1988) (statement of Rep. Mazzoli: “The key element of the crime of genocide is an act committed with genocidal intent” even against a few persons); M. BASSIOUNI, supra note 1, at 142; but see id. at 143; M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW — A DRAFT INTERNATIONAL CRIMINAL CODE 73 (1980); L. SOHN & T. BUERGENTHAL, supra, at 915 (statement of Sec. Rusk).

11. See Proviso II, supra note 7, at 2. Such a change was being considered by 1976. See Edwards, supra note 3, at 312 nn.71-72. For apt criticism of the change, see Joyner, supra note 1, at 445; Schiller, supra note 7, at 65-66; U.S. & the 1948 Convention, supra note 1, at 693-96.

viable entity” be exterminated or an intent to do so be proven beyond a reasonable doubt before genocide recognizably exists? Hitler’s defense under such a definitional scheme would have been even stronger, and so would that of any future exterminators of racial, religious, national, or ethnic groups as long as they intend to leave some “viable” portion of the group or as long as it cannot be proven that they did not. Frankly, I’ve never heard of a more ludicrous, if not egregious, effort at drafting an “Implementation Act.” There can be no doubt that adoption of the putative definition of “substantial part” in H.R. 807 would be fundamentally incompatible with the object and purpose of the Genocide Convention and leave the United States effort at meaningful adherence to the treaty and customary international law a laughable disgrace.

Equally unacceptable was a requirement in H.R. 807 that the offense either be “committed within the United States”13 or be perpetrated by a U.S. national. When the offense occurs abroad, such a requirement could leave the U.S. unable to fulfill its obligation under customary international law either to exercise universal enforcement jurisdiction or to extradite14 in a case where the U.S. is unable to extradite a foreign accused pursuant to a constitutionally required extradition treaty.15 The alternative requirement, that the alleged offender be “a national of the United States,”16 further complicates our ability to implement the Genocide Convention and customary obligations with respect to international crime while possibly leaving U.S. prosecutors unable to prosecute foreign nationals who commit acts of geno-

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13. See H.R. 807, supra note 12, at § 1091(d)(1). Apparently exempted would be acts of genocide committed on U.S. ships or aircraft outside U.S. territory, or on U.S. embassy grounds overseas. The alternative subsection is noted in infra note 16.


16. See H.R. 807, supra note 12, at § 1091(d)(2). This subsection and subsection (1) (supra note 13) some might term the Nazi exemption clauses. Functionally, regardless of purpose, they would have such an effect unless prosecution need not be based on such a federal statute. On this latter point, see infra text accompanying notes 38-48.

Additionally, such clauses can evoke an image of gross insensitivity to human suffering abroad and a seemingly arrogant self-denial of jurisdiction over foreign holocausts and other crimes against Creation. They are quite clearly out of line with other legislative efforts to establish jurisdiction over international crimes, so much so that draft H.R. 807 and S. 1851 seem to be singularly unique. For examples of other legislation allowing prosecution of any perpetrator reaching our shores, see, e.g., 49 U.S.C. § 1472(n)(1) (1976); 18 U.S.C. § 1651 (1948); 18 U.S.C. § 1583 (1948); 18 U.S.C. § 1203(b)(1)(B) (Supp. 1985); 18 U.S.C. §§ 1116(c), 1117 (1976); see also 18 U.S.C. § 2331(a)-(c); 10 U.S.C. §§ 818, 821 (1976); Paust, supra note 14, at 254.
cide against our own people abroad. What supposed political benefit exists from excepting acts of genocide committed against U.S. nationals by foreign perpetrators is difficult to imagine, but it remains as evidence of a sadly myopic, parochial effort at international criminal law enforcement. It invites criticism and would leave the United States unable to lead the effort against genocide at the start of its third century, a result that must not be allowed.

On April 14, 1988, the Senate Committee on the Judiciary completed consideration of its version of the bill and reported favorably to the full Senate. S. 1851 followed nearly lockstep the egregious portions of H.R. 807. The phrase "substantial part" was added to a draft of Section 1091(a), and in Section 1093(8) it was further redefined with the same "destruction of the group as a viable entity" threshold found in H.R. 807. It also contained the needlessly limiting phrase "permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques" in Section 1091(a)(3). Moreover, there was no change from the policy-thwarting portions of Section 1091(d) of H.R. 807, which would make it possible to prosecute under the draft legislation only if the offense is committed within the United States or the alleged offender is a U.S. national, thus still leaving uncovered acts of genocide committed against U.S. nationals and/or others abroad by non-U.S. perpetrators and thus still functioning (regardless of intent) as Nazi exemption clauses. On October 14, 1988, S.1851 was passed by the Senate without amendments. The House also passed S.1851 on October 19th without amendments, thus leaving our legislative efforts to punish all acts of genocide incomplete. President Reagan simply signed the legislation on November 4, 1988, and deposited the instrument of ratification with the United Nations on November 25th.

18. See id. at 6-8, 10-13.
19. Id. at 6, 12.
20. See id. at 5-7, 12-13.
21. See supra note 16. Enactment of such clauses might also constitute an ultimate affront to the victims of the Nazi Holocaust, the very victims whose deaths, injuries and suffering contributed to the international prohibition of genocide. Once again we would turn our backs on acts of genocide as long as they occur abroad and not directly at the hands of U.S. perpetrators. Does this "signal the U.S. Government's resolve to prevent future holocausts and to advance the cause of human rights around the world"? See 1988 Report of the Senate Comm. on the Judiciary, supra note 10, at 4 (statement of Senator Biden). Certainly not.
24. See, e.g., No to genocide, at last, Hous. Post, Nov. 8, 1988, at A16, col. 1; McLeod, supra note 2.
From the above, it is evident that the Senate's 1986 "understanding" should be changed. The present understanding would clash so seriously with the ordinary meaning of the terms of the treaty as well as its object and purpose that it could not survive a good faith, legally appropriate interpretation of the treaty. As an attempted "reservation," the Senate's "understanding" would be legally unacceptable since it is incompatible with the object and purpose of the Convention. Further, such an "understanding" cannot be legally operative in the face of a contrary *jus cogens*, which is the case here.

In my opinion, the President should have refused the present "advice and consent" of the Senate and sent the treaty back for a new "understanding." The Senate could have changed its unacceptable understanding with respect to Article II of the treaty before ratification by the President and, perhaps now, even afterward, if it is recognized that a Senate "understanding" as to a mere interpretation of a

25. With respect to such law of treaties and the proper approach to interpretation, see, e.g., Vienna Convention on the Law of Treaties, May 22, 1969, art. 31, U.N. Doc. A/CONF. 39/27, at 289 (1969), reprinted in 8 INT'L LEGAL MATERIALS 679 (1969). The Senate's 1986 "understanding" sought to add a word that simply did not exist in the text (i.e., the word "substantial")—a word, as demonstrated above, that would significantly shift the threshold and meaning of genocide beyond the patent and ordinary meaning of article II of the Convention and that would seriously thwart the object and purpose of the Convention. Such a belated attempt to rewrite the Convention and to gut the treaty of functional effect is unacceptable under the international law of treaties; see also Schiller, supra note 7, at 65-66; U.S. & the 1948 Convention, supra note 1, at 691-96, 703.

The U.S. accepts the Vienna Convention as being presumptively customary. See, e.g., RESTATEMENT, supra note 1, at 145, 147; Paust, supra note 14, at 238 n.9; cf. RESTATEMENT, supra note 1, at 196 (§ 325, comment a). Under article 31 of the Vienna Convention, one considers the "ordinary meaning" of "the terms of the treaty in their context and in light of its object and purpose." One does not add "terms" that do not exist, especially if such would change the ordinary meaning of the text and thwart the object and purpose of the treaty. Further, according to article 32, one does not resort to the "preparatory work" unless utilization of the interpretive criteria in article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." None of the article 32 thresholds apply to the "in part" phrase in article II of the Genocide Convention, so use of "preparatory work" is unnecessary if not improper. Moreover, in this case some of the "preparatory" debates are misleading or inconclusive and their use would be improper in the face of an adopted text; see also U.S. & the 1948 Convention, supra note 1, at 692 n.33 [3 U.N. GAOR C.6 (73d mtg.) at 92-97 (1948) contains some inconsistent views, some views not adopted, and is generally "not authoritative"]; More generally, the private opinions of treaty negotiators are not of legal import. See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 283 (1796) (also not bound by the opinion of negotiators).

26. See, e.g., F. BOYLE, supra note 1, at 309; Schiller, supra note 7, at 65-66; U.S. & the 1948 Convention, supra note 1, at 691-96, 703; Vienna Convention, supra note 25, art. 19(c); Reservations to the Convention on Genocide, [1951] I.C.J. 15 (Advisory Opinion of May 28); see also RESTATEMENT, supra note 1, § 313(1)(c) and reporters' note 1, § 334(3); Edwards, supra note 3, at 308; Glennon, The Senate Role in Treaty Ratification, 77 AM. J. INT'L L. 257, 263-65 & 264-65 nn.51-52 (1983).

27. See, e.g., Vienna Convention, supra note 25, arts. 53, 64; see also RESTATEMENT, supra note 1, §§ 331(2)(b), 338, comment c; Lobel, supra note 1, at 1137-38, 1141, 1148; infra note 36. 28. See also supra notes 4, 5.

treaty does not so condition its consent to ratification as to nullify ratification *post hoc* when its "understanding" and "consent" change.\(^3\) It may even be recognized that subsequent legislation, with at least two-thirds approval by the Senate, functionally (and constitutionally) could serve the same purpose, but these are partly uncharted areas of constitutional process.\(^3\)\(^1\)

In any event, Congress should pass adequate implementing legislation, dropping any reference to "substantial part" or "permanent" mental harm. In fact, Congress could pass new legislation incorporating Article II of the Genocide Convention by reference, as it has with respect to so many international crimes,\(^3\)\(^2\) and thus avoid the unacceptable thresholds and deviant definitional elements contained, for example, in H.R. 807 and S. 1851. With respect to new legislation, it would not matter whether Congress attempted to implement the treaty if it is recognized that Congress was also exercising its power under article I, section 8, clause 10 of the Constitution to define and punish "Offenses against the Law of Nations" of a customary nature evidenced in part by the definitional portions of such a treaty. Further

\(^3\)\(^0\). Cf. id. at 136; Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901) (Fuller, C.J., opinion); id. at 182-83 (Brown, J., concurring); but see RESTATEMENT, supra note 1, § 326, reporters' note 1; Glennon, supra note 26, at 261, 263; S. Res. 167, 100th Cong., 1st Sess. (1987) (sec. 2(2)(A)), understanding "when it gives its advice and consent"; sec. 8(1), "any interpretation expressed by the Senate in advising and consenting"), reprinted in T. Franck & M. Glennon, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 419-20 (1987); id. at 421-29 (remarks of Profs. Henkin and Tribe and Legal Adviser Sofaer). Yet, the question might be: *When* does the Senate "give" its "consent", only once or is consent a process even subject to modification? Treaties themselves are a *process* of meaning or communication. See, e.g., M. McDougal, H. Lasswell & J. Miller, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967). And it seems fundamentally unrealistic and undemocratic to tie the meaning of a treaty (or any law) to the dead hand of the past; see also Paine, The Rights of Man (1794), reprinted in THE ESSENTIAL THOMAS PAINE 128-31, passim (S. Hook ed. 1969); Paust, The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen, and McDougal-Lasswell, 52 TEMPLE L.Q. 9, 10-18, 23-24, 32-34, 47-49 nn.163-64 (1979); Paust, The Concept of Norm: Toward A Better Understanding of Content, Authority, and Constitutional Choice, 53 TEMPLE L.Q. 226, 228-48 (1980). The Senate ought be to able to change its mind about its "understanding," although clearly its views alone cannot be determinative. See, e.g., Fourteen Diamond Rings v. United States, 183 U.S. 176, 182-83 (1901) (Brown, J., concurring); but see the rather self-serving remarks in S. Res. 167, 2(2)(A), supra. Also at stake are the independent powers of the judiciary to identify and clarify or interpret the content of treaties. See, e.g., RESTATEMENT, supra note 1, §§ 112(2), 326(2), comment b and reporters' notes 1-3 thereto; infra note 33.

\(^3\)\(^1\). See, e.g., L. Henkin, supra note 29, at 135, 382-83; T. Franck & M. Glennon, supra note 30, at 419, 421-29; see also RESTATEMENT, supra note 1, at § 314, comment c (later consent assumed).


\[^{1091}\]. Genocide under the law of nations. Whoever commits the crime of genocide as defined by the law of nations, and is afterwards brought into or found in the United States, shall be [list types of punishment].
ther, the Congress, while implementing customary international law, would not be bound by any prior Senatorial provisos to advise and consent to the ratification of a treaty. Thus, whether or not the Senate can change its “understanding” of a treaty as such, the Senate’s new viewpoint can find expression in legislation designed in part to implement a customary prohibition of genocide. Changes could even occur later through amendments to legislation defining and punishing the international crime. In this sense, there is room for constant refinement and interplay by the House, Senate and Executive with respect to legislation implementing customary international law.

Additionally, there are significant powers of the judiciary at stake. Not only does the federal judiciary have the ultimate authority to identify, clarify and apply treaties in cases properly before the courts, but it has the same general authority and responsibility with respect to customary international law. Indeed, in the case of an unavoidable clash between a federal statute and customary international law, especially customary jus cogens, the more widely shared and authoritative preference is that customary international law prevail.

Under the primacy of customary international law approach, clearly the definition of genocide evidenced in article II of the Conven-

33. See, e.g., supra note 30; Nielson v. Johnson, 279 U.S. 47, 52 (1929); Jordan v. Tashiro, 278 U.S. 123 (1928); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239-40, 249, 251, 253-54, 283 (1796) (also not bound by private opinion of negotiators); Paust, Self-Executing Treaties, 82 AM. J. INT’L L. 760, 761-66, 772-73, 776-77, 782 (1988). If the Senate’s present “understanding” is not changed, the judiciary should follow the analysis in the text, supra at notes 25-29, and conclude that the “understanding” is legally inoperative.

34. See generally Paust, Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom, 28 VA. J. INT’L L. 393, 394 n.1, 418-43 (1988) [hereinafter Paust, Rediscovering], and references cited; infra note 37; Demjanjk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985). Constitutionally, such authority derives most directly from article III, section 1 (“The Judicial Power”) and section 2, clause 1 (“all Cases . . . arising under . . . the Laws of the United States,” since customary international law is part of the law of the United States), and Article VI, clause 2; see also Paust, Rediscovering, supra, at 394 n.1, 420 n.55; RESTATEMENT, supra note 1, § 111, reporters’ note 4; Henfield’s Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J.) (“laws of the United States [include]. . . .[t]he laws of nations”). Congress’ power is only concurrent to that of the judiciary and it is expressed merely as a power to “define” and to “punish.” See, e.g., Paust, Rediscovering, supra at 420 n.55.

35. One tries to interpret the statute consistently with international law if at all possible. See, e.g., Paust, supra note 34, at 400 n.9; cf. RESTATEMENT, supra note 1, § 114, reporters’ note 2.

36. See, e.g., Paust, supra note 34, at 418-43, 447-48. With respect to Congressional power under article I, section 8, clause 10 of the Constitution, such is a power to “define” offenses against international law, not to make or remake them, to “define” them away with deviant definitional schemes, or to “abrogate them or authorize their infraction.” See 11 Op. Att’y Gen. 297, 299-300 (1865); 9 Op. Att’y Gen. 356, 362-63 (1859) (“law . . . must be made and executed according to the law of nations”); Paust, supra note 34, at 418-21. In constitutional parlance, Congress is without power to abrogate such offenses through the use of deviant definitional schemes. Similarly, the necessary and proper clause of the Constitution will not aid H.R. 807 or S. 1851, because such definitional schemes are improper, inappropriate, and plainly not adopted to the end and relevant policies at stake.
tion should prevail in the face of deviant legislative provisions such as those found in H.R. 807 and S. 1851. An independent judiciary, applying customary law, could thereby assure a more meaningful role for the United States in the enforcement of international criminal law.

Such an approach is recognizably available with respect to civil sanctions, since customary international law is directly incorporable for such purposes. But is customary international law also enforceable directly for criminal sanction purposes or must there be federal legislation defining and punishing a relevant offense against the law of nations? It is generally assumed that a federal statute is needed, even though prosecutions for violations of international law had occurred early in our history in the absence of domestic implementary legislation. Yet the question arguably remains, especially since seemingly relevant Supreme Court opinions on the need for a federal statute merely denounced criminal prosecutions based on common law alone, and although customary international law has been said to be a "part of" the common law it is not merely "common law" but much more and of a higher transnational status with a recognizable constitutional base. Thus, it is possible that the customary prohibition of genocide is still directly enforceable in our courts despite the lack of relevant domestic legislation or the existence of any inconsistent definitional elements in legislation designed in part to implement the Convention.

It is also arguable that domestic legislation is not needed in order to prosecute treaty-based acts of genocide. Some have assumed that treaties are inherently non-self-executing for criminal sanction purposes, but the better view is that treaties can be self-executing for such purposes. Congress merely has a concurrent power to define and punish offenses against international law, not an exclusive power at the expense of the treaty power and that of the judiciary, which are also constitutionally based. If so, violations of the Genocide Con-

38. See, e.g., Paust, supra note 2, at 212-13, 219-20, and references cited; see also RESTATEMENT, supra note 1, § 111, comment i and reporters' note 6.
39. See Paust, supra note 2, at 212 n.82, 219 nn.115, 118-20.
40. See, e.g., id. at 219-20.
41. See id. at 220 n.121. There were no references to international law, whether customary or treaty-based.
42. See, e.g., Paust, supra note 34, at 441 n.91. On the recognizable constitutional base, see supra note 34.
43. See, e.g., RESTATEMENT, supra note 1, § 111, comment i and reporters' note 6.
44. See, e.g., Paust, supra note 33, at 775-77, 780; Paust, supra note 34, at 401-03 n.13.
45. See id.
vention could be prosecuted upon ratification\textsuperscript{46} whether or not there is adequate implementing legislation.\textsuperscript{47} Assuming that such legislation is not needed, generally unacceptable definitional elements contained in legislation could even be ignored.\textsuperscript{48}

In any event, the better approach to a legally permissible and responsible adoption and implementation of the Genocide Convention lies with a change of the Senate's 1986 "understanding." The Senate should conform its unjust understanding to the patent language and the object and purpose of the Genocide Convention. If such does not occur voluntarily, the new President should withdraw our "ratification" of the treaty and send the treaty back to the Senate. If not, one can predict that the U.S. "ratification" would be legally unacceptable as contrary to the object and purpose of the treaty and to customary \textit{jus cogens}. If so, the United States will not be bound by the treaty and its overall effort at ratification could be subject to ridicule. Given the development of a customary prohibition of the crime of genocide, efforts to gut the treaty of any meaningful effect have simply come too late and should be abandoned.

It is time, finally, to ratify the Genocide Convention intact, and to pass legislation appropriate to our international criminal law enforcement responsibilities.

\textsuperscript{46} Nonetheless, ratification generally relates back to the date of signature. \textit{See}, e.g., Paust, \textit{supra} note 14, at 238 n.9. The date of signature of the Genocide Convention in the case of the United States is 1948. Such a date may also be appropriate since Congress merely defines and punishes the offense but does not create it. \textit{See} Paust, \textit{supra} note 34, at 420 n.55.

\textsuperscript{47} It might be assumed that since article V of the Genocide Convention imposes an obligation upon signators to enact "the necessary legislation to give effect to the" Convention, this treaty was meant to be non-self-executing whether or not other treaties could be self-executing for criminal sanction purposes, but no such intent of the treaty makers is actually manifest, and whether or not legislation is "necessary" is the very question at stake. If legislation is not "necessary" in the United States in order to prosecute treaty-based crimes, then no such legislation is "necessary" within the meaning of Article V of the treaty and it could be self-executing; \textit{see also} Paust, \textit{supra} note 33, at 775 n.97; \textit{but see} 1988 \textit{Report of the Senate Comm. on the Judiciary}, \textit{supra} note 10, at 2-3. Note, however, that when legislation is passed it must be "legislation to give effect to the" Convention, not legislation which thwarts the object and purpose of the Convention; \textit{see also} \textit{supra} notes 25-27, 36.

\textsuperscript{48} Unless the Senate changes its 1986 "understanding," however, it may be difficult to ignore such with respect to the treaty (as opposed to a statute or custom). \textit{See} \textit{supra} text accompanying notes 25-31, and \textit{supra} note 30.