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THE UNITED STATES SHOULD WITHDRAW ITS RESERVATIONS TO THE GENOCIDE CONVENTION: A RESPONSE TO PROFESSOR PAUST'S PROPOSAL

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On November 25, 1988, the United States became a party to the Convention on the Prevention and Punishment of the Crime of Genocide.[1] The Senate's thirty-six year procrastination in giving its advice and consent to the Convention's ratification was an international embarrassment.[2] Now, conditions imposed by the Senate on the United States' participation in the Convention have become the main target of criticism.[3] In an article published recently in this journal, Professor Jordan J. Paust convincingly demonstrates how several reservations

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1. Genocide Convention, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277. The United States ratified the Genocide Convention on Nov. 25, 1988. *See* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DEC. 1989 at 97, U.N. Doc. ST/LEG/SER.E/7, U.N. Sales No. E.89.V.6 (1989) [hereinafter MULTILATERAL TREATIES].

2. The United States was one of the original signatories to the Convention. The U.S. Representative signed the Convention on December 11, 1948. Out of 43 original signatories to the Convention, 70% ratified it by 1954. Bolivia, the Dominican Republic and Paraguay, which still have not ratified the Convention, were for many years, together with the United States, the only original signatories that refused to join the Convention. As of December 31, 1989, 100 States were parties to the Convention. *See* MULTILATERAL TREATIES, *supra* note 1, at 97-98. President Truman transmitted the Convention to the Senate, and the Foreign Relations Committee held its first hearings on it in 1950. For a discussion of the ratification process, see, *e.g.*, LeBlanc, *The Intent to Destroy Groups In the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369 (1984).

3. The conditions include two reservations and five so-called "understandings." For the text, see MULTILATERAL TREATIES, *supra* note 1, at 101. For a criticism of the reservations, see, *e.g.*, LeBlanc, *supra* note 2, at 382-84. Several countries objected to the U.S. reservations. States that objected to the first U.S. reservation excluding obligatory jurisdiction of the International Court of Justice, provided for in article 9 of the Convention, include: Greece, Italy, the Netherlands and the United Kingdom. The Netherlands' objection regards the U.S. reservation as incompatible with the object and purpose of the Convention, thus precluding the Convention's entry into force between the United States and the Netherlands. Australia and Brazil did not object to the U.S. reservation, although they had objected to similar reservations made to article 9 by other countries, including the Soviet Union and East European countries. The Soviet Union, the Beylorussian SSR, the Ukrainian SSR and Hungary have recently withdrawn their reservations to article 9. MULTILATERAL TREATIES, *supra* note 1, at 105. States that objected to the second United States reservation (indicating that the United States will not be bound by the Convention to take any action which is deemed to be prohibited by the U.S. Constitution) include: Denmark, Finland, Greece, Ireland, Italy, the Netherlands, Norway, Spain, Sweden and the United Kingdom. The objections were justified on the grounds that the reservation is contrary to the general principle of international law granting primacy to international rules over internal law, or that the reservation creates uncertainty as to the extent of obligations which the United States is willing to assume under the Convention.

and understandings attached to the U.S. instrument of ratification at the request of the Senate seriously undermine the scope of U.S. obligations under the Convention.[4] The United States' unilateral redefinition of the term "genocide," resulting in a significant limitation of the scope of the term, is particularly improper.[5] Professor Paust maintains that this reformulation is so "fundamentally incompatible with the object and purpose of the treaty" that it is not only "legally unacceptable," but most probably "has been obviated by the development of a customary international law."[6]

Professor Paust concludes his analysis of the consequences that this and other reservations might have for the application of the Convention with a plea that either the Senate withdraw its "unjust understanding" or "[i]f such does not occur voluntarily, the . . . President should withdraw our 'ratification' of the treaty and send the treaty back to the Senate."[7] I agree with Professor Paust's insightful assessment of the limitations imposed by the Senate on the United States' participation in the Genocide Convention. I also share his view that

4. Paust, *Congress and Genocide: They're Not Going To Get Away With It*, 11 MICH. J. INT'L L. 90, 95-100 (1989). Generally speaking, there may be a difference between reservations and understandings on the U.S. domestic plane. *See, e.g., The Role of the Senate in Treaty Ratification, A Staff Memorandum to the Committee on Foreign Relations* (1977), *reprinted in* 2 M. GLENNON & T. FRANCK, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 7, 11-20 (1980); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 comments a, d (1987) [hereinafter RESTATEMENT]. Under international law, however, as long as understandings are incorporated in the instrument of ratification and meet the characteristics of the definition of reservation, they will be treated as reservations. According to article 2(1)(d) of the Vienna Convention on the Law of Treaties, a reservation means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, (1969), 63 AM. J. INT'L L. 875 (1969), *reprinted in* 8 I.L.M. 679, 681 (1969) [hereinafter Vienna Convention]. It seems that the U.S. understandings to the Genocide Convention are within the confines of that definition. *See, e.g.*, I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 51-54 (2d ed. 1984). *See also* SENATE COMM. ON FOREIGN RELATIONS, 99TH CONG., 1ST SESS., REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 16 (Comm. Print 1985), *reprinted in* 28 I.L.M. 760 (1989) (equating international effects of understandings with those of reservations). For the purposes of this article, the term "reservations" includes understandings.

5. The understanding regarding the definition of "genocide" provides "[t]hat the term 'intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such' appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such by the acts specified in article II." MULTILATERAL TREATIES, *supra* note 1, at 101.

6. Paust, *supra* note 4, at 94-95. The other parties to the Convention have not, however, objected to any of the U.S. understandings. Therefore, the position that the understanding in question is fundamentally incompatible with the object and purpose of the treaty has not yet been supported by state action. The silence of States with regard to the five U.S. understandings may, however, indicate that other parties to the Convention have refused to recognize those understandings as reservations.

7. Paust, *supra* note 4, at 104.

"[i]t is time, finally, to ratify the Genocide Convention intact."[8] What I would like to explore, however, is a different route to that end. I believe that the United States should withdraw the objectionable reservations by depositing relevant notification with the Secretary General of the United Nations, who acts as the Convention's depository.[9] I shall first explain why this procedure is preferable to those proposed by Professor Paust. I will then discuss the international and domestic legal aspects of the withdrawal process.

I. WITHDRAWAL OF RESERVATIONS

The Senate's withdrawal of the reservations, suggested by Professor Paust, would be a symbolic gesture devoid of international legal effects. The Senate, acting independently, does not have the capacity to change U.S. obligations on an international plane. The President is the sole constitutional representative of the United States with respect to external affairs.[10] Moreover, any such action by the Senate would also be devoid of any domestic effects. In particular, the Senate's decision to withdraw reservations would not be binding on the President. Conversely, the withdrawal of reservations by the United States government, acting at the request of the President, would effectively change the scope of U.S. obligations vis-à-vis other parties to the Convention.

The withdrawal of reservations by the U.S. government is also a better solution than a "withdrawal of ratification," the other means proposed by Professor Paust. To be exact, a ratification of a treaty cannot be withdrawn.[11] After its ratification took effect, the United States could only withdraw its participation in the Genocide Convention by denouncing the treaty. Denunciation is allowed under the Convention,[12] but the right to denounce is limited. Article XIV precludes the United States from denouncing the Convention before the

8. *Id.*

9. *See* Genocide Convention, *supra* note 1, at art. XVII.

10. As the Supreme Court has stated, "The President [i]s the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). More recently, the Court upheld the broad view of presidential foreign affairs powers. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981). *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-65 (1972).

11. Fitzmaurice, *Law of Treaties, First Report*, [1956] 2 Y.B. INT'L L. COMM'N 104, 114, U.N. Doc. A/CN.4/101. The Vienna Convention on the Law of Treaties does not provide for such a possibility. For provisions on various methods of denunciation and withdrawal from a treaty, see Vienna Convention, *supra* note 4, at part V, § 3, arts. 54-62.

12. The denunciation may be effected by a written notification addressed to the Secretary General of the United Nations. *See* Genocide Convention, *supra* note 1, at art. XIV.

expiration of a five-year period after joining the Convention.[13] More importantly, the denunciation of the Genocide Convention and "sending the treaty back to the Senate" would create a serious risk that the United States again would not be a party to the Convention for a lengthy period of time. In contrast, the withdrawal of the reservations by the U.S. government is a risk-free procedure. While the action is being effectuated, the United States will continue its participation in the Convention. If, for any reason, the action fails, the U.S. position with regard to the Convention will not be any more deplorable than it is now.

II. INTERNATIONAL CONSIDERATIONS

On an international plane, the withdrawal procedure is relatively simple and may be executed instantly. The Genocide Convention is silent on the making and withdrawing of reservations.[14] Thus, the customary international law of treaties regulates the relevant reservation process. The law has been codified by the Vienna Convention on the Law of Treaties of 1969.[15] The United States, although not formally bound by the Vienna Convention, recognizes most of its provisions as binding on the United States as a matter of customary international law.[16] The provisions on reservations are among those so recognized.[17] Article 22, adopted without formal vote by the U.N. Conference on the Law of Treaties,[18] provides for an unrestricted right

13. Article XIV provides that the Convention shall "remain in effect for a period of ten years as 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." Genocide Convention, *supra* note 1, at art. XIV. The earliest date that the United States could terminate its participation in the Convention in accordance with article XIV would be November 25, 1993. The notice of denunciation would have to be deposited at least six months earlier.

14. The absence of such provisions gave rise to a notorious ICJ Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15. The International Court established therein a flexible system for reservations to multilateral conventions which was eventually adopted in the Vienna Convention. *See* Vienna Convention, *supra* note 4, at arts. 19-23. *See also* Edwards, *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, 388-401 (1989).

15. Vienna Convention, *supra* note 4, at arts. 19-23.

16. The Secretary of State's letter of submittal described the Vienna Convention as "generally recognized as the authoritative guide to current treaty law and practice." *Secretary Rogers' Report*, 65 DEP'T ST. BULL. 684, 685 (1971). For further discussion of U.S. acceptance of the rules of the Vienna Convention as binding as a matter of customary law, see Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 295-301 (1988).

17. *Secretary Rogers' Report*, *supra* note 16, at 685. *See also* RESTATEMENT, *supra* note 4, at § 313.

18. U.N. Conference on the Law of Treaties, 2d sess., Apr. 9-May 22, 1969 (29th plen. mtg.) at paras. 8-13, 159-60, U.N. Doc. A/CONF.39/11/Add.1 (1970).

to withdraw reservations. It stipulates that "unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal."[19] The only condition that must be met for the reservation's withdrawal to be effective is that "notice of it has been received" by other contracting States.[20] Depositing the withdrawal notification with the U.N. Secretary General will meet this notice requirement.

III. DOMESTIC CONSIDERATIONS

On the U.S. domestic plane, the basic procedural issue would be whether the withdrawal of the reservations requires the Senate's advice and consent or whether such action may be taken by the President acting alone. The power to make reservations is shared by the Senate and the President. It is well established that when the President attaches reservations to a treaty in submitting the treaty to the Senate, the adoption of those reservations requires the advice and consent of the Senate. When the Senate qualifies its advice and consent to the ratification of a treaty by its own reservations, the President must attach such conditions to the U.S. ratification of the treaty. On the other hand, the President may refuse to ratify the treaty if he believes that the Senate's reservations would make U.S. participation in the treaty undesirable.[21]

This allocation of power over reservation procedure seems to restrict the ability of the President to withdraw the reservations independently.[22] The issue has not attracted much attention from commentators,[23] and there is little State practice in the area.[24] One could analogize the withdrawal of reservations to either termination or modification of a treaty. Both analogies seem proper as all instances involve an alteration of preexisting rights and obligations under a

19. Vienna Convention, *supra* note 4, at art. 22(1).

20. *Id.* at art. 22(3). The withdrawal of a reservation must be formulated in writing. *Id.* at art. 23(4).

21. *See* RESTATEMENT, *supra* note 4, at § 314; Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983).

22. Arguably, the President could, acting alone, withdraw those reservations that he formulated but would need the Senate's cooperation to withdraw reservations made by that body. The Restatement on the Foreign Relations Law provides that the advice and consent of the Senate is required for the withdrawal of reservations but does not distinguish between the two kinds of reservations. *See* RESTATEMENT, *supra* note 4, at § 314 reporter's notes.

23. The issue is not discussed in, for example, HENKIN, *supra* note 10; M. GLENNON & T. FRANCK, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1987); M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW (1970).

24. *See infra* note 30 and accompanying text.

treaty. In an analogy to treaty termination, it is well established that the President can independently terminate a treaty.[25] Thus, following the whole-implies-the-lesser logic, one could argue that since the President has the authority to act alone in terminating a treaty, he or she can also modify the treaty or withdraw reservations without the Senate's advice and consent. However, this argument seems contrary to the constitutional mandate that the President and the Senate share responsibility in the making of treaties. To allow the President to withdraw the Senate's reservations after ratification without the Senate's advice and consent would effectively nullify the Senate's power in the treaty process. The Senate's advice and consent in the form of reservations would become a meaningless exercise if the President could withdraw those reservations once the treaty is in effect.[26] The crucial point is that while treaty termination results in eliminating the United States' obligations on the international level, the withdrawal of reservations expands such obligations, thus making the Senate's involvement more significant.

Analogizing this procedure to treaty modification suggests that the Senate should be consulted. As a rule, the President cannot modify U.S. treaty obligations without the Senate's involvement. In fact, the Senate has given its formal consent to treaty modifications on several occasions.[27] At least once, however, this practice was not followed. In a *sui generis* case, the Executive, acting alone, added new reserva-

25. *See* L. HENKIN, *supra* note 10, at 136. President Jimmy Carter's termination of the Mutual Security Treaty with the Republic of China serves as a good example. For a discussion of an abortive attempt by several U.S. senators to challenge the authority of the President to terminate the Treaty, see Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (the Supreme Court vacated the judgment of the lower court and remanded the case with directions to dismiss the complaint; four Justices maintained that the case presented a political question beyond the Court's cognizance). *See also* M. GLENNON, CONSTITUTIONAL DIPLOMACY 145-61 (1990).

26. *See* Glennon, *Nicaragua v. U.S.: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 AM. J. INT'L. L. 682, 687-89 (1985).

27. For instances of treaty modification where the Senate's advice and consent was obtained, see, *e.g.*, U.S. DEPARTMENT OF STATE, U.S. DIGEST OF INTERNATIONAL PRACTICE 401-02 (1977) (discussing the ratification of the protocol done on Sept. 30, 1977, relating to an amendment to the Convention on International Civil Aviation adopting an authentic Russian language text of the Convention); U.S. DEPARTMENT OF STATE, U.S. DIGEST OF INTERNATIONAL PRACTICE 237 (1974) (reporting the adoption of an amendment to the text of art. VIII of the 1965 Convention on Facilitation of International Maritime Traffic). The State Department, however, has stated that, while a significant alteration of the terms of the existing treaty requires the consent of the Senate, the President "may interpret a treaty and secure the agreement of the other party or parties for a particular interpretation or method of implementation" acting alone. *See Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 214 (1979).

The dispute between the Senate and the President over interpretation of the Treaty between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) illustrates that the power to interpret may be as limited as modifying a treaty in contravention to the Senate's wishes. *See, e.g.*, 26 I.L.M. 282-312 (1987). *See also* L. Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 412-15 (1989).

tions to the U.S. Declaration accepting the compulsory jurisdiction of the International Court of Justice.[28] The United States regarded this action as a modification of its treaty obligations, whereas the International Court of Justice characterized it as tantamount to a termination.[29]

Direct U.S. precedent on the process of withdrawal of treaty reservations is rare, but illuminating. Although not denying that other cases exist, the State Department provided information on only one instance of the withdrawal of a reservation:[30] the 1987 withdrawal of the reservation made to the 1970 Patent Cooperation Treaty.[31] This case is analogous to the suggested withdrawal of reservations to the Genocide Convention, and the procedure established therein should be followed.

The Patent Cooperation Treaty was ratified by the United States in 1973 subject to three declarations in pursuance of the advice and consent of the Senate.[32] One of the declarations was a reservation under article 64(1)(a) of the Treaty to the effect that the United States would not be bound by the provisions of chapter II forming an optional part of the Treaty. When the decision to withdraw the reservation was considered, the Department of State, joined on this point by the De-

28. On April 6, 1984, Secretary of State George P. Shultz sent a letter to the U.N. Secretary General modifying the U.S. 1946 Declaration, 61 Stat. 1218 (1947), which had accepted the International Court of Justice's optional compulsory jurisdiction under article 36, paragraph 2, of the Statute of the International Court. 23 I.L.M. 670 (1984). In this letter two reservations were added to the Declaration. The Senate did not participate in the decision to add the new reservations, although it gave its advice and consent to the Declaration when it was originally made. The case is *sui generis* since it is unclear to what extent the rules of the law of treaties are applicable to declarations accepting ICJ compulsory jurisdiction. For an in-depth discussion of the domestic legal aspects of that action, see Glennon, *supra* note 26; Glennon, *Constitutional Issues in Terminating U.S. Compulsory Jurisdiction*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 447, 456-57 (L. Damrosch ed. 1987).

29. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 398 (Judgment of Nov. 26).

30. This information was kindly provided to the author by Mr. John R. Crook, the current head of the Treaty Office in the Office of the Legal Adviser, U.S. Department of State. On the international practice of reservation withdrawals, see, *e.g.*, R. SZAFARZ, ZASTRZEZENIA DO TRAKTATÓW WIELOSTRONNYCH (RESERVATIONS TO MULTILATERAL TREATIES) 250-61 (1974). Professor Szafarz reported 32 cases of reservation withdrawals prior to 1974. All withdrawals involved nations other than the United States. Examples of withdrawals include: France's withdrawal of a reservation to the Convention on the Political Rights of Women (1953), *reported in* 381 U.N.T.S. 409; Canada's withdrawal of a reservation to the Convention Relative to the Protection of Civilian Persons in Time of War (1949), *reported in* 538 U.N.T.S. 333; and New Zealand's withdrawal of a reservation to the Convention on Privileges and Immunities of the United Nations (1946), *reported in* 270 U.N.T.S. 372.

31. The Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, T.I.A.S. No. 8733. The President requested advice and consent regarding the withdrawal of a reservation made to the Treaty on July 31, 1984. 98th Cong., 2d Sess., Treaty Doc. 98-29. The case was reported in 78 AM. J. INT'L L. 889 (1984).

32. *See* Proclamation by the President, 28 U.S.T. 7645, T.I.A.S. No. 8733.

partment of Commerce, requested that the matter be submitted to the Senate for its advice and consent.[33] This procedure was followed and the President's message to the Senate on transmitting the treaty acknowledged the need for the Senate's participation in the decision-making process.[34]

The reasons justifying the Senate's involvement in the withdrawal of the reservation to the Patent Cooperation Treaty would be applicable to the withdrawal of reservations to the Genocide Convention. In both cases the reservations originated in the Senate. The President could not have ratified the treaties without those reservations. Moreover, the reservation to the Patent Cooperation Treaty, like the reservations to the Genocide Convention, sought to limit U.S. obligations. The withdrawal of the reservation to the Patent Treaty resulted in an extension of the scope of the Treaty as applied to the United States and the imposition of additional obligations on the United States, thus making the Senate's involvement proper. Likewise, the withdrawal of the reservations to the Genocide Convention would broaden U.S. obligations under the Convention. Under the circumstances, the Senate's advice and consent to the withdrawal of reservations is warranted.

Congress as a whole was also involved in the withdrawal procedure concerning a reservation to the Patent Cooperation Treaty. After the Senate's advice and consent, but before the President's action on an international plane, Congress enacted legislation necessary to implement the withdrawal domestically.[35] As Professor Paust mentions in his article, the legislation Congress passed to implement the Genocide Convention incorporates the reservations and understandings attached to the U.S. ratification of the Convention.[36] If the reservations to the Genocide Convention are to be withdrawn, the enactment of new implementing legislation should precede any action by the President on an international plane, just as in the case of the withdrawal of the reservation to the Patent Cooperation Treaty.[37]

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33. *See* Letter of Submittal, 96th Cong., 2d Sess., Treaty Doc. 98-29, at VI. The fact that the opinion of the State Department and the Department of Commerce as to the Senate's participation was sought implies that the matter was unclear. The decision whether the Senate's advice and consent was necessary was made *ad hoc* rather than undertaken in conformity with a well established procedure.

34. "To ensure that our domestic laws conform with our expanded international obligations, I do not plan to notify the Director General of the withdrawal of our reservation to chapter II until after the Senate has informed me of its advice and consent to the withdrawal and Congress has enacted all legislation necessary to implement that withdrawal domestically." President's Message to the Senate Transmitting the Patent Cooperation Treaty, 1984 PUB. PAPERS 1102, 1103 (July 27, 1984).

35. *See* Proclamation by the President, 28 U.S.T. 7645, T.I.A.S. No. 8733.

36. Paust, *supra* note 4, at 99.

37. It is questionable whether the Convention, as modified by the international withdrawal of

CONCLUSION

The simplicity of the procedure does not make the task of changing the posture of the United States toward the Genocide Convention easy. The political will to embrace wholeheartedly the obligations under the Genocide Convention as originally drafted is badly needed. Professor Paust's questionnaires addressed to U.S. international law experts have identified a group of potential supporters of the idea.[38] Their views, publicly and vigorously expressed, may energize public opinion on this issue, paving the way for the desired change.

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the reservations, would override the previously passed legislation according to the supremacy clause of article VI of the U.S. Constitution, declaring treaties and federal laws to be the supreme law of the land. Under the well established last-in-time rule, any treaty overrides earlier inconsistent legislation. As stated by the Supreme Court: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." Whitney v. Robertson, 124 U.S. 190, 194 (1888). For a challenging discussion of the rule, see, *e.g.*, 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 (1988). *See also* L. HENKIN, *supra* note 10, at 137-40.

However, courts may preclude the application of the last-in-time rule by declaring the treaty to be non-self-executing. *See, e.g.*, Sei Fujii v. California, 38 Cal. 2d 718 (1952). *See also* Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988). The existence of the legislation implementing the Genocide Convention makes such a declaration with regard to the eventually adopted version of the Convention highly probable. Thus, to avoid any problems with the self-executing character of the Convention's modified text, the Congress should pass enabling legislation for implementing the effects of the withdrawal of reservations in the domestic sphere.

38. Paust, *supra* note 4, at 91 n.1, 93 n.3. The majority of U.S. international law experts who responded to the questionnaires share the same basic assumptions concerning genocide. They believe that genocide constitutes a violation of *jus cogens* and is a crime over which there is universal jurisdiction. *Id.*