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WITHDRAWAL SHEET

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Collection Name ROBERTS, JOHN: FILES

Withdrawer LOJ 7/31/2005

File Folder JGR/GENOCIDE CONVENTION (2 OF 3)

FOIA 2005-139 COOKE 1009

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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
19469	MEMO	ROBERT MCFARLANE TO THE PRESIDENT, RE GENOCIDE CONVENTION	2	ND	B1
~~19470~~	~~MEMO~~	~~CHARLES HILL TO MCFARLANE, RE GENOCIDE CONVENTION~~ R 6/22/2006 ~~DOCUMENT PENDING REVIEW IN ACCORDANCE WITH E.O. 13233~~	2	~~8/22/1984~~	~~B1~~ Opened 08/03/2005 GJC

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NATIONAL SECURITY COUNCIL

9/4/84

Nancy:

Attached package pertains to Genocide Convention. It is my understanding that the plan to go forward has been approved – but is to be held close until Thursday.

I have told Bob Turner and Ron Sable. Bob Kimmitt has talked to B. Congressional notifications should be planned for tomorrow.

Paul T.

cc John Roberts

WITHDRAWAL SHEET

Ronald Reagan Library

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRESIDENTIAL STATEMENT

This Administration has done an extensive review of the Convention on the Prevention and Punishment of the Crime of Genocide. As a result of that review and at the strong urging of the American Bar Association and other interested groups, I have concluded that it would be in the nation's best interest for the United States to ratify the Genocide Convention.

The commitment of our country to prevent and punish acts of genocide is indisputable. Yet our failure to ratify this treaty, which has now been pending before the Senate for thirty-five years and has been supported by Presidents Truman, Kennedy, Johnson, Nixon, and Carter, has opened the United States to criticism in international fora. We can refute such baseless criticism by ratifying the Convention, and more importantly we can utilize the Convention in our own efforts to expand freedom and fight human rights abuses around the globe.

In 1976, the Senate Foreign Relations Committee reported favorably on the Convention and recommended that the Senate give its advice and consent to ratification subject to three understandings and one declaration. This approach exceeded the clarifications considered necessary by the Nixon Administration, but I support these understandings and declaration and believe they will help to secure Senate advice and consent to ratification of the Convention.

My Administration looks forward to working with the Senate to resolve any issues that may arise in connection with its consideration of this treaty. Ratification of the Genocide Convention would reaffirm in this international legal context the fundamental and timeless American commitment to human rights.

THE WHITE HOUSE
8/30/84 WASHINGTON

Ollie:

Ted Olson (Asst AG) informed me tonight that AG has no legal objection to going forward on the Genocide Convention. Unless we object, that clears the way for an announcement in the B'nai B'rith speech on 9/6. Please get a package over on 8/31. Thanks.

Bob

THE WHITE HOUSE

WASHINGTON

September 4, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Genocide Convention

Bob Kimmitt has copied you on a memorandum to Special Assistant to the Attorney General Ron Blunt, requesting Department of Justice comments on a memorandum on the genocide convention prepared by the Department of State. The memorandum, addressed to Robert McFarlane, recommends that the President announce his support for ratification of the convention, with the three understandings and one declaration recommended by the Senate Foreign Relations Committee in 1976.

Ted Olson has advised Kimmitt that the Attorney General has no legal objection to the State recommendation, although Justice declined to take a position on the policy question of whether to announce support for ratification at this time. State notes that such an announcement could be viewed as "a cynical electoral ploy," but argues that the Administration is vulnerable to criticism as the only one since Truman's not to support ratification.

The genocide convention makes genocide a crime under international law. Parties to the convention agree to provide "effective penalties" for genocide, extradite those accused of genocide (in accordance with existing extradition treaties), and to submit disputes concerning the convention -- including the liability of a state for genocide -- to the International Court of Justice.

Conservative opposition to the convention has, over the past several decades, focused on several objections: the convention "internationalizes" criminal law, hitherto a purely domestic concern; there is no justification for submitting American conduct to an international tribunal; violent nations will ignore the convention; the Senate by approving the convention will impose an obligation on the House to pass the requisite implementing legislation; the acts that constitute genocide -- primarily murder -- have traditionally been matters of state, not Federal, jurisdiction; hostile states will use the convention for propaganda purposes, accusing the United States before the ICJ of "genocide" in Vietnam. These objections are not unfounded, but a consensus has evolved

that they are outweighed by the propaganda windfall our failure to ratify the convention has already afforded our international opponents.

The "declaration" accompanying ratification -- that ratification will not be effective until implementing legislation has been passed -- responds to one of the principal objections. Two of the three "understandings" seek to limit the convention's rather broad and vague definition of "genocide;" the third notes that the extradition provision does not affect the right of the United States to try its own citizens before its own tribunals for extraterritorial offenses.

I have reviewed the State memorandum, and the previous material provided by Justice and NSC on this matter, and have no objection to the State recommendation.

Attachment

THE WHITE HOUSE

WASHINGTON

September 4, 1984

MEMORANDUM FOR ROBERT M. KIMMITT
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Genocide Convention

Counsel's Office has reviewed the draft Department of State memorandum on the Genocide Convention, and has no legal objection to the State recommendation that the President announce support for ratification of the Convention, with the noted three understandings and one declaration.

cc: Richard G. Darman

FFF:JGR:aea 9/4/84
bcc: FFFielding/JGRoberts/Subj/Chron

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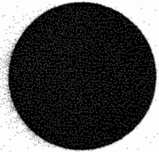
ID # ____________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: Robert M. Kimmitt

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Genocide Convention

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	84/08/28			/ /
Referral Note:					
CUAT 18	D	84/08/28		S	84/08/31
Referral Note:					COB
CUAT 04	A	84/08/28			/ /
Referral Note:					
		/ /			/ /
Referral Note:					
		/ /			/ /
Referral Note:					

ACTION CODES:
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6058

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CONFIDENTIAL
ATTACHMENT

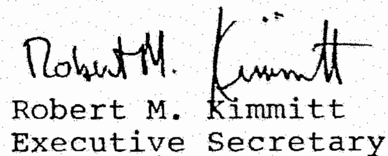
NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

August 27, 1984

MEMORANDUM FOR RONALD L. BLUNT, SPECIAL ASSISTANT
TO THE ATTORNEY GENERAL
Department of Justice

SUBJECT: Genocide Convention

Would you please provide by August 31, Justice comments and/or concurrence on the attached State memorandum? Thank you.



Robert M. Kimmitt
Executive Secretary

Attachment
a/s

cc: Fred F. Fielding

UNCLASSIFIED UPON REMOVAL
OF CLASSIFIED ENCLOSURE(S)
7/31/05

UNCLASSIFIED WITH
CONFIDENTIAL
ATTACHMENT

CONFIDENTIAL

United States Department of State

Washington, D.C. 20520

MEMORANDUM FOR MR. ROBERT C. McFARLANE
THE WHITE HOUSE

August 22, 1984

Subject: Genocide Convention

In recent months a variety of groups and individuals have written to the President or to senior staff members of the White House to urge Administration support for Senate ratification of the Genocide Convention. These have included a letter (dated April 12, 1984) to the President from Mr. Gerald Kraft, the President of B'nai B'rith, and most recently a letter to you (dated August 2, 1984) from Professor John Norton Moore on behalf of the American Bar Association. Attached is a draft presidential statement supporting ratification of the Genocide Convention.

The Genocide Convention has been pending before the Senate for 35 years, and ratification has been supported by Presidents Truman, Kennedy, Johnson, Nixon, and Carter. The Senate Foreign Relations Committee last reported the treaty out in 1976 with three understandings and one declaration. Due to opposition from various groups, the treaty was never brought to a vote on the floor.

Over the years, opposition to the Genocide Convention has diminished. The American Bar Association, which until the 1970s was opposed to the treaty, is now a very strong supporter. Moreover, conservative opposition has diminished, and senators such as Lugar and Armstrong have privately said they would support ratification under appropriate circumstances. The core opposition now appears to be limited to Senators Thurmond, East, and Helms, and the Liberty Lobby. Jewish groups have long urged ratification.

We consider that our technical questions about the treaty can be cured by the three understandings and one declaration that the Committee approved in 1976. The Committee's position, which we endorse, was even more restrictive than that taken by the Nixon Administration.

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NLS F05-139/1 #19470
BY LOT NARA, DATE 6/22/06

The key argument against presidential support for ratification at this time is political. The Administration might be accused of a cynical electoral ploy, in submitting the treaty too late for action during the President's entire term after sitting on it for three and a half years; as noted, a few conservatives would oppose ratification on substantive grounds. The key argument in favor of an announcement of presidential support for ratification at this time is in essence defensive. It is not urged that the Administration would gain a great deal by announcing support, but rather that a failure to support the treaty might well be denounced as an extreme position at variance with those of most preceding presidents including President Nixon. Moreover, the treaty is substantively acceptable and there is increasing pressure for the Administration to take a position on it.

Senate Foreign Relations Committee staff have made it clear to us that the treaty cannot be considered this year, and we could seek to defer the holding of a hearing on the treaty if we felt such a hearing would be controversial. The Department recommends that the President announce support for ratification, as part of his overall human rights policy, at whatever time the President may consider appropriate.

for Charles Hill
Executive Secretary

Attachments:

As Stated.

<u>DRAFT PRESIDENTIAL STATEMENT</u>

This Administration has done an extensive review of the Convention on the Prevention and Punishment of the Crime of Genocide. As a result of that review and at the strong urging of the American Bar Association and other interested groups, I have concluded that it would be in the Nation's best interest for the United States to ratify the Genocide Convention.

The commitment of our country to prevent and punish acts of genocide is indisputable. Yet our failure to ratify this treaty, which has now been pending before the Senate for thirty-five years, and has been supported by Presidents Truman, Kennedy, Johnson, Nixon, and Carter, has opened the United States to criticism in international fora. We can refute such baseless criticism by ratifying the Convention, and more importantly we can utilize the Convention in our own efforts to expand freedom and fight human rights abuses around the globe.

In 1976, the Senate Foreign Relations Committee reported favorably on the Convention and recommended that the Senate give its advice and consent to ratification subject to three understandings and one declaration. This approach exceeded the clarifications considered necessary by the Nixon Administration, but I support these understandings and declaration and believe they will help to secure Senate advice and consent to ratification of the Convention.

My Administration looks forward to working with the Senate to resolve any issues that may arise in connection with its consideration of this treaty. Ratification of the Genocide Convention would reaffirm in this international legal context the fundamental and timeless American commitment to human rights.

The Declaration and the 3 Understandings (adopted by Senate Foreign Relations Committee in 1976)

TEXT OF RESOLUTION OF RATIFICATION

Resolved. (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide. adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948. and signed on behalf of the United States on December 11, 1948 (Executive O, Eighty-first Congress, first session) subject to the following understandings and declaration:

1. That the United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such manner as to affect a substantial part of the group concerned.

2. That the United States Government understands and construes the words "mental harm" appearing in article II (b) of this Convention to mean permanent impairment of mental faculties.

3. That the United States Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the United States.

4. That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

ID # 238404 CU

JV

HU030

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Theodore B. Olson

Dick

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: Genocide Convention

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
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	Referral Note:				
CUAT04	A	84/06/25			/ /
	Referral Note:	See RAH's note			
CUAT18	A	84/07/02		S	84/07/12
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
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- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: NSC 8402206

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5/81

MEMORANDUM

NATIONAL SECURITY COUNCIL

ACTION

June 21, 1984

MEMORANDUM FOR ROBERT C. McFARLANE

FROM: STEVEN E. STEINER *Steve*

SUBJECT: Ratification of Genocide Convention

As I indicated in my Weekly Report of June 8 (Tab I), we have been looking at the possibility of submitting the UN Genocide Convention of 1948 to the Senate for ratification. Faith Whittlesey wrote to Jim Baker and you in March (Tab II) asking that we do so. I have been coordinating with Jim Ciccone of Baker's staff, who indicates that Baker has concurred that we should move on this. Since every Administration since Eisenhower has submitted the Convention for ratification, failure to do so could leave us open to attack on the "sensitivity" issue.

Ciccone suggests that since this is an international issue, the NSC Staff should call Assistant Attorney General Ted Olsen and ask that Justice put their comments on paper and return the action to State. Once State and Justice are in accord on the reservations we would attach to the Convention, State will submit the issue to the White House for final decision. In the meantime, we will take discreet soundings to see whether submission for ratification would cause any controversey and whether the Senate would be any more likely than in past years to move on this.

Ciccone feels that Olsen is sympathetic, but that philosophical reservations on the part of the Attorney General have led Justice to sit on this issue. Ciccone intends to follow up with a call to Smith's office once we have touched base with Olsen.

RECOMMENDATION

That you authorize us to ask Olsen to put Justice's comments in writing and move action back to State. (We will press no further at this point.)

Approve ________ Disapprove ________

SES Walt Raymond, Jack Matlock, Chris Lehman and Paul Thompson concur.

Attachments

Tab I Weekly Report of June 8, 84
Tab II Whittlesey to RCM, March 15, 84, w/atch

U.S. Department of Justice

Office of Legal Counsel

238404 Cu

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 21 1984

MEMORANDUM TO FRED F. FIELDING
COUNSEL TO THE PRESIDENT

As you know, the State Department sent the Genocide Convention to the Department of Justice for our review. We have had an opportunity to study the matters now and the Attorney General has asked me to ascertain from you what the White House would like us to do at this juncture. If the White House feels that it would be timely to communicate our thoughts to you at this time, we would be happy to do so.

Theodore B. Olson

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

MEMORANDUM

NATIONAL SECURITY COUNCIL

INFORMATION June 8, 1984

MEMORANDUM FOR ROBERT C. McFARLANE

FROM: STEVEN E. STEINER

SUBJECT: Weekly Report - International Communications and Information

-- Ratification of Genocide Convention: There may be a push within the Administration to submit the United Nations Genocide Convention to the Senate for ratification. The Convention was drawn up in 1948 and has been approved by 92 countries, including the USSR. Although this administration has not yet taken a position, every President beginning with Eisenhower has pressed for ratification. However, the Senate has not ratified it and is unlikely to do so in the near term.

Shultz has approved the Treaty with some legal reservations and sent it to Justice. Justice has made additional reservations, which I understand are acceptable to State, but wants to hold this over until Ed Meese has been confirmed. State would like to move now, as they consider it good international politics, and Faith Whittlesey is pushing for ratification with the thought that this is also good domestic politics. She sent you a copy of her March 16 memorandum to Jim Baker with a plea for your help.

I have been discussing this with State and with Jim Ciccone in Baker's office. Jim and I feel it would seem to be good politics to go forward. Jewish and other ethnic communities would strongly welcome it. Some conservatives would be opposed, but Evangelical Christian groups are likely to support ratification as long as we have appropriate clarifying reservations. One point of potential conservative opposition centers on the role which the International Court of Justice would play, but our reservations will make it clear that this would have to be based on the consent of the parties.

Ciccone intends to discuss this with Baker after the President returns from Europe, and Baker may then be in touch with you. The next step would likely be for Justice to take this off the shelf, put their reservations in writing and return it to State for comment. Once State and Justice are in agreement, it will come here for consideration by interested White House parties, including Baker, Fielding and yourself.

Walt Raymond and Jack Matlock support the suggestion of moving now to prepare the Convention for submission to the Senate.

THE WHITE HOUSE
WASHINGTON

March 15, 1984

TO: ROBERT MCFARLANE

FROM: **FAITH R. WHITTLESEY** FRW

☐ Information

☑ Action

Please help!

Delay in making this decision amounts to a negative decision and loss of an opportunity for Presidential leadership.

THE WHITE HOUSE

WASHINGTON

March 16, 1984

MEMORANDUM FOR JAMES A. BAKER, III

FROM: Faith Whittlesey FRW

SUBJECT: Ratification of the Genocide Convention

As you know, American ratification of the United Nation's genocide convention was first proposed in 1948. The treaty has been approved by 92 countries including the Soviet Union and various Eastern Bloc states. However, the treaty has never been ratified by the United States Senate.

This Administration has not yet taken a position on the treaty, stating repeatedly since 1981 that the question of support for a ratification effort is "under study." Some months ago, Secretary Shultz approved the treaty with minor language modifications or "reservations" and sent it to Justice where it is now waiting review.* Assistant Attorney General Theodore Olsen has sent an options memo to Attorney General Smith suggesting a number of additional "reservations" - all of which are acceptable in principle to State. It is our understanding that the Attorney General, as a courtesy, is planning to hold this matter over until Ed Meese's confirmation.

Delay in addressing this matter will be the equivalent of making a negative decision. That is because it will be extremely difficult for an Administration bill approving the treaty to pass the Senate if the go-ahead does not occur until early April. The short legislative session will require that some decision on this matter occur at this time.

From a political perspective the following points are relevant:

- There is every indication of broad support for a treaty with proper clarifying "reservations." This support flows from conservatives as well as liberals. Opposition should be limited to a handful of senators, and a number of well-known conservatives may be prepared to work to mitigate such opposition. Further, Evangelical Christian groups are likely to support ratification of a treaty which contains appropriate clarifying "reservations."

- Passage of the treaty would be a significant political plus for the President. It would show him to be a leader - as five Presidents since Eisenhower tried to get a treaty passed and failed. If we could say that this President succeeded, it would underscore his leadership capabilities.

- It would position the President as a leader who is prepared to make use of international treaties where appropriate, although he also has the will to reject international relationships (e.g., Law of the Sea, UNESCO) where necessary for United States interests.

- Ratification of the treaty would be well received in the Jewish community, the Eastern European ethnic community and the moderate-to-liberal "internationalist" political community - all areas where gains by the President would be significant.

cc: Edwin Meese, III
Robert McFarlane
Richard Darman

---

* Legal scholars, in general, support ratification as an important symbolic statement which will in no way affect United States sovereignty. As is the case with some fifty treaties ratified by the United States, dispute settlement under the genocide convention falls within the compulsory jurisdiction of the International Court of Justice. However, in no case may individuals ever be charged and brought before the ICJ, which has neither personal nor criminal jurisdiction. Moreover, the proposed "reservations" ensure that the definition of genocide accepted by any instrument of ratification would be drawn so as to protect the United States from frivolous or malicious charges in any international forum. Further, even if ratified the genocide convention and its provisions will have no domestic legal effect until implementing legislation is passed by each House of Congress.

Office of the
Assistant Attorney General

Washington, D.C. 20530

2 JUN 1982

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Genocide Convention

The Department of State is now considering whether to recommend to the President that he seek the advice and consent of the Senate to ratification of the Genocide Convention, 78 U.N.T.S. 277. The Secretary of State may in the near future seek your advice or support relative to his recommendation.

In general, the Convention makes genocide a crime under international law. Genocide is defined as the commission of various specified acts with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. Parties to the Convention undertake to enact, in accordance with their respective constitutions, legislation necessary to provide penalties for persons guilty of those acts.

Entering into the Convention would be an appropriate exercise of the treaty power under the United States Constitution in the sense that it deals with a proper subject of international concern. 1/ About ninety States are now parties. 2/

1/ The Constitution states no restriction on the treaty power (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Art. II, § 2). The Supreme Court has consistently said that the treaty power extends "to all proper subjects of negotiations between our government and other nations." Asakura v. Seattle, 265 U.S. 332, 341 (1924). No treaty has ever been held to be an improper subject. "Convention," as used in this memorandum, is synonymous with treaty. It is a term commonly used for multilateral treaties.

2/ The parties include Australia, Belgium, Canada, Cuba, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Israel, Mexico, Netherlands, Philipines, Poland, Spain, Sweden, U.S.S.R., United Kingdom of Great Britain and Northern Ireland, and Vietnam. Significant non-parties are the People's Republic of China, South Africa, and the United States.

The provisions of the Convention do not conflict with the Constitution. Whether the Administration wishes to support the Convention will, therefore, depend on its perception of the international and domestic legal and political factors involved, factors discussed in parts II and III of this memorandum.

To assist you in your consideration of the Convention and any recommendation regarding its ratification you may decide to make, the balance of this memorandum provides, in part I, a brief analysis of the Genocide Convention; in part II, some background material on efforts of prior Administrations to secure advice and consent for the Convention; and in part III, an analysis of arguments for and against ratification. Copies of the Convention and proposed implementing legislation are attached.

We have no recommendation to make with respect to whether the United States should become a party to the Convention. Whether to do so is largely a policy question with foreign policy and political overtones.

I. The Genocide Convention

Parties to the Convention undertake to prevent and punish genocide, which is defined and confirmed as a crime under international law. Any of the following five acts, if accompanied by the intent to destroy, in whole or in part, 3/ a national, ethnic, racial, or religious group, as such, constitutes genocide:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm 4/ to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

3/ Proposed implementing legislation, first drafted by the Department of Justice in 1972, defines "in part" to mean a "substantial part" of "such numerical significance that the destruction of that part would cause the destruction of the group as a viable entity." S. Ex. Rep. No. 23, 94th Cong., 2d Sess. 34-35 (1976).

4/ On next page.

(d) Imposing measures intended to prevent births within the group; and

(e) Forcibly transferring children of the group to another group.

The Convention also provides that conspiracy, attempt to commit genocide, direct and public incitement to commit genocide, and complicity in genocide shall be punishable.

4/ (Fn. p. 2) Prior administrations and the Senate Committee on Foreign Relations have recommended an "understanding" by the Senate to make clear that the United States understands and construes the words "mental harm" to mean permanent impairment of mental faculties. S. Ex. Rep. No. 23, 94th Cong., 2d Sess. 6 (1976). This understanding has been incorporated into implementing legislation submitted in the past by this Department. Id. at 35.

An "understanding" is a statement which accompanies ratification of a treaty and explains the meaning given to the treaty by the party submitting the understanding. It differs from a reservation, which excludes or varies the legal effect of a provision of a treaty in its application to the reserving State.

The designation by the ratifying State as to whether a statement is a reservation or understanding is not controlling. Whether the statement modifies the legal effect of the treaty or merely expresses its true intent depends on the substance of the statement. Statements made upon ratification are communicated to other signatory and acceeding states. Each has the separate right to decide whether the statement modifies the legal effect of the treaty and whether it will consider itself in treaty relations with the State proposing the reservation or understanding. If accepted, the reservation or understanding becomes a condition to the ratification of the State making it.

Parties have the right to object to a reservation or understanding as incompatible with the purpose of the Convention. In so objecting a State may refuse to consider itself in treaty relations with the reserving or construing State or may, alternatively, consider the provisions to which the reservation relates as not being in force between the two States. Id. at 15-16; Vienna Convention on the Law of Treaties, 8 Int'l Leg. Mat. 679, Art. 21. Thus, the treaty relationship among parties to a multilateral treaty may not be identical.

Parties to the Convention undertake to enact the necessary legislation to "give effect" to the provisions of the treaty including "effective penalties" for persons found guilty of genocide or conspiracy, incitement, attempts or complicity.

In connection with the obligation of parties to enact legislation necessary to give effect to the provisions of the Convention, legislation making genocide a federal crime was first drafted and submitted to Congress in 1972. It has been introduced in Congress several times since then. Past Administrations have had an understanding with the Senate Committee on Foreign Relations that the United States would not deposit its instrument of ratification (and thus not become a party to the Convention) until such legislation was enacted. E.g., S. Ex. Rep. No. 23, supra, at 9. The proposed legislation would amend Title 18 and would therefore be considered by the Committees on the Judiciary of the House and Senate. The Committee on Foreign Relations has, however, taken note of bills introduced to implement the Convention in analyzing the issues that it presents. Id. at 33. Any implementing legislation would presumably be cleared through the Criminal Division and the Office of Management and Budget prior to being transmitted to Congress.

In general, most acts constituting genocide would violate existing Federal law, particularly the broadly-worded civil rights statutes, which prohibit acts of violence which deny rights secured by the Constitution and laws of the United States. 18 U.S.C. §§ 241, 242, 245. 5/ See United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966). Most acts of the type contemplated by the Convention which destroy a national, ethnic, racial or religious group, as such, would seem necessarily to deny rights secured by the Constitution and laws of the United States. Based on particular facts, other Federal laws, such as those against kidnapping, may be violated. A specific statute making genocide an offense would avoid the problems of pleading and interpretation required by the

5/ Section 241 makes unlawful conspiracies to injure any citizen in the free exercise of "any right of privilege secured to him by the Constitution or laws of the United States"; section 242 makes it a crime, under color of law to deprive any person of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; section 245 provides penalties for interference with persons engaged in listed federally protected activities.

language of the civil rights laws and would cover some peripheral aspects of the offense of genocide, paticularly attempts and incitement, which do not appear to be covered by existing statutes. 6/

Under the Convention, persons charged with genocide would be tried by a competent tribunal of the State in whose territory the act was committed. As an alternative, they may be tried by "such penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction." Although some consideration was given to establishing a tribunal at the time the Convention was drafted, no such tribunal has been created or proposed, so the issue of acceptance of jurisdiction is not presented at this time. Thus, persons charged in the United States with violation of the federal statutes implementing the Convention would only be tried in the federal courts of the United States. Draft implementing legislation has provided in the past that criminal prosecution shall be the exclusive means of enforcement. S. Ex. Rep. No. 23, supra, at 37.

Parties to the Convention are bound to grant extradition, in accordance with their laws and treaties, of persons charged with crimes falling under the Convention. Thus, if the United States and another State were both parties to an extradition treaty and to the Convention, genocide would be considered an extraditable offense. Genocide is not to be considered a political crime for the purposes of extradition. This point is worth noting because, under existing extradition treaties, extradition is not normally granted for political offenses.

6/ Opponents of the Convention do not appear to be claiming now that the implementing legislation would increase federal jurisdiction over violent crimes. When the Convention was first submitted to the Senate in 1950 opponents argued that a genocide statute could be used as a federal anti-lynching law. See Executive Sessions of the Senate Foreign Relations Committee, (Historical Series), vol. 2, 81st Cong., 1st and 2d Sess. 391 (1949-50). Passage of civil rights legislation in the 1960's, such as 18 U.S.C. § 245, and court decisions, such as Guest and Price, supra, clarifying the scope of earlier statutes, ought to have eliminated this objection. Nevertheless, the strongest opposition to the Convention continues to come from the South. The proposed implementing legislation is not designed to amend or affect existing civil rights legislation.

Disputes relating to the interpretation, application, or fulfillment of the Convention, including those relating to the "responsibility of a State" for genocide, "shall" be submitted to the International Court of Justice ("I.C.J.") at the request of any of the parties to the dispute. 7/ This provision, Article IX, seems to contemplate that a nation which is a party may bring another such party before the I.C.J. and accuse it, institutionally, of genocide. If the alleged genocide has been committed against citizens of the complaining party, damages may be sought. However, if a party were accused by another State of mistreating its own citizens, it appears that damages could not be awarded but that party could be adjudicated a violator with the attendant publicity such adjudication would entail. 8/

7/ The I.C.J. is the principal judicial organ of the United Nations. All members of the United Nations are parties to the Statute of the Court which is part of the Charter. United Nations Charter, 59 Stat. 1031, Arts. 92, 93.

8/ See Hearings on the Genocide Convention before a subcommittee of the Senate Committee on Foreign Relations, 81st Cong., 2d Sess. 134-35 (1950). On December 2, 1948, when voting in favor of the text of the Convention, the United States representative in the General Assembly stated that if "responsibility of a state" is used in the traditional sense of responsibility to another State for injuries sustained by nationals of the complaining state, the words would not appear to be objectionable. He further said that if the words mean that a State can be held liable in damages for injury inflicted on its own nationals, the provision is objectionable. Subsequently, when the Convention was transmitted to the Senate in 1949, President Truman recommended an understanding that under Article IX a State could not be held liable in damages for injuries inflicted by it on its own nationals. Id. at 5. There has been no recommendation of such an understanding since then but it would be possible to renew this recommendation. It appears to be consistent with dictum by the I.C.J. to the effect that all States have a "legal interest" in protecting human rights but that "the instruments which embody human rights do not confer on States the capacity to protect the victims of infringement of such rights irrespective of their nationality." Barcelona Traction Case, [1970] I.C.J. Rep. 4, 32, 47. The Restatement of Foreign Relations Law of the United States (Revised) 170-71 (tent. draft No. 3, 1982) states that any State may pursue remedies for violations of human rights even if the individual victim was not a national of the complaining State. The draft Restatement does not go so far as to say, however, that a State may seek damages even if there was no damage to it and there is no precedent for such an action.

The term "genocide" has, of course, been used rather loosely in both domestic and international contexts. Mere charges of discrimination would not, it seems, be recognized under the Convention since the acts embraced within the definition include only such things as killing, causing serious bodily or mental harm, inflicting conditions on a group calculated to bring about its destruction, imposing measures to prevent births or separating children from their families. However, it may be important to define these terms further to make it entirely clear that these definitions could not be construed beyond those acts clearly embraced within the concept of genocide. Of course, a charge of violation must be predicated on an "intent" to "destroy one of the protected groups "as such." 9/ This should provide some protection against frivolous, propaganda-inspired, charges. However, irrespective of the ability of a party to defend itself on the merits of such charges, it does appear on the surface that charges could be made and supported by some unspecified form of evidence of "intent."

A related issue is whether a nation such as the United States could be charged with genocide for events which occured prior to ratification. State Department witnesses have testified in the past that the Convention is purely prospective, but have not explained how they reached that conclusion. _Genocide Convention, Hearings before a Subcommittee of the Senate Committee on Foreign Relations_, 91st Cong., 2d Sess. at 68-69 (1970). Similarly, an often-quoted writer on the Convention has stated that the Convention "purports to operate _in futuro_ by reference to a crime which the Contracting Parties 'undertake to prevent and punish.'" 2 P. Drost, _The Crime of State_ 120 (1959). It is not clear, however, that the quoted language

9/ For example, treatment of Haitians detained by the INS would not be genocide even though they may claim to have been "mentally harmed" by the experience. Detention is based on their status; Haitians who are in this country lawfully are not subjected to similar treatment. There is no intention to "destroy" Haitians "as such."

limits the Convention to future acts. Article I "confirms" that genocide is a crime under international law which could be construed as suggesting that the Convention recognizes a pre-existing obligation. The United States could submit an understanding stating that it understands the Convention to apply only to acts taking place after ratification. No such understanding has previously been discussed or proposed.

It should be noted, however, that if a State, such as Vietnam (however inappropriate Vietnam may be as a complainant), wished to charge the United States with genocide in the I.C.J., it probably could lodge such a charge irrespective of the Convention and assert that its claim was based on the obligations of the United States under customary international law, which exist in addition to those that would be undertaken in the Convention. As early as 1951 the I.C.J. made clear "that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. Rep. 15, 23. See Barcelona Traction Case, [1970] I.C.J. Rep. 4, 32; Restatement, Foreign Relations Law of the United States (Revised) 156, 158 (Tent. draft No. 3, 1982). 10/

10/ Claims may, however, be barred by lapse of time. International law recognizes a rule of extinctive prescription similar to the equitable doctrine of laches. 1 H. Lauterpacht, Oppenheim's International Law 349 (8th ed., 1955)

Article 36(2) of the I.C.J. Statute empowers the I.C.J. to decide without any special agreement any question of international law and the existence of any fact which, if established, would constitute a breach of an international obligation where States have declared that they recognize the jurisdiction of the Court to decide such matters. The United States has filed such a declaration, subject to the "Connally Amendment" that the declaration shall not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States "as determined by the United States." 61 Stat. 1218 (1946). 11/ The United States probably could invoke this reservation if charged under customary international law with genocide as to its own citizens within the United States but the terms of the reservation would not seem to embrace actions taken abroad, such as those which might be contained in charges that might be brought by Vietnam. 12/

11/ There has been considerable debate as to precisely what the Connally Amendment means and the extent to which the I.C.J. can review determinations made by the United States. See Gross, Bulgaria Invokes the Connally Amendment, 56 Am. J. Int'l L. 357 (1962). The State Department has taken the position in the past that the Reservation is inconsistent with the provision of the Statute of the Court that the Court shall determine its own jurisdiction, Digest of U.S. Practice in Int'l Law 1567 (1978), thus suggesting that any determination by the United States pursuant to the Reservation may not be conclusive. As long as the Reservation remains we ought to assume, however, the United States would be ready to assert it in a proper case.

12/ Article 36(1) of the Statute of the I.C.J. vests jurisdiction in cases provided for in treaties and conventions in force, thus allowing for jurisdiction under Article IX of the Genocide Convention. The Connally Amendment is, by its own terms, only a reservation to Article 36(2) and not Art. 36(1) and would therefore have no effect on the jurisdiction of the I.C.J. under the Convention if the United States become a party. S. Ex. Rep. No. 23, *supra*, at 13.

II. The History of Efforts to Secure Advice and Consent to the Convention

Traditional international law was concerned with co-existence among States; it did not ordinarily regulate the manner in which a country treated its own nationals. 13/ The scope of international law has, in recent years, been significantly broadened. The experience of the Second World War gave rise to the growth of a philosophy that international protection of individual human rights should be the rule rather than the exception and should be embraced within concepts of international law. Thus, the United Nations ("U.N.") has sponsored the codification of human rights in various treaties. 1 H. Lauterpacht, Oppenheim's International Law 736-53 (8th ed., 1955).

The Truman Administration was, through its representatives at the U.N., active in the drafting of the first of these treaties, the Genocide Convention. The text was adopted by the U.N. and opened for signature and ratification by members in 1948. President Truman transmitted it to the Senate for advice and consent in 1949, and hearings were held in 1950. The Genocide Convention, Hearings before a subcommittee of the Senate Committee on Foreign Relations, 81st Cong., 2d Sess. (1950). Solicitor General Perlman was a leading witness, taking the position that there was a firm constitutional basis for the treaty. The opposition was led by the American Bar Association. In general, opposition witnesses

13/ By international law, we mean "the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other." 1 H. Lauterpacht, Oppenheim's International Law 4-5 (8th ed., 1955). By its very nature, "international law" is in many respects quite amorphous. Its meaning on any particular subject may be debatable. Much international law is evidenced in the form of scholarly writings and speculation. Other sources, in addition to treaties, include international custom and the general principles of law recognized by civilized nations. See Statute of the I.C.J., Art. 38.

argued that the Convention would intrude federal criminal jurisdiction into local matters and that the treaty power should not be used to convert domestic criminal matters into international legal matters. No action was taken by the Senate on the Convention at that time. The Convention itself, pursuant to its terms, entered into force in 1951 when twenty States became parties.

The Eisenhower Administration, through Secretary Dulles, opposed implementing human rights through the treaty power, partly as a strategy to defeat the so-called Bricker amendment to the Constitution. Senator Bricker's proposed constitutional amendment would have limited the growth of federal power through exercise of the treaty power by overruling Missouri v. Holland, 252 U.S. 416 (1920). 14/ That decision held that a treaty could be the basis for enacting legislation to carry out the treaty even if the treaty dealt with matters otherwise reserved to the States by the Tenth Amendment. 15/ The Eisenhower Administration felt that if it supported the Convention it would have given more impetus to those who were sponsoring and supporting the Bricker Amendment. After Secretary Dulles stated in 1953 that he would not press for ratification of the Convention, there seems to have been no subsequent reconsideration of this position during the Eisenhower Administration.

14/ Hearings were held on the Bricker amendment, which appeared in different forms, in 1952, 1953 and 1955. It was reported favorably by the Senate Committee on the Judiciary in 1953. S. Rep. No. 412, 83rd Cong., 1st Sess. (1953). L. Henkin, Foreign Affairs and the Constitution 384 (1972). The key provision was: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."

15/ It does not seem that adoption of the Bricker Amendment would have prevented implementation of the Genocide Convention. The Constitution, Art. I, § 8, cl. 10, specifically authorizes Congress to define and punish offenses against the law of nations. Congress could therefore make genocide a federal crime under such power or under other constitutional provisions without relying on the treaty power.

Presidents Johnson and Nixon supported ratification of the Genocide Convention. A second series of hearings was held on the Convention in 1970. This Department was represented by then Assistant Attorney General Rehnquist, who reaffirmed this Department's 1950 position that the treaty was lawful under the Constitution. He noted that in 1950 the questions posed concerning the treaty power and federal jurisdiction were somewhat novel, adding that "developments in the intervening years--the extensive use of the treaty power and the growth of Federal criminal jurisdiction--have, it seems, illuminated both these areas to the point where I believe I can safely say that the questions . . . are more matters of policy than questions of legal power." Thus, he explained, the 1950 presentation was as fully valid in 1970 as it was before. If anything, the questions had become easier because of the growth of precedent; about two-thirds of the total number of treaties entered into by the United States since 1776 had been concluded between 1949 and 1968. These included several human rights treaties including the Protocol Relating to the Status of Refugees, 19 U.S.T. 6233. Mr. Rehnquist later wrote that the number of parties to the Genocide Convention had increased between 1950 and 1970 from 7 to 75, "thus emphasizing the view of the world community that genocide is both a matter of international concern and a proper subject for treaty negotiations." Genocide Convention, Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 91st Cong., 2d Sess. 147, 162, 164 (1970).

The Senate Committee on Foreign Relations reported the Convention out for the first time in 1970 but no further action was taken. S. Ex. Rep. No. 25, 91st Cong., 2d Sess. (1970). Hearings were held again in 1972 without participation by Government witnesses; the Convention was again reported out, but was not considered by the full Senate.

In 1974 the Convention came to the Senate floor for the only time. No vote was taken on the merits because of a filibuster led by Senator Ervin; several attempts to pass a cloture motion failed. Digest of U.S. Practice in Int'l Law 128-29 (1974). In 1976, the the American Bar Association reversed its position and has, since that time, supported the Convention. 16/ It was reported out again that year. S. Ex. Rep. No. 23, 94th Cong., 2d Sess. (1976). The Carter Administration attempted to secure ratification of the Convention. Hearings were held in 1977 at which both Executive branch and ABA witnesses appeared in support.

16/ An earlier attempt to change the ABA position in 1969-70 had been defeated by a narrow margin. S. Ex. Rep. No. 23, supra, at 3. The Convention had not been a live issue in the ABA in the years between 1950 and 1969.

In December, 1981 hearings were again held on the Convention. The Department of State declined to appear because the matter was under study. The Department of Justice was not invited. The principal supporters were the ABA, Senators Proxmire and Boschwitz, and former Senator Javits. The opposition included Senators Thurmond and Helms and the Liberty Lobby, which has regularly appeared at hearings against the treaty. No Committee action has been taken since the 1981 hearings.

Thus, over a period of 32 years, the Genocide Convention has been the subject of five hearings and has been reported out of committee four times, most recently in 1976. Opponents have always been able to command enough support to prevent approval by the Senate.

III. Arguments for and against the Convention

The arguments in favor of the Convention have been suggested in the discussion above and are easily stated. The United States is alone among the major democratic nations in not being party to the Convention. It is urged that it would therefore serve our foreign policy interests to become a party and demonstrate our support in the world community for the protection of human rights. Ratification would also provide the United States with legal standing, should the occasion arise, to bring cases before the I.C.J. and to file protests at the diplomatic level. These possible advantages must be weighed against the practical and political difficulties involved.

As noted, Senators Helms and Thurmond both opposed the Convention in recent hearings. We summarize their main points and provide comments or a summary of the responses which have been or could be made to them. (Citations are to pages in the 1981 hearing unless otherwise designated: The Genocide Convention, Hearing before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess. (1981).)

a. Senator Helms

1. The Convention creates a new theory of international law; criminal law has always been a matter of purely domestic concern and by approving the treaty we limit the sovereignty of the United States (p. 4).

Comment: The Constitution empowers Congress to define and punish offenses against the law of nations (Art I, § 8, cl. 10), and that authority has been used over the years to punish a variety of crimes, including piracy, assaulting foreign ambassadors, counterfeiting foreign currency, and aircraft hijacking. See Statement of Solicitor General Perlman in 1950 Hearings at 40-42.

Virtually all treaty obligations limit the sovereignty of parties in some way. The limitation is not significant here since the United States would not want to engage in genocide. As noted, supra, genocide is, in any event, an offense against customary international law.

2. There is no justification for submitting American conduct to the judgment of the world. (p. 4).

Comment: Ninety nations are now parties to the Convention. The above argument is necessarily based on the perception that the United States would not receive fair treatment by an international institution with power to adjudicate violations of the Convention. Some actions of the United Nations may provide a basis for this perception. U.N. bodies have, for example, denounced the United States for "practicing colonialism" in Puerto Rico. The only body authorized to make determinations under the Convention, however, is the I.C.J. which operates as a judicial rather than a political body. Although no one can predict what the I.C.J. would do in a particular case, it has not been the subject of the same criticism as the General Assembly for being biased against the United States.

3. The violent nations of the world will not obey the Convention (pp. 4-5, 8). 17/

Comment: This may well be very true. The Convention will not, of course, eliminate genocide. Becoming a party would, as noted, give the United States a right in some cases to call violators to account in an established forum. (No case has, however, been brought to the I.C.J. alleging genocide.) There have been instances in recent years in Central America and Southeast Asia in which the United States may have wished to have had a forum to bring charges against certain nations for brutal repression against ethnic groups. The approximately ninety parties include virtually all of the major countries of the world except the United States and the People's Republic of China. Most of the Communist nations are parties. Whether the airing of such charges in the I.C.J. would have had any salutary effect, however, is simply a matter of speculation.

17/ Senator Thurmond also made this point.

4. The Senate, in approving the Convention, would impose upon the House an obligation to pass implementing legislation which the House may not wish to pass (p. 5).

Comment: This problem has been avoided in the past by an understanding between the Executive and the Senate Committee on Foreign Relations that the President will not deposit the instrument of ratification until implementing legislation has been enacted. Under this procedure, there is no international obligation to pass such legislation until the time of deposit. If legislation is not passed, the United States simply does not become a party to the Convention. S. Ex. Rep. No. 23, supra, at 9, 19. This process would leave the House of Representatives free to exercise its own independent judgment on the matter.

b. Senator Thurmond

The Convention would become binding domestic law and would nullify acts of Congress and prior treaties inconsistent with the Convention (p. 8, 9).

Comment: The legislative history and the Convention itself make clear that the Convention would not be self-executing and that implementing legislation would be necessary. Statement of Solicitor General Perlman in 1950 Hearings at 31-32. We are not aware of, nor has Senator Thurmond identified, any existing statutes or treaties which would be inconsistent with the United States' becoming a party to this Convention.

2. Matters concerning criminal conduct involving murder or conspiracy to commit murder should be primarily a matter of state jurisdiction (p. 9).

Comment: Ordinary crimes such as murder would still be state crimes. Legislation submitted in the past has made clear that state law is not pre-empted. S. Ex. Rep. No. 23, supra, at 37; Statement of Solicitor General Perlman in 1950 Hearings at 46. A federal statute, were it deemed desirable, might well deal with matters beyond the capacity of individual state authorities. In any event, were crimes arguably constituting genocide, as defined in the Convention, to be committed within the jurisdiction of the United States, it would arguably be desirable for the Attorney General, rather than local prosecutors, to prosecute or determine not to prosecute such crimes due to the obvious international attention that would be drawn to such events.

3. The Convention would nullify Article II(7) of the U.N. Charter, which states that the Charter does not authorize the U.N. "to intervene in matters which are essentially within the domestic jurisdiction of any state." (p. 9).

Comment: The Convention rests on its own authority as a treaty and not on the U.N. Charter. The Convention does not grant any additional power to the U.N. Statement of Solicitor General Perlman in 1950 Hearings at 27. The approximately ninety parties to the Convention apparently do not consider concern about genocide to be solely a domestic affair. In fact, the United States has taken the position in the past that it is not. However, this Administration's judgment on this matter presents a policy, rather than a legal, issue.

4. The Convention creates a risk that Americans may be tried in an international tribunal (p. 10).

Comment: The Convention permits persons charged with genocide to be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." As noted in part I, _supra_, no tribunal has, in fact, been created or is now proposed. Statement of Solicitor General Perlman in 1950 Hearings at 44.

Apart from policy considerations, constitutional questions would probably prevent the United States from submitting persons accused of genocide in the United States to trial in such a tribunal. For example, Article III of the Constitution and the Sixth Amendment provide that the trial of all crimes shall be by jury and shall be held in the State where the crimes are committed.

5. The United States would not be able to refuse extradition for genocide on the grounds that it was a political offense and thus would be precluded from asserting that basis for not extraditing an American serviceman for fighting in a country with whom the United States has an extradition treaty (p. 10).

Comment: The Convention provides that genocide shall not be a political offense for extradition purposes. Extradition, however, requires a judicial hearing to review evidence and further review by Executive Branch officials. Such evidence must be sufficient to justify a person's arrest and committal for trial in the United States. 18 U.S.C. § 3181 _et seq._; 6 M. Whiteman, _Digest of International Law_ 996, 1026-30. There is no reason, therefore, to assume that extradition would take place in this country for

unfounded charges of genocide. If the United States believed the charge justified, the Convention does not prevent the United States from electing to try its own nationals. The Convention does not make this explicit, but the proposition has clear support in the drafting history. The Senate Committee on Foreign Relations has therefore proposed that the United States submit an understanding to this effect at the time of ratification. S. Ex. Rep. No. 23, _supra_, at 10. _See_ Letter from Assistant Attorney General Rehnquist in 1970 _Hearings_ at 162-63.

6. States, such as the Soviet Union and Vietnam, could bring charges of genocide against the United States in the International Court of Justice and wage an unfounded propaganda campaign (p. 11).

Comment: The International Court of Justice might be used in such a manner. However, reservations to the Convention by most Soviet bloc countries require the consent of all parties before a dispute can be brought before the I.C.J., a reservation 18/ that the United States could therefore invoke if brought by such a country.

Vietnam did not make such a reservation when it became a party in 1981, and could presumably file a case under the Convention against the United States based on the killing of Vietnamese in Vietnam if the United States ratified the treaty without such a reservation. (This assumes that the Convention might be applied to facts taking place before United States ratification, an issue discusssed in part I, _supra_. It also assumes that Vietnam would choose to bring charges of genocide against any country and implicitly place in issue its own conduct.) The United States would presumably contend that it

18/ The United States could submit a reservation to Article IX of the Convention relating to the jurisdiction of the I.C.J. similar to that submitted by the U.S.S.R. If it did so, however, other parties to the Convention, as described in note 4, _supra_, could take the position that such a reservation was incompatible with the purpose of the Convention and therefore object to it. In so objecting they may refuse to consider themselves in treaty relations with the United States as far as this Convention is concerned. _Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide_, [1951] I.C.J. Rep. 15. The Netherlands, for example, does not consider states making reservations to the I.C.J. jurisdiction provision of the Convention as parties to the Convention.

has never attempted to destroy Vietnamese, "as such," within the meaning of Article II of the Convention. The forces that the United States assisted in Vietnam were identical ethnically, nationally and racially with the forces we opposed. See Memorandum from then Assistant Attorney General Rehnquist to the Attorney General, Nov. 10, 1969, at 12.

7. The Genocide Convention would chill free speech because of the prohibition on incitement to commit genocide. (p. 11).

Comment: Article III of the Convention prohibits "direct and public incitement to commit genocide." This prohibition appears to be fully consistent with standards governing regulation of incitement to lawless action announced by the Supreme Court. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). See Statement of Assistant Attorney General Rehnquist in 1970 Hearings at 152, 163. Other States with different views of free speech could, as suggested by opponents, challenge the United States interpretation in the I.C.J. and argue that what the United States considers protected speech ought to be punished. Whether the United States wishes to take such a risk is essentially a political judgment. However, the United States probably stands more to gain than to lose in any debate over freedom of expression.

CONCLUSION

Whether to recommend ratification of the Convention is largely a policy question. Some judgment must be made concerning the value to the United States of entering into such a compact which may be said to be largely unenforcable against those countries most likely to violate it and useful as a propaganda vehicle against those countries which are most sensitive to human rights. On the other hand, the United States may well feel that if the tribunal before which such charges would be lodged is a fair one, it may have an excellent platform to seek to expose atrocities being committed in communist nations which otherwise are largely ignored in the world community. Assuming a fair tribunal, the United States has little to fear from charges brought against it. The I.C.J. has proved to be a useful tribunal to the United States in the past. In the Iran dispute, its judgment, while not directly enforceable, was valuable to the United States for economic and diplomatic purposes.

Some consideration should be given to the internal political impact of support of this Convention. Advantages and disadvantages in that regard should be explored by experts in those matters.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Deputy Attorney General

E. WAR CRIMES AND CRIMES AGAINST HUMANITY, INCLUDING GENOCIDE

16. Convention on the Prevention and Punishment of the Crime of Genocide

Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948

ENTRY INTO FORCE: 12 January 1951, in accordance with article XIII.

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(*a*) Genocide;

(*b*) Conspiracy to commit genocide;

(*c*) Direct and public incitement to commit genocide;

(*d*) Attempt to commit genocide;

(*e*) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

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

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

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

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

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

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

Article XII

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

Article XIII

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

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

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

Article XIV

The present Convention shall remain in effect for 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.

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

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

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

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

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(*a*) Signatures, ratifications and accessions received in accordance with article XI;

(*b*) Notifications received in accordance with article XII:

(*c*) The date upon which the present Convention comes into force in accordance with article XIII;

(*d*) Denunciations received in accordance with article XIV;

(*e*) The abrogation of the Convention in accordance with article XV;

(*f*) Notifications received in accordance with article XVI.

Article XVIII

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

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

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

17. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968

ENTRY INTO FORCE: 11 November 1970, in accordance with article VIII.

PREAMBLE

The States Parties to the present Convention,

Recalling resolutions of the General Assembly of the United Nations 3 (I) of 13 February 1946 and 170 (II) of 31 October 1947 on the extradition and punishment

94TH CONGRESS
2D SESSION

S. 3155

IN THE SENATE OF THE UNITED STATES

MARCH 17, 1976

Mr. HUGH SCOTT (for himself and Mr. JAVITS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To implement the Convention on the Prevention and Punishment of the Crime of Genocide.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) title 18, United States Code, is amended by adding
4 after chapter 50 the following new chapter:

5 "Chapter 50A.—GENOCIDE

"Sec.
"1091. Definitions.
"1092. Genocide.

6 "§ 1091. Definitions

7 "As used in this chapter—

8 "(1) 'National group' means a set of persons whose
9 identity as such is distinctive in terms of nationality or

forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(2) 'Ethnic group' means a set of persons whose identity as such is distinctive in terms of its common cultural traditions or heritage from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(3) 'Racial group' means a set of persons whose identity as such is distinctive in terms of race, color of skin, or other physical characteristics from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(4) 'Religious group' means a set of persons whose identity as such is distinctive in terms of its common religious creed, beliefs, doctrines, or rituals from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(5) 'Substantial part' means a part of the group of such numerical significance that the destruction or loss of

viable entity.

"(6) 'Children' means persons who have not attained the age of eighteen and who are legally subject to the care, custody, and control of their parents or of an adult of the group standing in loco parentis.

"§ 1092. Genocide

"(a) Whoever, being a national of the United States or otherwise under or within the jurisdiction of the United States, willfully without justifiable cause, commits, within or without the territory of the United States in time of peace or in time of war, any of the following acts with the intent to destroy by means of the commission of that act, or with the intent to carry out a plan to destroy, the whole or a substantial part of a national, ethnic, racial, or religious group shall be guilty of genocide:

"(1) kills members of the group;

"(2) causes serious bodily injury to members of the group;

"(3) causes the permanent impairment of the mental faculties of members of the group by means of torture, deprivation of physical or physiological needs, surgical operation, introduction of drugs or other foreign substances into the bodies of such members, or subjec-

[illegible] or psychiatric treatment calculated to permanently impair the mental processes, or nervous system, or motor functions of such members;

"(4) subjects the group to cruel, unusual, or inhumane conditions of life calculated to bring about the physical destruction of the group or a substantial part thereof;

"(5) imposes measures calculated to prevent birth within the group as a means of effecting the destruction of the group as such; or

"(6) transfers by force the children of the group to another group, as a means of effecting the destruction of the group as such.

"(b) Whoever is guilty of genocide or of an attempt to commit genocide shall be fined not more than $20,000, or imprisoned for not more than twenty years, or both; and if death results shall be subject to imprisonment for any term of years or life imprisonment. Whoever directly and publicly incites another to commit genocide shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(c) The intent described in subsection (a) of this section is a separate element of the offense of genocide. It shall not be presumed solely from the commission of the act charged.

"(d) If two or more persons conspire to violate this section, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than five years or both.

"(e) The offenses defined in this section, wherever committed, shall be deemed to be offenses against the United States.".

(b) The analysis of title 18, United States Code, is amended by adding after the item for chapter 50 the following new item:

"50A. Genocide .... 1091".

SEC. 2. The remedies provided in this Act shall be the exclusive means of enforcing the rights based on it, but nothing in the Act shall be construed as indicating an intent on the part of the Congress to occupy, to the exclusion of State or local laws on the same subject matter, the field in which the provisions of the Act operate nor shall those provisions be construed to invalidate a provision of State law unless it is inconsistent with the purposes of the Act or the provisions of it.

SEC. 3. It is the sense of the Congress that the Secretary of State in negotiating extradition treaties or conventions shall reserve for the United States the right to refuse extradition of a United States national to a foreign country for an offense defined in chapter 50A of title 18, United States

1 Code, when the offense has been committed outside the
2 United States, and

3 (a) where the United States is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction, or

6 (b) where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense.

CONVENTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME GENOCIDE

Adopted by the General Assembly of the United Nations o 9 December 1948

Entry into force: 12 January 1951, in accordance with article X