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1008

ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
19467	MEMO	ELLIOTT ABRAMS TO THE SECRETARY OF STATE, RE ENDORSEMENT OF CONVENTION... R 6/22/2006 DOCUMENT PENDING REVIEW IN ACCORDANCE WITH E.O. 13233	3	ND	B1 <i>denied 08/00/2005</i>
19468	MEMO	DRAFT ABRAMS TO THE DEPUTY SECRETARY OF STATE, RE ENDORSEMENT OF CONVENTION... R 6/22/2006 DOCUMENT PENDING REVIEW IN ACCORDANCE WITH E.O. 13233	11	ND	B1 <i>fic</i>

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Benke / Montgomery / Blackwell / HAA
reviewing 2 1/2 yrs

DOJ - we need to make a decision
which option -

1. NO
2. endorse w/ understandings + reservations
3. endorse

HAA: endorse w/ understandings + reservations

otgt reservations dealt w/ conservative's fears &
that might lead to successful advice
+ consent w/ Senate

Extradition of U.S. citizen
limit period of ICTJ

Legal: against reservations based on legal
arguments

Spec plus

Laxalt / Hatch → will oppose w/o reservations
w/reservations - won't oppose

Morton: what's the reason to go forward now

• Tom Stewart
Off of Public Affairs

Eugenio Rolando Martinez
KR signed Wed 5/11
grant pardon

Safe
file

ASSISTANT SECRETARY OF STATE
WASHINGTON

UNCLASSIFIED UPON REMOVAL
OF CLASSIFIED ENCLOSURE(S)

105
7/21/05

June 16, 1982

UNCLASSIFIED (with
CLASSIFIED attachments)

TO: L - Mr. Robinson

FROM: HA - Elliott Abrams ✓

SUBJECT: Genocide Convention

I attach the following documents regarding the Genocide Convention:

1. Action Memorandum to the Secretary;
2. Memorandum from Mr. Bremer to Judge Clark; and
3. Memorandum regarding understandings and reservations.

As you will discern, the issues surrounding the Convention are primarily political, the crucial question being how to attain Senate advice and consent. However, we look forward to receiving your comments on the legal issues presented. With the congressional session so far advanced, I would very much appreciate as fast a response as your work permits.

Attachments: as stated.

cc: L/HR - Mr. Surena ✓

PRESERVATION COPY



DEPARTMENT OF STATE
ACTION MEMORANDUM

S/S

~~CONFIDENTIAL~~

TO: The Secretary
FROM: HA - Elliott Abrams *W*
SUBJECT: Endorsement of Convention on the Prevention and
Punishment of the Crime of Genocide

ISSUE FOR DECISION

Whether the Administration should now press for Senate advise and consent to the Genocide Convention with appropriate reservations and understandings.

ESSENTIAL FACTORS

The Genocide Convention has been under Departmental review since the commencement of the Administration. President Truman first sent the Convention to the Senate for ratification in 1949 and each successive administration has endorsed the treaty, including the Nixon (when then Assistant Attorney General Rehnquist testified in its favor) and Ford Administrations. The Senate Foreign Relations Committee conducted hearings on the Convention in December 1981; Representative Ferraro submitted House Resolution 443 endorsing United States ratification on April 29, 1982. The Senate has never given its advice and consent to the Treaty because of conservative opposition. No previous administration has been willing to respond to conservative criticisms by agreeing to protective reservations addressing their concerns.

ANALYSIS OF OPTIONS

A. To Support Senate Ratification

The Administration may strongly endorse Senate ratification of the Genocide Convention with appropriate understandings and reservations and begin building support in the Senate.

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~~CONFIDENTIAL~~

-2-

The arguments in favor of support for the Convention by the Reagan Administration are simple and powerful.

First, we would be following in the footsteps of our Republican predecessors. Indeed, one can argue that a failure to follow this tradition would be widely publicized and would subject us to criticism.

Second, there are important interest groups who will be gratified if we support the Convention. It has become a significant issue to many activists in the American Bar Association and other legal groups, to many human rights and religious organizations, and especially to the American Jewish community. The Administration has been approached frequently on this issue by many Jewish organizations and support for the Convention would give us an issue of great appeal among American Jews.

Third, support for the Convention would assist us in blunting political attacks on the Administration from the left both at home and abroad on the grounds that we care only about military force, and give us a "humanizing" issue, especially as the nuclear debate continues. Moreover, support for the Convention could be useful as a political tool as we draw attention to such issues as Soviet use of chemical warfare in Afghanistan and Southeast Asia.

My staff has discussed the Convention with aides to the Republican members of the Senate Foreign Relations Committee and to selected key conservative Senators including Senators Laxalt and Hatch. The consensus is that if the Administration supports ratification and couples endorsement with new protective reservations responding to the concerns of the conservatives, ratification will succeed and opposition will be narrow. (The understandings and reservations suggested, and the reasons therefor, are explained in Attachment A). However, if endorsement is not accompanied by such reservations, key conservatives, such as Hatch, will be forced to criticize us.

The most productive manner in which to announce endorsement and seek ratification would be for the President to announce his support at a high visibility Jewish gathering. The formal hearings at which representatives of the State and Justice Departments would testify would be held this year, but the actual vote on the treaty would not occur until next year.

~~CONFIDENTIAL~~

B. To do nothing

The Administration may choose to do nothing with respect to the Convention. This would avoid criticism from opponents of the Treaty, in particular the Liberty Lobby, and Senators Thurmond and Helms. As time passes, however, this will subject the Administration to mounting criticism from those who support the Convention. To maintain that the Convention remains under study at the Department will become progressively less defensible and more embarrassing.

RECOMMENDATIONS

That you approve endorsement by the Administration of Senate advice and consent to the Genocide Convention, with appropriate understandings and reservations and that you approve of the attached Bremer-Clark memorandum (favored by HA), sending this recommendation on to the White House.

Approve _____ Disapprove _____

Alternatively, that no action be taken with respect to the Genocide Convention.

Approve _____ Disapprove _____

Attachments:

1. Bremer-Clark Memorandum
2. Memorandum regarding Understandings and Reservations

Drafted:HA:WSBurke:jel
6/15/82:22741



DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM FOR MR. WILLIAM P. CLARK
THE WHITE HOUSE

SUBJECT: Administration Support for Ratification of
Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly in 1948. Every American President since then has endorsed Senate ratification of the Convention, including Presidents Nixon and Ford. Mr. Justice Rehnquist (then Assistant Attorney General, Office of Legal Counsel) testified in favor of ratification in 1970. Ratification has received increasingly broad support in the United States from both parties and many legal scholars and organizations, including the American Bar Association. The Jewish community is especially concerned about and favorable to the Convention.

The opposition to ratification has been intense but very narrowly based. Former Senator Ervin led opposition until his retirement in 1974 and the Liberty Lobby has consistently and vigorously opposed the Treaty. At present, Senators Thurmond and Helms are on record as strongly opposing the Convention. However, we are convinced that if the Administration supports ratification with appropriate reservations and understandings (including some not supported by previous Administrations, but considered from time to time by the Senate), opposition from conservatives can be greatly limited. (See attachment A for explanation of the understandings and reservations suggested.) Conversations with aides to conservative Senators, (including Senators Laxalt and Hatch) indicate that if endorsement of the Treaty is coupled with such protective reservations and understandings responding to conservative concerns, opposition to the Treaty will be very limited. If such reservations are not suggested, some conservatives will probably be forced to criticize the Treaty and administration endorsement thereof.

Endorsement of the Convention by the President would provide further evidence of the Administration's compassion and sensitivity to the concerns of American Jews and the American legal and human rights communities and would

demonstrate to critics of Administration's policy on nuclear deterrence and military strength the President's good faith and the sincerity of his support for peace and human rights.

We believe that the President would best advance these objectives by endorsing the Convention, with appropriate reservations, at an important meeting of a Jewish group.

We have canvassed the Hill and are convinced that Administration endorsement, coupled with appropriate protective reservations, can lead to passage of the Convention with relatively little resulting controversy.

The Department recommends that the Administration support the ratification of the Genocide Convention. If this position is approved we will map out a strategy for gaining Senate ratification and provide a draft statement for use by the President.

The Department of Justice concurs in this recommendation.

L. Paul Bremer, III
Executive Secretary

ATTACHMENT A

Understandings, Declarations and Reservations

Previous administrations have supported only four (or in the case of the Nixon administration, three) understandings and no reservations. These understandings dealt with some of the concerns expressed by treaty critics, though not all of the concerns and not to their full satisfaction. Other administrations have not agreed to additional reservations or understandings dealing with other perceived flaws in the Treaty because they thought them unnecessary or because they were unsympathetic to the concerns to which these additional reservations would have been addressed. As a result, opponents have used these unaddressed possible problems to obstruct passage for over thirty years. Opposition has been remarkably effective. Even in 1974, when the Senate was far more liberal than at present, only 55 votes could be mustered in favor of closure. We believe that in the present political environment -- with the Senate far more conservative than in earlier years, with the power of the Treaty's principal opponents, Senators Thurmond and Helms, greatly increased, and with the elimination of the Convention's most effective supporters in 1980, Senators Javits and Church, it is very unlikely that success can be achieved if the pattern of previous administrations is followed. We believe that additional reservations must be prepared, to quiet conservative concerns, if Senate advice and consent to the Treaty is to be attained.

Understandings

All administrations have supported the following reservations:

1. That the U.S. 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 a manner as to affect a substantial part of the group concerned."

This understanding merely serves to emphasize that the element of "intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such" is basic in proving a charge of genocide, and consequently proof would

be required that the genocidal acts charged had been committed "in such a manner as to affect a substantial part of the group concerned."

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

The second proposed understanding construes the words "mental harm" in article II to mean "permanent impairment of mental faculties." This construction is in keeping with the generally understood meaning of the term in the context of article II. It would make clear that the term could not be construed as applying to various lesser forms of mental harassment toward minority groups. This construction is consistent with the negotiating history of the convention.

3. That the U.S. 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 of any of its nationals for acts committed outside the state.

The third proposed understanding is explicitly based on the negotiating record of the convention, which clearly adopts the interpretation 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 state. The possibility of concurrent jurisdiction thus created is supported not only by the negotiating record but by the practice of other states.

These understandings are unexceptionable. They usefully clarify the meaning of certain of the Convention's provisions, and respond to concerns of Treaty critics. This administration ought to support them, as have all its predecessors.

With the exception of the Nixon administration, previous administrations have supported the following understanding:

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

This understanding has been justified on the ground that ratification of the Convention is virtually entirely a symbolic act unless implementing legislation is passed, and that it would be best to couple ratification with passage of legislation giving the Convention some effect. However, the following factors militate against this understanding.

1. The Judiciary Committee is chaired by a strong opponent of the treaty. If deposit of the instrument of ratification is dependent upon passage of implementing legislation (which will originate in his committee), it might well be years before the Treaty becomes effective; indeed, the implementing legislation might never be passed.

2. In any event, it is unpredictable when such legislation would be passed by Congress, even in the best of circumstances. In the event that opposition to advice and consent proves to be stronger than we expect, some critics might be mollified through a compromise by which this understanding is inserted, believing that their concerns will be protected by Senator Thurmond.

For these reasons, we think it advisable not to include this understanding.

RESERVATIONS

Extradition Reservation

In 1971, Senator John Sherman Cooper (RKY) proposed the following reservation to the Genocide Convention:

That a U.S. Citizen in the United States charged with having committed an act outside the United States in violation of the treaty provisions shall not be subjected to extradition unless the Secretary of State determines such person is guaranteed all the constitutional rights of an accused under our Federal laws.

This reservation was tabled by the Foreign Relations Committee by a vote of 7 to 6. It addresses one of the principal fears and criticisms of the Convention raised by treaty opponents since it was first sent to the Senate by President Truman: that Americans will be extradited and deprived of some or all of their constitutional rights for a newly invented crime with possibly strong political overtones. It would, therefore, eliminate one of the major sources of opposition to the Treaty, and appease many conservatives, inside and out of the Senate, who would otherwise oppose the Treaty. Thus, it would help to ensure that the benefits of administration endorsement of the Treaty would not be accompanied by significant costs in the form of the alienation of some of the President's conservative supporters.

U.S. law permits extradition only when there is an extradition treaty in force which covers the crimes in question. Presently, there are no extradition treaties which cover the crime of genocide. However, the Convention contemplates that the crime of genocide will be made an extraditable offense through its inclusion in any new treaties the United States may conclude or existing treaties it may revise. A major consideration of the United States in the decision to conclude an extradition treaty is the likelihood that those extradited will receive a fair trial. However, it has not been considered essential that the standards abroad match ours in every respect. In the absence of such a provision, it would be necessary to rely upon procedural safeguards and executive discretion to prevent U.S. citizens from being abused by a foreign judicial system. Many conservatives believe that this is insufficient protection because charges of genocide are especially susceptible to political motivation, as was true of accusation of genocide against the United States during the Vietnam war and regarding the Black Panthers during the late sixties.

These concerns have been answered in the past by the assertion that no one will be extradited for genocide until that crime is added to extradition treaties now in force, and the Senate can protect against abuses at a later date because it must give its advise and consent to such changes. However, Senators voting to ratify the Genocide Convention in 1982 or 1983 cannot be sure that their concerns over denial of American constitutional and procedural rights to an extradited American citizen will be fully reflected in Senate actions in future years. This gives special appeal to the Cooper Resolution. We therefore urge that the Administration support this reservation at the time it endorses ratification.

International Court of Justice Reservation

One of the major sources of criticism of the Convention has been Article IX, which provides that the International Court of Justice shall be empowered to determine disputes between contracting parties relating to "the interpretation, application and fulfillment" of the Convention, including "the responsibility of a State for genocide". Many oppose the treaty because of the fear that other parties to the convention who are adversaries of the United States would make use of this provision to embarrass our country for political reasons.

In the past, Treaty proponents have responded that this fear was exaggerated because the Soviet bloc states, those most likely to want to use this provision for such purposes, had made Article IX reservations to the Treaty and thus could not bring charges against the United States. Unfortunately, this response is no longer particularly influence convincing because of the expansion of Soviet to include states that have issued no reservations to the Treaty (including Cuba, Afghanistan, Ethiopia, and Nicaragua), and because of the many Third World signatories who also have issued no such reservations.

Therefore, we suggest that the United States make the following reservation:

With reference to article IX of the Convention, the United States of America declares that for the submission of any dispute under the Convention to the International Court of Justice, the consent of all parties to the dispute is required in each case.

A variety of noncommunist or nonaligned states have issued similar reservations, including Algeria, Argentina, India, Spain and Venezuela.



United States Department of State

The Legal Adviser

Washington, D.C. 20520

July 19, 1982

MEMORANDUM

TO : HA - Mr. Abrams
FROM : L - Davis R. Robinson *[Signature]*
SUBJECT: Genocide Convention

You have requested our comments on your June 16 memorandum and attached papers. This memorandum addresses the legal issues presented by the possible U.S. reservations to the Convention and the treatment of the implementing legislation proposed in these papers. After considering these issues, it is our judgment that we should seek to avoid making reservations to this Convention and that at least some of our concerns can be more appropriately met through implementing legislation.

I. Reservations, per se

Since the Genocide Convention was first transmitted to the Senate in 1949, all Administrations have sought to avoid encumbering it with reservations. In this regard, care was taken to formulate the proposed understandings so that they would not be construed by States Parties to the Convention as reservations, that is, as statements which exclude or vary the legal effect of a treaty provision.

The Department's traditional resistance to U.S. ratification of the Genocide Convention with reservations has been grounded on two basic points: First, it is important to be able to state, legally and politically, internationally and domestically, that the United States adheres to the Genocide Convention without seeking to limit the legal effect of its provisions, i.e., without reservation. Given the existence in all States of criminal laws prohibiting under different names (e.g., murder, assault) the kinds of acts proscribed under the Convention as genocide, and given that many of these laws are applied "extraterritorially" in some manner, ratification of the Genocide Convention by the United States today would be largely symbolic as a legal matter.

The second reason for avoiding the entry of reservations concerns the likely reaction of States Parties to the Convention. They may object to our reservations. Moreover, if they consider that our reservations are incompatible with the purpose and object of the treaty, they may state that they are not in treaty relations with the United States under this Convention. Under such circumstances, the legal and symbolic effect of our ratification would be severely diminished.

In this regard, the reservations proposed in the attachments to your June 16 memorandum regarding extradition and the International Court of Justice, might invite strong objections from a wide range of States Parties to the Convention.

II. THE EXTRADITION RESERVATION

The suggested reservation on extradition, which would preclude extradition unless the receiving State afforded all U.S. constitutional protections to the person extradited, was first proposed in 1971 by Senator Cooper. At that time, "... the [Senate Foreign Relations] committee voted 7 to 6 to table the reservation, not so much because members were opposed to its thrust as because such policy would be more properly expressed in the implementing legislation."^{1/} In this connection, the Committee drew attention to Section 3 of the suggested implementing legislation which reads:

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

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

(b) where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense."^{2/}

Under the proposed legislation the United States would have jurisdiction to prosecute an American citizen for genocide committed by him outside the United States. See proposed 50A

^{1/}Senate Executive Report No. 94-23, 94th Cong., 2d Sess. 11(1976).

^{2/}Id., at 37, 38.

U.S.C. 1092 (a).^{3/} In our view, this approach should resolve concerns that ratification of the Convention would oblige the U.S. to extradite an American citizen to face "trumped up" charges before a foreign legal system which did not afford him adequate substantive and procedural safeguards. Under U.S. extradition law, no one may be extradited unless there is probable cause to believe he committed the crime charged. If we considered the charges "trumped up" probable cause for extradition would be lacking. If we found probable cause, we could prosecute the U.S. citizen in the U.S. and thereby defeat extradition. If the foreign system lacked procedural safeguards we should not have an extradition agreement with it.

It may be noted that the Congress may have some reluctance to enact new criminal legislation with extraterritorial jurisdiction over U.S. citizens. If this should be the case, and if some reservation relating to extradition is necessary to obtain advice and consent, one possible approach would be to seek to formulate a reservation on extradition which avoids significant objection from Parties to the Convention and which would not raise difficulties with the Senate Foreign Relations Committee. Such a reservation might be phrased in terms of the "prosecute or extradite" language found in a number of recent treaties.^{4/} This would avoid the likely criticism of the current proposed reservation that it would shield from any prosecution any American citizen found in the U.S. who is accused of genocide abroad. Such a position would be likely to invite substantial objections from the Parties to the Convention. No other nation guarantees an accused "all the constitutional rights of an accused under our federal laws;"^{5/} nor does the United States require such guarantees from foreign countries with which we have extradition treaties.

^{3/}Id., at 35.

^{4/}An example of this "prosecute or extradite" language is found in Article 7 of the Hague Convention on Suppression of Unlawful Seizure of Aircraft, TIAS 7192, which entered into force in 1971. Article 7 reads:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

^{5/}It is also awkwardly phrased; i.e., constitutional rights under federal laws.

We are not persuaded by the argument that Americans accused of genocide abroad should be extradited only under this standard "because charges of genocide are especially susceptible to political motivation..."^{6/} A great number of ostensibly criminal charges may be brought for political reasons. It is incumbent on the Departments of State and Justice and the courts to weigh the sufficiency of evidence presented by a foreign government in support of a request for extradition. In that sense a charge of genocide is no different from any other charge. Ultimately, of course, it is within the authority of the Secretary of State to deny extradition, even where a court has found probable cause to extradite, if the charge involves a political offense or the request is politically motivated.^{7/} It should also be noted that no Party to the Convention has entered a comparable reservation on extradition.^{8/}

III. THE ICJ RESERVATION

The United States has often reiterated its commitment to the peaceful adjudication of international disputes and has encouraged States to have recourse to the ICJ for this purpose. With regard to the concerns raised in your paper, it is recognized that the jurisdiction of any court may be abused by frivolous or politically motivated complainants. Such a risk is not restricted to international tribunals. In this regard, it is worthy of note that since the entry into effect of the Statute of the Court in 1945, the ICJ has not lent itself to abusive

^{6/}From p. 4 of Attachment A of the draft Bremer-Clark memo.

^{7/}The Congress is currently considering a major revision of U.S. extradition law. Neither House has indicated any interest in erecting barriers to the extradition of U.S. nationals, much less in making the full protections of the U.S. Constitution the sine qua non of the extradition of its own nationals. It should be noted that the Senate bill was considered by the Senate Foreign Relations Committee upon sequential referral.

^{8/}Two States, Venezuela and the Philippines, have entered statements with respect to Article VII of the Convention which relates to extradition. Some other Parties to the Convention have chosen to regard these statements as reservations. However, the statements in each case relate to the requirements of local law with respect to extradition. Venezuela, for example, states that Venezuelan law does not permit the extradition of its own citizens. The Philippines states that it will not extradite anyone until genocide is made a crime under Philippine law. Both of these statements appear consistent with Article VII under which Parties to the Convention "pledge...to grant extradition in accordance with their laws..." See Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1981, UN Doc. ST/LEG/SER.E/1. The Cooper reservation, however, does not reflect a requirement of U.S. law.

cases of this nature. Since the Connally reservation to our acceptance of the compulsory jurisdiction of the ICJ under Article 36.2 of the Court's statute, the U.S. has accepted under Article 36.1 of its statute the Court's jurisdiction to settle disputes under a large number of treaties. A reservation with respect to Article IX could lead to unfavorable speculation at home and abroad why the United States chose not to accept ICJ jurisdiction for dispute settlement under this treaty when we do so regularly for other multilateral treaties, some of which similarly involve the prospect of domestic prosecution or extradition leading to the prosecution overseas of one's own nationals. Examples of these treaties are: the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and the Convention on the Physical Protection of Nuclear Material.

In this connection the following excerpt from the 1976 Senate Foreign Relations Committee Report is relevant:

"It must also be noted that a number of countries, notably Communist countries, have ratified the treaty subject to the reservation that they do not consider themselves bound by Article IX. Other countries have taken exception to this action. The United States is expected to do likewise. As a consequence, the United States could invoke the reservation in its own behalf in cases brought by countries making such a reservation." (emphasis added)^{9/}

The following 20 States^{10/} have entered reservations against Article IX of the Convention, thereby not accepting the jurisdiction of the ICJ to resolve disputes under the Convention: Albania, Algeria, Argentina, Bulgaria, The Byelorussian S.S.R., Czechoslovakia, German Democratic Republic, Hungary, India, Mongolia, Morocco, Philippines, Poland, Romania, Rwanda, Spain, the Ukrainian S.S.R., the U.S.S.R., Venezuela, and the Socialist Republic of Vietnam.

Two Parties to the Convention, the Netherlands and the United Kingdom, have objected generally to any reservations taken with regard to Article IX. The Netherlands expressed the view that:

"... it considers the reservations... to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention."^{11/}

^{9/}Senate Executive Report No. 94-23, at p. 13.

^{10/}Note that the number 20 counts the Soviet Union thrice.

^{11/}Multilateral Treaties Deposited with the Secretary-General, status as at 31 December 1981, UN Doc. ST/LEG.SER.E/1, at p. 94.

Similarly, the U.K. did not accept the reservations made to Article IX. It stated:

"that [it is] unable to accept reservations in respect of Article IX of the said Convention; in [its] view this is not the kind of reservation which intending parties to the Convention have the right to make."^{12/}

Thus, a U.S. reservation to Article IX would not be acceptable to the United Kingdom, although we would arguably continue in a treaty relationship with the U.K. since its objection did not expressly indicate the absence of a treaty relationship.^{13/} However, we would have no treaty relationship under the Genocide Convention with the Netherlands.

Under these circumstances, we would strongly advise against a U.S. reservation to Article IX of the Convention.

IV. THE DECLARATION CONCERNING IMPLEMENTING LEGISLATION

We agree with your proposal that the understanding (actually a declaration) that the U.S. will not deposit its instrument of ratification until after implementing legislation has been enacted should not be included in the Senate's resolution of advice and consent.

This declaration was proposed, in part, to assuage the concerns of some that ratification of the Convention would constitute enacting criminal law without the participation of the House of Representatives. However, the Convention is clearly not self-executing. Its ratification alone would not result in the creation of a new crime in the United States. Arguably, if implementing legislation is not enacted, persons believed to have committed genocide in the United States could be charged under existing federal or state criminal provisions, e.g. murder. The U.S. could argue that such prosecutions fulfilled its obligations under the Convention. In the absence of implementing legislation, however, we could not include "genocide" as an extraditable offense in any subsequent extradition treaties,

^{12/}Id.

^{13/}Other Parties which have generally objected to the reservations entered by Parties which have lodged reservations against Article IX are: Australia, Belgium, Brazil, China, Cuba, Ecuador, Norway and Sri Lanka. Greece entered an objection to "any reservation which has already been made or which may hereafter be made..." Id., at pp. 93-94.

nor could we prosecute Americans accused of having committed genocide abroad. Thus, passage of implementing legislation is necessary to ensure full observance of U.S. obligations under the Convention.

Some delay between ratification and enactment of implementing legislation is clearly permissible under international law. However, after all these years it may be preferable that we not become a Party to the Convention until we are in a position to observe its obligations fully. If this is our objective, it can best be accomplished by not depositing the instrument of ratification until the implementing legislation is enacted.

A decision not to deposit an instrument of ratification until implementing legislation is enacted is a domestic matter and should not be "declared" in the Senate's resolution of advice and consent, which we would have to repeat in our instrument of ratification and communicate to the UN as depositary. Inclusion of the statement in the resolution of advice and consent might invite comments or objections from Parties. As a preferable alternative approach, the President or Secretary could simply state his intention orally or in writing to the Congress not to deposit the instrument of ratification until the implementing legislation is enacted.

Drafted:
L/HRR:AMSurena:al
7/1/82 x23044

Clearances:
L - Ms. Verville
L - Mr. McGovern
L/T - Mr. Dalton
L/UNA - Mr. Small
L/LEI - Mr. Peay

ASSISTANT SECRETARY OF STATE
WASHINGTON

TO: L - Mr. Robinson
FROM: HA - Elliott Abrams *JA*
SUBJECT: Genocide Convention

We have reviewed your July 19 memorandum regarding the Convention and have considered the arguments set forth therein against any reservations to the Convention. We continue to believe that the reservations we have suggested must accompany Administration endorsement of Senate advice and consent to the Convention if ratification is to succeed.

We address each of the memorandum's arguments against reservations below. However, we must emphasize that the course you recommend, of supporting no reservations, is identical to that followed by all previous administrations who have endorsed the Convention. This strategy invariably has met with failure. We are convinced, based in part on conversations with the staffs of conservative senators, that it has no more prospect of success at present without Administration endorsement of protective reservations.

The Senate is more conservative now than at any time in the past twenty years, and the Convention's most vociferous opponents, Senators Thurmond and Helms, hold positions of greater influence than ever before. In 1975, only 55 votes could be mustered in favor of cloture on debate on the Convention. The large majority of those favoring cloture were subsequently defeated and replaced by more conservative senators. Unless endorsement of the Convention is accompanied by reservations of the type we propose, crucial conservatives such as Senators Laxalt and Hatch are unlikely to vote to advise and consent. The support of many such conservatives is necessary if ratification is to succeed. This inescapable fact outweighs concerns expressed in the memorandum about the suggested reservations.

I. Reservations in General

The memorandum sets forth two general arguments against the inclusion of any reservations. First, it is "important to be able to state legally, politically, internationally and domestically, that the United States adheres to the Genocide Convention without seeking to limit the legal effect of its provisions." Although the

memorandum does not explain why this is the case, it states that ratification "would be largely symbolic as a legal matter."

We do not believe that ratification of the Convention with reservations will in fact have any serious ill effects, legally or politically, internationally or domestically. At least twenty-one other states have ratified the Convention with a variety of reservations, including most of the Soviet-bloc and many Third World states. It would be very difficult to demonstrate that they have suffered in any way for having done so. The fact that such states have issued reservations is significant because they are most likely to be in an adversarial position to the United States in international fora. If anyone is likely to be tempted to criticize the United States for reservations, it would be these countries. Because of their own reservations to the Treaty, they are in no position to object to American reservations.

We do not believe that there will be any serious domestic repercussions from the adoption of reservations. Because, as you state, ratification is almost entirely symbolic, the fact of advice and consent to the treaty will far outweigh any detrimental effects of adoption of reservations. Our conversations with representatives of B'nai B'rith, and with aides to Senators Proxmire and Percy, the leading Senate advocates of ratification, confirm this. They agree that the act of ratification is the important issue, and if reservations are necessary to win ratification, they should be proposed. Last but not least, the domestic and international reaction to ratification with reservations will certainly be more favorable than continued failure to ratify.

II. Extradition Reservation

The memorandum suggests that concerns over extradition of Americans to face trial overseas for genocide could be adequately addressed by implementing legislation. It casts doubt on the need for such protection on the following grounds:

- (1) No one may be extradited unless there is probable cause to believe he committed the crime charged and if we considered charges "trumped up", probable cause for extradition would be lacking.
- (2) If the foreign system lacked procedural safeguards, we should not have an extradition agreement with it.
- (3) The concern that charges of genocide may be politically motivated is not serious because the Departments of State and Justice must weigh the sufficiency of evidence presented by a foreign government in support of an extradition request. Moreover, the Secretary of State may deny extradition in any event, if the charge involves a political offense or the charge is politically motivated.

- (4) No other party to the Convention has made a comparable reservation on extradition.
- (5) The implementing legislation suggested in 1976 provided that the Secretary of State in negotiating extradition conventions shall reserve for the United States the right to refuse extradition of a United States national to a foreign country where the United States is competent to try the person charged or when the person is already being prosecuted for such offense.

We do not think that these points and suggestions adequately meet the concerns of Convention critics regarding extradition. This issue, it must be remembered, has been among the foremost matters of concern to conservatives. Senators Thurmond and Helms, and former Senator Ervin have strenuously objected to the Treaty on these grounds. So too have a variety of far-right political groups, including the Liberty Lobby, and such conservative publications as Human Events. The absence of a protective reservation on extradition would be a major impediment to ratification. It also would undoubtedly subject the President to strong conservative criticism.

In the past, the State Department response to concern over the possibility of extradition of Americans for genocide was that the Senate could ensure sufficient protections when it considered advice and consent to new extradition treaties and the amendment of existing treaties to include the crime of genocide. This argument is no longer persuasive, however, because of contemporary Justice Department interpretation of the law of extradition. The Justice Department argues that if two states with a preexisting extradition treaty become parties to the Convention, the two instruments should be considered together, and no additional treaty or revision of existing treaties ordinarily would be necessary in order for extradition to be proper for genocide. Justice observes that more recent extradition treaties do not itemize crimes. The trend is to avoid specific mention of each crime encompassed. This is the ongoing construction to extradition treaties applied by the Justice Department. Justice argues convincingly that a liberal stance on this issue is advantageous to the United States because it makes more frequent use of extradition treaties than other states.

We are sympathetic to fears of treaty critics that the Convention will be used by adversaries of the United States for political purposes. It is not sufficient to respond to these concerns that many crimes are currently prosecuted for political reasons or that there are some existing protections against extradition if charges were trumped up. The fact is that allegations of the commission of genocide are especially likely to be politically motivated. The history of such charges against the United States clearly illustrates this fact. From the time to time during the past dozen years America has been accused of genocide against the Black Panthers, Indians and Vietnamese.

We believe we must respond to conservative fears over political misuse of allegations of genocide and that they are basically correct that existing protections are insufficient.

III. The ICJ Reservation

We understand your view that a reservation on ICJ jurisdiction "could lead to unfavorable speculation at home and abroad" as to the reasons for this reservation. We think correct your observation that the risk of abuse by complainants exists in any court. However, the fact is that concern over ICJ jurisdiction in this context has been one of the primary objections to ratification raised by Convention critics. We believe that failure to include this reservation will preclude advice and consent.

The traditional response to fear that the Convention and the ICJ would be used for political purposes by America's adversaries has been that those states most likely to be tempted take such action, the Soviet bloc, have their own ICJ reservations. Therefore the U.S. could invoke their reservations on "its own behalf in cases brought by countries making the reservation." Unfortunately, this rationale is severely undermined by the expansion of Soviet influence and by the existence of widespread Third World hostility towards the United States that has arisen since the Convention was approved by the United Nations. States that have ratified the Convention without ICJ reservations include Afghanistan, Cuba, Ethiopia, Iran, Iraq, Laos, Nicaragua and Syria. It is obvious that such States may be tempted to utilize the Convention and the ICJ to harass the United States with charges of genocide. This possibility must be avoided.

Finally, although the United States has ratified without reservation other treaties with similar ICJ provisions such treaties are not so uniquely subject to abuse by our adversaries on political grounds as the Genocide Convention. Moreover, the suggested reservation would send an unmistakable message to those states who have been abusing the United Nations and its agencies to attack the United States, its allies and the West. It would signal our firm intention to resist the corruption of these and other international institutions and to take such actions as are necessary to protect our interests in these fora.

IV. Conclusion

I suggest that we meet to discuss these issues at your early convenience. If we are unable to agree, we will prepare a decision memorandum for the Deputy Secretary - designate.

DRAFT

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TO: The Deputy Secretary
FROM: HA - Elliott Abrams
SUBJECT: Endorsement of Convention on the Prevention and
Punishment of the Crime of Genocide

ISSUE FOR DECISION

Whether the Administration should now press for Senate advice and consent to the Genocide Convention and whether it should suggest reservations to the Convention.

ESSENTIAL FACTORS

President Truman first sent the Convention to the Senate for ratification in 1949 and Presidents Nixon, Ford and Carter subsequently endorsed the Convention. The Senate has never given its advice and consent to the treaty because of conservative opposition. The Genocide Convention has been under Departmental review since the beginning of this Administration. HA, IO and L agree that the Administration should support the treaty. HA and IO favor Administration endorsement of the treaty and two reservations to the treaty. L favors endorsement without any reservations.

ANALYSIS OF OPTIONS

HA, IO and L agree that the Administration should endorse Senate ratification of the Genocide Convention and should suggest three understandings to be adopted by the Senate.

The arguments in favor of support for the Convention by the Reagan Administration are simple and powerful.

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BY LOJ, NARA, DATE 6/22/06

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First, we would be following in the footsteps of our Republican predecessors. Indeed, one can argue that a failure to follow this tradition would be widely publicized and would subject us to criticism.

Second, there are important interest groups who will be gratified if we support the Convention. It is a significant issue to many activists in the American Bar Association and other legal groups, to many human rights and religious organizations, and especially to the American Jewish community. The Administration has been approached frequently on this issue by many Jewish organizations and support for the Convention would give us an issue of great appeal among American Jews.

Third, support for the Convention would assist us in blunting political attacks on the Administration from the left both at home and abroad on the grounds that we over-emphasize the role of military force. This will give us a "humanizing" issue which will be very useful, especially as the nuclear debate continues, and may assist us in 1984 if our foreign policy is attacked or the President's commitment to human rights is questioned. Moreover, support for the Convention could be useful as a political tool as we draw attention to such issues as Soviet use of chemical warfare in Afghanistan and Southeast Asia, and attacks by the Sandinistas upon the Miskito Indians.

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HA, IO and L also favor three understandings, discussed in the Appendix. HA and IO support, and L opposes, two reservations to the Convention.

One would limit extradition of American citizens on charges of genocide. It provides:

"That a U. S. citizen in the United States charged with having committed an act outside the United States in violation of the treaty provisions shall not be subjected to extradition unless the Secretary of State determines such person is guaranteed all the constitutional rights of an accused under our Federal laws."

This reservation is designed to address one of the major fears of conservatives: that American citizens may be extradited and deprived of some or all of their constitutional rights for a newly invented crime with strong political overtones. It was proposed by Senator John Sherman Cooper (R-Ky.) in 1971 and tabled by the Foreign Relations Committee on a vote of 7 to 6.

HA and IO also favor a reservation to limit jurisdiction of the International Court of Justice (ICJ) under the Convention. The suggested reservation (identical, incidentally to that of India) states:

"With reference to Article IX of the Convention, the United States of America declares that for the submission of any dispute under the Convention to the International Court of Justice, the consent of all parties to the dispute is required in each case."

A variety of noncommunist or nonaligned states have

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issued similar reservations, including Algeria, Argentina, India, Spain and Venezuela.

A. To Support Senate Ratification With Reservations

The Administration may endorse Senate ratification of the Genocide Convention with understandings and reservations responsive to conservative concerns.

HA has suggested two reservations described above. They are designed to deal with the principle fears of conservatives who have prevented Senate ratification for over 30 years. HA and IO believe they would help to ensure that the political benefits of Administration endorsement of the treaty will not be accompanied by significant costs in the form of alienation of some of the President's conservative supporters.

HA and IO note that all previous Administrations have followed the course of refusing to support reservations. This strategy invariably has met with failure. HA and IO are convinced, based in part on conversations with the staffs of conservative Senators, that it has no more prospect of success at present without Administration endorsement of protective reservations. In 1975, only 55 votes could be mustered in favor of cloture on debate on the Convention. Senators Thurmond and Helms, the main opponents of the treaty, are more influential than ever. Unless endorsement

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of the Convention is accompanied by reservations of the type we propose, crucial conservatives such as Senators Laxalt and Hatch are unlikely to vote to advise and consent. The support of many such conservatives is necessary if ratification is to succeed.

IO and HA do not believe that ratification of the Convention with reservations will have any serious ill effects. At least 21 other states have ratified the Convention with a variety of reservations, including most of the Soviet bloc and many Third World states, and have not suffered for having done so. The fact that such states have issued reservations is significant because they are most likely to be in an adversarial position to the United States in international fora. If anyone is likely to be tempted to criticize the United States for reservations, it would be these countries. Because of their own reservations to the treaty, they are in no position to object to American reservations.

In the past, the State Department response to concerns that Americans will be extradited and punished unfairly for genocide was that the Senate could ensure sufficient protection when it considered advice and consent to new extradition treaties and the amendment of existing treaties to include the crime of genocide. HA and IO believe that this is no

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longer persuasive, however, because of contemporary Justice Department interpretation of the law of extradition. The Justice Department argues that if two states with a pre-existing extradition treaty become parties to the Convention, the two instruments should be considered together, and no additional treaty or revision of existing treaties ordinarily would be necessary in order for extradition to be proper for genocide. Justice observes that more recent extradition treaties do not itemize crimes, that the trend is to avoid specific mention of each crime encompassed. This is the ongoing construction to extradition treaties applied by the Justice Department. Justice urges that a liberal stance on this issue is advantageous to the United States because it makes more frequent use of extradition treaties than do other states.

IO and HA support the extradition reservation because allegations of genocide are especially likely to be politically motivated. The history of such charges against the United States clearly illustrates this fact. From time to time during the past dozen years America has been accused of genocide against the Black Panthers, Indians and Vietnamese. IO and HA are sympathetic to concerns of conservatives that Americans should be fully protected against trial overseas on politically motivated charges.

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HA and IO support the ICJ reservation set forth above because of concern that the Convention and the ICJ may be used for political purposes by America's adversaries. The traditional response to this fear has been that those states most likely to be tempted to take such action, the Soviet bloc, have their own ICJ reservations. Therefore the U. S. could invoke their reservations on "its own behalf in cases brought by countries making the reservation." HA and IO believe that this rationale is undermined by the expansion of Soviet influence and by the existence of widespread Third World hostility towards the United States that has arisen since the Convention was approved by the United Nations. States that have ratified the Convention without ICJ reservations include Afghanistan, Cuba, Ethiopia, Iran, Iraq, Laos, Nicaragua and Syria. It is obvious that such states may be tempted to utilize the Convention and the ICJ to harass the United States with charges of genocide. This possibility must be avoided.

Finally, HA and IO argue that although the United States has ratified without reservation other treaties with similar ICJ provisions, such treaties are not so uniquely subject to abuse by our adversaries on political grounds as the Genocide Convention. HA and IO believe that the suggested reservation would send an unmistakable message to those states

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who have been abusing the United Nations and its agencies to attack the United States, its allies and the West. It would signal our firm intention to resist the corruption of these and other international institutions and to take such actions as are necessary to protect our interests in these fora.

B. To Support Senate Ratification Without Reservations

The Administration may endorse Senate ratification of the Genocide Convention with understandings but without any reservations.

L objects to the adoption by the United States of any reservations to the Genocide Convention. It argues that the U. S. should be able to state, legally and politically, internationally and domestically, that it adheres to the Convention without seeking to limit in any way the legal effect of its provisions. This is because ratification of the treaty is largely a symbolic matter and any reservations would limit the impact of this action.

L also argues that other parties to the Convention may object to our reservations. This too might diminish the legal and symbolic effect of ratification.

L has specific objections to both of the reservations suggested above. With respect to the extradition reservation L argues that that reservation is unnecessary because

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implementing legislation proposed by previous Administrations would require that the U. S. in negotiating extradition treaties shall reserve for the U. S. the right to refuse extradition for genocide if the offense is committed outside the U. S. where the U. S. is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction, or where the person has already been or is being prosecuted for such offense. This, L believes, would be sufficient to deal with fears of conservatives that Americans might be extradited and wrongly punished for genocide.

L has, however, indicated more sympathy for a different formulation of an extradition reservation. An example of such language is found in Article 7 of the Hague Convention on Suppression of Unlawful Seizure of Aircraft, TIAS 7192, which entered into force in 1971. Article 7 reads:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

L also objects to the ICJ reservation. It argues that the ICJ has thus far not lent itself to abusive cases and that the U. S. has accepted ICJ jurisdiction to settle disputes under a large number of the treaties. L believes that the suggested reservation could lead to unfavorable speculation at home and abroad as to the motivation for this

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action. L also notes that Great Britain and the Netherlands have objected to reservations on ICJ powers under the Genocide Convention by other states. If they did so in the case of the United States, it might be embarrassing.

C. To Do Nothing

The Administration may choose to do nothing with respect to the Convention. This would avoid criticism from opponents of the treaty, in particular the Liberty Lobby, and Senators Thurmond and Helms. As time passes, however, this will subject the Administration to mounting criticism from those who support the Convention. To maintain that the Convention remains under study at the Department will become progressively less defensible and more embarrassing.

RECOMMENDATIONS

That you approve endorsement by the Administration of Senate advice and consent to the Genocide Convention, with appropriate understandings and reservations and that you approve of the attached Bremer-Clark memorandum (favored by HA and IO), sending this recommendation on to the White House.

Approve _____ Disapprove _____

Alternatively, that you approve endorsement by the Administration of Senate advice and consent to the Genocide Convention without reservations and that you approve of

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the attached Bremer-Clark memorandum (favored by L),
sending this recommendation on to the White House.

Approve _____ Disapprove _____

Alternatively, that no action be taken with respect to
the Genocide Convention.

Approve _____ Disapprove _____

Attachments:

- Tab 1 - Bremer-Clark Memorandum
- Tab 2 - Memorandum regarding understandings and
reservations.

Drafted: HA:WSBurke:blo
9/22/82, Ext. 22741

Clearances: IO:GNewell
L:DRobinson

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