

INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION

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Mr. PELL, from the Committee on Foreign Relations,
submitted the following

REPORT

[To accompany Executive C, 95-2]

The Committee on Foreign Relations to which was referred the International Convention on the Elimination of All Forms of Racial Discrimination, adopted unanimously by the United Nations General Assembly on December 21, 1965, and signed on behalf of the United States on September 28, 1966, having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof subject to 3 reservations, 1 understanding, 1 declaration, and 1 proviso as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The purpose of the Convention is to forbid racial and ethnic discrimination in all fields of public life. The Convention obligates States Parties to condemn racial discrimination, to undertake to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms and promoting racial understanding,

and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, equality before the law in the enjoyment of a broad spectrum of legal, civil, political and economic rights.

The Convention also establishes a Committee on the Elimination of Racial Discrimination to oversee compliance, examine complaints concerning noncompliance made by one Party against another, and facilitate the settlement of disputes.

II. BACKGROUND

The International Convention on the Elimination of All Forms of Racial Discrimination is one of several instruments designed by the international community to implement the human rights articles of the United Nations Charter. It was adopted unanimously by the United Nations General Assembly on December 21, 1965, and entered into force on January 4, 1969. Today, more than 135 States are party to the Convention.

The United States played a leading role in the formulation of the Convention. The United States signed the Convention on September 28, 1966. The Carter Administration transmitted the Convention to the Senate on February 23, 1978, with four proposed U.S. conditions. In his letter of transmittal, President Carter stated:

The Racial Discrimination Convention deals with a problem which in the past has been identified with the United States; ratification of this treaty will attest to our enormous progress in this field in recent decades and our commitment to ending racial discrimination.

The Committee on Foreign Relations held hearings on this, and three other human rights treaties submitted by the Carter Administration, on November 14, 15, 16, and 19, 1979. Domestic and international events at the end of 1979, including the Soviet invasion of Afghanistan and the hostage crisis in Iran, prevented the Committee from moving to a vote on the Convention. Neither the Reagan nor Bush Administration supported ratification.

The Clinton Administration supports ratification of the Convention with a limited package of reservations, understandings, and declarations, similar to those suggested by the Carter Administration. In a letter to Senator Claiborne Pell, the Chairman of the Committee on Foreign Relations, dated April 26, 1994, Acting Secretary of State Strobe Talbott "writing on behalf of the President" urged the Committee "to give its prompt attention to and approval of this Convention."

In his letter, the Acting Secretary stated that ratification would "underscore our national commitment" to the promotion of values and principles embodied in the Convention, "enhance our ability to take effective steps within the international community to confront and combat the increasingly destructive discrimination which occurs against minorities around the world on national, racial and ethnic grounds," and "permit" the United States to "play an even more active and effective role in the struggle against racial discrimination throughout the world."

The Convention is rooted in Western legal and ethical traditions. For the most part, its provisions are consistent with existing U.S. law.

III. COMMITTEE ACTION

On May 11, 1994, the Committee on Foreign Relations held a public hearing on the Convention and the Clinton Administration's proposed reservations, understandings, and declarations for ratification of the Convention. John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labor; Conrad K. Harper, the Department of State's Legal Adviser; and Deval L. Patrick, Assistant Attorney General in the Civil Rights Division of the Department of Justice testified on behalf of the Administration. The following public witnesses also testified: Robert F. Drinan, S.J., Georgetown University Law Center, on behalf of the American Bar Association; Mr. William T. Lake, Partner at Wilmer, Cutler & Pickering, on behalf of the International Human Rights Law Group; Mr. Wade Henderson, Director, Washington Bureau of the National Association for the Advancement of Colored People; and Dr. Robert C. Henderson, Secretary General, National Spiritual Assembly of the Baha' is of the United States.

The Committee met to consider the Convention on May 25, 1994. The Committee adopted by voice vote an amendment offered by Senator Helms to the proposed resolution of ratification. The Helms amendment added a proviso, to be included in the resolution of ratification but not in the instrument of ratification, clarifying the relationship of the Convention to the U.S. Constitution. The Committee then voted unanimously by voice vote to report favorably the Convention with a resolution of ratification to the Senate for its advice and consent.

The resolution of ratification reported by the Committee contains the reservations, understandings and declarations proposed by the Clinton Administration and the Helms proviso.

IV. COMMITTEE COMMENTS

The International Convention on the Elimination of All Forms of Racial Discrimination is an important instrument in the international community's struggle to eliminate racial and ethnic discrimination. The Convention enjoys widespread support in the international community. More than 135 states, including the majority of traditional U.S. allies, have already ratified the Convention.

As a nation which has gone through its own struggle to overcome segregation and discrimination, the United States is in a unique position to lead the international effort to bring an end to racial and ethnic discrimination. The Committee believes that ratification of the Convention will strengthen the credibility of the U.S. leadership role. At a time when ethnic conflict is engulfing states such as Bosnia and Rwanda, it is imperative that the United States leave no doubt about its commitment to the elimination of racial and ethnic discrimination.

Ratification of the Convention will enable the United States to participate in the work of the Committee on the Elimination of Ra-

cial Discrimination established by the Convention to monitor compliance. The United States will be in a position not only to nominate an American to sit on the Committee but also to accept the competence of the Committee to hear complaints about noncompliance by States Parties. With respect to the latter, the Committee shares the Administration's view that the United States should accept the competence of the Racial Discrimination Committee to hear complaints from one State Party about another State Party's failure to comply. By accepting this competence, the United States will enhance the effectiveness of the Racial Discrimination Committee and have the opportunity to play a more aggressive role in the process of encouraging compliance with the Convention.

In general the provisions of the Convention are compatible with U.S. statutory and domestic law and practice. In those few areas where U.S. law and the Convention differ, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States. Although some of the public witnesses that testified at the Committee's hearing on May 11 questioned the need for some of these conditions, particularly the reservations related to private conduct and dispute settlement and the declaration that the Convention would be non-self executing, all indicated strong support for ratification of the Convention.

During consideration of the Convention on May 25, the Committee accepted a proviso, offered by Senator Helms, to be included in the resolution of ratification but not in the instrument of ratification. The proviso states that the Convention does not require any legislation or other action prohibited by the Constitution. The Committee adopted identical language offered by Senator Helms in March 1992 as part of the resolution of ratification of the International Covenant on Civil and Political Rights. The substantive language of the proviso reflects the Administration's position on the relationship between treaties and the U.S. Constitution. Since this relationship is a matter of domestic U.S. law, the proviso will not be included in the instrument of ratification. The Committee agrees with the Administration that this approach eliminates the potential for confusion at the international level about the nature of the U.S. ratification.

V. MAJOR PROVISIONS

The Convention has three parts. Part I (Articles 1-7) defines the term "racial discrimination" and lays out the obligations incurred by States Parties. Part II (Articles 8-16) deals with the establishment of the Committee on the Elimination of Racial Discrimination (hereafter referred to as "the Committee"). Part III (Articles 17-25) deals with the technical aspects of the ratification process.

Following is a summary of the major provisions of each part.

Part I

The Convention, in Article 1(1), defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental free-

doms in the political, economic, social, cultural or any other field of public life.” (Article 1(1)) Although this is a broad definition, it is *not* all-inclusive.

The Convention does not apply to “distinctions, exclusions, restrictions or preferences” made by a State Party between citizens and noncitizens (Article 1(2)), and it does not affect “in any way” legal provisions concerning nationality, citizenship or naturalization “provided that such provisions do not discriminate against any particular nationality” (Article 1(3)). Moreover, an exception is made. Under Article 1(4), for “special measures taken for the sole purpose of security adequate advance of certain racial or ethnic groups or individuals requiring such protection”—i.e. “affirmative action” programs.

In general, Article 2 requires States Parties to refrain from practicing or encouraging racial discrimination. Article 2(1) outlines specific steps, including legislative actions, to be taken to achieve this end. Article 2(2) obliges States Parties to take “special and concrete measures” when circumstances “so warrant” to guarantee certain racial groups or individuals belonging to them the “full and equal enjoyment of human rights and fundamental freedoms.”

States Parties are required, under Article 3, to “condemn” racial segregation and apartheid and to “prevent, prohibit and eradicate” these practices within their territories. Article 4 requires parties to “condemn” propaganda and organizations based on racial hatred or superiority and to take “immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.” Article 4 also specifies certain steps the Parties must take to eradicate this kind of discrimination.

Article 5 obligates the Parties to “guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law” in the enjoyment, among others, of the rights to equal treatment before the courts; security of the person and protection against violence and bodily harm; political rights including universal and equal suffrage; civil rights including freedom of movement, assembly, thought, speech, emigration; economic and social rights including the right to work, housing, education; and the right of access to public facilities.

Under Article 6, State Parties must assure all those within their jurisdiction effective institutional and legal protection and remedies against acts of racial discrimination, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7 requires the Parties to adopt “immediate and effective measures,” (particularly in the fields of education culture and information) to combat prejudices leading to racial discrimination and to promote understanding and tolerance.

Part II

The Committee on the Elimination of Racial Discrimination, established by Articles 8–16, is an autonomous body of 18 experts “of high moral standing and acknowledged impartiality” who are elected by States Parties to four year terms. Each State Party may nominate one of its nationals (Article 8). The Committee usually meets twice a year.

The Committee's primary function is to consider detailed reports from States Parties on the legislative, judicial, administrative or other measures they have adopted that give effect to the provisions of the Convention. Each Party must submit the first report within one year of the entry of the Convention into force for that State. Supplementary reports from each State Party are due every two year thereafter. The Committee submits an annual report to the U.N. General Assembly. (Article 9)

The Committee may hear complaints by one State Party against another concerning non-compliance with the Convention. After ascertaining that all available domestic remedies have been invoked and exhausted, the Committee may make recommendations to the Parties for an amicable solution to the dispute. (Article 11). The Committee can also refer the dispute to an ad hoc Conciliation Commission which can make nonbinding recommendations. The Commission, which consists of five members that may or may not be Committee members, is appointed, with the consent of the States Parties to the dispute (Article 12). To date, no such disputes have been brought to the Commission.

A State Party may, on an optional basis, recognize the competence of the Committee to receive and consider communications from individuals or groups claiming to be victims of a violation by that State of any of the rights set forth in the Convention (Article 14).

The Administration accepts the competence of the Committee to hear state-to-state complains. However, the Administration does not intend at this time to recognize the competence of the Committee to hear individual complaints.

Part III

Article 20 prohibits reservations incompatible with the object and purpose of the Convention or reservations which would inhibit the operation of the entities established by the Convention.

The Convention does not require States Parties or the Committee to submit disputes to the International Court of Justice (ICJ). However, Article 22 provides that disputes between two or more States Parties over the interpretation or application of the Convention, which are not settled by other methods, may be submitted to the ICJ at the request of either of them.

VI. RELATIONSHIP TO U.S. LAW

The Administration believes that no new implementing legislation is necessary for the United States to assume obligations under the Convention. Existing U.S. constitutional and statutory law and practice provide broad and effective protections against and remedies for discrimination on the basis of race, color, ethnicity or national origin for all persons within the United States or subject to its jurisdiction.

The Thirteenth, Fourteenth, Fifteenth, and Fifth Amendments to the Constitution provide protections against racial discrimination. Several statutes enacted by Congress since the Civil War expand these protections. These include the 1866, 1871, and 1954 Civil Rights Acts, the Voting Rights Act of 1965, and the Fair Housing Act. Moreover, most states and large cities have statutory and ad-

ministrative schemes for protecting individuals from discrimination in fields actively regulated by state and local governments. Existing U.S. law also provides extensive remedies and avenues for seeking redress for acts of discrimination.

VII. CLINTON ADMINISTRATION CONDITIONS

The Carter Administration transmitted the Convention to the Senate with four conditions (2 reservations, 1 understanding, and 1 declaration). The Clinton Administration's proposed package of conditions is similar to that submitted by the Carter Administration but goes beyond it in some areas. The Clinton Administration's package contains five conditions—3 reservations, 1 understanding, and 1 declaration.

Reservations

1. *Freedom of Speech, Expression and Association.*—Articles 4 and 7 of the Convention reflect the view that penalizing and prohibiting the dissemination of ideas based on racial superiority are key elements in the international struggle against racial discrimination. Article 4 requires States Parties not only to condemn all propaganda and organizations based on ideas or theories of racial superiority but also to “eradicate all incitement to, or acts of, such discrimination by: (a) punishing the dissemination of such ideas and acts of violence or incitement to acts of violence; (b) prohibiting organizations and activities promoting and inciting racial discrimination and violence; and (c) preventing public authorities or institutions from promoting or inciting racial discrimination.” Article 7 requires the Parties to take measures to combat prejudice and promote tolerance in various fields.

The U.S. Government's ability to restrict or prohibit the expression of certain ideas is limited by the First Amendment, which protects opinions and speech without regard to content. In that Article 4 is inconsistent with the First Amendment and that the Committee on the Elimination of Racial Discrimination has given a broad interpretation to Article 4, the Administration recommends a reservation to make it clear that the United States accepts no obligations under this Convention which have the effect of limiting individual speech, expression and association guaranteed by the Constitution and U.S. law.

2. *Private Conduct.*—The broad definition of “racial discrimination” in Article 1(1) and the obligations imposed on States Parties under Articles 2, 3 and 5, including the obligation under Article 2(1)(d) to end all racial discrimination “by any persons, group or organization,” could together constitute a requirement on the government to take action to prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under current U.S. law.

Although the definition of “racial discrimination” in Article 1 refers to “public life,” it is not clear from the negotiating history of the Convention to what degree governmental actions might be limited or whether “public life” is synonymous with the permissible sphere of governmental regulation under U.S. law. Moreover, the Committee has interpreted the term broadly.

For all of these reasons, the Administration proposes a reservation to clarify that U.S. undertakings with respect to the regulation of private individual or organizational conduct are limited by the reach of constitutional and statutory protections under U.S. law.

3. *Dispute Settlement*.—As indicated above, Article 22 provides for the referral of disputes, which have not been settled by other means, to the International Court of Justice at the request of any of the parties to the dispute. In keeping with the practice of recent administrations, the Clinton Administration rejects the idea of “compulsory submissions” to the Court. The Administration’s proposed reservation makes it clear that disputes to which the U.S. is a party can be submitted to the Court *only* with the specific consent of the United States in each case.

The Administration regards this reservation as necessary to retain the ability of the United States to decline a case which may be brought for frivolous or political reasons. It does not believe that this reservation will significantly curtail the possibility of effective resolution of disputes because the Court has not played an important implementation role and because the Convention provides other effective means (the Committee and the Commission) for dispute settlement.

Understanding

1. *Federalism*.—Although federal antidiscrimination law reaches the state and local levels of government, it is limited to the enforcement of constitutional provisions or statutes otherwise based on powers delegated to the Congress. State and local governments have a fairly substantial range of action within which to regulate or prohibit discriminatory actions beyond the reach of federal law. To reflect this situation, the Administration is proposing an understanding to make it clear that the United States will carry out its obligations under the Convention in a manner consistent with the federal nature of its form of government. This understanding is similar to the one approved by the Senate in its resolution of ratification of the Covenant on Civil and Political Rights.

Declarations

1. *Non-Self-Executing*.—In view of the extensive provisions present in U.S. law to provide protections and remedies sufficient to satisfy the requirements of the Convention, the Administration sees no need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. Therefore, the Administration proposes a declaration to the effect that the Convention is non-self-executing.

This declaration would not lessen the obligation of the United States to comply with the Convention as a matter of international law. The proposed declaration reflects the approach taken by the United States in ratifying other human rights treaties such as the U.N. Convention Against torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights.

VIII. CLINTON ADMINISTRATION SUBMISSION

On April 26, 1994, the Clinton Administration submitted its analysis of the provisions of the Convention, the text of its proposed reservations, understandings and declarations, and an analysis of these proposals to the Committee under a cover letter from Acting Secretary of State Strobe Talbott. That submission follows:

DEPARTMENT OF STATE,
Washington, DC, April 26, 1994.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN: As you are aware, the Clinton Administration has indicated its strong support for the early ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, which was signed by the United States in 1966 and transmitted to the Senate for its advice and consent to ratification in 1978. Apart from a hearing before the Senate Foreign Relations Committee in 1979, no further action has been taken with respect to this important human rights treaty. I am writing on behalf of the President to urge the Senate Foreign Relations Committee to give its prompt attention to and approval of this Convention.

Contemporary U.S. domestic law provides strong protections against racial discrimination in all fields of public endeavor, as well as effective methods of redress and recourse for those who despite these protections nonetheless become victims of discriminatory acts or practices. Accordingly, as indicated in the enclosed analysis, subject to a few necessary reservations and understandings, the requirements of this treaty are consistent with existing U.S. law. Early ratification by the United States would, however, serve to underscore our national commitment to the international promotion of the fundamental values and principles reflected in this widely-accepted treaty.

Even more importantly, U.S. ratification would enhance our ability to take effective steps within the international community to confront and combat the increasingly destructive discrimination which occurs against minorities around the world on national, racial and ethnic grounds. Ethnic animosity and hatred have become a tragically common feature of the post-Cold War political landscape, one which has strained the abilities of existing institutions to contain and control and which increasingly calls for new approaches and new solutions to what are in many cases centuries-old animosities.

Our own national struggle to overcome a history of racial discrimination, while by no means finished, has given us a measure of perspective and insight on various ways in which these issues can be successfully addressed within the context of an open, pluralistic democracy. These are lessons and experiences which the United States can usefully share with other nations which are now having to come to terms with their own long-standing racial, ethnic and nationalistic divisions, many of which have deep-seated historical roots but have been hidden beneath politically repressive regimes throughout most of the twentieth century. Ratification of the

Convention, and active participation in its Committee on the Elimination of All Forms of Racial Discrimination which serves to interpret and monitor compliance with its provisions, will permit the United States to play an even more active and effective role in the struggle against racial discrimination throughout the world.

The President has asked the Department of State to work closely with you and the Committee in a common and cooperative effort aimed at the early approval of this Convention. In this spirit, I am enclosing a short list of proposed reservations, understandings and declarations which the Administration believes should form the legal basis on which the United States will become party to this treaty.

To assist the Committee in its consideration of these proposals, I am also enclosing a memorandum analyzing the requirements of the Convention against relevant provisions of current U.S. law and explaining the reasoning behind each of the reservations, understandings and declarations.

I urge the Senate to give its advice and consent to ratification of this important human rights treaty.

Sincerely,

STROBE TALBOTT,
Acting Secretary.

Enclosures:

CONVENTION ON THE ELIMINATION OF ALL FORMS OF
RACIAL DISCRIMINATION

PROPOSED RESERVATIONS, DECLARATIONS AND
UNDERSTANDINGS OF THE UNITED STATES

1. Reservation: Freedom of speech, expression and association

"The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

2. Reservation: Private conduct

"The Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent,

however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.”

3. *Reservation: Dispute settlement*

“With reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.”

4. *Understanding: Federal-State implementation*

“The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.”

5. *Declaration: Non-self-executing treaty*

“The United States declares that the provisions of the Convention are not self-executing.”

CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

ANALYSIS OF PROVISIONS AND EXPLANATION FOR PROPOSED RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

The Convention on the Elimination of All Forms of Racial Discrimination was adopted unanimously by the United Nations General Assembly on December 21, 1965 and entered into force on January 4, 1969. Currently more than 135 States are party to the Convention, making it one of the most widely adhered-to human rights treaties in the international community. The United States signed the Convention on September 28, 1966. It was transmitted to the Senate for advice and consent to ratification in 1978. It has remained before the Senate since that time.

I. Overview of the Convention

The Convention is designed to forbid racial and ethnic discrimination in all fields of public life. It requires all States Parties to pursue a policy of eliminating racial discrimination,” which is defined in Article 1(1) as:

“any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Broad as this definition is, however, it is not open-ended. As specified in Article 1(2), the Convention does not apply to distinctions, exclusions, restrictions or preferences made between citizens and non-citizens, nor (by virtue of Article 1(3)) does it affect “in any way” legal provisions concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. Moreover, under Article 1(4), an exception is made for “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection,” i.e., what have come to be known in the United States as “affirmative action” programs.

Consistent with the overall objective of the Convention, Article 2 provides generally that States Parties must neither practice nor encourage racial discrimination. In particular, States Parties are required under Article 2(1) to take a series of specified steps or measures to eliminate racial discrimination within their jurisdictions, including (a) to ensure that all public authorities and institutions act in conformity with that basic obligation, (b) not to sponsor, defend or support racial discrimination by any persons or organizations, (c) to review governmental policies and to amend, rescind or nullify discriminatory laws and regulations at all levels of political organization, (d) to bring to an end, by all appropriate means, racial discrimination by “any persons, group or organization,” and (e) to encourage, where appropriate, integrationist multi-racial organizations and movements.

When circumstances so warrant, States Parties are obliged under Article 2(2) to take “special and concrete measures” to guarantee certain racial groups or individuals belonging to them the full and equal enjoyment of human rights and fundamental freedoms.

Under Article 3, States Parties condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4 requires States Parties to condemn propaganda and organizations based on racial hatred or superiority. Specifically, this article requires (a) criminalizing the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, (b) prohibiting organizations and propaganda which promote and incite racial discrimination, and (c) forbidding public authorities or institutions, national or local, from promoting or inciting racial discrimination.

Under Article 5, States Parties undertake to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law in the enjoyment, among others, of the rights to equal treatment before the courts, security of the person and protection against violence and bodily harm, political rights including universal and equal suffrage, freedom of movement and residence, peaceful assembly and association, thought, conscience, religion, opinion and expression, the right to nationality, marriage, to own and inherit property, and to work, to form and join unions, to housing, medical care, education, cultural activities, and access to public facilities.

Article 6 requires States Parties to assure everyone within their jurisdiction effective protection and remedies against acts of discrimination which violate human rights and fundamental freedoms contrary to this Convention, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Finally, under Article 7 States Parties commit to adopting immediate and effective measures (particularly in the fields of teaching, education, culture and information) with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations, racial or ethnical groups.

In Articles 8–16, the Convention established a Committee on the Elimination of Racial Discrimination (the Committee), an autonomous body of 18 experts of high moral standing and acknowledged impartiality who are elected by States Parties to four year terms. The basic function of the Committee is to consider detailed reports from States Parties on the legislative, judicial, administrative or other measures they have adopted or which give effect to the provisions of the Convention. The first such report is due within one year of the entry of the Convention into force for the State concerned; supplementary reports are due thereafter every two years. The Committee also submits an annual report to the UN General Assembly.

The Committee generally meets twice a year, usually in New York or Geneva. Although it is not a court, it may hear complaints by one State Party against another concerning non-compliance with Convention requirements. Such disputes, if not settled by mutual agreement, may be resolved by the Committee or, in its discretion, referred to a non-binding conciliation commission. To date, no such disputes have been brought.

States Parties may, on an optional basis, also recognize the competence of the Committee to consider communications from individuals or groups claiming to be victims of a violation by that State of any of the rights set forth in the Convention. A State which makes such a declaration may also establish a national body to receive and consider such petitions from individuals within its jurisdiction on

an initial basis; petitioners who fail to receive satisfaction from such a body within six months may communicate directly with the Committee.

Both mechanisms described above are non-binding. The Convention contains no provision for the referral of either state-to-state complaints or individual petitions to the International Court of Justice, either directly or from the Committee. Article 22 of the Convention does provide, however, that disputes between two or more Parties with respect to the interpretation or application of the Convention, which are not settled by negotiation or other methods, may be submitted to the ICJ at the request of either of them.

II. Relationship to U.S. law

Existing U.S. constitutional and statutory law and practice provide broad and effective protections against and remedies for discrimination on the basis of race, color, ethnicity or national origin for all persons within the United States or subject to its jurisdiction. In particular, the specific requirements of the Convention find ample counterparts in our federal law, so that no new implementing legislation is considered necessary to give effect to the Convention.

a. U.S. Constitution

The constitutional protections against racial discrimination are contained in the Thirteenth, Fourteenth and Fifteenth Amendments, all of which were ratified in a five-year period following the conclusion of the Civil War in 1865, and in the Fifth Amendment, which since 1954 has been construed to forbid the federal government from engaging in racial discrimination.

(1) *Thirteenth amendment.* The Thirteenth Amendment abolished slavery. Section 2 of the Amendment authorizes Congress to enforce the prohibition of slavery through "appropriate legislation." As set forth below, a few civil rights statutes have been enacted pursuant to Section 2 of the Thirteenth Amendment. It is clear that the Thirteenth Amendment and legislation implementing its commands are consistent with the Convention.

(2) *Fifth and fourteenth amendments.* The part of the Fourteenth Amendment that speaks to racial discrimination is the Equal Protection Clause, which provides that "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws." Equal protection strictures apply to the federal government through the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The Supreme Court has interpreted the Equal Protection Clause as a "direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). In essence, it precludes governments from adopting unjustifiable legal distinctions

between groups of people. See *Plyler v. Doe*, 457 U.S. 202, 216–219 (1982). Over time, the Supreme Court has made plain that distinctions based on race or national origin are inherently suspect, and thus are rarely justifiable. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). When challenged in court, such distinctions are subject to “strict scrutiny,” the most exacting standard of constitutional review. Under strict scrutiny, a classification violates the Equal Protection Clause unless it is necessary to promote a “compelling state interest” and is “narrowly tailored” to achieve that interest. *Palmore v. Sidotti*, 466 U.S. 429, 432 (1984). In practice, most racial or ethnic classifications fail to satisfy those standards. *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984). Moreover, strict scrutiny applies not only to laws that specifically categorize individuals on the basis of race or ethnicity, but also to ostensibly neutral laws that are enforced only against certain racial or ethnic groups. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 277 (1979) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

Even where racial or ethnic classifications are not at issue, strict scrutiny applies to legal distinctions that interfere with the exercise of certain fundamental rights that the Supreme Court has determined are subject to equal protection guarantees. Under this strand of equal protection doctrine, the Supreme Court has invalidated discriminatory measures in the areas of voting, *Harper v. Virginia State Board of Education*, 383 U.S. 663 (1966), inter-state and foreign travel, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) and access to court systems, *Griffin v. Illinois*, 351 U.S. 12 (1956).

In short, the Equal Protection Clause, as interpreted in the Supreme Court’s suspect classification and fundamental rights jurisprudence, is consistent with the enumerated guarantees of Article 5 of the Convention.

(3) *Fifteenth amendment*. The last of the post-Civil War era Amendments, the Fifteenth Amendment provides that the right to vote “shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” This is consistent with the voting guarantee that is among the rights enumerated in Article 5 of the Convention.

b. Federal civil rights legislation

Since the Civil War, Congress has adopted a number of statutes designed to supplement and expand upon the prohibitions of the Thirteenth, Fourteenth and Fifteenth Amendments in an effort to eliminate racial discrimination in a broad range of governmental, economic and social activity.

(1) *The 1866 and 1871 Civil Rights Acts*: Now codified at 42 U.S.C. §§ 1981–85, these Reconstruction-era statutes prohibit racial discrimination in the making and enforcement of private contracts (including employment, edu-

cation, health care and recreational facilities) (§ 1981) and in the inheritance, purchase, sale or lease of real and personal property (§ 1982); they also provide causes of action for civil damages against anyone who under "color of law" subjects another to unlawful discrimination (§ 1983), as well as those who conspire to deprive individuals of their federal rights (§ 1985).

(2) *The Civil Rights Act of 1964*: Often described as the most important civil rights legislation in U.S. law, this statute prohibits discriminatory acts involving public accommodation, federally-funded programs and private employment.

(a) Title II of the Act, codified at 42 U.S.C. § 2000a, forbids discrimination on the basis of "race, color, religion or national origin" in places of public accommodation, including dining and entertainment facilities affecting interstate commerce and gasoline stations serving interstate commerce. While this statute has in practice been broadly applied (for example, to cover theaters, bars and golf courses), it contains an exception for private clubs and other establishments not in fact open to the public.

(b) Title VI, codified at 42 U.S.C. § 2000d *et seq.*, provides that no person in the United States shall be excluded from participation in, or denied the benefits of, any federally-funded or assisted program or activity on account of race, color or national origin. This provision has had a particularly salutary effect in the continuing efforts to eliminate *de jure* school segregation and its vestiges as well as housing segregation.

(c) Title VII, codified at 42 U.S.C. § 2000e *et seq.* is the primary federal statute addressing discrimination in employment. Subject to certain exceptions, it prohibits discrimination on the basis of race, color and national origin (among other factors) in hiring, compensation, conditions of employment and dismissals by employers, labor organizations and employment agencies affecting commerce. Complaints under this statute are initially filed with the Equal Employment Opportunity Commission. In 1991, Congress amended Title VII to provide additional remedies for intentional discrimination in the workplace.

(3) *The Voting Rights Act of 1965*: Among the most fundamental rights in any democratic system is the right to participate freely in the government of one's country without discrimination on the basis of race, color or national origin. In the United States, the Fifteenth Amendment has prohibited denial of the right to vote on the basis of race, color or previous condition of servitude since 1870, and the Twenty-Fourth Amendment has precluded such other potentially discriminatory practices as poll taxes and literacy tests since 1964. In 1965, Congress supplemented these guarantees by adopting the Voting Rights Act, 42 U.S.C. §§ 1973-73c, which forbids states and their political subdivisions from using any voting qualification, standard, practice or procedure to deny or abridge the right of any

U.S. citizen to vote on account of race or color or because of membership in a language minority group. As interpreted, this statute also reaches discrimination on the basis of ethnic or national origin. It also requires that bilingual voting information be made available where more than 5% of the population or 10,000 individuals speak a language other than English.

(4) *The Fair Housing Act*: This statute, originally enacted as Title VIII of the Civil Rights Act of 1968 and amended by the Fair Housing Amendments Act of 1988, is codified at 42 U.S.C. §§3601-19. It prohibits discrimination on the grounds of, *inter alia*, race, color, religion, or national origin in the sale or rental of housing as well as in real estate related transactions (i.e., lending, insurance, and appraisal practices) and brokerage services. Exceptions are provided for private clubs, single family dwellings and owner-occupied boarding houses with no more than three other family units, except when the owner uses the services of real estate brokers or others.

c. State anti-discrimination measures

Most of the states, and many large cities, have adopted their own statutory and administrative schemes for protecting individuals from discrimination in fields actively regulated by state and local governments. For example, state constitutions and statutes typically protect individuals from discrimination in housing, employment, public accommodations, government contracting, credit transactions and education. As a result, a particular discriminatory act might well violate federal, state and local law—each with their own sanctions. To a varying extent, states may provide protections which differ from or exceed the minimum requirements of federal law. Where such protections exist, state or municipal law also provides judicial or administrative remedies for victims of discrimination.

d. Enforcement and remedial mechanisms

Existing U.S. law provides extensive remedies and avenues for seeking redress for acts of discrimination. A person claiming to have been denied a constitutionally protected right, for example under the Due Process or Equal Protection Clauses of the Fifth or Fourteenth Amendments, may assert that right directly in state or federal court. The federal Civil Rights Acts typically provide statutory remedies; for example, under the 1871 Act, 42 U.S.C. §1983, a person complaining of discrimination resulting from actions taken under color of state law may seek civil damages and injunctive relief against the responsible state official. Federal officials may be sued for damages directly under provisions of the Constitution. See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (violations of Fourth Amendment protections against unreasonable searches and sei-

zures by federal officers give rise to a federal cause of action for damages).

The Civil Rights Division of the Department of Justice has principal responsibility for the effective enforcement of federal civil rights laws, in particular for the Civil Rights Act of 1964 and 1991, the Voting Rights Act of 1965, and Executive Order No. 12250 (which requires all executive departments and agencies to eliminate racial, religious and sex discrimination). Primary responsibility for administration of the Fair Housing Act is vested in the Secretary of Housing and Urban Development. Where Congress has so provided, the federal government may itself bring civil actions to enjoin acts or patterns of conduct that violate constitutional rights, and in some instances is empowered to prosecute those who use force or threat of force to violate a person's rights to non-discrimination.

The Equal Employment Opportunity Commission, an independent agency within the executive branch established by the Civil Rights Act of 1964, has oversight and compliance responsibilities concerning the elimination of discrimination based *inter alia* on race, color and national origin by private employers in all aspects of the employment relationship. The U.S. Commission on Civil Rights collects information on discrimination or denials of equal protection of the laws because of race, color, and national origin, evaluates federal laws, and makes recommendations to the President and the Congress concerning the effectiveness of governmental equal opportunity and civil rights programs.

Other federal departments and agencies also have enforcement responsibilities. For example, within the Department of Education, the Office for Civil Rights is charged with administering and enforcing the civil rights laws related to education, including desegregation of the schools. The Assistant Secretary for Fair Housing and Equal Opportunity within the Department of Housing and Urban Development administers the laws prohibiting discrimination in public and private housing and ensures equal opportunity in all community development programs. The Office of Civil Rights within the Department of Health and Human Services administers laws prohibiting discrimination in federally-assisted health and human services programs. Authorities within the Department of Labor administer programs dedicated to equality in government contracting.

III. Proposed reservations, understandings and declarations

While U.S. law and policy are broadly consonant with the requirements of the Convention, the concurrence is not exact in all respects. The principal points of difference concern (a) the Convention's prohibitions concerning advocacy and incitement, which to a certain extent conflict with constitutional guarantees of free expression and association,

(b) the Convention's requirements to restrict the activities of private persons and non-governmental entities, which in some instances lie beyond the reach of current U.S. law, and (c) the express extension of the Convention's restrictions to all levels of political organization, which implicates the delicate relationship between the state and federal governments in the United States systems. While these differences are mostly ones of approach rather than substance, they nonetheless require clarification in the context of U.S. ratification of the Convention.

In making these clarifications, the Administration notes in particular the provisions of Article 20, which preclude reservations which are "incompatible with the object and purpose of the Convention" or "the effect of which would inhibit the operation of any of the bodies established by the Convention." While the prohibition against incompatibility is well-established in international treaty law, paragraph 2 of this Article also provides that "[a] reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it." This provision is clearly intended to protect the integrity of the Convention as a uniform and widely-adopted international standard against racial discrimination, to which States Parties conform their domestic law to the greatest possible extent. The United States supports this goal. It is the considered view of the Administration that none of the following proposals is incompatible with the object and purpose of the Convention or is likely to draw serious objections from other States Parties.

a. Freedom of speech, expression and association

As indicated above, Article 4 requires States Parties to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form." States Parties are further required to take immediate and positive measures to "eradicate all incitement to, or acts of, such discrimination" *inter alia* by (a) punishing the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to acts of violence, as well as the provision of assistance to racist activities, including financing; (b) prohibiting organizations and activities which promote and incite racial discrimination, including participation in such organizations and activities; and (c) preventing public authorities or institutions, whether national or local, from promoting or inciting racial discrimination.

Article 7 imposes an undertaking on State Parties to take measures to combat prejudice and promote tolerance in the fields of teaching, education, cultural and training.

These provisions reflect the view that penalizing and prohibiting the dissemination of ideas based on racial su-

periority are central elements in the international struggle against racial discrimination.

As a matter of national policy, the United States Government has long condemned racial discrimination (including the heinous practice of *apartheid*), and it engages in many activities both to combat prejudices leading to racial discrimination and to promote tolerance, understanding and friendship among national, racial and ethnic groups. Such programs include those under the authority of Title VI of the Civil Rights Act, the Fair Housing Act, the Bilingual Education Act, the Mutual Educational and Cultural Exchange Act of 1961, the International Education Act (Title VI of the HEA of 1965), and the National Foundation on the Arts and the Humanities Act of 1965. Further, the Hate Crimes Statistics Act mandates collection by the Justice Department of data on crimes motivated among other things by race.

The government's ability to restrict or prohibit the expression or advocacy of certain ideas, however objectionable, is sharply curtailed by the First Amendment to the Constitution. Under the First Amendment, opinions and speech are protected without regard to content. Certain types of speech, intended and likely to cause imminent violence, may constitutionally be restricted, so long as the restriction is not undertaken with regard to the speech's content. For example, several federal statutes punish "hate crimes," i.e., acts of violence or intimidation motivated by racial, ethnic or religious hatred and intended to interfere with the participation of individuals in certain activities such as employment, housing, public accommodation, use of public facilities, and the free exercise of religion. See 18 U.S.C. §§ 241, 245, 247; 42 U.S.C. § 3631. An increasing number of state statutes are similarly addressed to hate crimes, and while they too are constrained by constitutional protections, see *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992), the Supreme Court has recently determined that bias-inspired criminal conduct may be singled out for especially severe punishment under state law. *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993). Nonetheless, in most circumstances, speech itself is protected regardless of its content.

The requirements of Article 4 of the Convention are thus inconsistent with the First Amendment. During the drafting of Article 4, the U.S. delegation expressly recognized that it posed First Amendment difficulties, and upon signing the Convention in 1966, the United States made a declaration to the effect that it would not accept any requirement thereunder to adopt legislation or take other actions incompatible with the U.S. Constitution. A number of other States Parties have conditioned their acceptance of Article 4 by reference to the need to protect the freedoms of opinion, expression, association and assembly recognized in the Universal Declaration of Human Rights. However, the Committee has given a broad interpretation to Article

4, in particular emphasizing in General Recommendations I (1972) and VII (1985) the mandatory requirements of Article 4 (a) and (b), and its view that the prohibition against the dissemination of all ideas based on racial superiority or hatred is compatible with the rights of freedom of opinion and expression.

In becoming party to the International Covenant on Civil and Political Rights in 1992, the United States faced a similar problem with respect to Article 20 of that treaty. In part because the Human Rights Committee has adopted a similarly broad interpretation of that article (see General Comment 11 (1983)), the United States accordingly entered a reservation intended to make clear that the United States cannot and will not accept obligations which are inconsistent with its own constitutional protections of free speech, expression and association. A similar reservation is therefore proposed with respect to the current Convention.

PROPOSED RESERVATION

The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

b. Private conduct

Given the breadth of the definition of "racial discrimination" under Article 1(1), the obligation imposed on States Parties in Article 2(1)(d) to bring to an end all racial discrimination "by any persons, group or organization," and the specific requirements of paragraphs 2(1) (c) and (d) as well as Articles 3 and 5, the Convention may be viewed as imposing a requirement on the government to take action to prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under current U.S. law.

Since the time of the *Civil Rights Cases*, 109 U.S. 3 (1883), it has been clear that the Fourteenth Amendment prohibits "[s]tate action of a particular character" and that, by contrast, "[i]ndividual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11. The "state action" requirement of the Equal Protection Clause reflects a traditional recognition of the need to preserve personal freedom by circumscribing the reach of governmental intervention and regulation, even in situations where that freedom is exercised in a discriminatory manner.

In determining whether state action for Fourteenth Amendment purposes is present in a given case, the critical inquiry is whether the conduct of a private party is

“fairly attributable” to the state. *Lugar v. Edmonson*, 457 U.S. 922, 937 (1982). Under that test, governmental involvement with private parties is often insufficient to trigger a finding of state action. For example, in and of itself, government licensing and regulation of private entities is not state action. See *Moose Lodge No. 107 v. Irvins*, 407 U.S. 163 (1972) (licensing); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974) (regulation). That is also the case with government contracting. See *Blum v. Yaretsky*, 457 U.S. 991 (1982). However, state employees acting under color of law are generally “state actors.” *West v. Atkins*, 487 U.S. 42 (1988). In addition, the Supreme Court has held the following constitutes state action: the private performance of “public functions,” *Marsh v. Alabama*, 326 U.S. 501 (1946); judicial enforcement of private discriminatory arrangements, *Shelley v. Kraemer*, 334, U.S. 1 (1948); certain forms of governmental assistance or subsidies to private parties, *Norwood v. Harrison*, 413 U.S. 455 (1973); and state encouragement of discrimination by private parties, *Reitman v. Mulkey*, 387 U.S. 369 (1967).

Furthermore, the Thirteenth Amendment’s prohibition against slavery and involuntary servitude does encompass both governmental and private action. See *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Supreme Court has held that Congress may regulate private conduct under §2 of the Thirteenth Amendment, which provides that “Congress shall have the power to enforce this article by appropriate legislation.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Such power includes determining what constitutes the “badges and incidents of slavery and the authority to translate that determination into effective legislation.” *Id.* at 440. See also *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (discussing Thirteenth Amendment right to be free from involuntary servitude).

Although *Jones* could be read as authorizing Congress to regulate a broad array of harms on the ground that they were a form of servitude and slavery, the Court has had no occasion to define the outer limits of *Jones*. The Court has intimated, however, that “some private discrimination . . . in certain circumstances” is subject to legislation under §2 of the Thirteenth Amendment. See *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The Reconstruction-era civil rights statutes, which are predicated on the Thirteenth Amendment, reach private action. For instance, under the Reconstruction-era civil rights statutes discussed above, §1982 has been used to prohibit private actors from engaging in racial discrimination in a variety of activities, including the sale or rental of private property, see *Jones, supra*, 392 U.S. at 413; the assignment of a lease, see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and the grant of membership in a community swimming pool, see *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431 (1973). Racial restrictions in the making and enforcement of private contracts are prohib-

ited by § 1981, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 272 (1989); see also *Runyon v. McCrary*, 427 U.S. 160 (1976) (reaching refusal of private school to admit black students). Finally, § 1985(3) has been applied to some private conspiracies. Compare *Bray v. Alexandria Women's Health Clinic*, — U.S. — (1993) (demonstrations against abortions clinics not within scope of statute) with *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (conspiracy to deprive blacks of right of interstate travel within reach of statute).

In addition to the Thirteenth Amendment, Congress may regulate private conduct through the Commerce and Spending powers that it possesses under Article I of the Constitution. For example, it was under the Commerce Clause that Congress passed Title II and Title VII of the 1964 Civil Rights Act, which prohibit private entities from discriminating in public accommodations and employment. *Katzenbach v. McClung*, 379 U.S. 294 (1964). The Fair Housing Act is similarly grounded in the Commerce Clause. And it was under its Spending Power as well as its authority under Section 5 of the Fourteenth Amendment that Congress passed Title VI of the 1964 Civil Rights Act, which prohibits discrimination by public and private institutions that receive federal funds. See *Lau v. Nichols*, 414 U.S. 563 (1974).

Arguably, the reference to "public life" in the definition of "racial discrimination" in Article 1(1) of the present Convention might be read to limit the reach of its prohibitions to actions and conduct involving some measure of governmental involvement or "state action." The negotiating history of the Convention is far from clear on this point, however, and it is certainly not possible to say with assurance that the term "public life" as contemplated by the drafters is synonymous with the permissible sphere of governmental regulation under U.S. law. Moreover, the Committee appears to have taken an expansive view in this regard, finding in the Convention a prohibition against racial discrimination perpetuated by any person or group against another. Accordingly, some forms of private individual or organizational conduct which are not now subject to governmental regulation could well be found within the sphere of "public life" as that term is interpreted under the Convention.

Accordingly, it is appropriate to indicate clearly, through a formal reservation, that U.S. undertakings in this regard are limited by the reach of constitutional and statutory protections under U.S. law as they may exist at any given time.

PROPOSED RESERVATION

The Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom

from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

c. Federalism

Given its constitutional roots and its embodiment in the extensive statutory provisions enacted by Congress over the decades, federal antidiscrimination law is pervasive and reaches the state and local levels of government as well as the federal. It provides the basis for broad regulation on racially-discriminatory conduct at the private level as well. Nonetheless, it is conceptually limited to the enforcement of constitutional provisions or statutes otherwise based on powers delegated to the Congress, for example through the Commerce Clause. There remains to the constituent states and local governments a fairly substantial range of action within which to regulate or prohibit discriminatory actions beyond the reach of federal law. As indicated above, in many instances the states and local governments have exercised their inherent authority by adopting statutes and administrative regulations providing powerful and effective protections against, and remedies for, discrimination based on race, color, ethnicity and national origin.

There is no disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the constitutional treaty power. Nor is it necessary to do so in order to ensure that the fundamental requirements of the Convention are respected and complied with at all levels of government within the United States. In some areas, it would be inappropriate to do so. For example, state and local communities have always taken the lead in public education. Federal control over education, particularly in the areas of curricula, administration, programs of instruction, and the selection and content of library resources, textbooks, and instructional materials, is expressly limited by statute. Measures to ensure fulfillment of the Convention in these

areas will include activities that conform to these provisions.

Furthermore, there is no need for implementing legislation providing the Federal Government with a cause of action against states to ensure that states fulfill the obligations of the Convention; subject to the constraints imposed by our federal system, the Federal Government already has the authority under the Constitution and the civil rights laws to take action against states to enforce the matters covered by the Convention.

In ratifying the Covenant on Civil and Political Rights in 1992, the United States addressed the federalism issue through adoption of an interpretive understanding, the effect of which was to clarify that the United States will carry out its obligations in a manner consistent with the federal nature of its form of government. A similar understanding is recommended with respect to the current Convention.

PROPOSED UNDERSTANDING

The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

d. Non-self-executing

Under Article VI, cl. 2, of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute. Its provisions are clearly intended to impose immediate obligations upon the constituent States. In considering ratification of previous human rights treaties, in particular the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1990) and the International covenant on Civil and Political Rights (1992), both the Executive Branch and the Senate have considered it prudent to declare those treaties to be non-self-executing. The intent is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts.

As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. Given the extensive provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation

in order to enforce the essential requirements of the Convention. Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.

PROPOSED DECLARATION

The United States declares that the provisions of the Convention are not self-executing.

e. Dispute settlement

Article 22 of the Convention provides for the referral of any dispute between two or more States Parties over the interpretation or application of this Convention, which is not settled by negotiation or the alternative procedures (such as conciliation) provided for elsewhere in the treaty, to the International Court of Justice at the request of any of the parties to the dispute.

The general practice in recent Administrations with respect to such "compulsory submissions" to ICJ jurisdiction, which are common in virtually all U.N. treaties, has been to enter a reservation to such provisions. It is not proposed to change this general practice with respect to the current treaty at this time. The Administration strongly supports the use of international dispute resolution mechanisms in appropriate cases, but believes that it is prudent for the United States Government to retain the ability to decline a case which may be brought by another country for frivolous or political reasons.

In fact, recourse to the International Court of Justice is only an ancillary possibility for dispute resolution and has not played an important role in implementing the treaty (indeed, no state has ever brought a claim to the Court under this Convention). Instead, the principal oversight functions are performed by the Committee on the Elimination of Racial Discrimination, and the United States fully accepts the competence of the Committee in that regard. The Committee also has competence to consider complaints by one State Party that another is not giving effect to the provisions of the Convention; even though no such complaint has ever been brought, the Administration proposes to accept that competence as well. Moreover, in the event that such a dispute is not resolved by the Committee to the satisfaction of the parties, there is the additional possibility of appointment of an *ad hoc* Conciliation Commission to resolve the dispute. Finally, there is ample opportunity to seek fair and effective judicial review and remedy of situations of alleged discrimination in U.S. courts under the Constitution and laws.

In sum, the Administration does not believe the following reservation will significantly curtail the possibility of effective resolution of any disputes, should they arise, or undermine the oversight of implementation of the treaty's provisions.

PROPOSED RESERVATION

With reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

IV. Other issues

During the consideration of the Convention within the Executive Branch and in consultations with various interested non-governmental organizations, a number of questions and concerns were raised with regard to various aspects of the undertakings set forth in the Convention on which the Administration believes the record should be clear but which do not warrant inclusion in the Senate's resolution of advice and consent or in the instrument of ratification as specific reservations, understandings or declarations.

Ethnic Origin and Descent: Although the definition of racial discrimination contained in Article 1(1) of the Convention contains two specific terms ("descent" and "ethnic origin") not typically used in federal civil rights legislation and practice, there is no indication in the negotiating history of the Convention or in the Committee's subsequent interpretation that those terms encompass characteristics which are not already subsumed in the terms "race," "color," and "national origin," as they are used in existing federal law. See, e.g., *Saint Frances College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Roach v. Dresser Industrial Valve*, 494 F.Supp. 215 (W.D. La. 1980). The United States thus interprets its undertakings, and intends to carry out its obligations, under the Convention on that basis.

Special Measures: Article 1(4) specifically excludes from the definition of "racial discrimination" "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection" in order to provide equal enjoyment of human rights and fundamental freedoms. Such measures may not, however, lead to the maintenance of "unequal or separate rights for different racial groups" or "be continued after the objectives for which they were taken have been achieved." Article 2(2) provides that, when circumstances so warrant, States Parties may take "special and concrete measures" for the "adequate development and protection of certain racial groups or persons belonging to them for the purpose of guaranteeing to them the full and equal enjoyment of human rights and fundamental freedoms." Deciding when such measures are in fact warranted is left to the substantial discretion of each State Party. Together, Article 1(4) and Article 2(2) permit, but do not require, States Parties to adopt race-based af-

firmative action programs without violating the Convention.

There are a number of existing federal, state and local affirmative action measures that would be considered "special and concrete measures" for the purpose of Article 2(2). These include the array of programs for Native Americans, minority preferences in the field of employment, set-asides for minority contractors, race-conscious educational scholarships, and creation of minority electoral districts as a remedy for violations of the Voting Rights Act, to name a few. However, the exact line between permissible and impermissible affirmative action measures has been one of the most difficult issues in U.S. law, and it has not been static. See, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 647 (1990). It is the Administration's view that the Convention does not impose any obligation which would prevent or require adoption and implementation of appropriately-formulated affirmative action measures that are otherwise consistent with U.S. constitutional and statutory provisions.

Implementing Legislation: Because existing U.S. law already provides constitutional and statutory protections against racial discrimination sufficient to meet the requirements of the Convention, it was not deemed necessary or appropriate to propose new implementing legislation for this treaty in particular. It has been noted, however, that Article 5 obliges States Parties not only to prohibit and eliminate racial discrimination in all its forms but also to guarantee the right of everyone to equality before the law, without distinction as to race, color, or national or ethnic origin, "notably in the enjoyment" of a list of specifically enumerated rights, some of which may be characterized as economic, social and cultural rights not now explicitly recognized in U.S. law. However, States are not required by Article 5 to ensure observance of each of the rights listed in that article, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by the domestic law. In this respect, U.S. law fully complies with the requirements of the Convention.

Discriminatory Purpose and Effect: Article 2(1)(c) requires States Parties to "take effective measures to review governmental, national and local policies . . . which have the effect of creating or perpetuating racial discrimination." Article 2(1)(c) also requires States Parties to "amend, rescind or nullify any laws and regulations" that have such effects.

The U.S. satisfies the policy review obligation of Article 2(1)(c) through this nation's legislative and administrative process, as well as through court challenges brought by governmental and private litigants. With respect to the second obligation of Article 2(1)(c), practices that have discriminatory effects are prohibited by certain federal civil

rights statutes, even in the absence of any discriminatory intent underlying those practices. Thus, such practices may be nullified under the force of those statutes, consistent with Article 2(1)(c). This is true of the Voting Rights Act of 1965, which Congress amended in 1982 to make clear that practices that have discriminatory results violate Section 2 of that statute. It is also true of Title VII of the 1964 Civil Rights Act, the federal regulations implementing Title VI of the 1964 Civil Rights Act, and the Fair Housing Act, as those statutes have been interpreted by the Supreme Court and lower courts. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Title VI implementing regulations); R. Schwemm, *Housing Discrimination Law and Litigation* § 10.04 (1990) (noting that although the Supreme Court has yet to address the issue, lower courts have uniformly held that disparate impact claims may be brought under the Fair Housing Act, even in the absence of discriminatory intent). Those three statutes prohibit intentional racial discrimination. But even in the absence of evidence of discriminatory intent, plaintiffs can make out a *prima facie* case of discrimination in violation of the statutes if they show that a race-neutral practice causes statistically significant racial disparities. If the plaintiff satisfies the *prima facie* test, the burden shifts to the defendant to justify the practice by demonstrating its necessity.

By contrast, the equal protection components of the Fifth and Fourteenth Amendments, as well as 42 U.S.C. §§ 1981 and 1982, have been interpreted to proscribe only intentional discrimination. See *Washington v. Davies*, 426 U.S. 229 (1976) (Equal Protection Clause); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981); R. Schwemm, *Housing Discrimination Law and Litigation* § 10.04 (1990). This is not to say that disparate impact is irrelevant in equal protection or Sections 1981 or 1982 litigation. Determining whether discriminatory purpose exists "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Disparate impact "may provide an important starting point" for that inquiry. *Id.* Indeed, where racial disparities arising out of a seemingly race-neutral practice are especially stark, and there is no credible justification for the imbalance, discriminatory intent may be inferred. See *Casteneda v. Partida*, 430 U.S. 482 (1977). In most cases, however, adverse effect alone is not determinative, and courts will analyze statistical disparities in conjunction with other evidence that may be probative of discriminatory intent. *Arlington Heights*, 429 U.S. at 266-67. If the totality of the evidence suggests that discriminatory intent underpins the race-neutral practice, the burden shifts to the defendant to justify that practice. *Id.* at 270-71 n.21 (citing *Mt. Healthy*

City School Bd. of Education v. Doyle, 429 U.S. 274 (1977)).

The negotiating history of the Convention leaves unclear the precise scope of a State Party's obligation under Article 2(1)(c). It does not appear to be the case, however, that the provision requires the invalidation of every race-neutral law, regulation or practice that causes some degree of adverse impact on racial groups. In its recently adopted General Recommendation XIV, the Committee declared that "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or ethnic origin."

The Committee's use of the term "unjustifiable disparate impact" indicates its view that the Convention reaches only those race-neutral practices that both create statistically significant racial disparities and that are unnecessary. This reading of Article 2(1)(c) tracks the standards for litigating disparate impact claims under Title VII, the Title VI implementing regulations, and the Fair Housing Act. It is also consistent with equal protection and Sections 1981 and 1982 standards, to the extent that statistical proof of racial disparity—particularly when combined with other circumstantial evidence—is probative of the discriminatory intent that is necessary to make out a claim under those provisions and shift the burden to the defendant to justify a race-neutral practice. The Administration thus believes that Article 2(1)(c) is best interpreted as not imposing obligations that are contrary to U.S. law.

Territorial Application: The reach of the Convention is extensive. It contains repeated references, which have been emphasized by the Committee, that its obligations apply to States with respect to *all territories* under their jurisdiction; thus, U.S. obligations would extend to the fifty states as well as the District of Columbia, the commonwealths, territories and other possessions under U.S. jurisdiction. There appears to be no basis in the text or negotiating history of the Convention to support extraterritorial application. Indeed, the nature of the obligations undertaken, the specific exclusion of distinctions between citizens and non-citizens, and the requirement in Article 6 to provide remedies and protections to "everyone within their jurisdiction" suggest clearly that the Convention was intended to apply territorially. Since this interpretation is consistent with the general presumption of treaty law, the United States understands the Convention to apply to the territory of the United States, including the commonwealths, territories and possessions.

State to State complaints: In addition to considering periodic reports from States Parties concerning implementation of their obligations, the Committee may receive inter-state complaints alleging non-compliance. This competence applies automatically to all States Parties, not merely on the basis of reciprocal acceptance (as is the case

under the Covenant on Civil and Political Rights). Once it becomes a party, the United States therefore will be able to raise questions of non-compliance concerning other States Parties. The procedure for considering such complaints is relatively informal; the Committee may not call witnesses or conduct on-site investigations; and its decisions are not legally binding.

Individual Petitions: Article 14 of the Convention permits (but does not require) a State Party to accept the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction who claim to be victims of a violation by that State of any of the rights set forth in the Convention. Only a few States Parties to the Convention have to date made such a declaration, and accordingly this procedure has been rarely invoked. Given the requirement of prior exhaustion of domestic remedies, and the strength of remedies currently available under U.S. law for allegations of racial discrimination, the Administration's view is that it is not necessary to make a special declaration accepting the Committee's competence in this regard, while noting that one can always be done subsequently. A similar recommendation was made with respect to individual complaints with respect to the International Covenant on Civil and Political Rights.

Financial Implications: As originally drafted, the Convention provided that "States parties shall be responsible for the expenses of the members of the Committee (on the Elimination of Racial Discrimination) while they are in performance of Committee duties." Article 8(6). The United Nations General Assembly, however, decided in resolution 47/111 of December 16, 1992, that as from January 1, 1994 this Committee (like the other treaty-based bodies) would be financed under the regular U.N. budget. Thus, becoming a party to this Convention will not entail any additional cost to the United States for the expenses of the Committee. As from January 1 of this year, the United States will contribute to this expense, whether or not it is a party, as part of its contribution to the UN budget.

The submission of the biennial implementation reports called for in the Convention, and such other dealings with the Committee as may be required, will foreseeably have implications for personnel resources of a limited character.

It should be noted that a formal amendment has been proposed with respect to Article 8 of the Convention, which would conform the text of the Convention to the current practice. This amendment would replace paragraph 6 and adding a new paragraph 7 as follows:

(6) The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention.

(7) The members of the Committee established under the present Convention shall, with the approval

of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

This amendment was communicated to all States parties on March 1, 1993. The amendment will enter into force when accepted by two-thirds majority of States parties. As of December 31, 1993, notification of acceptance had been received from 5 of 132 States parties to the Convention. In keeping with the current situation and our general position that international human rights machinery should be better coordinated and adequately supported, the Administration proposes to submit the amendment, and a comparable change to the Torture Convention, to the Senate for its advice and consent at an appropriate time in the future.

IX. COST ESTIMATE

The Congressional Budget Office has supplied the Committee with the following information on the possible budgetary impact of the Convention.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 26, 1994.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed the International Convention on the Elimination of all Forms of Racial Discrimination and the accompanying Resolution of Ratification, as ordered reported by the Senate Committee on Foreign Relations on May 26, 1994. Ratification of the convention would not affect the budgets of federal, state, or local governments.

The convention is designed to guarantee civil and political rights to persons within each country that ratifies it. In many instances, the rights parallel those provided to U.S. citizens in the Bill of Rights. Ratification would permit the United States to participate in the work of the Committee on the Elimination of Racial Discrimination which monitors compliance of nations that have ratified the convention. Funding for the committee is currently provided by the United Nations' general account. Ratification of the convention would not require the United States to provide any additional funding.

Ratification of the convention would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to ratification.

If you would like further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christopher Duncan, who can be reached at 226-2840.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

X. 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 Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly on December 21, 1965 and signed on behalf of the United States on September 28, 1966 (Executive C, 95-2), subject to the following Reservations, Understanding, Declaration, and Proviso:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

XI. APPENDIX A: ADMINISTRATION RESPONSES TO QUESTIONS FROM
COMMITTEE

SENATE FOREIGN RELATIONS COMMITTEE

Convention on the Elimination of All Forms of Racial
Discrimination

Questions for the Administration

1. Need for Ratification

Question. What events of the last decade and one-half lend urgency to ratification of the Convention at the present time?

Answer. As Assistant Secretary Shattuck testified at the hearing, ratification is long overdue. The Convention will be a valuable tool as the United States confront the new challenges of the post-Cold War scene. While there has recently been real, material progress in combatting racial and ethnic discrimination (for example, in South Africa), there continue to be bitter confrontations over racial and ethnic differences in many areas of the world.

Question. In what ways, if any, has it proved disadvantageous to the United States not to be a party to the Convention?

Answer. Because we have not ratified the Convention, we have been unable to use its provisions as a reference point in our bilateral dealings with other States; for example, in seeking to hold them to their commitments. Despite our very positive domestic record, we have been exposed to allegations of hypocrisy and adhering to a double standard. To a significant degree, our role has been limited in the debate about the evolution of internationally-agreed norms regarding racial and ethnic discrimination. We do not participate, for example, in the work of the Committee on the Elimination of Racial Discrimination. Our ability to inject American energy and purpose into the human rights system, and to share our experience in addressing race discrimination in the United States, has been circumscribed.

Question. How many nations have ratified the Convention to date, and what general conclusions as to efficacy of the Convention in promoting the cause of racial equality can be drawn from the experience of these nations?

Answer. As of May 1, there were 138 States Parties. In general, the Convention reflects the commitment of the international community to eliminate racial and ethnic discrimination in all its forms. As an agreed common standard it clearly promotes the cause of racial equality around the world. Obviously, some states have been more successful than others in implementing its provisions.

2. Required Implementation Programs

Question. Can you indicate for us those program initiatives at the Federal or State level that may be most needed or appropriate to affirmatively implement the Convention in some of these areas (such as politics, law, employment, education, health care, and racially-motivated "propaganda" or hate speech)?

Answer. We do not believe any new legislation or other programs will be required to implement U.S. undertakings under the Convention. Existing U.S. law is, in our view, adequate to meet the requirements of the Convention. There is, of course, always room for improvement and the Administration is committed to additional efforts to combat racial discrimination and prejudice wherever it is encountered in the United States.

Question. Would the Federal Government be compelled to increase its efforts to enhance minority opportunities by joining the Convention?

Answer. No. The Convention does not require States Parties to pursue "special measures" or affirmative action plans except as each State Party deems appropriate. Whether to take such measures, and what types of measures to take, remains within the discretion of each State Party.

3. Implementation in Health Care

Question. In your view, what kinds of discrimination against racial minorities exist in the health care field and what steps would have to be taken to carry out this aspect of the Convention?

Answer. Article 5 does not require the provision of economic, social and cultural rights, but instead obliges States Parties to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law in the enjoyment of a number of enumerated rights, including "the right to public health, medical care, social security and social services." Existing U.S. law prohibits discrimination in such areas on the basis of race, color or national origin. The Administration is working to ensure that health care reform now under consideration in the Congress contains provisions ensuring against discrimination on the basis for race.

4. Educational and Cultural Programs

Question. Would the Convention require the Federal Government, or the States and localities, to take that next step (of guaranteeing a right to education) by mandating the provision of some unspecified level of educational and cultural services to all persons within the United States?

Answer. No. Our national commitment to equality of opportunity in public education is constitutionally assured. See *Brown v. Board of Education*, 349 U.S. 483 (1954); see also *Plyler v. Doe*, 457 U.S. 202 (1982). In this respect, U.S. law is consistent with the requirements of the Convention. Article 5 does not require States Parties to accord specific rights of education and training.

Question. Would the Federal Government be compelled to increase its funding or broaden the activities of organizations like the Endowment for the Arts or for the Humanities?

Answer. No.

Question. What other government sponsored or private initiatives in aid of education, training or cultural activities may be called for by the Convention?

Answer. We do not believe any additional initiatives or activities, whether government sponsored or not, are in fact required by the Convention. As indicated earlier, Article 5 requires States Parties to guarantee equality before the law in the enjoyment of the enumerated rights, not to grant those rights in the first place. Article 7 requires States Parties to take effective measures to combat prejudice and to promote understanding "particularly in the fields of teaching, education, cultural and information." We believe existing provisions of law are adequate to meet such requirements. At the federal level, a number of such efforts are already undertaken, for example through the annual celebration of Martin Luther King's birthday and, this year, the celebration of the 40th anniversary of *Brown vs. Board of Education* and the 30th anniversary of the Civil Rights Act of 1964. That Act created, within the Department of Justice, the Community Relations Service, which is empowered to provide assistance, through education, mediation and conciliation efforts, in resolving disputes relating to race, color and national origin. Additional efforts by the Federal, State and local governments, and by non-governmental organizations, to eliminate racial discrimination would be entirely consistent with the Convention. At the Federal, State and local levels, we currently celebrate Martin Luther King's birthday as a national holiday.

Question. With or without ratification by this body, could it be argued presently that the principles of the Convention, which has won broad support in the international community, constitute customary international law?

Answer. Yes, such an argument can be made, and indeed it has been. See, for example, the Restatement (Third) Foreign Relations Law of the United States, § 702 cmt. (i) ("Discrimination on account of race is prohibited by all the comprehensive international human rights instruments, and is the subject of the Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Suppression and Punishment of the Crime of *Apartheid*. * * * Racial Discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., *apartheid* in the Republic of South Africa.")

Question. What domestic law implications may this carry?

Answer. Customary international law has long been recognized to form a part of U.S. domestic law. See *The Paquete Habana*, 175 U.S. 677 (1900); cf. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980); Restatement (Third), Foreign Relations Law of the United States § 702 cmt. (c). Ratification of this Convention would not change U.S. law in this regard and is therefore unlikely to have significant domestic law implications.

5. *Status of the Committee on the Elimination of Racial Discrimination*

Question. What is the status of the Committee on the Elimination of Racial Discrimination established by Part II of the Convention and what has it been doing in recent years?

Answer. The Committee is an autonomous body established by the Convention which operates within the UN system. It consists of 18 experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals. However, its members sit in their personal capacities. The Committee is not a judicial body. It has four primary functions: (1) to examine reports by States Parties on their implementation of the Convention, (2) to consider interstate complaints, (3) to consider individual complaints (with respect to those States that have accepted the Committee's competence to do so), and (4) to assist other UN bodies in their review of petitions and reports from Trust and Non-Self-Governing Territories.

To date, most of the effort of the Committee has been devoted to the examination of country reports. On the basis of that work, it has articulated a number of "general recommendations" concerning its interpretation of the Convention to guide States Parties in preparing their reports. To date, it has considered relatively few individual petitions and no state-to-state complaints.

Question. What are the advantages of U.S. participation in this Committee?

Answer. Ratification of the Convention will permit the United States to participate in the work of the Committee, from which it has to date effectively been excluded. At the appropriate time, we could also nominate a highly qualified candidate for election to the Committee. Participation will allow the United States to take a larger and more active role in the discussion and articulation of international principles concerning racial discrimination, in particular as reflected in the Convention, and to share the experience we have developed as a nation over many years in dealing with racial discrimination in our own society. We believe we have learned some valuable lessons and have devised a number of useful approaches and techniques from which others might benefit.

6. Freedom of Speech and Association

Question. What is being proposed by way of a clarifying reservation to mitigate the adverse implications for speech and associational rights by the provision (Article 4) which requires States Parties to outlaw racist speech and organizations?

Answer. As indicated in the attachments to the Acting Secretary of State's letter of April 26 to the Chairman, we propose to condition ratification upon the following reservation:

The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, to the extent that they are protected by the Constitution and laws of the United States.

Question. What implications, if any, do the decisions of the Supreme Court in *R.A.V. v. City of St. Paul*, 505 U.S. 00 (1992) (overturning ordinance which punished racist expressions) and *Wisconsin v. Mitchell*, No. 92-515 (June 11, 1993) (sustaining statute

which enhanced punishment for racially motivated attacks) have for the just described provision of Article 4?

Answer. None, in light of the above-quoted reservation. That is, ratification of the Convention would not affect the Court's interpretation of the U.S. Constitution or require a different result from the one reached by the Court in those cases.

7. *Enforcement of the Convention*

Question. Is the Convention self-enforcing, that is, does it establish an international regime for keeping states in line or punishing violators, or is it totally dependent upon individual member enforcement action?

Answer. Compliance with the Convention is essentially left to the individual States Parties acting within their own territories. The Convention does not establish a compulsory enforcement regime at the international level. The Committee on the Elimination of All Forms of Racial Discrimination exercises a form of supervision through its review of and comments upon periodic reports by States Parties. It has the potential to make specific findings with regard to state-to-state complaints acting under Articles 11-13 and, for States Parties which recognize its competence to do so, with regard to individual complaints under Article 14. However, these mechanisms do not result in legally binding decisions. Under Article 22, a dispute between States Parties may be referred to the International Court of Justice; however, the United States proposes to condition ratification upon a reservation to this article under which it will retain the right to consent to the Court's jurisdiction on a case-by-case basis.

8. *Convention's Relationship to Customary International Law*

Question. What is the status of state-promoted racial discrimination under customary international law?

Answer. As indicated above, the Restatement (Third) of Foreign Relations Law reflects the view that a systematic practice of racial discrimination by a state, for example apartheid as formerly practiced in South Africa, would clearly violate principles of customary international law binding on all states.

Question. Does the Convention codify customary law or go beyond it and if so to what extent?

Answer. The Convention specifically "codifies" a prohibition of racial segregation and *apartheid*; as stated in Article 3, "States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." Of course, the definition of "racial discrimination" set forth in the Convention is much broader than that, as are the specific undertakings accepted by States Parties under other articles of the Convention; in this sense, the Convention goes beyond existing norms of customary international law.

9. *Official Racial Discrimination*

Question. What are the Convention's implications for occasional as distinguished from systematic acts of official racial discrimination?

Answer. Under Article 2(a), States Parties undertake to engage in *no* act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that *all* public authorities and public institutions, national and local, shall act in conformity with that obligation. There is no exemption in the Convention for "occasional" acts of official racial discrimination, nor is such an exemption known under existing U.S. law.

Question. Acts of private racial discrimination tolerated by the state?

Answer. Under Article 2(d), States Parties must "prohibit and bring to an end, by all appropriate means, * * * racial discrimination by any persons, group or organization." Under Article 2(b), each State Party "undertakes not to sponsor, defend or support racial discrimination by any persons or organizations." While the definition of "racial discrimination" in Article 1(1) refers to "public life," there is no exemption for private acts "tolerated" by the government. Because under our constitutional system there are limitations to the Government's ability to regulate private conduct, including discriminatory acts, we have proposed to condition U.S. ratification upon a specific reservation which states that we do not accept any obligation with respect to private conduct except as mandated by the Constitution and laws of the United States.

10. Affirmative Action Programs

Question. Does the Convention's definition of "racial discrimination" including, among other things, "preference based on race, colour," etc., prohibit Federal and State affirmative actions programs, minority set aside programs, and the like?

Answer. No. The Convention neither requires nor prohibits affirmative action programs and similar plans. Article 1(4) states only that such programs shall not be deemed to constitute racial discrimination themselves, provided that they do not themselves lead to maintenance of separate rights for different racial groups.

Question. Or are such programs insulated by Section 4?

Answer. Article 1(4) does except from the definition of "racial discrimination" "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection." It does not "insulate" affirmative action programs entirely, for under its terms it is possible for such a program to exceed the limits of the exception, i.e., if it is not pursued "solely" for the qualifying purpose, if it leads to the maintenance of separate rights, if it has continued after the objectives for which it was designed have been achieved. Similarly, it is possible under U.S. law for an affirmative action program to contravene the Equal Protection Clause.

Question. Are there any adverse implications for programs that are intended to benefit native Americans (Indians) that are constitutionally permitted because of the Federal Government's special relation to such persons?

Answer. No. They would be justified under Article 2(2).

11. Distinctions Based on Citizenship

Question. The Convention, in contrast to the United States Constitution, seemingly permits distinctive treatment in the enjoyment

of fundamental rights on the basis of citizenship. Does adherence by the United States have any undesirable domestic consequences or implications?

Answer. No. Nothing in the Convention authorizes or requires the United States to condition the enjoyment of fundamental rights on the basis of citizenship in a manner that would contravene the U.S. Constitution. The term "national origin" in Article 1(1) refers to ancestry and not to citizenship. Article 1(2), moreover, states that the Convention does not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens; Article 1(3) states that the Convention may not be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

12. School Curriculum

Question. Does the Convention's provision which commits state parties to undertake effective measures in select areas, including education, to stamp out prejudice, thrust the Federal Government into establishing the content of school curriculum contrary to historical practice and school assistance legal restrictions?

Answer. No. It was precisely this issue, among others, the Administration had in mind in proposing to condition U.S. ratification upon an express understanding concerning our federal system of government. As stated at pp. 15-16 of the analysis which accompanied the Acting Secretary of State's letter to the Chairman, the states and local governments retain a substantial range of action within which to regulate or prohibit discriminatory actions beyond the reach of federal law:

There is no disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the constitutional treaty power. Nor is it necessary to do so in order to ensure that the fundamental requirements of the Convention are respected and complied with at all levels of government within the United States. In some areas, it would be inappropriate to do so. For example, state and local communities have always taken the lead in public education. Federal control over education, particularly in the areas of curricula, administration, programs of instruction, and the selection and content of library resources, textbooks, and instructional materials is expressly limited by statute. Measures to ensure fulfillment of the Convention in these areas will include activities that conform to these provisions.

Questions for Both the Administration and the Public Panels

1. Benefits of Ratification

Question. What benefits will accrue to the United States upon ratification?

Answer. As indicated by all three Administration witnesses at the hearing, ratification will enable the United States to play a

more active and effective role in the effort to combat and eliminate racial and ethnic discrimination around the globe. It is past time for the United States to proclaim to the international system the strength of our national commitment to that struggle, our confidence in our domestic legal system, and our willingness to judge and be judged on the basis of widely accepted international standards. We shall be better able to hold other countries to their commitments, we shall be able to play a more effective role in the articulation of international norms regarding racial discrimination, and we shall be able to promote American concepts of equality of treatment and opportunity.

2. *Need for Implementing Legislation*

Question. Do you feel that additional civil rights legislation is necessary to comply with the Convention?

Answer. No. As indicated in the analysis which accompanied the Acting Secretary of State's letter to the Chairman, the specific requirements of the Convention find ample counterparts in our federal law, so that no new implementing legislation is considered necessary to give effect to the Convention.

3. *Segregation*

Question. Article 3 broadly condemns "segregation and apartheid" in all its vestiges, without distinction as to its nature or causes, and seems to pledge States Parties to undertake reforms for its complete eradication. Domestic U.S. law likewise erects statutory and constitutional safeguards against racial segregation on the job, in housing, and in the schools which is a direct product of deliberate or, in some circumstances, inadvertent practices by government or private parties. At the same time, however, segregation which is purely "adventitious," and which occurs without governmental complicity, is generally deemed outside the purview of governmental complicity to correct. Would U.S. ratification of the Convention necessitate the federal government or the states to take regulatory or reform actions of any kind to address the so-called "de facto" segregation problem?

Answer. The Convention would not require actions of the type you describe which are not already required by the Constitution or federal law.

4. *Impact on Future Development of U.S. Law*

Question. There has been some apparent reemergence of international human rights norms in domestic litigation. Some scholars and judges support the notion that these norms should be deemed directly binding on federal and state courts. For example, four U.S. Supreme Court Justices have expressed the view that international law may be relevant to the constitutionality of juvenile death penalties. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2985-86 (1989) (Brennan, J. dissenting). Moreover, in *Filartiga v. Pena-Irala*, 630 F.2d 8765 (2d Cir. 1980), the Second Circuit revived the incorporationist approach to customary international law, prevalent earlier in our history. The *Filartiga* court recognized that the "law of nations" is a dynamic concept, which should be construed in accordance with current customs and usages of civilized nations, as articulated by

jurists and commentators. It held specifically that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture. If ratified by the Senate, what is the likelihood that the nondiscrimination norms declared by the Convention, which are in many respects broader than current domestic law, would be directly incorporated into, or otherwise influence judicial development of, U.S. law?

Answer. As indicated above, ratification of the Convention is unlikely to have a significant impact on the inclination of a domestic court to look to rules of customary international law in resolving domestic litigation. (Congress has enacted several statutes expressly permitting courts to do so, including the 1789 Alien Tort Claims Act on which the *Filartiga* decision was based, and the more recent Torture Victims Protection Act of 1990.) A court which has been asked to apply a rule of customary international law prohibiting racial discrimination might find ratification of this treaty to have been a "controlling act" making recourse to principles of customary international law unnecessary. A court might also find that the extensive framework of existing U.S. statutory law concerning racial discrimination had exactly the same effect.

Ratification would not in and of itself enable litigants to challenge discriminatory acts on the basis of the treaty. The Administration proposes to condition ratification of the Convention by the United States upon a declaration that the Convention is, for purposes of domestic law, non-self-executing. The purpose is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts. Given the extensive non-discrimination provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation to enforce the essential requirements of the Convention.

It is of course open to U.S. courts, as they consider it appropriate, to have reference to decisions of other judicial systems and international bodies. Given the extensive body of caselaw under federal non-discrimination law, we believe that ratification of the Convention will have little foreseeable influence on the future development of judicial interpretations.