



# HARVARD LAW SCHOOL

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16 May 1978

Professor Matthew Messelson  
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Dear Matt,

This being the season of exams and papers, I have not been able to reply as promptly as I would have liked to your inquiry about the meaning and implications of the marked paragraphs of the enclosed letter from the Under Secretary of Defense (Research and Engineering) to Congressman Zablocki, dated 21 March 1978.

The passage, written in the opaque style favored by bureaucrats, seems to say three things:

1. The Defense Department is against any legislation which would simply make it an offense to violate the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 16 December 1971.

Comment: The Convention is certainly not self-executing. Article IV provides:

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment, and means of delivery specified in article 1 of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

The Defense Department does not favor carrying out this obligation by making it a crime to violate the Convention. This seems right. One would have to spell out with more precision what the forbidden acts (a court might, for example, hold that a criminal statute forbidding the development, etc. of "microbial or other biological agents, or toxins, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes" is unconstitutionally vague), what the mental element is, and what the penalty is (depending how serious the offense is). Of course, the British legislation that you furnished me (Biological Weapons Act 1974, c.6) does simply lift the words of the Convention into the statute, but the requirements as to the specificity of acts of Parliament

are not necessarily the same as our requirements regarding the specificity of statutes enacted by the Congress. If the United States legislation is to be effective and not void for vagueness, it will have to be more specific and nuanced than the treaty itself. There is nothing strange about this; we often respond to a treaty imperative by spelling out duties in municipal law in much greater detail than in the treaty.

I am reluctant to determine whether a particular bill, if enacted, would stand up in court, but H.R. 8149 certainly calls for a hard and expert look to determine whether it is sufficiently precise.

2. The Defense Department believes that in respects other than Article IV the Convention is self-executing and requires no further legislation to give it effect.

Comment: This too seems right. Articles I, II, and III, for example, impose obligations on the Government of the United States and on its officials and employees not to engage in the forbidden conduct. No legislation is needed to tell the Government and people working for it not to do the things that the Convention tells the Government not to do. Article IV is really directed to getting the Government to forbid people outside the Government to engage in the conduct forbidden by the treaty.

3. The Defense Department believes (top paragraph on page 3) that Article IV of the Convention is already executed in our internal law in executive orders and legislation. The Department of State (letter from Assistant Secretary Bennet to Congressman Zablocki of 10 May 1977) disagrees.

Comment: This point is related to Point 1. I have not attempted to verify the accuracy of this statement by the Defense Department. Mr. Berdes might like to ask the Defense Department for a bill of particulars: Just what is the existing law that gives effect to Article IV?

This is not a profound letter, but if you should wish to show it to Mr. Berdes, please do not hesitate to do so. Of course my regards to him, and my thanks to you for the papers provided, which I return herewith.

With kind regards,

Yours sincerely,



R. R. Baxter

Enclosures.