AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
STANDING COMMITTEE ON WORLD ORDER UNDER LAW
REPORT TO BOARD OF GOVERNORS

RECOMMENDATION:

BE IT RESOLVED, that the American Bar Association reiterates its support, originally declared by the House of Delegates in 1979, for the ratification by the United States of the American Convention on Human Rights, and its support for the enforcement of the judgments of the Inter-American Court of Human Rights;

BE IT FURTHER RESOLVED, that the American Bar Association should immediately convene a working group of representatives from interested Association entities and affiliated organizations, whose final work product will require approval of the Board of Governors or the House of Delegates, to work with the Executive Branch and the Senate in reviewing and updating the reservations proposed by the Carter Administration, and in evaluating whether the United States should accept the contentious jurisdiction of the Inter-American Court of Human Rights.
1. Summary of the Convention and Ratification History

The American Convention on Human Rights seeks to safeguard throughout the Americas the basic civil and political rights guaranteed in the United States by our Constitution. Its terms reflect active participation by the United States in drafting the treaty at a conference convened by the Organization of American States ("OAS") in San José, Costa Rica in 1969.

The Convention entered into force in 1978. It has now been ratified by 25 American states, including every South American nation (except Guyana), every Central American nation (except Belize), plus Mexico and seven Caribbean states. In all of Latin America, only Belize, Guyana and several Caribbean nations have yet to ratify. (In Canada, which joined the OAS in 1990, ratification is currently under active consideration.)

President Jimmy Carter signed the Convention for the United States in 1977 and asked the Senate to consent to ratification, subject to reservations, in 1978. Hearings were held before the Foreign Relations Committee in 1979, but no action has been taken.

In 1993, Secretary of State Warren Christopher declared at the World Conference on Human Rights in Vienna that we "strongly support the general goals" of the American Convention and other treaties signed by the United States. They "will constitute important advances, and our Administration will turn to them as soon as the Senate has acted on the racism Convention."

The Administration currently plans to review the American Convention, in anticipation of the summit meeting of American government leaders scheduled for December 1994.

The rights protected by the Convention are mainly those recognized domestically by our Constitution, and globally by the International Covenant on Civil and Political Rights ("Civil and Political Covenant"), ratified by the United States in 1992. Among others, the American Convention prohibits extrajudicial executions; disappearances; torture; cruel, inhuman or degrading punishment or treatment; arbitrary arrest and detention; slavery; racial and other discrimination; ex post facto laws; and invasions of privacy. It guarantees the rights to freedoms of expression, assembly and association; and of conscience and religion. It requires due process and essential judicial guarantees. It also protects basic rights of the family and of the child; rights to property, to a nationality, and to freedom of movement and residence; as well as the rights to participate in government and to free elections.
The Convention provides for both administrative and judicial implementation. It is implemented administratively by the Inter-American Commission on Human Rights. The Commission, an organ of the Organization of American States, exists independently of the Convention and may make non-binding recommendations to any OAS member state, including the United States.

The Convention's judicial arm is the Inter-American Court on Human Rights, which came into being in 1979. The Court has both advisory jurisdiction as to all OAS members, and contentious jurisdiction, which is binding, but only as to states parties which file a declaration accepting such jurisdiction.

2. Past Association Policy Actions

In August 1979 the American Bar Association House of Delegates approved a resolution urging the Senate to give its advice and consent to the ratification of the American Convention on Human Rights, subject to nine proposed reservations, understandings and declarations, all of which had been proposed by the Carter Administration. (For discussion of these proposed reservations and possible updating, see part 4 below.)

Neither the Carter Administration nor the Association at that time asked the Senate to consider United States acceptance of the contentious jurisdiction of the Inter-American Court, which only came into existence in May of 1979, and had not yet heard any cases.

In November 1979, Professor John Norton Moore, as Vice Chairman of the Section of International Law, testified on behalf of the Association in hearings on United States ratification of four human rights treaties then before the Senate Foreign Relations Committee. Mr. Moore testified that the Association "strongly supports ratification of these four treaties" -- the convention against racial discrimination, the international covenants on civil and political, and on economic, social and cultural rights, and the American Convention on Human Rights -- subject to certain reservations.

Mr. Moore emphasized that ratification would be fully consistent with the important United States foreign policy goal of promoting human rights in the world. He cited the importance of embodying minimum human rights standards in international law, the need for the United States as a human rights leader to adhere to international standards, and the prospect that ratification would encourage the progressive development of institutional mechanisms for protection of human rights, including the new Inter-American Court of Human Rights.
Since 1979, as neither the Executive Branch nor the Senate has taken any action on the American Convention, there has been no further occasion for the Association to act.

3. Reasons for Ratification

Ratification of the Convention would advance United States foreign policy goals in support of human rights, democracy, and the rule of law throughout the Americas. Achievement of these goals is important not only in principle, but also to promote a climate of peace and stability conducive to trade, investment and economic growth in the hemisphere.

Ratification of the Convention would enhance the credibility of our stated support for these goals, by confirming our shared commitment to basic international standards for the hemisphere. Now that nearly all South and Central American nations have ratified the Convention, the time has come to allay any doubts raised by our continued failure to ratify.

Ratification would also strengthen the Convention as a practical tool for defending human rights in Latin America. Our participation as a state party would send an important signal that the political and diplomatic weight of this nation supports compliance with the Convention. In practice, unfortunately, some governments weigh the costs and benefits before deciding whether to comply with their human rights treaty obligations. United States commitment to the Convention will raise both the perceived costs of non-compliance, and the perceived benefits of compliance.

This practical gain will be even greater if the United States also makes the optional declaration to accept the contentious jurisdiction of the Convention's judicial arm, the Inter-American Court of Human Rights. That Court has now developed a thoughtful body of jurisprudence. (See part 5 below.) But even without such a declaration, United States ratification will strengthen diplomatic incentives for Western Hemisphere nations to comply with their commitments under the Convention.

Finally, ratification will give the United States a voice in shaping the development of jurisprudence under the Convention. As a state party -- whether or not we accept the jurisdiction of the Inter-American Court -- the United States will become eligible to vote for judges of the Court, and will have an opportunity to nominate jurists to sit on the Court.

In fact, from 1979 through 1991, one of our most respected international law experts, Professor Thomas Buergenthal, currently Lobingier Professor at George Washington University, served on the Court by nomination of Costa Rica. His
participation left its mark on the Court's jurisprudence. For example, the Court's principal ruling on freedom of expression effectively incorporates the high standards for free speech set by the United States Supreme Court. However, when Judge Buergenthal's second term expired, no United States jurist was nominated to succeed him. Ratification will enable the United States to resume a role in shaping the interpretation of the Convention.

As against these practical foreign policy benefits, United States ratification of the Convention would likely have little domestic impact. Most of the Convention's standards are already recognized by our law, and our courts would continue to enforce them. The few significant variances between the Convention and our law can be addressed by a limited number of reservations.

3. Reservations, Understandings and Declarations

In its 1979 resolution urging ratification of the Convention, the Association recommended nine reservations, understandings and declarations, all of which had been proposed by the Carter Administration. These limitations declared that:

. Rights under the Convention are not self-executing;

. The right to life under the Convention is subject to our Constitution and laws;

. Separation of accused and convicted prisoners, and the penal goal of rehabilitation, are to be achieved progressively, not immediately; and minors may sometimes be tried as adults;

. Court-appointed counsel are not required for petty offenses or where the defendant is not indigent; indigent witnesses may be required to show that witnesses to be called by the court are necessary; and the prohibition of double jeopardy applies only to prosecutions by the same unit of government;

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1 "Reservations" are statements that a party does not agree to and will not be bound by a portion of a treaty. "Understandings" are statements that the party agrees to a portion of a treaty, but only on the condition that it means what the party's understanding says it means. "Declarations" neither vary nor interpret a treaty, but address a related matter which the party wishes to place on the international record at the time of ratification. Article 75 of the American Convention permits reservations only if they are in conformity with the Vienna Convention on the Law of Treaties, which provides that reservations may not be incompatible with the object and purpose of the treaty.
. Convicted persons are not entitled to the benefit of subsequent statutory reductions in the penalties for an offense;

. Prior restraints are permitted in strictly defined circumstances with immediate access to judicial review; propaganda for war and advocacy of national, racial or religious hatred that constitutes incitements to violence or illegal action, are not always punishable by law;

. The United States does not recognize a right to reply to inaccurate or offensive statements in the media, and only non-governmental media need have a person responsible who is not protected by immunities;

. Equality of rights in marriage, provision for children in case of marital dissolution solely on the basis of their own best interests, and equal rights for children born in or out of wedlock, are goals to be achieved progressively, not immediately;

. Aliens who constitute security threats or who are dangerous criminals, may be returned to a country, even if their lives or personal freedom would thereby be endangered because of their race, nationality, religion, social status or political opinions.

Since 1979 a number of developments have occurred which call for a review of these proposed reservations. Among others, they include the following:

1. In 1992 the United States ratified the Civil and Political Covenant. In doing so it did not attach all the reservations originally proposed by the Carter Administration to both the Covenant and the American Convention. For example, the United States no longer proposed that separation of accused and convicted prisoners be achieved only gradually.

2. In the 1993 Vienna Declaration, made at the close of the Vienna World Conference on Human Rights, the United States agreed to a provision encouraging nations "to avoid, as far as possible, the resort to reservations" in human rights treaties. This suggests a further need to review the 1979 reservations to determine whether the need for them outweighs this policy commitment.

3. United States domestic law has evolved since 1979. For example, we may now be closer to equality of rights in marriage, and of children born in and out of wedlock, than in 1979.

Together, all of these considerations counsel in favor of a review and possible reconsideration or reformulation of the reservations endorsed by the Association in 1979. This task could be entrusted to a working group of the Association.
5. The Inter-American Court of Human Rights

The Convention created an Inter-American Court of Human Rights, which came into being in 1979, and whose seven judges sit in San José, Costa Rica. The Court has begun to show promise as an important legal mechanism for protection of human rights in the Americas. But it has encountered resistance from several Latin American governments. United States participation would go far toward enabling the Court to realize its potential.

The Court has two kinds of jurisdiction: advisory and contentious. The United States is already subject to the Court's advisory jurisdiction. In contrast, we will not be subject to its contentious jurisdiction, even after ratifying the Convention, unless we file a separate declaration accepting the contentious jurisdiction.

Under the Court's advisory jurisdiction, any member state of the OAS, whether or not it has ratified the Convention, as well as certain OAS organs, may consult the Court "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." Advisory opinions are non-binding; governments affected have no legal obligation to comply.

The Court has now issued some thirteen advisory opinions. Taken together, they have developed a thoughtful jurisprudence strongly supportive of human rights. For example, the Court has interpreted the OAS Charter to impose specific human rights obligations on all OAS member states; it has broadly interpreted freedom of expression under the Convention; and it has interpreted the Convention to require that habeas corpus be available even during states of emergency.

The Court's binding, contentious jurisdiction may be exercised only with respect to nations which have both ratified the Convention and, separately, filed a declaration under Article 62.1 accepting the Court's contentious jurisdiction.

As explained below, important benefits could result if the United States were to join the sixteen nations which have to date accepted the Court's contentious jurisdiction. They include 14 of the 16 Spanish-speaking nations of South and Central America. (The only exceptions are Bolivia and El Salvador).

The Court's contentious jurisdiction cannot be invoked by individuals, but only by states or by the Inter-American Commission on Human Rights. While cases are pending, if they are of extreme gravity and urgency, the Court may order provisional measures to avoid irreparable damage to persons. At the conclusion of the case, if the Court finds a state responsible
for a violation of the Convention, it may order that the state pay compensatory damages to the victim or to the survivors.

The Court imposes no liability, either civil or criminal, on individuals; the only defendant is the state.

If the Court succeeds in practice as envisioned by the Convention, it will provide the first real hope of legal relief for victims of human rights violations in many nations in the Americas. As the U.S. State Department Country Reports for 1993 have again recognized, the domestic judicial systems in many Latin American nations generally fail to afford justice in human rights cases. In Guatemala, for example, "The judicial system is ineffective and often unable to ensure a fair trial ..." Country Reports for 1993 at 451; see also id. at 368 and 370 (Bolivia); 387 (Chile); 433 and 438 (El Salvador); 475 (Honduras); 493 (Mexico); and 534 (Peru).

This is not to suggest that the Inter-American Court can or should become a complete substitute for the failed judiciaries of many nations. But it can perform two essential functions. First, it can afford justice in at least a manageable number of exemplary cases. Second, by so doing, it may stimulate governments to improve their judiciaries, even if only to avoid the international stigma and monetary expense of repeatedly losing cases before the Inter-American Court.

In fact, since rendering its first contentious ruling in 1988, the Court has confirmed this potential. In its first few contested cases, it has found Honduras responsible for forced disappearances, and Suriname for extrajudicial executions and illegal detention. In these cases it has awarded monetary damages to survivors. It has also granted provisional orders requiring Peru and Guatemala to safeguard the lives of witnesses, judges and human rights monitors who had been threatened.

At the same time, the Court's rulings have been balanced. Where the evidence of a violation by Honduras was deemed insufficient, or where the Commission failed to bring a case against Peru in a timely manner, the Court ruled in favor of the defendant state.

Unfortunately, the Court has thus far been hampered in realizing its potential by a lack of resources and diplomatic support. For example, its budget from the OAS has been so inadequate that the Court was forced to suspend publishing its proceedings. For lack of resources, the full Court has met for only a few weeks each year.

Moreover, as long as the United States does not ratify the Convention and accept the Court's contentious jurisdiction, our ability to support its important role will be limited. This is
illustrated by Honduras' response to the Court's 1989 damages judgments in two disappearance cases. Although Honduras paid a meaningful portion of the damages, it refused at least through 1993 to pay the full amount -- notwithstanding its treaty obligation under the Convention to comply with the Court's judgments. In 1991 the United States Ambassador raised the matter of compliance with then President Callejas. According to the Embassy, President Callejas responded by questioning why the United States was inquiring about the case, in view of the fact that the United States has not ratified the American Convention.

Our acceptance of the Court's contentious jurisdiction, in contrast, would enable the United States to provide significant diplomatic support to the Court.

It may be argued, however, that there are potential risks to the United States of accepting the Court's contentious jurisdiction, such as the possibility of adverse decisions. In making a recommendation on whether to accept the Court's contentious jurisdiction, therefore, the Association should consider both the benefits and the risks. The Association working group on the Convention, whose final work product will require approval of the Board of Governors or the House of Delegates, could be asked to undertake this evaluation as well.