REPORT OF THE STANDING COMMITTEE ON
WORLD ORDER UNDER LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association favors the accession of the United States to the American Convention on Human Rights and urges the Senate of the United States to give its advice and consent to ratification of the Convention subject to the following reservation and statement of understanding:

"The Constitution of the United States and Article 13 of this Convention contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States."

"The United States understands that the fairness doctrine, as judicially interpreted in light of the requirements of the United States Constitution, meets the requirements of Article 14, and that the second sentence of paragraph 1 of Article 4 does not apply to lawful abortions."

Be It Further Resolved, That copies of this resolution be forwarded by the Secretary of this Association to the President of the United States and the Chairman and members of the Foreign Relations Committee of the United States Senate.

REPORT

The American Convention on Human Rights,7 which was negotiated in 1969 by members of the Organization of American States, including the United States, entered into force on July 18, 1978, in accordance with Article 14 of the Convention. To date, thirteen of the 25 American States have acceded to the Convention, including Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Panama, Peru and Venezuela.

On June 1, 1977, President Carter signed the Convention on behalf of the United States, consistent with the Administration's support of human rights as a fundamental tenet of American foreign policy. On February 23, 1978, the President submitted the Convention to the Senate for its advice and consent, together with three other human rights treaties.2 As stated by the President in his letter of transmittal to the Senate (Attachment B), "United States ratification of the Convention will give us a unique opportunity to express our support for the cause of human rights in the Americas."

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*The recommendation was withdrawn. See page 245.

1For full text of the Convention, see Attachment A.
ing all four treaties, including the Convention, the President further stated that the "great majority of the substantive provisions . . . are entirely consistent with the letter and spirit of the United States Constitution and laws."

Whenever a provision of the Convention was, in the opinion of the Department of Justice and the Department of State, possibly in conflict with United States law, the President recommended a reservation, understanding, or declaration as set forth in the State Department report (Attachment C) submitted with his letter of transmittal. Of the 11 reservations, understandings, and declarations recommended by the President at the suggestion of the State Department, the Committee recommends only one reservation and two understandings, with modifications, as being legally necessary or desirable as discussed below.

In the Committee's view, the only Convention provisions requiring a reservation, declaration or statement of understanding are those which contravene the Constitution. Convention provisions which do not conflict with the Constitution, but which may conflict with United States law or practice, raise policy questions which properly should be considered on their merits by the Congress. The Committee believes that the ABA should focus on the strictly legal aspects of the Convention, and leave the legislative policy considerations for the appropriate governmental bodies to determine.

Consistent with this belief, the Committee recommends one reservation (Article 3) and two statements of understanding (Articles 14 and 4) respecting the rights to free speech and to life as legally necessary to avoid Constitutional conflicts. The eight additional reservations, understandings and declarations proposed by the Departments of State and Justice are largely based on their apparent determination that provisions of the Convention that may be in conflict with United States law or practice, no less than those in conflict with the Constitution, should not be considered by the Senate in determining the international obligations of the United States. The Committee disagrees. Whether or not the Senate wishes to consent to a treaty provision requiring legislation to establish on the domestic level additional or different rights in an area of proper federal jurisdiction should be decided on the merits, including national interest considerations, of each provision and not generally by reference to a constitutionally inapplicable standard, e.g., conformity to existing legislation.

Purpose and Provisions of the Convention

As stated by the President, the American Convention on Human Rights contributes significantly to the developing international law of human rights by recognizing on the international level human rights that are, for the most part, already enjoyed by U.S. citizens under the Constitution and laws of the United States.

One intention of the Convention, as stated in its preamble, is "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The Convention recognizes that these essential rights are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, thereby justifying international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.

The Convention contains 82 articles divided into three parts: state obligations and rights protected, means of protection, and general and transitional provisions. The first 32 articles provide nondiscriminatory, non-self-executing guarantees of fundamental civil and political rights, including juridical personality (Art. 3), freedom from slavery (Art. 6), right to privacy (Art. 11), freedom of religion (Art. 12), expression (Art. 13), assembly (Art. 15), and association (Art. 15), and the rights to due process and equal protection of the law (Arts. 24 & 25).

Part I also contains, in effect, a non-self-executing provision of general applicability (Art. 2) and a provision for the progressive achievement, "by legislation or other appropriate means," of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States, as amended (to which the United States is a party) (Art. 26). There is also a provision for suspension of guarantees during time of war, public danger or other emergencies (Art. 27) and a Federal-State clause, which takes account of and is in the interest of federal systems such as the United States (Art. 28).

Parts II and III of the Convention establish the machinery for assuring and monitoring compliance. Thus, the Inter-American Commission on Human Rights (Arts. 33-51) is empowered to receive complaints from individuals or groups or, upon appropriate declaration (Art. 45), from States re-

1In his letter of transmittal, President Carter
garding violations of the rights protected by the Convention. The Commission’s powers are limited to requesting information from the State whose compliance with the Convention is in question, requesting assistance for carrying out its tasks and investigations, and making recommendations and public reports on unresolved cases.

The Convention also provides for an Inter-American Court of Human Rights (Arts. 52–73), which assumes jurisdiction over cases by voluntary declaration of the States or by special agreement between the parties to a dispute. The seven-judge Court has power to issue temporary or permanent injunctions in appropriate cases, as well as to restore the right or freedom denied to the injured party.

As previously noted, while the Convention is basically consistent with the Constitution, laws and practices of the United States, some of its provisions appear to conflict with the Constitution, existing laws and practice in certain areas. These provisions are discussed below, including those deemed to be violative of the Constitution and thus requiring a reservation or understanding, and the eight which may conflict with existing domestic laws and practice as to which the Committee believes no reservations, understandings or declarations, are legally necessary or desirable.

Non-Self-Executing Character of the Convention

Article 2 of the Convention requires States to “undertake to adopt, in accordance with their constitutional processes and other provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms” set forth in the Convention when their existing laws do not do so. Although this language suggests that the substantive provisions of the Convention are not self-executing, the State Department has recommended a declaration stating that “(T)he United States declares that the provisions of Articles 2 through 32 of this Convention are not self-executing.”

There is no doubt that the U.S. delegation participating in negotiation of the Convention indicated that, if the Senate ratifies the Convention, the United States will file its declaration under Art. 45 recognizing the competence of the Inter-American Commission on Human Rights to receive charges by one State that another State is violating the Convention.


limitations on the death penalty include prohibition of its reenactment in States that have abolished it (par. 3), prohibition of its imposition for "political offenses or related common crimes" (par. 4), or upon persons "under 18 years of age or over 70 years of age" and pregnant women. While these limitations may not be in accord with the existing law and practice in all jurisdictions in the United States, they do not drastically or unreasonably circumscribe the present freedom of States to impose capital punishment. Furthermore, the State Department's overbroad reservation would unnecessarily negate provisions which are consistent with underlying basic policies and shared values in this area which, at least, deserve to be considered by the Senate as possibly warranting encouragement and the opportunity for progressive development. The Committee therefore deems the proposed reservation to Article 4 (with the exception of the second sentence of paragraph 1) as unnecessary and undesirable.

Right to Humane Treatment

Article 5, consisting of six paragraphs on the right to humane treatment, bans cruel, inhuman or degrading punishment, and requires that persons deprived of their liberty be treated with respect for the dignity of the human person (Par. 2). It also provides that accused persons, except in unusual circumstances, are to be segregated and treated separately from convicted persons, (par. 4); that minors subject to criminal proceedings be separated from adults and brought before specialized tribunals as speedily as possible (par. 5); and that punishment consisting of deprivation of liberty have as an essential aim the reform and social readaptation of prisoners (par. 6).

Since the standards specified in pars. 4, 5, and 6, in some cases go beyond existing laws and practice in the United States, the State Department proposed the following statement and reservation: "The United States considers the provisions of paragraphs (4) and (6) of Article 5 as goals to be achieved progressively rather than through immediate implementation, and, with respect to paragraph (5), reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults."

The Committee considers the proposed statement and reservation to be unnecessary and undesirable for a number of reasons. By virtue of the non-self-executing and federal clauses (Arts. 2 and 28) of the Convention, the provisions of Article 5 can be considered as goals for progressive achievement, thus rendering the proposed statement and reservation essentially superfluous. Furthermore, Article 29(b) of the Convention provides that no provision of the Convention shall be interpreted to restrict the enjoyment or exercise of any right or freedom recognized by the laws of any State Party.

Right to Personal Liberty

Article 7, on the right to personal liberty, bars arbitrary arrest or imprisonment; requires that any person detained be informed of the reasons for his detention and promptly notified of any charges against him; and requires trial within a reasonable time, with recourse to a competent court to decide on the lawfulness of the arrest or detention. Paragraph (7) provides that no one is to be detained for debt, except under "orders of a competent judicial authority issued for nonfulfillment of duties of support."

The State Department has proposed a statement of understanding that this latter provision (the second sentence of paragraph 7) "applies to orders of any competent judicial authority, whether or not issued for fulfillment of duties of support." While the purpose in thus extending the exception to the principle against imprisonment for debt is unclear, it may be intended to permit imprisonment for contempt of court. But if this is the intent, no reservation or understanding is needed since imprisonment for contempt is not imprisonment for failure to pay a debt, i.e., the proposed understanding is unnecessary to preserve the power of the Courts for contempt. If the intent or effect of the proposed understanding is to broaden judicial authority to imprison for debt, the proposal is undesirable as unjustifiably retrogressive and anachronistic.

Right to Fair Trial

Article 8 sets forth the several procedural and other requirements necessary for a fair trial, including an independent and impartial tribunal, a presumption of innocence, language assistance if necessary, prior notification in detail of charges, adequate time and means for preparation of a defense, right to counsel of accused's own choosing or provided by the State, right to examine witnesses in Court and to obtain their appearance, right against self-incrimination, and the right of appeal.

The State Department's proposed understanding would make clear that par. 2(e) does not require the provision of court
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Article 13 protects freedom of thought and expression, including the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers. Paragraph (2) states that these rights "shall not be subject to prior censorship," but shall be subject to subsequent imposition of liability in order to ensure respect for the rights or reputations of others, or the protection of national security, public order, health or morals. Par. (3) provides that the right of expression may not be restricted by indirect methods, such as the abuse of government or private controls over information media. Under par. (4), public entertainment may be subject by law to prior censorship "for the moral protection of childhood and adolescence." Par. (5) stipulates that "any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses against law."

Believing that par. (2) and (5) raise questions under the First Amendment to the Constitution, the State Department proposed the following reservation: "The United States reserves the right to permit prior restraints in strictly defined circumstances where the right to judicial review is immediately available; the United States does not adhere to paragraph (5) of Article 13." In the Committee's view, no reservation respecting par. (2) is warranted. While there is a presumption against the constitutional validity of any type of prior censorship or restraint, courts in the United States have recognized exceptions relating to the obligations of the government to provide a fair trial and to protect national security in time of war or emergency. Similarly, the Conven-

tion (Articles 8, 15, 27 and 32) permits prior censorship in these same exceptional circumstances consistent with the traditional primacy given freedom of expression in American public policy.

It is also arguable that no reservation is required to paragraph (5) because, at the behest of the United States delegation, it was amended in order to meet the requirements laid down in Brandenburg v. Ohio, 395 U.S. 444 (1969). However, in view of the chilling effect on free speech implementation this paragraph may produce, the Committee favors a reservation expressed in the same way as the reservation made by the United States to the similar Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, stating: "The Constitution of the United States and Article 13 of this Convention contain provisions for the protection of individual rights, including the right to free speech and nothing in this convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States."

Right of Reply

Article 14(1) provides that "[a]nyone injured by inaccurate or offensive statements or ideas disseminated . . . by a legally regulated medium of communication has the right to reply . . ." Article 14(3) provides that "[e]very publisher and every newspaper, motion picture, radio and television company, shall have a person responsible who is not protected by immunities or special privileges.

Believing that the right to reply in Article 14(1) goes beyond existing United States law and that Article 14(3) does not provide for the immunity which government publishers enjoy under United States law, the State Department proposed the following reservation and understanding: "The United States does not adhere to paragraph (1) of Article 14, and understands that paragraph (3) of that Article applies only to non-governmental entities."

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 444 (1969), the Supreme Court held that the fairness doctrine and personal attack rules of the Federal Communications Commission were constitutionally permissible. While the fairness doctrine appears to substantially meet the requirements of Article 14(1), the latter provision might prevent the Supreme Court from overruling its Red Lion decision (as it suggested it might do, if the fairness doctrine resulted in less coverage of controversial issues) without violating the Convention. Also, the scope of the right to reply provided in Article 14 is broader than that currently required by the fairness doctrine, perhaps unjustly so. Accordingly, the Committee favors a statement of understanding to ensure the United States understands that the fairness doctrine, as judicially interpreted in light of the requirements of the United States Constitution, meets the requirements of Article 14."

The Committee opposes the proposed understanding that Article 14(3) not be construed to require the government to name an individual responsible for any of its publications as being unsound as a matter of policy. In short, the responsibility of the government as a publisher should be established as a matter of substantive law.

Rights of the Family

Article 17 requires that the family unit be protected by society and the State (par. 1). No marriage is to be entered into without the free and full consent of the intending spouses (par. 2). States are obligated to "take appropriate steps to ensure the equality of rights and adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution." (par. 4). Par. 4 also requires that children are to be protected "solely on the basis of their own best interests" upon the dissolution of a marriage. Par. 5 mandates equality of legal rights for legitimate or illegitimate children.

Noting that the United States has been moving towards these goals, but has not yet fully achieved them, the State Department proposed the following statement: "The United States considers the provision of paragraphs (4) and (5) of Article 17 as goals to be achieved progressively rather than through immediate implementation."

The Committee perceives no necessity for such a statement since Article 17 essentially confirms the right of privacy with respect to family life. Par. 4 is not inconsistent with this principle since it only requires "appropriate steps" to be taken in ensuring equality of the spouses and the protection of children. Furthermore, Article 29 requires that no provision of the Convention shall be interpreted to restrict the enjoyment of any freedom recognized by the laws of the State or by virtue of another treaty.
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Juxtaposition of the UN Charter have pledged
themselves to observe and to respect
basic human rights. Thus, no member
of the United Nations can claim the
mis-treatment of its citizens is solely its own
business. Equally no member can avoid
its responsibilities to review and to speak
when torture or unwarranted deprivation
occurs in any part of the world.

"The basic thrust of human affairs points
toward a more universal demand for funda-
mental human rights. The United States
has a historical birthright to be associated
with this process.

"We in the United States accept this re-
ponsibility, in the fullest and the most
constructive sense. Ours is a commitment
and not just a political posture. I know
perhaps as well as anyone that our own
ideals in the area of human rights have not
always been attained in the United States,
but the American people have an abiding
commitment to the full realization of these
ideals. And we are determined, therefore,
to deal with our deficiencies quickly and
openly. We have nothing to conceal."

To fulfill this commitment President Car-
ter has urged the Senate to ratify the Amer-
ican Convention on Human Rights. Prompt
ratifying action by the Senate will dem-
strate effective United States support for
human rights and representative democracy
in the Americas.

This Recommendation requests ratifica-
tion of the Convention subject to the reser-
vation and the understandings pertaining to
Articles 13, 14, and 4, respectively, which
deal with the right of free speech and the
right to life. For the reasons set forth in this
Report, there are no substantial constitu-
tional or other legal objections to the United
States’ ratification to warrant the imposi-
tion of any additional reservations, under-
standings, or declarations to the Conven-
tion.

This Convention has already come into
force by virtue of its acceptance and ratifica-
tion by more than the required number of
eleven American States. Failure to ratify
this Convention would damage the credibil-
ity of the United States in its efforts on be-
half of human rights in the Americas. The
time is ripe for the American Bar Associa-
tion to take leadership in supporting this
Convention which it should properly do by
adopting the resolution recommended by this
resolution recommended by this Report.

BRUNO V. BITKER
Chairman