

REPORT NO. 2 OF THE SECTION OF  
INTERNATIONAL LAW

## RECOMMENDATION\*

*Be It Resolved.* That the American Bar Association favors the ratification by the United States of the International Covenant on Civil and Political Rights and urges the Senate to give its advice and consent to ratification of the Covenant subject to the following reservations, declaration, statement and understanding recommended to the Senate by the Departments of State and Justice (and an understanding on "right to life"):

(a) The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant 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.

(b) The United States' adherence to Article 6 [concerning the 'right to life'] is subject to the Constitution and other laws of the United States.

(c) The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.

(d) The United States does not adhere to Paragraph (5) of Article 9 or to the third clause of Paragraph (1) of Article 15 [compensation for unlawful arrest, and retroactive lighter criminal penalties].

(e) The United States considers the [prisoner segregation and rehabilitation standards] rights enumerated in Paragraphs (2) and (3) of Article 10 as goals to be achieved progressively rather than through immediate implementation.

(f) The United States understands that subparagraphs (3)(b) and (d) of Article 14 do not require the provisions of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The United States further understands that Paragraph (3)(e) does not forbid requiring an indigent defendant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provisions of United States law currently in force constitute compliance with Paragraph (6). The United States understands that the prohibition on double jeopardy contained in Paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause.

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\*The recommendation was approved. See page 246.

(g) The United States declares that the [natural resources utilization] right referred to in Article 47 may be exercised only in accordance with international law.

(h) The United States shall implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.

(i) The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

#### REPORT

The International Covenant on Civil and Political Rights is close in concept to the United States Constitution and Bill of Rights. Reservations, declarations, a statement and an understanding were recommended in early 1978 by the Departments of State and Justice as to provisions in the Covenant which depart from United States law and practice. This recommendation proposes one understanding dealing with the "right to life" which is in addition to the understanding proposed by the Departments of State and Justice. It is believed that this understanding will not weaken the State Department position, or the treaty's merits, in Senate deliberation.

The rights guaranteed by the Covenant are those civil and political rights with which the United States and the Western democracies have always been associated. The rights are primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction. This Covenant is drawn largely from the U.N.'s 1948 Universal Declaration of Human Rights, in whose conception, formulation and adoption the United States played a major role.

On October 5, 1977, President Carter signed the Covenant on Civil and Political Rights on behalf of the United States, and on February 23, 1978, he transmitted this Covenant to the United States Senate for its advice and consent to ratification (U.S. Constitution, Article II, Section 2) with the reservations, declarations, statement and understanding set forth in this Recommendation. The text of the Covenant is attached as Exhibit.

The Covenant was adopted by the U.N. General Assembly on December 16, 1966,

and came into force on March 23, 1976. The following fifty-one (51) nations have ratified or acceded to the Covenant: Austria, Barbados, Bulgaria, Byelorussian SSR, Canada, Chile, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Finland, German Dem. Rep., Germany-Fed. Rep., Guinea, Guyana, Hungary, Italy, Iran, Iraq, Jamaica, Jordan, Kenya, Lebanon, Libya, Madagascar, Mali, Mauritius, Mongolia, Norway, Panama, Poland, Portugal, Romania, Rwanda, Senegal, Spain, Sweden, Surinam, Syrian Arab Rep., Tanzania, Tunisia, Ukrainian SSR, USSR, United Kingdom, Uruguay, Venezuela, Yugoslavia and Zaire.

#### Purpose and Provisions of the Covenant

Articles 1 through 27 contain the substantive provisions.

Article 1 contains provisions regarding self-determination and the right to dispose of natural wealth and resources subject to the principles of mutual benefit and international law.

Article 2 commits parties to provide the rights enumerated in the Covenant without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 obligates parties to undertake to ensure equal rights of men and women to all civil and political rights set forth in the Covenant.

Article 4 permits derogation of certain of the Covenant rights in certain situations of public emergency providing that the rights are not abridged in a discriminatory manner.

Article 5 provides that nothing in the Covenant may be interpreted "as implying for

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any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein. . . ." Furthermore, Article 20 prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. . . ." These provisions would raise problems in connection with the free speech provisions of the Constitution. Thus, the following *reservation* is required:

"The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant 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."

Article 6 of the Covenant provides a general protection of the right to life and limits the circumstances in which capital punishment may be imposed or carried out. Under Article 6(1) "every human being has the inherent right to life." Also under Article 16 "everyone" is recognized as a person before the law. The language is clearly less controversial than the language in the American Convention on Human Rights which protects human beings "in general, from the moment of conception." In addition there is no authority in the treaty-making power to contravene the U.S. Constitution. However, in order to avoid any confusion regarding the meaning of these terms, the following special *understanding* [beyond the recommendations of the Departments of State and Justice] is recommended:

"The United States' adherence to Article 6 [concerning the 'right to life'] is subject to the Constitution and other laws of the United States."

Paragraph 2 of Article 6 states that the death sentence may be imposed only for "the most serious crimes in accordance with the laws in force at the time of the commission of the crime."

Paragraph 5 prohibits any signatory nation from executing pregnant women and prohibits a death penalty "for crimes committed by persons below 18 years of age." Since United States law is not entirely in accord with these provisions, the following *reservation* is recommended:

"The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."

Article 7 provides that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment and that no one shall be subjected without their consent to medical or scientific experimentation. Article 8 forbids slavery.

Article 9 provides that everyone has the right to liberty and security of person and "no one shall be subjected to arbitrary arrest or detention."

Paragraph 5 of Article 9 provides "that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." A related provision is Paragraph (1) of Article 15 which, *inter alia*, would make imposition of lesser criminal penalties retroactive. Since these are rights which are not required under United States law, the following *reservation* is recommended:

"The United States does not adhere to Paragraph (5) of Article 9 or to the third clause of Paragraph (1) of Article 15."

Article 10 deals with treatment of prisoners and provides that the essential aim of prisons shall be the "reformation and social rehabilitation" of prisoners. However, some of the specific requirements go slightly beyond what is afforded in U.S. prisons and thus the following *statement* is recommended:

"The United States considers the rights enumerated in Paragraphs (2) and (3) of Article 10 as goals to be achieved progressively rather than through immediate implementation."

Article 11 forbids imprisonment "merely on the ground of inability to fulfill a contractual obligation." Article 12 guarantees one "the right to liberty of movement and freedom to choose his residence." Article 13 deals with the lawful means of expulsion from the territory of a State party.

Article 14 establishes standards for the conduct of trials including presumption of innocence, right to counsel, to speedy trial, to be informed of charges, to subpoena and to examine witnesses. It is possible to read the requirements in Article 14 as consistent with United States law, policy and practice. The Senate may wish, however, to record an *understanding* as follows:

"The United States understands that subparagraphs (3)(b) and (d) of Article 14 do not require the provision of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The United States further understands that paragraph (3)(e) does not forbid requiring an indigent defendant to make a showing that the wit-

provides that no one shall be tortured or to cruel, inhuman, or degrading treatment or punishment and that no one shall be subjected without their consent to medical or scientific experiments which are prohibited by law. Article 8 prohibits slavery.

Article 9 provides that everyone has the right to life, liberty and security of person and shall not be subjected to arbitrary arrest, detention or exile.

Article 10 provides that everyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. A related provision in Article 15 which, *inter alia*, prohibits retroactive laws. Since these are not required under United States law, the following reservation is recommended:

"The United States does not adhere to Article 10 or to the third paragraph (1) of Article 15." Article 11 deals with treatment of prisoners, stating that the essential aim of the "reformation and social rehabilitation" of prisoners. However, some requirements go slightly beyond those provided in U.S. prisons and the following statement is recommended:

"The United States considers the rights in Paragraphs (2) and (3) of Article 10 to be achieved progressively through immediate imprisonment."

Article 12 guarantees everyone the right to freedom of movement and free choice of residence. Article 13 guarantees everyone the right to a lawful means of expulsion from a State party.

Article 14 establishes standards for the trial of everyone including presumption of innocence, to counsel, to speedy trial, to public hearing, to charges, to subpoena and to witnesses. It is possible to read Article 14 as consistent with U.S. law, policy and practice. The following wish, however, to record an understanding as follows:

"The United States understands that Article 14 (3)(b) and (d) of Article 14 are the provision of counsel when the defendant is unable to retain counsel or for which imprisonment is imposed. The United States understands that paragraph (3)(e) of Article 14 requiring an indigent defendant to make a showing that the wit-

ness is necessary for his attendance to be compelled by the court. The United States considers that provisions of United States law currently in force constitute compliance with paragraph (6). The United States understands that the prohibition on double jeopardy contained in paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same government unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause."

Article 15 concerns retroactive criminal offense penalties and is dealt with in the reservation, *supra*. (Middle of page 6.)

Article 16 deals with the right to be recognized as a person. Article 17 prohibits "arbitrary or unlawful interference" with individual privacy. Article 18 sets forth the right to freedom of religion.

Other important rights which are provided for in the Covenant include the right of peaceful assembly (Article 21), freedom of association (Article 22) and protection of the family and of children (Articles 23 and 24). Article 25 discusses voting rights and provides, in paragraph (b), that every citizen shall have the right and opportunity "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." Article 26 provides for non-discriminatory equal protection of laws, and Article 27 protects cultural, religious, and language practices. These rights are entirely consistent with U.S. law.

Articles 28 through 47 of the Covenant set forth the administrative and enforcement provisions. Article 28 establishes a Human Rights Committee. Under Article 40 the State Parties "undertake to submit reports on the measures they have adopted which give effect to the rights recognized" in the Treaty. All such reports will be submitted to the United Nations Secretary-General who shall transmit them to the Committee for consideration. Only those states that declare under Article 41 that they recognize the competence of the Committee may claim that another declarant state party is not fulfilling its obligations under the Covenant. If the Committee is unable to resolve a claim properly submitted to it, it can appoint an ad hoc conciliation commission (under Article 42) to lend its good offices with a view to reaching an amicable solution of the matter, but only with the prior consent of the state parties concerned. It is anticipated that the United States will make a declaration recognizing the competence of the Committee

since it is in the interest of the United States to facilitate and influence the State-to-State complaint procedure which will help establish a generally accepted law of international human rights. Any such declaration may be withdrawn at any time by notification to the Secretary-General.

Article 47 provides that nothing in the Covenant is to be interpreted as impairing "the inherent right of all peoples to utilize fully and freely their natural wealth and resources." In order to ensure that the international law principle of prompt, adequate and effective compensation is recognized, the following declaration is required:

"The United States declares that the right referred to in Article 47 may be exercised only in accordance with international law."

Article 50 states that "the provisions of the present Covenant shall extend to all parts of federal States without any limitation or exceptions." In view of the nature of the federal system in the United States the following reservation is required for this Covenant:

"The United States shall progressively implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant."

Finally, it is believed advisable to include a treaty declaration that the substantive provisions (Articles 1 through 27 of the Covenant) are not self-executing, leaving any further implementation that may be desired to the domestic legislative and judicial process:

"The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."

#### Conclusion

Pursuant to the United Nations Charter, the United States has pledged to promote the observance of human rights and fundamental freedoms. The International Covenant on Civil and Political Rights is a means of putting this pledge into effect.

This Recommendation favors ratification of the Covenant subject to the reservations, declarations, statement and understanding proposed by the Department of State whose letter of submittal to the President dated De-

ember 17, 1977 states that the Department of Justice is of the view that with them "there are no constitutional or other legal objections to United States ratification . . . ." The Recommendation also proposes the additional understanding dealing with the "right to life" as noted above.

The Covenant is widely accepted throughout the world, as evidenced by the

fact that 51 nations have become party thereto. Failure to ratify would damage the international credibility of the United States in the area of human rights. The American Bar Association should, accordingly, adopt the resolution recommended by this Report.

DON WALLACE, JR.  
*Chairman*

## EXHIBIT

# INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

### *Preamble*

*The States Parties to the present Covenant,*

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that these rights derive from the inherent dignity of the human person,

*Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

*Agree* upon the following articles:

## Part I

### *Article 1*

1. All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

## Part II

### *Article 2*

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.