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ADDING TEETH TO UNITED STATES RATIFICATION OF THE COVENANT ON CIVIL AND POLITICAL RIGHTS: THE INTERNATIONAL HUMAN RIGHTS CONFORMITY ACT OF 1993

Michael H. Posner and Peter J. Spiro***

United States ratification of the International Covenant on Civil and Political Rights in June of 1992¹ marked a milestone in this country's long history as a guardian of human rights. The Covenant has been hailed as one of the most important international instruments of our generation, a modern Magna Carta for more than one hundred nations that have acceded to it. Ratification of the Covenant allows the United States to participate more actively in the development and monitoring of international human rights standards throughout the world. At a time when democracy and democratic ideals enjoy an unprecedented primacy, the United States' renewed commitment to the international protection of human rights will help to ensure that important democratic principles and values take hold in the infant democracies of Eastern Europe, the former Soviet Union, and elsewhere.

However, U.S. ratification of the Covenant was conditioned by the attachment of reservations, declarations, and understandings that confine its domestic effect to the existing requirements of U.S. law. In its report on the Covenant, the Senate Committee on Foreign Relations recognized the need to consider changes in U.S. law towards the goal of more complete conformity with the treaty's mandate.² The report recommended, however, that these changes

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1. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR]; *see also* SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 25 (1992), *reprinted in* 31 I.L.M. 645 (1992); 5 WEEKLY COMP. PRES. DOC. 1008-09 (June 5, 1992).

2. *See International Covenant on Civil and Political Rights: Hearing Before the Committee on*

would best be pursued through "the normal legislative process," as a more appropriate means of bringing the United States into full compliance at the international level.³

The draft International Human Rights Conformity Act of 1993 (draft Act)⁴ responds to this call for legislative action. It addresses several substantive deviations from the requirements of the Covenant arising from conditions attached to U.S. ratification. In particular, the draft Act conforms U.S. law to requirements of the Covenant in the following areas: the execution of juvenile offenders and pregnant women; standards of cruel, inhuman, or degrading treatment or punishment; retroactive imposition of lighter criminal penalties; compensation for unlawful arrests and convictions resulting from the miscarriage of justice; successive prosecutions by federal and state authorities; and the segregation of juvenile from adult offenders and of the convicted from the accused.

Part I of this Article summarizes the history of the International Covenant on Civil and Political Rights and of its path to ratification by the United States. Substantive provisions of the draft International Human Rights Conformity Act are explained in Part II. Part III discusses dual sources of congressional authority to enact this bill, pursuant to its powers both to "define and punish . . . offenses against the law of nations"⁵ and "to enforce, by appropriate legislation," the requirements of the Fourteenth Amendment.⁶

The draft Act is the product of the combined efforts of a broad coalition of domestic civil and human rights organizations. Uniting these diverse organizations is an overriding interest in the development and protection of human rights both in the United States and abroad, to which end the United States should provide unstinting and unqualified international leadership. Strict U.S. adherence to the same high standards to which it holds other nations will enhance its ability to shape and protect standards of human rights on a global basis.

Foreign Relations of the United States Senate, 102d Cong., 1st Sess. (1991) [hereinafter *1991 Human Rights Hearing*]; SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 25, reprinted in 31 I.L.M. at 660.

3. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 25, reprinted in 31 I.L.M. at 660.

4. See app., *infra*, at 1228.

5. U.S. CONST. art. I, § 8, cl. 10.

6. U.S. CONST. amend. XIV, § 5.

I. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights was born of the aftermath of World War II. Inspired in part by President Roosevelt's call for the establishment of the "Four Freedoms" throughout the world,⁷ the Allies imposed human rights obligations on the conquered Axis powers. These obligations included execution of a charter for the United Nations that placed a special emphasis on "universal respect for, and observance of, human rights and fundamental freedoms for all," the achievement of which end member States must pledge to undertake.⁸

Recognizing that the Charter's general statement on human rights required more specific action, member states, as led by the United States, moved to conclude the Universal Declaration of Human Rights,⁹ the International Covenant on Civil and Political Rights,¹⁰ and the International Covenant on Economic, Social and Cultural Rights¹¹ — collectively known as the International Bill of Human Rights.¹² All three documents, but particularly the Covenant on Civil and Political Rights, draw heavily on our own Bill of Rights and the United States' long tradition of protecting individual human rights. As a result, the Covenant is almost entirely consistent with the U.S. Constitution, protecting many of the same rights. Among the specific rights enumerated in the Covenant are freedom of thought, conscience, and religion; freedom of opinion and expression; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person, including protection against arbitrary arrest or detention; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and emigration; freedom

7. See Annual Message of President Franklin D. Roosevelt to the United States Congress, reprinted in 3 DOCUMENTS ON AMERICAN FOREIGN POLICY 26-41 (1940-41); Louis Sohn, *United States Attitudes Toward Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 255, 256-58 (1990).

8. U.N. CHARTER arts. 55, 56.

9. G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

10. ICCPR, *supra* note 1.

11. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), 6 I.L.M. 360 (1967).

12. For background on the genesis of the covenants, see Louis Henkin, *Introduction to INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1* (Louis Henkin ed., 1981); Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in INTERNATIONAL BILL OF HUMAN RIGHTS, supra*, at 32.

from slavery and forced labor; and the general right to protection of life, including protection against the arbitrary deprivation of life.

At least 115 nations have become party to the Covenant since it was first opened for signature in 1966.¹³ Today, human rights are no longer governed exclusively by national law; the Covenant, along with a host of other more recent international accords adopted in its wake, carves out a series of inalienable human rights protected under the law of nations. What once was a matter of domestic jurisdiction is now the subject of daily diplomacy and international relations. Regional human rights treaties, international human rights tribunals, and nongovernmental human rights organizations have multiplied over the last twenty years, supplementing — and sometimes supplanting — domestic law and legal institutions. The Covenant on Civil and Political Rights itself provides for the consideration of specific human rights abuses, subsequent to the exhaustion of domestic remedies, by the Human Rights Committee, a body of eighteen experts who meet to review compliance by State Parties under United Nations auspices.¹⁴ As Professor Louis Henkin recently observed, “[t]he universalization of human rights is a political fact.”¹⁵

President Carter signed the International Covenant on Civil and Political Rights in 1977 and sent it to the Senate for its consent to ratification in 1978.¹⁶ The Senate Foreign Relations Committee held hearings on the Covenant and three other human rights treaties in 1979.¹⁷ At the urging of President Bush, the Committee renewed its consideration of the Covenant with hearings in 1991¹⁸ and subsequently referred the treaty to the full Senate for formal approval.¹⁹ On April 2, 1992, the Senate granted its consent to the Covenant,²⁰ subject to a series of reservations and understandings implicating many of the Covenant’s most important provisions and qualifying

13. Multilateral Treaties Deposited with the Secretary General, Status as of 1991, U.N. Doc. ST/LEG/SER. E/10 & 1993 supp. at 133-34 (listing actions by State Parties to the Covenant through Jan. 14, 1993)

14. See ICCPR, *supra* note 1, arts. 28-45, 999 U.N.T.S. at 179-84.

15. Henkin, *supra* note 12, at 1.

16. Message from the President to the Senate Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978).

17. See *International Human Rights Treaties: Hearings Before the Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979).

18. 1991 *Human Rights Hearing*, *supra* note 2.

19. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 25, reprinted in 31 I.L.M. at 660.

20. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

every respect in which adherence to the Covenant would otherwise alter existing U.S. practice.²¹ President Bush accomplished delivery of the instruments of ratification in June.²²

During the 1991 hearings and in the Committee Report itself, several references were made to the possibility of enacting legislation to address the substance of these conditions through the "customary legislative process."²³ As a matter of constitutional law, changes in U.S. law could have been directly effected by unconditional U.S. assent to the Covenant.²⁴ As noted during Senate consideration of the Covenant, however, unlike modifications of U.S. law made by treaty, a traditional legislative initiative requires the participation of the House of Representatives.²⁵ Inclusion of the House of Representatives will reflect the importance that the United States places on legislation affecting our civil and political rights and will highlight broadly based domestic support for the protection of human rights both nationally and globally.

Allowed to stand, the conditions attached to ratification would leave significant disparities between U.S. and international law. These disparities could lead other parties to question the sincerity of our commitment to the Covenant and our willingness to submit to the same international standards we urge on others. Uncorrected derogation thus may prompt serious and continuing international opprobrium at the same time as it undermines our standing as a longstanding champion of human rights and deprives Americans of protections guaranteed to citizens of many other nations. The draft

21. *Id.* at S4783-84.

22. 5 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992).

23. See SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 4, reprinted in 31 I.L.M. at 650 ("[I]t may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level . . . the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process."); see also 1991 Human Rights Hearing, *supra* note 2, at 15 (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs); *id.* at 80 (administration reply to questions submitted by Sen. Helms) ("Congress remains free, of course, to adopt legislation conforming U.S. law to the requirements of the Covenant through the customary legislative process."). Even in the absence of such corrective legislation, ratification of the Covenant may have concrete, albeit marginal, impact on U.S. law. See John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

24. Because imposition of Covenant requirements on the states would not implicate any specific constitutional prohibitions, federalism concerns would prove no bar to the preemption of state law by treaty. See *Missouri v. Holland*, 252 U.S. 416 (1920); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. d (1987).

25. See 1991 Human Rights Hearing, *supra* note 2, at 15.

Act would reaffirm our commitment to universal human rights through the accomplishment of more substantial U.S. compliance with the Covenant.

II. THE INTERNATIONAL HUMAN RIGHTS CONFORMITY ACT OF 1993

The draft International Human Rights Conformity Act of 1993 is offered as a means of conforming U.S. human rights law, through the traditional legislative process, to international standards as defined by the Covenant. The Act does not address every area in which U.S. law conflicts with international norms on human rights. Rather, it modestly attempts to address only the most important respects in which U.S. reservations to the Covenant will otherwise entrench disparities between U.S. law and that of other parties to the accord. In particular, the draft Act would: 1) prohibit the execution of juvenile offenders and pregnant women; 2) make it unlawful to subject individuals to cruel, inhuman, or degrading treatment or punishment as defined by international law; 3) require the retroactive imposition of legislative reductions in criminal penalties; 4) provide a federal right to compensation for unlawful arrests and convictions resulting from the miscarriage of justice; 5) prohibit the prosecution of individuals by federal or state authorities when an individual has already been either finally convicted or acquitted for the same acts or transaction; and 6) require segregation of juveniles offenders from adult prisoners and of the accused from the convicted.²⁶ The following is a section-by-section discussion of the substantive provisions of the draft Act.

A. Execution of Juvenile Offenders

Section 103 of the draft Act prohibits the execution of any indi-

26. The draft Conformity Act would leave standing only one significant condition attached to ratification of the Covenant. Article 20 of the Covenant requires that "propaganda for war" and "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence" shall be prohibited by law. The first reservation to U.S. ratification provides that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 11, *reprinted in* 31 I.L.M. at 653. Because full adherence to the Covenant would in this respect represent a restriction of existing domestic rights, the reservation is appropriate and should not be countermanded. *See Reid v. Covert*, 354 U.S. 1, 16-17 (holding that a treaty may not override specific constitutional prohibitions); Louis Henkin, *Constitutional and Human Rights*, 13 HARV. C.R.-C.L. L. REV. 593, 626 (1978).

vidual for a crime or crimes committed while under the age of eighteen, implementing Article 6(5) of the Covenant and reversing the effect of the second reservation to U.S. ratification. Under existing Supreme Court precedent, criminal offenders may be executed for crimes committed at the age of 16 or older.²⁷ Twenty-four states currently permit the execution of such offenders, leaving the United States as one of only a handful of countries (including Bangladesh, Pakistan, Rwanda, and Barbados) that continues to tolerate this practice.²⁸ No other Party to the Covenant has failed to accept this proscription, which is also found in Article 4(5) of the American Convention on Human Rights,²⁹ Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,³⁰ Article 4 of the African Charter on Human and Peoples' Rights,³¹ and Article I of the American Declaration of the Rights and Duties of Man.³² Reflecting the clear command of the Covenant and these other international accords, the bill would prohibit the execution of juvenile offenders as a matter of U.S. law.

B. Execution of Pregnant Women

Section 104 prohibits the execution of pregnant women. Although the Senate's ratification of the Covenant did not include a reservation from the Covenant's prohibition of the execution of pregnant women, sixteen states in this country still have laws governing capital punishment which would permit such executions.³³ While in practice no state has executed a pregnant women, this section recog-

27. See *Stanford v. Kentucky*, 492 U.S. 321 (1978); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993) (discussing inconsistency between international and U.S. policies on executing offenders aged 18 or under).

28. See *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting).

29. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 144 U.N.T.S. 123, 9 I.L.M. 673 (1970) (entered into force July 18, 1978) [hereinafter American Convention].

30. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

31. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 21 I.L.M. 58 (1982).

32. American Declaration of the Rights and Duties of Man, Res. XXX of the Ninth International Conference of American States (1953), *reprinted in* 1 Human Rights: The Inter-American System (Oceana) pt. 1, ch. 4, at 1 (Thomas B. Buergenthal & Robert E. Norris eds., 1984).

33. See David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 72 n. 210 (1978) (of the 32 states with laws imposing capital punishment, only 16 have legislation staying the execution of a pregnant woman until after the birth of her child).

nizes that by ratifying the Covenant, the United States has undertaken an affirmative obligation to ensure that no state ever does. The execution of pregnant women is prohibited by Article 6(5) of the International Covenant on Civil and Political Rights. It is also prohibited by Article 4(5) of the American Convention on Human Rights and Article 4 of the African Charter on Human and Peoples' Rights.

C. Cruel, Inhuman, or Degrading Treatment

Section 105 implements international standards prohibiting torture or cruel, inhuman, or degrading treatment or punishment. This prohibition is set forth in Article 7 of the Covenant. It is also found in Article 5 of the American Convention on Human Rights, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁴ the Declaration on the Protection of All Persons from Being Subjected to Torture,³⁵ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁶ No other country has made a reservation, declaration, or understanding with respect to Article 7.

International standards in this regard are broader than protections provided under the Eighth Amendment of the U.S. Constitution, at least as so interpreted by the Supreme Court. For instance, whereas the Eighth Amendment has been found inapplicable to individuals awaiting trial and to persons held under color of state law where the victim has not been taken into custody,³⁷ the Covenant contains no such limitation.³⁸ The Human Rights Committee, which is charged with interpreting the Covenant, has found the following to constitute inhuman and degrading treatment: placing a prisoner in a small cell for twenty-three hours out of the day, with random, arbitrarily granted exercise periods and random destruction of reading material; repeated solitary confinement; and threats of death

34. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1951).

35. Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc A/39/51 (1985), *reprinted in* 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985) (entered into force June 26, 1987).

37. See *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

38. ICCPR, *supra* note 1, art. 7, 999 U.N.T.S. at 175.

and deprivation of medical attention.³⁹ The current definition of such standards, however, remains in flux. Although the European Court of Human Rights, in *Soering v. United Kingdom*, interpreted a similar provision of the European Convention on Human Rights to prohibit lengthy stays on death row,⁴⁰ the Human Rights Committee came to a contrary conclusion in *Pratt & Morgan v. Jamaica*.⁴¹ Enactment of section 105 of the draft Act will ensure that U.S. practice will conform with the interpretation afforded Article 7 as it develops under international law by requiring the courts to consult recognized authorities of international law in giving content to the provision.

D. *Retroactive Imposition of Lighter Penalties*

Section 106 provides for the retroactive imposition of lighter criminal penalties when the penalty for a particular crime is reduced by a legislative act. This result is required by Article 15(1) of the Covenant. It is also required by Article 9 of the American Convention on Human Rights. Among the other parties to the Covenant, only Italy and Trinidad and Tobago have submitted reservations regarding this provision. Under current U.S. law, post-sentence, retroactive reductions in penalties are permitted but not required.⁴² In the context of existing U.S. constitutional bars to the imposition of heavier punishment than that mandated when a criminal act was committed, there is a ready body of case law identifying when new legislation changes the severity of a particular criminal punishment.⁴³

39. See 1991 *Human Rights Hearing*, *supra* note 2, at 95-96 (reprinting statement of Amnesty International USA).

40. 161 Eur. Ct. H.R. (ser. A) at 439 (1989) (finding that extradition of a West German national to the United States to face trial in Virginia for capital murder would violate the European Convention on Human Rights Article 3 prohibition on "inhuman or degrading treatment or punishment").

41. *Pratt & Morgan v. Jamaica*, UN Doc. CCPR/C/35/D/210/1986 and 225/1987, Annex at 1, 10 (Apr. 7, 1989).

42. See 18 U.S.C. § 3582(c)(2) (1992) (providing that where a sentencing range is subsequently lowered, the court may retroactively reduce the term of imprisonment); UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.10.

43. See, e.g., *Lindsey v. Washington*, 301 U.S. 397 (1937) (reversing the application of a more onerous mandatory sentence, *ex post facto*, to a crime committed before the enactment of the state statute requiring the more onerous sentence).

E. Right to Compensation for Unlawful Arrest

Section 107 of the Act would afford, where not otherwise provided by law, a right to compensation for unlawful arrests and convictions resulting from the miscarriage of justice. The provision mirrors the language of Articles 9(5) and 14(6) of the Covenant and would nullify any limiting effect of the second understanding to U.S. ratification. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights contain similar requirements. Such compensation in many instances may be available through existing domestic remedies under the common law,⁴⁴ federal statutes,⁴⁵ and the Constitution.⁴⁶ However, it is not apparent that these remedies give rise to complete congruence with the requirements of the Covenant. Section 107 is intended to mandate such congruence, specifically incorporating the standards of Articles 9(5) and 14(6) as interpreted by recognized authorities under international law.

F. Successive Prosecution by Different Sovereigns

Section 108 bars successive prosecutions under federal or state law except where the subsequent federal prosecution is undertaken to enforce rights protected under the U.S. Constitution or federal civil rights statutes. Successive prosecutions are barred under Article 14(7) of the Covenant and Article 8(4) of the American Convention on Human Rights. Under current U.S. law, successive prosecutions by the federal government and a state or by two states for the same conduct are not prohibited.⁴⁷ Subsection (d) of this section of the draft Act provides an exception for the prosecution by federal authorities of civil or constitutional rights violations notwithstanding prior acquittal for the same acts or transactions under state law.

44. For example, a cause of action exists under common law for false arrest. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984).

45. The most notable example being the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1981). See also 28 U.S.C. §§ 1495, 2513 (1988) (creating a cause of action for unjust conviction by federal authorities).

46. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that the victim of an unlawful arrest may bring suit against a federal agent for a constitutional tort).

47. See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985) (holding that successive prosecutions by two states were not precluded by the Double Jeopardy Clause of the Fifth Amendment); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (holding same for successive prosecution by federal and state authorities).

The exception, which would preclude the insulation otherwise provided under this section for civil rights offenses inadequately prosecuted by state authorities, is justified as in furtherance of other protections provided under the Covenant.

G. Segregation of the Accused and Convicted

Section 109 requires, to the extent practicable, the separate confinement of accused and convicted prisoners. Separate confinement of the accused and the convicted is mandated by Article 10(2)(a) of the Covenant. It is also required under Article 5 of the American Convention on Human Rights and by Rules 8(b) and 85(1) of the U.N. Standard Minimum Rules for the Treatment of Prisoners.⁴⁸ Although the Federal Bail Reform Act already requires such segregation of federal prisoners,⁴⁹ section 109 would expand the requirement to cover all persons imprisoned in the United States.

H. Segregation of Juvenile from Adult Offenders

Finally, section 110 prohibits the confinement of accused and adjudicated juvenile offenders in any institution in which the juvenile would have regular contact with adult prisoners. Articles 10(2)(b) and 10(3) of the Covenant and Article 5 of the American Convention on Human Rights require the segregation of juvenile and adult prisoners, as do Rules 8(d) and 85(2) of the U.N. Standard Minimum Rules for the Treatment of Prisoners. The language of section 110 tracks the language of 18 U.S.C. § 5035, which requires the separation of juvenile offenders from adult prisoners in the federal system.⁵⁰ The draft provision would extend this requirement to the states. Although virtually every state now requires the segregation of juvenile offenders and adult prisoners, enforcement of these laws by state officials has been erratic.⁵¹ Section 110 is designed to provide additional recourse for juvenile offenders who have been unlawfully confined in close quarters with adult prisoners.

48. U.N. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *extended*, E.S.C. Res. 2976, U.N. ESCOR, Supp. No. 1, at 35 (1977).

49. 18 U.S.C. § 3142 (i)(2) (1985) (requiring that persons committed to the custody of the Attorney General for confinement in correctional facilities be separated "to the extent practicable" from persons awaiting or serving sentences or held pending appeal).

50. 18 U.S.C. § 5035.

51. See Kristin H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1024-25 (1991).

III. CONGRESSIONAL AUTHORITY FOR ENACTMENT OF THE CONFORMITY ACT

By its terms, the draft Act would preempt the effectiveness of any inconsistent law or practice at the state level. Under well-settled principles of international law, federal authorities are held accountable for the acts of constituent elements.⁵² All of the rights guaranteed by the draft Act implicate practices of the states, in some cases exclusively so. The Act's expressly preemptive effect is thus of vital importance to accomplishment of substantial compliance by the United States with the requirements of the Covenant.

Although constraints on the states posed by the draft Act touch upon matters traditionally within the dominant concern of state authorities, it is fully consistent with the constitutional strictures of our federal system. Congress enjoys two independent sources of authority for imposition of the draft Act: section 5 of the Fourteenth Amendment and Article I's so-called Offenses Clause.

A. Congressional Powers Under Section 5 of the Fourteenth Amendment

Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment,⁵³ including its broad protections against the denial of due process and equal protection. By the grant of section 5, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."⁵⁴ "Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁵⁵ Quite apart from the aim of conforming U.S. law with that mandated by the Covenant and international law, the expansion of constitutional guarantees proposed in the draft Act constitutes a valid exercise of the section 5 power. The objectives of the draft Act all implicate rights guaranteed by the Fourteenth Amendment, and the legislation, viewed both as a whole

52. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. b (1987).

53. U.S. CONST. amend. XIV, § 5.

54. Fullilove v. Klutznick, 448 U.S. 448, 483 (1980).

55. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

and in its particulars, may thus be considered necessary to achieve full protection of those rights.

Several of the Act's provisions — specifically those that address compensation for unlawful arrest, successive prosecutions, and separation of the convicted from the accused and of juveniles from adults — squarely implicate due process protections and thus come within the direct ambit of the Fourteenth Amendment in general and of section 5 in particular.⁵⁶ Equal protection of the laws will be enhanced by the provisions addressing execution, torture, and retroactive imposition of lighter penalties insofar as minorities may be affected disproportionately by such punishments.⁵⁷ Finally, all of the provisions of the draft Act seek, to a greater or lesser extent, to prohibit “cruel or unusual punishment” as proscribed by the Eighth Amendment to the Constitution and as applicable to the states through the incorporative effect of the Fourteenth. This is most obviously true with respect to the proposed prohibition on the execution of juvenile offenders and of pregnant women,⁵⁸ and to the adoption of Eighth Amendment-like international standards of cruel, inhuman, or degrading treatment or punishment.

These measures are all amenable to the fact-finding abilities and particular institutional competence of the Congress.⁵⁹ They comprise a finely tuned and broadly tailored package that could not be executed by way of judicial action.⁶⁰ The fact that the Supreme Court has made clear that it would not make similar determinations

56. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing cause of action for unlawful arrest under the Fourth Amendment); *Abbate v. United States*, 359 U.S. 187, 195 (1959) (noting that successive prosecutions by state and federal authorities implicate Fifth Amendment due process rights); *Santana v. Collazo*, 793 F.2d 41, 43 (1st Cir. 1986) (detecting due process mandate for separation of adults and juveniles in some cases).

57. See *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (recognizing evidence that capital punishment and other criminal penalties may disproportionately affect minorities); *Jones v. Cupp*, 452 F.2d 1091, 1093 (9th Cir. 1971) (noting equal protection concerns respecting retroactive imposition of lighter penalties).

58. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989) (considering a challenge under the Eighth Amendment to the execution of a seventeen-year-old convicted of murder).

59. See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966); see also *McCleskey*, 481 U.S. at 319 (1987) (concluding that legislative bodies are better positioned to consider and act on evidence of disproportionate impact of the death penalty and on resulting equal protection concerns).

60. See *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) (“Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records.”).

is no bar to contrary congressional action.⁶¹ Because each provision of the draft Act would further protections mandated by the Fourteenth Amendment, enactment of the draft Act would represent a legitimate exercise of Congress's section 5 power.

This legitimacy is significantly bolstered by the draft Act's reference to standards established under international law.⁶² International human rights norms have long been relevant to the delimitation of Fourteenth Amendment guarantees. In applying the prohibition against the infliction of cruel and unusual punishment, for example, the Supreme Court has been guided by the "evolving standards of decency that mark the progress of a maturing society."⁶³ In 1988, in *Thompson v. Oklahoma*,⁶⁴ the Court looked specifically to the Covenant, as well as to other international instruments and international state practice, in the course of finding an Eighth Amendment violation in the execution of a fifteen-year-old criminal offender.⁶⁵ The courts have likewise examined international norms when applying due process protections. In *Kennedy v. Mendoza-Martinez*,⁶⁶ for example, the Supreme Court cited the Universal Declaration of Human Rights in the course of holding a federal statute which expatriated Americans who refused to serve in the military to violate due process.⁶⁷

61. In *Morgan*, the Supreme Court upheld the invalidation of state literacy requirements pursuant to the Voting Rights Act of 1965, notwithstanding the Court's previous holding in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), that such literacy requirements did not violate the Equal Protection Clause. *Morgan*, 384 U.S. at 649. In the face of a Supreme Court increasingly inclined towards restrictive interpretations of constitutional rights, Congress has in recent years demonstrated a greater willingness to resort to § 5 as the basis for several important, albeit as yet unperfected, legislative initiatives. See Religious Freedom Restoration Act, H.R. 2797, 102d Cong., 1st Sess. (1991) (seeking to reverse the Supreme Court's free exercise decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)); Racial Justice Act, S. 1249, 102d Cong., 1st Sess. (1991) (to reverse the Supreme Court's holding in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that imposition of the death penalty does not violate equal protection); Freedom of Choice Act, S. 25, Version 1, 102d Cong., 1st Sess. (1991) (to guarantee, through legislation, abortion rights as defined in *Roe v. Wade*, 410 U.S. 113 (1973), despite dilution by subsequent decisions); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?: An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

62. See app., *infra* at 1228-31, §§ 102, 105(c), 107(c).

63. *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

64. 487 U.S. 815 (1988).

65. *Thompson*, 487 U.S. at 830-31 & n.34; see also *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (noting that the "practice of other nations, particularly other democracies, can be relevant" to constitutional norms implicated by capital punishment).

66. 372 U.S. 144 (1963).

67. *Id.* at 161 n.16, 164-66; see also *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) (looking to the Universal Declaration of Human

To the extent the courts can look to international norms in defining constitutional standards, so too may Congress. The legislative branch is both better equipped to ascertain those international norms and institutionally capable of deciding which of such norms are properly incorporated into U.S. law. Thus the very purpose of the draft Act — to bring the United States into conformity with international law — demands the sort of special competence upon which the Fourteenth Amendment, section 5 authority is ultimately grounded, and section 5 accordingly supplies a legitimate constitutional basis for the draft Act.

B. *The Offenses Clause*

Article I, Section 8, Clause 10 of the U.S. Constitution provides that Congress has the power to “define and punish . . . Offenses against the Law of Nations.”⁶⁸ The Offenses Clause was adopted to prevent individual states from violating international law and to assist the new federal government in presenting the world with one unified voice in foreign affairs. Congress’s power under the Offenses Clause is broad in scope and has been deferentially addressed by the courts. Given its express aim of conforming U.S. law to international standards, the draft Act provides a classic opportunity for exercise of Congress’s Offenses Clause powers.

During the Confederation period, national leaders feared that repeated violations of international law by the states posed great dangers for the Confederacy in its dealings with, and reputation among, other nations.⁶⁹ Finding the absence of legislative authority to punish offenses against the law of nations as among the central flaws of the Articles of Confederation, the Framers placed a high priority on inclusion of the Offenses Clause in the Constitution.⁷⁰ To avert these

Rights and the American Convention on Human Rights in concluding that the challenged detention of aliens violated due process protections); Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 Hous. J. INT’L L. 39 (1981); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 834 (1990).

68. U.S. CONST. art. I, § 8, cl. 10.

69. See Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 333 (1986); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 (1989).

70. See, e.g., Glennon, *supra* note 69, at 333 n.79 (noting Alexander Hamilton’s observation that “for want of authority [to punish international offenses], the faith of the United States may be broken, their reputation sullied, and their peace interrupted by the negligence or misconception of any particular state” (quoting 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPT-

dangers, on the authority of the Offenses Clause, Congress was empowered to supersede state legislation in violation of the law of nations.⁷¹ Although the Founders' fears that state violations of international law could draw the nation into war may seem improbable in the human rights context, the potential for other less dramatic repercussions is very real.⁷² Congress's enactment of the draft International Human Rights Conformity Act of 1993 would defuse the possibility of any such international action, thus serving a core purpose of the Offenses Clause power.

Under the original draft version of the Offenses Clause, Congress could only "punish" offenses against the law of nations; it was not empowered to "define" them.⁷³ At the constitutional convention, however, the Framers revised the clause to provide Congress with the necessary discretion to make sense of what Gouverneur Morris described as the "vague and deficient" standards set by international law.⁷⁴ The Framers thus viewed Congress's authority to "define" and "punish" offenses against the law of nations as separate powers. Congress could define offenses without necessarily proscribing criminal penalties for them. This power to declare "civil" offenses or simply prohibit conduct violating international law provides Congress with the flexibility to deal with various types of offenses against international law. While such acts as piracy and hijacking are natural candidates for criminal sanctions, violations of

TION OF THE FEDERAL CONSTITUTION 543 (Jonathan Elliot ed., 2d ed. 1863)); see also THE FEDERALIST NO. 42, at 272 (James Madison) (Bicentennial ed. 1976) ("[A]ny indiscreet member [might] embroil the Confederacy with foreign nations.").

71. See Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988).

72. For example, the international community can and often does impose economic and diplomatic sanctions on violators of international human rights law. These sanctions can frequently be severe, including embargoes and other trade sanctions, government-to-government protests, and the withdrawal of diplomatic recognition. See Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT. L. 923, 928 (1986). International condemnation of U.S. violations of standards set by the Covenant is already pronounced, see, e.g., David Weissbrodt, *Current Development*, 80 AM. J. INT'L L. 685, 689-91 (1986) (noting public appeals by U.N. Secretary-General and special rapporteur regarding executions of juvenile offenders in the United States); *South Carolina Executes Killer: Age Stirs Protest*, N.Y. TIMES, Jan. 11, 1986, § 1, at 6 (citing international condemnation of the execution of a juvenile offender), and such protest could inevitably assume a more concrete form against the United States as a whole.

73. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614 (M. Farrand ed., 1911).

74. See 2 *id.* This grant of discretionary power to Congress also garnered the support of James Madison, who found conflicting interpretations of international law too "dishonorable and illegitimate [a] guide" to go undefined by Congress. THE FEDERALIST NO. 42, at 272 (James Madison) (Bicentennial ed. 1976); Glennon, *supra* note 69, at 333.

international law by state governments require more sensitive treatment. In this context, simple prohibitions are more appropriate than criminal penalties but no less consistent with the Offenses Clause authority.

The Offenses Clause power has not lain dormant. Congress has, from the earliest days of the Republic up to the present day, repeatedly exercised its Offenses Clause powers.⁷⁵ None of these statutes has been so much as questioned, much less struck down, as an invalid exercise of the Offenses Clause power. Indeed, courts have repeatedly deferred to Congress's discretionary power to define offenses against the law of nations, and the cases make plain that Congress may ground offenses against international law on slim support.⁷⁶

But even under the most exacting of definitions, the international human rights norms enunciated in the draft Act readily satisfy "the law of nations" threshold of the Offenses Clause. Courts have generally interpreted the phrase "law of nations" to cover both treaty-based and customary international law.⁷⁷ The international human

75. Statutes founded upon the Offenses Clause include: the Aircraft Sabotage Act, 18 U.S.C. § 32(a) & (b) (1988) (enacted in 1984 as part of U.S. implementation of the Tokyo, Hague, and Montreal anti-hijacking conventions, with legislative history expressly relying on the Offenses Clause by way of constitutional authority); Hostage Taking Act, 18 U.S.C. § 1203 (1988); Submarine Cable Act, 47 U.S.C. §§ 21-39 (1988) (regulating and protecting the use of international telephone cables); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 (1988); Alien Tort Claims Act, 28 U.S.C. § 1350 (1988) (granting federal jurisdiction over alien tort claims arising from violations of "the law of nations"); Act to Prevent and Punish the Counterfeiting of Notes, Bonds, and Other Securities of Foreign Governments, 23 Stat. 22 (1884) (codified at 18 U.S.C. § 482 (1988)); Congressional Resolution Barring Protests in Front of Embassies, D.C. Code § 22-1115 (since repealed); 18 U.S.C. § 1546 (1988) (criminalizing conduct, such as perjury and forgery, constituting a misuse of visas, permits, and other entry documents); Act for the Punishment of Certain Crimes Against the United States, Ch. IX, §§ 25-28, 1 Stat. 112-19 (1790) (criminalizing affronts to ambassadors and other public ministers and regulating safe-conduct and passports) (codified at 18 U.S.C. §§ 112, 541-546 (1988)).

76. See, e.g., *United States v. Arjona*, 120 U.S. 479, 484 (1887) (relying solely on the writing of a single legal scholar in upholding Congress's definition of an offense against the law of nations); *Finzer v. Barry*, 798 F.2d 1450, 1481-84 (D.C. Cir. 1986), *aff'd in part, rev'd in part*, 485 U.S. 312 (1987) (finding valid Congress's exercise of its Offenses Clause power to enact a statute barring protests in front of a foreign embassy despite tenuous treaty-based support). The broad power of Congress to define violations of international law contrasts sharply with that of the courts acting alone. See *The Paquete Habana*, 175 U.S. 677, 686-710 (1900) (devoting 25 pages of text to discussion of international law where the Court itself was required to define international custom).

77. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (finding law of nations to include "general usage and practice of nations"); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307 (1819) (referring to and affirming the "customary and conventional law of nations"); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796) ("The law of nations may be considered of three kinds, to wit, general, conventional, or customary."); *Filatiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d

rights norms set forth in the International Human Rights Conformity Act of 1993 are protected by numerous treaties and international pronouncements and have arguably come to represent binding customary law as well.⁷⁸ No less than 115 nations have acceded to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, and related instruments have received similar support. This strong international support for the individual human rights protected in the draft Act, as manifested both by formal instruments and by custom, far exceeds that required for the valid exercise of Congress's Offenses Clause powers. Against the backdrop of the drafting history and the Framers' intent, prior use by Congress, and the extreme judicial deference accorded congressional action pursuant thereto, the Offenses Clause affords a solid constitutional foundation for the draft Act.⁷⁹

CONCLUSION

Ratification of the International Covenant on Civil and Political Rights demonstrates this country's continuing commitment to the guarantee of basic human rights. Reservations and conditions attached to U.S. ratification of the Covenant are inconsistent with that commitment, and it is unfortunate that the United States continues to find itself unable to harmonize domestic practice with in-

Cir. 1980) (relying on treaties, practice, and legal scholarship).

78. See *supra* notes 27-52 and accompanying text (specifying alternative treaty-based support for operative provisions of the draft Act); see also Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1986/21, at 100 (noting the "special status" of the Covenant, "having been proclaimed and adopted by the General Assembly and having received for the most part widespread acknowledgement throughout the international community"); Yoram Dinstein, *Right to Life, Physical Integrity and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 12, at 114, 136 (observing that certain Covenant safeguards have become "generally accepted norms of customary international law"); Jeffrey M. Blum & Ralph G. Steinhart, *Federal Jurisdiction Over International Human Rights Claims*, 22 HARV. INT'L L.J. 53, 70 (1981).

79. Congress's broad powers under the Offenses Clause appear still further enhanced when read in conjunction with the Necessary and Proper Clause, which has special significance for the conduct of international relations insofar as it draws on the foreign affairs power of the entire federal government, not merely that of Congress. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs."); see also *United States v. Arjona*, 120 U.S. 479, 487 (1887) ("A right secured by the law of nations to a nation, or its people, is one the United States . . . are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that congress may enact . . ."). Likewise, Congress's powers under the Offenses Clause cannot be completely divorced from its expansive powers under the Commerce Clause. See *id.* at 487-88.

ternational norms through the direct mechanism of the treaty-making process. One can hope that with respect to future human rights conventions both the Senate and the Executive Branch will find the way to allow the immediate domestic implementation of internationally mandated rights, thus eliminating the need for subsequent legislative fulfillment of such acceptable international obligations.

That, however, is water under the bridge as concerns the Covenant. Through operation of the normal legislative process, the International Human Rights Conformity Act of 1993 will eliminate such disparities between U.S. and international law as will result from entrenchment of these conditions. Indeed, in assuming the form of domestic legislation, the draft Act presents an excellent opportunity to raise national consciousness of our failure fully to comply with prevailing international standards and to cement a natural and powerful alliance between domestic and international human rights advocacy groups. Enactment of the bill will mark a significant step towards more complete recognition of the primacy of international human rights, and towards the more complete protection of those rights in both the United States and other nations.

APPENDIX**THE INTERNATIONAL HUMAN RIGHTS CONFORMITY
ACT OF 1993****Section 101. Short Title**

This Act may be cited as the "International Human Rights Conformity Act of 1992."

Section 102. Congressional Statement of Findings and Purpose**(a) Congress finds that—**

(1) the steadfast commitment of the United States to the universal protection of human rights as a core value of our traditions, of our laws and Constitution, and of our relations with other nations is not yet adequately reflected by our present participation in international covenants and treaties protecting these rights;

(2) the International Covenant on Civil and Political Rights has come to represent, both as a source and reflection of, the law of nations with respect to certain human rights;

(3) reservations were attached to United States ratification of the International Covenant on Civil and Political Rights with the understanding that Congress would subsequently consider changes to United States law through the normal legislative process in order to more closely conform domestic human rights law with the law of nations;

(4) the participation of both Houses of Congress in the process of conforming United States law with international human rights standards properly reflects the importance that the United States places on the domestic protection of civil and political rights;

(5) the elimination of disparities between United States and international human rights law as reflected in the International Covenant on Civil and Political Rights will advance the reputation of the United States as a longstanding champion of human rights and will reinforce the protection of these rights in the United States and abroad.

- (b) It is therefore Congress's purpose, through the exercise of its power to define and punish offenses against the law of nations and to ensure the enforcement of the due process rights embodied in the 14th Amendment to the United States Constitution, to bring United States law in closer conformity with international norms for the protection of human rights
- (1) by prohibiting the execution of juvenile offenders and pregnant women;
 - (2) by making it unlawful to subject individuals to cruel, inhuman or degrading treatment or punishment as defined by international law;
 - (3) by requiring the retroactive imposition of lighter criminal penalties;
 - (4) by providing a federal right to compensation for unlawful arrests and convictions resulting from the miscarriage of justice;
 - (5) by prohibiting prosecution of individuals by federal or state authorities when an individual has already suffered final conviction or been acquitted for the same acts or transaction;
 - (6) by requiring the segregation of the accused from the convicted, and of juvenile from adult offenders.
- (c) Congress's aim in enacting the International Human Rights Conformity Act of 1992 is limited to the elimination of certain disparities between the protection of civil and political rights under current United States law and the protection afforded such rights under the International Covenant on Civil and Political Rights. Congress does not purport by this Act to address all facets of United States law protecting domestic civil and political rights. Nor does Congress here intend to address every respect in which United States law does not conform with international standards of human rights.

Section 103. Execution of Juvenile Offenders

No individual shall be executed for a crime or crimes committed while under the age of eighteen.

Section 104. Execution of Pregnant Women

No woman shall be executed while pregnant.

Section 105. Torture or Cruel, Inhuman or Degrading Treatment or Punishment

(a) No individual shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

(b) The term "torture" shall mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as, including but not limited to, obtaining from him or a third person information or a confession, intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(c) "Cruel, inhuman or degrading treatment or punishment" shall be given such content and definition by the courts of the United States as provided for by recognized authorities under governing principles of international law, and should depend on the kind, purpose, and severity of the particular treatment.

Section 106. Retroactive Imposition of Lighter Penalties

Where a mandatory criminal penalty for an offense imposed under either state or federal law is reduced by subsequent legislative act, the penalty imposed on all individuals previously convicted of and continuing to suffer confinement for that offense must be reduced in conformity with the new penalty.

Section 107. Compensation for Unlawful Arrest

(a) To the extent not otherwise provided by law, anyone who has been the victim of unlawful arrest shall have an enforceable right to compensation.

(b) When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to him.

(c) This section shall be interpreted by the courts of the United

States consistent with such interpretations accorded Articles 9(5) and 14(6) of the International Covenant on Civil and Political Rights by recognized authorities under governing principles of international law.

Section 108. Successive Prosecutions

(a) No individual shall be subject to prosecution under state law for an offense arising from the same acts or transaction for which he has already been finally acquitted or convicted under federal law.

(b) No individual shall be subject to prosecution under federal law for an offense arising from the same acts or transaction for which he has already been finally acquitted or convicted under state law.

(c) No individual shall be subject to prosecution under state law for an offense arising from the same acts or transaction for which he has already been finally acquitted or convicted under the law of another state.

(d) Subsection (b) of this Section does not preclude successive prosecution under federal law when the Attorney General of the United States has determined in writing that such prosecution is necessary to enforce rights protected under the United States Constitution, this Act, or any other Federal civil rights statute.

Section 109. Separation of the Convicted from the Accused

To the extent practicable, accused persons shall be confined separately from persons awaiting or serving sentences or being held in custody pending appeal.

Section 110. Separation of Juvenile and Adult Offenders

Accused and adjudicated juvenile offenders shall not be confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. For the purposes of this provision, a juvenile offender is a person under the age of eighteen who has been charged with or adjudicated of a violation of a criminal law of the United States or any state or territory.

Section 111. Separability of Provisions

If any provisions of this Act or the application thereof to any person

or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 112. Repeal of Conflicting Acts

All acts and parts of acts of the United States in conflict with the provisions of this Act are repealed; provided that, nothing in this Act shall be construed to limit rights and remedies provided under any such acts or parts of acts.

Section 113. Preemption

To the extent inconsistent with any provision of this Act, any law, regulation, order, ruling, provision, practice or other requirement of a State of Territory or political subdivision thereof is preempted; provided that, nothing in this Act shall be construed to limit rights and remedies provided under any such law, regulation, order, ruling, provision or other requirement.