

**TORTURE VICTIM PROTECTION ACT OF 1989**

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HEARING

BEFORE THE

OCT 28 1991

SUBCOMMITTEE ON

IMMIGRATION AND REFUGEE AFFAIRS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1629

A BILL TO ESTABLISH CLEARLY A FEDERAL RIGHT OF ACTION BY ALIENS AND UNITED STATES CITIZENS AGAINST PERSONS ENGAGING IN TORTURE OR EXTRAJUDICIAL KILLING, AND FOR OTHER PURPOSES

AND

H.R. 1662

A BILL TO AMEND THE UNITED NATIONS PARTICIPATION ACT OF 1945 TO CARRY OUT OBLIGATIONS OF THE UNITED STATES UNDER THE UNITED NATIONS CHARTER AND OTHER INTERNATIONAL AGREEMENTS PERTAINING TO THE PROTECTION OF HUMAN RIGHTS BY PROVIDING A CIVIL ACTION FOR RECOVERY FROM PERSONS ENGAGING IN TORTURE, AND FOR OTHER PURPOSES

JUNE 22, 1990

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# TORTURE VICTIM PROTECTION ACT OF 1989

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FRIDAY, JUNE 22, 1990

U.S. SENATE,  
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 9:48 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy (chairman of the subcommittee) presiding.

Also present: Senators Simon and Specter.

## OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON [presiding]. The subcommittee will come to order.

This morning, the Immigration and Refugee Affairs Subcommittee is convened to hear testimony on Senate bill 1629, the Torture Victim Protection Act. Senator Kennedy, our subcommittee chairman, will be joining us later, and I am pleased to welcome our colleague, Senator Specter, who was here earlier and who will be back again shortly after voting, who is the author of this legislation, to sit with the subcommittee this morning.

The legislation before us today establishes a Federal right of action by aliens and U.S. citizens against persons engaged in torture or extrajudicial killings. The administration and public witnesses raise many critical issues, and I welcome them.

I think the fundamental question is, Can we in the United States take some action that will help to protect human rights around the face of the earth? That is the basic question that we are confronted with.

As I stated, Senator Specter will be joining us again shortly, and I am going to take the liberty of interrupting the witnesses to take his opening statement at that point.

[Texts of Senate bill 1629 and House bill 1662 follow:]

101ST CONGRESS  
1ST SESSION

# S. 1629

To establish clearly a Federal right of action by aliens and United States citizens against persons engaging in torture or extrajudicial killing, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14 (legislative day, SEPTEMBER 6), 1989

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To establish clearly a Federal right of action by aliens and United States citizens against persons engaging in torture or extrajudicial killing, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SHORT TITLE**

4 **SECTION 1.** This Act may be cited as the "Torture  
5 Victim Protection Act of 1989".

6 **LIABILITY; LIMITATIONS ON REMEDIES**

7 **SEC. 2. (a)** Every person who, under actual or apparent  
8 authority of any foreign nation, subjects any person to torture  
9 or extrajudicial killing shall be liable to the party injured or  
10 his or her legal representatives in a civil action.

1 (b) The court shall decline to hear and determine a claim  
2 under this section if the defendant establishes that clear and  
3 convincing evidence exists that the claimant has not exhaust-  
4 ed adequate and available remedies in the place in which the  
5 conduct giving rise to the claim occurred. The court shall not  
6 infer the application of any statute of limitations or similar  
7 period of limitations in an action under this section.

8

## DEFINITIONS

9

SEC. 3. For the purposes of this Act—

10 (1) the term “torture” shall include any act by  
11 which severe pain or suffering (other than pain or suf-  
12 fering arising only from or inherent in, or incidental to,  
13 lawful sanctions), whether physical or mental, is inten-  
14 tionally inflicted on a person for such purpose as ob-  
15 taining from that person or a third person information  
16 or a confession, punishing that person for an act that  
17 person or a third person has committed or is suspected  
18 of having committed, or coercing that person or a third  
19 person, or for any reason based on discrimination of  
20 any kind; and

21 (2) the term “extrajudicial killing” means a delib-  
22 erated killing without previous judgment pronounced  
23 by a regularly constituted court affording all the judi-  
24 cial guarantees which are recognized as indispensable  
25 by civilized peoples.

101ST CONGRESS  
1ST SESSION

# H. R. 1662

[Report No. 101-55, Part I]

To amend the United Nations Participation Act of 1945 to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by providing a civil action for recovery from persons engaging in torture, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 4, 1989

Mr. YATRON (for himself, Mr. LEACH of Iowa, Mr. BEREUTER, Mr. FASCELL, Mr. BROOMFIELD, Mr. BROOKS, Mr. MORRISON of Connecticut, and Mr. MAZZOLI) introduced the following bill; which was referred jointly to the Committees on Foreign Affairs and the Judiciary

MAY 16, 1989

Reported from the Committee on the Judiciary, with amendments

[Omit the part struck through and insert the part printed in italic]

SEPTEMBER 29, 1989

Additional sponsors: Mr. BRYANT, Mr. DOUGLAS, Mr. SMITH of New Jersey, and Mr. FEIGHAN

SEPTEMBER 29, 1989

Committee on Foreign Affairs discharged, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

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## A BILL

To amend the United Nations Participation Act of 1945 to carry out obligations of the United States under the United



Nations Charter and other international agreements pertaining to the protection of human rights by providing a civil action for recovery from persons engaging in torture, and for other purposes.

1        *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4        This Act may be cited as the "Torture Victim Protec-  
5 tion Act of 1989".

6 SEC. 2. TORTURE VICTIM PROTECTION.

7        (a) LIABILITY.—Every individual who, under color of  
8 law of any foreign nation, subjects any individual to torture  
9 or extrajudicial killing shall be liable to the party injured or  
10 that party's legal representative in a civil action.

11        (b) LIMITATIONS ON REMEDIES.—The court shall de-  
12 cline to hear and determine a claim under this section if the  
13 defendant establishes that clear and convincing evidence  
14 exists that the claimant has not exhausted adequate and  
15 available remedies in the place in which the conduct giving  
16 rise to the claim occurred. The court shall not infer the appli-  
17 cation of any statute of limitations or similar period of limita-  
18 tions in an action under this section.

19        (c) DEFINITIONS.—For the purposes of this Act—

20                (1) the term "torture" means any act by which  
21                severe pain or suffering (other than pain or suffering  
22                arising only from or inherent in, or incidental to, lawful

1 sanctions), whether physical or mental, is intentionally  
 2 inflicted on a person for such purpose as obtaining from  
 3 that person or a third person information or a confes-  
 4 sion, punishing that person for an act that person or a  
 5 third person has committed or is suspected of having  
 6 committed, or intimidating or coercing that person or a  
 7 third person, or for any reason based on discrimination  
 8 of any kind; and

9 (2) the term "extrajudicial killing" means a delib-  
 10 erated killing without previous judgment pronounced  
 11 by a regularly constituted court affording all the judi-  
 12 cial guarantees which are recognized as indispensable  
 13 by civilized peoples.

14 **SEC. 3. JURISDICTION OF UNITED STATES DISTRICT COURTS.**

15 (a) **JURISDICTION OVER NEW CAUSE OF ACTION.—**

16 Chapter 85 (relating to district court jurisdiction) of title 28,  
 17 United States Code, is amended by adding at the end the  
 18 following new section:

19 **"§ 1367. Cases under law creating remedies against torture**  
 20 **and extrajudicial killings**

21 "The district courts shall have jurisdiction over civil ac-  
 22 tions under section 2 of the Torture Victim Protection Act of  
 23 ~~1988~~ 1989."

24 (b) **TABLE OF SECTIONS AMENDMENT.—**The table of  
 25 sections at the beginning of chapter 85 of title 28, United

- 1 States Code, is amended by adding at the end the following
- 2 new item:

"1367. Cases under law creating remedies against torture and extrajudicial killings."

Amend the title so as to read: "A bill to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of the human rights by providing civil action for recovery from persons engaging in torture, and for other purposes."

Senator SIMON. We are pleased to welcome the first panel, administration witnesses: Mr. John McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, with the Department of Justice; and Mr. David Stewart, the assistant legal adviser for human rights and refugee affairs, with the Department of State.

Mr. McGinnis, we will hear from you first, unless you have a reason to go in another direction.

**PANEL CONSISTING OF JOHN O. MCGINNIS, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE; AND DAVID P. STEWART, ASSISTANT LEGAL ADVISER FOR HUMAN RIGHTS AND REFUGEE AFFAIRS, U.S. DEPARTMENT OF STATE**

**STATEMENT OF JOHN O. MCGINNIS**

Mr. MCGINNIS. Thank you, Mr. Chairman.

I would ask that the full text of my statement be entered in the record.

Senator SIMON. It will be, as it will be with all of the witnesses.

Mr. MCGINNIS. Thank you for giving me the opportunity to appear today. I am pleased to present to the committee the views of the Department of Justice on Senate bill 1629 and House bill 1662, two versions of the Torture Victim Protection Act of 1989.

The proposed legislation would subject persons of any foreign nation who torture other persons under color of law to civil liability in our courts, regardless of where the alleged act of torture took place.

In addition, House bill 1662 would amend title 28 of the United States Code, to provide district court jurisdiction over civil actions brought under the new substantive provisions. Neither bill contains any territorial or nationality limitations, and, thus, both would provide a remedy for an act of torture committed by one foreign national upon another foreign national in a foreign country, without any significant or substantive connection to the United States.

Mr. Chairman, we have essentially four reasons for opposing this bill.

One, we believe that the approach to combating torture found in the International Torture Convention is the way to go.

Second, we think that this bill would lead to our courts exercising jurisdiction in inappropriate circumstances, with really no connection to the United States. Third, we fear reciprocity, indeed retaliation, because of this bill and other nations hauling our officials into court on specious charges.

And finally, our concern is that it may interfere with complex and multifarious foreign policy that we need to conduct.

Very briefly, I will begin with what I think is our positive reason for feeling that this bill is perhaps not the way to go at this time. We think that we have another approach which we hope will substantially reduce the incidence of torture in the world, and that is the U.N. Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment. We submit that President Reagan submitted that to the Senate for its advice and consent in

May 1988, and early ratification of that convention remains a priority for this administration.

Article 14(1) of that convention states that

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. \* \* \*

The negotiating record of the convention supports the view that the obligation imposed by this article extends only to acts of torture committed within the territory of the state party.

The approach adopted by the international community—which this administration supports—is a multilateral approach, requiring each state party to provide means of redress and compensation, such as a civil suit, for acts taking place within their own territory, and specifically it declines to make that requirement extraterritorial, and we think, at least in the first instance, we should attempt to make this multilateral approach work.

Second, we fear that this may often lead to suits that are inappropriate for the U.S. forum. Indeed, the common law has developed the doctrine of forum non conveniens to prevent adjudication of disputes in a forum with no substantial connection to the parties, events, or witnesses involved.

These same principles seem to be implicated here, because the suits here between aliens concerning events in foreign countries and may have happened halfway around the world, and they are simply not appropriate for adjudication in the U.S. courts. The difficulty of gathering evidence, as well as the likely absence of witnesses, we feel will greatly diminish the prospect of substantial justice in the U.S. courts.

Now, we recognize that both bills, both Senate bill 1629 and House bill 1662, would ameliorate the problem somewhat by providing that the court shall decline to hear and determine a claim under this section, if the defendant establishes through "clear and convincing evidence" that the claimant has not exhausted "adequate and available remedies." This hurdle, though, seems to us to be, in many cases, a pretty high one and would indeed lead to a variety of procedural litigation in the courts. We do not think it would also meet the concern that still U.S. courts would have a difficult time giving substantial justice to cases where they could not compel the attendance of the most important witnesses.

Moreover, considerations of reciprocity and comity would suggest that such an extension of jurisdiction would be unwise. The legal principles contained in the bill could lead foreign nations to attempt to assert jurisdiction in cases involving U.S. domestic policy, and, in particular, our officials.

For example, courts in other countries, especially those hostile to the United States, might entertain suits against U.S. officials responsible for operating maximum security facilities in the United States, on the ground that conditions in such facilities constitute "torture."

I guess, finally, we are also concerned that the bill could create difficulties for the management of foreign policy. Under this bill, individual aliens could determine the timing and manner of making allegations in U.S. courts about the conduct of foreign

countries and their officers. The use of U.S. judicial fora to bring charges against officials of foreign states obviously has the potential to create serious frictions and tensions with other nations at times when these tensions may substantially hamper U.S. foreign policy.

As stated above, of course, we are wholly opposed to torture, but the United States can best manage its complex foreign policy with multiple objectives. The timing and manner of such serious allegations in official fora of the United States are left in the hands of the persons who are responsible for the conduct of foreign policy.

Accordingly, we do not believe that creating a new Federal cause of action for foreign torture involving only aliens is prudent at this time, particularly when we are trying to take another approach through the multilateral attempt to get the Torture Convention ratified. As the courts and some commentators have recognized, judicial involvement in such matters may have severe adverse consequences for our relations with other nations.

Finally, I guess I would take this opportunity to urge that the Senate consider taking the decision to give early consideration to the Torture Convention. In our view, that is the way the objective and effective international prohibition against torture, and of appropriate remedies and avenues of compensation, can best be pursued.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McGinnis follows:]



# Department of Justice

---

STATEMENT

OF

JOHN O. MCGINNIS  
DEPUTY ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

CONCERNING

S. 1629 AND H.R. 1662

ON

JUNE 22, 1990

Mr. Chairman and Members of the Committee:

Thank you for giving me the opportunity to appear today. I am pleased to present to the Committee the views of the Department of Justice on S. 1629 and H.R. 1662, two versions of the "The Torture Victim Protection Act of 1989." The proposed legislation would subject persons of any foreign nation who torture other persons under color of law to civil liability in our courts, regardless of where the alleged act of torture took place. In addition, H.R. 1662 would amend title 28 of the United States Code to provide district court jurisdiction over civil actions brought under the new substantive provision. Neither bill contains any territorial or nationality limitations, and both would provide a remedy for an act of torture committed by one foreign national upon another foreign national in a foreign country without any significant or substantive connection to the United States. This would extend the jurisdiction of United States courts well beyond current limits.

The Department of Justice, of course, opposes torture, and the Administration has supported international efforts to eradicate torture from the practices of all nations. Nonetheless, the Department opposes both bills in their present form because they conflict with the approach to combatting torture found in the international Torture Convention which the United States has already signed and submitted to the Senate for its advice and consent; they may pose significant problems of reciprocity; and they would permit the judiciary to exercise jurisdiction in a manner detrimental to the executive branch's need for control over our relations with foreign nations.

President Reagan submitted the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Senate for its advice and consent to



ratification in May, 1988. Early ratification of that Convention is a priority of this Administration. The convention is currently pending before the Senate Foreign Relations Committee, which held a hearing on it in January and will, we hope, bring it to a vote this month or next. Article 14(1) of that Convention states that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . ." The negotiating record of the Convention supports the view that the obligation imposed by Article 14(1) extends only to acts of torture committed within the territory of the State Party. Thus, the approach adopted by the international community -- which this Administration supports -- requires States Party to provide means of redress and compensation (such as a civil suit) only for acts taking place within their own territory and specifically declined to make that requirement extraterritorial.

H.R. 1662 and S. 1629 would go beyond the regime established by the Torture Convention by establishing a United States cause of action for any victim of torture, regardless of the nationality of either the accuser or the accused, and without regard to the location of the alleged offense. Such a unilateral assertion of extraterritorial jurisdiction would be in tension with the framework of the Convention.

Moreover, these bills raise issues of Congress' constitutional authority. Under the Constitution, Congress has the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Article I, Section 8, Clause 10. The reference in the constitutional text to "punish[ing] Piracies and Felonies . . . and Offenses" suggests that the Founders intended that Congress use this power to define crimes. It is a difficult and unresolved question, therefore, whether that power extends to

creating a civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens.

Whatever the resolution of this issue, it is clear that the United States is not the most appropriate civil forum for hearing cases involving acts of torture committed in foreign countries by one alien against another. Indeed, the common law has developed the doctrine of forum non conveniens to prevent adjudication of a dispute in a forum with no substantial connection to the parties, events or witnesses involved. The same principles underlying this venerable doctrine also compel the conclusion that suits between aliens concerning events in foreign countries are not appropriately adjudicated in the United States. The difficulty of gathering evidence as well as the likely absence of witnesses will greatly diminish the prospect of substantial justice in United States courts. I note S. 1629 would ameliorate this problem somewhat by providing that "The court shall decline to hear and determine a claim under this section if the defendant establishes that clear and convincing evidence exists that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." That limitation, however, with its requirement of "clear and convincing evidence" and "adequate and available remedies" would not substantially address this concern and indeed could give rise to a sub-class of procedural litigation.

Moreover, considerations of reciprocity and comity would suggest that such an extension of jurisdiction would be unwise. The legal principles contained in the bill could lead foreign nations to attempt to assert jurisdiction in cases involving United States domestic policy. For example, courts in other countries, especially those hostile to the United States, might entertain suits against United States officials responsible for

operating maximum security facilities in the United States, on the spurious ground that conditions in such facilities constitute "torture." If this bill were enacted into law, we would be hard pressed to object to such suits on international law grounds.

We are also concerned that the bill could create difficulties for the management of foreign policy. Under this bill individual aliens would determine the timing and manner of making allegations in the United States courts about the conduct of foreign countries and their officers. The use of United States judicial fora to bring charges against officials of foreign states obviously has the potential to create serious frictions and tensions with other nations at times when these tensions may substantially hamper United States foreign policy. As stated above, the United States is, of course, wholly opposed to torture and has made and will continue to make efforts to assure the end of its practice. The United States, however, can best manage a complex foreign policy with multiple objectives if the timing and manner of such serious allegations against foreign countries in official fora are not left in the hands of persons who are not responsible for the conduct of our foreign policy.

Accordingly, we do not believe that creating a new federal cause of action for foreign torture involving only aliens is prudent. As the courts and some commentators have recognized, judicial involvement in such matters may have severe adverse consequences for our relations with other nations.

We also believe that certain of the bills' provisions are vague or ill-crafted. For example, "torture" is defined to exclude acts conducted pursuant to "lawful sanctions," but in both bills the latter term is not defined so as to differentiate between foreign legal systems that provide due process and those that provide only summary prosecution. Further, H.R. 1662 refers

to torture conducted "under color of law of any foreign nation," and S. 1629 refers to torture "under actual or apparent authority of any foreign nation," a standard that may prove overinclusive. The definition of "extrajudicial killing" in both bills may well create problems with friendly nations whose judicial systems do not parallel ours, and does not seem to allow for justifiable killings in connection with legitimate law enforcement or military actions that are "extrajudicial."

In addition to the problems noted above, the Senate may decide that legislative efforts against torture would be more efficiently directed toward giving advice and consent to ratification of the Torture Convention. The Administration would certainly endorse such a decision, and we stand ready to work with the Senate to obtain an early and favorable vote. In our view, the objective of an effective international prohibition against torture, and of appropriate remedies and avenues of compensation, can best be pursued through the agreed multilateral framework rather than unilateral extensions of civil jurisdiction to events taking place abroad.

Senator SIMON. Thank you.

I indicated that we would probably interrupt your testimony to hear the opening statement of Senator Specter, who has rejoined us here.

Senator Specter.

**OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR  
FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman. I had been here at 9:30, but had gone to vote and I met the chairman, who is en route back from the vote when I was on my way to the vote. I do want to thank you, Mr. Chairman and our colleague, Senator Kennedy, for convening this hearing on this important subject.

This is legislation which I have introduced, actually reintroduced. I put a bill in the 100th Congress back on March 24, 1987, the Torture Victims Protection Act, Senate bill 824, and have reintroduced this legislation in the 101st Congress, Senate bill 1629, because I believe that it is important that the law of the United States be clear that there is a Federal cause of action, a Federal claim for relief for this kind of outrageous and horrendous conduct.

We have, unfortunately, torture being practiced in many, many parts of the world. There are estimates that as many as one-third of the world's governments reportedly engage in torture. The U.N. Convention Against Torture was adopted by the General Assembly in December 1984, by unanimous vote, and the convention was entered in force on June 26, 1989, and the United States signed the convention on April 18, 1988.

There have been a few crimes recognized as universal crimes. The most frequently cited is the crime of piracy, where it was viewed that someone could be prosecuted for piracy wherever that individual was found, contrary to the generalized notion that jurisdiction resided only in the government, in the territory where the offense occurred.

It is my view that there are other crimes which deserve that classification, such as terrorism, and I think we are working toward that objective in the series of international acts and laws enacted by the United States. Similarly, it is my view that torture ought to be considered a universal crime, because of its outrageous and horrendous character.

The statute here is designed to make it plain that the U.S. district courts, the Federal court system has jurisdiction to provide for compensation for victims of torture, and the case law on the subject is split, it is highly doubtful at this time that victims of torture may bring such lawsuits and, without taking any further time now, Mr. Chairman, that is the essence of my thinking on this subject. Similar legislation has passed the House of Representatives and I think it is time the Senate acted on it, and I am looking forward to speedy enactment of this bill.

Thank you.

Senator SIMON. Thank you, Senator Specter.

Mr. Stewart.

## STATEMENT OF DAVID P. STEWART

Mr. STEWART. Thank you, Mr. Chairman. With your permission, I will submit my written testimony for the record and summarize my remarks.

Senator SIMON. It will be entered in the record.

Mr. STEWART. Before summarizing my testimony, Mr. Chairman, let me respond to the basic question that you posed at the outset of the hearing, whether we can take some action to help protect human rights around the world.

The simple and straightforward answer to your question, Senator, is yes, we can, we can ratify and implement the convention. That is an appropriate and effective step. We think it is likely to be more effective in the long run than the approach followed by the Torture Victims Protection Act, which raises a number of concerns that I want to raise.

I also would like to respond to Senator Specter's comment. We agree entirely with your analogy to the approach followed in the international community in the terrorism area. In fact, the Torture Convention is modeled on exactly the same multilateral conventions that you mentioned. It is important that U.S. law be clear, and we do not think it could be made more clear than by providing interlocking criminal remedies of precisely the same form that are used in the terrorism area, that will enable us to prosecute torturers wherever they commit their acts, if they are found in the United States, and that will provide a civil remedy for the victims of torture.

The Torture Victim Protection Act, in fact, varies from the model that you have referred to and as contained in the multilateral terrorism area, and it is likely to be viewed as inconsistent, and therein lies some of our concern.

The strong support of the United States for effective measures against torture, I would hope, Mr. Chairman, is not an issue here. We have long been a leader in the efforts to condemn and eliminate the practice of torture and the administration's strong support for the early ratification of the Torture Convention reflects that national commitment.

Nonetheless, we do not support enactment of the Torture Victim Protection Act. There is no question, of course, about our support for the goals of the proposed act, namely, to deter torture and extrajudicial killing, to punish those who engage in abhorrent acts, and to provide a means of compensating their victims.

Our desire to ratify the Torture Convention is testament to the strong belief that torture, wherever it occurs, must be punished as a criminal act; our support for the U.N. Voluntary Fund for Victims of Torture reflects our view that victims of torture deserve compensation.

Our disagreement is one purely of means, not ends. The act would allow individuals, aliens as well as citizens, to bring cases in Federal courts for damages resulting from extraterritorial acts of torture or extrajudicial killing, when such acts occurred either "under color of" foreign law, to use the language of House bill 1662, or "under actual or apparent authority of any foreign nation," to use the language of Senate bill 1629.

To the best of our knowledge, no other country has similar legislation. We have serious reservations about the appropriateness or effectiveness of providing a unilateral assertion of civil jurisdiction over acts of foreign governments or officials which take place in their own countries.

The prospect of opening U.S. courts to suits against foreign governments or officials for extraterritorial acts of torture or extrajudicial killings raises three particular concerns: consistency with the international approach reflected in the U.N. convention, the problem of reciprocity and retaliation—to which Mr. McGinnis has already referred—and the issue of unwarranted judicial involvement in the conduct of foreign affairs.

With respect to the U.N. convention, the central provisions establish a regime for international cooperation in the criminal prosecution of torturers, relying on so-called universal jurisdiction. Just as in the multilateral conventions concerning terrorism, Senator, each party is required to make all acts of torture criminal offenses and to establish jurisdiction over those offenses when they are committed in its territory, by its nationals wherever committed, or, if they deem it appropriate, against their nationals. Each state party is required either to prosecute alleged torturers who are found in its territory or to extradite them to other countries for prosecution.

This network of criminal jurisdiction parallels the treaties found in the antiterrorism area concerning aircraft hijacking and sabotage, ship piracy, assaults on diplomats, and the protection of nuclear materials. By thus requiring individuals who commit acts of torture will be brought to justice wherever they are found, the convention denies safe haven to any who engage in such heinous offenses.

In addition, the convention requires each state party to

Ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

The negotiating history of the convention indicates that this provision contemplates a private right of action only for acts of torture committed in the territory of the state party, not for acts of torture committed in other countries. In fact, because of the concerns of a number of states on precisely this issue, the text as adopted included an express reference to that effect. That reference was deleted, evidently, by a mistake in the printed version. To remove the ambiguity that could result from that omission, the President's transmittal of the convention to the Senate recommended including in the instrument of ratification a specific understanding on this point.

In the Department's view, the multilateral regime contemplated by the convention is more appropriate, and in the long run likely to be more effective than a unilateral approach permitting private suits in U.S. courts.

The elimination of torture on a global scale requires international cooperation. Our efforts should be devoted toward encouraging all foreign countries to adhere to the convention and to implement its obligations.

We note that both versions of the act now before the committee would require the exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred" before a suit could be pursued. One aim of the convention is to ensure that such remedies do, in fact, exist.

The United States can, in our view, best demonstrate its commitment to the prevention and punishment of torture and extrajudicial claims by ratifying the convention and working actively within the multilateral framework to get others to do likewise.

By comparison, we do not believe that it is appropriate for the United States to use its courts to police the world or that torture can, in fact, be effectively eliminated by unilaterally creating a cause of action in damages in the United States. The threat of civil suit here is, in our judgment, unlikely to have the desired effect of reducing the incidence of officially sanctioned or tolerated torture in other countries.

On the contrary, it may well be perceived by other countries as inconsistent with the convention and overreaching on our part. It could even lead to the enactment of reciprocal legislation in countries which perceive themselves as the target of suits, and to retaliation against U.S. citizens or Government officials traveling abroad for actions that take place within the United States. This has been a concern of the law enforcement community.

From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purpose, where the allegations may be made against foreign governments or officials who are not torturers, but who will be required to defend against expensive and drawnout proceedings.

This is particularly troubling, Mr. Chairman, because, in order to meet the statutory requirements, plaintiffs will have to allege, as a preliminary matter, that the conduct in question took place under the authority of the foreign government or under color of its law. In every case, therefore, the "lawfulness" of foreign government policies or sanctions will be an issue. We believe that inquiry by a U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as intrusive and offensive. It is also likely to be unnecessary, since even those states which engage in torture do not assert a legal right to do so.

Nor is it clear that the proposed legislation would, in fact, provide tangible relief to victims of torture abroad. We understand that under either version of the act, the prospective defendant must be found in the United States or otherwise submit himself or itself to U.S. jurisdiction. This may well limit the number of suits actually brought. However, because the statute would extend only to acts under color of foreign law or under the actual or apparent authority of a foreign nation, there will be serious questions of immunity, both in connection with personal jurisdiction, the production of documents and witnesses, and the enforcement of any resulting judgment.

To conclude, Mr. Chairman, our opposition to the act should not be mistaken for a weakening of our commitment to eliminate torture throughout the world. That commitment remains unchanged. We do not tolerate torture in the United States, nor do we excuse



it when practiced elsewhere. We strongly support the establishment of common rules and institutions to combat torture.

Instead, our position on the bills before you reflects a sober assessment of the means best suited to achieve this common goal. We believe that the United States can best demonstrate its strong commitment for universally recognized human rights by promptly ratifying the U.N. Convention Against Torture, by implementing its provisions effectively, and by participating actively in the multilateral mechanisms established by that convention to ensure that other nations do likewise.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Stewart follows:]

STATEMENT

OF

DAVID P. STEWART  
ASSISTANT LEGAL ADVISER  
DEPARTMENT OF STATE

Before the

SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

Concerning

The Torture Victim Protection Act  
S. 1929 & H.R. 1662

on

June 22, 1990

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before the Committee this morning to provide you the views of the Department of State concerning the proposed Torture Victim Protection Act, as contained in S. 1629 and H.R. 1662.

Government-sponsored torture (and murder) is universally condemned by the world community as one of the most flagrant violations of human rights. It is prohibited as a matter of customary international law and, more specifically, by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention was signed by the United States over two years ago and is now pending before the Senate for advice and consent to ratification. The United States in particular has long been a leader in the international efforts to condemn and eliminate the practice of torture, and the Administration's support for the early ratification of the Torture Convention reflects this national commitment.

Despite our strong support for effective international measures against torture, we do not support enactment of the Torture Victim Protection Act. There is no question, of course, about our support for the goals of the proposed Act, namely, to deter torture and extra-judicial killing, to punish those who engage in such abhorrent acts, and to provide a means of compensating their victims. Our desire to ratify the Torture Convention is testament to the strong belief that torture, wherever it occurs, must be punished as a criminal act; our support for the United Nations Voluntary Fund for Victims of Torture reflects our view that victims of torture deserve compensation.

Our disagreement with the Torture Victim Protection Act is one purely of means, not ends. The Act would allow individuals (aliens as well as U.S. citizens) to bring cases in Federal courts for damages resulting from extraterritorial acts of torture or extra-judicial killings when such acts occurred "under color of" foreign law (to use the language of H.R. 1662) or "under actual or apparent authority of any foreign nation" (S. 1629). To the best of our knowledge, no other country has similar legislation. We have serious reservations about the appropriateness or effectiveness of providing a unilateral assertion of civil jurisdiction over acts of foreign governments or officials which take place in their own countries. The prospect of opening U.S. courts to suits against foreign governments or officials for extraterritorial acts of torture or extra-judicial killings raises three particular concerns: consistency with the international approach reflected in the UN Convention, the problem of reciprocity and retaliation, and unwarranted judicial involvement in the conduct of foreign affairs.

The U.N. Convention Against Torture represents a significant step in the development of international measures against torture. Building upon other international instruments condemning torture (such as the Universal Declaration of Human Rights), it establishes an agreed multilateral peacetime regime for cooperation among States in the prevention of torture and the punishment of those who engage in acts of torture. The United States contributed significantly to the development of the Convention, with broad bipartisan support in the Congress. As you know, in 1984 Congress passed and the President signed a Joint Resolution (Pub. L. 98-447, Oct. 4, 1984) reaffirming the continuing policy of the United States to oppose acts of

torture wherever they occur and requesting the President to continue U.S. involvement in the formulation of the Convention. The Convention was adopted by unanimous consent in the UN General Assembly on December 10, 1984. It entered into force on June 26, 1987 and now has 49 parties.

The central provisions of the Convention establish a regime for intentional cooperation in the criminal prosecution of torturers relying on so-called "universal jurisdiction." Each State Party is required to make all acts of torture criminal offenses and to establish jurisdiction over those offenses when they are committed within its territory (including on board its ships or aircraft), by its nationals wherever committed, and (if considered appropriate) against its nationals. Each State Party is required either to prosecute alleged torturers who are found in its territory or to extradite them to other countries for prosecution. This network of criminal jurisdiction parallels similar treaty provisions found in the anti-terrorism area (concerning aircraft hijacking and sabotage, ship piracy, assaults on diplomats, and the protection of nuclear material). By thus requiring that individuals who commit acts of torture will be brought to justice wherever they are found, the Convention denies safe haven to any who engage in such heinous offenses.

In addition, the Convention requires each State Party to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." A State could provide such a right either through victim compensation schemes or through the right to bring a civil suit against the alleged torturer under its domestic law. Existing U.S. law already establishes

private rights of suit sufficient to implement this requirement domestically, for example, through a common law tort action, a civil action for violations of civil rights or a suit for constitutional tort. The negotiating history of the Convention indicates, however, that this provision contemplates a private right of action only for acts of torture committed in the territory of that State Party, not for acts of torture occurring in other countries. In fact, because of the concerns of a number of States on this issue, the text as adopted included an express reference to that effect (which was evidently deleted by mistake). To clarify any possible ambiguity, the President's transmittal of the Convention to the Senate recommended including, in the instrument of ratification, a specific understanding on this point.

In the Department's view, the multilateral regime contemplated by the Convention is more appropriate, and in the long run likely to be more effective, than a unilateral approach permitting private suits in U.S. courts for acts of torture and extra-judicial killings that take place in foreign countries. The elimination of torture on a global scale requires international cooperation. Our efforts should be directed towards encouraging all foreign countries to adhere to the Convention and effectively implement its central obligations, in particular the prevention of torture, the imposition of criminal sanctions on those who commit such acts, and the provision of effective means of fair and adequate compensation to victims with respect to acts taking place in their own jurisdictions.

We note that both versions of the Act now before the Committee would require the exhaustion of "adequate and available remedies in the place in which the conduct giving

rise to the claim occurred" before a suit could be pursued. The aim of the Convention is to ensure that such remedies do exist.

The Convention establishes a mechanism, known as the Committee Against Torture, for reviewing the measures States Parties have taken to implement their undertakings under the Convention. States are required to submit reports to the Committee and may be examined on their shortcomings. Moreover, the Committee has the competence to examine "well-founded indications that torture is being systematically practiced in the territory of a State Party." In addition, States Party may accept the Committee's competence to receive and consider communications from other States (and, if they so chose, from individuals) that they are not fulfilling their obligations under the Convention.

The United States can, in our view, best demonstrate its commitment to the prevention and punishment of torture and extra-judicial killings by ratifying the Convention and actively working within the multilateral framework to get others to do likewise. By comparison, we do not believe that it is appropriate for the United States to use its courts to police the world or that torture can in fact be effectively eliminated by unilaterally creating a cause of action in damages in the United States. The threat of civil suit here is unlikely to have the desired effect of reducing the incidence of officially sanctioned or tolerated torture in other countries.

On the contrary, unilateral enactment of extraterritorial jurisdiction may well be perceived by other countries as inconsistent with the Convention and overreaching on our part. It could even lead to enactment of reciprocal legislation in

countries which perceive themselves as targets of such suits, and to retaliation against U.S. citizens or governmental officials travelling abroad for actions which took place within the United States. This has been a concern of the law enforcement community.

From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harrassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not torturers but who will be required to defend against expensive and drawn-out legal proceedings. Even when the foreign government declines to defend and a default judgment results, such suits have the potential of creating significant problems for the Executive's management of foreign policy. This is especially troubling because, in order to meet the statutory requirements, plaintiffs will have to allege as a preliminary matter that the conduct in question took place under the authority of the foreign government or under color of its law. In every case, therefore, the "lawfulness" of foreign government sanctions will be at issue. We believe that inquiry by a U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as highly intrusive and offensive. In fact, it is also likely to be unnecessary, since even those states which engage in torture do not assert a legal right to do so.

The "exhaustion of local remedies" requirement will not eliminate this problem, because the defendant will have to litigate that issue as an affirmative defense.

Nor is it clear that the proposed legislation would in fact provide tangible relief to victims of torture abroad. We understand that under either version of the Act, the



prospective defendant must be found in the United States or otherwise submit himself (or itself) to U.S. jurisdiction. This may well limit the number of suits actually brought under the Act. However, because the statute would extend only to acts under color of foreign law or under the actual or apparent authority of a foreign nation, there will inevitably be serious questions of immunity, both with respect to the establishment of personal jurisdiction, the production of documents and witnesses, and the enforcement of any resulting judgment either in the United States or abroad. In any event, we believe that foreign governments which condone or tolerate acts of torture, or which do not provide adequate domestic remedies for the victims of torture, are not likely to honor or acquiesce in the enforcement of a U.S. civil judgment against their officials or assets. Nor are such judgments likely to be enforceable in third countries.

To conclude, Mr. Chairman, our opposition to the proposed Act should not be mistaken for a weakening of our commitment to eliminate torture throughout the world. That commitment remains unchanged. We do not tolerate torture in the United States, nor do we excuse it when practiced elsewhere, whether by friends or adversaries. We strongly support the establishment of common rules and institutions to combat torture. Instead, our position on the bills before you reflects a sober assessment of the means best suited to achieve this common goal. We believe that the United States can best demonstrate its strong commitment for universally recognized human rights by promptly ratifying the UN Convention against Torture, by implementing its provisions effectively, and by participating actively in the multilateral mechanisms established by the Convention to ensure that other nations do likewise.

Senator SIMON. Thank you.

You say, as I jotted down in my notes, I did not find it exactly in your statement here, you say torture cannot be eliminated by U.S. courts. I do not think anyone suggests that is possible. The question is whether torture can be reduced by action of our courts. Both of you are suggesting the U.N. Convention Against Torture is the tool that should be used.

Let us say that I am a member of the Bahai religion in Iran and I am tortured and I manage to escape to France or the United States. Under the U.N. Convention Against Torture, what is my option? As I listened to you and Mr. McGinnis, my option is to go back to Iran and sue. Is that correct?

Mr. STEWART. For personal damages, that would be the case. If Iran were a party to the convention, it would be obligated to provide a civil remedy of redress. But in addition, the convention would provide criminal sanctions and the torturer, wherever found, could be brought to justice.

Senator SIMON. But for all practical purposes, that is no remedy for someone who has been tortured in Iran. You know, I can give you 20 other countries where that is the case today.

Mr. STEWART. I am not sure the Torture Victim Protection Act gives you much more of a remedy. Even assuming that we find the individual torturer present in the United States and obtain a judgment, you are not likely to be able to execute against any assets or to execute on that judgment overseas.

Senator SIMON. But if you found it was government policy that had caused this and there were assets of the government of that country here—

Mr. STEWART. Well, that is, in fact, the reason why we support the Torture Convention, because it does go to the issue of government policy and imposes a treaty obligation on governments to take action within their own countries to eliminate torture, to prosecute the torturers and provide a civil remedy. The Torture Victim Protection Act does not get to the government. The issues of sovereign immunity would prevent that. The statute itself only goes to individuals.

Senator SIMON. The testimony of both of you, does it not suggest that, instead of withdrawing from World Court jurisdiction, we are going to have to create more and more entities that can deal with problems that relate to people in more than one country?

Mr. STEWART. The approach followed by the Torture Convention is based on a commitment by each state party to provide effective national remedies. The Torture Convention does not contemplate individual actions in an international tribunal. It does have the standard kind of dispute settlement mechanism referring to the World Court that most multilateral treaties have, but that would involve disputes between states as to the meaning or implementation of the convention.

The essential difference between the convention approach and the Torture Victim Protection Act is that, under the agreed multilateral scheme, each state would have to provide effective criminal and civil remedies for actions that take place in their own territory. That is, after all, where the evidence is likely to be and the people are likely to be. The Torture Victim Protection Act, by con-

trast, contemplates an unusual, perhaps unprecedented extension of U.S. civil liability over acts that take place entirely abroad between, for example, a foreign government and some nationals in its own country.

Senator SIMON. You are juxtaposing one against the other. Is it not possible for us to do both?

Mr. STEWART. It would not be a violation of the Torture Convention were a statute like this to be enacted, but I think a number of state parties would consider it inconsistent, precisely for the reason I mentioned in my statement, that they considered the issue of states establishing civil jurisdiction over acts that take place abroad and rejected it.

Senator SIMON. When you think of the countries in which torture takes place, are they likely to approve the U.S. Convention Against Torture, and are they likely to pay any attention to it? Let us take Libya. Is Libya, do you think, going to approve the U.N. Convention Against Torture?

Mr. STEWART. Well, Senator, it is a fact that the international community is made up of sovereign nations and one cannot force a nation to become a party to the treaty against its will, but what one can do is mobilize the attention and will of the international community to isolate such steps and so on, on an agreed basis. That is the reason why we prefer the U.N. convention, which has been crafted and adopted unanimously in the U.N. General Assembly, and now has some 49 parties, with more than 20 others, including the United States, who have not yet ratified it. The point is that we want to work to get those states which conduct torture, or condone it and sanction it, to adhere to and implement that treaty effectively. We think doing that through the mechanism of the Torture Convention is likely to be more effective than doing it through extraterritorial civil suits here.

Senator SIMON. It is a very diplomatic answer, but it did not answer my question. Is Libya likely to approve the U.N. Convention Against Torture?

Mr. STEWART. Well, I would not want to speculate on what Libya would do now or in the future, but one can—as I say, one cannot force the, but one can certainly focus attention on that issue and states are likely to respond to international pressure. I think, frankly, they are more likely to respond, than they would to a civil judgment of a district court here. I do not think that has any effect on Libya.

Senator SIMON. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

The convention that you gentlemen refer to goes only so far as to call upon each nation to establish a crime for torture and a civil cause of action within that jurisdiction. Is that not right, Mr. McGinnis?

Mr. MCGINNIS. Yes.

Senator SPECTER. So that if a nation, hypothetically Libya, as cited by Senator Simon, does not do so, then someone who is tortured in Libya has no redress under the convention.

Mr. MCGINNIS. You mean if Libya does not ratify the convention, for instance?

Senator SPECTER. Right.

Mr. MCGINNIS. That is correct.

Mr. STEWART. Senator, if I could just intercede, from my notes I note that, in fact, Libya acceded to the convention just over a year ago.

Senator SPECTER. Which nation has not?

Mr. STEWART. Which nation has not?

Senator SPECTER. Do you want to find one that has not?

Mr. STEWART. That could probably take half the nations in the world, roughly, that have not yet.

Senator SPECTER. Well, I do not want to take those nations. Maybe I would suggest you take them, but Libya is only a hypothetical and I picked it up, because Senator Simon had mentioned it. I do not know if their ratification means a whole lot, so be it. But if a nation has not ratified the convention, then, as Mr. McGinnis has said, one who is a victim of torture cannot do anything about it and he cannot do anything about it in another country.

The case law on this subject is interesting. There is a second circuit decision, which I know you are familiar with, *Filartiga v. Pera-Irala*, in 1980, where the court of appeals held that deliberate torture perpetrated under the color of official authority violates universally accepted norms of international law of human right, regardless of the nationality of the parties, and, thus, whenever an alleged torture is found and served with process by an alien within the borders of the United States, the alien toward statute provides Federal jurisdiction.

Mr. McGinnis, are you familiar with that case?

Mr. MCGINNIS. Yes.

Senator SPECTER. Do you disagree with this conclusion?

Mr. MCGINNIS. Well, the department, I think, has been more sympathetic to the approach, as you know, I think you referred to in your opening statement, there was something of a split in the circuit on this matter, the *Hanaktel Orin* case, in which the District circuit refused to entertain a somewhat similar suit.

Senator SPECTER. I am coming to that. The question that is pending, that I would appreciate your answer on, is whether you disagree with the second circuit opinion in the *Filartiga v. Pera-Irala* case.

Mr. MCGINNIS. Well, the alien tort claims statute is an extremely ancient statute in the United States. I think it is very difficult to know exactly what that statute contemplated.

Senator SPECTER. Older than the Bill of Rights?

Mr. MCGINNIS. No, it is not older than the Bill of Rights, but it is—

Senator SPECTER. Age is not necessarily a disabler. Because it is old does not mean it is ineffective or bad.

Mr. MCGINNIS. Oh, absolutely not, but it is, I was saying, a difficult—I was prefacing my remark by saying that it is a difficult question, one, in fact, I think we have much less information on what prompted the statute than—

Senator SPECTER. I will not pursue that question, since I am not getting an answer. Let us go, instead, to *Hanaktel Orin*, which is the case you referred to. As you correctly note, there is a split in the circuits and the opinion of Judge Bork says, at page 801 of 726 Fed. 2d, it is essential that there be an explicit grant of a cause of

action before a private plaintiff be allowed to enforce principles of international law in a Federal tribunal. So, absent a statute of this sort, at least as to the Court of Appeals for the District of Columbia, you cannot bring an action of this sort.

Mr. MCGINNIS. That is correct, Senator.

Senator SPECTER. Well, it may just boil down to the views of public policy which you gentlemen are articulating from the Department of Justice and the Department of State, for the reasons which you have referred to. Speaking for myself, they are not convincing to me, and I do not know that it is worthwhile to pursue them.

Let me approach the subject from a little different vantage point, in terms of the different view of the Department of Justice on the assertion of extraterritorial jurisdiction for crimes against terrorism, where the Department has been subjected to a fair amount of criticism on some recent opinions.

We legislated in 1984 to make it a violation of U.S. law to take a hostage or a hijacking anywhere in the world. My statute in 1986 made it a violation of U.S. law for a terrorist to assault, maim, or murder a U.S. citizen anywhere in the world, and the United States has asserted that jurisdiction under the authority of *Kerr v. Illinois*, a very old decision, 1886, but one which was upheld in an opinion by Hugo Black in the 1950's, and we do have a man named Fawa Unis in jail now in a Federal penitentiary, where the Federal Government, the FBI, took Unis into custody in the Mediterranean and brought him back to the United States court for trial, and he is under a 30-year sentence.

Now, does not that kind of aggressive action by the United States raise all the considerations, does it not fly right in the face of the policy reasons that you have advanced?

Mr. MCGINNIS. No, I do not think—

Senator SPECTER. Now, wait a minute. Can I finish my question?

Mr. MCGINNIS. I am sorry, Senator.

Senator SPECTER. Does not that really fly in the face of all of the policy reasons that you have raised in opposition to this proposed legislation?

Mr. MCGINNIS. No, I do not think so, Senator. I think there are two things to be said about that. First of all, that is the criminal jurisdiction that the United States is carrying out. This is a civil statute that allows the authorities in the United States to make the decision as to when it would be appropriate to prosecute, and so that—

Senator SPECTER. You support legislation which established a crime, then?

Mr. MCGINNIS. The legislation—I think we would support that legislation.

Senator SPECTER. Even if it did not involve the U.S. citizen, but involved an alien in another country—

Mr. MCGINNIS. I believe—

Senator SPECTER [continuing]. And might involve a crime against the laws of the United States?

Mr. MCGINNIS. I would defer to my colleague from the State Department, but I believe the Torture Convention contemplates that.

Senator SPECTER. For the United States to create a crime cognizable in our courts for an act of torture against a foreign citizen in a foreign country?

Mr. STEWART. That is right, Senator, again exactly the same model as followed by the Torture Convention in this respect, as is followed in the antiterrorism area, the 1984 statute that you refer to implemented two of those conventions, as you know, and we would have the same—

Senator SPECTER. The 1984 statute and the 1986 statute require that there be a U.S. citizen as a nexus for U.S. jurisdiction.

Mr. STEWART. The 1986 statute is a unilateral statute and does require that nexus. But under the multilateral conventions, we would have jurisdiction—let us take the Torture Convention—over an act of torture committed by a U.S. person abroad or over a torturer found in the United States, wherever he committed the crime. Again, that is the fabric of the multilateral conventions.

Senator SPECTER. Whether the individual, the defendant, the torturer, need not be a U.S. citizen, the torturee need not be a U.S. citizen?

Mr. STEWART. That is correct.

Senator SPECTER. The torture may occur in a foreign country?

Mr. STEWART. That is correct, and we would have the extradite or prosecute obligation, precisely the same as we do in the area of multilateral terrorism conventions. That is the reason we support the Torture Convention, rather than the unilateral civil remedy.

Senator SPECTER. So, the convention would warrant a criminal statute in the United States to take action under a criminal law, where the act occurred somewhere else, and the victim and the perpetrator were both foreign nationals, but not to have a civil action in the United States?

Mr. MCGINNIS. Yes.

Mr. STEWART. That is correct.

Senator SPECTER. Now, that kind of a dichotomy does not make much sense to me. It seems to me that you would have to have—that it would be tougher to establish a crime than it is a civil right of action.

Mr. MCGINNIS. I think, Senator, the policy reasons we have given do seem, at least to me, to suggest that a criminal statute is not so much a problem, it is not so much inference with foreign policy, because it is in the executive branch's decision to go forward with the prosecution, so it does not have those same risks.

Senator SPECTER. Let me see if I am understanding you correctly. Brown tortures Smith in *x* country, and the United States can make that a crime in the United States. Brown tortures Smith in *x* country, and the United States should not have the authority to make that—give rise to a civil cause of action in the United States?

Mr. MCGINNIS. Yes, Senator.

Senator SPECTER. OK. Thank you very much.

Senator SIMON. If I could just add a comment, first, the criminal action is virtually unenforceable. A civil action has the possibility of remedy. The second observation I have, and you say that Libya has agreed to the U.N. Convention on Torture, I have an idea that, Mr. Stewart or Mr. McGinnis, if you had been tortured in Libya and had escaped, you are not likely to want to go back to the

tender mercies of Colonel Qadhafi and sue in Libya. It sounds great in theory, but I do not think it is practical. Am I incorrect?

Mr. STEWART. I would not be personally inclined to go back, if I had been the victim of torture, officially sanctioned torture.

Senator SIMON. I would say that that is prudence on your part.

Mr. STEWART. Thank you, Senator. But my point would be I am not sure that providing the civil remedy here gives me much more of a remedy. I think if I am successful, I end up with an empty judgment and I do not think that advances the cause at all. What we are saying is that if we pursue the multilaterally agreed approach, where nations have gotten together and have agreed that the kind of jurisdiction that Senator Specter has been talking about is appropriate, we have done it in the terrorism area, you will have a criminal remedy.

Senator, I must respectfully disagree in this respect, I think the criminal sanction is, in fact, more powerful than the civil sanction, because something will result from it. We will have jurisdiction to prosecute or extradite and that is the case in the terrorism area.

Senator SIMON. We thank you both for your testimony.

We will move to our next panel: An old friend, a former colleague in the House of Representatives, Father Bob Drinan, professor of law at Georgetown University Law Center, representing the American Bar Association; Mr. Michael H. Posner, executive director of the Lawyers Committee for Human Rights; and Mr. John Shattuck, vice president for governmental affairs, of Harvard University, and vice chair, board of directors, Amnesty International.

We are very pleased to have all three of you here. And let me call on my former colleague first, to have his statement.

**PANEL CONSISTING OF ROBERT F. DRINAN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW SCHOOL, WASHINGTON, DC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; MICHAEL H. POSNER, EXECUTIVE DIRECTOR, LAWYERS COMMITTEE FOR HUMAN RIGHTS, NEW YORK, NY; AND JOHN SHATTUCK, VICE CHAIRMAN, BOARD OF DIRECTORS, AMNESTY INTERNATIONAL, U.S.A., CAMBRIDGE, MA**

#### **STATEMENT OF FATHER DRINAN**

Father DRINAN. Thank you, Mr. Chairman and Senator Specter.

My name is Robert F. Drinan and I am a professor at Georgetown University Law Center. I am the chairman-elect of the section on individual rights and responsibilities of the American Bar Association, and I am happy to say that Mr. Stanley Chauvin, the president of the ABA, has authorized me to express the views of the ABA. The ABA is very much in favor of this important legislative initiative and we commend both of you, and particularly Senator Specter.

Back in 1975, the American Bar Association adopted a proposition that they would seek to extend the rule of law around the world, and their enforcement of this particular act is simply a corollary of that particular commitment.

We all know about torture all around the world. We were reminded just on June 19 by the New York Times of allegations that police in Brazil "continue to routinely torture and sometimes kill

prisoners," even though military rule ended in that country 5 years ago.

It is very clear that the Congress has the authority to implement legislation pursuant to the Constitution. Mr. Chairman, we are considering today a legislative proposal which seeks, in the words of Ambassador Richard Schifter, to translate our words into action. The impetus for this particular legislation goes back many, many years, it has overwhelmingly passed the House with only 4 negative votes, and, Mr. Chairman, it is simply an extension and a clarification of the decision already referred to, the *Filartiga* decision in the second circuit in 1980.

If the administration desires to oppose this particular bill, do they want the original Judiciary Act of 1789 also to be repealed? That is what they are asking to do. There you have the Alien Tort Claim Act, which has been quiescent for all of these years, but it simply states that, in the original Judiciary Act enacted by this body and by the Congress, there was a provision for an alien to sue an official of a foreign government for an act of torture committed in that country, and the judges in that decision and in several other decisions have simply said that torture is now clearly a violation of customary international law, and, pursuant to the original Judiciary Act, that is now operable in all of the Federal courts.

The proposed legislation would eliminate any uncertainty in this matter and would compliment the ongoing litigation efforts under the Alien Tort Claims Act by providing, Mr. Chairman, a clear Federal right of action against torturers or those who have engaged in political killings who are physically present in the United States. The bill confirms the existence of the right of aliens who have been victims of gross human rights abuse to bring suit and extend this same right to U.S. citizens.

The legislation would serve notice on individuals engaged in human rights violations that the United States strongly condemns such actions and will not shelter violators from being held accountable for civil damages, and as we look to Europe, the United States should be the leader in this area.

Enactment of the Torture Victim Protection Act would encourage our Western allies and other nations to develop similar domestic remedies, thereby multiplying the deterrent effect of the proposed legislation. Threat of retaliatory and abuse of use of the Torture Victim Protection Act by any American groups is not a legitimate ground to deny individuals the legal remedies that they are entitled to under the act put through by the very First Congress.

Mr. Chairman, our Constitution authorizes Congress to regulate the conduct of aliens who engage in abuses against other persons.

In 1985, the house of delegates of the American Bar Association passed a resolution that urged the adoption of Federal legislation which would

\* \* \* clearly establish a federal right of action by both alien and United States citizens against persons who, under color of foreign law, engage in acts of torture or extrajudicial killing as defined by the law of nations.

Mr. Chairman, in my full testimony, I have three or four suggestions about the proposed legislation. I would say that I am proud that the American Bar Association, which has urged the ratifica-



tion of all of the major human rights treaties, in addition wants the enactment of this legislation. I had the honor of testifying on behalf of the ABA in the House and there was no opposition to the bill in the House, and I hope that the U.S. Senate would follow.

Mr. Chairman, we offer the technical amendments that I mentioned to a good and important bill and we would be glad to assist the subcommittee with these other questions. We commend both of you once again for your leadership in introducing and holding hearings on this important legislation. And on behalf of the American Bar Association, we strongly urge its prompt passage and adoption into law.

Thank you very much.

[The prepared statement of Father Drinan follows:]

Statement of Robert F. Drinan, S. J.  
on behalf of the  
American Bar Association  
before the  
Subcommittee on Immigration and Refugee Affairs  
of the  
Committee on the Judiciary, United States Senate  
in support of enactment of S. 1629  
The Torture Victim Protection Act

June 22, 1990

Mr. Chairman and Members of the Subcommittee:

My name is Robert F. Drinan. I am a professor of law at Georgetown University Law Center. I have the honor of serving currently as Secretary of the American Bar Association's Section of Individual Rights and Responsibilities, and am the chair-elect of that Section. It is my pleasure to appear before you at the request of the President of the ABA, L. Stanley Chauvin, Jr., to express the ABA's views on an important legislative initiative, The proposed Torture Victim Protection Act, S. 1629.

In 1975 the American Bar Association adopted a resolution reaffirming its support for the rule of law in the international community, and the need to maintain internationally recognized standards of fairness and justice. In the past decade, the ABA has become increasingly involved in the international debate on these issues, frequently protesting persecution of lawyers and judges, sending trial observers to important trials in other countries, and supporting U.S. ratification of a number of pending human rights treaties.

These actions are in furtherance of the eighth goal of the American Bar Association to promote the rule of law worldwide.

Today's hearing addresses a related, and important aspect of the effort to strengthen international mechanisms to protect human rights and enhance the rule of law. We all know that systematic and government-sponsored human rights violations are rampant throughout the world, regardless of a nation's political or economic structure. These gross abuses take place despite efforts by some governments and intergovernmental agencies, as well as by non-governmental organizations and private citizens, to stop them from occurring. Indeed, for example, the June 19 New York Times reported on allegations that police in Brazil "continue to routinely torture and sometimes kill prisoners," even though military rule ended in that country five years ago.

The United States Government, and Congress in particular, has taken on an especially important leadership role in promoting respect for human rights and in fostering international standards defining criminal behavior. In 1984 the U.S. government played a key role in obtaining the adoption of the U.N.'s Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which is now pending approval by the Foreign Relations Committee.

Ambassador Richard Schifter, now the Assistant Secretary of State for Human Rights and Humanitarian Affairs, spearheaded the U.S. effort to gain broad support for this important treaty. In his statement to the General Assembly, on December 10, 1984, the day the treaty was adopted, Ambassador Schifter stated:

It is no longer acceptable in the eyes of the international community for a government to claim that the way it treats its own citizens is solely an international matter if the treatment in question is violative of the international instruments which set human rights standards.

He went on to note:

But the mere setting of standards, as we all know, is not enough. There is ample evidence of a wide gulf between lofty words and the unacceptable practices which continue unabated in many parts of the world. One of the most flagrant continuing violations of human rights is torture -- a crude violation of everything that we understand by the word "human." As long as torture persists, further steps are needed to translate our words into action to eliminate this abhorrent practice.

Mr. Chairman, today we are considering a legislative proposal, the Torture Victim Protection Act, which seeks, using Ambassador Schifter's phrase, to translate "our words into action," by providing a new domestic civil remedy to torture victims residing in the U.S., regardless of where the violations took place. The impetus for this legislation was a series of House Foreign Affairs subcommittee hearings in 1984 on the phenomenon of torture. Following those hearings Congress adopted, and President Reagan signed, a joint resolution on torture. The resolution called for the Congress to develop concerted mechanisms by which the U.S. can combat the use of torture throughout the world.

In 1980, the second circuit court of appeals, in the case of Filartiga v. Pera-Irala, 630 F.2d 876 (2d Cir. 1980), held that the Alien Tort Claims Act, part of the original Judiciary Act of 1789, provided the basis for an alien to sue an official of a foreign government for an act of torture committed in that country. That official, a senior Paraguayan police officer, was later found liable to the plaintiffs for compensatory and punitive damages, although by that time he had returned to Paraguay.

The Alien Tort Claims Act has been used successfully in several cases since Filartiga. However, a few judges have

questioned whether that statute creates a federal cause of action for these types of lawsuits concerning violations of human rights committed abroad.

The proposed legislation S. 1629, introduced by Sen. Arlen Specter, would eliminate any uncertainty here, and would complement the ongoing litigation efforts under the Alien Tort Claims Act by providing a clear federal right of action against torturers or those who have engaged in political killings who are physically present in the United States. This bill confirms the existence of the right of aliens who have been victims of gross human rights abuses to bring suit and extends this same right to U.S. citizens. The legislation would serve notice to individuals engaged in human rights violations that the United States strongly condemns such actions, and will not shelter violators from being held accountable for civil damages in the U.S. Enactment of the Torture Victim Protection Act would encourage our western allies and other nations to develop similar domestic remedies, thereby multiplying the deterrent effect of the proposed legislation. Threat of retaliatory and abusive use of the Torture Victim Protection Act by anti-American groups is not a legitimate ground to deny individuals legal remedies; these groups will attempt to misuse our laws as they do now.

Mr. Chairman, our Constitution authorizes Congress to regulate the conduct of aliens who engage in abuses against other aliens. Article III of the US Constitution establishes federal court jurisdiction in cases "arising under" the Constitution and the laws of the U.S. A case properly "arises under" the laws of the U.S. if it is grounded upon U.S. common law, which includes the law of nations. In addition, Article I, Section 8, bestows upon Congress the power to "define and punish . . . offenses against the Law of Nations." The proposed

legislation while not a penal statute, clearly defines the offense of torture and imposes civil penalties for tortuous acts. The offense of torture is condemned by virtually all nations and rises to level of the law of nations; the torturer is, in the words of Professors Blum and Steinhardt, the "enemy against all mankind."

At its annual meeting in July 1985, the House of Delegates of the American Bar Association passed a resolution which urged the adoption of federal legislation which would "clearly establish a federal right of action by both alien and United States citizens against persons who, under color of foreign law, engage in acts of torture or extrajudicial killing as defined by the law of nations."

Consistent with that resolution, we strongly support legislation along the lines of S.1629, and in that context, would offer a few suggestions for minor amendments to the bill.

First, Section 2(b) of the proposed legislation directs courts to decline to hear a case when the claimant has not exhausted adequate and available remedies in the place in which the tort was alleged to have occurred. Statutory or report language should provide for dismissal as well in those instances in which the claimant has already obtained adequate remedies in the state where the torture or killing occurred. Where other countries actually mete out proper justice, it would be inappropriate to permit recovering again in the United States.

Second, the definition of torture in Section 3(1) of the bill closely conforms to the definition of that term found in the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is hoped that that treaty will shortly be from the Foreign Relations Committee to the Senate and approved. In order to be more fully consistent with the Torture Convention's definition, we suggest the

addition of the words "intimidating or" before the word "coercing" in Section 3(1).

Third, the definition of "extrajudicial killing" in Section 3(2) should be clarified to exclude those instances of killing which are not intended by the term. A killing by a soldier in wartime, for example, or by a police officer in the context of legitimate law enforcement activity, might be interpreted by some to constitute extrajudicial killing under authority of a government, but we would not want those possibly legitimate actions to give rise to private suits in U.S. courts. The exclusionary language found in Article 2 of the European Convention on Human Rights may be instructive in this regard.

Finally, the United States has repeatedly enacted legislation in compliance with international legal obligations, and has simply placed that statutory language in the chapter of the U.S. Code most relevant to the particular subject matter. In this context, it may be most appropriate to include not only Section 3 but the body of this bill as well as an amendment to Chapter 85 of title 28 of the United States Code. This would permit the deletion of the references in the bill to the United Nations Participation Act of 1945, as the provisions of that act deal more specifically with the administration of U.S. participation in the U.N. and other international organizations.

Mr. Chairman, we offer these comments as technical revisions to a good and important bill, and would be glad to assist the subcommittee with these or other questions. We commend you for your leadership role in introducing and holding hearings on this important legislation, and we strongly urge its prompt passage and adoption into law. Thank you for inviting the ABA's views. I would be pleased to respond to any questions.

Senator SIMON. Thank you very much.

**STATEMENT OF MICHAEL H. POSNER**

Mr. POSNER. Thank you, Senator Simon. I also have a written statement which I would like to submit for the record.

Senator SIMON. Your complete statement will be included in the record.

Mr. POSNER. I would like to say special words also to Senator Specter, who introduced this legislation in the Senate in 1987, and he has reintroduced it in 1989 and has been a tireless fighter in this effort which we very much appreciate, those of us in the human rights community.

As Father Drinan mentioned, this bill passed the House twice, most recently in the fall of 1989 by a vote of 362 to 4, and we are hoping to have similar support here in the Senate.

I want to, if I can, just respond to several points made by the two administration witnesses. One relates to the applicability and relationship between the Torture Victims Protection Act and the U.S. Torture Convention. I think, as both you, Senator Simon, and Senator Specter indicated, there are limits in the Torture Convention, and I should say we in the human rights community support the Torture Convention, we view the Torture Convention in the long term as a very important step in the right direction in addressing the problem, but we see that the Torture Victim Protection Act is a mutually reinforcing legislative provision which, in fact, gives the United States an opportunity to address this issue in its own courts, at the same time we are trying to deal with it internationally.

There are limitations, as you have indicated. There are only 49 states or countries that have ratified the Torture Convention, and that means about 110 or 120 countries in the world have not ratified it. As you, Senator Specter, suggested, a number of countries, perhaps Libya is one, ratify treaties with giving them much serious consideration, and that is a problem we need to address.

As both of you have indicated and it is quite clearly true, there are, unfortunately, many countries in the world where people are subjected to torture and where domestic courts and institutions are not strong enough or there is not the political will to hold officials accountable for their act.

So, what we attempt to do here and what the Torture Victim Protect Act I think does, by symbolically and practically, is to say to the victims, the individuals who have suffered torture or suffered gross human rights abuse, that there is an opportunity, if they come to the United States, if they are in the United States and they happen to find their torturer here, an opportunity to avail themselves of the American courts, has a private right of action, there is civil remedy. If domestic remedies are exhausted, it is a very modest proposal intended to clarify and reaffirm our commitment to human rights in this country and, importantly, to say to the world that there should be no safe haven in this country for people who engage in the horrendous practice of torture.

The two administration witnesses suggested that there may be inappropriate circumstances foisted upon the courts by this legisla-



tion. I think that is not likely to happen. The courts are well able at this point in weeding out frivolous lawsuits. Rule 11, which has been reinforced by recent Supreme Court decision, makes it more difficult for frivolous suits to be brought.

I think, as a final point, the administration witnesses were suggesting that somehow this is an intrusion into foreign affairs. It seems to me that, as a practical matter, we in our foreign affairs want to stand for the proposition that torturers do not have a place in the United States. This legislation does that. It says, both symbolically and practically, we are going to do something about it, and it is also I think a hope that, when the United States adopts this legislation, it is going to encourage other countries to do so, as well. I thank you both for your interest and support and would be glad to answer any questions.

[The prepared statement of Mr. Posner follows:]

PREPARED STATEMENT OF MICHAEL H. POSNER,  
EXECUTIVE DIRECTOR,  
LAWYERS COMMITTEE FOR HUMAN RIGHTS

Mr. Chairman, thank you for inviting me to testify today concerning the Torture Victim Protection Act. My name is Michael Posner, and I am the Executive Director of the Lawyers Committee for Human Rights. I am accompanied here by Tony Edwards, who has been working with the Lawyers Committee on this issue.

Since 1978, the Lawyers Committee has worked to protect and promote international human rights and refugee law and legal procedures. The Committee has investigated serious human rights violations in all regions of the world. In evaluating human rights conditions, the Committee holds every government to a single standard: that contained in the International Bill of Human Rights. One of the Lawyers Committee's objectives is to encourage the development of effective domestic laws in the United States to assist in the protection of human rights throughout the world.

Nearly six years ago, Congress held extensive hearings investigating the phenomenon of torture. Those hearings, which coincided with Amnesty International's worldwide campaign against torture, were instrumental in providing a greater understanding of the practice of torture and what can be done to stop it. As was pointed out during those hearings, the United States Congress has the opportunity to play a critical role in helping to combat, deter, and ultimately to help put an end to torture and other egregious violations of human rights.

As a result of those hearings, Congress adopted and the President signed a joint resolution on torture. In reaffirming the United States' abhorrence of the use of

torture, under any circumstances, the resolution called upon Congress to develop concrete mechanisms by which the United States can combat the use of torture throughout the world. The Torture Victim Protection Act is such a mechanism.

The Torture Victim Protection Act was first introduced in the Senate by Senators Specter and Leahy on March 24, 1987 as S. 824. Senator Specter reintroduced the Act in 1989 as S. 1629. Previously, in 1986, Congressmen Yatron, Leach and Rodino introduced the Act in the House.

In 1988, the House Committee on Foreign Affairs held hearings on this legislation in which the Lawyers Committee also participated. Following those hearings, the Foreign Affairs Committee marked up the bill and recommended its adoption. The Torture Victim Protection Act was reintroduced in the House in 1989 as H.R. 1662. After being reported favorably by both the Committee on Foreign Affairs and the Committee on the Judiciary, H.R. 1662 passed the full House of Representatives on October 2, 1989 by a vote of 362-4. It is our hope that the proposed legislation will receive similar support in the Senate. We applaud the roles that Senators Specter and Kennedy have played in placing the Act on the Subcommittee's agenda.

The Torture Victim Protection Act is a carefully-conceived and drafted bill that will provide important relief -- both substantive and symbolic -- in a defined set of circumstances.

The legislation would enable any victim (or, if the victim cannot bring the suit, a family member or legal representative) of torture or extrajudicial killing, committed under the actual or apparent authority of any foreign nation, to bring a civil damages suit in U.S. federal district court. Any plaintiff will have to establish

governmental involvement in the torture of killing. The Torture Victim Protection Act, however, will be subject to the doctrine of diplomatic immunity. In most cases, diplomatic immunity will act as a defense against foreign heads of state and other diplomats visiting the United States on official business.

In order to be liable under the legislation, a person who acted under such actual or apparent authority must be subject to the personal jurisdiction of the court. The legislation is intended to cover gross abuses that are tolerated, condoned, or encouraged by a foreign state, even if not part of official government policy, as well as state-authorized violations. It covers individuals who ordered or assisted in the abuses, but not officials whose only connection was their position at the top of a chain of command. The defendants would be the individual violators themselves and not the foreign governments.

This legislation represents an important step in making our domestic laws more effective in protecting basic human rights. More importantly, it recognizes the significant role the United States can play in encouraging other governments to enact comparable domestic law. One of the effects of the Torture Victim Protection Act will be to serve as a clear statement that the United States Congress is taking an affirmative role in the development of effective means to combat and deter torture and extrajudicial killing, wherever such violations may occur. We hope that passage of the Torture Victim Protection Act will spur other countries to adopt similar legislation.

The Torture Victim Protection Act clarifies and expands upon existing law by establishing a federal cause of action against certain human rights violators, and by

authorizing suits by both aliens and U.S. citizens who have been victims of gross human rights abuses. The legislation meets two of the important objectives of Amnesty International's 12-point program against torture: preventing a "safe haven" for torturers, and helping victims and their dependents obtain some measure of financial compensation from their tormentors.

In 1980, a federal court of appeals in New York interpreted the Alien Tort Claims Act, codified at 28 U.S.C. section 1350, to allow an alien to bring a civil suit against a foreign official for torture committed outside of the United States -- so long as all of the usual jurisdictional requirements could be satisfied. That decision, in Filartiga v. Pena-Irala, enabled the family of a young man tortured to death in Paraguay by a government security officer to obtain an award of civil damages. Although that judgment has not yet been enforced because the defendant left the United States, Filartiga has come to be recognized as a seminal decision. The right to be free from torture has become a matter of universal concern under international law; consequently, the Second Circuit found it to be fully appropriate that a United States court has the ability to hear a claim for money damages, even though the act of torture was committed outside of this country. As Judge Kaufman wrote in Filartiga, "for the purpose of civil liability, the torturer has become like the pirate and the slave trader before him . . . an enemy of all mankind."

Since the Filartiga decision, victims of human rights abuses have sought redress under the Alien Tort Claims Act on several occasions. Results have varied and the ensuing uncertainty of the extent to which the Alien Tort Claim Act applies in particular circumstances should be

resolved by establishing clear domestic legislation regarding torture.

The varying conclusions of the District of Columbia circuit court, in Tel-Oren v. Libyan Arab Republic, is an example of this uncertainty. In Tel-Oren, survivors and representatives of persons murdered in an attack on a civilian bus in Israel brought action under the alien tort statute against Libya, for alleged tortious acts in violation, inter alia, of the law of nations. The three judges on the panel concurred in their decision, however, they did so for varying reasons. Judge Bork concluded that due to the lack of an express grant of a private cause of action for human rights violations in either the Alien Tort Claims Act or international law, the suit against Libya necessarily had to be dismissed. Judge Bork based his opinion on the confusion surrounding the meaning and application of the alien tort statute and expressed his hope that "clarification will not be long delayed." The Torture Protection Victim Act provides this clarification. Judge Edwards, on the other hand, adopted the Filartiga interpretation of the alien tort statute.

Recently, in the Suarez-Mason litigation in California, the district court expressly followed the analysis of the Filartiga decision. The court denied the motions of defendant, a former senior official in the Argentine Army, to dismiss all of plaintiff's claims alleging torture. The court, however, dismissed plaintiff's claim of "cruel, inhuman or degrading treatment," determining that in order to state a cause of action for international tort under the alien tort statute, there must be a general recognition, among states, that a specific practice is prohibited.

Most recently, the United States Supreme Court ruled on the application of the alien tort statute in an action against the Argentine government for an attack on a Liberian oil tanker in international waters. In Argentine Republic v. Amerada Hess Shipping Corp., the Court distinguished Filartiga, noting that the decision in Filartiga was applicable only in an action against an individual.

The Lawyers Committee believes that the Torture Victim Protection Act affords Congress the opportunity to both reaffirm the principles underlying the Filartiga decision and its progeny, and to provide a clear statement of legislative and political support for victims of human rights abuse who are able to bring a case against their oppressors. The Torture Victim Protection Act will not replace the 200-year old Alien Tort Claims Act. Instead, it will make relief clearly available to United States citizens as well as aliens who are the victims of torture or extrajudicial killing abroad.

The Torture Victim Protection Act recognizes that individual rights are now included among the subjects of the law of nations. This concept was articulated by Judge Kaufman in Filartiga when he noted that the international legal community has recognized "the emergence through international consensus of a universal law of human rights. That law . . . affords substantive rights to individuals and places limits on a state's treatment of its own citizens."

The Torture Victim Protection Act addresses the concerns of judges who have not accepted the use of the Alien Tort Claims Act to bring human rights violators to account in this country. The concept of a United States law having extraterritorial reach is by no means new. In the

areas of antitrust and securities regulation, provisions in the Sherman Act and the Securities Exchange Act provide for causes of action to both government and private persons injured either directly or indirectly by violations occurring outside of the United States. The Foreign Trade Antitrust Improvement Act of 1982 amended the Sherman Act in an attempt to clarify the question of the extraterritorial jurisdiction of the Act. Section 27 of the Securities Exchange Act gives federal courts exclusive jurisdiction in suits alleging violation of Rule 10b-5; permitting an action to be brought wherever any act or transaction constituting the violation occurs, or wherever the defendant may be found.

The United States has already extended the extra-territorial reach of federal courts with regard to crimes against the "law of nations." The Anticrime Bill of 1984, established that certain acts, such as hostage taking and aircraft sabotage, committed anywhere in the world, be punishable in U.S. federal courts. This bill was staunchly supported by the State Department.

In the wake of the Achille Lauro hijacking, the United States strengthened its domestic legislation in these areas with the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, which provides the U.S. with jurisdiction over certain crimes committed against U.S. citizens overseas. This legislation gave the U.S. the legal right to prosecute, in the United States, those who murder or violently attack Americans abroad.

Passage of the Torture Victim Protection Act will not open the floodgates to litigation in U.S. courts. Human rights violators rarely are made available to victims or



victims' families in this country. The language of the Act expressly states several important limitations:

- Only persons acting "under actual or apparent authority" of a foreign nation would be liable for damages -- neither governments themselves nor purely private persons would be liable;
- A court could decline jurisdiction if there was clear evidence that the party bringing the case had not exhausted "adequate and available remedies" in the nation where the alleged abuses occurred.

Furthermore, as noted above, the federal district court must have personal jurisdiction over the defendant, based either on physical presence or sufficient contacts with the forum. Existing rules of civil procedure will thus restrict the number of suits under this new cause of action.

Mr. Chairman, the Torture Victim Protection Act provides a practical measure through which this committee and, we hope, the entire Congress can help deter torture and extrajudicial killing. By making it clear that gross violators of human rights are not welcome in this country, and affording a means for their victims to seek redress, the Torture Victim Protection Act will help enforce universally-recognized human rights. It will reaffirm that the United States assumes a leading role in promoting respect for human rights throughout the world, and in effectively using its own domestic institutions in pursuit of that objective.

Senator SIMON. Thank you.  
Mr. Shattuck.

#### STATEMENT OF JOHN SHATTUCK

Mr. SHATTUCK. Thank you, Mr. Chairman. I, too, have a prepared statement which I will submit for the record.

I want to join with Mr. Posner and Mr. Drinan in thanking Senator Specter for your leadership in introducing this very important legislation over two Congresses.

We at Amnesty International regard this legislation as an important step in combating the widespread practice of torture. In June 1984, the Senate Foreign Relations Committee held hearings on the phenomenon of torture, following the publication of an Amnesty International report, "Torture in the Eighties."

At that time, Amnesty reported that the practice of torture was widespread, occurring in more than 90 countries around the globe. Further, Amnesty reported that torture was a systematic practice in 30 of those countries. It was not confined to countries of one political persuasion or another, as we all know, but occurred in countries across the political spectrum and is a sad commentary on the way in which those countries have operated domestically with respect to people who are brought to torture.

I would like to be able to report to you today that our experience in Amnesty International is that this is no longer the case and that in 6 years major changes have been made. However, I cannot. Instead, torture continues to be practiced on a wide scale by governments of every persuasion, for a variety of reasons, none of them justifying the practice.

Earlier this year, the U.N. Special Rapporteur on Torture submitted a report to the U.N. Human Rights Commission, which lists over 40 countries in Asia, Africa, Europe, the Middle East, and Latin America, with documented or suspected cases of torture, and over the last 18 months, Amnesty International has issued 29 reports on countries in which torture is a serious concern.

A sampling of those countries includes Burma, Guatemala, Ethiopia, Iraq, Somalia, and Turkey, demonstrating again that torture continues to occur in countries of every region and across the ideological spectrum. In short, torture continues to plague the globe and is a human rights epidemic.

The U.S. Government has, indeed, taken a number of significant steps to combat the practice of torture, and I have outlined those in my prepared statement and, indeed, they have been referred to by the administration witnesses and my colleagues.

The most important of these steps, of course, is the signing of the International Convention Against Torture, which is now pending ratification by the Senate. But the practice of torture, I think, continues to challenge our conscience as a Nation. In its report referred to earlier, Amnesty International detailed a 12-point program to eradicate the practice, and I have attached a copy to my statement.

Key among those 12 points is the need to hold the individual torturer and those who direct others to torture accountable for their actions. Sadly, I think, as we see at the heart of this hearing and as

seems to be conceded by the administration witnesses, this is something that is not likely to happen in countries that practice or encourage torture. Indeed, it may even not be likely to happen if we sign the convention.

So, the challenge to hold torturers to account falls upon the international community of nations and those with the political will to take action. We hope that the committee will look on this legislation in that light, as a means of holding torturers to account for their actions when their own governments are unwilling or unable to do so.

The legislation, I think, Mr. Chairman, stands for the very simple proposition that the United States will not be a safe haven for torturers. It means that torturers coming to the United States would face the risk of being sued by their victims in civil court for damages for acts related to the torture or the acts, if it is family members in the case of someone who may have been, in fact, killed by the torturer.

I think a key element of the program against torture that we feel very strongly about at Amnesty International is that there is a need to compensate the torture victims, and criminal prosecution, as important as it might be under some circumstances, nonetheless rests very heavily on the prosecutorial discretion and certainly does not involve the degree of involvement by the torture victims of compensation. Under this bill, the remedy would be available for both aliens and U.S. citizens who suffered at the hands of the torturers.

So, while this legislation may not have the magnitude of the International Convention Against Torture, it is an essential complement to that convention and should be seen in that light. In short, we feel that the enactment of the bill provides an important weapon in the arsenal against the epidemic of torture which we have outlined in our reports and which the United Nations, as recently as this year, have thoroughly canvassed once again. Above all, I think the bill would send a clear and unmistakable message that the United States will not provide a safe haven to torturers.

In conclusion, Mr. Chairman, I would like to ally myself with the comments that Mr. Posner just made in response to some of the administration points, and I would certainly be happy to respond to questions along those lines, as well.

Thank you very much.

[The prepared statement of Mr. Shattuck follows:]

Testimony  
of  
Amnesty International USA  
on  
The Torture Victim Protection Act  
S.1696

Presented to the  
Subcommittee on Immigration and Refugee Affairs  
Senate Judiciary Committee  
June 22, 1990

Mr. Chairman, I am John Shattuck, Vice-Chairman of the Board of Directors of Amnesty International USA.

We want to commend you, Mr. Chairman, for holding these hearings today to further the progress of the Torture Victim Protection Act through the Senate. We are grateful to Senator Specter and Senator Leahy for introducing this legislation.

The House of Representatives recently passed a bill similar to this one by a vote of 362 to 4. We hope that the Senate will pass this bill by an equally impressive margin.

We regard this legislation as an important step in combating the widespread practice of torture. In June of 1984, the Senate Foreign Relations Committee held hearings on the phenomenon of torture following the publication of the Amnesty International 1984 Report, "Torture in the Eighties." At that time Amnesty International reported that the practice of torture was widespread, occurring in more than 90 countries around the globe. Further, Amnesty reported that torture was a systematic practice in 30 of those countries. It was not confined to countries of one political persuasion or another, but occurred in countries across the political spectrum.

I would like to be able to report today that that is no longer the case. However, I cannot. Instead, torture continues to be practiced on a wide scale by governments of every persuasion for a variety of reasons, none of them justifying the practice. The U.N. Special Rapporteur on Torture recently submitted a report to the U.N. Human Rights Commission which lists over 40 countries in Asia, Africa, Europe, the Middle East and Latin America with documented or suspected cases of torture. Over the last 18 months, Amnesty International has issued 29 reports on countries in which torture is a serious concern. A sampling of those countries includes Burma, Guatemala, Ethiopia, Iraq, Somalia, and Turkey, demonstrating again that torture continues to occur in countries of every region and across the ideological spectrum. Torture continues to plague the globe--a human rights epidemic.

The U.S. Government has taken a number of significant steps to combat the practice of torture. Passage of the Congressional Resolution Against Torture in 1984 (P.L. 98-447), which instructed U.S. Ambassadors to raise issues relating to the practice of torture, has proved to be an effective tool for those U.S. diplomats willing to use it. U.S. embassy officials attend trials where allegations of torture are raised. They investigate reports of torture and the State Department country reports expose this practice reasonably well. The United States was instrumental in the development of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations in December 1984. The United States signed the Convention on April 8, 1988, and later submitted it to the Senate for ratification. The Senate Foreign Relations Committee held hearings on ratification on January 30, 1990. We hope that a mark-up and floor vote will take place during this Session of Congress.

But the practice of torture continues to challenge our conscience as a nation. In its report on torture referred to earlier, Amnesty International detailed a twelve-point program to eradicate the practice of torture, a copy of which is attached to my statement. Key among those twelve points is the need to hold the individual torturer and those who directed others to torture accountable for their actions.

Unfortunately, few if any countries regularly or even rarely attack the problem of torture by bringing to justice those involved in its practice. Perhaps this is too much to expect, particularly where the practice is sanctioned by the political or military elite in the country who continue in power.

So the challenge to hold torturers to account falls upon the international community of nations and those with the political will to take action. We hope that this committee will look on this legislation in that light, as a means of holding torturers to account for their actions when their own governments are unwilling or unable to do so. The legislation would deny a safe haven in the United States to torturers. Torturers coming to the United States would face the risk of being sued by their victims in civil court for damages related to torture or by family members if their actions had resulted in death.

One other element of the twelve-point program against torture that this legislation addresses is the need to compensate the victims of torture. Obviously what is intended here is that the government under whose real or apparent authority the torture occurred compensate the victims for their suffering and loss. However, where that is unlikely or impossible to bring about, victims would have an opportunity for compensation or some sense of redress of their grievances through a civil suit in U.S. federal courts, if both they and the torturer are within the jurisdiction of the court. Under this legislation, such a remedy would be available for both aliens and U.S. citizens who have suffered at the hands of the torturer.

This legislation may not have the magnitude of an international convention against torture. It may not have the immediate impact that a U.S. Ambassador raising the issue directly with a government could have. But we feel strongly that enactment of this legislation provides an important additional weapon in the arsenal against the epidemic of torture.

June 22, 1990

## Amnesty International

# TWELVE-POINT PROGRAM FOR THE PREVENTION OF TORTURE

Torture is a fundamental violation of human rights, condemned by the General Assembly of the United Nations as an offence to human dignity and prohibited under national and international law.

Yet torture persists, daily and across the globe. In Amnesty International's experience, legislative prohibition is not enough. Immediate steps are needed to confront torture and other cruel, inhuman or degrading treatment or punishment wherever they occur and to eradicate them totally.

Amnesty International calls on all governments to implement the following 12-Point Program for the Prevention of Torture. It invites concerned individuals and organizations to join in promoting the program. Amnesty International believes that the implementation of these measures is a positive indication of a government's commitment to abolish torture and to work for its abolition worldwide.

**1. Official condemnation of torture**  
The highest authorities of every country should demonstrate their total opposition to torture. They should make clear to all law enforcement personnel that torture will not be tolerated under any circumstances.

**2. Limits on incommunicado detention**

Torture often takes place while the victims are held incommunicado—unable to contact people outside who could help them or find out what is happening to them. Governments should adopt safeguards to ensure that incommunicado detention does not become an opportunity for torture. It is vital that all prisoners be brought before a judicial authority promptly after being taken into custody and that relatives, lawyers and doctors have prompt and regular access to them.

**3. No secret detention**

In some countries torture takes place in secret centres, often after the victims are made to "disappear". Governments should ensure that prisoners are held in publicly recognized places, and that accurate information about their whereabouts is made available to relatives and lawyers.

**4. Safeguards during interrogation and custody**

Governments should keep procedures for detention and interrogation under regular review. All prisoners should be promptly told of their rights, including

the right to lodge complaints about their treatment. There should be regular independent visits of inspection to places of detention. An important safeguard against torture would be the separation of authorities responsible for detention from those in charge of interrogation.

**5. Independent investigation of reports of torture**

Governments should ensure that all complaints and reports of torture are impartially and effectively investigated. The methods and findings of such investigations should be made public. Complainants and witnesses should be protected from intimidation.

**6. No use of statements extracted under torture**

Governments should ensure that confessions or other evidence obtained through torture may never be invoked in legal proceedings.

**7. Prohibition of torture in law**

Governments should ensure that acts of torture are punishable offences under the criminal law. In accordance with international law, the prohibition of torture must not be suspended under any circumstances, including states of war or other public emergency.

**8. Prosecution of alleged torturers**

Those responsible for torture should be brought to justice. This principle should apply wherever they happen to be,

wherever the crime was committed and whatever the nationality of the perpetrators or victims. There should be no "safe haven" for torturers.

**9. Training procedures**

It should be made clear during the training of all officials involved in the custody, interrogation or treatment of prisoners that torture is a criminal act. They should be instructed that they are obliged to refuse to obey any order to torture.

**10. Compensation and rehabilitation**

Victims of torture and their dependants should be entitled to obtain financial compensation. Victims should be provided with appropriate medical care and rehabilitation.

**11. International response**

Governments should use all available channels to intercede with governments accused of torture. Inter-governmental mechanisms should be established and used to investigate reports of torture urgently and to take effective action against it. Governments should ensure that military, security or police transfers or training do not facilitate the practice of torture.

**12. Ratification of international instruments**

All governments should ratify international instruments containing safeguards and remedies against torture, including the International Covenant on Civil and Political Rights and its Optional Protocol which provides for individual complaints.

The 12-Point Program was adopted by Amnesty International in October 1983 as part of the organization's Campaign for the Abolition of Torture.

Senator KENNEDY [presiding]. Thank you very much.

I want to join in welcoming three long-time friends for whom I have enormous admiration. Father Drinan, we have been good friends for a number of years and we always know of your very significant contributions in public policy matters.

Mr. Posner, we have enjoyed working with you on many different matters, on human rights and immigration.

Mr. Shattuck, who is a very effective advocate for the protection of individual rights and liberties, and continues to be concerned about that and lives up in my home State.

We appreciate your presence.

I will include my full statement in the record.

[The prepared statement of Senator Kennedy follows:]



STATEMENT OF SENATOR EDWARD M. KENNEDY  
 HEARING ON THE  
 TORTURE VICTIM PROTECTION ACT (S.1629)  
 SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS  
 JUNE 22, 1990

The Subcommittee's hearing today is on the Torture Victim Protection Act.

It is appropriate that we are considering this measure at a time when Nelson Mandela is in the United States. For he stands as the most powerful symbol in the world today of the goals we are trying to achieve in the cause of fundamental human rights and the liberty of all humanity.

This bill would provide legal remedies in U.S. courts to victims of torture or extrajudicial killings who are unable to seek relief in the courts of their own countries.

Significant progress has been made in recent years in the worldwide effort against the cruelty and brutality of torture. Unfortunately, as we know only too well, not all governments abide by international standards and conventions. The record of torture and death squad activity by government officials in recent years demonstrates that all too often these officials consider themselves above the law and beyond the reach of any civilized sanction. The Torture Victim Protection Act is an important step in America's contribution to the enforcement of international laws against torture.

There are few actions so dehumanizing as torture. Victims bear the physical and psychological scars of their experience for life. Its use is designed to terrorize and oppress entire populations.

Other nations have an obligation to make their courts accessible to torture victims, and the United States should do so to the maximum extent our Constitution permits, in order to assure that torturers feel the full weight of international law.

The legislation before us today is a modest, but important step. There are reasonable limits to what we can achieve, in part because our laws require that both the victim and the torturer must be present in the United States for the matter to be considered.

But if other governments follow the course we are considering today, there will be fewer and fewer places for the torturers and the death squads to hide. By enacting this legislation we are helping to set a standard for other nations to apply under their laws.

I commend Senator Specter for his leadership on this important initiative, and I am pleased to co-sponsor this bill.

I look forward to hearing from the Administration on the legislation, and to receiving the views of our panel of eminent American human rights leaders.

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## TORTURE CONVENTION

Senator KENNEDY. Mr. Shattuck, you talked about the convention just in the closing parts of your statement and I would like to have you address—perhaps this has been addressed with the previous witnesses—whether the remedies proposed under the Torture Victims bill, as some argue, should be addressed in the context of the Torture Convention and not unilateral legislation by the United States. I know all of you have been very much involved in the Torture Convention, and so could you comment again about whether there is conflict between this bill and the Torture Convention?

Mr. SHATTUCK. Certainly, Mr. Chairman. This bill is entirely complimentary to the Torture Convention. The Torture Convention is a very significant multilateral treaty which involves the general proposition to which all the subscribing nations are bound to follow, that torture must be eradicated and that the states that sign that convention and other states, if they are willing to follow the precepts of the prohibition against torture even if they do not sign, should have a set of sanctions inside of their states.

The practical problem which has come out throughout this hearing, I think, Mr. Chairman, is that the worst torturing nations are those nations which either harbor the torturers or encourage them, are extremely unlikely to impose sanctions themselves and, in that sense, it is necessary to have a unilateral component to this general effort on the part of nations to eliminate torture, and this bill is indeed addressed to that.

It is by no means an effort to prosecute torturers or give victims rights insofar as there is no direct jurisdiction in the United States, so the victim and the torturer must be within the United States or within the jurisdiction of the United States. But if that occurs, then it is very much the case that if Libya or Iran or another state, which is unlikely to provide remedies internally, fails to do so, it is this bill that sends the signal that our country is not going to harbor torturers and is going to give those who are victims of torture a remedy.

## IMPACT OF LEGISLATION

Senator KENNEDY. That is another point, because there are going to be so few cases, is the bill really important? Mr. Posner, with the small number of individuals covered, given the requirement that the torturers and the victims be in the United States, realistically how much will this bill accomplish?

Mr. POSNER. I think it is important, in two respects. I think it is, first of all, even if it is a handful of people every year that avail themselves of this protection and are able, as Mr. Shattuck said, to obtain compensation. It is a recognition that torture happens to real people and there ought to be some remedies available to those people somewhere in the world.

I think, on a broader level, it is important symbolically for us to say that we are going to extend every opportunity and go out of our way to make it clear to the world community that we not only say we oppose torture, but we are willing to do something about it. It is important that people who commit torture know that there is

a possibility, even if it is a slim possibility, that they are going to be sued in the United States and may have to pay some money for their actions.

So, I think both in limited practical terms, for a few cases a year, not a large number, that in a broader sense, a practical recognition confirmation that our country stands against torture and is willing to do something to prevent it.

Senator KENNEDY. I imagine you also have the hope that if we pass it, other countries might take some steps, as well, and this point should not be lost.

Mr. POSNER. Absolutely.

#### EFFECT ON TORTURE VICTIMS

Senator KENNEDY. Let me ask Father Drinan just about the therapeutic effect of the bill on torture victims. We know there is a victims treatment center up in Minnesota that tries to deal with the aftershock and posttorture trauma. I am familiar with a case of a Massachusetts man who was unsuccessful in the Saudi courts in getting prosecution. Do you think that this can have some impact in terms of the posttorture trauma of individuals? Do you think this can be useful?

Father DRINAN. Senator, that is a very good observation. I think that it can. I think if we clarified existing law, without enacting new laws at all, just clarify the law that was put through by the First Congress, it would have a therapeutic effect. It would say that the United States forbids it and there is a remedy.

Incidentally, I have never heard before today the allegation that there is a conflict or an inconsistency between the Convention on Torture and this particular act. In the American Bar Association that point never came up, and in the hearings and in the floor debate in the House that point had never been alleged.

So, Senator, I am very familiar with what they are doing in Minnesota and also in Sweden. I talked with Mr. Tinnerman at some length on several occasions in Argentina and here about the physical and psychological impacts on those who were tortured, and I think the enactment of this particular bill would send a signal that we want to deal with this terrible disease around the world in a unique and creative way, and that is, as Senator Kennedy suggested, other nations of the Earth would follow, so that the torturers would know that if they do this in their own country and if they travel abroad, they are very likely to be hit with heavy damages.

#### DEFINING ACTIONS UNDER GOVERNMENT AUTHORITY

Senator KENNEDY. To continue, Father Drinan, section 2 of the bill says that it covers every person who, "under actual or apparent authority of any foreign nation," subjects any person to torture or extrajudicial killing. How could you prove this? Could you give us an example—a fact situation—which demonstrates this?

Father DRINAN. As you know, Senator, that language is tracked from section 1983 and from the civil rights bill, all that jurisprudence there would be applicable. But I think it would be very clear that if, for example, some woman from Chile is here now and she can demonstrate that, under the official policies of the Pinochet

government, she was tortured, then clearly we could say that she is entitled to any compensation that can be derived from any assets that Chile might have here. I think it is as provable as it is in the cases of the civil rights area.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman. In your absence, Senator Kennedy, I had expressed my appreciation for your scheduling this hearing this week and moving this legislation along.

Father Drinan, let me pick up on the last comment you made about pursuing assets of Chile. I am not sure that this legislation can go to another sovereign state, the assets of a country.

Father DRINAN. No, it would be a person from Chile. As in the *Filartiga* decision, it was an individual in Paraguay, so I think the misgivings of the State Department are not well placed.

Senator SPECTER. You mentioned Chile. It is not quite on point, but a number of us are still working on the *Letellier* case, on the murder or assassination on the streets of Washington, DC, in 1976. Again, illustrative of State Department reticence to pursue the matter with real forcefulness, looking favorably upon some lesser action by the new Chilean Government, which raises a lot of questions.

I would pick up on what Senator Kennedy had asked about with respect to how many of these cases there would likely be, and I inquire of you three gentlemen, if you know of any other litigation which has been started on this torture theory under the authority, say, of the second circuit opinion.

Mr. POSNER. I think in the last 10 years, there may have been a dozen cases, 10 cases, something like that, a very few. Now, part of that is the—

Senator SPECTER. Do you know the results?

Mr. POSNER. There are a few cases, the *Suarez-Mason* cases, of which there were several concurring cases in the Northern District of California, the judgments were in favor of the plaintiffs, and by the time damages were awarded, the Government of Argentina had extradited Suarez-Mason back to that country.

A number of the cases were dropped and, as far as I know, a couple of the cases were the situation you just described, where somebody tried to sue a state. *Seiderman* was one such case, in the Central District of California, and, as you suggest, that is clearly beyond the scope of what we are intending and beyond the scope of section 1350 of the Foreign Sovereign Immunities Act, which was deemed to have applied.

So, I think the answer is that there may be a couple of cases a year. If this legislation passes, my guess is that it may go up as high as 5 or 6 cases a year or 10. We are not talking about a flood of litigation. The circumstances are so improbable that we are not going to see, I think, any likely flood, but we are going to see probably more attention to it and probably a handful of good cases brought a year.

Senator SPECTER. The *Tel-Oren* case in the District circuit poses an interesting line of an approach, where the plaintiffs were survivors and representatives of persons murdered on an armed attack on a civilian bus in Israel in March 1978, and the defendants

named were the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab-Americans, and the Palestine Congress of North America, and to have jurisdiction to impose civil damages would certainly open up an area which really ought to be aired, and if litigation could establish some form of justice in the form of monetary damages, that certainly would be quite a significant step forward.

Mr. POSNER. I think that is right, although in that case, there were several problems. One is that they were, in the one instance, suing a state, Libya, which again has problems with the Foreign Sovereign Immunities Act, and, in the second instance, suing an independent entity or a series of entities that are not governments.

So, I think Judge Edwards, in his dissenting opinion, correctly pointed out that those were impediments under section 1350, but certainly the spirit of what people were trying to do in holding violators accountable is something that we support.

I should say, in that opinion, Judge Bork made the observation that this area was one where legislative clarification and certainty would be appreciated by the courts, and I think it is in that spirit that this legislation is in the right direction.

Senator SPECTER. Well, that is why the legislation is really brought. The *Tel-Oren* case has a very complex series of a short pro curiam opinion of the court and three expansive concurring opinions raising a great many complex legal issues, and this bill would lay it all to rest.

Mr. Shattuck, do you have anything you would care to say?

Mr. SHATTUCK. Yes; Mr. Chairman, if I could just add to that, I did not want to cite, I do not have any additional cases to cite, but I think really to credit you, as the sponsor and the person, along with other Senators, who crafted this legislation, I think it is worth just very quickly reviewing the four limitations on jurisdiction that the bill imposes, so that, in response to your question about the size of the floodgates of litigation which were very gently alluded to by the administration witnesses, I think there are very clear answers to that.

First, the suit can only be brought when the victim has no remedy in the country where the torture occurs, and that is a very important limitation and is the way in which this legislation compliments the convention, in that we are not suggesting, you are not suggesting through the legislation that there would be a remedy, that there would be some remedy in the United States, if there would be some remedy in the country where the torture occurs, and that needs to be demonstrated to the courts.

Second, both the victim and the torturer must be within the U.S. jurisdiction, under normal jurisdictional determinations, under the regular personal jurisdiction, jurisprudence that we have in the Federal courts.

Third, individuals outside the U.S. jurisdiction who are protected by sovereign or diplomatic immunity or in any other way protected as agents of a state, through normal sovereign and diplomatic immunity channels, cannot be sued or cannot be reached.

Finally, the torturer must be acting under the actual or apparent authority of the foreign nation, and that is a subject, as Father

Drinan was suggesting, that is very similar to acting under color of state law, although I think in this case it would probably be even a narrow determination that might be made by an individual court.

So, all of those limitations are very important, but, nonetheless, the administration cuts through the great confusion that exists that I think the administration witnesses were conceding, in terms of the applicability of the Alien Tort Claims Act, but it is a rather elderly statute which clearly applies, but this makes it clear exactly what it means.

Senator SPECTER. Well, I thank you very much for coming. I think this is an important bill and—

Father DRINAN. Senator Specter, could I add just a footnote to that question? Recently I wrote about the *Tel-Oren* decision as compared with *Filartiga*, and I was very pleased to get a letter from counsel in *Tel-Oren*, who said that if Senate bill 1629, this bill, had been the law, the result in *Tel-Oren* would have been different.

Senator SPECTER. Thank you very much for coming. I think that it is an important step forward in trying to provide some judicial remedies. We are doing a great many things in a great many areas on the terrorism line, which touches on this, trying to get some international court activity on drug cases and on terrorism cases.

There are a lot of very difficult concepts that we have started to explore with the administration officials, the implication of Fawa Unis and moving for arrests in other parts of the world where there are no governments, where there is a government like Lebanon, which cannot extradite, or maybe even get into a situation where there is a country which will not honor extradition. I do not know that the United States can make arrests in that context or if it can assert the jurisdiction of our courts, but it is a question to be at least considered.

We have a very complex controversy now with the Mexican Government, arising from the process by which the Mexican doctors have been brought to the United States and the torture, apparently, of a Federal drug agent doing very important work. We have to protect our drug agents, wherever they are. That is a very complex and a very fascinating matter.

I do not know when we will really know all as to what happened, if ever, but if you have torture by officials of another government and you identify the torturers and the criminals and you cannot get extradition and it is something that is of core value of a country like the United States fighting drugs and sending our agents out subjected to that kind of torture, what do you do about it, short of going to war? And these are heinous and horrendous acts and wherever we can move against them, we should, and this, of course, is just a very small step, but I think an important one.

The House has acted and this hearing will give it the basis for moving it up on the judiciary calendar. I predict this legislation will be enacted, and I further predict it will not be vetoed.

Thank you.

Father DRINAN. Thank you very much.

Senator SPECTER. And if it is vetoed, I will not make a prediction as to—

[Laughter.]

## CASE OF SCOTT NELSON

Senator KENNEDY. We had a fellow named Scott Nelson from Massachusetts who had been working in Saudi Arabia and he writes that on September 27, 1984,

I was taken from my place of work in Saudi Arabia by officials of the government and spent the next few hours being forced to be bent over a rod until the joints of the knees separated, my shoes were pulled off and they tortured me.

And he continues along.

The Nelson family was in touch with me and with the Embassy and he was released and told it was a mistake, which is enormously reassuring for this poor fellow. He goes on to say,

As you suggested, I contacted the State Department when I returned and soon found out they were going to do battle to get their assistance, and they referred to Saudi Arabia as their client. It felt like Saudi Arabia was the one who was tortured by me. At the Department of State, I had to ask the desk officer if this was the U.S. State Department.

They gave him a list of 20 lawyers in Saudi Arabia and none of them would take the case, because of fears of reprisal.

I will put Mr. Nelson's letter in the record, but here is a hard-working, decent person who has just pursued this over a long period of time. In every single place he has tried to go through the various options, seeing the Ambassador, he has been denied any kind of redress whatsoever, and he talks about this posttorture trauma that continues with him in his daily life. I am not sure that passing this bill will answer, obviously, his particular problem, but there is no question that there are these kinds of anxieties, and obviously justice that needs doing. But his letter is something that we will put in the record.

[The information referred to follows:]

Received 6/19/90

The Honorable Edward Kennedy  
Chairman  
Immigration Sub. Committee  
United States Senate

Dear Senator Kennedy;

I am writing you today for a number of reasons. First to show you how much we need the passage of S1629 and second to be able to thank you publicly for all that you did for my son Mathew, wife Pam, and myself in 1984. Without your intervention extracting us from my tortures we would not be here today to write this letter.

On Sept. 27, 1984 I was taken from my place of work in Saudi Arabia by officials of the Gov. (none Spoke English) and put in a cell. The next few hours consisted of being forced to do deep knee bends over a rod until the joints in the knees separated and I fell to the ground. They pulled off my shoes and tortured me with phalanga, the beating of the bottom of your feet causing great pain and physical complications that persist today. Then I was kicked punched and beaten from head to toe. I was forced to sign a paper in Arabic that to this day have no idea what it said. I was never taken to a court, charged, tried, or convicted of any crime in Saudi Arabia. I now suffer with the after effects of this torture but have developed Posttraumatic Stress Disorder that effects my every day life. Due to the results of the torture I have not been able to work in 5 years I have had many operations and treatments and will continue to need medical attention for a long time to come.

When they finally released me after your intervention I was told many times by many different Gov. of Saudi Arabia officials that "it has all been a big mistake" and I should just go back to work. I refused all their offers and about 8 days later after meeting many Saudi Gov. people I was given my passports and left Saudi Arabia.

As you suggested I contacted the State Dept. when I returned and soon found out that it was going to be a battle to get their assistance when they refer to Saudi Arabia as "their CLIENT". It felt like Saudi Arabia was the one who was tortured by me and I had invaded their Dept. of State I had to ask the desk officer if this was the UNITED STATES State Dept. The desk officer then gave me a list of aprox. 20 Lawyers in Saudi Arabia to contact. I sent letters to each and with out exception none would even talk to me about the case. They said one of three things 1) conflict of interest 2) not in their line of work 3) Would not take a case against the Gov. for fear of reprisal. But all did say the same thing that this type of case is best handled with direct contact with the King.

My Attorney contacted Fred Dutton who is the Attorney for the Saudi Embassy in Washington. After many phone calls they agreed to meet and formulate a claim to be sent by Dutton to the King. This was completed to the satisfaction of Dutton and he was to send it to the King. After many calls to find out the status of the claim and almost 2 years later Dutton informed me that he was not "CONDUIT" to handle claims and would not send it to the King.



During this time Many members of Congress had written dozens of letters for me to the Saudi Gov; U.S. State Dept; and the Administration requesting help in getting the claim to the king. I appeared before the House of Representatives with many other Americans that have had the same problems in Saudi Arabia written hundreds of letters and phone calls to anyone that would listen.

On one of my many calls to the State Dept. I was transferred to Mr. Cutler Ambassador Designate to Saudi Arabia he asked if I would come to D.C. and meet with him.

I met with Cutler and agreed to go through the same list again of lawyers and he agreed that if I could not get one he would take my case to the King if he gets - confirmed. I along with the Embassy in Saudi contacted the lawyers and received much the same answers. I contacted Cutler and told him that no lawyer would take the case and seeing that he had been confirmed would he now take the case to the King as he told the Senate he would during his hearing and he told me to never contact him again to call the desk at the State Dept. I did this and they just blew my request off

I filed suit in Fla against the Saudi Gov. This was soon dismissed due to Foreign Sovereign Immunities Act. and is now on appeal in Atlanta and will be heard on June 28 1990

I now go back to the State Dept. International Claims Dept. and a legal advisor tells me that before the State Dept. can raise this claim to the Gov. of Saudi Arabia I must satisfy all local remedies but has not to this day told me what they are. He did tell me that I have to send a copy of the complaint to the high court called The Board of Grievance (B.O.G.)

I did this and it was returned to me unopened with the stamp that said "REFUSED" I contacted the Desk officer at the State Dept. and he made arrangements to have the Embassy in Saudi deliver it.

During this Time Cutler left Saudi and the new Designate Freeman called me. He wanted to meet in D.C. but in all of my dealings with the State Dept. I felt that he could tell me what he wanted to over the phone as I did not want to waste the time and money going to D.C. as I have yet to get the State Dept. to do as they promise. All that he said was that he would follow my case.

Freeman in his confirmation hearing before the Senate tells the committee that the B.O.G. would handle the case by mail that no lawyers were required I would not have to go to Saudi and appear before the B.O.G. as they would request information as they

needed

it from me and would send me any questions that they had. I heard nothing from the B.O.G. until two weeks ago when during one of my weekly calls to the State Dept. I was informed that I should be in Saudi the Following Sat for trial at the request of the B.O.G. When I stated that I cannot and will not go to Saudi Arabia I was asked if I had a lawyer in Saudi who could represent me . I could not believe it after 5 years of trying to get a lawyer they are asking this question as this last go around the Embassy contacted all the lawyers. Now I am told that the State Dept. got a continuance until Aug 1990 and If I do not have a representative or I do not

appear the case will be dismissed '

I think it is plain to see that there is no place for those of us who have problems outside the U.S. to be able to resolve their claims as the State Dept. can not even tell you what you have to do to meet their requirements before they will take your claim to a Foreign Gov. for you. I feel it should be put in the record that it was never the intent of congress when the alien Tort Staute was made into law that U.S. citizens not have those same rights given to non-citizens of the U.S. and to go one more step this bill should be made retroactive to allow people like myself to at least have his day in court.

I hope that passage of this bill will be expeditious and a message sent all over the world that the U.S.A. will not stand and protect those who support torture and the victims of torture will have a forum to be heard and compensated for their suffering. When dealing with the State Dept. you cannot help the feeling that you are getting involved in a conflict of interest situation as the CLIENT is more important than a tortured American.

I am reminded of the words told to me by a ranking official at the Saudi Embassy in Washington "Why should my country pay your claim if you country will not support it." Now is the time for my country to stand up and do something about torture. Those who do not support this bill are either blind to torture or are supportive of torture

WITH THE THANKS FOR MY FREEDOM FROM TORTURE AND THAT OF MY FAMILY

With kindest regards, I am

Most sincerely,



Scott J. Nelson

## AND RESEARCH CENTRE

SAUDI ARABIA  
RIYADH - 11211

و من ذل مائة تحت المصيبة  
اتحاد المملكة العربية السعودية  
الرياض - ١١٢١١

TO WHOM IT MAY CONCERN14 Ramadan 1404  
13 June 1984

Reference: Mr. Scott Nelson - Letter of Appreciation

Mr. Scott Nelson was assigned as Monitoring Systems Engineer in the Utilities & Maintenance Division of King Faisal Specialist Hospital on December 7, 1983. During this period of time, due to manpower shortages and Hospital requirements, Mr. Nelson was assigned additional duties as Supervisor of the Elevator Team, and Acting Head of Plant Operations/Maintenance.

In the position of Supervisor of the Elevator Team, he has developed operating procedures for both routine and emergency call outs, initiated a reporting system that provides current and daily status on all elevators, developed and pursued spare parts requirements on all elevators, and has researched and identified required specifications, drawings and manuals for all five types of elevators in use on King Faisal Specialist Hospital property.

Mr. Nelson has devoted a vast amount of overtime without compensation in the interest of maintaining the elevators in working order during a period of time when parts and personnel were nonavailable. On numerous occasions, through the innovation of Mr. Nelson's efforts, he has been able to maintain the elevators successfully in the Hospital, MCF, KAC, "D" Complex and other Residential Areas. In order to achieve this, Mr. Nelson has been required to work nearly every weekend and has been called out at all hours of the night during the week.

Mr. Nelson assumed the responsibilities and duties as Acting Head of Plant Operations/Maintenance on May 13, 1984. This was due to the fact that the Acting Department Head had submitted his resignation and no available replacement had been identified or approved. The Head of Plant Operations/Maintenance is certainly a full-time and demanding job and carries the responsibilities for the operation and maintenance of critical equipment, producing utilities essential to the Hospital's operation. These services include 50 and 60 cycle electrical power production, steam generation, domestic hot and cold water services, low pressure hot water for heating and chilled water for cooling the Hospital. Plant Operations Department is also responsible for

Continued...2

compressed air system, liquid propane system, liquid oxygen system and distribution system for all above utilities. As Acting Department Head of Plant Operations he was also responsible for monitoring and operating all emergency standby equipment at ICU, KAC housing, the Water Reservoir and the Diesel Tank Farm, plus the operation of six electrical substations.

Mr. Nelson has proven his ability to successfully and efficiently carry out not only the responsibility of his primary job as Monitoring Systems Engineer, but all duties, responsibilities, and functions as Acting Head of Plant Operations/Maintenance, and Supervisor of the Elevator Team.

This letter of appreciation is by no means proper compensation for the devotion, professionalism and concern Mr. Nelson has shown in the interest of the Hospital. His dedication reflects not only upon himself but on the Division and the Hospital as a whole.

Sincerely yours,



Gerald L. Jeffew  
Assistant Administrator  
Utilities & Maintenance Division

ULL:js

cc: Official Personnel File

Tele: 391039 (ROSPEC SJ) - Cable: Specialist  
Telephone No. 4647272

تکس ۲۰۹۰۵۰ (روسیک س.ج.) - برقیا : اتنسیسی  
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Abdulaziz Al-Mohaimed

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Abdulaziz Al-Mohaimed

Law Firm

Attorneys & Counsellors - at - Law

License No. 132

Abdulaziz Al-Mohaimed

عبد العزيز عبد الرحمن المحيبي  
حامون ومستشارون قانونيون  
ترخيص رقم ١٣٢

11th Sept., 1988. Ref.

التاريخ ..... الرقم .....

R

1 P.

Mr Scott J. Nelson  
2601 Honard Road  
Raleigh  
N.C. 27612.  
U. S. A.

Dear Mr Nelson,

With reference to your letter dated 9th August, 1988, please be advised that we prefer you deal with this case yourself through direct contacts with the higher authorities in the Kingdom.

Very truly yours,

Abdulaziz Al-Mohaimed

HAIG V. KALBIAN  
ATTORNEY AND COUNSELOR AT LAW  
1900 L STREET, N.W.  
SUITE 500  
WASHINGTON, D.C. 20036

April 6, 1989

Mr. John Knox  
International Claims - I/CID  
United States Department of State  
Washington, D.C. 20520

TELEPHONE (703) 339-6675  
TELECOPIER (202) 466-9042

Re: Scott Nelson

Dear Mr. Knox:

As you know, the above-named citizen of the United States has, for the past several years, attempted to pursue legal avenues for filing a cause of action against the government of the Kingdom of Saudi Arabia. Mr. Nelson is seeking damages for personal injuries he suffered at the hands of the Saudi government and its agents while employed there as an expatriate.

Mr. Nelson first contacted me about a year ago. He had been referred to me by colleagues who were aware that I practiced law in Saudi Arabia for the period 1983-1985. I was employed in Dammam, Saudi Arabia, as a U.S.-trained attorney for the law office of Adbulluh Al-Munifi.

During my stint in the Kingdom, I argued several cases before the Shari'a Courts as well as the Kingdom's Commercial Courts. It is my opinion that Scott Nelson would be unable to secure Saudi legal counsel to undertake a cause of action against the Kingdom in a Saudi forum. Lawsuits against the government do arise in commercial settings (i.e., collection type cases, breach of contract), however, Mr. Nelson's case is in tort and seeks to pin liability against the Saudi government for the acts of its agents, namely brutally beating and imprisoning Mr. Nelson for no apparent reason. This type of case would be most sensitive and highly charged. No Saudi attorney that I am aware of would jeopardize his practice, and some would argue his life to take on such a case.

Should you have any questions regarding the above, please let me know.

Sincerely,

  
Haig V. Kalbian

✓cc: Mr. Scott Nelson

Senator KENNEDY. What information do you have about people that come here who are torturers? We had, as I remember, a situation with a Paraguayan not long ago in the past, which led to the *Filartiga* case. But could you give me any feel on that issue?

Mr. POSNER. Well, we are certainly aware that people have come to the United States, a number from Latin America that I am aware of who have been in and out of the United States in recent years. We have been approached by people in communities in South Florida, for example, who are aware that Central American and other police and military officials are in the area, and I imagine that there are similar incidents involving other countries, as well.

I think that we are going to find, when this bill is enacted, that people are more attentive to trying to identify some of those people. Again, there is still going to be a limited number of lawsuits brought, because of the requirement here that an individual has to identify his or her precise torture and they have to be both in the United States. I do not think that is going to happen very often, but I think the sad reality is that a number of torturers and gross human rights violators come in to retire in the United States, and I think that is something we ought to be concerned about and we ought to try to prevent it.

Senator KENNEDY. I am drawing on memory now. But I remember the time when Marcos and his group were coming in here and the initial group was very sizable. One of the individuals who fled Marcos spent a lot of time up our way and returned to the Philippines to be a part of the opposition. My son Teddy was over there, he had been to a conference in China on disability, and stopped by there to watch the elections, had dinner with the anti-Marcos forces on a Tuesday night, and Thursday night his host, Evilio Javier, had been shot and killed by a policeman under orders, at least allegedly, of a pro-Marcos legislator who had a notorious reputation personally for torture and outrageous behavior. And I took the liberty of indicating to the State Department that if he came to this country that we should do something about his case. I did not know quite what we were going to do, but situations such as these do arise.

This situation still rings in my ear.

Mr. POSNER. Senator, if I can just make one very quick comment, in reaction to something you said a moment ago about Saudi Arabia. I think we are, as we have looked at the Torture Convention today and we have looked at this legislation, there is a third component of what the U.S. Government can do and that is to have strong diplomacy. Saudi Arabia is one of some countries, but it is a prominent example of a place where our diplomats essentially do not have a human rights policy. We do not advance human rights issues vis-a-vis the Saudis, because we have other interests at stake.

Even in the context that you suggest, where an American citizen is abused in that country, where we have an absolute opportunity and an obligation to do something, the tendency is not to make waves, and I think it is incumbent on all of us to be attentive to that and make sure that, even as we pursue these other avenues,

that our diplomacy includes aggressive promotion of human rights in every part of the world, regardless of other circumstances.

Senator KENNEDY. Well, I think that is a good point and it might be useful for us to write to the chairman of the Foreign Relations Committee to raise this during confirmation hearings on ambassadorial appointments.

I remember that my father was an Ambassador and he used to say that his impression of ambassadors was that, for the first 3 months they represent the United States, and after that they represent the other country in the United States. I do not know whether that is true.

Mr. SHATTUCK. Mr. Chairman, if I could just add one very short (footnote to what my colleague Mr. Posner said, I think that point goes directly to this legislation, as well. It is not an unrelated point, and it is really in some respects a response to the point made by the administration regarding the alternative of criminal sanctions.

While I do not have any particular organizational view on whether criminal sanctions would be appropriate here, I think the most important thing to note is that criminal sanctions depend on prosecutorial discretion and prosecutorial discretion depends, in many ways, on the determinations that are made about interests that we may have as a Nation vis-a-vis other countries.

So, I fear that if we moved in the direction of criminal sanctions as an alternative to civil remedies here, you just would not find the kind of effective enforcement mechanism that otherwise you would.

Senator KENNEDY. You might give us a list of the countries where torture is the most troublesome now, and then, Senator Specter, you and I could write to the Foreign Relations Committee, and when they consider ambassadors to those countries, they might inquire of those nominees just as a reminder of this point.

Mr. SHATTUCK. I would be glad to submit that, Senator.

Father DRINAN. Senator Kennedy, one last point.

Senator KENNEDY. Yes.

Father DRINAN. This also includes, this bill, extrajudicial killing, and it seems to me that the 71,000 people killed in El Salvador, through their survivors, might well reach people who did this thing under color of foreign law.

Senator KENNEDY. OK. We appreciate your testimony.

The subcommittee is adjourned.

[Whereupon, at 11:11 a.m., the subcommittee was adjourned.]



## APPENDIX

### ADDITIONAL STATEMENTS FOR THE RECORD

# THE CENTER FOR VICTIMS OF TORTURE

July 3, 1990

Senator Edward Kennedy  
United States Senate  
Washington, D.C. 20510

attention: Michael Meyers

Dear Senator Kennedy:

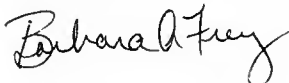
The Minnesota Lawyers International Human Rights Committee and the Center for Victims of Torture collaborate to provide treatment, legal services, and advocacy for victims of torture by foreign governments. Although independent organizations, we often serve the same clients. The Minnesota Lawyers Committee provides free legal services for the Center's clients, approximately 65% of whom apply for political asylum. The Minnesota Lawyers Committee refers its clients who are torture survivors to the Center for Victims of Torture for medical, psychiatric, psychological, and social services specially designed to meet the long-lasting traumas they have endured.

Attached are written testimonies from our two agencies urging the Senate's support for the Torture Victim Prevention Act. We are both human rights agencies with an advocacy function. But we both gain special insights into the lasting impact of torture by our work with individual survivors. Our professional staffs and community volunteers are profoundly affected by the support and care offered to hundreds of victims of strategic physical and psychological abuse by foreign governments. We understand the ongoing trauma they experience by the impunity from any social sanction granted their torturers.

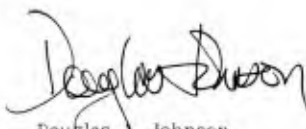
We strongly urge that the United States Senate provide the survivors of torture with a legal tool to break the impunity of their abusers by quickly passing the Torture Victim Protection Act.

Thank you for holding hearings on this act, and for your support to the survivors of torture.

Sincerely,



Barbara Frey  
Executive Director  
Minnesota Lawyers  
International Human Rights  
Committee



Douglas A. Johnson  
Executive Director  
Center for Victims of Torture



STATEMENT OF SUPPORT BY THE CENTER FOR VICTIMS OF TORTURE  
FOR THE TORTURE VICTIM PROTECTION ACT OF 1989

The Center for Victims of Torture urges the Senate Judiciary Committee and the entire United States Senate to pass S.1629, the Torture Victim Protection Act of 1989.

The Center for Victims of Torture is an independent non-profit agency, founded in 1985 to provide treatment for survivors of torture by foreign governments, and their families. In addition, the Center serves as an information, education and training resource for professionals and paraprofessionals providing care to victims of torture; provides research toward effective treatment methods for victims of torture; and works for the prevention and prohibition of torture through public education and cooperation with other human rights organizations.

The Center's multi-disciplinary treatment team provides clients with medical assessment and long-term medical care, psychological assessment and long-term psychotherapy, psychiatric evaluation and follow-up, social work services and advocacy, as well as pro bono legal assistance through a cooperative arrangement with the Minnesota Lawyers International Human Rights Committee.

The treatment function of the Center for Victims of Torture officially began in May 1987 and since that time Center staff has provided a variety of services to 243 torture victims from 21 countries. These 243 individuals were served as follows: 97 received multi-disciplinary rehabilitative treatment services; 10 received medical care only; 11 received short-term counseling; 28 received consultation services; 56 were referred to other agencies; 35 requested information only; and 6 cases are pending. Approximately 39% of our clients come from Africa, 12% come

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A MINNESOTA NON-PROFIT CORPORATION WITH TAX-EXEMPT STATUS

from the Middle East, 13% come from Latin American, 19% come from Southeast Asia and 4% come from Eastern Europe. Approximately 13% of our clients are either United States citizens who have been tortured abroad or survivors of the Nazi Holocaust.

We respectfully urge passage of the Torture Victim Protection Act of 1989 because of our documentation of the profound and long-lasting effects of torture, effects which do not seem to diminish with time without specialized care. Torture is used to achieve broad political ends through the strategic victimization of hundreds of thousands of individuals. The purpose of torture in this context is to destroy an individual's capacity to take meaningful action and to belong to a greater community. This occurs when, under torture, victims are forced to act or react in ways that are so much in conflict with their personality and identity (in terms of their humanity, cultural norms, gender roles, spiritual values, professional roles, etc.) that their vision of themselves is shattered. Their connection to others is also profoundly damaged by having been the target of the intentional infliction of extreme pain and suffering by other human beings. This is particularly threatening when carried out by persons who represent government policy, are government sanctioned and government employed.

The effects of such brutal treatment impact all levels of functioning. On the individual level, this is reflected in physical, psychological and cognitive symptoms. Physical symptoms presented by torture victims include headaches, backaches, joint pain, gastrointestinal problems, hearing deficits, visual deficits, dental problems, scars and physical damage to areas of the body most directly affected by the torture. Psychological symptoms include severe nightmares and sleep disturbances, irritability, panic attacks, appetite disturbances, anxiety, depression, intrusive re-experiencing of the torture experience, sexual dysfunction, hyperalert reactions, and profound feelings of shame and alienation. Torture affects cognitive functioning as well: loss of short-term memory, confusion and an inability to concentrate are commonly seen in our clients

as repercussions of torture. Often these symptoms will manifest themselves in psychiatric diagnoses. More than 2/3 of our clients meet criteria for the diagnosis of Post-Traumatic Stress Disorder. Torture also severs family and community ties by severely impeding trust, intimacy and communication.

It is obvious that the cumulative effects of torture often result in a significantly impaired level of functioning. Learning a new language, working as an effective employee, having success in relationships are all profoundly hampered by the aftereffects of torture. This can be seen, for example, by the fact that 70% of our clients, most of whom are well-educated, are now either unemployed or underemployed.

Initial research undertaken in countries where repression has stopped and democratic governments restored demonstrates that the issue of amnesty and impunity for torturers has a significant effect on the rehabilitation of survivors of torture. Dr. Elizabeth Lira, director of a treatment center in Chile, states "on a social level desires to forget are generated in the name of putting an end to the horror and these inevitably contradict the necessity of not forgetting, which on the therapeutic level is a condition for mental health."

On a more global level, the denial of safe haven to the torturer can act as a preventive measure. In order to operate, torturers need government sanction, safe haven and impunity. By denying the legitimacy of torture, by depriving perpetrators a protected place to flee after committing torture and withholding impunity for acts of torture, the United States Senate will make a significant contribution toward eliminating this evil practice. This act of mercy must extend not only to those survivors seeking protection in the United States, but to our own citizens as well, who run the risk of being tortured abroad and will be similarly affected.

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**MINNESOTA LAWYERS  
INTERNATIONAL HUMAN RIGHTS COMMITTEE**


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**STATEMENT OF SUPPORT BY THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE FOR THE TORTURE VICTIM PROTECTION ACT OF 1989**

The Minnesota Lawyers International Human Rights Committee (Minnesota Lawyers Committee) urges the Senate Judiciary Committee and the entire United States Senate to pass S.1629, the Torture Victim Protection Act of 1989.

The work of the Minnesota Lawyers Committee reflects the widespread concern among the people of Minnesota for the advancement of human rights and the elimination of torture. The organization has its headquarters in Minneapolis, Minnesota.

The Minnesota Lawyers International Human Rights Committee was established in 1983 as a nonprofit organization committed to the promotion and protection of human rights in the United States and abroad. It has over 800 members, including over 600 lawyers. The Minnesota Lawyers Committee has undertaken investigations of torture throughout the world and has sought to redress the wrongs done to torture victims.

Stopping torture should be a primary objective of United States foreign policy and the policies of all civilized societies. Yet, two-thirds of the world's governments practice or condone torture. Torture has no ideology; it is practiced by governments of both the right and the left. Unfortunately, torturers learn from each other. Repressive governments share torture techniques and integrate advances in science to accentuate pain and psychological damage. It is clear that the goal of torturers is to inflict long-term physical and psychological damage on individuals. Torturers seek to destroy, through both physical and psychological means, the very core of the victim's sense of dignity, humanity and personhood. Unless treated, torture has a

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lifelong impact on the victims, their families, friends and communities.

The United States has been active as an advocate for human rights and opponent of the use of torture by persons acting with actual or apparent authority of foreign nations. In the 1970's, the U.S. government adopted laws designed to prohibit economic and military assistance to consistent human rights violators.<sup>1</sup> The United States signed the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment on April 18, 1988, signifying its intention to ratify the treaty in the future. The ratification of the Convention Against Torture is now under consideration by the United States Senate. By passing the Torture Victim Protection Act of 1989, the United States can reaffirm to the world that it does not condone the use of torture.

For torture victims and for those who try to assist victims of torture in the healing process, it is frustrating and discouraging that our law has not yet established a clear legal remedy for U.S. citizens and others who have been tortured by foreign government. It is not difficult to understand the additional suffering that is caused to our clients -- torture victims from around the world -- if they discover that their torturers are present in the United States and that they have no right of legal action against them.

It is because of the degree of psychological harm to torture victims that would be generated by the prolonged presence of their torturers in the United States, that the Minnesota Lawyers Committee urges the Senate to pass the Torture Victim Protection Act without the reservation contained in Section 2(b) of the bill. That section requires the court to decline to hear a claim under the Act if the defendant established that the torture victim has not exhausted his or her domestic remedies in the location where the torture occurred. Domestic

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<sup>1</sup> See sections 116 and 502B of the Foreign Assistance Act of 1961, as amended.

remedies in a country where a government condones and even directs acts of torture against its political opponents or other individuals are, at best, inadequate and most often are a futile exercise.

The Minnesota Lawyers International Human Rights Committee is familiar with the problems inherent in requiring the exhaustion of domestic remedies through actual experience with the legal system of a government that has been accused of torture. For the past four years, the Minnesota Lawyers Committee has filed petitions for habeas corpus on behalf of disappeared Guatemalans with the courts of Guatemala. Not only have these formal legal requests failed to turn up a single living person, but almost every one of the approximately 50 petitions filed with the courts are stalled indefinitely in Guatemala's lengthy legal procedure. This kind of inactivity is characteristic of the problems faced by the human rights victims who seek justice within the legal systems of their home countries. Indeed, seeking legal remedies can often be dangerous for lawyers who undertake suits in foreign courts. The Senate should recognize this barrier to justice and remove the exhaustion requirement from S.1629 as the bill moves toward adoption by the full Senate.

United States law has established a system in which there should be no serious wrong without a remedy. There is no greater wrong than that done to victims of torture by those acting under authority of a foreign nation. Providing a legal right of action and remedy against torturers in the event torturers enter the United States sends an important message from the people of the United States to governments and to torturers -- that torture will not be tolerated by our country. To coddle torturers by providing them a safe haven within U.S. borders seems nearly as despicable as condoning the act of torture itself. A cause of action and legal remedy will not only serve to reject the crime of torture on policy grounds, but will also assist in the healing process of victims, their families, friends and communities.