

REPORT NO. 2 OF THE  
SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION\*

*Be It Resolved*, That the American Bar Association urges the United States to promptly sign and ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

REPORT

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly on December 10, 1984. On February 4, 1985, the Convention was opened for signature with twenty countries signing that day.

The United States has not yet signed the Convention despite the fact that the United States actively participated in the drafting process and strongly supported its adoption.

None of the Convention's proscriptions against torture are in conflict or fail to comport with United States law. In fact, several provisions of U.S. law relating to torture or cruel, inhuman or degrading treatment or punishment exceed the standards called for by the Convention.

In stating the views of the United States' Government on the Convention, the U.S. representative to the U.N. General Assembly Third Committee proclaimed that the United States recognizes that the way a government treats its citizens cannot be

considered solely an internal matter. Rather where such treatment by a foreign nation constitutes a violation of international human rights instruments, it becomes a matter of international concern.

Prior to the adoption of the Convention by the General Assembly, the U.S. Congress passed and the President signed a Joint Resolution pledging the United States' full support to the goals and objectives of the Convention (Public Law 98-447 signed into law on October 4, 1984).

Articles 1, 2, 4, 6 and 12 of the Convention codify within the body of international law the crime of torture inflicted by or at the instigation of a public official or other person acting in an official capacity. Cruel, inhuman or degrading treatment or punishment not amounting to torture is also prohibited. The acts proscribed include those which inflict severe pain or suffering—physical or mental—for such purposes as punishment, intimidation or coercion or attempting to obtain a

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\*The recommendation was approved. See page 42.

forced confession. Punishable acts include the actual commission of torture, as well as complicity or participation in torture or attempting to commit torture. Exceptional circumstances or orders from a superior officer or public authority may not be invoked as a justification for the use of torture.

The United States already prohibits the acts encompassed by the Convention's definition of torture. United States legal prohibitions are embodied in federal and state law, and are the result of case law interpretations of constitutional standards and statutory authority.

The Eighth Amendment's prohibition against cruel and unusual punishment is one of the primary constitutional standards which protects persons in the United States from acts of torture. In addition, the Due Process Clause of the Fourteenth Amendment has afforded additional rights and protection not provided by the Eighth Amendment.

In addition to defining the parameters of the prohibited acts of torture, the Convention establishes a system of universal jurisdiction under which there will be no "safe haven" for torturers. It provides that torture is to be considered an extraditable offense under existing extradition treaties between states which are parties to the Convention.

The Convention further requires state parties to insure that persons alleging to be victims of torture have a right to complain and to have their claims investigated. States must also provide the victims of torture with a mechanism to obtain fair and adequate compensation, including means for rehabilitation from the effects of torture. Any statements extracted as a result of torture may not be used against the victim as evidence.

These Convention procedures for protecting the rights of torture victims are entirely consistent with U.S. law and are guaranteed by state and federal laws.

The Convention further provides for the establishment of a Committee Against Torture which is to receive reports on ratifying states implementation of the Convention and information about alleged acts of torture which it may then investigate.

In discussing the question of U.S. ratification of the Torture Convention, the Council of the Section of International Law and Practice recognized that there may be a need for understandings and declarations in the instrument of ratification. Several such understandings and a declaration were presented to the Council and generally met with its approval. The Council decided, however, that the proposed ABA Resolution should support the ratification of the Convention in general terms without a formal position on these proposed understandings and declaration.

The proposed understandings and declaration which the Council considered were as follows:

1. That the United States Government understands and construes the definition of "torture" appearing in Article 1(1) of the Convention as covering torture done in an official capacity for any motive or purpose and not only for the reasons set out in the illustrative list contained in Article 1.

2. That the United States Government understands and construes the words "severe pain or suffering, whether physical or mental" appearing in Article 1(1) of the Convention, as it relates to mental pain or suffering, to mean permanent or recurring impairment of mental facilities.

3. That the United States Government understands and construes the words "lawful sanctions" in the second sentence of Article 1(1) to mean sanctions which are "lawful under both national and international law."

Comment: Article 1 of the Convention defines torture to mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

4. That the United States Government understands and construes Article 5, 6, 7 and 8 of the Convention to mean that nothing in Articles 5, 6, 7 and 8 shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state.

Comment: Under these articles, a state party to the Convention is to take jurisdiction over alleged tortures under three circumstances: when the alleged offense took place on the state's territory; when the alleged offender is a national of the state; and when the victim is a national of the state, if the state considers it appropriate. States are also

to prosecute alleged torturers when they do not extradite those persons at the request of another state party pursuant to the Convention's extradition provisions.

This proposed understanding was suggested in order to insure that the Convention itself will serve as a basis for the United States to exercise jurisdiction over its nationals who are alleged offenders and to protect U.S. citizens against unwarranted claims for extradition by foreign nations.

5. That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Articles 2, 4, 5 and 10 and elsewhere in the Convention has been enacted.

Comment: This proposed declaration is identical to that proposed for the Genocide Convention and the four human rights conventions submitted to the Senate by the Carter Administration in order to make clear that the convention is considered to be non-self executing under U.S. law.

### Conclusion

Since the Convention's terms are fully consistent with United States domestic law and present no constitutional problems, the American Bar Association should urge that the United States sign and ratify the Convention Against Torture without delay.

Respectfully submitted,

ARTHUR W. ROVINE,  
Chairman

February 1986