

REPORT NO. 4 OF THE SECTION OF
INDIVIDUAL RIGHTS AND RESPONSIBILITIES
AND THE STANDING COMMITTEE ON
WORLD ORDER UNDER LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association supports federal legislation which would:

(1) clearly establish a federal right of action by both aliens and United States citizens against persons who, under color of foreign law, engage in acts of torture, extrajudicial killing or prolonged arbitrary detention;

(2) authorize suits by both aliens and United States citizens who have been victims of torture, extrajudicial killing or prolonged arbitrary detention, under color of foreign law, wherever these acts occur and expressly provide federal court jurisdiction over these suits; and

(3) amend the immigration laws to allow the deportation from the United States of any alien who, in his or her official capacity, took part in the torture of another person under color of foreign law.

REPORT

Governments throughout the world continue to violate fundamental human rights. While virtually every nation now condemns torture, extrajudicial killing, and prolonged arbitrary detention in principle, in practice more than one-third of the world's governments engage in, tolerate or condone such acts. The systematic and institutionalized violation of these fundamental human rights occurs in countries of every political persuasion and in every region of the world.

Because of its longstanding commitment to individual rights and the rule of law, the United States has assumed a special responsibility in promoting respect for human rights throughout the world. While most nations of the world have joined with the United States in universally condemning violations of fundamental human rights, each state has substantial discretion in determining how it will seek to promote these international obligations. The United States has long recognized that if international human rights are to be given legal effect, adhering nations must make available domestic remedies and sanctions to redress abuses regardless of where they occur.

*The recommendation was amended, then approved. See page 712.

During the past four years, international human rights violators visiting or residing in the United States have, in some instances, been held liable for money damages under the Alien Tort Claims Act, 28 U.S.C. § 1350. Several recent judicial decisions, however, have questioned whether this statute provides a clear basis for future suits in U.S. federal courts.

In an important case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a federal court of appeals in New York interpreted the Alien Tort Claims Act (28 U.S.C. § 1350) to allow aliens to sue a foreign official acting under "color" of state authority for torture committed outside the United States. In the period since *Filartiga* was decided, its practical wisdom and legal soundness have been noted with great interest in the United States and other countries throughout the world.

However, in a recent case, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), the Court of Appeals for the District of Columbia Circuit dismissed an action brought against several defendants accused of an act of terrorism, a decision that has caused considerable confusion regarding the proper interpretation of section 1350. In three widely differing opinions, the three-

judge panel noted that the lack of clear congressional guidance made it difficult to ascertain the proper scope of the Alien Tort Claims Act.

Federal legislation is needed to clarify existing law by clearly establishing a federal right of action against violators of human rights and authorizing suits by both aliens and U.S. citizens who have been victims of gross human rights abuses abroad.

Such legislation should contain several important limitations. Only persons acting "under the color of" foreign state authority should be liable for damages; the courthouse door should not be open wide to suits based upon any type of violent, international crime. In addition, the courts should be allowed to decline jurisdiction over such suits if it were shown by "clear and convincing evidence" that justice could "reasonably be assured" in the nation where the alleged violations took place. Thus, only a limited number of cases would likely be adjudicated under the proposed statute each year. The legislation, therefore, would have a minimal effect on the case load of U.S. federal courts.

While human rights violators seldom present themselves to their victims while in the United States, providing victims of gross human rights abuses access to the courts is both of practical and symbolic importance. Providing a right of action would add a new dimension to U.S. human rights policy by serving notice to individuals engaged in human rights violations that the United States strongly condemns such acts and will not shelter human rights violators from being held accountable in appropriate proceedings. The legislation also would encourage other nations to develop and apply meaningful domestic remedies, clearly the most effective deterrent to continued human rights abuses. Finally, legislation in this area would provide individual victims with the possibility, however remote, of obtaining some measure of justice.

Consistent with this policy of individual accountability, legislation should be considered to amend the immigration laws to allow deportation from the United States of any alien who, in his official capacity, took part under color of foreign law in the torture of any other person. Existing legislation does not adequately ensure that all aliens who took part in the torture of another person may be deported from the United States. The best evidence that current measures are inadequate is Congress' stated belief in 1979 that it needed to amend the Immigration and Nationality Act (INA) in order to ensure the deportation of Nazi war criminals. According to the House Report that accompa-

nied that amendment, individuals who arrived in the United States pursuant to the INA would not be deportable "even if engagement in atrocities is proven."

Legislation in this area would reaffirm the commitment of the United States to protect human rights and would help ensure that the United States will not provide a safe haven for those who violate these rights.

The proposed legislation is based on the principle that human rights violations are not an abstract problem upon which the United States can have little effect. This country can and should become a model for other nations, both by extending practical remedies to victims of human rights abuses and by deporting torturers from our shores.

The pages that follow provide a detailed explanation of the specific substantive, procedural and policy implications of legislation in this area. The accompanying documentation was prepared after consultations with congressional offices, legal scholars, practicing attorneys and nongovernmental human rights organizations.

Questions Pertaining to a Federal Right of Action

1. *QUESTION:* Who could bring suit under the proposed legislation?

ANSWER: Any person, whether an alien or a citizen of the United States, who has been a victim of torture, extra-judicial killing, or prolonged arbitrary detention abroad under color of foreign law should be able to bring suit under the proposed legislation. Under an existing statute, the Alien Torts Claims Act (28 U.S.C. § 1350), some courts have held that aliens who have been the victims of torture may bring suit. The proposed legislation confirms the existence of this right as to aliens and extends the same right to U.S. citizens.

2. *QUESTION:* Could persons other than the individuals injured bring suit under the proposed statute?

ANSWER: Yes. The legal representatives or heirs of victims of torture, extrajudicial killing or prolonged arbitrary detention should be able to bring suit under the proposed statute. This principle is consistent with the decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the parents and sister of the victim were allowed to bring suit against the individual who tortured and murdered him. The heirs of a vic-

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tim would normally be his descendents or other family members. A legal representative may be a family member, friend or attorney appointed to represent the victim's interests in the event that the victim is mentally or physically unable to do so. Obviously, in the most egregious cases of torture (and in every case of extrajudicial killing), the victim would not survive to bring suit against his perpetrators.

3. *QUESTION:* What type of suit would be brought under the statute?

ANSWER: A statute would authorize civil actions for compensatory and punitive damages. Such actions may include personal injury claims for compensation for physical injury or emotional distress suffered by the victim. They also may encompass requests for punitive damages to punish the violator for his deeds and to serve as a deterrent to other, potential perpetrators.

4. *QUESTION:* If a court renders a judgment awarding monetary relief to the victim of abuse, how would such a judgment be satisfied?

ANSWER: The victim, or his heirs or representatives, could execute a favorable judgment by seizing or attaching a lien on any of the assets of the defendant located in the United States. The rules concerning execution of judgments vary widely from state to state. In general, a judgment obtained in one jurisdiction will be recognized and may be executed in another. In some cases, it may even be possible to execute an award of compensatory damages against assets of the defendant in a foreign country.

5. *QUESTION:* What was the United States' position with respect to the recently passed U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

ANSWER: The United States strongly supports the Convention, although its signature has been held up pending a full legal review of the Convention's ramifications. Over the past seven years, the United States has supported and actively participated in the drafting of the Convention. On December 10, 1984, the United States joined in the consensus of the United Nations General Assembly in adopting the Convention. At that time, Ambassador Richard Schifter, Alternate U.S. Representative to the United Nations, expressed the United States' "hope that the Convention just adopted will help mobilize the political will of states to end the

resort to torture as an accepted practice of law enforcement agencies."

6. *QUESTION:* Would the proposed legislation be supported by international instruments concerning human rights?

ANSWER: Yes. The proposed legislation is consistent with the principles of a number of multilateral agreements reaffirming the signatories' commitment to the protection and maintenance of human rights. The Charter of the United Nations, the Universal Declaration of Human Rights and, more recently, the Final Act of the Conference on Security and Cooperation in Europe restate the commitments of the civilized nations of the world to recognize the right of every human being to live, work and practice his beliefs free from oppressive governmental interference, and to refrain from such oppressive conduct. Moreover, torture, extrajudicial killing and prolonged arbitrary detention have been specifically prohibited by a large number of international declarations and conventions, including the Universal Declaration of Human Rights (1948); the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975); the International Covenant on Civil and Political Rights (1966); the American Declaration on Rights and Duties of Man (1975); the American Convention on Human Rights (1960); the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949); the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949); the Geneva Convention Relative to the Treatment of Prisoners of War (1949); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

7. *QUESTION:* How will a court determine if the acts complained of constitute "torture," "extrajudicial killing" or "prolonged arbitrary detention" in violation of the Law of Nations?

ANSWER: All nations are bound by international customary human rights law, and many are bound by international conventions and declarations concerning human rights. This body of international human rights law universally prohibits persons acting under the color of official authority from

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engaging in acts of torture, extrajudicial killing and prolonged arbitrary detention. The proposed statute only requires the courts to determine whether the alleged acts constitute torture, extrajudicial killing or prolonged arbitrary detention, as defined by international law. The statute recognizes that the international community condemns these acts as violations of international law. Therefore, courts would not have to determine independently that such acts violate international law. The courts will scrutinize the facts in particular cases to determine the existence of torture, extrajudicial killing or prolonged arbitrary detention in accordance with the authorities described below.

(a) *Torture.* A court will probably look to the definitions of torture in the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The definitions contained in these two instruments are very similar. The Declaration defines torture as follows:

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

(b) *Extrajudicial killing.* To determine what constitutes "extrajudicial killing" in violation of international law, a court may refer to several instruments incorporating the international consensus regarding this violation of international law: the International Covenant on Civil and Political Rights, Art. 6; the American Convention on Human Rights, Art. 4; the European Convention on Human Rights, Art. 2; and the Geneva Conventions, Art. 3. The Geneva Conventions define extrajudicial killing as follows:

The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as

indispensable by civilized peoples.

Under the proposed legislation, a court may be faced with claims of extrajudicial killing in cases where the victim died as a result of being tortured or was summarily executed without meaningful judicial process.

(c) *Prolonged arbitrary detention.* To determine what constitutes prolonged arbitrary detention, a court may rely on the International Covenant on Civil and Political Rights, Art. 9; the American Convention on Human Rights, Art. 7; and the European Convention on Human Rights, Art. 5. The International Covenant on Civil and Political Rights provides:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

In deciding whether "prolonged arbitrary detention" occurred in a particular case, a court might consider such factors as whether the individual was officially charged with a criminal offense, whether the individual was tried by a judge or judicial officer, whether the individual was brought to trial (or released) within a reasonable time, the length and conditions of the detention, and the availability of procedures for review.

8. *QUESTION:* If a suit is based upon the unlawful detention of an individual, who would be the proper defendant(s) in such a suit?

ANSWER: The individual or individuals who were directly and indirectly responsible for the unlawful detention would be the proper defendant(s) in such a suit. This would include the guards who placed and kept the individual in detention, the official or officials who ordered the detention, and any official who had the authority to prevent or halt the detention and knew or should have known about it, but failed to take action to prevent or halt it. In determining liability under the Act, a court will probably examine the scope of the official's discretion and all of the circumstances as they reasonably appeared at the time of the alleged abuse.

9. *QUESTION:* Should state courts be allowed to entertain such suits under either the proposed legislation or any other principle of law?

ANSWER: As a practical matter, state courts may not be as sensitive as federal courts to human rights issues. Moreover, international human rights cases predictably raise legal issues—such as interpretations of international law and the Act of State doctrine—that are matters of federal common law and within the particular expertise of federal courts. However, the courts of appeals in the *Filartiga* decision stated that state courts could properly exercise their general subject matter jurisdiction in such cases. While the legislation should specifically provide the federal district courts with jurisdiction over these suits, it should not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases.

10. *QUESTION:* Who should be liable under the proposed statute?

ANSWER: Any person who committed one of the specified offenses and who acted “under the color of” foreign state authority should be liable under the proposed statute. The individual must be subject to the personal jurisdiction of the federal district court, either by being present in the jurisdiction or by means of long-arm statutes.

11. *QUESTION:* What constitutes acting “under the color of any statute, regulation, custom or usage of any nation”?

ANSWER: The legislation would be intended to provide federal court jurisdiction over cases arising under color of foreign law out of state-sanctioned torture, extrajudicial killing, or prolonged arbitrary detention. It is not intended to extend federal court jurisdiction over all human rights violations; for example, it would not include torture committed by ordinary criminals. At the same time, limiting jurisdiction only to acts committed pursuant to official government policy would make prosecution virtually impossible. The Foreign Sovereign Immunities Act (28 U.S.C. §§ 1606-1611) would protect a state from suit in almost every instance. The Act of State doctrine could protect both state and individual defendants by preventing inquiry into whether foreign or international law had been violated by the official government acts.

The vast majority of gross human rights violations do not occur pursuant to official government policy. Rather, they occur as a

result of a government’s willingness to tolerate, condone or encourage such acts. States have a strong interest in denying that violators of human rights were acting as government agents. Most states have either outlawed torture domestically or have signed international conventions prohibiting torture. Therefore, it is highly unlikely that a state would admit to knowledge or authorization of the alleged unlawful acts.

A court adjudicating a suit alleging abuse in violation of international law theoretically could be faced with a situation where the state officially authorized the conduct, thus giving rise to sovereign immunity or the Act of State defense, or completely denies any knowledge of the conduct, in which case it would not appear to be state-sanctioned. The proposed statute incorporates the concept of “color of authority” to avoid this dilemma. This concept has been used by courts applying federal civil rights legislation to resolve the same type of problem. Action taken “under the color of authority” has been explained by the Supreme Court as the “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941).

12. *QUESTION:* Would the statute require that the person being sued actually perform or participate in the act or acts that form the basis of the complaint?

ANSWER: No. Individuals who knowingly ordered or assisted in the act or acts that form the basis of the complaint should be held liable under the proposed statute, even if they did not actually perform the acts that form the basis of the complaint. For example, an officer who did not engage in the unlawful acts but who ordered his subordinates to perform the acts, or knew they were being performed and intentionally failed to exercise his authority to stop them, could be held liable. A high level official whose *only* connection with the offense was his position at the top of a chain of command would not be liable, however, if he had no knowledge of or involvement in the offense.

13. *QUESTION:* Could a government be sued under the proposed statute?

ANSWER: No. The proposed statute would establish personal liability for individual acts and would seek to avoid the political and legal problems that arise in applying sanctions against governments. It would protect internationally recognized human

rights by holding individuals who violate these rights accountable for their actions. A government would be protected from suit by the Foreign Sovereign Immunities Act if the acts complained of could be shown to be official government policy.

14. QUESTION: If the defendant claims to have acted pursuant to official government policy, could the courts refuse to hear the suit on the basis of the Foreign Sovereign Immunity Act or the Act of State doctrine?

ANSWER: A defendant would have to convince the court that the abuse occurred pursuant to official government policy in order to raise successfully the defense of foreign sovereign immunity or Act of State. It is unlikely, however, that courts in the United States would conclude that a defendant accused of torture, extrajudicial killing or prolonged arbitrary detention acted pursuant to official government policy. States have a strong interest in denying that violators of human rights were acting as agents of their governments and therefore would be highly unlikely to make such admissions. If a state denied any prior knowledge or authorization of the alleged acts, a court probably would not find that the acts constituted an "Act of State." Thus, in cases where a state official is accused only of acting under "color" of state authority, the defenses of sovereign immunity and Act of State are not likely to succeed.

(a) *Doctrine of Foreign Sovereign Immunity:* The Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1606-1611) precludes U.S. courts from exercising jurisdiction over foreign states, their agencies and instrumentalities, unless one of the exemptions to the Act applies. In the absence of an applicable exemption, the Act shields a state from liability altogether and, once successfully invoked, prevents the suit from proceeding. Because none of the exemptions would apply to suits brought under the proposed legislation, state defendants and official agencies would be absolutely immune from such actions; however, the Act would not protect individual defendants from being held personally liable for their misdeeds.

(b) *The Act of State Doctrine:* The Act of State doctrine forbids domestic courts from inquiring into the validity under international law or its own law of a foreign sovereign's acts in its own territory. In order to assert this defense successfully,

the defendant would have to prove that the alleged abuse occurred pursuant to an official act or policy of his government. Most states would deny having any association with the alleged abuse, and many states have adopted domestic laws or have become signatories to international declarations or conventions banning such conduct. It is therefore unlikely that this defense would prevail in most cases brought under the proposed legislation. Indeed, the court of appeals in the *Filartiga* case doubted whether action by a state official in violation of the laws of that state could be properly characterized as an Act of State.

15. QUESTION: May a defendant in such a suit be sheltered from liability by claiming that he was merely following higher orders?

ANSWER: Although this defense should be extremely limited, the courts might, in some instances, refrain from holding defendants liable if they had little or no power to stop or prevent the unlawful acts. For example, if the defendant can prove that he exercised no discretion in carrying out the alleged unlawful conduct, and was himself subject to duress or the threat of torture if he refused to carry out his superior's orders, a court might find that he is an improper defendant and dismiss the suit.

16. QUESTION: Are the federal courts equipped to determine whether justice can "reasonably be assured" in another country?

ANSWER: Yes. The federal courts routinely make this type of determination in a variety of other types of cases. In extradition cases, for example, a court may refuse to extradite the accused if it appears that he will not be afforded a fair trial in the foreign country. See Restatement of Foreign Relations Law (Tentative Draft No. 5) § 487, Comment h. U.S. courts also may decline to exercise jurisdiction under the doctrine of *forum non conveniens* if the court is convinced that the case may proceed in the foreign court more conveniently and without injustice. A dismissal under *forum non conveniens* presupposes an alternative forum. If the court has any doubt about whether the plaintiff can obtain a fair trial in the other forum, the proper procedure is either not to dismiss the case or to dismiss conditionally, reserving the power to reinstate the case if the conditions are not met.

17. *QUESTION:* What standards would a court apply in assessing whether the claimant had "exhausted adequate and available remedies" in the country where the violations occurred?

ANSWER: Under the civil rights laws, the federal courts have routinely applied an exhaustion requirement to determine whether the plaintiff has exhausted state administrative remedies. In such cases, a court may refuse to exercise jurisdiction if it appears that the plaintiff has failed to exhaust state administrative remedies unless the state remedies are clearly inadequate or unavailable or circumstances render resort to these remedies futile.

In the international context, the doctrine of "exhaustion of domestic remedies" originated from the doctrine of espousal by a government of its nationals' claims. The requirement that domestic remedies be exhausted is met if the claimant shows that none are available or that it would be futile to pursue them. *See* Restatement on Foreign Relations Law (Tentative Draft No. 3) § 703, Comment d. Several international instruments that require exhaustion of remedies provide that it is not a precondition for consideration of a claim where resorting to the domestic remedies would be "unreasonably prolonged." *See, e.g.,* Optional Protocol to the International Covenant on Civil and Political Rights, Art. 5; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 14(7).

An elaborate exhaustion standard is set forth in Article 46.2 of the American Convention on Human Rights. Under this Convention, exhaustion is not required when:

- (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

18. *QUESTION:* Are there any barriers under international law to the exercise of federal court jurisdiction over the abuses specified in the statute?

ANSWER: No. Under a traditional common law doctrine, civil actions for personal injury torts are considered "transitory" in

that the tortfeasor's wrongful acts create an obligation that follows him across national boundaries. If personal jurisdiction is obtained over the defendant, and if the policies of the forum state are consistent with those underlying the laws allegedly violated by the defendant, then the exercise of jurisdiction is proper. The court of appeals in *Filartiga* noted that actions for battery or wrongful death by torture are transitory and that, in civil actions, "a state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders." 630 F.2d at 885.

In addition, a state arguably has "universal jurisdiction" to adjudicate and punish offenses that are universally recognized as reprehensible. Jurisdiction in such cases is grounded upon a universal obligation to punish certain acts regardless of where they occurred. Traditionally, this doctrine has been applied to pirates, slave traders, assassins and arsonists. Although the doctrine historically has been applied in civil cases, it has not in the past been extended to include the acts specified in the proposed legislation. As the court of appeals in *Filartiga* noted, however, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890.

19. *QUESTION:* Can Congress legally regulate the conduct of aliens who engage in abuses against other aliens?

ANSWER: Yes. Article III of the U.S. Constitution establishes federal court jurisdiction in cases "arising under" the Constitution and laws of the United States. A case properly "arises under" the laws of the United States if it is grounded upon U.S. common law, which includes the law of nations. This view is supported by the reasoning of the court of appeals in the *Filartiga* case and the Supreme Court's recent decision in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

20. *QUESTION:* Do other nations, particularly those with a history of commitment to human rights and the rule of law, provide remedies or sanctions comparable to those contained in the proposed legislation?

ANSWER: Although other nations apparently have not enacted legislation providing judicial remedies comparable to those contained in the proposed legislation, most nations have endorsed the numerous international agreements mentioned above that outlaw torture, extrajudicial killing, and

wrongful acts create an obligation on the part of the United States to exercise jurisdiction if the acts are committed within its borders." 630

arguably has "universal jurisdiction and punish offenders in such cases is a general obligation to the world of where they are; this doctrine has been applied in civil cases, it is extended to include the proposed legislation for purposes of civil liability—like the pirate ship—*hostis humani generis*." 630 F.2d

Can Congress legally legislate against aliens who engage in terrorism?

Article III of the U.S. Constitution grants federal court jurisdiction over "all Cases arising under" the Constitution, the laws of the United States, and the laws of the States grounded upon U.S. law. This includes the law of nations reported by the reason in the *Filartiga* Court's recent decision, *Central Bank of Nicaragua* (1983).

Do other nations, through their treaty obligations and customary rule of law, provide a legal basis for such legislation?

Do other nations have legislation providing a legal basis comparable to those countries? In most nations, the law of nations is not a separate body of law, but is integrated into the national law. In numerous international treaties mentioned above that prohibit judicial killing, and

prolonged arbitrary detention.

21. QUESTION: Based upon the experience of federal courts adjudicating suits brought under the Alien Torts Claims Act (28 U.S.C. § 1350), what would be some hypothetical fact situations under which a court would be expected to exercise jurisdiction pursuant to the proposed statute?

ANSWER: A federal court typically would exercise jurisdiction under the proposed statute in cases where, for a multitude of reasons, the perpetrator of the acts complained of travels or relocates to the United States. The plaintiff could be an alien who was a citizen of the state in which the alleged torture, extrajudicial killing or prolonged arbitrary detention occurred. Alternatively, he could be a U.S. citizen or a citizen of a third country who was detained and subjected to the abusive acts while living in or visiting that state. The defendant could be either the individual who actually committed the abuse or the individual who ordered it. It is also possible that an individual who knowingly allowed the abuse to take place and had the power to prevent it could be sued under the statute.

22. QUESTION: Would an individual sued under the proposed statute be able to avoid liability by asserting the defense of diplomatic immunity?

ANSWER: In some cases. Diplomatic agents and members of their family are immune from civil jurisdiction under Articles 31 and 37 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, which the United States has extended to representatives of nonsignatory nations. See Diplomatic Relations Act of 1978, 22 U.S.C. § 254a-e. Members of a diplomatic mission and their families who are in or passing through the territory of a third state are also immune from civil jurisdiction (Article 40 of the Vienna Convention). Thus, official representatives of an existing government would be immune from suit as long as they were acting in their official capacities. The sending state, however, can waive immunity of diplomats and their families (Article 32 of the Vienna Convention). In addition, the receiving state can declare a diplomat *persona non grata* and expel him from the country (Article 9 of the Vienna Convention).

Members of a foreign country's administrative and technical staff and their families who are not U.S. nationals or permanent residents enjoy only immunity from civil jurisdiction with respect to acts performed in the course of their duties. Thus, as to these

individuals, the defense of consular immunity would be available only if it were shown that the alleged acts were performed within the scope of their official duties.

Questions Pertaining to Deportation

1. QUESTION: Can existing legislation be invoked to deport from the United States any alien who took part in the torture of any other person?

ANSWER: Existing legislation does not adequately ensure that all aliens who took part in the torture of another person can be deported from the United States. Individuals who were involved in Nazi atrocities during World War II may be deported under a special statute enacted by Congress in 1978. In addition, an individual may be deported upon proof that he gained entry by providing false or misleading information to the Immigration and Naturalization Service. Otherwise, as the House Report on the bill to deport Nazi war criminals pointed out, individuals who have been lawfully admitted to the United States under the Immigration and Nationality Act ("INA") may not be deported "even if engagement in atrocities is proven."

2. QUESTION: How would torture be defined in the proposed legislation?

ANSWER: The definition of torture contained in a statute could be drawn from Article I of the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975). This definition is supported by the Restatement of the Law of Foreign Relations (Tentative Draft No. 3) § 702, and the Draft Convention on the Prevention and Suppression of Torture.

3. QUESTION: Would the proposed statute require the deportation of all aliens who ordered, assisted, or otherwise participated in the torture of any person?

ANSWER: No. Only public officials or individuals acting at the instigation of a public official should be deported under the proposed statute.

4. QUESTION: Why should the legislation withdraw the discretion of the Attorney General to waive deportation?

ANSWER: As noted above, the Attorney General has discretionary authority to invoke or waive deportation provisions under the INA. Such discretion is inappropriate as

applied to torturers for at least two reasons. First, torturers arguably should not be entitled to such equitable relief. Second, the existence of this discretionary power invites political interference by the Executive Branch. For precisely these reasons, Congress withdrew the Attorney General's discretion to waive exclusion or deportation under the statute dealing with Nazi war criminals.

5. *QUESTION:* Why should the legislation eliminate the possibility of allowing the accused to leave the United States voluntarily?

ANSWER: The opportunity to depart voluntarily from the United States is a privilege generally granted at the discretion of the immigration authorities to one who would otherwise be expelled. An individual allowed to depart the United States in such circumstances is allowed to select his own destination. Congress has restricted this privilege, however, when the Attorney General has reason to believe that the alien is deportable for specific grounds related to criminal or subversive activity or national security. Similarly, Congress withdrew this privilege in enacting the provision dealing with Nazi war criminals. Obviously, if torturers were allowed to leave the United States for a country that would protect them for political or other reasons, they would escape extradition or trial in the United States for their atrocities.

6. *QUESTION:* What procedural safeguards would the proposed legislation contain to protect the interests of resident aliens who may face deportation under the statute?

ANSWER: Under current U.S. immigration law, aliens present in the United States may seek judicial review of an administrative deportation decision. A judicial review proceeding encompasses the full range of procedural safeguards required by the due process clause of the Constitution.

7. *QUESTION:* Would the proposed legislation apply to aliens seeking entry to the United States?

ANSWER: No. The proposed legislation would merely allow the INS to deport aliens thought to have committed torture from the United States.

8. *QUESTION:* Would the proposed legislation apply to officials of foreign gov-

ernments seeking to visit the United States in their official capacity?

ANSWER: No. Officials of a foreign government visiting the United States in their official capacity have an A-1 or A-2 visa status. See 22 C.F.R. § 41.20. Unless expressly provided by statute, these nonimmigrants cannot be deported from the United States. The proposed legislation therefore would not apply to visiting foreign officials. See 22 C.F.R. § 41.91(e).

9. *QUESTION:* Is the proposed legislation supported by related international agreements concerning human rights?

ANSWER: Yes. The Charter of the United Nations, the Universal Declaration of Human Rights and, more recently, the Final Act of the Conference on Security and Cooperation in Europe support the proposed legislation by restating the moral and legal obligation of nations to respect the right of every human being to live, work and practice his beliefs free from oppressive governmental interference. In addition, torture has been specifically prohibited by a host of international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Geneva Convention Relative to the Treatment of Prisoners of War, the Convention Relative to the Protection of Civilian Persons in Time of War, and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

10. *QUESTION:* If the proposed legislation establishing a federal right of action depends upon the violators' presence in the United States in order to institute suit, wouldn't the deportation provision diminish the importance of providing the federal courts with jurisdiction over such suits?

ANSWER: No. Although, the deportation provision theoretically could reduce the number of suits filed, the INS could always defer deportation pending the outcome of the suit. Further, in some instances, an individual's past atrocities might not be known at the time of admission into the United States. A private action would alert immigration authorities to possible grounds for

deportation of that individual, as well as provide an opportunity for the victim or his heirs to seek damages for the illegal activities. The two proposals are thus complimentary rather than inconsistent.

J. DAVID ELLWANGER
Chairperson
Section of Individual
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ROBERT F. DRINAN
Chairman
Standing Committee on
World Order Under Law

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