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The Torture Convention and The Reception of International Criminal Law within the United States

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Abstract

The unanimous adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United Nations General Assembly in 1984 reflected continuing international concern over the use of torture as an instrument of state policy and practice in many parts of the world.'

KEYWORDS: convention, torture, criminal

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David P. Stewart*

The unanimous adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United Nations General Assembly in 1984 reflected continuing international concern over the use of torture as an instrument of state policy and practice in many parts of the world.¹ Modelled in both form and substance after several earlier multilateral conventions directed against terrorist acts,² the Convention is aimed at elimination of torture by establishing an effective international regime for the criminal prosecution of torturers. While the Convention is certainly not the first international instrument to criminalize acts violating internationally recog-

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1. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 INT'L LEGAL MATERIALS 1027 (1984), entered into force June 26, 1987. For the negotiating history of the Convention, see J. H. BURGERS AND H. DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK* (1988); see also N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987).

2. See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft ("Hijacking"), *done at The Hague*, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Sabotage"), *done at Montreal*, September 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents ("Protection of Diplomats"), *done at New York*, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532; and the International Convention against the Taking of Hostages ("Hostages"), *done at New York*, Dec. 17, 1979, ____ U.S.T. ____, T.I.A.S. ____, *reprinted in* 18 INT'L LEGAL MATERIALS 1456-63 (1979). The United States is party to all of these conventions, as well as the Inter-American Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *done at Washington*, February 2, 1971, 27 U.S.T. 3949, T.I.A.S. 8413.

nized human rights, it is one of the most specific and comprehensive.³

Now that the Senate has given its advice and consent to ratification, the United States is poised to become party to the Torture Convention.⁴ While strongly supportive of other recent efforts to adopt international criminal regimes⁵, the United States has historically had great difficulty in adhering to so-called human rights treaties. Indeed, the Torture Convention is only the second such treaty recently to receive advice and consent (the other was the Genocide Convention, rati-

3. It is not the only multilateral convention specifically addressed to the problem of torture. Within the OAS, a parallel Inter-American Convention to Prevent and Punish Torture was adopted in 1985 by the OAS General Assembly. *See* 25 INT'L LEGAL MATERIALS 519 (1986). The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Eur.T.S. No. 126, *reprinted in* 27 INT'L LEGAL MATERIALS 1152 (1988), *entered into force* Feb. 1, 1989, supplements the European Convention for the Protection of Human Rights and Fundamental Freedoms by establishing a committee of experts to conduct on-site visits to places of detention within States Party and to make recommendations thereon. A similar approach is taken by the proposed Optional Protocol to the Torture Convention, the second draft of which is currently before the U.N. Commission on Human Rights. *See generally* Casese, *A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128 (1989).

4. A joint resolution of Congress had endorsed United States participation in the negotiation of the Convention. *See* Pub. L. 98-447, 98 Stat. 1721 (1984). The Convention was signed by the United States on April 18, 1988 and submitted to the Senate by President Reagan on May 20, 1988. *See* President's Message to Congress Transmitting the Convention Against Torture and Other Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 642-643 (May 20, 1988) [hereinafter the President's Transmittal]. Following a public hearing, and extensive consultations with the Executive Branch as well as interested groups in the private sector, the Senate Foreign Relations Committee reported favorably on the Convention. *See Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Hearing Before the Senate Foreign Relations Committee*, 101st Cong., 2d Sess. (1990) [hereinafter *Committee Hearing*]; Report of the Committee on Foreign Relations, S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. 1 (1990) [hereinafter SENATE EXEC. REP. NO. 30]. The Senate gave its advice and consent to ratification on October 27, 1990. *See* 136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990). The United States will not deposit its instrument of ratification until after the Congress has adopted necessary implementing legislation. *See* Appendix A to SENATE EXEC. REP. NO. 30.

5. *See, e.g.*, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF/82/15 Rev. 1, *adopted by consensus* Dec. 19, 1988, *reprinted in* 28 INT'L LEGAL MATERIALS 493 (1989). The United States instrument of ratification was deposited with the U.N. on Feb. 20, 1990. *See generally* Stewart, *Internationalizing the War on Drugs: The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DEN. J. INT'L L. AND POL'Y 387 (1990).

fication of which took some forty years).⁶ Some of the reasons for this longstanding reticence were re-examined during the Senate's consideration of the Torture Convention and are reflected, to a greater or lesser extent, in the package of provisos on which the Senate conditioned its advice and consent.⁷

This article briefly reviews the most important provisions of the Torture Convention and examines the various reservations, declarations and understandings contained in the Senate's resolution of advice and consent.⁸ The conditions that the United States intends to impose on its

6. The Convention on the Prevention and Punishment of the Crime of Genocide, done at Paris, Dec. 9, 1948, — U.S.T. —, T.I.A.S. —, 78 U.N.T.S. 277 (1951), was initially submitted to the Senate in 1949 and received advice and consent only in 1986. *See* 132 CONG. REC. S1355-1381 (daily ed., Feb. 19, 1986), and the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§1091-1093). The United States is also party to several earlier multilateral human rights treaties concerning slavery, the political rights of women, and refugees. Five human rights treaties submitted to the Senate during the Carter Administration remain pending. *See generally* Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. Y.B. 53 (1990).

7. The Senate had before it an initial package of reservations, declarations and understandings proposed by the Reagan Administration when it submitted the Convention for advice and consent. *See* Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, contained in the President's Transmittal, *supra* note 4, at 1-18. The Reagan proposals were criticized on a number of grounds, and in consequence a revised package was formulated by the Bush Administration, which the Senate Foreign Relations Committee accepted with some modifications. *See Committee Hearing, supra* note 4; SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A. Only minor modifications were made on the floor by the full Senate. *See* 136 CONG. REC. S17486 et seq. (daily ed., Oct. 27, 1990). For a critique of the Bush Administration proposals, see *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 42 THE REC. OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 235 (1987).

8. The "package" finally adopted by the Senate includes two reservations, five understandings, two declarations and a "proviso". *See* 136 CONG. REC. S17486-92 (daily ed. Oct. 27, 1990). For present purposes, only the final versions of these conditions, as contained in the resolution of advice and consent to ratification (which is appended to this Article), are discussed.

As a matter of international law, a reservation is required when a state party purports to exclude or modify the substantive legal effect of an international agreement in its application to that state. *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art 2 § 1(d), 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §313 (1986) ("A state may enter a reservation to a multilateral international agreement . . ."). It is the substantive effect of a proviso, not its label, which is controlling. In United States practice, a reservation is distinguished from a statement of understanding, which is binding domestically but not in-

adherence to the Convention illustrate some of the current limitations of the international system in establishing effective criminal sanctions on a global basis. These conditions also demonstrate the problems of reception or incorporation which international criminal law can encounter at the domestic level.

I. BACKGROUND

The prohibition against torture is hardly a new development in international law. Indeed, it has been recognized so often and so widely that most scholars and practitioners consider it a principle of customary international law binding on all states.⁹ Persistent non-compliance with the prohibition, however, led the United Nations General Assembly to adopt, in 1975, a comprehensive Declaration defining and elaborating the substantive prohibition.¹⁰ Subsequently, in 1977, the General Assembly called upon the U.N. Commission on Human Rights to draft a multilateral convention incorporating the principles set forth in the Declaration.¹¹ The Commission completed its work in 1984, and the General Assembly adopted the Convention by consensus on Human

ternationally. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §314. The terms "declaration" and "proviso" encompass conditions which may be legally or politically relevant or important but which do not modify substantive legal obligations under either domestic or international law.

9. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702; Ackerman, *Torture and Other Forms of Cruel and Unusual Punishment in International Law*, 11 VAND. J. OF INT'L L. 653 (1978). The prohibition is found, inter alia, in art. 5 of the Universal Declaration of Human Rights (1948); art. 7 of the International Covenant on Civil and Political Rights (1966), Dec. 19, 1966; art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); art. 5(2) of the American Convention on Human Rights (1969); and art. 5 of the African Charter on Human and Peoples' Rights (1981). Torture is also prohibited by the humanitarian law applicable to armed conflicts (see the four Geneva Conventions of 1949 on the protections of victims of war, including the Additional Protocols of 1977). Even the U.S. Senate considered the Convention to represent a codification of customary international law. See SENATE EXEC. REP. NO. 30 *supra* note 4, at 3. Within the European human rights system, several cases have examined the issue of which acts constitute torture. See *Ireland v. United Kingdom*, 2 Eur. H.R.R. 25 (ser. A) (1978); *Greek Case*, 12 Y.B.Eur.Conv.Hum.Rts. (1969); cf. *Tyrer v. United Kingdom*, 2 Eur. H.R.R. 1 (ser. A)(1978).

10. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 30/3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/10034 (1975).

11. U.N. Res. 32/62 (Dec. 8, 1977).

Rights Day, December 10, 1984. It entered into force on June 26, 1987; as of the end of 1990, a total of 52 states had become Party through ratification or accession, and 21 others (including the United States) had signed but not yet ratified the Convention.

The significance of the Torture Convention lies less in its restatement of the well-established prohibition against torture than in its creation of interlocking law enforcement obligations among States Party to take steps to bring alleged offenders to justice. The Convention can be considered, in this respect, primarily as a law enforcement rather than human rights treaty— although it also contains important preventive and remedial provisions. Its principal application by States Party will presumably be through prosecutions and other governmental law enforcement measures as opposed to invocation as a cause of action in civil suits. Most of the problems it posed with respect to U.S. ratification turned on the manner in which the Convention affected law enforcement interests.

II. PROVISIONS

The central provisions of the Convention require each State Party: 1) to prevent acts of torture in any territory under its jurisdiction; 2) to ensure that such acts—including attempts and complicity — are criminal offenses under its domestic law; and 3) to cooperate with all other States Party to ensure that alleged torturers will be criminally prosecuted, by relying on so-called “universal jurisdiction” and the duty to extradite or prosecute alleged torturers.

The Convention defines torture to include any act by which severe mental or physical pain or suffering is intentionally inflicted upon a person by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹² States

12. Art. 1(1) states:

For the purposes of this Convention, the term “torture” means 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.

Party are obliged both to prevent all acts meeting that definition and to make them a crime under their domestic laws punishable by appropriately severe penalties.¹³ Each State Party must establish jurisdiction over offenses committed in any territory under its jurisdiction (and on board its registered ships or aircraft) or by its nationals, and may, if that State considers it appropriate, do so with respect to acts of torture against its nationals wherever those offenses occur.¹⁴

Torture is made an extraditable offense in all existing and future extradition treaties between States Party, and each State Party is obliged, under the *aut dedere aut judicare* principle, to submit the case for prosecution if it does not extradite an alleged offender found within its jurisdiction, regardless of where the offense was committed, who committed the offense, or the individual against whom the offense was committed.¹⁵ States Party must also provide each other with the greatest measure of assistance in connection with such proceedings.¹⁶

In an effort to prevent as well as punish torture, the Convention requires States Party to take various educational and remedial steps to strengthen their domestic legal regimes, including providing the means for compensation and rehabilitation of victims.¹⁷ Notably, Article 16 calls upon each State Party to undertake to prevent "other forms of cruel, inhuman or degrading treatment or punishment not amounting to torture" as that term is defined in the Convention, *inter alia* through many of the same educational and remedial measures. Finally, borrowing from other human rights treaties, the Convention establishes a

13. Art. 2(1), 4(1) and (2). Attempts to commit torture, as well as complicity and participation, must also be prohibited. The Convention does not require enactment of a specific offense of torture corresponding to the definition in art. 1, only that all acts falling within that definition must be criminal offenses under domestic law. It does specifically provide, however, that neither exceptional circumstances, such as a state of war or political instability, nor an order from a superior, may be invoked as a justification of torture. Art. 2(2) and (3). These latter provisions are strongly suggestive that the Convention was intended to apply in times of war as well as peace. Interestingly, the Convention does not make torture a crime under international law or even specify that it is "an international criminal activity," as is the case, for example, with respect to illicit narcotics trafficking under the new U.N. Convention.

14. Art. 5(1).

15. Art. 7 and 8. Art. 5(2) provides the so-called "universal jurisdiction" to submit the case for prosecution, whether or not any of the other grounds of jurisdiction exist, when an alleged offender is present in a State Party and that State does not extradite him to a State having jurisdiction under Art. 5(1).

16. Art. 9.

17. Art. 10-14.

Committee Against Torture to monitor and enforce compliance with its provisions, on the basis of reports from States Party, its own inquiries, and consideration of complaints that other States Party or individuals submit.¹⁸

III. CONDITIONS TO RATIFICATION

A. *Definition of Torture*

A central purpose of the Convention is to establish, as a matter of treaty obligation, a standard, uniform definition of torture to be applied by each State Party as a matter of its domestic criminal law.¹⁹ It does so not by describing the particular acts or practices which are proscribed but rather by articulating the criteria to be applied in determining whether a given act amounts to torture as opposed to a lesser form of cruel, inhuman or degrading treatment or punishment.²⁰ Thus, according to Article 1, "torture" includes any act by which severe mental or physical pain or suffering is intentionally inflicted for purposes of punishment, coercion, intimidation or discrimination, by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity, excluding lawful sanctions.²¹

By stressing the extreme nature of torture, by requiring both specific intent and specified motives, and by limiting the context to one involving improper use of governmental authority, this definition describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems. Without question, any such act would be criminal under existing federal or state law in the United States. Precisely because the Convention contemplates criminal prosecutions, however, there was concern within the Executive Branch to ensure that the treaty definition satisfied United States Constitutional standards of clarity and precision. This was particularly true with respect to the inclusion of mental pain and suffering, which was critical to ensure that the Convention's protections extended to the psychological effects of such methods as mock executions, sensory deprivation, use of drugs, and confinement to psychiatric hospitals, but which some thought fell short of constitutionally required precision.²²

18. Arts. 17-24.

19. See SENATE EXEC. REP. NO. 30, *supra*, note 4, at 13.

20. See *id.*

21. Art. 1(1), *supra* note 12.

22. *Committee Hearing, supra* note 4, at 17.

Accordingly, U.S. ratification will be conditioned on an understanding that, to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering, and that mental pain or suffering refers to prolonged mental harm caused by or resulting from one of four specified circumstances:

- the intentional or threatened infliction of severe physical pain or suffering;
- the actual or threatened administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- the threat of imminent death; or
- the threat that any person will be subjected to any of the foregoing.²³

For similar reasons of clarity and specificity, United States adherence will be conditioned on several related understandings relevant to the definition of torture. In particular, it will be noted that the term “acquiescence,” as used in Article 1, requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity;²⁴ the definition of torture is intended to apply only to acts directed against persons in the offender’s custody or physical control;²⁵ and, noncompliance with applicable legal procedural standards—for example, a failure to provide a *Miranda* warning which might result in the inadmissibility of a subsequent statement under the exclusionary rule—does not *per se* constitute torture.²⁶

23. SENATE EXEC. REP. NO. 30, *supra* note 4, at 17.

24. *See also* the Appendix to this article, *infra* p. ____ at II(1)(d) [hereinafter Appendix].

25. *See* Appendix at II(1)(b). This is consistent with the intent of the Convention to protect the rights of individuals subjected to any form of detention or imprisonment: “The history of the Declaration and the Convention make it clear that the victims must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person inflicting the pain or suffering.” J.H. BURGERS AND H. DANIELIUS, *supra* note 1, at 120-121. Thus the use of armed force for military or police purposes would not by itself constitute torture.

26. *See* Appendix at II(1)(e). Art. 15 provides that statements which have been made as a result of torture shall not be invoked as evidence in any proceedings, “except against a person accused of torture as evidence that the statement was made.”

B. *Lawful Sanctions Exception*

The negotiators of the Convention agreed that the proper application of penal sanctions by the State does not constitute torture. Accordingly, the final sentence of Article 1 (1) states that the definition does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions." They were unable, however, further to define the content of this exception or to agree on whether the lawfulness of the sanctions in question should be determined by reference to domestic or international law.²⁷ Because the exception clearly contemplates sanctions which are, at the least, considered lawful under the relevant domestic law, it was considered necessary to supplement the treaty definition by specifying that the exception means, for the U.S., actions that United States law authorizes. However, it was also recognized that permitting the "lawfulness" of sanctions to be assessed solely by reference to domestic law could create a loophole in the definition by which the exception could swallow the rule.

Accordingly, United States ratification will include an understanding to the effect that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law, while at the same time expressly noting that a State Party to the Convention could not, through its domestic sanctions, defeat the object and purpose of the Convention to prohibit torture.²⁸ Thus, a sanction which amounted to torture could not be justified merely on the grounds that it was authorized by domestic law.

C. *Non-Refoulement*

An important protection to potential victims of torture is contained in Article 3, which provides that no State Party shall expel, return ("refouler") or extradite a person to another State where substantial grounds exist for believing that he or she would be in danger of being subjected to torture. The Convention does not, however, specify what constitutes "substantial grounds," leaving that issue to domestic law

27. The original draft text of the Convention limited the exception to sanctions consistent with the U.N. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1955), *approved by* ECOSOC Res. 663C(XXIV) (1957). *See* J.H. BURGERS AND H. DANIELIUS, *supra* n. 1, at 121.

28. *See* Appendix at II(1)(c).

and requiring only that in making the determination, the competent authorities take into account all relevant circumstances including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.²⁹ A question to be resolved, therefore, was the standard to be applied under United States law for determining "substantial grounds."

Under the Refugee Act of 1980, an individual may not normally be expelled or returned from the United States if his life or freedom would be threatened on account of "race, religion, nationality, membership in a particular social group, or political opinion" ³⁰ The United States Supreme Court has interpreted this mandatory "withholding of deportation" provision to apply when the threat of persecution is more likely than not.³¹ By comparison, the Court has applied a somewhat less rigorous burden of proof in the context of eligibility for a discretionary grant of asylum, requiring only a "well-founded fear of persecution" in order to meet the statutory standard.³²

In light of these statutory interpretations by the Court, and because adherence to the Convention would require (rather than permit) non-refoulement, the former, more stringent standard was considered the appropriate referent as a matter of domestic law. Accordingly, the Senate adopted an understanding interpreting the non-refoulement provision in Article 3 to mean "if it is more likely than not" that the individual in question would be tortured.³³

D. *Private Remedies for Victims*

Article 14 provides that each State Party must accord the victim of torture both a legal right to redress and an enforceable right to fair and adequate compensation "including the means for as full rehabilita-

29. See Appendix, II(2).

30. Pub. L. No. 96-212, §203(e), 94 Stat.102, [codified at 8 U.S.C. § 1253(h)(1) (1980)]. This provision implemented the non-refoulement obligations of Art. 33 § 1 of the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, which the United States undertook when it became party to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

31. *INS v. Stevic*, 467 U.S. 407 (1984)(interpreting § 243(h) of the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. § 1253(h) (1989)).

32. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting § 208 of the Immigration and Nationality Act, *as amended*, 8 U.S.C. § 1158 (1989)).

33. See Appendix at II(2).

tion as possible." In the event of the victim's death as a result of torture, his (or her) dependents are entitled to compensation.

As finally agreed by the negotiators, this provision was expressly limited to acts of torture committed in any territory under the State Party's jurisdiction.³⁴ Inexplicably, this limitation was evidently deleted by mistake in the final document, although the negotiating history supports the restrictive reading. Accordingly, the United States will clarify its view of the issue by conditioning ratification on an understanding interpreting Article 14 to require a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.³⁵

In rejecting extraterritorial civil jurisdiction over acts of torture, the Convention reflects a narrower view than some courts have been prepared to adopt with respect to existing United States law. Under the Alien Tort Claim Act of 1790,³⁶ United States District Courts are given jurisdiction over civil actions by aliens "for a tort only, committed against the law of nations." Several cases have found this statute to apply, at least in principle, to alleged acts of torture committed entirely outside U.S. jurisdiction by non-U.S. persons; in one, actual as well as punitive damages were in fact awarded against a former Paraguayan official alleged to have tortured the plaintiff's brother to death in Paraguay.³⁷

Recent efforts to codify the extraterritorial reach of the civil jurisdiction of United States courts over acts of torture, through adoption of the proposed Torture Victims Protection Act, have been opposed by the Executive Branch as inconsistent with the approach that the Torture Convention has taken, and as legally unwarranted and potentially prob-

34. See Appendix at II(3).

35. See *id.*

36. 28 U.S.C. § 1350 (1988).

37. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980), *on remand* 577 F. Supp. 860 (E.D.N.Y. 1984). *But see* *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1003 (1985); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd* 654 F.2d 1382 (10th Cir. 1981). See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § § 702 and 703 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones: . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment.") ("An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements."). For a recent case holding nonjusticiable claims based inter alia on extraterritorial torture, see *Linder v. Calero Portocarrero*, 747 F. Supp. 1452 (S.D. Fla. 1990).

lematic in practice.³⁸ The proposed Act would effectively open U.S. courts to cases having no nexus whatsoever to the United States, essentially providing the civil analogue to “universal jurisdiction” in the international criminal field. Absent a treaty providing for such jurisdiction, there would seem to be little justification for such overreaching.

IV. CONSTITUTIONAL CONSIDERATIONS

Some commentators have perceived several issues that the Convention presented as creating potentially difficult problems concerning the relationship between a treaty — which according to Article VI of the Constitution is the law of the land — and the Constitution itself.

A. *Cruel, Inhuman or Degrading Treatment or Punishment*

As indicated above, Article 16 obligates States Party to undertake to prevent—but not to prohibit or criminalize—other acts of cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in Article 1, “when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” In particular, the same steps must be taken in this regard under Articles 10-13 as are required with respect to torture itself: training of law enforcement personnel; review of interrogation techniques and detention rules and practices; investigation of violations by State authorities; and ensuring the right to bring a complaint for investigation.

Arguably, the scope of Article 16 exceeds existing United States law. Certainly, the phrase “cruel, inhuman or degrading treatment or punishment” as interpreted in other contexts³⁹ varies from the closely analogous prohibitions under various amendments to the United States Constitution. Because it is unclear how the Convention’s terms will be

38. This was the position taken by the Departments of State and Justice at the June 22, 1990 hearing before the Subcommittee on Immigration and Refugee Affairs of the Senate Judiciary Committee (no published transcript) concerning two bills introduced in the 1st session of the 101st Congress, namely, H.R. 1662 (introduced April 4, 1989 by Congressman Gus Yatron (D. PA.) and others) and S.1629 (introduced Sept. 14, 1989 by Senator Arlen Specter (R. PA.)).

39. See, e.g., *X v. Federal Republic of Germany*, (No. 6594/74) 11 Eur. Comm’n H.R. 16 (1977). Corporal punishment, for example, is lawful under the United States Constitution, unlawful under the analogous provisions of the European Convention.

interpreted, it was considered necessary to condition United States ratification of the Convention on a formal reservation to the effect that the United States considers itself bound by the obligation under Article 16 only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the fifth, eighth and/or fourteenth amendments to the Constitution.⁴⁰

B. *Death Penalty*

As noted at the hearing before the Senate Foreign Relations Committee on the Torture Convention, the death penalty does not violate international law nor does international law require the abolition of the death penalty.⁴¹ Many, perhaps even most, countries in the world today provide for capital punishment for some offenses under their domestic laws, and none of the major international human rights instruments prohibits the death penalty.

The Torture Convention itself does not address the death penalty. Nonetheless, some concern was expressed that its ratification could, notwithstanding the "lawful sanctions" exception, provide an additional legal basis on which to oppose the imposition of capital punishment in U.S. courts. In part, this concern was motivated by the recent decision of the European Court of Human Rights in *Soering v. United Kingdom*,⁴² which held that extradition of a West German national from the United Kingdom to the United States to stand trial on capital murder charges, for which the penalty could be execution, would violate the European Convention's prohibition against "cruel and inhumane pun-

40. See Appendix at I(1). Initially a proposed understanding addressed this potential conflict, but since the intended legal effect was in fact to restrict, rather than simply to interpret, the legal obligation which the United States was prepared to accept under Article 16, a formal reservation was considered more appropriate. See SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A.

41. *Committee Hearing*, *supra* note 4, at 10-11 (statement of Abraham D. Sofaer, Legal Adviser, Department of State). Various international conventions — for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights — do contain provisions limiting application of the death penalty, and some, such as the 6th Optional Protocol to the European Convention, prohibit its use entirely. These obligations apply only to states that have affirmatively accepted them through ratification or accession.

42. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 4 (ser. A) (1989), *reprinted in* 28 I.L.M. 1063 (1989).

ishment.” Interestingly, that decision did not turn on a finding that application of the death penalty itself would violate the European Convention, much less international law. Rather, the Court held that, because the United States legal system permitted extensive appeals in capital cases, the accused, if convicted, would face the prospect of spending many years on death row, never knowing whether his sentence would be carried out, overturned or commuted.⁴³ Given his youth at the time of the crime, the Court considered this “death row syndrome” prospectively violative of the accused’s human rights.⁴⁴

The Administration proposed — and the Senate endorsed — an understanding reflecting its view that international law does not prohibit the death penalty in order to allay any doubt about the position of the United States in respect of the capital punishment issue. In addition, to clarify the United States’ position on the application of the death penalty in international law, the Senate consented to the ratification of the Convention on the condition that the Convention neither restricts nor prohibits the United States from applying the death penalty consistent with the protections of the fifth, eighth, and fourteenth amendments of the United States Constitution, including any constitutional period of confinement prior to the imposition of the death penalty.⁴⁵

C. *The “Sovereignty” Proviso*

When the Senate gave its advice and consent to ratification of the Genocide Convention, it did so subject to the following reservation, which was included in the United States instrument of ratification:

That nothing in the [Genocide] Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.⁴⁶

This reservation reflected the view, shared by those who believe that Senator Bricker was historically and legally correct in proposing

43. *Id.* at 44-45.

44. *Id.*

45. *See* Appendix at II(4).

46. *See* REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS ON THE GENOCIDE CONVENTION, S. EXEC. REP. NO. 2 at 19 (1985); 132 CONG. REC. S1377 (daily ed., Feb. 19, 1986).

his amendment to the Constitution,⁴⁷ that an explicit statement of the primacy of the Constitution over an arguably or possibly inconsistent treaty is necessary to avoid any possibility that ratification of the suspect treaty could in some fashion bind the United States to take actions that the Constitution prohibited.

When consideration was given to the Torture Convention, neither the Administration nor a majority of the Senate Foreign Relations Committee shared this view. As indicated in the Committee's report, the Convention does not textually and could not, as a matter of domestic law, require the United States to take any legislative or other actions that the Constitution prohibited.⁴⁸ In *Reid v. Covert*⁴⁹ the Supreme Court stated that it had "regularly and uniformly recognized the supremacy of the Constitution over a treaty." This principle is acknowledged as definitive.⁵⁰ Even if an inconsistency did exist between the Constitution and the Convention, a constitutional reservation by the Senate would thus add nothing in the way of constitutional protection.⁵¹ Such a reservation could, however, raise questions among other States Party to the Convention as to the extent of United States obliga-

47. For a useful recent account of the debate, see D. TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988). As initially proposed, the so-called Bricker amendment, S.J. Res. 102, 82nd Cong. 1st Sess., 197 CONG. REC. 11344 (1951), would have repealed the second paragraph of Article VI of the Constitution and precluded, inter alia, treaties respecting or abridging rights and freedoms of United States citizens recognized by the United States Constitution. Subsequent versions, including the one finally voted on and defeated, provided that a provision of a treaty or other international agreement which conflicts with the Constitution shall not be of any force and effect. The "sovereignty" reservation to the Genocide Convention is a variant on this theme.

48. SENATE EXEC. REP. NO. 30, *supra* note 4, at 4.

49. 354 U.S. 1, 17 (1957).

50. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2): "No provision of an [international] agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States;" see also *id.* at Comment (b): "The view, once held, that treaties are not subject to constitutional restraints is now definitively rejected. Treaties and other international agreements are subject to the prohibitions of the Bill of Rights and other restraints on federal power. . . ."

51. However, such a reservation could be unsettling at the international level, since it could raise questions as to the exact nature of the treaty obligations undertaken by the United States pursuant to the Convention. For other States Parties unfamiliar with the United States Constitution and its interpretation by United States courts, it would be difficult, if not impossible, to assess the precise effect of the "proviso" or "reservation" on the legal undertakings of the United States under the Convention.

tions under the Convention and, much more damaging, lead others to invoke their own Constitutions to limit compliance with the Convention's central provisions, including the prohibition against torture and the obligation to extradite or prosecute torturers.⁵²

Nonetheless, when the Convention reached the floor of the Senate, Senator Jesse Helms of North Carolina expressed continued concern over the necessity of clarifying and preserving the supremacy of the Constitution over any inconsistent treaty provision. He stressed, however, in particular, the importance of doing so with respect to "international criminal law treaties" under which the United States accepts an obligation to conform its domestic law to international standards, because of the potential harm that could be done to the safeguards guaranteed in the Bill of Rights.⁵³ For this reason, he noted, the Senate had attached so-called "sovereignty" reservations not only to the Genocide Convention, but also to subsequently considered Mutual Legal Assistance Treaties ("MLAT's") and to the Vienna Illicit Trafficking Convention, eight times in all.⁵⁴

Others — for example, Senator Daniel Patrick Moynihan — considered the "sovereignty" reservation to have been a mistake, noting that it could be read as a matter of international law to render uncertain the extent of obligations that the United States had undertaken pursuant to the Convention.⁵⁵ Unlike a narrowly drawn reservation to a specific article or clearly identified undertaking, the "sovereignty" reservation broadly purports to condition every provision of the treaty on the entire corpus of evolving United States constitutional jurisprudence. Not only are other nations then left to question the meaning and reach of United States adherence to the Convention, but some could also be drawn to attempt to condition their undertakings on their own domestic constitutional law. Such a development would clearly undermine the uniformity and universality which lie at the heart of a multilateral approach to the elimination of torture.⁵⁶

52. See, e.g., SENATE EXEC. REP. 30, *supra* note 4, at 5.

53. See 136 CONG. REC. S17487-89 (daily ed., Oct. 27, 1990).

54. 136 CONG. REC. S17489 (daily ed., Oct. 27, 1990).

55. Indeed, some twelve countries have made just such an objection to the comparable condition imposed on U.S. ratification of the Genocide Convention, and others have indicated their intention to oppose a similar reservation if taken with respect to the Torture Convention. Four of the six states involved with recent MLAT's have expressed strong concerns and/or take reciprocal reservations. See SENATE EXEC. REP. No. 30, *supra* note 4, at 4-5.

56. See 136 CONG. REC. S17489-90 (daily ed., Oct. 27, 1990).

To avoid these pitfalls, while at the same time recognizing the primacy of the Constitution as a matter of domestic law, the Senate agreed to include in its resolution of advice and consent a statement — which is neither a reservation nor an understanding to the Convention, and which need not be included in the instrument of ratification — that “[t]he President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying party to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States prohibited by the Constitution of the United States as interpreted by the United States.”⁵⁷

D. *Federal-State Provision*

Many provisions of the Convention impose obligations that necessarily implicate State and local governments in addition to the Federal government. For example, the central undertakings to criminalize torture and to take effective legislative, administrative, judicial or other measures to prevent acts of torture apply throughout the territory under the jurisdiction of each State Party⁵⁸ and thus apply at the State and local levels.⁵⁹ With respect to a few provisions requiring specific prophylactic and preventive measures, the question arose over the extent of the Federal government’s undertaking to ensure that State and

57. See Appendix at IV; 136 CONG. REC. S17488 (daily ed., Oct. 27, 1990). In proposing this formula, Senator Clairborne Pell (D. R.I.), Chairman of the Senate Foreign Relations Committee, noted in particular that because it is not a reservation, other countries cannot invoke it on a reciprocal basis to limit or eliminate their obligations to comply with the Convention, and the President can comply with the proviso simply by notifying all countries of the U.S. position.

58. Art. 2 and 4.

59. As indicated in the Reagan Administration transmittal, any act of torture in the United States, including acts constituting attempts or conspiracy to torture, would unquestionably violate criminal statutes under existing state and/or federal law. When such acts are subject to state jurisdiction, the offense would likely be a common crime, such as assault or murder. In some circumstances, the nature of the activity or the persons involved could also give rise to a federal offense, such as interstate kidnapping or hostage-taking under such statutes as 18 U.S.C. § § 112, 114, 115, 878, 1201 and 1203. Acts subject to federal jurisdiction would violate statutory provisions against assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, and rape. See, e.g., 18 U.S.C. § § 113, 114, 1111, 1112, 1113 and 2241-2245 (1988). In addition, federal law defines two “constitutional crimes” under 18 U.S.C. § § 241 and 242 that would likely be relevant to any situation covered by the Convention.

local governments comply. In particular, attention was focused on Articles 10-14, which require States Party to:

—ensure that education and information regarding the prohibition against torture are fully included in the training of persons involved in the custody, interrogation or treatment of persons arrested, detained or imprisoned;⁶⁰

—keep under systematic review its interrogation rules, instructions, methods and practices for the custody and treatment of persons arrested, detained or imprisoned;⁶¹

—conduct prompt and impartial investigations of allegations of acts of torture within their territories;⁶²

—provide individuals the right to bring complaints of torture and to have such cases promptly and impartially examined;⁶³ and to

—provide victims of torture with enforceable rights of redress, compensation and rehabilitation.⁶⁴

Under Article 16, States Party assume similar obligations with respect to the prevention of cruel, inhuman or degrading treatment or punishment not amounting to torture, except that the Convention does not require provision of rights of redress or compensation.

In view of the division of authority between Federal, State and local governments in the United States, and considering the largely decentralized distribution of police and related authorities at all levels, it was considered necessary to clarify, primarily for the benefit of the international community, that the Convention would not be implemented solely by the Federal government or by Federal law. This clarification was particularly necessary in respect to those preventive measures which would in the first instance fall to State and local governments. The object is not to limit or modify United States obligations under the Convention but rather to indicate that implementation of those obligations will necessarily take place with respect to the Federal system.⁶⁵

60. Art. 10(1). This provision covers law enforcement personnel (civil and military), medical personnel, public officials and others.

61. Art. 11.

62. Art. 12.

63. Art. 13. States are also obliged to take steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

64. Art. 14.

65. The provision is thus to be distinguished from a traditional "federal-state

For this purpose, the United States instrument of ratification will include the statement, characterized as an understanding, that "this Convention shall be implemented by the United States to the extent that it exercises legislative and judicial jurisdiction over matters covered by the Convention and otherwise by the State and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention."⁶⁶

V. NON-SELF-EXECUTING TREATY

Although the Convention, subject to the aforementioned provisos, is deemed consistent with United States law (or, stated otherwise, United States law is considered already to satisfy the substantive requirements of the Convention), it was considered nonetheless preferable to leave technical implementation of the Convention to the domestic legislative and judicial processes. Accordingly, the Senate declared that the provisions of Articles 1 through 16 are "non-self-executing," by which it is meant they do not establish rights enforceable in United

clause" having the object of releasing a central government from international obligations which would require action beyond its power. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Reporters' Note 4 ("A 'federal-state clause' is likely to render a federal state's commitment under an international agreement less onerous than that of unitary states. Such clauses are therefore more likely to be acceptable in multilateral agreements reflecting common purposes than in those containing reciprocal exchanges.") The issue is not whether such a provision is required, for example under the tenth amendment to the Constitution, but whether a statement for the record is advisable.

66. *See* Appendix at II(5). This issue was initially addressed in a proposed reservation to the Convention, which suggested to some that the United States was in fact not accepting an international legal obligation to implement the Convention to the extent that it required action beyond the existing scope of Federal legislative and judicial jurisdiction. A reservation may have seemed appropriate to those who anticipated that the Convention could or would be used by the Federal government to expand its legislative and judicial jurisdiction into areas now primarily or exclusively the province of State and local authorities. Since neither was the case — the United States intends to implement the Convention fully and consistently with the Federal system — the reservation was rewritten and recast as an understanding by the Senate, and the amended version was introduced on the Senate floor. *See* 136 CONG. REC. S17486 (daily ed., Oct. 27, 1990). An interesting, and one assumes hypothetical, issue concerns the refusal of state or local authorities to comply with Convention obligations.

States courts unless and until Congress has approved implementing legislation.⁶⁷ This provision concerns only the domestic effect of the Convention and does not limit or alter the extent of the United State's international obligations thereunder.

VI. COMMITTEE AGAINST TORTURE

To monitor and supervise compliance with its provisions, the Convention establishes an international Committee Against Torture, consisting of ten experts in the human rights field.⁶⁸ States Party are obliged to submit to the Committee, within one year after ratification or accession and every four years thereafter, reports on the measures they have taken to give effect to the Convention; the Committee considers and comments upon these reports at its semiannual meetings.⁶⁹ In addition, the Committee has competence: (1) to investigate reports of the use of torture by States Party when it receives "reliable information which appears. . .to contain well-founded indications that torture is being systematically practiced in the territory of a State Party;"⁷⁰ (2) to consider complaints by one State Party that another is not fulfilling its obligations under the Convention, where both States have rec-

67. See Appendix at III(1). For the distinction between "self-executing" and "non-self-executing" treaties and agreements, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111. Given the language of the Convention, for example requiring each State Party to criminalize acts of torture and to take "effective legislative, administrative, judicial and other measures" to prevent such acts, there is little room to argue that the Convention was intended to be self-executing. Since United States law, at both the federal and state levels, seems to be fully in compliance with the Convention, it may only be necessary to establish federal jurisdiction over offenses committed by United States nationals outside the United States, and over foreign offenders committing torture abroad who are later found in a territory under United States jurisdiction, under Art. V(1) and (2) respectively.

68. Art. 17. The experts are required to be persons of "high moral standing and recognized competence;" while nominated and elected by States Parties, they serve in their individual capacities, not as representatives of governments. Creation of such oversight bodies is common in contemporary multilateral treaty practice where there are no existing international structures to perform the function; for example, the International Covenant on Civil and Political Rights established a similar body, the Human Rights Committee, while the Vienna Illicit Trafficking Convention conferred supervisory responsibilities on two standing UN bodies, the International Narcotics Control Board and the UN Commission on Narcotic Drugs. See Stewart, *supra* note 5, at 403.

69. Art. 19(1), (3), and (4). See generally *Report of the Committee Against Torture*, U.N. GAOR Supp. (No. 44), U.N. Doc. A/45/44 (1990).

70. Art. 20(1).

ognized the Committee's competence to do so;⁷¹ and (3) to consider complaints by or on behalf of individuals claiming to be victims of a violation of the Convention by a State Party if that State Party has recognized the Committee's competence to do so.⁷²

In addition to submitting the required periodic reports to the Committee, the United States will recognize and accept the Committee's competence to investigate any reliable reports it may receive indicating a systematic practice of torture in the United States, and to consider complaints other States Party have lodged concerning alleged violations of the Convention by the United States — if the opposing State Party has made a reciprocal declaration.⁷³ Because of this reciprocity, accepting the possibility of State-to-State complaints will permit the United States to participate actively in the Committee's work by focusing attention where it may be most warranted. Since the Committee's authority to investigate reliable reports of a systematic practice of torture is accepted unless specifically declined, the United States' instrument of ratification need only include a declaration recognizing the competence of the Committee to receive State-to-State complaints under Art. 21 on the basis of reciprocity.⁷⁴

By contrast, the United States will not, at least at this point, accept the competence of the Committee to consider individual complaints of treaty violations. Under Art. 22, such complaints are admissible only after the individual has exhausted all available domestic remedies — except when the application of the remedies is unreasonably prolonged or unlikely to be effective. Given the extensive protections of the United States legal system, it is highly unlikely that any complaint of torture by United States authorities not already resolved under United States law would be substantively meritorious. The

71. Art. 21(1).

72. Art. 22(1).

73. See Appendix at III(2).

74. *Id.* In submitting the Convention to the Senate, the Reagan Administration had indicated its intent to "opt out" of the Committee's work by making a reservation, pursuant to Article 28, that the United States did not recognize the competence of the Committee under Article 20 to investigate charges of a systematic practice of torture in the United States and by declining to make the declarations necessary to accept the Committee's other competencies under Articles 21 and 22. See President's Transmittal, *supra* note 4, at (iii). The Bush Administration determined, after its review of the "package," to drop the proposed reservation under Article 28 and to accept the Committee's competence over State-to-State claims. See SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A.

amount of time and otherwise scarce governmental resources potentially required to respond to specious complaints outweighs any benefit accorded by "opting in" to the individual complaint mechanism. Declining to accept the Committee's jurisdiction in this regard will not prevent the United States from participating actively and effectively in the Committee's work.

VII. DISPUTE SETTLEMENT

A final reservation, concerning an issue of public international law, will be made to the dispute settlement provisions of Article 30(1), which requires States Party to adhere to a two-step process with regard to dispute resolution. The process requires States Party to first submit any dispute between them concerning the interpretation or application of the Convention to arbitration and then, if within six months the arbitration has not been organized, to refer the matter to the International Court of Justice in conformity with the Statute of the Court. In keeping with recent U.S. policy regard the compulsory jurisdiction of the Court, and as specifically permitted by the "opt out" provision contained in Article 30(2), the reservation will state that the United States does not consider itself bound by Article 30(1) but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.⁷⁵

VIII. CONCLUSION

The United States has been from the outset a strong supporter of the Torture Convention. The Executive Branch participated actively in its negotiation, with the endorsement and encouragement of the Congress, and the Senate in giving its advice and consent to ratification viewed United States ratification as demonstrating a clear national policy of unequivocal opposition to torture as well as a major step forward in the international community's efforts to eliminate the practice.⁷⁶

The various provisos upon which advice and consent was conditioned were intended both to clarify points of possible confusion and to resolve any potential conflicts between the Convention and United States law. No proviso significantly or substantially modifies the commitment of the United States to carry out its obligations under the

75. See Appendix at I(2).

76. See SENATE EXEC. REP. NO. 30, *supra* note 4, at 3.

Convention. Some may contend that a few of these conditions are overly technical, unnecessary or unduly limiting, and would in any event have been more appropriately included in the Senate's record of consideration or in domestic implementing legislation, rather than formally placed in the international record as reservations, declarations or understandings. Nonetheless, each addresses an actual or perceived difficulty of implementation or interpretation. Taken together, they reflect the seriousness with which the United States approaches its international undertakings, particularly when they affect the rights and obligations of individuals within its jurisdiction. A close study of the reasons underlying the provisos may in fact help pave the way for future ratification of other human rights and international criminal law treaties.

APPENDIX
SENATE OF THE UNITED STATES

in Executive Session

October 27, 1990

RESOLVED, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988,

Provided that:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following

declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.