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Testimony Before the Senate Committee on Foreign Relations, Convention Against Torture

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present proposed reservation by the State Department the United States is with-
drawing further from its acceptance of the International Court of Justice. The reser-
vation is a retreat by the United States from the International Court of Justice and the
peaceful resolution of disputes in the international community.

We note that the U.S.S.R. has announced it will withdraw its reservation to Article
30. With the significant political changes occurring in Eastern Europe at this
time, it is hoped that other states parties making this reservation will also with-
draw it. We recommend this course of action to the United States as well.

In conclusion, Amnesty International USA requests the administration to recon-
sider the reservations and understandings found in the State Department’s letter of
December 19, 1989, in light of the concerns we have raised in this memorandum and
respond positively to any Senate action to address these concerns. We look forward
to continued discussions with the Bush administration and to working together
toward speedy ratification of the Convention Against Torture and Other Cruel, In-
human or Degrading Treatment of Punishment.

The CHAIRMAN., Thank you very much, indeed, Mr. Nagan.
We now come to Mr. David Forte, Professor of Law at the Cleve-
land Marshal College of Law at Cleveland State University.

STATEMENT OF DAVID FORTE, PROFESSOR OF LAW, CLEVELAND
MARSHAL COLLEGE OF LAW, CLEVELAND STATE UNIVERSITY,
CLEVELAND, OH

Mr. Forte, Thank you, Mr. Chairman. It is nice to see you again.
The CHAIRMAN. Thank you.
Mr. Forte, I shall submit my full statement for the record and
get to the nub of the issue right now.

From the testimony we have received, we are now seeming to
come to a consensus that a number of reservations are necessary to
make this convention effective, both in terms of U.S. laws and con-
cerning with human rights internationally. The only questions are
which ones and how they should be refined.

I have been doing significant research in the “travaux prepara-
toires”—that’s French for “committee hearings”—of the negoti-
atations leading to the treaty. The treaty itself fully expected that
there would be reservations.

It is a multilateral treaty. Multilateral treaties, by their nature,
cannot cover every type of nuance in every legal system. So, very
often, multilateral treaties expect reservations.

Let me give you some examples.

On the definition of “torture,” according to the commentary of
two of the prime negotiators of the treaty, the representatives of
Holland and Sweden, the definition of torture in article 1 was not
designed to be a penal definition. I repeat: it was not designed to be
a definition that was to be transported, as a whole, into criminal
law.

United States Diplomatic and Consular Staff in Teheran, 1980 1 C.J. 3, 4, where the United
States asserted jurisdiction based upon provisions in the Treaty of Amity, Economic Relations
and Consular Rights of 1955. The International Court of Justice also based jurisdiction upon the
Optional Protocols to Vienna Convention of 1961 and 1963 on Diplomatic and Consular Rela-
tions. In Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area,
1984 1 C.J. 246, 249, jurisdiction was provided by the Special Agreement dated March 29, 1979,
between the United States and Canada. On February 6, 1987, the United States filed in the Reg-
istry of the International Court of Justice an application instituting proceedings against Italy.
The jurisdiction in the case, Elettronica Sicula S.p.A. v United States of America v Italy, is based
upon Article XXVI of the Treaty of Friendship, Commerce and Navigation signed February 2,
1886, between Italy and the United States. International Court of Justice Communique, No 87/2,
The negotiators to the convention and the drafters of article I said that explicitly.

What article 1 was designed to do was elucidate the notion of torture which had been condemned previously in many other treaties and declarations but had never had any flesh put upon it.

So it is left to the nation states, in their penal legislation or through reservations, whichever is more appropriate, to find a definition of torture that is explicitly focused on what the criminal aspects of that act should be.

Second, on the jurisdiction of the International Court of Justice, it is explicit in the convention that a reservation is permitted. We should note that at any time, once the convention is ratified, we can later on accept the jurisdiction of the International Court of Justice. But once we accept the International Court of Justice jurisdiction and if bad things come from that, the only way we can get out of it under the treaty would be to denounce the treaty altogether, and that would be unfortunate.

Third, Senator Helms mentioned the question as to why the extradition exception was not kept in the latest rendition by the Justice Department and the Department of State.

In fact, a number of states had made a statement on the record that they would like to have article 3 not apply to existing extradition treaty standards. And, in the commentary to the treaty, it was expected. That was the word. It was “expected” that a number of states would opt for such a reservation should they find it necessary.

Why do we need so many reservations?

We need so many reservations because the U.S. Government is a Government of very complex structure: our Federal structure, and our highly developed notions of due process.

Mr. Chairman, we should never forget that, as noble as convention is—and I do hope we ratify it in far less time than 35 years—as noble as this convention is, in my view, the greatest human rights document extant in the world today is the United States Constitution.

Anytime a document that is extrinsic to the legislative process of this country can have effect within the country and be applied by the judiciary without sufficient legislative guidance, there is a danger that our tradition of due process can be undermined.

For example, in one of the reservations, dealing with the definitions of intent, the word “awareness” was used by the State Department, rather than “knowledge.” Well, it strikes me that that goes against our normal requirement in criminal law that there must be specific intent before we can punish somebody.

I think “awareness” is too weak a term. I think “knowledge” or “actual knowledge” would be a far better term.

In conclusion, I would like to bring up one final point, and that is the difference between the Reagan submission and the Bush submission regarding articles 20, 21, and 22.

We are under a dilemma in this kind of treaty because there are ten states, among whom are Bulgaria, Mexico, and the Soviet Union, that have accepted the jurisdiction of the committee against torture to receive individual and state party complaints as to their
torture practices, and also the complaints of others about state party practices in regard to torture.

May I have time to conclude? I should be only a moment.

The CHAIRMAN. Yes.

Mr. Forte. Many international agencies, such as UNESCO, have, unfortunately, been perverted into political actions against the United States in the past. We want very much for this committee against torture not to turn into that situation.

I would suggest, therefore, that the Senate consider one of two alternatives: first, the Reagan alternative of waiting a few years to make sure that this committee of experts properly fulfills its duty and investigates torture without political bias; or, second, if the committee decides to accept the current administration's view that we should accede to the committee against torture's jurisdiction, we should get binding and reliable assurances from the administration that for political reasons, we will not hesitate to bring up actions of torture against China, we will not hesitate to bring up actions of torture against Mexico or the Soviet Union.

I think if either of those two things are done, then we can safely move into the treaty. But I do not think we should allow ourselves to be hit by charges from foreign governments about torture when we do not have the political will to make the counter arguments against them.

Thank you.

[The prepared statement of Mr. Forte follows:]

PREPARED STATEMENT OF DAVID F. FORTE

Today is a day for hope and caution. The consideration by the United States Senate of the Convention Against Torture can be another major step towards the realization of America's vision of a world order ruled by law, in freedom, and with concern for the dignity of every human person. Every person in this room who has dedicated his or her mind, energy, prayers, and public service to the cause of freedom and justice for years or decades cannot but be deeply moved by the events of the past two years. We can recall the prophecy of the Sermon on the Mount: "Blessed are they hunger and thirst for justice, for they shall be satisfied."

Like the other victories for human rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can be beneficial only if we take it seriously and we take our participation in it seriously. We should accede to the Convention not because it sounds or looks good, but only if it furthers the American interest in protecting freedom and security both within this country and overseas.

We should remember that, even in its present form, the Convention Against Torture was not obtained easily within the international atmosphere of the United Nations. Administrations from both parties, both the Congress and the Executive, have long known what a hostile diplomatic environment the United Nations has been for the interests of the United States. Ten years ago, the Executive and Congress made the firm decision that to take the United Nations seriously. We decided that the United States would no longer supinely accept insults to this country or to the cause of human rights. It has been a valiant struggle within an institution unready for change because of its institutional structure and rigid agenda. But changes nonetheless were won.

Over a period of eight years under the vigorous leadership of Ambassadors Jeane Kirkpatrick and Vernon Walters, significant progress was made on the issues of Afghanistan, Cambodia, chemical warfare, African famine and economic development, terrorism, and human rights. Ambassador Richard Shifter in particular deserves the gratitude of our country for his work in bringing the Convention Against Torture to reality. I hope the United States does not now lessen its pressure on the United Nations to reform its structure and modify its agenda.

In considering this Convention, we should assure ourselves that it will work for its intended purposes, and not be perverted for political objectives the way some
other international agencies, such as UNESCO, have been. I believe that this Convention can further the cause of human rights, provided certain reservations, understandings, and assurances are present. At a minimum, the revised package of reservations and understandings submitted by the Department of State is absolutely necessary for the success of the Convention Against Torture, although a few, in my opinion, need modification. However, the Senate should also obtain additional assurance time to take the Convention in effect and neither withhold for our own political reasons evidence of torture committed by other states, nor accept the mechanism of the Convention being turned against the United States by states unfriendly to our values.

There are two essential reasons why a group of reservations is necessary to the success of the Convention. First, in bilateral treaties, the two parties are normally aware of the specific institutional and foreign policy needs of each other. Details respecting the particular requirements of each party can be negotiated into the text. Of course, in the American context, the role of the Senate in the approval of treaties allows for an additional voice. But by and large, a wise administration shall take into consideration the opinions of the Senate during the negotiation phase. Reservations are often, therefore, less critical to the success of bilateral treaties.

Multilateral treaties, on the other hand, deal with any number of parties, each of which has differing internal political, economic, and legal institutions. It is frequently impossible for a multilateral treaty to contend with and incorporate the range of variations that the respective parties bring to the table. Consequently, most multilateral treaties contemplate the possibility and the expectation of reservations and it is perfectly appropriate for there to be any number of reservations.

The Vienna Convention on Treaties permits reservations to treaties, unless "the reservation is incompatible with the object and purpose of the treaty." (Art. 19 c) The Convention Against Torture contemplates that there will be reservations. Not only are appropriate reservations compatible with the object and purpose of the Convention, they will assist in making the United States participation in the Convention more effective.

Second, as important and noble as the Convention Against Torture may be, we must never lose sight of the fact that the greatest human rights document in the world today is the United States Constitution. Any Convention which modifies the structure of our political process, or which changes our laws without reference to our constitutional values does the cause of human rights no service. The reason why these reservations are important is because the United States takes the rule of law to heart, and the members of the executive, judicial, and legislative branches only serve in their respective positions of power upon taking an oath to preserve, protect and defend the Constitution of the United States.

Although some groups have criticized the administration for putting forwards reservations that seek to maintain American legal standards, this is precisely why these reservations are necessary. The American system of justice, of due process, and of human rights has no peer in the world. When other countries adopt the protections we have for the criminally accused, for the political opposition, and for the religious dissenter, then they may appropriately criticize us. But the United States owes no apology for its Constitution. To bring into harmony the application of the Convention Against Torture with American law does both a service. When Prime Minister Nehru was questioned shortly after Indian independence why he chose to stay in the British Commonwealth, he replied that the Commonwealth was not independence with something less. Rather membership in the Commonwealth constituted independence with something more. Similarly, reservations that maintain the coherence of the American constitutional order will give us the benefits of the Convention Against Torture with something more, much more.

In particular, it is vital that the United States declare that the Convention be not self-executing, that the definition of inhuman punishment under Article 16 comport with the Eighth Amendment to the United States Constitution, and that the United States not agree to the compulsory jurisdiction of the International Court of Justice at this time.

There is, in addition, one omission in the latest package put forward by the Department of State that deserves special comment. In 1988, the administration had decided not to recognize the competency of the Committee Against Torture under Articles 20, 21, and 22. The current position of the State Department is that the United States should adhere to those articles. In 1988, the administration wished to defer recognition of the competency of the Committee Against Torture until we had some time to assess the manner in which it carried out its work. It was a prudent caution. There are many international organizations and entities supposedly dedicated to the cause of human betterment that have been undermined by corruption.
and political biases. UNESCO is one that comes immediately to mind. We should be cautious in allowing a new organization to be used as a possible political weapon against the United States until we have seen how it actually operates.

It is, therefore, important to note what other states have adhered to the competency of the Committee Against Torture. At present, ten states have agreed to the committee's jurisdiction. They include Bulgaria, Mexico, and the Soviet Union. This leaves the United States in a dilemma. On the one hand, it has been countries like Bulgaria, the Soviet Union, and Mexico that have politicized U.N. agencies against the United States in the past. I can say frankly from my experience at the United Nations that Mexico is no friend of this country in that forum. On the other hand, it is precisely those countries, and others, we would want to have investigated for alleged violations of human rights.

To resolve this dilemma, we should opt for one of two practical alternatives. First, inasmuch as we still do not know if this Committee will be undermined by political considerations in the way that supposedly nonpolitical organizations like UNESCO have been, we could choose to follow the example of the majority of other countries that have ratified the Convention. We can withhold our recognition of the jurisdiction of the Committee Against Torture until we can measure how fairly and impartially it accomplishes its mandate.

On the other hand, if the Senate should choose to go along with the latest position of the Department of State and accept the jurisdiction of the Committee Against Torture, the Senate should first obtain some firm, formal and reliable assurances from the Department of State. First, will the United States in fact forward evidence of torture to the Committee Against Torture that may occur in countries such as Mexico and the Soviet Union without regard to political considerations? After all, the Convention is designed to protect human individuals from one of the most heinous acts that governments can commit. We should not blithely let these pass simply because of diplomatic considerations. Second, can we expect that at the next election for members of the committee it is probable that a United States national will be appointed to the committee? Third, if the Committee Against Torture does become distorted by anti-American political biases, what assurance do we have that the United States will exercise its rights under Articles 21 and 22 and promptly withdraw? Finally, can we have any reasonable assurance in the light of recent events that the administration will use its diplomatic influence which it claims it is maintaining with the Peoples' Republic of China to have that government also accept the competency of the committee? Are we now pressing China to live up to its obligations under the Convention?

I do not believe the Senate would be wise in allowing the United States to be subject to charges brought before the committee until it has some definite assurance that the administration will not, for politically expedient reasons, fail to bring egregious offenses to the attention of the committee. I suggest to you, gentlemen and gentlelady, that some assurance from the current administration should be obtained that incidents of torture in Mexico or in China, for example, will not be ignored if the Senate agrees to accepting the jurisdiction of the committee. Frankly, as it now stands, if political reasons restrain the administration from doing much on these vital human rights issues now, the fact that we agree to the competency of the committee will not change that attitude. But if the Senate makes it a quid pro quo, if it agrees to adhering to Articles 21 and 22 on condition that the administration will bring specific violations before the committee, and gives the Senate the other vital assurances I have suggested, then it may be appropriate to accept the committee's jurisdiction. Otherwise, the wisest course would be to abstain from the committee's jurisdiction until the Senate can evaluate the conduct of the committee and the manner in which other parties to the Convention abide by its obligations.

At this point, I would like to offer the Foreign Relations Committee some comments on specific reservations as submitted by the Department of State in December 1989.

1. General Reservation. This reservation respects the federal nature of the American polity. It keeps intact the delicate balance between state and federal authority that the framers of the Constitution astutely provided for in the Great Compromise of 1787. It assures that the workings of our federal system may not be used by other parties to this Convention to declare that the United States is not in compliance. It therefore keeps our international obligations and our constitutional requirements in harmony.

2. Reservation to Article 16. By making the prohibitions in Article 16 equivalent to the prohibitions in the Fifth, Eighth and Fourteenth Amendments, this reservation preserves the constitutional prerogatives of the Congress and the President at the federal level, and of the states in formulating policies dealing with corporal pun-
ishment, the death penalty, and other punitive measures permitted by the Constitution. Without this reservation, those who have certain legislative agendas—the abolition of capital punishment, for example—may be tempted to outflank our constitutional processes and ask a judge to declare the death penalty illegal under the Convention. In my opinion, public policy of such serious moment should not be formulated in such an extra-constitutional fashion.

3. Reservations to Article 30. At the present time, the International Court of Justice has not fully lived up to the hopes of those that supported it after World War II. For the past few years, the United States has chosen a course of respectful distance from the Court because of the manner in which it adjudicated the dispute brought by Nicaragua. The policy of using the Court on appropriate occasions is the correct policy. Until major reforms in the Court are brought about to change its current political cast, the United States should not agree to grant automatic jurisdiction to the Court in disputes arising under the Convention. According to Article 30 of the Convention, a reservation not to accept the compulsory jurisdiction of the ICI must be made at the time of ratification. It may at any time thereafter be withdrawn. However, if the United States does not make its reservation now, it will not be able to in the future unless it denounces the Convention altogether. It is far better the take the cautious route permitted by the Convention, and reserve now while it may be done while we await future developments in the Court.

UNDERSTANDINGS

Article 1. It is my opinion that the definition of torture and the liability for acts of torture need to be appropriately clarified to comport with essential requirements of due process. Specific clarifications need to make clear Anglo-American understandings of the substance of the offense and the extent of liability under the Convention. These understandings are part of the one of the most fundamental attributes of the Rule of Law, namely, *nullum crimen, nulla poena, sine lege*: there may be no punishment without prior clear standards established in the law. To adhere to a Convention without the clarifications that our tradition of protection of the accused requires would be a violation of the legal tradition enshrined in our adherence to due process.

In that vein, I am deeply troubled by the change in the latest State Department version that requires only "knowledge" of an activity constituting torture rather than "knowledge." The explanation of the Department of State is that "knowledge" means "willful blindness." If that be the case, then "knowledge" is a particular weak term to carry such a meaning. In the history of criminal law, the term "knowledge" is a far better concept, for it means primarily that there be must be specific intent, a necessary prerequisite in our law to criminal liability. Any concept that might fasten the extreme sanction of this Convention to acts of mere negligence is contrary to our deepest traditions of due process.

Article 3. To deport or extradite a person to a country where there is a possibility of his being tortured is prohibited under this Convention. The Convention uses the term "substantial grounds." If, as the State Department suggests, "substantial grounds" mean only "more likely than not," then much of the protection of the Convention is undone. If we are to use an appropriate domestic standard for courts to use, the best analogous standard should be "a well-founded fear of political or religious persecution" only applied in this context to torture.

Article 14. Any state should be cautious in asserting extraterritorial jurisdiction. The purpose of the Torture Convention is to bind states in the prevention and prosecution of those who commit such heinous acts. The Convention was not designed to change the internal civil law of any country. The understanding simply makes the point more clearly.

DECLARATIONS

That the Convention be non-self-executing. Many decades ago, Senator John Bricker proposed a constitutional amendment that would have required that all treaties be non self-executing. The amendment failed. But experience has shown the principle to be a good one. By requiring implementing legislation, our constitutional process of law making is preserved. Otherwise, our courts will be authorized to interpret a treaty that might have been negotiated for important foreign policy reasons but without sufficient thought as to its domestic repercussions. Only the United States Senate would have the chance for a second look. By requiring implementing legislation, however, the entire Congress, and the President as well, can carefully craft the details of implementation so that courts have sufficient guidance to be able to apply the Convention clearly and consistently.
I cannot close without an answer to the charge of Amnesty International in its November 2, 1988, position that reservations to the Convention "will further erode the United States credibility regarding its commitment to promoting human rights throughout the world." The charge irresponsible and patently false. When the German people celebrated the opening of the Berlin Wall, we saw them waving the German and the American flag, not the banner of the United Nations. Just before the students were crushed in Tiananmen Square, they raised a facsimile of the Statue of Liberty. National Public Radio reported last week that the symbol of freedom for the Rumanian people was the United States system of freedom. When the Panamanian and, earlier, the Grenadan people celebrated their liberation from tyranny, they thanked this country. When the dictator Marcos was removed and the government of President Aquino needed to be protected, the Philippines called upon the United States. When Poland and Hungary led the way in Eastern Europe to freedom, they cheered the President of the United States. When the students of the Soviet Union listened intently to Ronald Reagan, they heard the message of hope. This country and its Constitution is the beacon of human rights. To assure that the Convention of Torture lives up to our constitutional standards is, in fact, a duty we owe to the cause of human rights.

The CHAIRMAN. Thank you very much, indeed.

Next we will hear from Mr. James Silkenat, Chairman of the Section of International Law and Practice of the American Bar Association.

Mr. Silkenat.

STATEMENT OF JAMES R. SILKENAT, CHAIRMAN, SECTION OF INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION, NEW YORK, NY

Mr. Silkenat. Good morning.

I am Jim Silkenat, Chairman of the ABA Section of International Law and Practice and Chairman of the International Human Rights Committee of the Association of the Bar of the City of New York.

I am in the private practice of law in New York City with the firm of Morrison & Forster.

I am appearing here today on behalf of the ABA and the President of the ABA, L. Stanley Chauvan, of Kentucky, because of the ABA's firm support for U.S. ratification of the U.N. Convention Against Torture.

We commend the committee's prompt attention to this issue and the Bush administration for bringing this package to you as promptly as it has.

Support for the torture convention has been the official policy of the ABA since 1986. At that time, my section prepared a report and a resolution which was adopted by the ABA House of Delegates, representing 350 some-odd lawyers from across the United States, urging the United States to ratify this convention.

Significantly, that action was simply in support of ratification of the Convention. A conscious decision was made to adopt no formal policy by the ABA on any of the reservations, understandings, or declarations that existed at that time.

Nevertheless, while we will not oppose the inclusion of some qualifying language with regard to the convention, we wish to emphasize the importance and unity of the convention as it was unanimously approved by the U.N. General Assembly in 1984 without any qualifications.

If torture continues to exist, as it surely does, why should we bother with yet another treaty which we will observe and which