S. REP. 102-249, S. Rep. No. 249, 102ND Cong., 1ST Sess. 1991, 1991 WL 258662 (Leg.Hist.)
P.L. 102-256, ***1** THE TORTURE VICTIM PROTECTION ACT OF 1991

SENATE REPORT NO. 102–249

November 26, 1991
[To accompany S. 313, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 313), having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

***2** SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.–An individual who, under actual or apparent authority or under color of law of any foreign nation, subjects another individual to torture or extrajudicial killing shall be liable for damages in a civil action to that individual (or that individual's legal representative) or a beneficiary in a wrongful death action with respect to the death of that individual.

(b) Exhaustion of Remedies.–A court shall decline to hear a claim under this section if it appears that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitation.–No action shall be maintained under the provisions of this section unless it is commenced within 10 years of the time when the cause of action arose. All principles of equitable tolling, however, shall apply in calculating this limitation period.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.–For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.–For the purposes of this Act–

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason

based on a discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) 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;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses of personality.

I. LEGISLATIVE HISTORY

This legislation was first introduced on June 6, 1986, by Senator Specter as S. 2528. The Senator reintroduced it in the 100th Congress on March 24, 1987, as S. 824 and, in the 101st Congress, on September 14, 1989, as S. 1629. On June 22, 1990, the Subcommittee on Immigration and Refugee Affairs held a hearing on this legislation. Witnesses at the hearing were: John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice; David P. Stewart, Assistant Legal Adviser for Human Rights and Refugee Affairs, U.S. Department of State; Robert F. Drinan, professor of law at Georgetown Law School, speaking on behalf of the American Bar Association; Michael H. Posner, executive director, Lawyers Committee for Human Rights; and John Shattuck, vice chairman, board of directors, Amnesty International, U.S.A. Senate bill 1629 was reported favorably by the subcommittee on July 19, 1990, by a 2-to-1 vote.

In the 102d Congress, Senator Specter reintroduced the bill as S. 313 on January 31, 1991. The Senate Judiciary Committee reported ***3** S. 313 favorably by voice vote with an amendment in the nature of a substitute on November 21, 1991. This legislation is now cosponsored by Senators Leahy, Kennedy, Kohl, Heflin, Adams, Akaka, Bryan, D'Amato, Inouye, Jeffords, Kerry, McCain, Wellstone, and Wirth.

II. NEED FOR LEGISLATION

Official torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in a decision written by then-Chief Judge Irving R. Kaufman, "official torture is now prohibited by the law of nations." Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980). Senator Kennedy explained at the June 22, 1990, subcommittee hearing why torture is so universally condemned: "There are few actions so dehumanizing as torture. Victims bear the physical and psychological scars of their experience for life. Its use is designed to terrorize and oppress entire populations." The prohibition against summary executions has acquired a similar status.

These universal principles provide little comfort, however, to the thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people. For 1990 alone, Amnesty International reports over 100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads. See "Amnesty International Report 1991." Too often, international standards forbidding torture and summary execution are honored in the breach. As Senator Specter noted in introducing S. 313 on January 31, 1991,

While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of

the world's governments engage in, tolerate, or condone such acts.

The purpose of this legislation is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing. This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that–by making sure that torturers and death squads will no longer have a safe haven in the United States.

Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation ***4** by providing a civil cause of action in U.S. courts for torture committed abroad.

The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. 1350). Section 1350 has other important uses and should not be replaced. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir., 1980), the Court of Appeals for the Second Circuit held that section 1350 afforded it subject matter jurisdiction over a tort claim in which two citizens of Paraguay alleged that a former Paraguayan inspector general of police had tortured and killed a member of their family in Paraguay. After finding that torture has been condemned and renounced as an instrument of official policy by virtually all countries of the world, Chief Judge Irving R. Kaufman further held that customary international law provides individuals with the right to be free from torture by government officials. Consequently, section 1350 gave Federal courts jurisdiction over allegations of torture since torture violates the "law of nations."

As Judge Kaufman explained in the Filartiga decision:

> Among the rights universally proclaimed by all nations *** is the right to be free of physical torture. Indeed for purposes of civil liability, the torturer has become–like the pirate and slave trader before him–hosts humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

The Filartiga case has met with general approval. In Forti v. Suarez Mason, 672 F.Supp. 1531 (N.D. Cal., 1987) motion to reconsider granted in part on other grounds, 694 F.Supp. 707 (N.D. Cal., 1988), the court followed Filartiga and held that allegations of official torture constituted a violation of the law of nations, as did prolonged arbitrary detention, summary execution, and "causing disappearance" of individuals. Suarez Mason was an action under section 1350 by Argentine citizens against former Argentine General Suarez Mason for damages arising out of alleged torture, murder, and prolonged arbitrary detention by military and police personnel under Suarez Mason's authority and control. The revised draft of the Restatement of Foreign Relations Law of the United States provides that there should be a cause of action where a state practices "[summary] murder or causing disappearance [or] disappearance," among other wrongs, because these practices violate the law of nations.[1]

At least one Federal judge, however, has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress. In a concurrence in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir., 1984), cert. denied, 470 U.S. 103 (1985), Judge Robert H. ***5** Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit grant by Congress of a private right of action for lawsuits which affect foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a

statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350.[2] Consequently, that statute should remain intact.

Furthermore, legislation allowing for the civil suits against torture occurring abroad is by no means unknown. States have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad. Several states have established that the international law of human rights can be enforced on behalf of individuals in their courts. See Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 602–03 (1980) (citing cases from the Constitutional Court of Germany, the Supreme Court of the Philippines, and the Court of First Instance of Courtrai (Belgium)). In addition, according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over "offenses of universal interest."[3]

III. CONGRESS' POWER TO ENACT THIS LEGISLATION

Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases "arising under" the "law of the United States." The Supreme Court has held that the law of the United States includes international law.[4] In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 481 (1983), the Supreme Court held that the "arising under" clause allows Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant. Congress' ability to enact this legislation also drives from article I, section 8 of the Constitution, which ***6** authorizes Congress "to define and punish *** Offenses against the Laws of Nations."[5]

IV. ANALYSIS OF LEGISLATION

The legislation authorizes courts in the United States[6] to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent authority of or under color of law of any foreign action, subjects any person to torture or extrajudicial killing.

A. Extrajudicial killing

The TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law. This definition conforms with that found in the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949).[7] This definition further excludes killings that are lawful under international law–such as killings by armed forces during declared wars which do not violate the Geneva Convention[8] and killings necessary to effect a lawful arrest or prevent the escape of a person lawfully detained.[9] Thus, only killings which are truly extrajudicial in nature and which violate international law are actionable under the TVPA.

B. Torture

The definition of torture in this bill includes word-for-word the understandings included by the Senate concerning the definition of torture in the Torture Convention when it ratified that convention on October 27, 1990 (Understandings 1 (a) and (b)). See Congressional Record at S 17491–92 (daily ed. Oct. 27, 1990).

The definition of torture exempts those actions pursuant to "lawful sanctions." There has been some confusion whether this phrase refers to sanctions which are lawful under the foreign state's laws, even if they violate international law, or whether this phrase only includes sanctions which are lawful under international law. This debate was resolved by the U.S. Senate during the ratification of the Torture Convention and courts construing the term "lawful sanctions" in this legislation's definition of torture should refer for guidance to the following legislative history of the ratification of the Torture

Convention. When the U.S. Senate ratified the Torture Convention, it included an understanding, "Understanding 1(c)," which states that the term "lawful sanctions" refers to sanctions ***7** authorized by domestic law or by judicial interpretation of such law. The understanding continues, however:

> 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.

As Assistant Secretary for Legislative Affairs with the Department of State Janet G. Mullins explained in a December 11, 1989, letter to Senator Claiborne Pell, chairman of the Senate Committee on Foreign Relations, the U.S. Government "does not regard authorized sanctions that unquestionably violate international law as 'lawful sanctions' exempt from the prohibition on torture."

C. Who can sue

The legislation permits suit by the victim or the victim's legal representative or a beneficiary in a wrongful death action. The term "legal representative" is used only to include situations in which the executor or executrix of the decedent's estate is suing or in which an individual is appearing in court as a "friend"of the victim because of that victim's mental or physical incapacity or youthful age. The term "beneficiary in a wrongful death action" is generally intended to be limited to those persons recognized as legal claimants in a wrongful death action under Anglo-American law.[10]

D. Who can be sued

First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have "minimum contacts" with the forum state, for example through residency here or current travel.[11] Thus, this legislation will not turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever.

The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976,[12] which renders foreign governments immune from suits in U.S. courts, except in certain instances.

The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats. The United States is a party to the Vienna Convention on Diplomatic Relations, under which diplomats are immune from civil lawsuits except with regard to certain commercial activities.[13]

***8** Nor should visiting heads of state be subject to suit under the TVPA. Article 2(1) of the United Nations Convention on Special Missions provides that, when one state sends an official mission to another, the visiting head of state "shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit."[14]

However, the committee does not intend these immunities to provide former officials with a defense to a lawsuit brought under this legislation. To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.

Similarly, the committee does not intend the "act of state" doctrine to provide a shield from lawsuit for former officials. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court held that the "act of state" doctrine is meant

to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.[15]

E. Scope of liability

In order for a defendant to be liable, the torture or extrajudicial killing must have been taken "under actual or apparent authority or under color of law of a foreign nation." Consequently, this legislation does not cover purely private criminal acts by individuals or nongovernmental organizations. However, because no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of "official actions" taken in the course of an official's duties. Consequently, the phrase "actual or apparent authority or under color of law" is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority. Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing "under color of law" as well as interpretations of "actual or apparent authority" derived from agency theory in order to give the fullest coverage possible.

The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit ***9** against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts–anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.[16] In Forti v. Suarez Mason, the court found Suarez Mason liable as Commander of the First Army Corps under the theory that the alleged acts of torture and summary execution were committed by personnel under his command "acting pursuant to a 'policy, pattern and practice' of the First Army Corps." Suarez Mason, 672 F.Supp. at 1537–38. Thus, although Suarez Mason was not accused of directly torturing or murdering anyone, he was found civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent.

Similarly, in In re Yamashita, 327 U.S. 1 (1946), the Supreme Court held a general of the Imperial Japanese Army responsible for a pervasive pattern of war crimes committed by his officers when he knew or should have known that they were going on but failed to prevent or punish them.[17] Such "command responsibility" is shown by evidence of a pervasive pattern and practice of torture, summary execution or disappearances.[18]

Finally, low-level officials cannot escape liability by claiming that they were acting under orders of superiors. Article 2(3) of the Torture Convention explicitly states that "An order from a superior official or a public authority may not be invoked as a justification for torture."

F. Exhaustion of remedies

A court may decline to exercise the TVPA's grant of jurisdiction only if it appears that adequate and available remedies can be assured where the conduct complained of occurred, and that the plaintiff has not exhausted local remedies there. Cases involving torture abroad which have been filed under the Alien Tort Claims Act show that torture victims bring suits in the United States against their alleged torturers only as a last resort. Usually, the alleged torturer has more substantial assets outside the United States and the jurisdictional nexus is easier to prove outside the United States. Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this ***10** legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

More specifically, as this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts, the interpretation of section 2(b), like the other provisions of this act, should be informed by general principles

of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use.[19] Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

This practice is generally consistent with common-law principles of exhaustion as applied by courts in the United States. See, e.g., Honig v. Doe, 484 U.S. 305, 325–29 (1988) (allowing plaintiffs to by-pass administrative process where exhaustion would be futile or inadequate). Courts in the United States are familiar with the operation of the exhaustion requirement.[20] As in the international law context, courts in the United States do not require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile.[21] In this determination, courts in the United States are equipped to deal with the intricacies of determining issues of foreign law and will have to undertake a case-by-case approach.[22]

If a final judgment has been rendered against the plaintiff abroad, the court will have to determine whether to recognize that judgment and dismiss the case. In such a case, the usual principles of res judicata apply.[23] Grounds for nonrecognition of foreign judgments include situations much like those that exempt a plaintiff from the exhaustion of remedies requirement: unfairness of the judicial system, unfair procedures, and lack of competence.[24] Courts also will not recognize or enforce foreign judgments contrary to public policy or fundamental notions of decency and justice.[25]

G. Statute of limitations

The legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles ***11** in calculating this period with a view toward giving justice to plaintiff's rights.[26] Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following.[27] The statute of limitation should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated.[28] It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.[29]

However, the explicit reference in this legislation to principles of equitable tolling is in no way intended to suggest that such principles do not apply in other statutes adopted by Congress which do not explicitly contain equitable tolling clauses.

V. ESTIMATED COST OF LEGISLATION

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 404 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, November 21, 1991.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office (CBO) has reviewed S. 313, the Torture Victim Protection Act of 1991, as ordered reported by the Senate Committee on the Judiciary on November 21, 1991. The bill makes any person who,

under the authority of any foreign nation, tortures or extrajudicially kills any person liable to the injured party or the injured party's representative in a civil action.

Enactment of the bill would have no significant budget impact on Federal, State, or local governments. Also enactment of S. 313 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

***12** If your would like further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kent Chritensen, who can be reached at 226–2840.

Sincerely,

Robert D. Reischauer, Director

VI. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

***13** I. MINORITY VIEWS OF MESSRS. SIMPSON AND GRASSLEY

We certainly condemn acts of cruelty and inhumanity, and we share Senator Specter's deeply felt concern that atrocious and frequent offenses of torture are too often not remedied. One offense not remedied is too many. Senate bill 313, however, is not an appropriate way to remedy foreign acts of torture.

We oppose S. 313, the Torture Victims Protection Act, for four reasons: (1) it is in tension with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (2) it possibly exceeds Congress' constitutional authority, (3) it inappropriately establishes U.S. courts as the forum in which suits that have no substantial connection with the United States could be brought, and (4) it might create serious difficulties with the management of foreign policy.

THE U.N. CONVENTION AGAINST TORTURE

Under S. 313, a foreign national who commits torture in a foreign country could be held liable in a U.S. court, no matter the victim's domicile. The Department of Justice noted, and we agree, that "[s]uch a unilateral assertion of extraterritorial jurisdiction would be in tension with the framework of the [U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]." Statement of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, before the Senate Subcommittee on Immigration and Refugee Affairs, June 22, 1990 (concerning S. 1629 and H.R. 1662, substantially similar to S. 313).

The convention was ratified by the Senate October 27, 1991. According to the administration, the convention requires countries to provide remedies for acts of torture which took place only within their own territory. In fact the convention specifically declined to extend coverage to acts committed outside the country in which the lawsuit is brought. We do not wish to second-guess the experts who drafted this treaty, and believe it is unwise to do explicitly what its drafters chose not to do–extend the coverage to extraterritorial actions.

CONGRESSIONAL AUTHORITY

Senate bill 313 also appears to over-extend Congress' constitutional authority. Congress has the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Article I, section 8, clause 10. But as the Department of Justice has noted,

> [t]he reference in the constitutional text to "punish[ing] Piracies and Felonies * * * and Offenses" suggests that the Founders intended that Congress use this power to define crimes. It ***14** is a difficult and unresolved question, therefore, whether that power extends to creating a civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens.

In short, we simply do not agree with the contention in the majority views that Congress "clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad." The majority views cite Verlinden B.V. v. Central Bank of Nigeria (461 U.S. 480 (1983)) as justification for this bill. However, in that case there was a clear U.S. connection. The case involved a contract between a Dutch corporation and the Government of Nigeria (which wished to purchase 240,000 metric tons of cement). When Central Bank of Nigeria issued an unconfirmed letter of credit through Morgan Guaranty Trust Company of New York, the Dutch corporation filed suit, claiming an anticipatory breach of contract.

The connection to the United States in this case is clear: while the plaintiff and defendant in the breach of contract suit were foreign entities, an instrumentality of that breach–however unintended–was a United States corporation, Morgan Guaranty Trust Company, of New York, which acted as a correspondent bank to the Central Bank of Nigeria. Thus, the Verlinden case does consider some actions occurring within the United States, while S. 313 would address actions which occurred wholly outside the United States, with no connection to the United States.

We must concur with the Department of Justice's reservations about the constitutionality of this statute.

ESTABLISHES INAPPROPRIATE FORUM

The principle behind the common law doctine of forum non conveniens, which prevents parties from having their dispute adjudicated in a forum with which they have no connection, describes our overriding problem with S. 313. The doctrine addresses the logistical problems of bringing witnesses and evidence from one state to another when the parties and witnesses have no connection to the forum state and to which the evidence does not have even a remote attachment.

For example, a Montana plaintiff should not bring a Wyoming defendant to a New York Federal District Court when the action originates far from New York and when the parties have no substantial connection with New York. For exactly the same reasons, the United States is not the appropriate forum for a foreign national to hold a foreign defendant to answer for action which occurred far from the United States.

DIFFICULTIES WITH THE MANAGEMENT OF FOREIGN POLICY

The executive branch, through the Department of Justice, has expressed a most serious concern with S. 313, which we share. Senate bill 313 could create difficulties in the management of foreign policy. For example, under this bill, individual aliens could determine the timing and manner of the making of allegations in a U.S. court about a foreign country's alleged abuses of human rights.

***15** There is no more complex and sensitive issue between countries than human rights. The risk that would be run if an alien could have a foreign country judged by a U.S. court is too great. Judges of U.S. courts would, in a sense, conduct some of our Nation's foreign policy. The executive branch is and should remain, we believe, left with substantial foreign policy control.

In addition the Justice Department properly notes that our passage of this bill could encourage hostile foreign countries to retaliate by trying to assert jurisdiction for acts committed in the United States by the U.S. Government against U.S. citizens. For example, if this bill's principles were adopted abroad, Saddam Hussein could try a United States citizen police officer who happened to be present in Iraq, in an Iraqi court, for alleged human rights abuses against any United States citizen that the policeman happened to arrest while performing his duties in the United States.

We very much wish to avoid that result, and believe that this legislation unintentionally would encourage such actions.

CONCLUSION

This bill has noble objectives. However, we believe that the possible negative consequences are too great, and the constitutional authority for Congress to act too tenuous, to allow us to vote in favor of this legislation.

Alan K. Simpson.

Chuck Grassley.

1 Restatement (revised) of the Foreign Relations Law of the United States, Secs. 702, 703 (Tent. Draft No. 6, 1985).

2 For example, outside of the torture and summary execution context, several Federal court decisions have relied on sec. 1350. See Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C., 1985) (finding that sec. 1350 granted Federal court jurisdiction to hear claim that the Swedish diplomat Raoul Wallenberg was arrested, imprisoned and possibly killed by representatives of the Soviet Union); Adra v. Clift, 195 F.Supp. 857 (D. Md., 1961) (in a child custody dispute between two aliens, the court held that wrongful withholding of custody is a tort, and defendant's falsification of child's passport in order to procure custody violated the law of nations).

3 Section 404 of the Restatement, supra fn. 1, sets forth the doctrine of universal jurisdiction: even where there is no other basis for jurisdiction, a "state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern ***." See also United States v. Yunis, 924 F.2d 1086 (D.C. Cir., 1991) (finding terrorism to be an offense of universal concern).

4 The law of nations is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." "The Paquete Habana," 175 U.S. 677, 700 (1900).

5 In Ex parte Quirin, 317 U.S. 1, 28 (1942), the Supreme Court interpreted the "define and punish" clause to allow Congress to make substantive laws incorporating international rules intended to govern individual behavior.

6 While the legislation specifically provides Federal districts courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues–such as interpretations of international law–that are matters of Federal common law and within the particular expertise of Federal courts.

7 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

8 See Geneva Convention, supra at fn. 7, art. 3, sec. 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 15, sec. 2 (excluding "deaths resulting from lawful acts of war" from the prohibition against extrajudicial killings).

9 See European Convention, supra fn. 8, art. 2, sec. 2.

10 Where application of Anglo-American law would result in no remedy whatsoever for an extrajudicial killing, however, application of foreign law recognizing a claim by a more distant relation in a wrongful death action is appropriate. In re Air

Crash Disaster Near New Orleans, Louisiana, on July 9, 1982, 789 F.2d 1092, 1097–98 (5th Cir., 1986) (recognizing claim of nephew for wrongful death of aunt where Louisiana law on wrongful death action would have afforded no remedy)

11 See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

12 The FSIA is codified at 28 U.S.C. 1330, 1332(A) (2)–(3); 1391(f), 1441(d), and 1602–1611.

13 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, art. 31, 35.

14 Convention on Special Missions and Optional Protocol Concerning the Compulsory Settlement of Disputes, G.A. Res. 2530, 24 U.N. GAOR Supp. (No. 30) at 99, U.N. Doc. A/7799 (1969).

15 Accord Trajano v. Marcos, 878 F.2d 1439 (9th Cir., 1989) (unpublished decision reversing lower court dismissal of a lawsuit against former Philippines President Ferdinand Marcos under the "act of state" doctrine and remanding for further adjudicating on the merits). See also Restatement, supra fn. 1, sec. 469, comment c (rejecting the act of state defense in suits alleging violations of fundamental human rights). It is precisely because no state officially condones torture or extrajudicial killings that the Senate in its ratification of the Torture Convention made clear that official sanctions of a state could not possibly include acts of torture. See supra sec. IV(B).

16 Article 4(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: "Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in the torture." (Emphasis added.) Article 3 of the Inter-American Convention to Prevent and Punish Torture similarly provides:

> The following shall be held guilty of the crime of torture: (a) A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or directly commits it or who, being able to prevent it, fails to do so.

17 See also L. Oppenheim, "International Law: A Treatise," vol. II, sec. 253(a), 572–74 (7th ed., 1965).

18 As the opinion of the Tokyo War Crimes Trial tribunal explained: "that crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge." "The Tokyo War Crimes Trial," reprinted in 2 L. Friedman (ed.) "The Law of War: A Documentary Study," 1039 (1972).

19 See, e.g., American Convention of Human Rights, adopted Nov. 4, 1950, art. 46(2), O.A.S.T.S. No 36, and European Convention on Human Rights, supra at fn. 8, art. 26. See generally P. Schochet, "A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act," 19, "Columbia Human Rights Law Review," 223, 232–50 (1987).

20 See Parratt v. Taylor, 451 U.S. 527, 543–44 (1981) (no federal civil rights action against state officials for deprivation of property where the plaintiff did not resort to state remedies).

21 See, e.g., Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y. 2d 52, 57 (1978).

22 Fed. R. Civ. p. 44.1 (Determination of Foreign Law).

23 Hilton v. Guyot, 159 U.S. 113, 166–67 (1895).

24 Restatement, supra at fn. 1, Sec. 492.

25 Id. Sec. 492, comment f.

26 See Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (justice of plaintiff's rights usually outweighs protection

of defendant in considering equitable tolling).

27 See generally Anderson v. Wisconsin Gas Co., 619 F. Supp. 635 (E.D. Wisc., 1985) (discussing factors that give rise to equitable tolling).

28 Boag v. Chief of Police, 669 F. 2d 587 (9th Cir., 1982) (plaintiff's imprisonment suspends running of time limit), cert. denied, 459 U.S. 849 (1982); Brown v. Bigger, 622 F. 2d 1025 (10th Cir., 1980) (same); Origet v. Washtenaw County, 549 F. Supp. 792 (E.D. Mich., 1982) (infancy).

29 Cerbone v. International Ladies' Garment Workers Union, 768 F. 2d 45 (2d Cir., 1985) (fraudulent concealment tolled time limitation).

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