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**United States Department of State**

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**Office of the Legal Adviser**

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**FROM: Harold Hongju Koh, Legal Adviser, U.S. Department of State**

**RE: Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict**

The United States has been a party to the Convention Against Torture (“CAT”) since 1994. The U.N. Committee Against Torture (“CAT Committee”) has now asked the United States to address in its forthcoming Third Periodic Report a number of questions regarding the United States’ compliance with the Convention Against Torture both (1) extraterritorially and (2) in situations of armed conflict. Both of these issues will also unquestionably be raised in NGO submissions and by the Committee during the United States’ oral appearance before the Committee, which will likely be scheduled within a year of the United States’ submission of the Report in 2013. In preparation for the U.S. response to these questions, this Memorandum Opinion addresses the scope of U.S. obligations under the CAT along both dimensions.

This Office has previously conducted an exhaustive legal analysis of the scope of extraterritorial application of the International Covenant on Civil and Political Rights (“ICCPR”) (Tab A). Unlike the ICCPR, which has a single jurisdictional clause, multiple provisions of the CAT address its geographic scope, and the treaty explicitly imposes certain extraterritorial obligations. For example, it is uncontested that the CAT obligates States Parties to criminalize “all” acts of torture, *wherever they occur*, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in “any territory under its jurisdiction.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), Dec. 10, 1984, 1465 U.N.T.S. 113, arts. 4, 5(2). Articles 2, 5, 11, 12, 13 and 16 obligate a State Party to take certain actions limited to “any territory under its jurisdiction,” a concept which, as discussed below, extends beyond sovereign U.S. soil. Article 7 employs a nearly identical phrase (“in the territory under whose jurisdiction”), as does Article 6. Article 14, which requires States Parties to ensure that a victim of torture “obtains redress and has an enforceable right to fair and adequate compensation,” does not include any explicit geographic limitation. However, the United States likewise adopted an understanding upon ratification that it understood Article 14 to apply only to acts of torture “committed in any territory under its jurisdiction.” See notes 130-132 *infra*. Other articles in the CAT, however, including Article 3, which prohibits *nonrefoulement* (non-return) to torture, do not include any such textual geographic limitation and the United States adopted no similar

understanding.

With respect to the question of armed conflict, Article 2 of the CAT provides explicitly that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war . . . may be invoked as a justification of torture.” *Id.*, art. 2(2).

In the recent past, the United States has articulated a very constrained territorial view of many of its human rights treaty obligations, including under the Convention Against Torture. As described below, the last administration specifically claimed that U.S. obligations under many provisions of the CAT did not apply outside sovereign U.S. territory, and that the CAT did not apply to the conduct of armed conflict. However, a number of these positions marked a significant retreat from the United States’ prior interpretations of the CAT, and many of the prior interpretations have been specifically rescinded by this Administration. A number of other intervening developments have also called into question whether prior U.S. positions remain legally sustainable, including the following:

(1) *Ambiguous security situations*: In the last decade, the United States, NATO, and other allies have engaged in increased multilateral military activities overseas, including operations that fall into gray zones that are not easily characterized as armed conflicts, or that have evolved in and out of being situations of armed conflict. Such situations have made it difficult to sustain a bright line distinction between the application of human rights law and the law of armed conflict.

(2) *Foreign and international doctrinal developments*: To address concerns over the existence of perceived legal “black holes,” national, regional and international courts and tribunals have shown increasing willingness to assert the applicability of human rights treaty obligations extraterritorially and in situations of armed conflict. Although that trend began well before September 11, 2001, in the last decade the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Commission and Court of Human Rights, the U.N. Human Rights Committee (HRC), the CAT Committee, the U.N. Human Rights Council, the U.N. General Assembly, and national courts and governments (including in Australia, Canada, and European states) have all become increasingly assertive in publicly recognizing at least some extraterritorial application of human rights treaty obligations, including to some military operations.

(3) *Cooperative operations and aiding and assisting*: The recognition of human rights treaty obligations by some states extraterritorially and in armed conflict has required closer attention to compliance by all participants in joint and multilateral operations. In part because of the perceived paucity of law in this area, the last decade has seen the increasing recognition and clarification of international law rules regarding state responsibility for *aiding and assisting* international law violations. State obligations regarding aiding and assisting have virtually ensured that recognition of extraterritorial human rights obligations by some states *de facto* will cross borders. The rules regarding aiding and assisting mean that states that themselves recognize some human rights obligations extraterritorially and in situations of armed conflict—including our NATO

allies and Australia—cannot collaborate in joint operations, transfer detainees, share intelligence, and otherwise cooperate in activities that might constitute aiding and assisting violations of their own human rights obligations. Common standards have proven vital for such operations.

The international trend toward recognizing some form of extraterritorial application of human rights treaty obligations—however exceptional and limited—has left the United States increasingly isolated in its legal positions in relation to the allies with which it collaborates. Our isolation has hobbled our cooperation with those allies in important respects, and has damaged our international reputation for a commitment to human rights and humane treatment.

Upon taking office, the Obama Administration formally rescinded most of the prior Administration’s internal legal analyses of the scope of U.S. obligations under the Convention Against Torture.<sup>1</sup> On his second day in office, President Obama issued Executive Order 13491 on Ensuring Lawful Interrogations, which was adopted, *inter alia*, “to ensure compliance with the treaty obligations of the United States.” Exec. Order No. 13491 (2009) Preamble. This Order mandated compliance with the treatment standards of the Convention Against Torture for all persons under the effective control of the United States in situations of armed conflict, wherever located. That order recognizes no geographic limit, and instead expressly provides that

[c]onsistent with the requirements of the Federal torture statute, 18 U.S.C. 2340 2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, *the Convention Against Torture*, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), *whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.*

*Id.*, §3(a) (emphasis added).

The President’s Special Task Force on Interrogations and Transfer Policies, which was also established by Executive Order 13491, specifically raised, but left open, the question whether the United States should revisit its prior legal interpretation that the CAT Article 3 *nonrefoulement* prohibition is limited to U.S. territory.<sup>2</sup>

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<sup>1</sup> President Obama’s Executive Order 13491 on Ensuring Lawful Interrogations prohibited U.S. government agents from relying “upon any interpretation of the law governing interrogation—including interpretations of . . . the Convention Against Torture [and] Common Article 3 . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009.” Exec. Order No. 13491, 74 C.F.R. 4893 (2009). See also *Memo from the Office of Legal Counsel on the Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009), <http://www.justice.gov/olc/memoranda-opinions.html>.

<sup>2</sup> Report by the Special Task Force on Interrogations and Transfer Policies (Aug. 2009), at 18-19 [hereinafter Transfer Task Force Report].

To date, the Obama Administration has not publicly reasserted the positions of the prior Administration regarding extraterritorial limitations on application of the Convention Against Torture, or application of the CAT in situations of armed conflict. At the same time, neither has it clearly articulated its own public position regarding either the CAT's extraterritoriality or application in situations of armed conflict. To facilitate the Administration's consideration of these questions, this Memorandum Opinion examines those two issues in detail.

Part I of this Memorandum Opinion addresses background issues relating to the extraterritorial application of treaties. *It concludes that international law does not recognize any general background presumption for, or against, the extraterritorial application of treaties.* Unlike U.S. statutes, with respect to which the U.S. Congress is presumed to legislate primarily domestically, because treaties are by definition international instruments intended to address international relations, there is no presumption that they do not apply extraterritorially. Instead, the geographic application of treaties is a question to be determined for each treaty according to the ordinary rules of treaty interpretation, as set forth in the Vienna Convention on the Law of Treaties—namely, by the treaty's object and purpose, text, and context.

Parts II and III apply these interpretive rules to address the geographic scope of various provisions of the Convention Against Torture, particularly the application of certain articles to “any territory under [a State Party's] jurisdiction” (Part II) and the Article 3 *nonrefoulement* obligation (Part III). *Based upon that application, I conclude that the Convention Against Torture is best understood as establishing and reflecting the following four principles regarding extraterritoriality:*

*First, a comprehensive background prohibition against torture:* The Convention built upon and incorporated a preexisting, geographically comprehensive, background prohibition against torture and cruel, inhuman, or degrading treatment (CIDT) that was already established as a matter of both treaty and customary international law.

*Second, comprehensive obligations to criminalize acts of torture:* The primary purpose of the Convention was to establish a universal regime criminalizing acts of torture. The Convention thus imposes geographically comprehensive obligations on State Parties to criminalize *all* acts of torture, not to return individuals to torture, and to prosecute or extradite offenders, regardless where the act of torture occurs.

*Third, an effective control test for “any territory under its jurisdiction:”* Against this backdrop of comprehensive criminalization, the best interpretation of the term “any territory under its jurisdiction”—which appears in a number of Articles of the CAT—is that this language limits the obligations of a State Party to take the actions specified in those articles to those contexts over which a state exercises sufficient *effective control* to be able to exercise the relevant legal or regulatory authority. *In other words, where a State Party can comply, it must comply.* If the contracting State exercises sufficient legal jurisdiction to be able to regulate the conduct at issue (for example, to adopt affirmative measures to prevent torture or cruel, inhuman or degrading treatment (“CIDT”), to take an individual into its custody and refer the person for prosecution or extradition, or to investigate a violation, etc.), it is required to do so by the terms of the CAT. On its face,

and consistent with both the negotiating and ratification history of the Convention and longstanding U.S. interpretations, “any territory under [U.S.] jurisdiction” necessarily includes the special maritime and territorial jurisdiction (“SMTJ”) of the United States<sup>3</sup> and special aircraft jurisdiction.<sup>4</sup> On their face these concepts recognize U.S. legal jurisdiction over extraterritorial locations—such as State-registered ships and aircraft, U.S. embassies and consulates, Guantánamo and other U.S. military bases overseas—and other locations over which the United States, as a matter of domestic statute, explicitly exercises lawful jurisdiction. The negotiating history of the Convention also makes clear that “any territory under its jurisdiction” was understood to reach circumstances over which a State exercises *de facto* effective control, including situations of occupation. *In short, the Convention limits obligations to circumstances in which a State Party exercises sufficient de jure or de facto control over circumstances to legally comply.* On the other hand, where a State lacks sufficient legal authority to take the relevant action, it is not required to do so.

*Fourth, no general territorial limit, including for nonrefoulement:* In light of the overall structure of the CAT, articles in the Convention apply geographically without constraint unless they include a textual geographical limitation, or unless the United States has adopted an explicit understanding imposing such a geographic limitation, as it did for Article 14. Provisions in the Convention that contain no geographic constraint include Article 1 (the definition of torture), Article 3 (*nonrefoulement*), and Article 4 (criminalization of torture), which on their face apply without territorial limitation. Although the United States has previously taken the position that the Article 3 *nonrefoulement* obligation is the most geographically restrictive provision of the CAT—limited to sovereign U.S. territory—I find that position legally unsustainable and unsupported by the object and purpose, text, context, and negotiating history of the Convention. That U.S. position was not articulated at the time of ratification and has been based primarily on the Supreme Court’s analysis of the 1951 Refugee Convention, which had a different text, context, object and purpose, and negotiating history. Nothing in the CAT suggests that that treaty intended, on the one hand, to criminalize “all” torture, wherever located, yet at the same time to permit a person to be *returned* to torture from any offshore location.

Finally, Part III addresses the Convention’s application, within its geographic scope, to situations of armed conflict. *Although the prior Administration took a different position, I conclude that it is clear that the Convention was intended to apply in situations of armed conflict.* Article 2 of the Convention on its face plainly states that neither war, nor the orders of a superior officer, constitutes an exception to the prohibition on torture. That was also clearly the view of the U.S. Executive and Senate at the time of ratification, which reviewed the Convention’s consistency with the Uniform Code of Military Justice and adopted implementing criminal legislation that applies, *inter alia*, to the U.S. armed forces abroad. This conclusion also is consistent with international law rules regarding *lex specialis*, under which the Convention Against Torture, as the later-in-time, generally applicable, and more specific treaty obligation, must be understood to be applicable in armed conflict to complement, not to contradict or

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<sup>3</sup> 18 U.S.C. § 7 (2006).

<sup>4</sup> 49 U.S.C.A. § 46501(2) (West 2006).

undermine, U.S. obligations under the 1949 Geneva Conventions and other rules of international humanitarian law.

*In sum, an exhaustive analysis of all available sources of treaty interpretation requires rejection of an interpretation that would impose a categorical bar against the Convention's extraterritorial scope or its application in armed conflict. In my legal opinion, it is not legally available to policymakers to claim such a categorical bar.* The object and purpose, text and context of the CAT, the negotiating history of the Convention and its Optional Protocol, and the U.S. Executive Branch and Senate understandings at the time of ratification all support these conclusions.

I acknowledge that not all of the positions in this Memorandum Opinion have been previously articulated by the United States as legal positions and some of them would change prior U.S. legal positions. *But significantly, all are fully consistent with current U.S. practices and policy.* In particular, these conclusions are fully consistent with current U.S. policy regarding the treatment of persons in U.S. custody and *nonrefoulement*. Since the United States last submitted its report to the CAT Committee in 2005, significant developments in U.S. law and policy have clarified that the United States has comprehensive domestic legal obligations to ensure the humane treatment of persons in U.S. custody, wherever they are located, and whether in or out of situations of armed conflict. In addition to Executive Order 13491, the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld* made clear that the treatment standards of Common Article 3 of the Geneva Conventions apply to the conflict with al Qaeda. The Detainee Treatment Act, 42 U.S.C. 2000dd(a) (2006), provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." Other related laws also help mandate humane treatment. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, div. A, tit. X, § 1038(a), 123 Stat. 2451 (2009) ("No enemy prisoner of war, civilian internee, retained personnel, other detainee, or any other individual who is in the custody or under the *effective control* of the Department of Defense or otherwise under detention in a Department of Defense facility in connection with hostilities may be interrogated by contractor personnel.") (emphasis added); Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. 3261, et seq., *as amended* (allowing prosecution, *inter alia*, of U.S. civilians employed by or accompanying U.S. armed forces overseas). The United States also has repeatedly asserted and reaffirmed the global U.S. commitment, articulated in the 1998 Foreign Affairs Reform and Restructuring Act ("FARR Act"), not to transfer persons to torture, regardless of where they are located.<sup>5</sup>

Publicly acknowledging that the basic principles of humane conduct that we are already committed to pursuing reflects our *legal*, and not merely policy, commitments would require no change in current U.S. conduct. On the other hand, continuing to deny that the United States recognizes these commitments as legal obligations under the Convention leaves us vulnerable to the charge that we are not bound by them, and that we could change these policies adversely at any moment. A perception that the United States is continuing to preserve its "freedom" to commit or condone mistreatment would severely undermine our reputation for a commitment to

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<sup>5</sup> Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (codified at 8 U.S.C. 1231 note) [hereinafter FARR Act].

international law in general, and our efforts to restore the United States' international reputation with respect to humane treatment. Moreover, clearly acknowledging our basic commitments to humane treatment as legal obligations under the Convention, would bring the United States significant benefits. It would attract international approval for adopting responsible legal positions, facilitate the ability of our closest allies to cooperate with us on a range of multilateral counter-terrorism, counter-piracy, and other international security and humanitarian assistance efforts, and allow the United States to demonstrate global leadership on one of the most basic human rights: freedom from torture and cruel, inhuman or degrading treatment or punishment.

## **PART I: BACKGROUND RULES OF TREATY INTERPRETATION**

### **A. There is no General International Law Presumption Regarding the Geographic Application of Treaties**

Interagency discussions have raised the question whether there is a general “presumption against extraterritoriality” applicable to treaties. *My review reveals no presumption in international law either for or against the extraterritorial application of treaties.* Like other questions of treaty interpretation, questions of extraterritorial application are answered by looking to the text, object and purpose, and negotiating history of the particular treaty in question. Nor is there any general domestic law canon limiting the extraterritorial reach of treaties, such as that applicable to domestic statutes. Indeed, applying such a presumption would work at cross-purposes with other well-established canons that are designed to prevent the United States from violating its international obligations.

#### *1. International Law Recognizes No Presumption For or Against the Extraterritorial Application of Treaties*

##### a. Traditional Rules of Treaty Interpretation

The Vienna Convention on the Law of Treaties (“VCLT”), which articulates established rules for treaty interpretation,<sup>6</sup> contains no presumption for or against the extraterritorial application of treaties. Rather, Article 31(1) provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A great many treaties contain provisions that address their geographic scope. But these provisions have been included to provide greater clarity with respect to the particular treaty in which they appear, not to overcome any general “presumption against extraterritoriality.”<sup>7</sup> As with other treaty clauses, such provisions are to be interpreted according to the treaty’s object and purpose, text, and context.

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<sup>6</sup> Vienna Convention on the Law of Treaties (“VCLT”), 1155 U.N.T.S. 331 (1969). Although the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the “authoritative guide” to treaty law and practice. Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 Dep’t St. Bull., 684, 685 (Dec. 13, 1971). The International Court of Justice has held that Article 31 of the VCLT reflects customary international law. *See Kasikili/Sedudu Island (Bots. v. Nami.)*, 1999 I.C.J. 1045, ¶ 18 (Dec. 13).

<sup>7</sup> The Third Geneva Convention of 1949, for example, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

When a treaty contains no jurisdictional provisions, or when its provisions are ambiguous, the International Court of Justice (“ICJ”) consistently has declined to apply a presumption against extraterritorial application and instead has looked to the language of the treaty and to its context, object and purpose. In *Application of the Genocide Convention*, Yugoslavia argued that “[t]he 1948 Genocide Convention can only apply when the State concerned has territorial jurisdiction in the areas in which the breaches of the Convention are alleged to have occurred.”<sup>8</sup> The ICJ rejected that argument. Finding no express provision in the Convention relevant to its geographic scope, the Court “recall[ed] its understanding of the object and purpose of the Convention . . . to condemn and punish genocide as a crime under international law.”<sup>9</sup> The Court observed “that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” and “that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”<sup>10</sup> In his separate opinion in other proceedings in the case, Judge Lauterpacht noted, “[o]bviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense.”<sup>11</sup>

In *Construction of a Wall*, the ICJ found the ICCPR to be textually ambiguous regarding extraterritorial scope. The Court did not apply a presumption against extraterritoriality to resolve the ambiguity, but examined the “object and purpose” of the Convention to conclude that the ICCPR imposed extraterritorial obligations.<sup>12</sup>

Most recently, in *Application of the CERD*, Russia argued against provisional measures in a suit brought by Georgia alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) on the ground that “[t]he general rule continues to be that treaties, including human rights treaties, in line with Article 29 of the Vienna Convention only bind States with regard to their own territory.”<sup>13</sup> Significantly, the ICJ declined to apply such a “general rule.” Instead, the Court applied traditional rules of treaty interpretation and observed that “there is no restriction of a general nature in CERD relating to

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<sup>8</sup> Preliminary Objections of the Federal Republic of Yugoslavia, at 129 (June 1995), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, 129 (June 1995), <http://www.icj-cji.org/docket/files/91/8618.pdf>.

<sup>9</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia & Herzegovina v. Yugoslavia)*, 1996 I.C.J. 595, ¶ 31 (July 11) (internal quotation marks omitted).

<sup>10</sup> *Id.*; see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia & Herzegovina v. Serbia & Montenegro)*, 2007 I.C.J. 43, ¶ 183 (Feb. 26) (“The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State *wherever it may be acting or may be able to act* in ways appropriate to meeting the obligations in question.”) (emphasis added).

<sup>11</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Further Requests for the Indication of Provisional Measures (Bosnia & Herzegovina v. Yugoslavia)*, 1993 I.C.J. 407, ¶ 114 (Sept. 13).

<sup>12</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, ¶¶ 108-109 (July 9).

<sup>13</sup> Verbatim Record of Public Sitting at 40, *Case Concerning Application of the International Convention of the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)* (2008).



its territorial application” and that “neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation.”<sup>14</sup> The Court “consequently [found] that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”<sup>15</sup>

b. VCLT Article 29

At the provisional measures phase of the Russia-Georgia case regarding *Application of the CERD*, Russia pointed to Article 29 of the VCLT to contend that the CERD should not be understood to apply extraterritorially.<sup>16</sup> That Article provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” VCLT, art. 29. The drafting history of Article 29, however, makes clear that the provision sets a minimum, not a maximum, on a treaty’s geographic scope; it establishes a presumption that a treaty will apply at the very least to a state’s *entire* territory. But the drafting history of the VCLT makes equally clear that Article 29 does *not* establish a presumption that a treaty applies *only* to a state’s territory.

Article 29 took shape in 1964 as Article 57 of the International Law Commission’s (“ILC”) draft articles on the law of treaties, which provided: “The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.”<sup>17</sup> In 1966, the Special Rapporteur proposed to deal expressly with the territorial scope of treaties by adding a paragraph that would have read: “A treaty may apply also in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended.”<sup>18</sup> Significantly, the United States supported the extraterritorial application of treaties and was concerned that this proposed paragraph might be read to exclude other areas, including the high seas. The United States stated that “[a]lthough it may be clear from the commentary that the application of a treaty is not necessarily confined to the territory of a party, the United States Government feels that the

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<sup>14</sup> Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Request for the Indication of Provisional Measures (Georgia v. Russian Federation), 2008 I.C.J. 353, ¶ 109 (Oct. 15).

<sup>15</sup> *Id.* Russia renewed its arguments on geographic scope in its preliminary objections. See Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, 1155 U.N.T.S. 331, Preliminary Objections of the Russian Federation, Ch. V (Dec. 2009). Because the ICJ ultimately dismissed the case on other grounds, it did not reach Russia’s argument on geographic scope. See Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections (Georgia v. Russian Federation), 2011 I.C.J. 184 (Apr. 1).

<sup>16</sup> One law review article has briefly suggested, incorrectly, that “Article 29 of the Vienna Convention can actually be taken to contain a general presumption against the extraterritorial effect of treaties.” Naomi Burke, *A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties*, 41 N.Y.U. J. INT’L L. & POL. 103, 121 (2008). The author, however, reaches this conclusion by misreading the drafting history of the article and ignoring the commentary to the ILC Draft Articles.

<sup>17</sup> Report of the International Law Commission Covering the Work of its Sixteenth Session, 11 May – 24 July 1964, 1964 Y.B. Int’l L. Comm’n, Vol. II, at 179.

<sup>18</sup> 850th Meeting, 1966 Y.B. Int’l L. Comm’n, Vol. I, Pt. II, at 46.

present article standing alone may imply that such is the intention.”<sup>19</sup> To avoid that implication, the United States proposed to reword Article 57 as follows:

1. A treaty applies throughout the entire territory of each party unless the contrary appears from the treaty.
2. A treaty also applies beyond the territory of each party whenever such wider application is clearly intended.

*Id.* The question was discussed at length over the course of two days.<sup>20</sup> Ultimately neither proposal was adopted, because the ILC determined that the issues raised were too complex and that it would be best not to address the subject of extraterritorial application at all. As explained in the commentary to the ILC’s *Draft Articles on the Law of Treaties*, “[t]he article was intended by the Commission to deal only with the limited topic of the application of a treaty to the territory of the respective parties.”<sup>21</sup> In the Commission’s view, “the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention.”<sup>22</sup> Thus, neither Article 29 nor its drafting history supports a presumption against extraterritoriality for treaties.

Article 29 is repeated as a principle of U.S. foreign relations law in the *Restatement (Third) of the Foreign Relations Law of the United States* § 322(2), which states that “[u]nless a different intention appears, an international agreement binds a party in respect of its entire territory.” The *Restatement*, however, does *not* find a presumption against extraterritoriality inherent in this principle. To the contrary, it states that “[a]n international agreement *may* bind states with respect to activities they undertake outside of their own territories.”<sup>23</sup>

### c. Colonial Clauses

A number of older treaties—although not the CAT—contain so-called “colonial clauses,” but these also do not cast light on the existence or absence of a presumption against extraterritoriality. One prominent example of a colonial clause is Article XII of the Genocide Convention of 1948, which provides: “Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.” The British—who championed the use of such clauses—viewed them not as a way of restricting the extraterritorial application of treaties, but as “an element in the development of self-government.”<sup>24</sup> The British practice was to extend international agreements to dependencies only with local consent. It was impracticable to

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<sup>19</sup> *Sixth Report on the Law of Treaties*, by Sir Humphrey Waldock, *Special Rapporteur*, 1966 Y.B. Int’l L. Comm’n, Vol. II, at 65.

<sup>20</sup> See 1966 Y.B. Int’l L. Comm’n, Vol. I, Pt. II, at 46-54.

<sup>21</sup> 1966 Y.B. Int’l L. Comm’n, Vol. II, *supra* note 18, 213-14 (emphasis added).

<sup>22</sup> *Id.* at 214 (emphasis added).

<sup>23</sup> *Restatement (Third) of Foreign Relations Law*, § 322, Reporters’ Note 3 (emphasis added) [hereinafter *Restatement*].

<sup>24</sup> A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE 288-89 (2004).

consult all colonial governments continuously throughout a treaty's negotiation, and a colonial clause ensured an opportunity for such consultation before applying the treaty to the colony.<sup>25</sup>

Colonial clauses thus served a discrete, historic purpose. They have not been understood as necessary to overcome a general presumption against the extraterritorial application of treaties; indeed, the ICJ did not even mention the clause in its 1996 decision considering the geographic scope of the Genocide Convention. "On the contrary," as Special Rapporteur Sir Humphrey Walcock noted in his *Third Report on the Law of Treaties* in 1964, colonial clauses "seem to have been designed to negative by implication the *automatic application* of the treaty to non-metropolitan territories and to provide in its place a convenient procedure for the piecemeal extension of the treaty to these territories."<sup>26</sup>

This view of the application of treaties to colonies is also consistent with the policy of the U.N. Secretary General as depositary, which took the position that "[i]f there is no provision on territorial application, action has been based on the principle, frequently supported by representatives in the General Assembly, that the treaty was automatically applicable to all the dependent territories of every party."<sup>27</sup> More recently, in the 2011 *al-Skeini* case, the European Court of Human Rights rejected the suggestion that the Article 56 colonial clause in the European Convention on Human Rights established some textual constraint on the extraterritorial application of the Convention under the Article 1 jurisdictional clause.<sup>28</sup> Most significantly, even if such colonial clauses might in some circumstances be understood as reflecting a textual understanding that a particular treaty was territorially limited where such a clause appeared, the Convention Against Torture contains no such clause.

## 2. Domestic Law Recognizes No Presumption Against Extraterritorial Treaty Application

U.S. domestic law has developed a number of interpretive canons to ensure compliance with the international obligations of the United States and more generally to minimize conflict with foreign nations. Most famously, the Supreme Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In the area of treaty interpretation, the Supreme Court has long noted that it is "bound to observe [treaties] with the most scrupulous good faith." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821); see also *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind . . . are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.") (internal quotation marks omitted). The Court has also repeatedly reaffirmed that it gives "considerable weight" in interpreting treaties to the "opinions of our sister signatories." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010).

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<sup>25</sup> *Id.*

<sup>26</sup> 1964 Y.B. Int'l L. Comm'n, *supra* note 17, Vol. II, at 14-15 (emphasis added).

<sup>27</sup> *Succession of States in Relation to General Multilateral Treaties of Which the Secretary-General is the Depositary: Memorandum Prepared by the Secretariat*, 1962 Y.B. Int'l L. Comm'n, Vol. II, 106, 123.

<sup>28</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07 (Eur. Ct. H.R.), ¶ 140 (2011).

The domestic presumption against the extraterritorial application of statutes has served similar purposes. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”) (internal quotation marks omitted). This presumption originally rested on a desire to avoid violations of the law of nations with respect to jurisdiction. See *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824) (applying the presumption to avoid “a clear violation of the laws of nations”). As international law changed to allow more expansive extraterritorial jurisdiction, the rationale for the presumption shifted—first to “comity,”<sup>29</sup> and then to “the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>30</sup>

Applying a domestic presumption against extraterritoriality to the interpretation of treaties would invert these principles. Unlike statutes, treaties by definition deal with “foreign matters.” See *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (noting that treaties may cover “any matter which is properly the subject of negotiation with a foreign country”). Applying a presumption against extraterritoriality to treaties not only is unnecessary to avoid violations of international law, but also could have the opposite effect by placing the United States at increased risk of breaching its international obligations. It is well established that a state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>31</sup> Given that no presumption against the extraterritorial application of treaties exists in international law, applying a *domestic* presumption against extraterritoriality to treaties could result in the United States recognizing, as a matter of domestic law, treaty obligations with a *narrower* geographic scope than international law would require. Contrary to established rules of treaty interpretation, applying an idiosyncratic domestic law presumption to treaties would thus increase the risk of constructions that are at odds with obligations intended to be established by the treaty and “the opinions of our sister signatories.”<sup>32</sup>

We have found no case in which a U.S. court has applied a presumption against extraterritoriality to treaties, including *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). Although in that case, the Supreme Court held that neither § 243(h) of the Immigration and Nationality Act (“INA”) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applied to action taken by the Coast Guard on the high seas, the Court relied in part on the presumption against extraterritoriality in construing the domestic *statute* at issue—the INA.<sup>33</sup> But it did not apply any presumption to construction of the Refugee Protocol. Instead, the Court concluded that “both the text and negotiating history of Article 33 *affirmatively indicate* that it was not intended to have extraterritorial effect.”<sup>34</sup>

The *Sale* Court did note that “a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”<sup>35</sup> But this passage, which concludes a long discussion of the Protocol’s text, simply reiterates that “the

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<sup>29</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

<sup>30</sup> *Morrison*, 130 S. Ct. at 2877.

<sup>31</sup> VCLT, Art. 27.

<sup>32</sup> *Abbott*, 130 S. Ct. at 1993.

<sup>33</sup> *Sale v. Haitian Centers Council, Inc.*, 504 U.S. 155, 173-74 (1993).

<sup>34</sup> *Id.* at 179 (emphasis added); see also *id.* at 179-83 (examining text); *id.* at 184-87 (examining negotiating history).

<sup>35</sup> *Id.* at 183.

spirit of Article 33” could not overcome the “affirmative” textual territorial limitations in the provision.<sup>36</sup> At the end of its opinion the Court also says: “As we have already noted, Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).”<sup>37</sup> The first sentence in this statement plainly refers to the presumption against extraterritoriality only with respect to statutes. The second sentence again refers to back to “[t]hat presumption” (against extraterritorial application of statutes) and then makes a different point about deference to the Executive Branch in the foreign relations area with its citation to *Curtiss-Wright*.

Thus, this statement does not purport to apply a presumption against extraterritorial application to treaties. Even if it could be so understood, the passage would be *dictum* and cites no supporting authority. The Court’s interpretation of the Refugee Protocol in no way relies upon such a presumption, which is notable given the Court’s extensive discussion of the presumption in construing the statute at issue. Nor, significantly, did Justice Blackmun’s dissent read the majority’s opinion to apply any presumption against extraterritoriality to the Protocol. Justice Blackmun criticized the majority for applying a presumption against extraterritoriality to “a statute that regulates a distinctively international subject matter: immigration, nationalities, and refugees.”<sup>38</sup> This objection would have applied *a fortiori* to applying the presumption to a treaty, but the dissent did not suggest that the Court had made any such claim.

In sum, international and domestic law and practice establish that, with respect to questions of geographic scope as with other questions of treaty interpretation, there is no general presumption regarding the extraterritorial application of treaties. Rather, treaties are to be interpreted in accordance with their terms, context, and object and purpose, and with resort to such other means of interpretation as are appropriate under the VCLT in the particular case.

## **B. Standards for Treaty Interpretation**

Under Article 31 of the Vienna Convention on the Law of Treaties, the language of a treaty shall be interpreted in good faith, according to the ordinary meaning of the terms of the treaty, when read in their context and in light of the treaty’s object and purpose.<sup>39</sup> According to

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<sup>36</sup> *Id.* Specifically, the Court focused in particular on Article 33(2) (which provides an exception to the general protection where the refugee presents a danger to “the security of *the country in which he is*”), and Article 33’s use of the “return (‘refouler’)” (which it interpreted as presupposing territorial presence in the context of that treaty). *See* discussion, *infra*, Part III(E).

<sup>37</sup> *Sale*, 509 U.S. at 188.

<sup>38</sup> *Id.* at 206 (Blackmun, J., dissenting) (emphasis added).

<sup>39</sup> Article 31 of the VCLT provides as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of

Article 31, this analysis requires consideration of the treaty’s object and purpose, the specific language of the relevant treaty provision, the treaty’s overall text (including its preamble and annexes), any agreement negotiated coterminously or subsequently that relates to the treaty, and subsequent State practice. Article 31 does not prioritize among these criteria, but expects them to be addressed as a totality. In other words, it does not privilege the text of a particular treaty clause over the treaty’s overall context, object and purpose, but instead describes the “context” of the treaty as including “the text, including its preamble and annexes,” and coterminous agreements. Article 31(3) further provides that the interpretation of a treaty shall take into account any subsequent agreements or State practice among the treaty parties, and any other relevant rules of international law. Article 31 directs that the treaty’s meaning will be based on the overall conclusion to be drawn from all of these considerations.

Under Article 32 of the VCLT, the negotiating history of a treaty (*travaux préparatoires*) is merely a “supplementary” source of interpretation. It may be considered only to confirm the meaning of the treaty or to determine the treaty’s meaning when the examination under Article 31 leaves it ambiguous or yields an interpretation that is manifestly absurd or unreasonable.<sup>40</sup>

## **PART II: GEOGRAPHIC SCOPE OF THE CAT**

### **A. Object and Purpose of the CAT**

In considering whether and to what extent the CAT applies extraterritorially or in situations of armed conflict, it is important to acknowledge that certain fundamental human rights obligations apply to all governmental action, in all places, as a matter of customary international law. Although the complete list is subject to debate, these obligations generally would include the prohibitions against torture, cruel, inhuman or degrading treatment or punishment (“CIDT”); arbitrary and extrajudicial killings; slavery and forced labor; and prolonged arbitrary detention; as well as the international criminal law offenses of genocide, war crimes, and crimes against humanity.<sup>41</sup> Many of these prohibitions are considered *jus cogens* and/or subject to universal jurisdiction. The prohibition against *refoulement* to torture is widely

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the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

VCLT, Art. 31.

<sup>40</sup> VCLT Article 32, entitled “Supplementary means of interpretation,” provides as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

VCLT, Art. 32.

<sup>41</sup> Cf. *Restatement* § 702.

accepted as a customary international law obligation. In situations of armed conflict, applicable customary international law obligations would also include Common Article 3 of the Geneva Conventions.

This background is important because, contrary to the assumptions of some, the Convention Against Torture was not adopted for the purpose of *prohibiting* torture. Torture and CIDT were already comprehensively prohibited by both treaties and customary international law at the time the CAT was adopted, as the United States had recognized at length in its *amicus* brief in *Filartiga v. Pena-Irala*.<sup>42</sup> In the transmittal package sending the treaty to the Senate for advice and consent in 1988, and in State Department Legal Adviser Abraham Sofaer's 1990 testimony, the Reagan and Bush Administrations both reaffirmed that "the prohibition of torture and inhuman treatment or punishment has been established as a standard for the protection of all persons, in time of peace as well as war," citing numerous international humanitarian law and human rights instruments, including the 1907 Hague Regulations, the Third and Fourth Geneva Conventions of 1949, the Universal Declaration of Human Rights, Article 5; the ICCPR, Articles 4 and 7; the American Convention on Human Rights, Article 5(2); the European Convention on Human Rights, Article 3; the African Charter on Human and Peoples' Rights, Article 5; and the 1975 General Assembly Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Executive Branch further underscored that multiple treaties, including the ICCPR, explicitly prohibit derogation from the prohibition on torture and CIDT.<sup>43</sup>

As the CAT Preamble makes clear, the Convention instead was adopted to "*make more effective*" the existing international prohibition against torture and cruel, inhuman or degrading treatment or punishment by codifying certain state obligations to prevent, prosecute, and remedy violations.<sup>44</sup> Thus, the Preamble to the CAT references the preexisting prohibitions on torture and CIDT in the Universal Declaration of Human Rights ("UDHR") and the ICCPR, as well as the path-breaking 1975 U.N. Declaration on Torture, which stated flatly that "No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment."<sup>45</sup> The Preamble then expresses the "[d]esir[e]" to make these prohibitions "more effective." *See* CAT, Preamble.

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<sup>42</sup> *See, e.g.*, Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, No. 79-6090 (2d Cir. 1980), at 13 ("[T]he proscription against torture has entered into customary international law"); *see also id.* at 12-20.

<sup>43</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, SEN. EXEC. REP. 101-30, at 11-12 (Aug. 30, 1990) [hereinafter Senate Report]; *see also Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong., S. Hrg. 101-718 (Jan. 30, 1990), at 4 [hereinafter *Senate Hearing*] (Testimony of Legal Adviser Sofaer) ("International law already condemns torture, and I refer in my prepared statement to the many conventions and declarations in which torture is condemned under international law. This convention builds on those declarations and other agreements.").

<sup>44</sup> *See* CAT, Preamble (emphasis added).

<sup>45</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), art. 3.

The Senate Report issued at the time of advice and consent describes primary “Purpose[s]” of the Convention as establishing “a regime for international cooperation in the criminal prosecution of torturers based on the principle of ‘universal jurisdiction’” and obligating States “to take legislative, administrative, judicial, or other measures to prevent acts of torture in territories under their jurisdiction.”<sup>46</sup> The Report explains that the Convention is “a major step forward in the international community’s efforts to eliminate torture and other cruel, inhuman or degrading treatment or punishment,” and that “[t]he Convention codifies international law as it has evolved.”<sup>47</sup> It further observes that the Convention “takes a *comprehensive* approach to the problem of combating torture,” and reflects an “*absolute* prohibition on torture.”<sup>48</sup> Commentators take the same view.<sup>49</sup>

This background understanding forms an important part of the context, object, and purpose of the Convention. The understanding is also reflected in the Convention’s entire structure, which is designed to impose certain comprehensive obligations on States Parties, while geographically limiting other obligations to “any territory under [the State’s] jurisdiction.” *The general structure of the CAT thus assumes a preexisting background prohibition on all acts of torture and CIDT everywhere.* The Convention obligates States to criminalize “all” acts of torture, *wherever* and by whomever committed, including “attempt,” “participation,” and “complicity” in torture, and to prosecute or extradite perpetrators based upon the principle of universal jurisdiction. The Convention then imposes certain specific obligations on States to legislate and create institutions and structures to prevent, investigate, remedy and train regarding torture and CIDT that are limited to the circumstances in which a State would be considered to have sufficient legal authority and governance capacity to take such action—i.e., with respect to “any territory under its jurisdiction.” In the context of the Convention, then, the inclusion of “any territory under its jurisdiction” imposes a limit on specific State obligations that otherwise would be geographically comprehensive.

### 1. *Clauses with no Geographic Limitation*

Consistent with this framework, the treaty does not include a general clause governing its geographic application like that in the ICCPR. Article 1 sets forth the definition of torture without geographic limitation. Underscoring the non-derogability of the preexisting prohibition on torture, Article 2(2) asserts that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture,” while Article 2(3) provides that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.” Neither clause is geographically limited. It is also clear that these provisions are not intended to be so limited. If they were, then exceptional circumstances such as war or orders of a superior *could* be invoked

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<sup>46</sup> Senate Report, *supra* note 43, at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at 3, 5 (emphasis added).

<sup>49</sup> See MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 8 (2008) [hereinafter NOWAK & MCARTHUR] (“Since the prohibition of torture and cruel, inhuman or degrading treatment or punishment has been recognized in Article 7 CCPR and other international and regional human rights treaties as an absolute and non-derogable human right . . . the drafters of the Convention abstained from reiterating this principle. Rather, the Convention is based on the explicit desire of its drafters ‘to make more effective the struggle against torture and [CIDT].’”).



in prosecutions under Article 5 for acts of torture committed outside of territory under the State's jurisdiction.

Article 4 obligates States to ensure that “*all* acts of torture are offenses under its criminal law” (emphasis added), including attempts to commit torture and other complicity or participation in torture. This article places no geographic limitation on the locus of the torture. Article 5 obligates States parties to extend criminal jurisdiction over the State's nationals and other persons present in its territory, regardless where the torture occurred. Article 8 obligates States to make the offenses defined in Article 4 extraditable offenses, again without any geographic restriction on where the underlying offense occurred. Article 9 requires States to assist with criminal proceedings brought by others, without geographic restriction. Article 10 requires States to include education about the prohibition on torture in the training of all government officials “who may be involved in the custody, interrogation or treatment” of any detained individual and provides that States “shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person,” again without geographic restriction. Article 15 prohibits the introduction into evidence of statements made as a result of torture, regardless of location. Finally, the prohibition on *nonrefoulement* under Article 3 provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State” where they are likely to face torture, and does not include any geographic limitation. The Articles that apply without territorial constraint thus include the obligations to criminalize all acts of torture (Arts. 2(2), 2(3), and 4); not to return individuals to torture (Art. 3); to prosecute a State's own nationals (Art. (5)(1)(b)); to share evidence with other States (Art. 9); to train and establish rules regarding the prohibition on torture for all personnel involved in detention (Art. 10); and not to introduce tortured evidence in legal proceedings (Art. 15).

## 2. *Clauses Limited to “Any Territory Under Its Jurisdiction”*

By contrast, Articles 2(1), 5(1)(a), 5(2), 6(1), 7(1), 11, 12, 13, and 16(1) all set forth particular affirmative obligations that a State Party must accept, but limit those obligations to “any territory under its jurisdiction” or equivalent phrasing. For example, Articles 2(1) and 16(1) obligate a State to adopt effective legislative, administrative, judicial, and other measures “to prevent” acts of torture and cruel, inhuman, or degrading treatment or punishment in “any territory under its jurisdiction.” Article 5(1) requires each State Party to establish criminal jurisdiction over offenses committed in “any territory under its jurisdiction or on board a ship or aircraft registered in that State” or by its nationals wherever located, and Article 5(2) limits universal criminal jurisdiction to perpetrators present “in any territory under [the State's] jurisdiction.”<sup>50</sup> Article 7(1) establishes that a State must prosecute or extradite any person who

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<sup>50</sup> Article 5 provides that a State Party must establish jurisdiction over all acts of torture:

- (1)(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State;
  - (c) When the victim is a national of that State if that State considers it appropriate [, and]
- (2) . . . “in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . . .”

Article 5 thus explicitly contemplates the exercise of criminal jurisdiction over extraterritorial acts of torture, whether committed on State-flagged vessels or aircraft or in any other “territory under [a State's] jurisdiction,” by or against its nationals, or otherwise by a perpetrator later found in any territory under its jurisdiction.

is found in any territory under its jurisdiction who is alleged to have committed an act of torture. (See also Article 6).<sup>51</sup> Articles 11, 12, and 13 provide that a State shall further prevent torture by reviewing interrogation rules, ensuring an effective investigation, and providing redress to victims of torture in any territory under its jurisdiction. Article 14, which provides for compensation to victims of torture, contains no textual geographic limitation on its face, and thus could be included in the prior paragraph. However, the United States adopted a limiting understanding at the time of ratification, indicating that the United States understood the Article to require compensation to victims of acts of torture committed in any territory under its jurisdiction.

In this context, the inclusion of the phrase “any territory under its jurisdiction” in various clauses appears intended to limit those obligations of States Parties to circumstances under which international law would allow them to exercise, and they would be capable of exercising, the governmental authority necessary to fulfill the particular obligation. All of the provisions containing this phrase presume that the State exercises sufficient control with respect to the territory at issue to adopt the requisite legislative, institutional, or governance measures; to establish structures to prevent and respond to acts of torture and CIDT; or to take the requisite action consistent with their domestic and international law. They obligate States to “take effective legislative, administrative, judicial or other measures to prevent” acts of torture or CIDT (Arts. 2(1) and 16(1)); to prosecute (Art. 5(1)(a), 5(2)); to take an offender into custody (Art. 6(1)); to extradite or submit a case to authorities for prosecution (Art. 7(1)); to systematically review interrogation rules and practices and arrangements for custody and treatment of persons detained (Art. 11); to conduct a prompt and impartial investigation (Art. 12); to ensure the right of victims to complain and to have their case examined by competent authorities (Art. 13); and to ensure an enforceable right to compensation and full rehabilitation for victims of torture (Art. 14). *The qualifier “any territory under its jurisdiction” thus limits the above obligations of a State Party to take specific actions to those contexts where the State exercises sufficient jurisdictional control to prescribe and adjudicate to reasonably be expected to fulfill those obligations.* In the absence of such language, the Convention’s obligations are not geographically confined.

Articles 5 and 14 help make this structure particularly clear. Under Article 5(1)(b), a State is obligated to establish criminal jurisdiction “[w]hen the alleged offender is a national of that State.” There is no geographic limitation on this provision because, based on the principle of nationality jurisdiction, a State may regulate the conduct of its own nationals, and impose criminal punishment on them, regardless where they are located. *See Restatement* § 402(2) (noting that “a state has jurisdiction to prescribe law with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory”).<sup>52</sup> Article 5(2)

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<sup>51</sup> Article 6 provides for a State “in whose territory [an alleged offender] is present” to take the individual into its custody. This slightly different wording might be viewed as suggesting a narrower formulation, but the text of the Article makes clear that it is intended to parallel offenders described in 5(1)(a) and 5(2), and that the phrase “in whose territory . . . is present” is simply shorthand for “in any territory under its jurisdiction.”

<sup>52</sup> Article 5(1)(c), which provides for criminal jurisdiction over acts of torture “[w]hen the victim is a national of that State” authorizes, but does not require, the exercise of passive personality jurisdiction in cases where the victim of torture outside of territory under a State’s jurisdiction is a national of that State. Such jurisdiction might not otherwise be generally accepted under customary international law. *See Restatement* § 402, cmt. g; *id.* § 402, Reporters’ Note 3.

goes further still and obligates a state to exercise universal jurisdiction over non-national perpetrators who commit acts of torture abroad but are “present in any territory under its jurisdiction,” unless it chooses to extradite them to another state. The limitation of universal jurisdiction to persons “present in any territory under its jurisdiction” both recognizes that trials *in absentia* are not required and that the State’s practical capacity to prosecute is limited to that context, where a state exercises appropriate control.

The Article 14 obligation to ensure a right to compensation for victims of torture likewise contains no facial geographic limitation.<sup>53</sup> During the ratification process, however, the United States observed that in the absence of such limiting language, this obligation would apply sweepingly to all victims of torture, wherever and by whomever the torture was committed. *See* discussion accompanying notes 130-32, *infra*. The United States therefore adopted an understanding that Article 14 is limited to acts of torture committed “in any territory under its jurisdiction,” in order to impose some geographic limit on the obligations in that article.

These two baskets of obligations—those that are geographically constrained, and those that are not—create a potential tension between the Article 2(1) obligation to “prevent” torture “in any territory under a state’s jurisdiction” and the obligation to criminalize and prosecute under Articles 4 and 5. Article 5 obligates States to be able to *prosecute*, not only acts of torture committed in “any territory under its jurisdiction,” but also acts of torture committed by the State’s nationals *anywhere*, and by *any* perpetrator “present in” any territory under the State’s jurisdiction. If Article 2(1) is understood to mean what it says, i.e., to simply define the circumstances under which States must take steps to affirmatively “*prevent*” torture, through legislation or otherwise, it is not in tension with Article 5, but instead focuses the State’s positive obligations on the area over which the State exercises jurisdiction to prescribe and adjudicate. But if Article 2(1) is misread as limiting the scope of a State’s implicit negative obligation not to *commit* acts of torture to “any territory under its jurisdiction,” this would produce the bizarre result that Article 2(1) would not *prohibit* States and their agents from committing acts of torture outside of territory under the State’s jurisdiction, but Articles 4 and 5 would obligate States to *criminalize and prosecute* these very same extraterritorial acts of torture, at least if the perpetrator were a national or later found in territory under the State’s jurisdiction.

Given the explicit object and purpose of the Convention to make the existing prohibition of torture “more effective,” Article 2(1) thus is best understood as simply addressing the contexts in which a State has an affirmative duty to “ensure,” i.e., to legislate, adjudicate, or take effective administrative measures in order to prevent torture, not as articulating the outer boundaries of a State’s obligation to refrain from committing acts of torture. The negative obligation to

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<sup>53</sup> Article 14 provides that

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

“respect” the prohibition on torture instead is implicit in the State’s obligation under the CAT to criminalize “all” acts of torture and to prosecute all acts of torture committed by its nationals or by persons found in their jurisdiction, without geographic limit. This reading is consistent with the broader object and purpose of the CAT to “make more effective” the preexisting global effort to abolish torture.

*In sum, the overall interpretation of the extraterritorial application of the CAT that is most faithful to the object and purpose, text, and context of the Convention (1) views specific obligations under the CAT as geographically limited to “any territory under its jurisdiction” wherever that phrase appears, while (2) the obligations that do not include such limiting language are not subject to such geographic constraint.*

## **B. The Meaning of “Any Territory Under Its Jurisdiction”**

The text of the CAT, read in light of the Convention’s object and purpose, the negotiating history of the CAT and its Optional Protocol, the U.S. ratification history, subsequent U.S. interpretations, and the views of authoritative commentators collectively confirm a number of principles regarding the meaning of “any territory under its jurisdiction”: (1) This phrase was intended to be broader than the mere sovereign territory of a state. (2) It was understood to include State-flagged ships and aircraft. (3) It was understood to apply to situations of *de facto* control, including situations of occupation, not merely *de jure* control. (4) The phrase was included to *limit* certain state obligations, apparently to ensure that States would not have certain affirmative obligations with respect to their citizens abroad, over whom other States had primary jurisdiction. (5) Prior to 2005, the United States consistently understood “any territory under its jurisdiction” as including, at a minimum, the “special maritime and territorial jurisdiction” (“SMTJ”)<sup>54</sup> and “special aircraft jurisdiction”<sup>55</sup> of the United States. These areas are statutorily defined by Congress as areas outside the sovereign territorial United States over which the United States nevertheless exercises domestic criminal jurisdiction. On their face they therefore constitute *de jure* “territory under U.S. jurisdiction.” In their present form, these areas encompass, *inter alia*, U.S.-registered ships and aircraft, Guantánamo Naval Base and other military bases, U.S. embassies, and other lands acquired for use by the United States.

The United States has not previously taken a clear position regarding the outer limits of “any territory under its jurisdiction.” In my view, the above considerations, the obligations to which this phrase attaches in the CAT—including the textual obligations that the CAT imposes on States to criminalize the conduct of their nationals, wherever located, as well as to punish foreign nationals who come within their jurisdiction—suggests that the best interpretation of “any territory under its jurisdiction” is that the phrase limits obligations of a State Party to circumstances in which the State exercises sufficient *de jure* or *de facto* control over the circumstances to legally comply with the relevant obligation. *On the other hand, where a State lacks sufficient legal authority to undertake the relevant action, it is not required to do so.*

### *1. The Position of the CAT Committee*

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<sup>54</sup> 18 U.S.C. § 7 (2006) (as amended).

<sup>55</sup> 49 U.S.C. § 46501(2) (2006).

The CAT Committee has read “any territory under its jurisdiction” as follows:

16. Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also “in any territory under its jurisdiction.” The Committee has recognized that “any territory” includes all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. The reference to “any territory” in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction “when the alleged offender is a national of the State.” The Committee considers that the scope of “territory” under article 2 must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.<sup>56</sup>

The Committee thus considers that the scope of “any territory under its jurisdiction” must include situations where a State Party exercises, directly or indirectly, *de facto* or *de jure* effective control over persons in detention as well as places of detention. The Committee is led to this interpretation in part by Article 5(1)(b), which requires that a State Party must exercise criminal jurisdiction “when the alleged offender is a national of the State,” regardless where the act of torture had occurred.

As discussed below, the United States has previously objected to the Committee’s suggestion that “any territory under its jurisdiction” equates with *de facto* control in all circumstances.<sup>57</sup> Reading “any territory under its jurisdiction” to include the exercise of control over persons, devoid of any control over territory, is of course, a significant textual stretch. However, the Committee’s approach seeks to make sense out of the relationship between the Article 2(1) obligation to prevent torture in any territory under a State’s jurisdiction and the Article 5 obligation to prosecute extraterritorial acts of torture committed by a State’s nationals. The Committee’s interpretation appears motivated in part by its conclusion that Articles 2(1) and 16(1) describe the scope of a State’s negative obligations not to commit torture or CIDT, rather than simply a State’s positive obligations to take affirmative steps to prevent torture in territory under its jurisdiction. But as discussed above, the better interpretation is that the Convention recognizes a background, geographically comprehensive, obligation on States and their agents not to engage in acts of torture, consistent with preexisting law, as reflected, *inter alia*, in the Article 4 obligation to criminalize “all” acts of torture, and the Article 2(2) and (3) rejection of any justifications for torture. That comprehensive prohibition need not be found in Article 2(1).

## 2. Text

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<sup>56</sup> U.N. Comm. Against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (2008), ¶ 16.

<sup>57</sup> *Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States Parties* (Nov. 3, 2008).

The object and purpose of the CAT was to establish a comprehensive and effective regime for the prevention and punishment of torture and CIDT, as noted. Consistent with this purpose, the term “any territory under its jurisdiction” appears on its face to be broader than simply territories over which a State exercises formal sovereignty. For example, Articles 2, 16, and others do not say “within its borders,” but “*any territory under its jurisdiction.*” The repeated inclusion of the term “*any*,” and the inclusion of the concept of “jurisdiction,” which in both domestic and international law is broader than either a strict conception of “territory” or “sovereignty,”<sup>58</sup> underscores that this concept is intended to be broad and encompassing, not restrictive.<sup>59</sup>

One textual question immediately arises regarding the State’s obligation to “prevent” torture in “any territory under its jurisdiction” in Article 2(1) and elsewhere, and the Article 5(1)(a) obligation to establish criminal jurisdiction over offenses committed in “any territory under its jurisdiction *or* on board a ship or aircraft registered in that State.” Under both international and domestic law, State-registered ships and aircraft are irrefutably under a State’s “jurisdiction.”<sup>60</sup> The differentiation, through the use of the term “*or*,” of ships and aircraft from “any territory under its jurisdiction” in Article 5 could be understood to suggest that “any territory under its jurisdiction” does not itself encompass State-registered ships and aircraft. However, the remainder of the Convention makes clear that such ships and aircraft must be included within the meaning of “any territory under its jurisdiction” for other clauses of the Convention.

For example, the Article 6 obligation to take offenders into custody applies to a State “in whose territory a person alleged to have committed any offense . . . is present,” and the Article 7 obligation to prosecute applies to a State “in the territory under whose jurisdiction a person alleged to have committed any offence . . . is found.” Both of these convoluted phrasings must necessarily refer back to the contexts in which a State is obligated to extend criminal jurisdiction for purposes of Article 5(1)(a). If territory under its jurisdiction is not understood as including

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<sup>58</sup> The Supreme Court has recognized that territory may be under a state’s legal jurisdiction but not under its formal sovereignty. *Guantánamo* is one such location. *Boumediene v. Bush*, 553 U.S. 723 (2008). States may also exercise *de facto* control in areas where another state is technically sovereign. *Id.* at 754. (“Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.”). *See also* *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R., ¶¶ 137-38, 2011) (holding that “jurisdiction” under Article 1 of the European Convention on Human Rights includes, *inter alia*, situations in which “the State through its agents exercises control and authority over an individual, and thus jurisdiction,” and “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory.”).

<sup>59</sup> CAT Article 20(1) and (3) employ a slightly different formulation, providing that “[i]f the [CAT] Committee receives reliable information . . . that torture is being systematically practised *in the territory* of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information” and may request “a visit to its territory.” (Emphasis added). This narrower formulation makes sense in the context in which it appears, which addresses the ability of the CAT Committee to make a territorial visit. It does, however, lend further support to the view that “any territory under its jurisdiction” should be understood to have a broader meaning. Article 22(1) also confirms this view, as it addresses the State’s obligations under the Convention in terms of jurisdiction entirely de-linked from territory. It provides that a State Party may “recognize the competence of the Committee to receive and consider communications from or on behalf of *individuals subject to its jurisdiction* who claim to be victims of a violation by a State Party of the provisions of the Convention.” (Emphasis added).

<sup>60</sup> *See, e.g.,* *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶¶ 77, 81-82. (Grand Chamber) (2012).

State-flagged ships and aircraft for these purposes, then the Convention would require the State to extend criminal jurisdiction over such persons under Article 5(1)(a), but the Convention would impose no further on the obligation of the State to take such individuals into custody, or to prosecute them.

Similarly, under such a reading, despite the fact that the State is obligated to criminalize the conduct, the obligation to prevent torture and CIDT under Articles 2 and 16 would not apply on State-registered ships and aircraft—including the government’s *own* ships and aircraft; the Article 11 obligation to establish rules regarding persons in detention would not apply (even on the State’s own vessels, although individuals are frequently taken into custody there), and the Article 12 obligation to investigate acts of torture and the Article 13 obligation to allow victims to complain would not apply to acts of torture committed there. Excluding State-registered ships and aircraft from the meaning of “any territory under its jurisdiction” in the other provisions of the Convention thus would allow ships and aircraft to fall through the cracks of the Convention for all purposes that apply to “any territory under [a State’s] jurisdiction” *except* Article 5(1)(a), and would make the Convention’s ostensibly comprehensive regime for criminalizing, prosecuting, extraditing, investigating and punishing torture incoherent.

The better reading of the Convention, which is confirmed by the negotiating and ratification history, is that the drafters of Article 2 felt comfortable simply making clear in the record that State-registered ships and aircraft were included in “any territory under its jurisdiction” for purposes of that (and presumably other) Articles. For Article 5, on the other hand, in order to ensure that State-registered ships and aircraft were clearly included for purposes of the obligation to establish *criminal* jurisdiction, the drafters felt the need to make that inclusion textually explicit. As discussed below, the negotiating history and U.S. ratification history of the Convention lend support to this reading. Both the drafters of the Convention and the ratifying U.S. Executive and Senate explicitly stated that “any territory under its jurisdiction” under Article 2 included State-registered ships and aircraft.

### 3. *Negotiating History*

Negotiating history is only a supplementary interpretive source, to be used for either confirming the meaning of treaty terms derived from the application of VCLT Article 31, or for determining that meaning if the application of Article 31 in its entirety leaves the treaty’s meaning ambiguous or manifestly absurd. The precise import of the negotiating history in relation to the Article 31 analysis need not be finely parsed here, however, because the negotiating history confirms the following: (1) The drafters intended “any territory under its jurisdiction” to have a broad scope. “[A]ny territory under its jurisdiction” was not understood as limited to a State’s territorial borders, but was intended to include State-registered ships and aircraft, as well as areas under *de facto* control such as occupied territories. (2) This phrase was understood as *limiting* a State’s otherwise comprehensive obligations with respect to the provisions in the Convention that required significant governmental control and authority to fulfill. The stated purpose was to ensure that those extraterritorial obligations not be so expansive that States would be considered responsible for the conduct of their citizens residing abroad, over whom other States had primary jurisdiction. (3) Other Convention provisions that

were not so limited were understood to apply more broadly, wherever a State or its agents acted, consistent with the preexisting comprehensive international law prohibition against torture.

The original Swedish proposal for Article 2(1), which constituted the foundational text for the Convention's negotiations and its eventual adoption, provided that "[e]ach State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction."<sup>61</sup> In 1978, the French delegation proposed replacing the words "within its jurisdiction" with "in its territory" throughout the draft text, attempting to narrow the scope of the obligation.<sup>62</sup> In discussions a few months later, concern was expressed that "within its jurisdiction" might be understood to apply to all of a State Party's nationals, including those residing abroad.<sup>63</sup> Specifically, an unnamed party

stated that the phrase "within its jurisdiction" might be interpreted too widely so as to cover citizens of one State who are resident within the territory of another State. It was proposed to change the phrase to refer to "any territory under its jurisdiction". *It was emphasized that such wording would cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories.*<sup>64</sup>

The Working Group adopted the "any territory under its jurisdiction" language in the draft text,<sup>65</sup> where it remained for the rest of the Working Group deliberations and final text.

This passage in the *travaux* suggests four important points: *First*, "any territory under its jurisdiction" was chosen to replace "within its jurisdiction," due to concerns that "jurisdiction" alone would be overbroad because it could include jurisdiction over a State's nationals residing abroad, over whom a State enjoys "nationality jurisdiction" to prescribe, but who are primarily subject to the sovereign jurisdiction of another State.

*Second*, the negotiators also rejected the even more restrictive phrasing, "within its territory" as too narrow, thus making clear that they intended a broader geographic application.

*Third*, the chosen language "any territory under its jurisdiction" was proposed and adopted based on the express representation that this concept would include "ships or aircraft

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<sup>61</sup> United Nations, Econ. & Soc. Council, Comm'n On Human Rights, Letter dated Jan. 18, 1978 from the Permanent Mission of Sweden to the United Nations Office at Geneva addressed to the Division of Human Rights, 2, U.N. Doc. E/CN.4/1285, at 2 (Jan. 23, 1978) [hereinafter Original Swedish Draft], reprinted in HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT app. 6, at 203, 47 (1988) [hereinafter BURGERS & DANIELIUS].

<sup>62</sup> United Nations, Econ. & Soc. Council, Comm'n on Human Rights, Summary Prepared by the Secretary General in Accordance with the Commission Resolution 18(XXXIV), ¶ 54, U.N. Doc. E/CN.4/1314 (Dec. 19, 1978); BURGERS & DANIELIUS, *supra* note 61, at 48.

<sup>63</sup> United Nations, Econ. & Soc. Council, Comm'n on Human Rights, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 32, U.N. Doc. E/CN.4/L.1470 (Mar. 12, 1979), reprinted in Rep. of the Comm'n on Human Rights, 35th Sess., Feb. 12 – Mar. 16, U.N. Doc. E/CN.4/1347, at 35, 40 (1979); see also BURGERS & DANIELIUS, *supra* note 61, at 48.

<sup>64</sup> U.N. Doc. E/CN.4/L.1470, *supra* note 63, ¶ 32 (emphasis added).

<sup>65</sup> *Id.* ¶ 33, 36.



registered in the State” as well as “occupied territories.”<sup>66</sup> This confirms that State-registered ships and aircraft were intended to be included in “any territory in its jurisdiction.”

Finally, the reference to occupied territories also demonstrates that the negotiating parties understood this scope to go beyond the *de jure* jurisdiction of a State to include areas where a State exercised actual, or *de facto*, effective control. No parties issued objections or expressed concern about this extraterritorial scope.

The discussions of Article 5, on the other hand, suggest that State-registered ships and aircraft were explicitly included in Article 5(1), not because they would not fall within “any territory under its jurisdiction” for other purposes, but for reasons peculiar to the drafting and purposes of that clause. Article 5(1) provides that each State Party must establish criminal jurisdiction “[w]hen the offences are committed in *any territory under its jurisdiction or on board a ship or aircraft registered in that State . . .*” The original Swedish draft provided for the State Party to establish jurisdiction “when the offences are committed *in the territory of that State or on board a ship or aircraft registered in that State.*”<sup>67</sup> The territorial reference in the Swedish formulation was thus narrower. It applied only “in the territory of that State,” which may explain why Sweden originally separately included ships and aircraft.

In December 1978, the Working Group discussed revised language for Article 5(1)(a). According to Burgers and Danelius, “there was general agreement that territoriality should be a ground for jurisdiction.”<sup>68</sup> This was a logical starting point, since the “territoriality principle constitute[d] the traditional ground for criminal jurisdiction under international law,” with the notable exception of extraterritorial jurisdiction.<sup>69</sup> Consequently, “[t]he only question was to what extent offences committed on board ships or aircraft or on the continental shelf should be assimilated to offences committed in the territory of a State, and how this should be reflected in the text of the article.”<sup>70</sup>

France suggested deleting the reference in Article 5 to ships and aircraft for two reasons. First, it stated that the proposed text was “badly worded and would in any event have to be amended to read ‘or on board an aircraft registered in that State or a ship flying the flag of that State.’”<sup>71</sup> Second, France argued that the phrasing “[did] not cover all possible cases (continental shelf, etc.),” arguing that it therefore would be better to keep to the single concept of “territory,” which would be understood in a broad sense<sup>72</sup> and could be clarified as necessary by the legislation of each State.<sup>73</sup>

The Swedish draft was revised to reflect France’s proposed broader concept of territory, and referred only to offenses committed “in any territory under its jurisdiction” without any

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<sup>66</sup> *Id.* ¶ 32.

<sup>67</sup> Original Swedish Draft, *supra* note 61, at 3; BURGERS & DANELIUS, *supra* note 61, at 57.

<sup>68</sup> *Id.* at 59.

<sup>69</sup> NOWAK & MCARTHUR, *supra* note 49, at 308.

<sup>70</sup> BURGERS & DANELIUS, *supra*, at 59.

<sup>71</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 72.

<sup>72</sup> NOWAK & MCARTHUR, *supra*, at 309.

<sup>73</sup> U.N. Doc. E/CN.4/1314, *supra*, ¶ 72.

reference to the flag principle.<sup>74</sup> As Nowak notes, “[t]his wording clearly reflect[ed] a wider concept of territory extending beyond a State’s land, sea and air territory to include also territories under military occupation, colonial territories and to any other territories over which a State has factual control.”<sup>75</sup> Apparently, however, some doubt was expressed in the context of Article 5 as to “whether the wording in the revised Swedish draft also covered the obligation of the flag State to *criminalize* torture committed on board a ship or aircraft registered in that State, as suggested by France.”<sup>76</sup>

In 1980, the clause continued to refer only to “territory under its jurisdiction.” The record of the negotiations indicates that several delegates proposed adding “or on board aircraft of ships registered in that State,” though the reason is not given. Another delegation stated that it found this proposal “somewhat unhappily phrased.”<sup>77</sup> “While not opposing the consensus on that addition to the text,” the delegation preferred the formulation: “on board an aircraft registered in that State or a ship flying the flag of that State.”<sup>78</sup> The 1980 Working Group ultimately combined the broader concept of “any territory under its jurisdiction” with the explicit reference to offenses committed “on board a ship or aircraft registered in that State,” drawn from the original Swedish draft text.<sup>79</sup> The Working Group then adopted by consensus the final formulation of Article 5(1)(a), which referred to States establishing jurisdiction “[w]hen the offences are committed in any territory under its jurisdiction or on board an aircraft or ship registered in that State.”<sup>80</sup>

This revision ensured that State criminal jurisdiction under Article 5 would include jurisdiction over State-registered ships and aircraft, regardless of how the Working Group construed “any territory under its jurisdiction.”<sup>81</sup> Because unlike some other forms of jurisdiction, criminal jurisdiction is generally considered territorial, the reference to ships and aircraft may have been included simply to ensure that there could be no doubt for that crucial article. Despite the textual differentiation of “ships and aircraft” and “territory within its jurisdiction” in Article 5(1), therefore, the negotiating history of Article 5 supports the proposition stated by the negotiators of Article 2—i.e., that “any territory under its jurisdiction” elsewhere in the Convention was understood to include State-registered ships and aircraft.

The negotiating history of Articles 13 and 14 also indicates that the drafters rejected a narrower formulation (“within its territory”) for “any territory under its jurisdiction.” Article 13 obligates a State Party to ensure that victims of torture “in any territory under its jurisdiction” have the right to complain and have their case examined by competent authorities.<sup>82</sup> Following

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<sup>74</sup> NOWAK & MCARTHUR, *supra*, at 309.

<sup>75</sup> *Id.*; see BURGERS & DANIELIUS, *supra*, at 131-32.

<sup>76</sup> NOWAK & MCARTHUR, *supra*, at 309 (emphasis added).

<sup>77</sup> Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 39, U.N. Doc. E/CN.4/1367 (Mar. 5, 1980) [hereinafter 1980 Working Group Report].

<sup>78</sup> *Id.* ¶ 40.

<sup>79</sup> NOWAK & MCARTHUR, *supra* note 49, at 309.

<sup>80</sup> 1980 Working Group Report, *supra* note 77, ¶ 41; BURGERS & DANIELIUS, *supra* note 61, at 59.

<sup>81</sup> NOWAK & MCARTHUR, *supra*, at 309.

<sup>82</sup> Article 13 states in full:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and

discussions on the original Swedish draft, in which the right to complain was formulated in two articles,<sup>83</sup> the United States proposed a new article in December 1978 that consolidated the right to complain into one article.<sup>84</sup> The United States' proposed draft language would have provided for investigation of alleged acts of torture or CIDT committed "*within a State Party's jurisdiction.*"<sup>85</sup> The United Kingdom suggested that "jurisdiction" be deleted and replaced by "territory," so that the article would read: "within its territory."<sup>86</sup> This proposal was not discussed or adopted. An unnamed State Party later inquired about the scope of "'territory under its jurisdiction' as contained in these articles," and was told "it was intended to cover, *inter alia*, territories still under colonial rule and occupied territories."<sup>87</sup> The Working Group then adopted the Article 13 text by consensus with the standard language, "any territory under its jurisdiction."<sup>88</sup>

Article 14 provides that each State Party must ensure that victims of torture can seek "redress" and "ha[ve] an enforceable right to fair and adequate compensation" for acts of torture committed.<sup>89</sup> Early draft texts, including the original Swedish draft, contained no express territorial limitation on this obligation.<sup>90</sup> During the 1981 Working Group discussion, the Netherlands proposed to limit the obligation to provide civil remedies to acts of torture "committed in any territory under its jurisdiction."<sup>91</sup> The Working Group adopted this proposal by consensus,<sup>92</sup> and it remained in the draft during the 1982 meeting of the Working Group.<sup>93</sup>

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impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

<sup>83</sup> Original Swedish Draft, *supra* note 61.

<sup>84</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, at 16; NOWAK & MCARTHUR, *supra*, at 441.

<sup>85</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, at 16 (emphasis added).

<sup>86</sup> United Nations, Econ. & Soc. Council, Comm'n on Human Rights, summary Prepared by the Secretary-General in accordance with Resolution 18 (XXXIV) of the Comm'n on Human Rights, 3-4, U.N. Doc. E/CN.4/1314/Add.1 (Jan. 18, 1979); NOWAK & MCARTHUR, *supra* note 49, at 442.

<sup>87</sup> 1980 Working Group Report, *supra* note 77, ¶ 72; *see also* NOWAK & MCARTHUR, *supra* note 49, at 442.

<sup>88</sup> 1980 Working Group Report, *supra* note 77, ¶ 73.

<sup>89</sup> *See supra* note 53. The civil remedy can also be sought by surviving dependents in the case of the victim's death, as noted in the text of the Article above.

<sup>90</sup> *See, e.g.*, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), Annex, art. 11 (Dec. 9, 1975); United Nations Econ. & Soc. Council, Comm'n on Human Rights, Written Statement Submitted by the International Association of Penal Law, 2, U.N. Doc. E/CN.4/NGO/213 (Feb. 1, 1978); Original Swedish Draft, *supra* note 61, at 4.

<sup>91</sup> NOWAK & MCARTHUR, *supra* note 49, at 457; BURGERS & DANIELIUS, *supra* note 61, at 74. Burgers & Danielius cite that the Netherlands made this proposal, but the negotiating history provides only that the Group decided to add the words "committed in any territory under its jurisdiction" after the word "torture," without reference to which State Party made the proposal. Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 (Feb. 19, 1981) [hereinafter 1981 Working Group Report]. Nowak and McArthur cite only to Burgers and Danielius to support the Netherlands made this proposal. NOWAK & MCARTHUR, *supra* note 49, at 457 n.12. Burgers was a member of the Netherlands delegation to the U.N. Commission on Human Rights, and served as Chairman-Rapporteur of the Working Group from 1982-1984. BURGERS & DANIELIUS, *supra* note 61, at vi.

<sup>92</sup> 1981 Working Group, *supra* note 91, at 13.

<sup>93</sup> Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1982/L.40 (Mar. 5, 1982). By 1983, reference to the jurisdictional limitation was mysteriously absent. *See* Rep. of the Working Group on a Draft Convention Against Torture and

Yet, ultimately “this phrase disappeared from the text and neither the *travaux* nor the commentary provide any insight as to why it was deleted.”<sup>94</sup>

The United States has assumed that this omission was an oversight or drafting error.<sup>95</sup> As the Reagan Administration observed, had the parties intended to create a “universal” obligation to provide civil remedies to victims of torture, their move to do so likely would have elicited at least some discussion.<sup>96</sup> Without any clues in the text or *travaux* however, the issue is not entirely clear.<sup>97</sup> With the jurisdictional limitation mysteriously absent, the United States acceded to the Convention subject to an understanding limiting the scope of its Article 14 obligations, as discussed *infra*. (In General Comment 3, adopted in 2012, however, the CAT Committee adopted the position that the Article 14 obligation to provide redress is not territorially limited.)<sup>98</sup>

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Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex, U.N. Doc. E/CN.4/1983/63, at 6 (Mar. 25, 1983).

<sup>94</sup> NOWAK & MCARTHUR, *supra* note 49, at 457; see Kate Parlett, *Universal Civil Jurisdiction for Torture*, 4 EUR. HUM. RTS. L. REV. 385, 395 (2007).

<sup>95</sup> See NOWAK & MCARTHUR, *supra* note 49, at 460 n.23.

<sup>96</sup> See Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at 13-14 (1988). David P. Stewart, Assistant Legal Adviser, U.S. Department of State, testified at the Senate hearing in 1990 that during the negotiations on the CAT, a number of States “considered the issue of states establishing civil jurisdiction over acts that take place abroad and rejected it.” *Torture Victim Protection Act of 1989: Hearing Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 31 (1990).

<sup>97</sup> As Nowak and McArthur write, “[o]n the one hand, it could be argued that removal of the phrase, albeit[] undocumented, was intended to make clear that the revised version was not territorially limited. On the other hand, it could be contended that the territorial limitation was so obvious that it did not need to be spelled out.” NOWAK & MCARTHUR, *supra* note 49, at 492-93. Nowak and McArthur contend, however, that the savings clause in article 14(2), which leaves remedies under national law unaffected, suggests that the Convention drafters did not wish to preclude States from adopting universal civil jurisdiction, like the United States has under the Alien Tort Claims Act and the Torture Victim Protection Act. *Id.* at 496-501.

According to Professor Andrew Byrnes, States Parties were unlikely to agree lightly to making their legal systems, including legal aid, rehabilitation facilities, and compensation funds, available to all individuals seeking remedies, and an explicit statement to that effect would be expected if such an obligation were to be imposed. Furthermore, Byrnes argues that the presence of the savings clause in Article 14(2) “would seem to suggest that, at most, the drafters did not wish to preclude States from adopting a universal approach to redress such as that found in the United States’ Torture Victim Protection Act (TVPA).” Andrew Byrnes, *The Committee Against Torture*, in PHILIP ALSTON, *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 509, 543 n.13 (1992). Byrnes points to the analysis of the provision that accompanied President Reagan’s 1988 submission of the CAT to the U.S. Senate as well as the U.S. Understanding submitted regarding Art. 14, which received no objection from other States at the time, as strong evidence of the view that this was merely a mistaken omission. *Id.*

<sup>98</sup> The Committee stated:

Under the Convention, States parties are required to prosecute or extradite alleged perpetrators of torture when they are found in any territory under its jurisdiction, and to adopt the necessary legislation to make this possible. *The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party.* The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, *article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.*

United Nations Comm. Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, ¶

The Working Group did not separately discuss the scope of “any territory under its jurisdiction” for purposes of the Article 16 obligation to prevent cruel, inhuman, or degrading treatment or punishment.

In sum, the negotiating history of Articles 2, 5, 12, 13, 14 and 16, to the extent that they address the issues, all underscore that the negotiating parties intended “any territory under its jurisdiction” *to encompass areas beyond a State’s sovereign territory to areas where a State exercises de facto control*. In the context of various articles, the negotiators repeatedly rejected the formulation “within its territory” in preference for this broader formulation. The negotiators preferred this language over a pure reference to “jurisdiction,” because it would avoid obligating States Parties to affirmatively prevent acts of torture by their nationals who were residing abroad, and over whom the State thus did not exercise primary jurisdiction. The negotiating history does not, however, otherwise evidence any concerns regarding overbroad extraterritorial reach. Instead, the negotiating history clarifies that “any territory under its jurisdiction” was deliberately chosen in order to include, in addition to a State’s traditional lands and territorial seas and airspace, *inter alia*, State-registered ships and aircraft, jurisdiction over the continental shelf, and the exercise of *de facto* control over occupied territories or areas subject to colonial rule. Finally, the negotiating history of Article 14 makes clear that the drafters understood that “territory within its jurisdiction” was a limiting clause. In the absence of such a provision, as in Article 3 for example, a State’s obligations under any particular article of the Convention (such as to provide civil remedies) would be broader.

#### 4. *Commentary on “Any Territory Under Its Jurisdiction”*

The above reading of the *travaux*, and particularly the view that “any territory under its jurisdiction” includes State-registered ships and aircraft and areas under *de facto* control, is shared by prominent commentators.

J. Herman Burgers and Hans Danelius, who actively participated in the preparation of the Convention,<sup>99</sup> state in their authoritative *Handbook* that “any territory under its jurisdiction” in Article 2(1) “is intended to include not only the actual land territory of the State and its territorial sea, but also ships flying its flag and aircraft registered in the State concerned as well as platforms and other installations on its continental shelf,”<sup>100</sup> and that the “same considerations apply as with regard to article 5.”<sup>101</sup>

Manfred Nowak, the former U.N. Special Rapporteur on Torture and author of the comprehensive *Commentary* on the Convention, offers a similar understanding of Article 2(1)’s scope:

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22, U.N. Doc. CAT/C/GC/3 (2012) (emphasis added).

<sup>99</sup> Burgers served as a member of the Netherlands delegation to the U.N. Commission on Human Rights, and served as Chairman-Rapporteur of the Working Group from 1982-1984. Danelius, the Under-Secretary for Legal and Consular Affairs of the Swedish Ministry of Foreign Affairs, wrote the initial drafts of the Declaration and the Convention, and participated in all of the Working Group sessions.

<sup>100</sup> BURGERS & DANELIUS, *supra* note 61, at 123-24.

<sup>101</sup> *Id.* at 149.

This formulation . . . seems to be fairly clear. States have an obligation to take measures to prevent torture in their own territory (land and sea), but also under any other territory under their jurisdiction, such as aboard ships flying their flag, aircraft registered in accordance with their laws, occupied territories or other territories where civilian or military authorities of the State exercise jurisdiction, *whether lawful or not*.<sup>102</sup>

With respect to the same phrase in Article 5, Burgers and Danelius further explained:

sub-paragraph 1 [of Article 5] does not only apply to offences committed in the territory of a certain State, but to offences committed in *any territory under its jurisdiction*. This is in fact a wider concept. It means that the obligation to establish jurisdiction is not limited to a State's land territory, its territorial sea and the airspace over its land and sea territory, but it also applies to *territories under military occupation, to colonial territories and to any other territories over which a State has factual control*. To a limited extent it is also applicable to *certain maritime areas outside the territorial sea over which a State has limited jurisdiction*. If, for instance, torture is committed on an oil-rig or other installation placed on the continental shelf of a State Party, that State should be required to have jurisdiction over the offence.

Sub-paragraph [1](a) also mentions, specifically, offences committed on board ships and aircraft over which the State in which the ship or the aircraft is registered must likewise establish jurisdiction. . . . [T]he expression 'any territory under its jurisdiction' in [Article 5] paragraph 2 [also] refers to all territories under the factual control of a State, including territories under military occupation."<sup>103</sup>

Nowak states that the flag principle was the first example of extraterritorial jurisdiction included in Article 5(1)(a), and that under this clause, "States parties are also required to extend their criminal jurisdiction regarding torture to conduct on board of ships or aircraft flying their flag regardless of the precise location where the crime is committed."<sup>104</sup> He suggests that the inclusion of this reference in Article 5 was intended to underscore the Article's broad extraterritorial reach:

The text of Article 5(1)(a) and the *travaux préparatoires* clearly indicate that the drafters wished to cover all cases in which a State exercises territorial jurisdiction or control as well as the flag principle. States parties, therefore, have an obligation to ensure that torture as an offence under its criminal law applies not only to its territory in the narrow sense (land territory, sea territory and the airspace over its land and sea territory), but more broadly to "any territory under its jurisdiction." This wording corresponds to the scope of application of the

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<sup>102</sup> NOWAK & MCARTHUR, *supra* note 49, at 117 (emphasis added).

<sup>103</sup> BURGERS & DANIELIUS, *supra* note 61, at 131-33.

<sup>104</sup> NOWAK & MCARTHUR, *supra*, at 309.

Convention defined in Article 2(1) and also covers, for example, territories under military occupation or similar legal or *de facto control* . . . .<sup>105</sup>

##### 5. *Subsequent Agreements: The Optional Protocol to the CAT*

Article 31 of the VCLT provides that in addition to a treaty's context, interpreters shall take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Art. 31(3)(a)-(b). Such subsequent agreements are a primary source of interpretation, to be considered prior to resort to the *travaux*.

The negotiating history of the concept of "jurisdiction" in the Optional Protocol to the Convention Against Torture ("OPCAT") sheds important light on the meaning of "any territory under its jurisdiction" in the Convention Against Torture and confirms that it was understood by the OPCAT negotiating parties to encompass *de facto effective control* over specific areas, including military and diplomatic installations. The OPCAT establishes a regime for regular preventive site visits by the Subcommittee on Prevention of Torture to ensure against torture. The original draft of the OPCAT was proposed in 1980, concurrent with the negotiation of the CAT and prior to that treaty's adoption.<sup>106</sup> The OPCAT was primarily negotiated between 1992 and 2002 and entered into force in 2006; it currently has 65 States parties and 72 signatories.<sup>107</sup> The United States participated in the negotiations for the OPCAT, but it is not a party.

Article 4(1) of the OPCAT provides that "[e]ach State Party shall allow visits, in accordance with the present Protocol, . . . to any place under its jurisdiction and control where persons are or may be deprived of their liberty." (Emphasis added). This phrasing was adopted to clarify the concept of "any territory under its jurisdiction," particularly with respect to situations of mixed legal authority or *de facto* control that could arise in federal states, situations of civil war, or with a State's military or diplomatic facilities on foreign soil. The negotiating history of this phrase indicates that the additional term "control" was included merely to reduce uncertainty in these circumstances, and to reflect the normal understanding of "jurisdiction" found in other instruments of international law. The negotiations indicate that the drafters understood "any territory under its jurisdiction" within the meaning of the CAT and the OPCAT to include not just *de jure* authority, but also *de facto* control.

The original draft of the OPCAT, proposed by Costa Rica in 1980, provided in Article 1 that a State Party agreed to permit visits to "any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party" where persons were detained.<sup>108</sup> In 1991, Costa Rica revised the language to "any place within its jurisdiction."<sup>109</sup> In the first report of the

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<sup>105</sup> *Id.*

<sup>106</sup> United Nations Econ. & Soc. Council, Comm'n on Human Rights, Note by the Secretariat, U.N. Doc. E/CN.4/1409 (Mar. 6, 1980) [hereinafter Draft Optional Protocol].

<sup>107</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9-b&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9-b&chapter=4&lang=en) (last visited Jan. 7, 2013).

<sup>108</sup> Draft Optional Protocol, *supra* note 106, at 2.

<sup>109</sup> NOWAK & MCARTHUR, *supra* note 49, at 927.

Working Group on the OPCAT, the Working Group explained that this language sought to provide that States would “agree to permit visits to *any place* over which the State exercises *either direct authority or control* and in which any person is deprived of liberty.” The Working Group also indicated that “[f]urther consideration should be given to the possible extension of visits to places of detention over which the State exercises control or influence of an indirect character.”<sup>110</sup> A number of delegations expressed the view, moreover, that in order to avoid circumvention of obligations, the right of visitation “had to extend beyond those institutions that are operated by public authorities alone.” They expressed the view that “as a matter of State responsibility under the optional protocol, there should be a right to visit any place where a person is deprived of liberty, by a person or body who is either under the direct control of the State *or is subject to such direct or indirect influence by the State that control or authority should be inferred or imputed.*”<sup>111</sup>

The Working Group noted that the existing draft language regarding jurisdiction in the OPCAT resembled that in CAT Article 13 (which refers to “any territory under its jurisdiction”). Some delegations, however, expressed concern that this language was insufficiently clear and “should be reviewed” to ensure that it did not “create uncertainty.” They noted that in certain federal states, the national government might have responsibility over the entire territory, but other components of government could have responsibility over places where the subcommittee would want access. Thus, while the formulation of the jurisdictional language being employed was “similar to that of Article 13” of the CAT and other human rights instruments, “different language” might be required, not to alter the intended meaning but “to ensure that the intent of the provision is in fact accomplished unequivocally.”<sup>112</sup>

In 1993, the Working Group changed the language from “any place within its territory” to “any place in any territory under its jurisdiction.” One delegation further requested that “jurisdiction” be replaced with “under its direct or indirect control,” in order to cover uncertainties created by civil wars and some federal states.” However, the language was retained<sup>113</sup> and carried over in subsequent drafts.<sup>114</sup>

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<sup>110</sup> Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1st Sess., Oct. 19-30, 1992, ¶ 35, U.N. Doc. E/CN.4/1993/28 (1992) (emphasis added).

<sup>111</sup> *Id.* ¶ 39 (emphasis added).

<sup>112</sup> *Id.* ¶ 41.

<sup>113</sup> Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2d Sess., Oct. 25–Nov. 5, 1993, ¶ 22, Annex U.N. Doc. E/CN.4/1994/25 (Nov. 17, 1993).

<sup>114</sup> Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 3d Sess., Oct. 17-28, 1994, Annex, U.N. Doc. E/CN.4/1995/38 (Dec. 12, 1994); Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4th Sess. Oct. 30–Nov. 10, 1995, Annex, U.N. Doc. E/CN.4/1996/28 (Jan. 25, 1996); *see* Rep. of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 5th Sess., Oct. 14–25, 1996, Annex II, U.N. Doc. E/CN.4/1997/33 (Dec. 23, 1996); *see also* Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 6th Sess., Oct. 13–24, 1997, U.N. Doc. E/CN.4/1998/42 (Dec. 2, 1997).



During the 1998 session, “the issue was raised about gaining access to territory which is not under a State Party’s jurisdiction but under its actual control.” No change was felt necessary to the term “any place in any territory under its jurisdiction,” however, since in the view of the members of the Working Group, “the interpretation of the concept of jurisdiction in other instruments included both the notion of formal and actual jurisdiction.”<sup>115</sup> In other words, the Working Group concluded that “any place in any territory under its jurisdiction” adequately encompassed both *de facto* control and *de jure* exercises of jurisdiction.

In the 1999 session, concerns were raised about whether the language permitting visits “to any place in any territory under a State party’s jurisdiction” could create conflict of law problems or affect non-State parties, “particularly in cases when access would be sought to diplomatic missions or foreign military installations.” The Working Group noted, however, that Article 2 of the European Convention for the Prevention of Torture similarly “refers to any place within a State party’s jurisdiction and that no exceptions were made to this provision nor had any problems been encountered in its implementation.”<sup>116</sup> The draft article in the 1999 report reflected the varied discussions on jurisdictional language, containing multiple bracketed phrases and reading: “to [any place] [places of detention] [on any territory] under its jurisdiction [and control] . . . .”<sup>117</sup> The negotiating history does not, however, indicate how the various options were resolved.

Finally, in the 2001 report, language was added to the draft preamble “[r]ecalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction.” This language was retained in the final draft. In 2001, Mexico proposed language for Article 4 using “places in any territory under its jurisdiction,” and the EU Draft proposed “any place under its jurisdiction and control,” the language that was retained in the final version.<sup>118</sup>

The negotiating history thus indicates that “any place under its jurisdiction and control” was understood as simply clarifying the language “any territory under its jurisdiction,” and was intended to have the same meaning. Both phrases were equally intended to include situations in which multiple governmental entities exercised competing *de jure* or *de facto* control, including contexts involving civil wars, federal states, and military and diplomatic installations on foreign soil.

## 6. *Prior U.S. Positions*

The ratification history and subsequent positions of the United States, at least through the Clinton Administration, indicate that the United States understood “any territory under its jurisdiction” to be broader than the sovereign United States, that it included State-registered

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<sup>115</sup> Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 7th Sess., ¶ 31, U.N. Doc. E/CN.4/1999/59 (Mar. 26, 1999).

<sup>116</sup> Rep. of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 27, U.N. Doc. E/CN.4/2000/58 (Dec. 2, 1999).

<sup>117</sup> *Id.* Annex II; see also NOWAK & MCARTHUR, *supra* note 49, at 928.

<sup>118</sup> NOWAK & MCARTHUR, *supra*, at 929.

ships and aircraft, and that it reached at least as far as the special maritime and territorial and special aircraft jurisdiction of the United States. This understanding was reflected in the implementing legislation adopted by Congress to criminalize extraterritorial acts of torture, which defined the “United States” as including the special military and territorial (“SMTJ”) and special aircraft jurisdiction zones. The understanding was also carried forward in the Clinton Administration report to the CAT Committee. Although the Bush Administration publicly backed off of this interpretation in its public appearance before the CAT Committee in 2006, contemporaneous internal assessments of the question, both by John Yoo in a classified memorandum for the CIA in 2005, and by John Bellinger, in a 2005 memorandum to the Justice Department, articulated the view that CAT obligations that applied to “any territory under its jurisdiction reached,” *inter alia*, Guantánamo as well as areas under *de facto* governmental authority.

a. Understanding of the Ratifying Executive and Senate

The Convention Against Torture was adopted unanimously by the U.N. General Assembly on December 10, 1984, and signed by the United States on April 18, 1988. President Reagan’s letter of transmittal to the Senate Foreign Relations Committee on May 20, 1988, urged the Senate to consent to ratification of the Convention, subject to certain conditions, in order to “clearly express the United States’ opposition to torture, an abhorrent practice” and “establish a regime for international cooperation in the criminal prosecution of torturers.”<sup>119</sup>

The United States had been a strong proponent of establishing a universal jurisdiction regime for torture, and Senate Report noted that the United States “played an active part” in negotiation of the Convention, including in helping “to focus the Convention on torture rather than other less abhorrent practices and to strengthen the effectiveness of the Convention by pressing for provisions that would ensure that torture is a punishable offense.”<sup>120</sup>

The Reagan Administration’s transmittal package included 17 conditions—4 reservations, 9 understandings, and 4 declarations.<sup>121</sup> That package proved controversial, and upon entering office, the George H.W. Bush Administration renewed the Executive’s request for Senate advice and consent, but reviewed the RUD proposals “in response to congressional and public concern about their impact on the international community’s effort to eliminate torture.”<sup>122</sup> This review resulted in the submission of “a reduced and revised package of conditions,”<sup>123</sup> and the Senate ultimately adopted the Bush RUD package.

Notably, both the Reagan Administration and the Senate took the explicit position at the time of advice and consent that “any territory under its jurisdiction” extended beyond a State’s sovereign boundaries to include ships and aircraft as well as U.S. special territorial, maritime, and aircraft jurisdiction.

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<sup>119</sup> Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at iii (1988) [hereinafter Message from the President].

<sup>120</sup> S. EXEC. REP. NO. 101-30, at 2-3 (1990) [hereinafter Senate Report].

<sup>121</sup> *Id.* at 7.

<sup>122</sup> *Id.* at 7-8.

<sup>123</sup> *Id.* at 8.

## Article 2

The Reagan Summary and Analysis of the Convention which was transmitted to the Senate stated:

Article 2 provides generally that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. *The term 'territory under its jurisdiction' refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State.*<sup>124</sup>

The Administration thus made clear—consistent with the negotiating history of the Convention—that the scope of Article 2(1) included State-registered ships and aircraft and did not diverge from the scope of Article 5(1)(a). Although the Bush Administration carefully reviewed the Reagan Administration ratification package and indicated a number of specific changes of position to the Senate, the Bush Administration did not question or alter this interpretation. The Senate incorporated this aspect of the Reagan Summary into the final Senate Report without modification.<sup>125</sup> There is no suggestion in the Senate Report that this was not the Senate's understanding.

## Articles 4 and 5

The Reagan Administration's Summary and Analysis also took the position that the United States' obligations under Article 5 to establish U.S. criminal jurisdiction over acts of torture committed on "territory under U.S. jurisdiction or on U.S.-registered ships and aircraft" were already addressed by existing federal statutes extending U.S. criminal jurisdiction to U.S. special maritime and territorial and aircraft jurisdiction. However, the Executive acknowledged that the obligation in Articles 4 and 5 to criminalize and prosecute extraterritorial acts of torture committed by U.S. nationals and by persons later found present in any territory under U.S. jurisdiction went beyond existing U.S. law and required legislative action to bring the United States into compliance.<sup>126</sup>

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<sup>124</sup> Message from the President, *supra* note 119, at 5 (emphasis added).

<sup>125</sup> Senate Report, *supra* note 120, at 15. Although Legal Adviser Sofaer's oral summary to the Senate Committee described Article 2 as applying "within their territory" and Article 5(1)(a) as applying to acts "within the territory of any State Party (or on board its ships or aircraft)," this statement simply reflects the tension in the language of the two Convention articles. The Legal Adviser's brief oral testimony was informal in a number of respects (such as substituting "within their territory" for "any territory under its jurisdiction"). *Senate Hearing, supra* note 43. Given the Reagan Administration's explicit written explanation for the Senate that "any territory under its jurisdiction" included State-registered ships and aircraft for purposes of Article 2, the support for this interpretation in the negotiating history, the fact that the Bush Administration specified in writing the changes that it was making to Reagan Administration interpretations (and that its changes consistently broadened, rather than restricted, U.S. obligations under the Convention), and the Senate's inclusion of the Reagan Administration interpretation in the Senate Report without qualification or modification, Legal Adviser Sofaer's statement alone cannot reasonably be viewed as communicating a change in Executive branch position regarding the meaning of this crucial clause, and the Senate record contains no evidence of such an understanding or purpose.

<sup>126</sup> Senate Report, *supra*, at 19-20.

The Executive firmly embraced the provision for universal jurisdiction under Article 5(2):

The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for “universal jurisdiction” was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied upon to take action.<sup>127</sup>

Then, regarding Article 5, the Executive stated:

[E]xisting federal and state law appears sufficient to establish jurisdiction when the offense has allegedly been committed *in any territory under U.S. jurisdiction or on board a ship or aircraft registered in the United States*. See 18 U.S.C. § 7 [defining the “special maritime and territorial jurisdiction of the United States”]; 49 U.S.C. App. §§ 1301(38), 1472 [defining the “special aircraft jurisdiction of the United States”]. Implementing legislation is therefore needed only to establish Article 5(1)(b) jurisdiction over offenses committed by U.S. nationals outside the United States, and to establish Article 5(2) jurisdiction over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction.<sup>128</sup>

These aspects of the Summary were also accepted by the George H.W. Bush Administration and included in the Senate’s final report. They reflect the collective understanding of Presidents Reagan and Bush, as well as the Senate, that “any territory under U.S. jurisdiction or on board a [registered] ship or aircraft” encompassed the statutory special territorial and maritime jurisdiction and special aircraft jurisdiction of the United States.<sup>129</sup>

#### *Article 14*

As noted, Article 14 of the CAT, which mandates civil remedies for victims of torture, does not include language geographically limiting the scope of the obligation. The Reagan Administration transmittal letter considered this a drafting oversight and sought to correct it:

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<sup>127</sup> *Id.* at 19.

<sup>128</sup> *Id.* at 20 (emphasis added).

<sup>129</sup> In a few places, the Executive and Senate descriptions of treaty provisions, as a shorthand for the official treaty phrasing, use the phrase “in its territory” or “in their territories” interchangeably with “any territor[ies] under their jurisdiction.” See, e.g., Senate Report, *supra* note 120, at 2, 8, 10, 23-24. But given the clear understanding of the Executive that “any territories under their jurisdiction” included State-flagged ships and aircraft and implicated the special territorial, maritime, and aircraft jurisdiction of the United States, as well as the clear text and negotiating history of the treaty that “any territory under its jurisdiction” was intentionally drafted to be expansive, nothing in these imprecise passages can be read to suggest that the United States was contending at the time of ratification that “any territory under its jurisdiction” was limited solely to the territorial United States.

Article 14 was in fact adopted with express reference to “the victim of an act of torture *committed in any territory under its jurisdiction.*” The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence of any discussion of the issue, since the creation of a “universal” right to sue would have been as controversial as was the creation of “universal jurisdiction,” if not more so.<sup>130</sup>

The Executive therefore recommended the adoption of the following understanding to clarify that a geographic limitation was intended: “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.”<sup>131</sup> The Bush Administration then reasserted, and the Senate ultimately adopted, the same understanding.<sup>132</sup>

Significantly, like the drafting history of Article 14 discussed above, the U.S. discussion of Article 14 and the understanding that was adopted make clear that the ratifying Executive and Senate understood that *in the absence* of the textual limitation to “territory under the jurisdiction,” the plain text of Article 14 *would* apply fully extraterritorially and create a “universal” right to sue” for civil damages for all extraterritorial acts of torture. Limiting language therefore was required to avoid “universal” extraterritorial application of Article 14.

The Senate Foreign Relations Committee held a hearing on the treaty on January 30, 1990, at which Legal Adviser Abraham Sofaer testified and Deputy Assistant Attorney General for the Justice Department Civil Division Mark Richard addressed the need for domestic legislation to establish universal jurisdiction and criminalize torture by U.S. nationals abroad.<sup>133</sup>

On October 27, 1990, the Senate gave its advice and consent to the CAT.<sup>134</sup> Implementing legislation criminalizing extraterritorial acts of torture was enacted on April 30, 1994 and went into effect on October 21, 1994, the day that President Bill Clinton deposited the Convention’s instrument of ratification.<sup>135</sup>

#### b. Implementing Legislation

In order to ensure U.S. compliance with CAT obligations to criminalize all acts of torture, the United States enacted 18 U.S.C. §§ 2340 and 2340A (“Torture Act”). Specifically, the United States implemented Article 5(1)(b) and 5(2) of the Convention by establishing criminal penalties for committing torture “outside the United States” by “a national of the United

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<sup>130</sup> *Id.* at 24 (emphasis in original).

<sup>131</sup> *Id.* at 24.

<sup>132</sup> *Id.* at 10, 30. See also U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

<sup>133</sup> *Senate Hearing, supra* note 43, at 40-41. Extraterritoriality was not the focus of the hearing, other than the obligation to address extraterritorial criminal jurisdiction under Article 5, and the testimony of Legal Adviser Abraham Sofaer did not purport to address the question of territoriality with precision.

<sup>134</sup> 136 CONG. REC. S17,486-01 (Oct. 27, 1990), 1990 WL 168442; see Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 463 (1994) (codified at 18 U.S.C. §§ 2340, 2340A).

<sup>135</sup> Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999), <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-57543/0-0-0-59216.html>.

States” or an offender who is later “present in the United States.” *Id.* § 2340A. The Act, which was drafted coterminously with the U.S. ratification of the Convention, also directly reflects the Executive Branch’s representations to the ratifying Senate that U.S. obligations under Article 5(1)(a) to criminalize acts of torture in “any territory under U.S. jurisdiction or on board a ship or aircraft registered in the State Party” could be addressed through application of the United States’ special territorial and maritime jurisdiction and its special aircraft jurisdiction.

Thus, as originally enacted, the Torture Act defined the term “United States” for purposes of the Act as “*all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and [section 46501(2) of title 49].*”<sup>136</sup> 18 U.S.C. § 2340(3). This included traditional U.S. territorial jurisdiction, as defined by 18 U.S.C. § 5.<sup>137</sup> But it also included registered ship and aircraft jurisdiction as well as other forms of special territorial jurisdiction, as discussed below.

Consistent with the Administration’s representations that no new legislation was required to implement the obligations under Article 5(1)(a), the Act only criminalized acts of torture committed “outside” of this area (i.e., “outside the United States”). Consistent with Article 5(2), liability for a perpetrator who was a foreign national arose if the perpetrator was later found “in” this area (i.e., “in the United States”). Thus, for purposes of implementing the CAT, Congress used the special territorial, maritime, and aircraft jurisdiction of the United States, including State-registered ships and aircraft, to implement both Article 5(1)(a) *and* “any territory under its jurisdiction” under Article 5(2). Section 2340A thus confirms that “any territory under its jurisdiction” was understood by the Executive and Congress as “including” the jurisdiction set forth in 18 U.S.C. § 7 and 49 U.S.C. § 46501(2), including State-registered ships and aircraft.

The Senate Report on the Torture Act also reflects this understanding, stating that, for purposes of the Act, “The term ‘United States’ is defined to encompass the requirements of paragraph (1)(a) of article 5 of the Convention.”<sup>138</sup> The Report continues:

Section 2340A creates the federal offense of torture committed outside the United States and establishes appropriate penalties taking into account the grave nature of the offense. The section applies only to acts of torture committed outside the United States. Since “United States” is defined to *include* any registered United

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<sup>136</sup> In October 1994, Congress amended the recently enacted Torture Convention Implementation Act to substitute “section 46501(2) of title 49” for the originally-enacted language “section 101(38) of the Federal Aviation Act of 1958 (49 U.S.C.App. 1301(38)).” United States Code: Technical Amendments to Transportation Laws, Pub. L. No. 103-429, § 2(2), 108 Stat. 4377 (1994). In 2004, due to concerns that the United States’ restrictive interpretation of U.S. law resulted in application of neither the U.S. Constitution or other domestic law, nor the extraterritorial Torture Act to Guantánamo, Congress amended the Torture Act to define “United States” more narrowly, in order to expand the application of the extraterritorial Torture Act. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1089, 118 Stat. 2067 (2004) (“‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”). This change, however, was motivated by other purposes and did not purport to alter the original Congress’ understanding of the scope of “any territory under its jurisdiction” under the Convention Against Torture.

<sup>137</sup> Section 5 defines the term “United States” for purposes of Title 18 “in a territorial sense,” as “includ[ing] all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.” 18 U.S.C. § 5 (2006).

<sup>138</sup> See S. REP. NO. 103-107, at 59 (1994).

States aircraft or s[h]ip [sic], the provision is not applicable to these particular conveyances when they are outside of the geographical territory of the United States. These places would, as would acts of torture committed within the United States, be covered by existing applicable federal and state statutes.<sup>139</sup>

The two extraterritorial statutes that the Torture Act incorporated in implementing Article 5(1)(a) were the special aircraft jurisdiction statute, 49 U.S.C. § 46501(2),<sup>140</sup> and 18 U.S.C. § 7, which defines the “special maritime and territorial jurisdiction of the United States.” Although the latter statute encompasses a variety of areas, it notably includes (1) the high seas, (2) a vessel belonging to the U.S. or to any citizen when within the admiralty and maritime jurisdiction of the United States (i.e., on the high seas or U.S. waters), and (3) “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.”<sup>141</sup> As

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<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> The statute defines the “special aircraft jurisdiction of the United States” as including “any of the following aircraft in flight:” U.S. civil aircraft, an aircraft of the U.S. armed forces, an aircraft in the United States, certain aircraft outside the United States if an offense is committed on them and they next land in the United States, and an aircraft without crew leased by an entity whose principal place of business is in the U.S., or if it has no principal place of business, whose permanent residence is in the United States. 49 U.S.C. § 46501(2).

<sup>141</sup> 18 U.S.C. § 7, as amended, defines the “special maritime and territorial jurisdiction of the United States” as follows:

- (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
- (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
- (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
- (4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.
- (5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
- (6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.
- (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
- (8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

amended in 2009, it now also explicitly includes, for purposes of offenses committed by or against U.S. nationals, U.S. diplomatic, consular, military and other missions overseas as well as accompanying residences.

Significantly, since 1982—well before the Torture Act’s enactment—the Justice Department’s Office of Legal Counsel has viewed the Guantánamo Naval Base as a “land reserved or acquired for the use of the United States” within the meaning of subsection 3 of the SMTJ, *see* Installation of Slot Machines on U.S. Naval Base, Guantánamo Bay, 6 Op. O.L.C. 236, 238 (1982), and crimes committed on Guantánamo were routinely prosecuted under the SMTJ. Thus, Guantánamo clearly would constitute “any territory under [U.S.] jurisdiction,” for purposes of the CAT, both because it is, as a matter of fact and law, “territory under U.S. jurisdiction,” and because it constitutes part of the SMTJ.

Finally, Congress does not appear to have viewed the SMTJ and aircraft jurisdiction as necessarily exhausting the scope of “any territory under its jurisdiction.” The Torture Act only described areas under the jurisdiction of the “United States” as “including” the SMTJ and special aircraft jurisdiction, suggesting that other areas potentially could also be considered to be included therein.

In sum, as conceptualized by the ratifying Executive and Congress, and as reflected in the statute they crafted, U.S. obligations under Articles 2(1), 5(1)(a), 5(2), 16(1), and others under the Convention that apply in “any territory under its jurisdiction” encompass the areas falling within the SMTJ and the special aircraft jurisdiction of the United States. For purposes of prosecuting acts of torture, domestic U.S. criminal law applies there. On the other hand, the U.S. obligations under Article 5(1)(b) and 5(2) to prosecute acts of torture committed outside “any territory under its jurisdiction” were addressed by the Torture Act, 18 U.S.C. §§ 2340-2340A.

This history is significant because under the prior Administration, the United States attempted to reinterpret its Article 16 obligations to prevent CIDT, and other obligations under the CAT, as limited to sovereign U.S. territory and inapplicable even on Guantánamo. The Convention unquestionably was intended to apply more broadly, and the United States’ ratification of the Convention and the implementing legislation adopted by Congress make clear that the obligations applicable to “any territory under its jurisdiction” must, at a bare minimum,

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**(9)** With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act--

**(A)** the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

**(B)** residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities . . . .

18 U.S.C. § 7. Subsection 9.3(a) of 18 U.S.C. § 7 was added in 2001. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 377 (2001). The areas included in subsection 9 previously could have constituted “lands reserved or acquired for the use of the United States” under the prior version of the statute. The new section, however, makes explicit that the SMTJ includes U.S. “diplomatic, consular, military” and other overseas installations, at least when the offender or victim is a U.S. national.



be understood to extend to the relevant areas encompassed by the special aircraft jurisdiction and the SMTJ—areas which, on their face, are under the *de jure* “jurisdiction” of the United States.

c. Prior U.S. Representations to the CAT Committee

i. *Clinton Administration: Initial Periodic Report (1993-2001)*

On October 15, 1999, toward the end of the Clinton Administration, the U.S. Government filed its Initial Periodic Report to the CAT Committee. The Initial Report did not address the meaning of “any territory under its jurisdiction” for purposes of Article 2. As Assistant Secretary of State for Democracy, Human Rights and Labor, I presented the CAT Report in Geneva. With the concurrence of all relevant agencies of the U.S. Government, I told the Committee Against Torture:

Our report makes clear our unequivocal and unambiguous condemnation of torture as a tool of governmental policy. As the report states “torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state, or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture.” . . . In short, we view the Convention Against Torture as a treaty with far-reaching domestic and international implications both in the administration of justice and the promotion of universal human rights.<sup>142</sup>

At that presentation, the U.S. delegation at no time suggested that the United States might be allowed to tolerate torture in any location over which it had effective legal authority.

The Report addressed extraterritorial criminal jurisdiction under Article 5 of the CAT as follows:

183. As a general matter, criminal jurisdiction under federal and state law is territorial. It encompasses crimes committed by any person within the territory of the United States (or relevant subordinate jurisdiction) regardless of the nationality or citizenship of the offender or victim.

184. In relatively few instances, the definition of “territory” has been specifically crafted to apply to acts taking place outside United States geographical territory. For example, certain provisions of the federal criminal code apply within the “special maritime and territorial jurisdiction of the United States” (18 U.S.C. § 7), which includes, *inter alia*, vessels registered in the United States, aircraft belonging to the United States, and “any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States”.

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<sup>142</sup> Harold Hongju Koh, U.S. Assistant Sec’y of State, Democracy, Human Rights & Labor, Remarks to the U.N. Committee Against Torture (May 10, 2000), [www.state.gov/documents/organization/6589.doc](http://www.state.gov/documents/organization/6589.doc)

Federal law also defines the “special aircraft jurisdiction of the United States” to include extraterritorial offences against aircraft in specified instances. *See* 49 U.S.C. § 46501(2).

185. For instance, United States criminal jurisdiction extends beyond the territory of the United States to the following conduct:

- criminal acts which occur on a vessel belonging to a United States individual or corporation located on the high seas. 18 U.S.C. § 7(1).
- criminal acts which occur on an aircraft belonging to a United States individual or corporation flying over the high seas. 18 U.S.C. § 7(5).
- criminal acts performed by or against a United States national outside the jurisdiction of any country. 18 U.S.C. § 7(7).
- criminal acts which occur on any foreign vessel with a scheduled departure or arrival in the United States and the criminal act is performed by or against a United States national. 18 U.S.C. § 7(8).
- criminal acts performed on an aircraft with its next scheduled destination or last place of departure in the United States, if it next lands in the United States. 49 U.S.C. § 46501(2)(D)(i).
- criminal acts performed on an aircraft leased (without a crew) to a United States lessee with its principal place of business in the United States. 49 U.S.C. § 46501(2)(E).

186. *These provisions meet the obligation of the United States under article 5 to establish jurisdiction over acts of torture when committed “in any territory under its jurisdiction or on board a ship or aircraft registered in” the United States.*<sup>143</sup>

Without specifying whether the United States considered all aspects of the SMTJ to be included in “any territory outside its jurisdiction,” the Clinton Administration Report thus appeared to reiterate the Reagan and Bush Administrations’ view that the obligations under the CAT to criminalize conduct under Article 5(1)(a) could be addressed at least largely by SMTJ and special aircraft jurisdiction of the United States. The Report then described the Torture Act, the implementing criminal legislation that had been adopted to provide for jurisdiction over extraterritorial acts of torture by U.S. nationals and for universal jurisdiction. *See* 18 U.S.C. §§ 2340-2340A, Pub. L. No. 103-236, § 506(a), as amended by Pub. L. No. 103-322, § 60020, Pub. L. No. 103-415, § 1(k), and Pub. L. No. 103-429, § 2(2).<sup>144</sup>

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<sup>143</sup> Initial Report of the United States, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties Due in 1995, Addendum, United States of America*, ¶¶ 183-86, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (emphasis added) [hereinafter Initial Report of the United States].

<sup>144</sup> *Id.* ¶ 188.

Thus, up until 2000, although the United States had not publicly defined “any territory under its jurisdiction” with precision, it had never taken the position that this phrase was limited to the sovereign territorial United States. To the contrary, the Reagan and George H.W. Bush Administrations, the ratifying Senate, and the Clinton Administration all appear to have recognized that this phrase included State-registered ships and aircraft, and encompassed the SMTJ and special aircraft jurisdiction, and understood the federal Torture Act as reflecting this interpretation.

ii. *George W. Bush Administration (2001-2008)*

The May 30, 2005 Yoo-Rizzo Memorandum

The next discussion of the meaning of “any territory under its jurisdiction” that we have identified appears in the formerly classified May 30, 2005 Office of Legal Counsel Memorandum, written by Deputy Assistant Attorney General John Yoo for John Rizzo, then Senior Deputy General Counsel for the Central Intelligence Agency. That now-revoked<sup>145</sup> Memorandum purported to address the question whether CIA rendition and interrogation practices could constitute cruel, inhuman, or degrading treatment or punishment in violation of Article 16 of the Convention Against Torture. Yoo wrote:

We conclude, first, that the CIA interrogation program does not implicate United States obligations under Article 16 of the CAT because Article 16 has limited geographic scope. By its terms, Article 16 places no obligations on a State Party outside “territory under its jurisdiction.” The ordinary meaning of the phrase, the use of the phrase elsewhere in the CAT, and the negotiating history of the CAT demonstrate that *the phrase “territory under its jurisdiction” is best understood as including, at most, areas where a State exercises territory-based jurisdiction; that is, areas over which the State exercises at least de facto authority as the government.* As we explain below, based on CIA assurances, we understand that the Interrogations conducted by the CIA do not take place in any “territory under [United States] jurisdiction” within the meaning of Article 16. We therefore conclude that the CIA interrogation program does not violate the obligations set forth in Article 16.<sup>146</sup>

The Memorandum continued:

Articles 11 through 13, moreover, use the phrase “territory under its jurisdiction” in ways that presuppose that the relevant State exercises the traditional authorities of the government in such areas . . . . These provisions assume that the relevant

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<sup>145</sup> See Withdrawal of Office of Legal Counsel CIA Interrogation Opinions, *supra*, note 1. The May 2005 opinion was formally withdrawn in its entirety in April 2009. See *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions*, Office of Legal Counsel, Apr. 15, 2009, available at <http://www.justice.gov/olc/memoranda-opinions.html>.

<sup>146</sup> Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Dep’t of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees, at 16 (May 30, 2005) (emphasis added).

State exercises traditional governmental authority—including the authority to arrest, detain, imprison, and investigate crime—within any “territory under its jurisdiction.”<sup>147</sup>

The Memorandum observed that Articles 5(2) and 7(1) assume that a State will exercise sufficient authority over “territory under its jurisdiction” to be able to either prosecute, extradite, or refer to competent authorities for prosecution, an individual found there.<sup>148</sup> It pointed to Article 2(1), which provides for States Parties to “take effective legislative, administrative, judicial or other measures” to prevent torture “in any territory under its jurisdiction,” as referencing “areas over which States exercise *broad* governmental authority—areas over which States could take legislative, administrative or judicial action.”<sup>149</sup> The Memorandum further noted that “portions of the negotiating record of the CAT may support reading the phrase ‘any territory under its jurisdiction’ to include not only sovereign territory but also *areas subject to de facto government authority (and perhaps registered ships and aircraft)*,” but also “tends to confirm that the phrase does not extend to places where a State Party does not exercise authority as a government.”<sup>150</sup> The Memorandum elsewhere concluded however that “[a]s relevant here, we believe the phrase ‘any territory under its jurisdiction’ certainly reaches no further than the sovereign territory and the SMTJ of the United States.” *Id.* at 20-21.

One apparent goal of the Yoo Memorandum was to establish that overseas CIA abusive interrogation and rendition practices did not fall within the ambit of the Article 16 obligation “to prevent” CIDT. (This exercise, of course, misses the point that Articles 2 and 16 of the CAT are not the source of the prohibition on torture or CIDT, which preceded the Convention as a matter of customary and treaty law.) That Memorandum was formally withdrawn in its entirety by the Obama Administration in April 2009. *In light of our research, I cannot agree that “any territory under its jurisdiction” as used in the CAT is as restrictive as suggested in the Yoo Memorandum.* In particular, I do not agree that the relevant CAT articles that employ this term require the exercise of “broad” governmental authority. The memorandum also persistently overlooks the presence, and import, of the word “any” in “any territory under its jurisdiction.” The interpretation in Yoo’s memorandum is notable, however, because even during that period of extremely restrictive reading of the CAT, Yoo still took the position that “territory under its jurisdiction” could include State-flagged ships and aircraft, is “best understood” as including “areas over which the state exercises at least *de facto* authority as a government,” and that it includes the SMTJ. Even this reading would include all sovereign U.S. territory, U.S.-registered ships and aircraft, the U.S. naval base at Guantánamo Bay, as well as (1) U.S. embassies and consulates abroad, over which the US exercises *de jure* jurisdiction; (2) other U.S. military bases, over which the U.S. does not enjoy complete jurisdiction, but over which it nevertheless exercises extensive *de jure*

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<sup>147</sup> *Id.* at 18-19.

<sup>148</sup> *Id.* at 19.

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> *Id.* at 20 (emphasis added); *see also id.* at 19, n.15 (noting that the language of Article 6 may support the position “‘that territory under its jurisdiction’ may extend beyond sovereign territory to encompass areas where a state exercises *de facto* authority as the government, such as occupied territory”); *id.* at 21, n.17 (noting that Article 16 obligations may extend to occupied territory).

authorities as a government, and certainly authorities sufficient to comply with the CAT obligations that are applicable to “any territory under its jurisdiction” (all of which also fall within the SMTJ); and (3) occupied and similar territory that is subject to *de facto* U.S. governmental control, as Yoo acknowledged.

#### Bellinger Note for the Secretary, Sept. 14, 2005

A second interpretation of Article 16 of the CAT that was set forth in the May 30, 2005 Yoo Memorandum contended that the United States’ reservation to Article 16, which indicated that the United States would interpret cruel, inhuman, or degrading treatment or punishment under that Article as consistent with the meaning of the Fifth, Eighth, and Fourteenth Amendments, itself limited the application of Article 16 to the territorial United States, because some U.S. courts had interpreted certain constitutional provisions as so limited.

On September 14, 2005, then-Legal Adviser John Bellinger sent a sensitive but unclassified (SBU) Note to the Secretary of State sharply objecting to this interpretation. Bellinger noted the “intense domestic and international criticism” regarding uncertainty in the U.S. position on whether the Article 16 obligation “applies to detainees in U.S. custody abroad.”<sup>151</sup> He expressed the State Department’s disagreement with the Justice Department’s view that the U.S. reservation “exempts from Article 16 all territory outside the United States,” and stated the view of the State Department that “Article 16 expressly applies to “territory under [U.S.] jurisdiction,” including Guantánamo Bay.”<sup>152</sup> Bellinger attached a letter from Judge Abraham Sofaer, the Legal Adviser to President George H.W. Bush during the CAT ratification, which also stated his disagreement with the new-found Justice Department conclusion. Judge Sofaer observed that Article 16 on its face applies to “territory under its jurisdiction,” and that “*we understand this to mean any territory, not just the territory of the US,*” consistent with the “underlying objective” of preventing official acts of torture or CIDT “*which are within our legal capacity to prevent.*”<sup>153</sup>

#### The Second Periodic CAT Report (2005-2006)

The United States’ Second Periodic Report to the CAT Committee, submitted in 2005, did not address the scope of U.S. extraterritorial obligations under the CAT. However, the United States’ 2006 written responses to the Committee’s List of Issues regarding the Report for the first time took the position that “any territory outside its jurisdiction” did *not* reach territories under the *de facto* control of the State. The George W. Bush Administration also, for the first time, rejected the view that there was a relationship between the SMTJ of the United States and “any territories under its jurisdiction.” This interpretation marked the most geographically restrictive interpretation offered by the United States to date. Both positions were also contrary to prior U.S. government interpretations, including the conclusions of the 2005 Yoo Memorandum.

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<sup>151</sup> Note for the Secretary from John B. Bellinger, III, *Re: CAT and Detainees in U.S. Custody Abroad* (Sept. 14, 2005).

<sup>152</sup> *Id.*

<sup>153</sup> Letter from Abraham D. Sofaer, George P. Shultz Senior Fellow, Hoover Institution, Patrick J. Leahy, Comm. On the Judiciary (Jan. 21, 2005) (emphasis added).

In response to the Committee's request in the List of Issues that the United States provide data "regarding the incarcerated population in the State party's territory . . . and in areas under the jurisdiction of the State party, including in Afghanistan, Iraq and Guantánamo Bay," the United States stated ambiguously: "To the extent that this question relates to transfers of detainees outside the United States, the United States takes exception to the premise of the question that the areas outside of the jurisdiction of the United States are within the scope of the Convention."<sup>154</sup> The United States did not, however, specifically clarify what it meant by "outside the United States."

The United States then had the following exchange with the Committee regarding the geographic scope of Article 16:

44. In view of the reservation by the State party to article 16, is this article fully applicable outside the State party's territory, or in territories under the jurisdiction of the State party or under the de facto control of the State party . . . ? Please clarify what is considered to be within the Special Maritime and Territorial Jurisdiction. Does article 16 of the Convention apply to the Special Maritime and Territorial Jurisdiction? . . .

[Answer:] By its terms, Article 16 of the CAT obliges States Parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of "territory under [the] jurisdiction" of the United States. *The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention that indicates that the two are equivalent.*<sup>155</sup>

Note that this exchange appears to assume, erroneously, that Article 16 is the source of the U.S. obligation not to commit CIDT. Nevertheless, taken on its own terms, the United States' assertion regarding the text and *travaux* is, at best, an overstatement. Both the text and the *travaux* indicate that "any territory under its jurisdiction" was intended to have broad application, including to territory under the *de facto* control of a State, as even the Yoo Memorandum concluded. As discussed above, the negotiating history of both the CAT and the OPCAT confirm that the drafters of these instruments knew that this phrase would apply to a variety of forms of control over territory beyond a State's sovereign borders. On the other hand, the U.S. response that it does not accept that "'de facto control' equates to [any] territory under its jurisdiction," does not address whether it might consider *some* areas under *de facto* U.S. control to fall within the scope of the phrase. The answer is ambiguous in that regard.

<sup>154</sup> Response of the United States, *List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America*, at 13, U.N. Doc. CAT/C/USA/Q/2 (2006), available at <http://www.state.gov/documents/organization/68662.pdf>. See also U.N. Comm. Against Torture, *List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America* (CAT/C/48/Add.3), ¶ 6, U.N. Doc. CAT/C/USA/Q/2 (Feb. 6, 2006) [hereinafter *List of Issues*].

<sup>155</sup> *Id.* at 86-87 (emphasis added).

The U.S. Response then rejected the relevance of SMTJ jurisdiction, and particularly of ship and aircraft jurisdiction, to Article 16:

The special maritime and territorial jurisdiction of the United States is a creation of statute. *See* 18 U.S.C. § 7. It includes aircraft belonging to a U.S. citizen or corporation when in flight over the high seas, certain spacecraft while in flight, and, when the offense is committed by or against a U.S. national, or at certain U.S. diplomatic and military installations in foreign states. *Id.* For certain criminal statutes, Congress uses this definition to extend their coverage beyond the territory of the United States.

The territorial restriction in Article 16 of the CAT, which also appears in other provisions of the CAT, uses different terms to describe its coverage and serves a purpose entirely different from the technical term “special maritime and territorial jurisdiction,” which Congress used to define the jurisdiction of certain U.S. criminal statutes. Article 16 is limited, by its own terms, to “territory under [the State Party’s] jurisdiction.” Article 5 of the CAT expressly distinguishes between “territory under [a State Party’s] jurisdiction” and “on board a ship or aircraft of that State.” *See* Article 5(a) (requiring a State Party to “establish its jurisdiction” over offenses that constitute torture “[w]hen the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State”). Yet a crucial part of Congress’s definition of “special maritime and territorial jurisdiction,” is vessels and aircraft belonging to United States citizens traveling on or flying over the high seas. 18 U.S.C. § 7(1), (5). Moreover, “special maritime and territorial jurisdiction” includes concepts obviously inapposite to Article 16’s reach, such as offenses committed on certain spacecraft and in “places outside the jurisdiction of any nation.” 8 U.S.C. § 7(6)-(7). Thus, the “territory under [a State Party’s] jurisdiction,” as employed by the CAT, and the “special maritime and territorial jurisdiction,” as employed by U.S. criminal law, are distinct concepts.

Also, Congress’s use of the term “special maritime and territorial jurisdiction” reaches some geographic areas only with regard to offenses committed by or against U.S. nationals. In contrast, the term “territory under [a State Party’s] jurisdiction,” is not cast in terms of the nationality of perpetrators or victims, but solely the place in which the activity occurs. Indeed, Article 5 of the CAT expressly recognizes that “territory under [a State Party’s] jurisdiction” is distinct from jurisdiction that is based upon the nationality of the victim of conduct. *See* Article 5(a), (c) (requiring the extension of the jurisdiction to “any territory under [a State Party’s] jurisdiction,” on the one hand, and “[w]hen the alleged offender is a national of that State,” as well as “[w]hen the victim is a national of that State if that State considers it appropriate,” on the other). *Under these circumstances, the technical device of “special maritime and territorial jurisdiction” occasionally deployed by Congress to extend certain criminal prohibitions extra-*

*territorially does not govern the scope of Article 16's restrictions in "territory under [a Contracting Party's] jurisdiction."*<sup>156</sup>

Three points are notable about this retreat. *First*, the United States rejected the relevance of the SMTJ to "any territory under its jurisdiction," despite the facts that (a) the United States since 1988 had considered the SMTJ highly relevant to the concept and had defined its obligations under the CAT implementing legislation in terms of the SMTJ, and (b) the SMTJ by its terms makes the "territories" it addresses subject to *de jure* U.S. "jurisdiction." *Second*, while focusing on areas of divergence between the SMTJ and the CAT, the U.S. Response does not address, or acknowledge, whether *some aspects* of the SMTJ do constitute "any territory under its jurisdiction." The United States did not indicate, for example, whether it acknowledged that the Guantánamo Naval Base constitutes "any territory under its jurisdiction." *Finally*, apparently for the first time, the U.S. rejected the possibility that "any territory under its jurisdiction" under the CAT could include State-registered ships and aircraft, pointing at the text of Article 5(1)(a) to distinguish the two.

In its Conclusions and Recommendations at the end of the session, the Committee stated:

The Committee notes that a number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (arts. 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the *de facto* effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own *de jure* territory to be regrettable.

[The Committee then recommended:] The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.<sup>157</sup>

In its one-year follow up to specific Committee recommendations, in response to a recommendation that the United States "rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding', 'short shackling' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control," the United States again stated that it "disagrees with the Committee's contention that 'de facto effective control' is *equivalent* to territory subject to a State party's jurisdiction for the purposes of the Convention."<sup>158</sup>

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<sup>156</sup> *Id.* at 88-89 (emphasis added).

<sup>157</sup> U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America*, ¶ 15, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

<sup>158</sup> *United States Response to Specific Recommendations Identified by the Committee Against Torture*, 7 (emphasis added).



Finally, in discussing “territory and jurisdiction” in its response to the CAT Committee’s General Comment No. 2, submitted on November 3, 2008, the United States again rejected equating these concepts to *de facto* jurisdiction, or their application to State-registered ships and aircraft:

26. General Comment 2, paragraph 7 states:

“The Committee also understands that the concept of ‘any territory under its jurisdiction,’ linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.”

27. Article 2, paragraph 1 of the Convention states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in *any territory under its jurisdiction.*” (Emphasis added.) This important phrase, which clarifies the scope of certain Convention obligations, also appears in Convention Articles 5, 11, 12, 13, and 16.

28. As explained to the Committee in 2006, the United States does not agree that “‘de facto control’ equates to ‘territory under its jurisdiction.’ There is nothing in the text or the *travaux* of the Convention that indicates that the two are equivalent.” The Committee offers no textual or historical support for its proposition in General Comment 2 that the words “any territory under its jurisdiction . . . includes any territory or facilities . . . subject to the de jure or de facto control of a State party.” The Committee has made similar assertions in its communications to the United States. In these communications, the Committee has likewise not provided a reasoned explanation of how the scope of the Convention’s obligations supposedly depart from the plain meaning of its text.

29. .... The drafters of the Convention were capable of devising legal obligations with a more expansive reach, as is demonstrated by Convention Article 5, which applies to offenses “committed in any territory under [a State Party’s] jurisdiction *or on board a ship or aircraft registered in that State.*” (Emphasis added.) If the drafters had intended for Article 2 to extend beyond the territory under a State Party’s jurisdiction, they would have reflected that intent in the words of the Convention.<sup>159</sup>

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<sup>159</sup> *Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States Parties*, at 9-10 (Nov. 3, 2008) (citations omitted). The United States also rejected the Committee’s reliance on the non-derogable character of torture to inform the meaning of “any territory under its jurisdiction,” contending that the “principle of non-derogability” “appears nowhere in the text of the Convention” and cannot “expand[] the carefully considered scope of legal obligations assumed by States Parties.” Non-derogability, however, is embodied in Article 2(2) of the Convention, and the U.S. objection to “expanding” the scope of the Convention begs the question of that that scope is, and how Article 2(2) may inform it.

Once again, the U.S. statement erroneously rejected the relevance of the concept of *de facto* control and of any relationship between State-registered ships and aircraft and “any territory under its jurisdiction.”

We have not found any internal analysis or explanation of the reasoning behind the George W. Bush Administration’s positions before the CAT Committee other than the 2005 Yoo Memorandum, which recognized, *in tension with the United States’ stated position before the CAT*, that “any territory under its jurisdiction” could include State-registered ships and aircraft, Guantánamo and other SMTJ areas, and areas under “*de facto*” governmental control.

Importantly, however, other than the Bush Administration’s erroneous rejection of the idea that “any territory under its jurisdiction” includes State-registered ships and aircraft, and its rejection of the idea that SMTJ and *de facto* control always “equate” with that CAT phrase, the Administration did not clearly articulate any precise interpretation of “any territory under its jurisdiction” to the CAT Committee. *The above positions thus should not in any way preclude the United States from taking a more responsive and responsible position before the Committee in its Third Periodic Report and its upcoming appearance to present that Report.*

#### 7. “Any Territory Under Its Jurisdiction” and Effective Control

I believe that the text, context, and object and purpose of the CAT establish that “any territory under its jurisdiction” is best understood to mean what the language says—that *the relevant obligations under the CAT apply when a State exercises effective control, i.e., sufficient de facto control over a place or situation to be able to meaningfully fulfill those obligations, using the legal authorities available to the State.* This is consistent with the focus in the text on “any territory,” and the broadening concept “under its jurisdiction.” Modern understandings of jurisdiction are very much tied to *de facto* effective control, and as the negotiating history of both the CAT and the OPCAT make clear, the drafters of the Convention understood that “jurisdiction” includes both *de jure* and *de facto* control. The drafters of the CAT understood this in observing that the clause would encompass colonial control and military occupation. The drafters of the OPCAT also understood this, in concluding that “any place under its jurisdiction or control” would apply comprehensively to all locations, whether under the State’s official or informal authority. The negotiators made clear that the language “or control” was not meant to be distinct from jurisdiction, but to underscore the ordinary international law meaning of jurisdiction, which includes the exercise of effective control. “Territory” also may be understood to encompass specific and discrete locations, particularly in the context of the CAT, which emphasizes its application to “any territory.” Indeed, embassies, and State-flagged ships and aircraft, are often thought of as *de jure* “territories” of the State.

Such an interpretation would be consistent with our current domestic legal framework. Since the last U.S. Periodic Report to the CAT Committee, a number of domestic legal developments have established a geographically comprehensive legal regime of humane treatment obligations, based on the concept of “effective control” over a place or person. Thus, President Obama’s Executive Order No. 13491 instructed that, “consistent with . . . the Convention Against Torture,” U.S. personnel must treat humanely all persons in U.S. custody or under “the *effective control*” of the United States in situations of armed conflict, wherever

located. Exec. Order No. 13491, *supra* note 1, § 3(a). It further provided that “an individual in the custody or under the *effective control* of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual).” *Id.*, § 3(b) (emphasis added). And the Order provides for International Committee of the Red Cross access to “any individual detained in any armed conflict in the custody or under the *effective control* of an officer, employee, or other agent of the United States Government.” *Id.*, § 4(b) (emphasis added).

The Detainee Treatment Act of 2005 likewise prohibits acts of cruel, inhuman or degrading treatment or punishment for any individual under the “*physical control*” of U.S. personnel, “regardless of . . . physical location.”<sup>160</sup> Other recent laws that reinforce this regime also tie humane treatment to effective control. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1038(a), 123 Stat. 2451 (2009) (emphasis added). (“[n]o enemy prisoner of war, civilian internee, retained personnel, other detainee, or any other individual who is in the custody or under the *effective control* of the Department of Defense or otherwise under detention in a Department of Defense facility in connection with hostilities may be interrogated by contractor personnel.”).

Since at least the Supreme Court’s 2006 decision in *Hamdan v. Rumsfeld*, Common Article 3 of the Geneva Conventions, which prohibits torture and cruel or degrading treatment, has been recognized as obligatory in all non-international armed conflicts. In addition to the Torture Act, which provides for criminal jurisdiction over any acts of torture outside the United States, the Military Extraterritorial Jurisdiction Act (“MEJA”), 18 U.S.C. § 3261 (2000), also enables the prosecution of U.S. civilians employed by or accompanying U.S. armed forces overseas. *All of these legal directives are fully consistent with an interpretation that ties a State’s humane treatment obligations under the Convention to persons and situations under its effective control.*

Moreover, international law increasingly has recognized the fact of effective control as giving rise to jurisdiction, State responsibility and other legal obligations. In *Nicaragua v. United States*, the ICJ indicated that State responsibility for acts directly committed by third parties may arise, *inter alia*, where a State exercises “effective control” over a specific operation by a group that otherwise is not sufficiently linked to the state to be considered an arm of the state. Similar tests have been articulated by the International Law Commission (ILC).<sup>161</sup> With

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<sup>160</sup> Detainee Treatment Act, 42 U.S.C. § 2000dd(a) (2005) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”).

<sup>161</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 115 (June 27) (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”) (emphasis added); see also Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 10, ¶¶ 398-400 (applying the “effective control” test enunciated in *Nicaragua*) (quoting Article 8 of the International Law Commission Articles on State Responsibility) (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or

respect to occupation law, Article 42 of the Hague Regulations<sup>162</sup> has been understood as setting forth a two-prong test—a requirement that military control “has been established”—generally through physical military presence, and that authority “can be exercised”—which has been understood to ask whether the invading power has effective control.<sup>163</sup>

Apart from Executive Order No. 13491, this Administration has not yet taken any public positions regarding extraterritorial application of the CAT, to situations of armed conflict or otherwise. It would therefore be fully available to the United States, and fully consistent with U.S. domestic and international law, for the United States now to take the position that “*any territory under its jurisdiction*” means precisely that—*any place or situation over which the United States exercises sufficient effective control to fulfill the relevant obligations of the CAT.*

### **PART III: TERRITORIAL SCOPE OF CAT ARTICLE 3**

The second issue of extraterritoriality that we have been asked to address by the Committee Against Torture involves the extraterritorial application of Article 3 of the CAT, which prohibits the physical transfer of a person, through expulsion, return, or extradition, to another State where substantial grounds indicate that person is at risk of torture.

Article 3 states:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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control of, that State in carrying out the conduct.”); *Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 6 (2001) (stating that conduct is attributable to a state when “the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed”). The ILC also has employed effective control as a basis for determining State responsibility in the context of operations with international organizations. *Int’l Law Comm., Draft Articles on Responsibility of International Organizations and its Commentary*, art. 6 (2009) (“The conduct of an organ of a State . . . that is placed at the disposal of [an] international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct.”) (emphasis added); *see also id.* at Commentary, art. 6, ¶ 7 (providing that where an organ or agent of an international organization retains some control over its national contingent, the decisive question in establishing legal responsibility for given conduct appears to be “who has *effective control* over the conduct in question”) (emphasis added).

<sup>162</sup> Article 42 provides that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and *can be exercised*.” Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the laws and Customs of war on Land, art. 42, Oct. 18, 1907 (emphasis added).

<sup>163</sup> Thus, the U.S. Army Field Manual provides that “[i]t is sufficient that the occupying force can within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is *effective*.” DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE, FM 27-10 § 356 (1956) (emphasis added). The U.K.’s 2004 Manual provides that, in addition to removal of the occupying power from the area, “Occupation will also cease when *effective control* transfers to a different authority, such that the territory cease to be under the authority of external military forces.” THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 11.7 (2004) (emphasis added).

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

During the United States' 2006 appearance before the CAT Committee, the United States took the position that the *nonrefoulement* obligation contained in Article 3 of the CAT applies only to transfers of persons from U.S. sovereign territory (not including the SMTJ). The United States based this interpretation of the Article, which is in significant tension with the interpretation of other States and international bodies, largely on the U.S. Supreme Court's construction of Article 33 of the U.N. Convention and Protocol Relating to the Status of Refugees,<sup>164</sup> which was originally drafted in 1951. *Sale v. Haitian Centers Council*, 509 U.S. 153 (1993).<sup>165</sup> The United States took this position despite the fact that the *Sale* case addressed a different and much earlier treaty, containing different language, and with a different context, object and purpose, and negotiating history. Notably, under the United States' reading, Article 3 would be the most severely territorially restricted obligation in the entire Convention, since articles that are limited to "any territory under its jurisdiction" at a minimum includes areas where a State exercises *de jure* jurisdiction, even if not formal sovereignty. This United States position purported to exclude from Article 3's scope both Guantánamo and U.S.-registered ships and aircraft, among others.

The territorial scope of Article 3 is a question that has been opened, but not resolved, in this Administration. In 2009, the Interrogations and Transfer Task Force was established by President Obama's Executive Order 13491 on Ensuring Lawful Interrogations, "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody and control."<sup>166</sup> The Task Force examined all types of transfers<sup>167</sup> of individuals conducted by the United States, and made recommendations that were accepted by the President.

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<sup>164</sup> In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268, thereby accepting as domestic law the *nonrefoulement* obligation in Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

<sup>165</sup> Article 33 of the Convention provides:

Article 33. Prohibition of Expulsion or Return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

<sup>166</sup> Transfer Task Force Report, *supra* note 2, at 1, quoting Exec. Order 13491, *supra* note 1, § 5(e)(ii).

The Task Force reexamined a number of legal and policy questions relating to transfers, including the “more likely than not” legal standard for determining whether individuals will face torture upon return. However, the final report of the Task Force opened, but deferred without resolving, the question of the territorial scope of Article 3. The Task Force first noted that the Convention Against Torture imposes different *nonrefoulement* obligations from the Refugee Convention:

*The Article 3 prohibition is absolute. Unlike non-refoulement in the refugee context, a potential transferee, no matter how dangerous, cannot be sent from the United States to another country if it is more likely than not that he or she will face torture there.*<sup>168</sup>

The Report observed that “[t]he United States has previously interpreted Article 3 to impose legal obligations on the U.S. only with respect to individuals who are transferred from the territory of the United States,” but noted the existence of international disagreement on this point:

The United States has argued that this interpretation is consistent with the text of the Convention itself, the negotiating history, and the U.S. record of ratification, as well as the U.S. Supreme Court’s interpretation of similar language in the Refugee Convention. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 153 (1993). Other states and international bodies, however, assert that Article 3 of the CAT applies to wholly extraterritorial transfers. Some take a broad view of the situations in which non-refoulement obligations legally attach—not just to expulsions, returns, or extraditions, but to any transfers of people from the custody of one state to another, wherever located. Yet others argue that, as a matter of customary law or by operation of Article 7 of the International Covenant on Civil and Political Rights, non-refoulement obligations extend to situations in which the sending state believes that the person may face cruel, inhuman, or degrading treatment or an unfair trial. (Article 7 of the ICCPR states, in part, that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” The U.S. has not agreed with the view that this text contains an implicit non-refoulement obligation nor with the view that the covenant applies extraterritorially.)<sup>169</sup>

Given its other responsibilities, however, the Task Force declined to resolve this legal question for purposes of the Report, in light of the firm policy of the United States not to transfer individuals to torture:

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<sup>167</sup> Because the term “transfer” had been given a more restrictive meaning in some prior contexts, the Task Force defined “transfer” for purposes of the Report “to describe a variety of different scenarios in which the United States moves or facilitates the movement of a person from one country to another or *from U.S. custody to the custody of another country*.” Transfer Task Force Report, *supra* note 2, at 4 n.2.

<sup>168</sup> *Id.*, at 18 (emphasis added).

<sup>169</sup> *Id.*, & n.4.

In implementing Article 3 of the Torture Convention, Congress nevertheless has provided that “it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*” In light of the United States’ stated policy commitment not to send any person, no matter where located, to a country in which it is more likely than not that the person would be subject to torture, *this report does not address the legal question whether Article 3 applies to transfers conducted by the United States that are initiated outside of U.S. territory.*<sup>170</sup>

As the Task Force noted, in 1998, Congress adopted legislation implementing the CAT that established a global policy prohibiting *refoulement* to torture.<sup>171</sup> This Administration has repeatedly asserted to courts, the public, our allies, and international bodies that the United States has a firm commitment not to return individuals to torture from anywhere in the world. However, this Administration has not taken a public position on the question whether Article 3 of the CAT should be understood to have some extraterritorial reach. The CAT Committee has now directly asked this question.

Based upon a thorough review of the object and purpose, text, and context of the Convention Against Torture, the negotiating history of Article 3, the understanding of the ratifying Executive and Senate, and relevant developments in international law and foreign state practice, *I conclude that Article 3 of the CAT, which was adopted nearly 30 years after the Refugee Convention, for the purpose of ensuring a global prohibition on torture without qualification, establishes a distinct and more rigorous prohibition on nonrefoulement to torture than the prohibition on the return to persecution set forth in Article 33 of the Refugee Convention.* Unlike the Refugee Convention, Article 3 contains no language suggesting a geographic limitation, and it includes no exceptions. The language was deliberately expanded beyond the terms of the Refugee Convention in order to underscore the broad scope of the prohibition. And it is contained in a Convention that was intended to establish a universal and geographically comprehensive enforcement regime against torture, and which the United States understood would apply comprehensively if no geographically limiting terms were included. It was for this reason that the United States included an understanding limiting the CAT Article 14 obligation to provide a remedy to acts of torture committed “in any place under its jurisdiction.” *The United States did not offer any similar geographic understanding for Article 3.* The text and context of the Convention, the negotiating history, international law, and foreign state practice all confirm that the terms of Article 3—“expel, return (‘refouler’) or extradite”—are not territorially cabined.

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<sup>170</sup> *Id.*, at 18-19 (emphasis added).

<sup>171</sup> FARR Act, *supra* note 5, § 2242 (establishing a section titled “United States Policy With Respect to Involuntary Return of Persons in Danger of Subjection to Torture” that provides that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States”).

*The better reading of Article 3, in short, is that it contains no rigid geographic constraint, but broadly provides precisely what it says: that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”*

#### **A. Object and Purpose, Text, and Context**

The text of Article 3 contains no specific jurisdictional language. Consistent with Article 31 of the VCLT, the object and purpose, text, and context of the CAT make clear that the Article 3 obligation is not geographically confined to a State’s formal territory, for the following five reasons:

1. *Allowing extraterritorial returns to torture is contrary to the Convention’s core purpose of universally prohibiting and punishing torture.* Article 3 addresses *nonrefoulement* to torture, not to CIDT, a fact that is consistent with the conclusion that its terms were not intended to be geographically constrained. The object and purpose of the Convention, as previously noted, was to “make more effective the struggle against torture . . . throughout the world.”<sup>172</sup> Under the structure of the Convention, it is *torture* that is criminalized and subjected to universal jurisdiction and a global obligation to extradite or prosecute. By contrast, the more limited Article 16 obligations relating to CIDT do not criminalize “all” acts of CIDT or impose universal jurisdiction, and are limited to “any territory under its jurisdiction.” Based on the Convention’s context, object, and purpose, the obligation not to return an individual to torture logically should parallel the scope of the Convention’s other obligations relating to torture. Certainly, there is no reason why the Article 3 prohibition on return to *torture* should be more *limited* in geographic scope than the Articles addressing prevention of *CIDT*. The position articulated by the Bush Administration, however, would read Article 3 as uniquely geographically constrained to the sovereign U.S. territory.

2. *The Convention criminalizes certain extraterritorial returns to torture.* It would be odd for a Convention that treats torture as a universal jurisdiction crime to geographically limit the prohibition on *return* to torture. Article 4 requires criminalization of “all” forms of torture—including attempt, complicity, and participation in torture, regardless of where the acts are committed, and Article 5 requires States to exercise universal jurisdiction over all such acts. Knowingly or purposefully returning an individual to torture could readily constitute complicity or participation in torture, and thus be punishable as a universal jurisdiction crime under the CAT. Yet, if Article 3 were strictly territorially limited, Article 3 would permit the knowing or purposeful return to torture from outside a State’s territory, while Articles 4 and 5 would criminalize the same conduct.

3. *Article 3 is not textually limited to “any territory under its jurisdiction.”* Although a number of specific provisions of the Convention are limited to “any territory under its jurisdiction,” *Article 3 contains no such geographic limitation.* This absence is notable, because “any territory under its jurisdiction” is the primary way in which the Convention *limits* States’ obligations throughout the Convention. *See, e.g.,* CAT, arts. 2, 16. Indeed, the absence of this limiting phrase in Article 14 led the United States to adopt an understanding that read “any

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<sup>172</sup> CAT, *supra* note 44, pmbl (emphasis added); *see also* NOWAK & MCARTHUR, *supra* note 49, at 8.



territory under its jurisdiction” into that Article, since the United States recognized that the Article 14 obligation to compensate victims of torture would otherwise apply to any victim of torture around the world. Reading Article 3 as geographically limited therefore requires reading into that article an implicit geographic limitation that appears nowhere else in the Convention.

4. *The terms “expel, return (‘refouler’) or extradite” are not strictly geographically limited.* The prior U.S. position required that *all four* of the terms that appear in Article 3—*expel, return, refouler, and extradite*—be understood as strictly limited to the sovereign United States. Such a reading is unwarranted under international law. See discussion *infra* notes 198, 203. Even in *Sale*, the Supreme Court held that, in the context of the Refugee Convention, the terms “*expel or return (‘refouler’)*” did not apply to return of individuals *from the high seas*.<sup>173</sup> The Court did not address whether those terms would apply to returns from territories over which the U.S. exercises greater legal authority. Thus, even if one accepted the relevance of the *Sale* interpretation of these terms to the CAT (which I do not, as explained below), *Sale* did not resolve the question whether these terms apply, for example, to returns from “any territory under U.S. jurisdiction,” including territories under complete U.S. jurisdiction and control, such as Guantánamo. Nor did *Sale* interpret the scope of the term “extradite.” Finally, in the FARR Act, Congress understood that these terms could describe extraterritorial actions. See FARR Act, *supra* notes 5, 171, § 2242 (providing that the United States shall not “expel, extradite, or otherwise ... return” a person to torture ... regardless of whether the person is physically present in the United States”).

5. *The obligation to “extradite” in the CAT applies to “any territory under its jurisdiction.”* The addition of the new term “extradite” in Article 3 of the CAT on its face indicates that the prohibition on *nonrefoulement* in the Convention Against Torture is broader than that in the Refugee Convention. The use of “extradite” elsewhere in the CAT also confirms that Article 3 must apply *at least* to “any territory under its jurisdiction,” as that term is used in the Convention, including on State-registered ships and aircraft. The obligation to “extradite” appears repeatedly in the CAT, and consistently applies to persons who are found “in any territory under its jurisdiction,” not merely on the State’s sovereign soil. Thus, Articles 5(2), 6, 7 and 8 effectively obligate a State to extradite any offender found “in any territory under its jurisdiction” whom the State does not prosecute. See *infra* note 195. The CAT thus makes clear that the ability to “extradite” is understood to arise, at a minimum, with respect to all persons found in any territory under a State’s jurisdiction, not simply within its *de jure* sovereign territory. Under ordinary rules of treaty interpretation, the term “extradite” in Article 3 must have at least the same scope. Moreover, the CAT uses the term “extradite” broadly, to include the extradition of individuals to another State even if no formal extradition treaty exists between those States.<sup>174</sup> U.S. domestic law does not allow extradition in the absence of an extradition treaty, but these articles make clear that the concept of extradition is broad for purposes of the CAT and is not limited to the formalities of an extradition treaty.

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<sup>173</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179-87 (1993).

<sup>174</sup> See, e.g., CAT, at art. 8(2) (stating that if a State Party receives an extradition request from a State Party “with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offenses.”); *id.* at art. 8(3) (“States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offenses as extraditable offense between themselves.”).

Later in this Part, I will explain why the Supreme Court’s analysis of the text in Article 33 of the Refugee Convention is not relevant to the CAT. But these are five independent reasons why the object and purpose, context, and text of the CAT support the conclusion that Article 3 is not strictly constrained.

## B. Negotiating History

The negotiating history of the CAT explicitly states that “*the purpose of [Article 3] was to afford the greatest possible protection against torture.*” U.N. Doc. E/CN.4/L.1470, *supra* note 63, ¶ 44. The drafters therefore included the terms “return (‘refouler’)” in order to broaden Article 3’s humanitarian protection, and that they understood the term “return (‘refouler’)” could include persons located outside of a State. The drafters understood that “return” was included in the 1951 Refugee Convention, but their discussions did not reflect any effort to mirror the meaning of that Convention. To the contrary, the language that they adopted for Article 3 was both significantly broader (including “extradite,” not including any exceptions, and not including any territorially-limiting language) and more specific (with the *nonrefoulement* obligation limited to torture, not “persecution”). Indeed, the absence of a geographic limitation on Article 3 may reflect the negotiating States’ recognition that the narrow obligation not to return to torture was already widely viewed as impermissible.

Sweden’s initial draft proposal on *nonrefoulement* did not include the word “return,” but instead stated only “expel or extradite.”<sup>175</sup> In March 1979, the Working Group discussed the “advisability of including the word “return” (“refouler”) in the revised draft of article 3.”<sup>176</sup> In support of this proposal, “it was said that there were *strong humanitarian considerations for the inclusion of the word ‘return’ which broadened the protection of the persons concerned.*”<sup>177</sup> The Working Group noted this concept also arose in Article 33(1) of the 1951 Convention relating to the status of refugees, though “the view was expressed that the 1951 Convention on Refugees was on a quite different subject.”<sup>178</sup>

The only concern expressed in the Working Group’s ensuing discussion of this change was whether the concept of “return” in Article 3 might “require a State to *accept* a mass influx of persons when it was not in a position to do so.”<sup>179</sup> This comment indicates that the drafters understood that the term “return” could refer to persons *outside* a State’s territory, and wanted to ensure that the obligation not to return individuals to torture would not result in a State’s being required to “accept,” or allow to *enter*, persons at risk of being tortured when it lacked the capacity to process large numbers of persons outside of its borders. It was also noted that disagreement about the concept of return or *refoulement* had led to failure in the drafting of the Convention on Territorial Asylum.

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<sup>175</sup> Original Swedish Draft, *supra* note 61; *see also* U.N. Doc. E/CN.4/1314, *supra* note 62, at 12; and U.N. Doc. E/CN.4/L.1470, *supra* note 63, ¶ 39.

<sup>176</sup> *Id.* ¶ 42.

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> *Id.* *See also* BURGERS & DANIELIUS, *supra* note 61, at 126 (“[A] reference to return (“refoulement”) was added in order to make the provision more complete and with article 33 of the *Refugee Convention* as an obvious source of inspiration.”).

<sup>179</sup> U.N. Doc. E/CN.4/L.1470, *supra*, ¶ 42 (emphasis added).

A proposal accordingly was made that “return” either “be deleted or that specific provision be made in the Convention for States to attach a reservation to their acceptance of the article.”<sup>180</sup> This exchange also suggests that the parties interpreted the term “return (‘refouler’)” to include “mass migrations” and other extraterritorial applications of Article 3, but considered compromising by allowing individual States to adopt reservations that limited this effect. Notably, in response to this proposal, no one suggested that “return (‘refouler’)” was territorially confined. Ultimately, however, the Working Group accepted the addition of “return (‘refouler’)” without the qualification or reservation,<sup>181</sup> and “return (‘refouler’)” remained in the text of Article 3 from this point onward.

Nothing in this history suggests that the drafters thought that Article 3 was restricted to a State’s territory. Instead, the discussion of “return” suggests that (1) they wanted the *nonrefoulement* obligation to be as broad as possible and “to afford the greatest possible protection against torture,” (2) they understood that “return” included the return of individuals from outside a State’s territory, and (3) they considered, but did not take, action to modify that effect.

This understanding also is consistent with the United States’ own interpretation of its Article 33 obligations under the Refugee Protocol, which the United States recognized at that time as applying extraterritorially, including on the high seas.<sup>182</sup> There therefore is no tension

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<sup>180</sup> *Id.*

<sup>181</sup> *See, e.g.*, 1980 Working Group Report, *supra* note 77, ¶ 13.

<sup>182</sup> The 1981 U.S. agreement with Haiti that authorized the interdiction of Haitian migrants on the high seas cited “the international obligations mandated in the [Refugee] Protocol” and promised that the U.S. would not return “any Haitian migrants whom the United States authorities determine to qualify for refugee status.” Agreement Effected by Exchange of Notes, U.S.-Haiti, Sept. 23, 1981, T.I.A.S. No. 10,241 (emphasis added). An OLC opinion reviewing the interdiction program at the time concluded in light of Article 33 that “[i]ndividuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims.” Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. Of Legal Counsel, to the Att’y Gen., Proposed Interdiction of Haitian Flag Vessels, 248 (Aug. 11, 1981) (emphasis added); *accord* Memorandum from Larry L. Simms, Deputy Assistant Att’y Gen., Off. of Legal Counsel, to the Assoc. Att’y Gen. (Aug. 5, 1981) (“Those who claim to be refugees *must be given a chance to substantiate their claims [under Article 33].*”) President Reagan’s Executive Order implementing the high seas agreement thus provided that “no person who is a refugee will be returned without his consent,” and directed the Attorney General and Secretary of State to “ensure” “the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.” Exec. Order No. 12324, 46 Fed. Reg. 48,109 (1981) (emphasis added). The INS Guidelines for the high seas interdiction program further mandated that INS personnel be constantly watchful “for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.” INS Role In and Guidelines For Interdiction at Sea, Oct. 6, 1981 (emphasis added). Moreover, in 1981, Acting Commissioner of the INS Doris Meissner testified before Congress that in interviewing interdicted Haitians, “[t]he INS officer’s responsibility on the ship is to insure that we are in compliance with the U.N. protocol . . . .” Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th Cong., 21-22 (1981) (statement of Doris Meissner, Acting Comm’r, INS) (emphasis added). The United States did not begin to reinterpret its position on the extraterritorial application of Article 33 until the government was sued over the interdiction program in *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff’d* 809 F. 2d 794 (D.C. Cir. 1987). As late as 1989, James Buck, Deputy Commissioner of the INS, again testified to Congress that in administering the interdiction program, the INS had “strictly observ[ed] our international obligations concerning those who are genuinely fleeing persecution in their homeland.” *Haitian Detention and Interdiction: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the S. Comm. on the Judiciary*, 101st Cong., 28 (1989) (emphasis added). The government did not formally reverse the prior OLC opinions until 1991, in light of the Haitian interdiction litigation. *See* Letter from Edwin D. Williamson,

between this view of the negotiating history of Article 3 of the CAT and the United States' own interpretation of its *nonrefoulement* obligations under Article 33 of the Refugee Convention at the time.

The negotiating history of the concepts of “complicity or participation” in Article 4 also is consistent with the view that the obligation in Article 3 includes conduct that could be considered criminal under Article 4 and subject to universal jurisdiction. The term “complicity” was added to Article 4 in order to *broaden* the criminal act of torture. States wanted to ensure the phrase included persons who aided or acquiesced in the commission of torture prior to the fact, as well as persons who acted after the fact, for example to conceal or cover up torture.<sup>183</sup> Indeed, one delegate even expressed concern that “complicity or participation” was not broad enough.<sup>184</sup>

Thus, although the negotiating history of Article 3 is sparse, nothing in that history suggests a view that Article 3 would be limited to the sovereign territory, or even to “any territory under its jurisdiction.” The only discussion regarding the inclusion of the terms “return (‘refouler’)” suggests to the contrary.

### C. Ratification History

Most of the discussion of Article 3 during the U.S. ratification process focused on the Reagan and Bush Administration proposal that the U.S. should adopt a RUD indicating that “substantial grounds” for believing that an individual would be tortured should be understood as requiring that torture be “more likely than not.” Senate Report, *supra* note 43, at 10. The Senate adopted this understanding. This elevation of the burden of proof represented the United States' only effort to limit its *nonrefoulement* obligations under the Torture Convention.

The ratification proceedings did not explicitly consider of the geographic scope of Article 3. President Reagan's 1988 Summary and Analysis of the Convention stated that “[u]nder current U.S. law, an individual may not normally be expelled or returned where his ‘life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion,’” and noted that the Supreme Court had adopted a “more likely than not” standard for such cases. *Id.* at 16 (citing 8 U.S.C. § 1253(h)(1)); *see also id.* at 41 (Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pressler, April 4, 1990 (making a similar point)). This statement invoked current U.S. law for purposes of the “more likely than not” standard, rather than for any implication regarding territorial scope.

The Summary further noted that “Article 3 would extend the prohibition on deportation under existing U.S. law to cases of torture not involving persecution on one of the listed

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Legal Adviser, State Department, to Timothy Flanigan, Acting Assistant Att’y Gen., Haitian Refugee Center Inc. v. Baker (Dec. 11, 1991) (arguing against extraterritorial application of U.S. obligations under Article 33 in light of pending litigation), *available at* <http://www.state.gov/documents/organization/65847.pdf>; *see also Memorandum from Timothy E. Flanigan, Acting Assistant Att’y Gen., Off. of Legal Counsel, to the Legal Adviser, Dep’t of State, Legal Obligations of the United States Under Article 33 of the Refugee Convention* (Dec. 12, 1991) (same).

<sup>183</sup> 1980 Working Group Report, *supra* note 77, ¶ 34; *see also* NOWAK & MCARTHUR, *supra* note 49, at 232.

<sup>184</sup> 1980 Working Group Report, *supra*, ¶ 35.

permissible grounds. This prohibition applies to the expulsion or return of persons in the United States to a particular State, and does not grant a right to seek entry or to avoid expulsion to other States.”<sup>185</sup> This single reference to “in the United States” does not suggest that the Article 3 obligation applied only in the United States (or “any territory under its jurisdiction”). The sentence on its face only discusses “deportation,” and not extradition or exclusion, and thus clearly does not address the full scope of the Article. The statement also contends only that the Article did not entitle an alien to “entry” or to avoid being sent to another State. A *nonrefoulement* obligation can apply outside a State’s borders without requiring either. Furthermore, even if the reference to “in the United States” could be considered meaningful, in the context of CAT ratification this phrase was commonly used as shorthand for “any territory under its jurisdiction,” which included special aircraft, maritime and territorial jurisdiction. (Indeed, this is how the Torture Act statutorily defined the “United States.”) Thus, there is no reason in this context to understand such a passing reference as restricting the Article to the sovereign territorial United States.

On the other hand, numerous references to the Article included no domestic limitation at all. The Senate’s Summary of the Convention Senate identified “[n]onrefoulement” as one of the “[m]ajor [p]rovisions” in the Convention, under which “States Parties have an obligation not to expel, return (‘refouler’) or extradite a person to another State where there are ‘substantial grounds’ for believing that the individual would be tortured.”<sup>186</sup> At the Senate Hearing, Legal Adviser Abraham Sofaer merely testified that the “basic obligations” under the Convention included “to decline to expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture,” and his written testimony stated that the provisions of Article 3 would be implemented by “competent authorities” within the Justice and State Departments, as appropriate.<sup>187</sup> Deputy Assistant Attorney General Mark Richard also testified that “Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. Under our existing law, the competent authorities for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation.”<sup>188</sup>

Nothing in these descriptions suggests a territorial limitation on Article 3. The statement that the Secretary of State and Attorney General are the competent authorities in *extradition and deportation* cases is simply true. It does not preclude or address other types of returns, whether supervised by those same authorities, or by others. Indeed, the statement does not even address power over *exclusion* of persons who have not entered the United States, which was a distinct authority from deportation, was clearly encompassed by Article 3, and was also under the oversight of the Attorney General. The description of the Attorney General and Secretary of State as the “competent” authorities over deportation and extradition thus clearly did not purport

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<sup>185</sup> *Id.*, at 16.

<sup>186</sup> *Id.*, at 6-7.

<sup>187</sup> *Senate Hearing, supra* note 43, at 5, 12.

<sup>188</sup> *Id.*, at 15 (Testimony of Deputy Ass’t Attorney Gen. for the Criminal Division, Mark Richard). The Reagan Administration had proposed adoption of a Declaration that the Secretary of State would be the competent authority in extradition cases and the Attorney General in deportation cases, but the Bush Administration rejected this as unnecessary. Senate Report, *supra* note 43, at 35-38 (Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pell, Dec. 10, 1989).

to encompass the entire universe of the obligations imposed by Article 3. Nor does the statement address or preclude other returns of individuals, including from outside U.S. territory, over which the Secretary of State and/or Attorney General also exercised authority. Indeed, at that time, the Attorney General was also responsible for the *extraterritorial* activities of the INS and the Border Patrol, and was not merely a domestic actor in migrant matters.

Deputy Assistant Attorney General for the Criminal Division, Mark Richard, testified orally that “this article will probably have the most day-to-day impact upon law enforcement activities in the United States. The United States does not, and, we trust, never would extradite or return a person to a country where it is known that he would be subjected to torture.” *Senate Hearing, supra* note 43, at 14-15. This statement is simply true, since most law enforcement returns and extraditions would occur from the territorial United States. The statement again does not address the third activity explicitly covered by Article 3 – expulsion. The remainder of Richard’s oral and written testimony regarding Article 3 focused on explaining and justifying the “more likely than not” standard.

The lack of discussion of the extraterritorial reach of Article 3 during the ratification process may mean that the Executive and Senate simply did not think of the question. It could mean that they did not believe that the Article applied extraterritorially, or that it did not apply beyond “any territory under its jurisdiction.” Or it could mean that they believed the Article did apply extraterritorially in some manner, but that they also thought that existing U.S. obligations already applied extraterritorially and that existing authorities, including the discretion exercised by the Attorney General not to return individuals to persecution, meant that the U.S. was in compliance with those obligations.

Indeed, as noted previously, during the period that the United States was participating in the negotiation of the Convention, the United States apparently interpreted its *nonrefoulement* obligations under the Refugee Convention as applying extraterritorially, and the prospect of extraterritorial application of Article 3 thus may not have been any cause for concern.<sup>189</sup> Moreover, because the preparatory work for the CAT’s ratification took place before the Government had formally reversed the view that the existing U.S. *nonrefoulement* obligations under the Refugee Protocol applied extraterritorially—the Senate gave its advice and consent in October 1990, and the relevant OLC opinions were overruled in December 1991—an analogous extraterritorial application of the CAT Article 3 *nonrefoulement* obligation may not have been cause for concern.

At a minimum, there certainly is no clear evidence from the ratification history that the United States assumed that Article 3 could *not* apply outside the sovereign territory. Indeed, in light of its shifting position regarding the extraterritorial application of Article 33 and the litigation exposure that the United States was beginning to confront, if the United States had wanted to make clear that the Article 3 *nonrefoulement* obligation did *not* apply abroad, one might have expected the United States to have at least made a specific statement on the record during the ratification proceedings to that effect, or to have adopted a declaration or understanding regarding geographic scope, as it did for Article 14. But no such statement was made, nor RUD offered, for Article 3.

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<sup>189</sup> See note 171, *supra*.

The ratification history, in short, also does not establish that the Executive or Senate interpreted Article 3 as applying only to the sovereign United States.

#### **D. Subsequent Positions of the United States**

The Clinton Administration's Initial Periodic Report to the CAT Committee included no mention of the territorial scope of Article 3. The United States' Second Periodic Report, in 2005, merely stated without explanation that "the United States remains committed to providing Article 3 protection to all aliens *in its territory* who require such protection, and recognizes that there are no categories of aliens who are excluded from protection under Article 3. *U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, 14, ¶ 38, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) (emphasis added).

In written and oral responses to the Committee regarding its Second Periodic Report filed in 2006, however, the United States asserted that Article 3 "does not apply as a matter of law to individuals located outside of U.S. territory," and claimed support from the Convention text, negotiating history, and U.S. record of ratification.

In the Committee's List of Issues, the United States was asked to address its implementation of Article 3, "including in respect of persons under the jurisdiction of the State party outside its territory." The United States responded as follows (bracketed notes in original):

[T]he United States, while recognizing that some members of the Committee may disagree, believes that Article 3 of the CAT does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Article 3 provides that "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of the United States.

On its face, the text of Article 3 speaks of actions taken with respect to persons already present in the territory of a State. Both in the cases of expulsion, the deportation of an individual, and extradition, the transfer of a person pursuant to an extradition treaty to another country for the purpose of prosecution, there is no question that such terms describe conduct taken against individuals within a State Party's territory. Accordingly, if there is any debate at all as to whether Article 3 applies outside the territory of a State Party, it turns on whether the term "return ('refouler')" prohibits the return of persons by a State Party in those circumstances covered by Article 3, regardless of where the officials and the individual benefiting from the protection are located.

In the view of the United States, the meaning of the term "return ('refouler')" contained in Article 3 of the CAT is limited to actions occurring *within the*

*territory of a State Party*. Construing the same term, “return (‘refouler’),” as employed in Article 33 of the Refugee Convention, the U.S. Supreme Court found that both the text and the negotiating history of Article 33 “affirmatively indicate that it was not intended to have extraterritorial effect[.]” in *Sale vs. Haitian Centers Council, Inc.*, 509 U.S. 155, 179 (1993). In examining the text of Article 33, the Supreme Court found two aspects of Article 33’s text persuasive. The first aspect concerns Article 33(2) of the Refugee Convention, which exempted from Article 33(1)’s non-refoulement protection “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is.” As Article 3 of the CAT contains no such limitation, the Supreme Court’s discussion of this provision is not relevant to the question at hand.<sup>[190]</sup> However, the second aspect of the Supreme Court’s interpretation of the use of the term “return (‘refouler’)” in Article 33 of the Refugee Convention and Protocol is relevant to the interpretation of that same term in Article 3 of the CAT. Specifically, the Court found that the legal meaning of the term “return,” as modified by reference to the French “refouler” (the English translations of which included “repulse,” “repel,” “drive back,” and “expel”), implied that “‘return’ means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination.” *Id.* at 182. The Supreme Court thereby concluded that the non-refoulement protection contained in the Refugee Convention and Protocol was not intended to govern the conduct of States Parties outside of their national borders and noted that “[f]rom the time of the Convention, commentators have consistently agreed with this view.” *Id.* The Court further examined the negotiating history of Article 33 of the Refugee Convention and concluded that the negotiating history supports the Court’s interpretation of Article 33 not to impose obligations on States Parties outside of their territory.<sup>[191]</sup>

The negotiating history of Article 3 of the CAT confirms the view that the provision was intended to apply to the territory of a State Party, and not to persons who had not yet entered the country. The original Swedish proposal spoke only of expulsion or extradition, and did not employ the term “return (‘refouler’).” However, when the draft was revised to expand the prohibition to include “return (‘refouler’),” considerable discussion ensued over the advisability of including the

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<sup>190</sup> The Supreme Court made it clear that Article 33(1) was limited to persons within the territory of a State Party, otherwise the interplay between Article 33(1) and 33(2) would have created an “absurd anomaly” whereby “[d]angerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.” The Supreme Court concluded that it was “more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.” *Id.* at 180.

<sup>191</sup> This conclusion was based on a series of statements by delegates of several countries (including Switzerland, the Netherlands, and the U.K.) that indicated that the word “return (‘refouler’)” did not apply to persons who had not entered the territory of the State Party. Following a statement by the Swiss to this effect, the representative of the Netherlands noted that representatives of several countries supported that view and he “wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.” Noting that there was no objection, the President of the Conference ruled that the interpretation given by the representative of the Netherlands be placed on the record. 509 U.S. at 186 (1993).



term, including references to ambiguity surrounding the extra-territorial reach of the provision. At no point was there agreement that the term was intended to apply to individuals located outside the territory of a State Party. Additionally, both the text and the negotiating history of the CAT make clear that negotiators used explicit language applying certain provisions of the CAT extra-territorially when they intended those provisions to have extra-territorial effect.<sup>[192]</sup> The negotiators' failure to do so in Article 3 further confirms that there was no express intent to apply Article 3 extra-territorially.

Finally, the record of proceedings related to U.S. ratification of the CAT demonstrates that at the time of ratification, the United States did not interpret Article 3 to impose obligations with respect to individuals located outside of U.S. territory. When the Secretary of State transmitted the CAT to the Senate for its advice and consent to ratification, the State Department's analysis of Article 3 indicates that it understood that the non-refoulement obligations it was undertaking related to removal or extradition from the United States, and not to extraterritorial action by U.S. officials. In the immigration deportation (removal) context, the State Department indicated that the new protection afforded by Article 3 could be implemented by simply extending the protections then-available under U.S. law implementing the Refugee Protocol to "cases of torture not involving persecution on one of the listed impermissible grounds." See Message from the President of the United States Transmitting 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. Treaty Doc. 100-20, at 6. The State Department explained, "This prohibition applies to expulsion or return of persons in the United States to a particular State, and does not grant a right to seek entry or to avoid expulsion to other States." (Emphasis added.) *Id.* By emphasizing that Article 3 of the CAT does not grant a right to seek entry, the State Department thereby indicated its view that Article 3 did not apply to persons who had not yet entered U.S. territory. The State Department's analysis discussed the implementation of Article 3 solely in terms of the authorities of the Attorney General under the Immigration and Nationality Act and of the Secretary of State in cases of surrender pursuant to extradition treaties.<sup>[193]</sup> This analysis was subsequently adopted by the Senate in its report recommending that the Senate provide its advice and consent to ratification of the CAT. See S. Exec. Rep. No. 101-30 at 16-17.<sup>194</sup>

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<sup>192</sup> See, for example, Articles 2(1), 5, 12, 13, and 16.

<sup>193</sup> In fact, when the State Department transmitted the CAT to the Senate for its advice and consent to ratification in 1988, it originally proposed a declaration to this effect. The declaration provided, "The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases." The State Department later withdrew this proposal, but it nevertheless reflects the understanding that Article 3 only applied to cases in which persons who were physically present in the United States were subject to immigration deportation (removal) or extradition proceedings.

<sup>194</sup> *List of Issues*, *supra* note 154, at 32-36. For further statements of the U.S. position, see *U. S. Delegation Oral Responses to CAT Committee Questions*, May 5, 2006 (Statement of Legal Adviser John Bellinger) ("Despite [our]

## E. Analysis of Prior U.S. Position and Relevance of *Sale v. Haitian Centers Council*

The prior Administration thus based its interpretation of the CAT on a number of erroneous assertions:

1. “[E]xpulsion” and “extradition” do not only “describe conduct taken against individuals within” a State’s territory. The U.S. assertion that these terms are limited to a State’s territory is unsupported in the U.S. Response to the List of Issues. The United States provides no analysis or authority for it. The Response does not address the meaning of these terms in the context of the Convention Against Torture, despite the fact that the text of the CAT repeatedly applies the concept of “extradition” to “any territory in its jurisdiction”—a concept that is clearly broader than a State’s sovereign territory.<sup>195</sup> Nor does the Response attempt to establish that “expel” or “expulsion” is understood as territorially constrained as a general matter of international law. At a minimum then, “extradite” for purposes of Article 3 must apply not only in the sovereign territory of a State Party, but in “any territory under its jurisdiction.”

The language of the CAT in this regard is in stark contrast to Article 33 of the Refugee Convention. Articles 32 and 33 of the 1951 Refugee Convention both use the term “expulsion” in explicit reference to an alien “in its territory,” or in “the country,” and it is therefore possible that the term “expel” might contemplate presence within a State’s territory in the context of that particular Convention.<sup>196</sup> Indeed, the Supreme Court in *Sale* relied heavily on these explicit

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firm policy, as a legal matter, the view of the United States is that Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 applies to persons outside of U.S. territory.”); *United States’ Oral Response to the Questions Asked by the Committee Against Torture*, May 8, 2006 (Statement of Legal Adviser John Bellinger) (“We agree that Article 3’s *non-refoulement* provision is an essential safeguard to prevent torture. However, as a legal matter, we note that the affirmative obligation in Article 2 is limited to ‘any territory under [a State Party’s] jurisdiction.’ As we noted previously, Article 3 of the Convention in our view does not apply as a matter of law to individuals located outside of U.S. territory. This view is supported by the text of the Convention, its negotiating history, and the U.S. record of ratification.”); *Comm. Against Torture, Comments by the Government of the United States of America to the Conclusion and Recommendation of the Committee Against Torture*, ¶ 20(5), U.N. Doc. CAT/C/USA/CO/2/Add.1 (Nov. 6, 2007) (“Although the United States and the Committee hold differing views on the applicability of the non-refoulement obligation in Article 3 of the Convention outside the territory of a State Party, . . . with respect to persons outside the territory of the United States as a matter of policy, the United States government does not transfer persons to countries where it determines that it is more likely than not that they will be tortured.”).

<sup>195</sup> Article 33 of the Refugee Convention does not explicitly address extradition, a notable difference with Article 3. Under the Convention Against Torture, the Article 5(2) obligation to prosecute or extradite applies “where the alleged offender is present in any territory under [a State Party’s] jurisdiction.” *See also* Article 6 (obligation of a State Party “in whose territory a person alleged to have committed [torture] is present” to take him into custody for prosecution or extradition); Article 7 (obligation of a State Party “in the territory under whose jurisdiction a person alleged to have committed [torture] is found” to prosecute if it does not extradite); Article 8(4) (for extradition purposes “. . . offenses shall be treated as if they had been committed . . . in the territories of the States required to establish their jurisdiction” under Article 5(1)).

<sup>196</sup> Article 32(1) of the 1951 Refugee Convention, entitled “Expulsion,” provides that “The Contracting States shall not *expel* a refugee *lawfully in their territory* save on grounds of national security or public order.” Convention Relating to the Status of Refugees, art. 32(1), July 28, 1951, 189 U.N.T.S. 150 (emphasis added) [hereinafter Refugee Convention]. The remainder of Article 32 refers to the expulsion of “*such a refugee*” (i.e., a refugee “lawfully in their territory”). Article 33(1), which immediately follows, provides that no State may “expel or return

textual references in Articles 32 and 33(2) to conclude that the Article 33(1) *nonrefoulement* obligation did not apply abroad.<sup>197</sup> Notably, Article 3 of the CAT, however, does *not* include any such textual limitation. Furthermore, international courts have recognized that “expulsion” means “to drive away from a place” and does not have “a strictly territorial scope,” but applies, *inter alia*, to the interdiction actions of a State on the high seas.<sup>198</sup> Notably, in construing Article 4 of Protocol No. 4 to the European Convention on Human Rights, the European court found the absence of any reference to territory in the relevant article addressing expulsion to be significant.<sup>199</sup> Nothing in the text of CAT Article 3, the ordinary meaning of “expulsion,” or that term’s use in other international legal instruments, therefore, suggests that “expel” is meant to be territorially restricted in the context of the CAT. Indeed, *the absence of the type of territorially restrictive language that appears in the Refugee Convention supports Article 3’s universal scope.*

2. “Return (‘refouler’)” is not limited to actions occurring within the territory of a State Party. The United States’ assertion that these terms are territorially limited erroneously relies on the Supreme Court’s interpretation of the term “return (‘refouler’)” in Article 33 of the Refugee Convention. As the U.S. Response to the List of Issues notes,<sup>200</sup> the Supreme Court’s interpretation in *Sale* turned, in substantial part, on the presence of specifically territorial language in the Refugee Convention, as discussed above, that does not appear in Article 3 of the CAT. The U.S. Response acknowledges that this aspect of the *Sale* analysis is not relevant.<sup>201</sup> It does not, however, address or acknowledge the extraterritorial implications of the absence of such language for the CAT.

Nonetheless, the U.S. Response further contends that the Court concluded that term

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(‘refouler’) a refugee,” but Article 33(2) provides that “[t]he benefit” of Article 33 may not be claimed by a refugee “who is a danger to the security of the country *in which he is*, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community *of that country*.” *Id.* art. 33 (Emphasis added).

<sup>197</sup> *Sale* relied importantly on the interplay between the text of Articles 33(1) and (2). In light of the geographically restrictive text in Article 33(2), the Court reasoned that Article 33(1) “obligated the signatory state *only* with respect to aliens *within its territory*.” 509 U.S. 155, 180 (1993) (emphasis added). The Court also noted that, in light of 33(2), reading 33(1) to apply extraterritorially “would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.” *Id.* Article 3 of the CAT, on the other hand, has no analogue to Article 33(2), and extraterritorial application of CAT Article 3 would not frustrate the purpose of other Articles or create any “absurd anomaly.” To the contrary, extraterritorial application of Article 3 is entirely consistent with the comprehensive criminalization of torture under Article 4 (including complicity and participation) as well as with the Convention’s overall universal scheme to eradicate torture. It is imposing a novel territorial restriction solely on Article 3 that would create an “absurd anomaly” in the CAT.

<sup>198</sup> *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶¶ 174, 178 (2012) (Grand Chamber). The European Court of Human Rights concluded that Italy’s interdiction of Libyan migrants on the high seas constituted a “collective expulsion” under Article 4 of Protocol No. 4 to the European Convention on Human Rights. *Id.* at Conclusion ¶ 9. The court observed that although “expulsions are most often conducted from national territory,” the concept also applies “where a State has, exceptionally, exercised its jurisdiction outside its national territory,” as Italy had done in using its ships to interdict. *Id.* ¶ 178.

<sup>199</sup> The court further observed that “the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extra-territorial application,” noting that the prohibition on collective expulsions in the Article “contains no reference to the notion of ‘territory,’” while Article 3 of the Protocol “specifically refers to the territorial scope of the prohibition on the expulsion of nationals . . . . In the Court’s view, that wording cannot be ignored.” *Id.* ¶ 173.

<sup>200</sup> *List of Issues*, *supra* note 154.

<sup>201</sup> *Id.* at 33.

“return (‘refouler’)” means “a defensive act of resistance or exclusion at a border” rather than its more ordinary (and broader) understandings.<sup>202</sup> This restrictive interpretation of “return (‘refouler’)” has not been widely accepted by the international community.<sup>203</sup>

Whatever the merits of the Supreme Court’s interpretation of “return” in the context of Article 33 of the Refugee Convention, moreover, it is a reading that the Supreme Court necessarily made in light of the text, context, and object and purpose and negotiating history of that Convention.

Indeed, the different purpose of the Refugee Convention significantly impacted the *Sale* Court’s understanding of the term “return (‘refouler’).” That reading was heavily informed by the Court’s view that the Refugee Convention and its domestic implementing legislation focused principally on regulating the obligations of a State toward immigrants qualifying as refugees who were present in its territory.<sup>204</sup> The Convention predominantly addresses the treatment of refugees on issues of juridical status, gainful employment, and welfare within the national territory, and regulates domestic policy in that regard. *Sale* therefore interpreted Article 33 of the Refugee Convention against the background of U.S. domestic immigration law, and read “expel or return (‘refouler’)” in Article 33 to have the same meaning as “deport or return” in § 243(h)(1) of the Immigration and Naturalization Act (“INA”).<sup>205</sup> The Court concluded that “return” in the domestic immigration context meant “the exclusion of aliens who are merely on the threshold of initial entry,” and then reasoned backwards to conclude that the same meaning must be given to the word “return” in Article 33.<sup>206</sup>

The Convention Against Torture, on the other hand, is not primarily an instrument regulating a State’s domestic treatment of immigrants; its purpose is focused broadly on

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<sup>202</sup> *Id.*

<sup>203</sup> Courts and authoritative commentators have objected to the Supreme Court’s reading of the term in *Sale*. See, e.g., *Hirsi Jamaa*, App. No. 27765/09, at 69 (concurring opinion of Judge Pinto de Albuquerque) (observing that the “French term of *refoulement* includes the removal, transfer, rejection or refusal of admission of a person,” and that “[t]he deliberate insertion of the French word in the English version has no other possible meaning than to stress the linguistic equivalence between the verb return and the verb *refouler*”) (citing ALLAND & TEITGEN-COLLY, TRAITÉ DU DROIT D’ASILE 229 (Paris, 2002) (“L’expression française de ‘refoulement’ vise à la fois l’éloignement du territoire et la non-admission à l’entrée”). In *Sale*, the Supreme Court purported to rely on the opinion of the U.N. High Commissioner for Refugees that Article 33 did not apply extraterritorially. 509 U.S. at 183, n.40. However, UNHCR has since made clear that Article 33 does have extraterritorial reach. U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, ¶ 27, available at <http://www.unhcr.org/refworld/docid/45f17a1a4.html> (stating that “[t]he ordinary meaning of return includes to send back or to bring, send, or put back to a former or proper place.” The English translations of *refouler* include words like ‘repulse’, ‘repel’, ‘drive back’ . . . . The ordinary meaning of the terms return and *refouler* does not support an interpretation which would restrict its scope to conduct within the territory of the State concerned.”) (citations omitted). Cf. *J.H.A. v. Spain*, U.N. Doc. CAT/C/41/D/323/2007 (Comm. Against Torture, Nov. 21 2008) (finding petition inadmissible but concluding that rescued passengers were within the jurisdiction of Spain, which was under a duty to respect the *refoulement* prohibition of Article 3). Although *Regina v. Immigration Officer at Prague Airport*, [2004] H.L. 55, has been characterized as following *Sale*, the Law Lords resolved that case on other grounds.

<sup>204</sup> *Sale*, 509 U.S. at 174-75.

<sup>205</sup> *Id.* at 155-56.

<sup>206</sup> *Id.* at 180-81.

eradicating torture in all forms, *wherever it may occur*. A geographically unconstrained reading of CAT Article 3 supports that comprehensive purpose.<sup>207</sup> Furthermore, the *Sale* Court itself recognized that the concept of *nonrefoulement* may have evolved to later embrace extraterritorial action, but that “in 1951 *non-refoulement* had a narrower meaning, and did not encompass extraterritorial obligations.”<sup>208</sup> The Convention Against Torture, on the other hand, opened for signature in 1984, and its terms must be understood in light of contemporary understandings of *nonrefoulement*. Thus, the Supreme Court’s interpretation of “return” in the context of the 1951 Refugee Convention does not establish that “return” in Article 3 of the CAT is geographically constrained.

3. *The negotiating history of Article 3 of the CAT does not establish that the provision was intended to apply only in the sovereign territory of a State party.* The United States’ claim regarding the negotiating history is not supported by the *travaux* of Article 3 of the CAT, which is quite sparse. The U.S. Response contains no citations to the negotiating history. That history, as discussed above, makes clear that the Working Group added “return” for “strong humanitarian considerations” and to “broaden” the Article’s protection—a fact omitted from the U.S. Response. There is no suggestion, moreover, that the drafters of the CAT believed that “return” was restricted to “resistance or exclusion at a border.” No member of the Working Group proposed such a territorially restrictive reading. The *travaux* discussion—which is essentially limited to a single paragraph—instead briefly references a proposal that the Working Group try to ensure that the obligation not to “return” would not require a State to “accept” a mass influx, by allowing states to enter reservations in this regard. This discussion reflects concerns regarding being legally obligated to allow mass *entry*, not regarding extraterritorial application of the prohibition on non-return. To the extent that it reflects some conception of extraterritoriality, however, this discussion suggests that the drafters understood that “return” *would* apply to individuals *outside* a State’s borders. Nevertheless, they ultimately rejected proposals to delete or qualify State obligations relating to “return (‘refouler’)” and added the term to Article 3. *See* discussion accompanying notes 179-181, *supra*.

The contrast with the negotiating history of Article 33 of the Refugee Convention discussed in *Sale* is striking. The *Sale* Court cited statements made by the Swiss delegation in 1951 that the “wording left room for various interpretations, particularly as to the meaning to be attached to the words ‘expel’ and ‘return,’ but that it “could not, however, be applied to a refugee who had not yet entered the territory of a country.” *Sale*, 509 U.S. at 184. The delegation had stated further that Article 33 “applied solely to refugees who had already entered a country, but were not yet resident there.” *Id.* at 184-85. The Swiss delegate then conditioned Switzerland’s acceptance of the article on the Conference’s acceptance of that interpretation, and the Supreme Court found that “[n]o one expressed disagreement with the position of the Swiss delegate.” *Id.* at 185. This *travaux* discussion not only explicitly articulates a territorial limitation, but is also entirely consistent with the wording of Article 33(2) and Article 32(1), both of which provide that the relevant individual be *inside* the State’s territory. The *Sale* Court

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<sup>207</sup> This broad purpose is supported by the Congressional policy statement in the FARR Act, which implemented the CAT prohibition by establishing a policy against return to torture of any person, wherever located. Congress thus understood the CAT as reflecting a broad intent to universally enforce the prohibition on torture. *See supra* notes 5, 171. Congress has not adopted a similar provision for Article 33 of the Refugee Convention.

<sup>208</sup> *Sale*, 509 U.S. at 182-83, n.40 (citing G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74-76 (1983)).

also invoked statements from the Netherlands delegate that according to the Swiss interpretation, Article 33 “would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations,” and that “he wished to have it placed on the record that the Conference was in agreement” with this interpretation. *Id.* at 185-86. The *Sale* Court found that these combined Swiss and Dutch statements showed a “general consensus” that the Convention’s *nonrefoulement* obligation would apply only to aliens physically present in the host country. *Id.* at 186-87.

The negotiating history of CAT Article 3 includes nothing with the territorial specificity of the Swiss statements in *Sale*. Nor was a request made for consensus or for a statement to be put on the record. The U.S. Response to the List of Issues does not contend that the drafters of the CAT were aware of any specific statements made in the *travaux* of the Refugee Convention, or that they agreed with any particular interpretation of that negotiating history, which occurred nearly 30 years earlier.<sup>209</sup> Finally, the drafters of the CAT obviously were not privy to the Supreme Court’s interpretation of Article 33, which came over a decade later. (Nor, for that matter, was the ratifying U.S. Senate, since *Sale* was decided over a year and half after the Senate gave its advice and consent.)

4. *The text and the negotiating history of the Convention establish that clauses that do not contain language addressing geographic scope are not geographically limited to a State’s sovereign territory.* The United States’ Response erroneously assumes that the Convention only applies presumptively within the national territory, and that the negotiators used explicit language when they intended to give provisions extraterritorial effect. The U.S. thus apparently reads “any territory under its jurisdiction” as expanding, rather than constraining, State obligations under the CAT. This claim inverts the actual purpose, text, structure, and negotiating history of the CAT, which sought to establish a regime of universal enforcement and employed “any territory under its jurisdiction” to geographically *limit* State obligations under particular clauses. Articles in the CAT that do not include such language apply comprehensively, as the United States’ RUD adding “in any territory under its jurisdiction” to territorially limit the scope of Article 14 makes clear. The absence of territorially restrictive language in Article 3 thus confirms its extraterritorial reach.

5. *The U.S. ratification does not demonstrate that the United States understood Article 3 as not imposing obligations outside of sovereign U.S. territory.* The U.S. Response to the List of Issues significantly overstates the discussion in the ratification history regarding geographic scope. As discussed *supra*, few, if any, clear references were made regarding the scope of Article 3 obligation during the ratification proceedings, which occurred in a period in which the U.S. had understood its Article 33 obligations under the Refugee Convention as applying abroad. *See supra* note 182. The Executive and Senate did discuss the relationship between CAT Article 3 and existing powers to deport or extradite, but these discussions did not contend that Article 3 “only” addressed those functions—a term that the U.S. Response adds—or that those functions were clearly limited to the sovereign United States. Acknowledging that the Secretary of State and Attorney General were the “competent authorities” regarding extradition and deportation does not address responsibility for expulsion and does not mean that the Article could not have extraterritorial effect. Those officials were also “competent authorities” over the Haitian

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<sup>209</sup> *See supra* note 178.

interdiction program and other extraterritorial activities of the border patrol and INS. Moreover, nothing in the proposed-but-abandoned declaration quoted in note [193] of the U.S. Response states that “competent authorities” refers “only” to deportation or extradition cases. Finally, as Congress’ adoption of the criminal implementing legislation makes clear, *see* 18 U.S.C. §§ 2340-2340A (2006), discussion of events “in the United States” during the ratification of the CAT generally meant “in any territory under its jurisdiction,” including, *inter alia*, SMTJ and special aircraft jurisdiction. *Thus, even under the most restrictive territorial reading that is reasonably available, Article 3 of the CAT would apply, inter alia, in those jurisdictional areas, including on Guantánamo, on U.S.-registered ships and aircraft, and any other places “under [U.S.] jurisdiction.”*

Ultimately, CAT Article 3 differs from Article 33 of the Refugee Convention in *Salé* in at least six material ways, all of which support its extraterritorial application:

(1) The purpose of CAT is to eradicate torture everywhere in the world through a comprehensive regime of criminalization, and its provisions thus apply comprehensively unless geographically limited. The Refugee Convention was focused primarily on State treatment of refugees within their borders and thus is intrinsically geographically defined.

(2) Article 3 was negotiated roughly 30 years after the Refugee Convention, to advance the CAT’s broad purpose, and in the context of a more expansive modern understanding of *nonrefoulement*.

(3) Article 33 of the Refugee Convention is subject to a number of exceptions,<sup>210</sup> while the Article 3 prohibition is absolute.

(4) Articles 32 and 33(2) of the Refugee Convention contain explicit territorially restrictive language, while Article 3 contains no such restrictions. An extraterritorial reading of the Article 3 prohibition on return to torture is entirely compatible with other Convention text, which also applies extraterritorially for acts of torture.

(5) Article 3 adds extradition to the *nonrefoulement* prohibition, which by the terms of the CAT is applicable “in any territory under [a State’s] jurisdiction.”

(6) The negotiating history of Article 3 does not reflect the concerns about extraterritorial application that were articulated for the Refugee Convention, nor does it reflect an understanding that the article was geographically constrained. Instead, it was adopted to reflect the CAT’s broad humanitarian purpose and “to afford the greatest possible protection against torture.”

For all of these reasons, and the analysis of CAT Article 3 in Section A of this Part, the United States’ reliance on *Salé* to establish the non-extraterritorial application of Article 3 is misplaced.

In every instance where the United States has set forth its position that Article 3 of the CAT does not apply extraterritorially, the United States has immediately accompanied this assertion with a detailed claim that the United States nevertheless fully complies in all instances,

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<sup>210</sup> In addition to the qualifications in Article 33(2), the Refugee Convention extends protection only to those facing persecution on account of race, religion, nationality, membership of a particular social group or political opinion, and creates an exception for those that pose a security threat to the host country. Refugee Convention, *supra* note 164, art. 33(1)-(2). CAT Article 3, on the other hand, applies to all persons and provides for no exceptions.

as a matter of policy, with the principle of *nonrefoulement*. In the List of Issues, for example, the U.S. stated as follows:

Although as a legal matter Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States, as a matter of policy, the United States does not transfer persons to countries where it believes it is “more likely than not” that they will be tortured. This policy applies to all components of the U.S. Government and with respect to individuals in U.S. custody or control regardless of where they may be detained. In the case of interdictions of migrants at sea, as a matter of policy, in addition to screening individuals for fears of persecution, the United States screens individuals to assess whether it is “more likely than not” that they face torture. This policy finds support, in part, from language contained in section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 . . . . [W]ith respect to individuals detained by the U.S. Armed Forces at the U.S. Naval Base in Guantánamo Bay, Cuba, after determinations are made that a detainee . . . is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. It is always of a particular concern to the United States in such cases that the foreign government concerned will continue to treat the detainee humanely, in a manner consistent with its international obligations. U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured, or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds.<sup>211</sup>

Our repeated insistence that, on the one hand, the United States has no legal obligation not to return people to torture from beyond our borders, and on the other hand, our firm policy makes the absence of a legal obligation irrelevant, is increasingly untenable as a legal matter, and does not serve U.S. interests. The denial of the legal obligation invites suspicion and distrust from our audiences, domestic and foreign. It also invites emulation from States less scrupulous about compliance, and thus risks undermining the effectiveness of the global regime of protection the CAT sought to establish. *Indeed, the claimed policy commitment simply papers over the reality that the policy is substituting for what is, in fact, a legal obligation.* In the absence of the claimed policy, it would be entirely untenable, legally and politically, for the United States to claim that it is legally entitled to return someone to torture.

We cannot have it both ways. If we are, in fact, truly conducting ourselves in a manner consistent with the globally recognized prohibition on *refoulement* to torture, then we should accept the legal obligation, confirm that our practice is consistent with our legal commitments, and reclaim our leadership in the global effort to eliminate torture. If our practice is not, in fact, consistent with this fundamental legal obligation, then to claim otherwise is disingenuous.

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<sup>211</sup> List of Issues, *supra* note 200, at 36-37. See also statements in *supra* note 197.



#### **PART IV: APPLICATION OF THE CONVENTION AGAINST TORTURE IN SITUATIONS OF ARMED CONFLICT**

The CAT Committee has concluded that “the Convention applies at all times, *whether in peace, war or armed conflict*, in any territory under its jurisdiction and that the application of the Convention’s provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its Articles 1 and 16.”<sup>212</sup> In its 2006 appearance before the Committee Against Torture, the prior administration took the position that the Convention Against Torture does not apply in situations of armed conflict, and that international humanitarian law is the *lex specialis* in this area. Based on an exhaustive review of the object and purpose, text, and context of the Convention, its negotiating history, the understanding of the Executive and Senate at the time of ratification, subsequent U.S. positions, and the views of other States Parties, *I conclude that it is clear that in fact, the Convention was intended to apply, and does apply, in situations of armed conflict.*

A core purpose of the Convention was to universalize a regime of criminal punishment for those who commit torture. In this regard the Convention built upon the regime that already existed under international humanitarian law, under which torture constitutes a grave breach of the Geneva Conventions, a violation of Common Article 3, and a violation of the customary international law of armed conflict, and must be criminally punished as such. Nothing in the design of the Convention suggests that the universalization of criminal punishment that the Convention sought was intended to apply exclusively outside of situations of armed conflict. To the contrary, Article 2 of the Convention explicitly states that neither war nor the orders of a superior can constitute an exception to the prohibition on torture, and that understanding is reflected in the negotiating history of the Convention.

This was also plainly the view of the U.S. Executive and Senate at the time of the CAT’s ratification, which saw the existing regime of international humanitarian law as an important predecessor to the CAT. The ratifying Executive and Senate clearly understood that the Convention applied in situations of armed conflict, reviewed its implications for the Uniform Code of Military Justice, and adopted implementing criminal legislation for extraterritorial acts of torture that applies to all persons, *inter alia*, to the U.S. armed forces. This conclusion is also consistent with international law rules regarding *lex specialis*, under which the Convention Against Torture, as the later-in-time and more specific treaty obligation, which is general in application, must be understood to be applicable in armed conflict. It also comports with the view of the overwhelming majority of our close allies with whom we cooperate militarily, who recognize that the CAT applies to their armed conflict operations. Finally, recognizing that the CAT applies in situations of armed conflict is consistent with current U.S. law and policy, which broadly prohibits acts of torture or CIDT by U.S. personnel everywhere, whether in or out of situations of armed conflict.

##### **A. Object and Purpose, Text and Context**

As discussed in Part I, the object and purpose of the Convention was to “make more

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<sup>212</sup> U.N. Doc. CAT/C/USA/CO/2, *supra* note 157, ¶ 14 (emphasis added); *see also* NOWAK & MCARTHUR, *supra* note 49, at 60, ¶ 81.

effective” the existing prohibitions on torture and CIDT. *See* Convention Against Torture preamble. Nothing in the text, context or object and purpose of the Convention suggests in any way that the treaty was not intended to apply to situations of armed conflict. To the contrary, the text makes clear that no such exemption was contemplated. Article 2(2) provides that “No exceptional circumstances whatsoever, *whether a state of war or a threat of war*, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, art. 2(2) (emphasis added). This language reaffirms the non-derogability of the prohibition against torture under international law, with specific reference to situations of armed conflict.

Article 2(3) further provides that “An order from a *superior officer* or a public authority may not be invoked as a justification of torture.” Convention Against Torture, art. 2(3) (emphasis added). Under international law usage, “superior” is a term used to encompass military superiors; it is not limited to civilian personnel. In the context of Article 2(3), “superior officer” may be primarily intended to reference military superiors, because the article distinguishes the orders of a “*superior officer*” from those of “a public authority,” which could also include a civilian supervisor. Indeed, the prohibition against invoking “superior orders” as a defense originates from Article 8 of the Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284 (“The fact that the Defendant acted pursuant to order of his Government or of a *superior* shall not free him from responsibility . . .”) (emphasis added), and is reflected in similar language in the statutes of the Yugoslavia and Rwanda international criminal tribunals<sup>213</sup> as well as the Rome Statute of the International Criminal Court, all of which address situations of armed conflict.<sup>214</sup>

Article 4 provides that “all” acts of torture must be criminalized under a State’s domestic law. Articles 5, 6, 7, 8 and 9 then create related obligations of States regarding “all” acts of torture under Article 4, i.e., to establish criminal jurisdiction, take perpetrators into custody, extradite or prosecute, and cooperate in sharing of evidence with other States. The language in these articles is comprehensive and allows for no exceptions for armed conflict.

Article 10 further obligates States to ensure that education and training materials include instruction on the prohibition against torture for “law enforcement personnel, civil or *military*, medical personnel, public officials and *other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or*

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<sup>213</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(3) and (4), May 25, 1993, 32 I.L.M. 1192, <http://untreaty.un.org/cod/avl/ha/icty/icty.html>. Statute of the International Criminal Tribunal for Rwanda, art. 6(4), Nov. 8, 1994, 33 I.L.M. 1598, <http://untreaty.un.org/cod/avl/ha/icttr/icttr.html>.

<sup>214</sup> Article 33 of the Rome Statute, regarding “Superior orders,” provides that “[t]he fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, *whether military or civilian*, shall not [generally] relieve that person of criminal responsibility . . .” Rome Statute of the International Criminal Court, art. 33, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The modern international criminal law concept of “superior responsibility” likewise encompasses the responsibility of military commanders. *See, e.g.*, Protocol Additional of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) to the Geneva Conventions, art. 86(2), June 8, 1977, 1125 U.N.T.S. 3 (“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his *superiors* from penal or disciplinary responsibility”) (emphasis added); *see also* Rome Statute, *supra* note 214, art. 28; Statute of the International Criminal Tribunal for Rwanda, *supra* note 213, art. 6(3); Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 213, art. 7(3); Statute of the Special Court for Sierra Leone, art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 145.

*imprisonment.*” CAT, art. 10 (emphasis added). The language used is again comprehensive, and specifically references both military personnel and other persons involved in the custody, care or interrogation of “*any*” detained individual.

Finally, the Convention contains two “savings clauses,” which provide that the Article 1 definition of torture” is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application,” CAT, art. 1(2), and that the Convention’s provisions “are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion,” CAT, art. 16(2). These clauses allow for the CAT to be reconciled in favor of other international instruments that may provide for broader protection against torture or CIDT, such as the Geneva Conventions.

## **B. Negotiating History**

The negotiating history of the Convention supports the view that the CAT was intended to apply in situations of armed conflict. The negotiating history indicates that the drafters considered the overlap between the CAT and the existing prohibitions under international humanitarian law (“IHL”). They recognized that the CAT would be applicable “in all circumstances,” and that the Convention regime would be “superimposed” on top of the existing human rights and IHL regimes.

No members of the Working Group objected to this characterization. The only concern expressed was that the Convention should not in any way dilute the existing IHL regime, and it appears that this concern was considered adequately addressed by the language of Article 2(2) (which provides that war is not a justification for torture) and the Article 1(2) and 16(2) savings clauses. After the close of most of the substantive negotiations, the United States’ representative briefly asserted that the Convention would not apply in armed conflict,<sup>215</sup> and two brief, ambiguous statements were later offered by other States (in one case, following adoption of the CAT by the General Assembly). These brief statements were generally unclear regarding the contemplated relationship between the CAT and situations of armed conflict. At most they addressed conflicts covered by the Geneva Conventions; they were in tension with the views that had been accepted during negotiation of the relevant provisions; they came after negotiations over the relevant text were completed, and no efforts were made to implement or reflect those views in the Convention. Under these circumstances, this weak and ambiguous aspect of the negotiating history cannot overcome the overwhelming case from the language, context and object and purpose of the treaty and other aspects of the negotiating history. Nor was any view that the CAT would not apply in armed conflict articulated by the United States to the ratifying Senate. The record instead was to the contrary.

The original Swedish draft of Article 2(2) of the Convention provided that no exceptional circumstances whatsoever may be invoked as a justification of torture or CIDT.<sup>216</sup> In the

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<sup>215</sup> United Nations, Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984).

<sup>216</sup> Original Swedish Draft, *supra* note 61, art. 2(2).

December 1978 Working Group discussions of Article 2(2), the Swiss government stated: “in preparing the future convention, every effort must be made to ensure that the provisions adopted do not weaken existing international law.”<sup>217</sup> The Swiss representative referenced “provisions prohibiting acts of torture and inhuman or degrading treatment contained in the International Covenant on Civil and Political Rights and, for periods of armed conflict, the four Geneva Conventions for the protection of war victims and their two Additional Protocols of 1977,” and observed that collectively, “[i]n humanitarian terms, these rules represent minimum guarantees that should be protected.”<sup>218</sup>

The Swiss representative then explained that the CAT would be complementary of, and “superimposed” on top of, the existing prohibitions in international human rights and humanitarian law. The Swiss delegate stated that

[Article 2(2)] provides that *the convention is applicable in all circumstances, whether in time of peace or during a period of armed conflict . . . .* [T]his rule is consistent with existing international law, which prohibits acts of torture and inhuman treatment at all times. *In view of its very general material scope, the future convention will be superimposed on two complementary but distinct legal systems—human rights regulations and the law of armed conflicts—the characteristics of which vary according to the specific situation in which they are applied. The draft conventions against torture are more closely related to human rights regulations—particularly with regard to the machinery for monitoring the application of the instruments—than to international humanitarian law applicable in armed conflicts. Care should therefore be taken to ensure that the future convention does not restrict the application of the latter in any way.*<sup>219</sup>

This statement clearly recognizes, *first*, that the CAT would apply “*in all circumstances*,” including situations of armed conflict; and *second*, that the Convention would be “*superimposed*” on top of the existing “legal system” of “the law of armed conflicts.” The Swiss delegate thus noted, correctly, that the broad and general language of the draft Convention made no exception for situations of armed conflict, and that the Convention thus would apply in such circumstances, as well as to peacetime conduct. *Third*, the delegate urged that the drafters of the CAT should therefore be careful to make sure that the Convention did not “*restrict*” (or narrow, or undermine) international humanitarian law. Such a consideration might arise, for example, to the extent that the Geneva Convention regime prohibits a broader range of mistreatment (such as torture committed by private actors in the course of an armed conflict, or “humiliating” treatment under Common Article 3). Under the Swiss representative’s approach, the CAT would be understood to apply to complement the Geneva regime in armed conflict, but would not “restrict” such broader obligations. No member of the delegations objected or disagreed with either statement.

In order to make particularly clear that the operation of existing IHL rules should not be adversely impacted, Switzerland proposed a “safeguard clause,” which, “combined with [Article

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<sup>217</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 21(a).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* ¶ 55 (emphasis added).

2(2)], could constitute a separate article concerning the material scope of this instrument.” The proposed article would have provided as follows:

1. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.
2. The foregoing is without prejudice to the provisions of the Geneva Conventions of 12 August 1949 for the protection of war victims, as well as the Additional Protocol relating to the Protection of Victims of International Armed Conflicts, of 10 June 1977, and the Additional Protocol relating to the Protection of Victim of Non-International Armed Conflicts, of 10 June 1977.<sup>220</sup>

Consistent with the Swiss position, the second paragraph of this proposal would have made explicit that the CAT, while applicable in armed conflict, would operate in that context “without prejudice” to the international humanitarian law treaty regime. The proposal was not adopted, however, possibly because the negotiators felt that this issue was already adequately addressed in the savings clauses to Articles 1 and 16. The Swedish delegate also presented a proposed revision based on this discussion, but the proposal was not adopted nor discussed further.<sup>221</sup>

During the same December 1978 Working Group discussions of Article 2(2), the United States proposed an alternative to the Swedish formulation that stated: “1. No exceptional circumstances whatsoever, whether a state or threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.”<sup>222</sup> The United States’ proposal dropped the reference to CIDT from the original, but explicitly inserted “*a state or threat of war*” into the text, which previously had referenced only “exceptional circumstances.” The United States’ inclusion of an explicit reference to war seems, if anything, to reflect agreement with the Swiss interventions that the Convention would apply in situations of armed conflict, and a U.S. desire to make that application explicit. The Holy See<sup>223</sup> and France<sup>224</sup> offered other thoughts on the draft text, but not implicating its application in armed conflict.

The negotiating history of Article 2(3) also confirms that the prohibition on reliance on “superior orders” was understood to apply to military commands. The United States and other negotiators discussed the clause in terms of military operations, and specifically whether the clause should include the possibility of considering superior orders in mitigation,<sup>225</sup> as under the Nuremberg Charter. In 1979, the Working Group agreed to include such a provision, but the

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<sup>220</sup> *Id.* ¶ 56; BURGERS & DANIELIUS, *supra* note 61, at 47-8.

<sup>221</sup> See Revised Swedish Draft Convention, U.N. Doc. E/CN.4/WG.1/WP.1 (Feb. 19, 1979).

<sup>222</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 53. United Nations, Econ. & Soc. Council, Comm’n on Human Rights

<sup>223</sup> United Nations, Econ. & Soc. Council, Comm’n on Human Rights, *Summary Prepared by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights: Addendum*, ¶ 6, U.N. Doc. E/CN.4/1314/Add.3 (Feb. 27, 1979) (expressing support for Article 2(2) given “certain schools of thought that are prone to give national security priority over the right of the person”).

<sup>224</sup> U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 54 (proposing that “internal political instability” be removed because it “[did] not correspond to any clear legal concept and could be deleted”).

<sup>225</sup> *Id.* ¶ 53.

Working Group removed it two years later without a recorded explanation, perhaps because they understood that the clause did not preclude such consideration.<sup>226</sup>

In March 1984, at the very end of the negotiations, after discussion of most of the substantive terms of the treaty had closed, during a brief “Consideration of the Title and the Preamble,” the *travaux* notes that

[t]he representative of the United States, while sharing this consensus on the title, stated his understanding that the convention, as indicated by the title of the agenda item under which it was considered by the Commission on Human Rights and the history of its negotiation was never intended to apply to armed conflicts and thus *supersede* the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto. He stated his further understanding that incidents covered by the Geneva Conventions and Protocols thereto would not fall within the scope of the convention against torture and that to consider otherwise would result in an overlap of the different treaties which would undermine the objective of eradicating torture.<sup>227</sup>

The U.S. representative did not point to any text supporting the statement, nor did he introduce any proposed language to reflect it or operationalize it in any way. Nothing relevant to his point was being discussed, and the interjection was very brief; the entire discussion of the Convention preamble and title, including the U.S. statement, forms a single paragraph in the *travaux*. His reference to the negotiating history of the Convention contradicted the actual record, in which the Swiss representative asserted during the substantive discussions, without objection, that the Convention would “apply in all circumstances” including armed conflict and would be “superimposed” on top of both the international humanitarian law and human rights legal regimes. The statement was in tension with other U.S. actions during the negotiations, including the U.S. addition of an explicit reference to war in Article 2(2), and the discussion of superior orders in military terms. Moreover, it is very unclear what this statement was intended to communicate. The concern stated was simply that the CAT should not apply in a manner that would “supersede” the Geneva regime – a goal that could be accomplished simply by reconciling the conventions’ application. The suggestion that “overlap” between the different treaties would “undermine” the effort to eradicate torture overlooks the savings clauses in Articles 1(2) and 16(2), which were included to avoid any adverse conflicts, and to preserve any broader obligations imposed by IHL. The fact that other countries did not respond to the statement is not surprising given the very late point at which it was made, after the actual substantive discussions that pertained to Article 2(2) and 2(3) and the Convention’s scope more generally had closed, and in the context of comments on the title and the preamble. At a minimum, the record’s silence in response to the U.S. statement under these circumstances does not indicate concurrence.

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<sup>226</sup> See Rep. of the Comm’n Hum. Rts., 37th Sess., Feb. 2-Mar. 13, 1981, at 53, U.N. Doc. E/CN.4/1475 ESCOR, Supp. No. 5 (1981); see also BURGERS & DANIELIUS, *supra* note 61, at 73; NOWAK & MCARTHUR, *supra* note 49, at 124-25.

<sup>227</sup> U.N. Doc. E/CN.4/1984/72, *supra* note 215, ¶ 5.

In the October 1984 Report of the Secretary General, Norway noted that “[t]he draft convention has no provisions on its field of application,” and summarized the U.S. statement above. He then noted that even if the CAT might not apply in *international* armed conflicts, where the Geneva Conventions already established a regime of universal criminal jurisdiction, the CAT arguably would apply in *non-international* armed conflicts, where no such comprehensive criminal punishment system existed. The U.S. statement, he said,

seems relevant in relation to international armed conflicts as defined in common article 2 of the 1949 Geneva Convention and article 1, paragraph 4, of the First Additional Protocol. For these kinds of armed conflicts, the Geneva Conventions and the First Additional Protocol established a system of universal jurisdiction and of implementation that must be considered equal to the system of the convention against torture. As concerns internal armed conflicts, however, these are governed by the Second Additional Protocol of 1977, where no provisions of universal jurisdiction are to be found, and where the systems of implementation are far less developed. For these reasons, it could be argued that the convention against torture *should apply in all other cases* than in international armed conflicts, as defined by the 1949 Geneva Conventions and the First Additional Protocol thereto.<sup>228</sup>

There is no record of a reaction to this statement but, at a minimum, it demonstrates that even if mere “overlap” of treaty regimes might somehow be considered to undermine the international humanitarian law regime, the CAT would not “overlap” with any such regime in non-international armed conflicts, and thus there was no obstacle to its application in that context.

Finally, in the subsequent statements made by various delegations on December 10, 1984—after the General Assembly had adopted the completed convention—“[t]he Israeli delegation observed that it had joined the consensus on the understanding that the new Convention would not supersede the *1949 Geneva Conventions* as regards their applicability to armed conflicts.”<sup>229</sup>

These latter statements by Norway and Israel, while ambiguous, also do *not* establish that the CAT does not apply in armed conflicts. The Norwegian statement, which was simply interpreting the U.S. comment, raises a question about the CAT’s application in conflicts covered by the Geneva Conventions, but we do not know how other states reacted to this statement, or whether or not they concurred. Even the Israeli statement—which was made after the Convention’s adoption and thus is not part of the treaty’s negotiating history—only objects to the possibility that the CAT could “*supersede*” the 1949 Geneva Conventions. It in no way forecloses the possibility that the CAT could and should be applied in a manner that *complements* the Geneva Conventions. Equally importantly, neither Norway nor Israel claimed that the CAT would not apply in situations of non-international armed conflict.

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<sup>228</sup> See *Report of the Secretary-General*, ¶ 6, at 15, U.N. Doc. A/39/499 (Oct. 2, 1984) (referring to the United States statement) (emphasis added).

<sup>229</sup> BURGERS & DANIELIUS, *supra* note 61, at 106.

In sum, the negotiating history overall supports application of the CAT in situations of armed conflict. The Swiss statement explicitly acknowledging that the CAT would apply in wartime and would be “superimposed” on the IHL regime, and the proposal for a savings clause to mediate that relationship, reflects the view that the CAT did apply even in situations of international armed conflict governed by the Geneva Conventions. Those statements were offered when the Working Group was actively considering Article 2(2), and thus may be most likely to reflect the actual views of other negotiating states. U.S. actions during these negotiations were consistent with this position. The ambiguous U.S. suggestion to the contrary came very late, at the end of the negotiations, and only articulates a concern that the CAT not “supersede” the Geneva regime in a manner that would “undermine” the goal of eradicating torture. There is no indication regarding the motivation for the statement or the authority under which it was made. Nor is there any indication, through textual changes or comments by other states, that other states were in agreement. The subsequent Norwegian statement appears to contend that the CAT *would* apply, at a minimum, in non-international armed conflict. And the post-adoption Israeli statement also does not preclude operation of the CAT in a manner that complements the Geneva Convention regime and application of the CAT in non-international armed conflict.

### **C. U.S. Ratification History**

Despite the extensive RUD package that the Reagan Administration submitted with the CAT to the Senate, and the fact that the Bush Administration comprehensively reviewed that RUD package and offered detailed changes, neither administration made any suggestion that the CAT did not apply in armed conflict. To the contrary, the ratification history of the Convention indicates that the ratifying Reagan and Bush Administrations, and the Senate that gave its advice and consent, understood that the Convention addressed “all” acts of torture and CIDT, in peacetime as well as armed conflict.

The Reagan Administration’s Summary and Analysis of the Convention, which was included in the package transmitting the treaty to the Senate as well as in the Senate Report, opens with a lengthy discussion of the fact that the CAT built upon three existing international legal regimes—the prohibition on torture under the laws of war and under human rights law, and a regime of treaties establishing universal criminal jurisdiction for acts of terrorism:

Among the antecedents of the Convention are the laws of war. The 1907 Hague Convention on the Laws and Customs of War on Land provides that prisoners of war ‘must be humanely treated,’ and that inhabitants of occupied territories generally may not be forced ‘to furnish information about the army of the other belligerents, or about its means of defense’ or compelled ‘to swear ally glance [sic] to the hostile Power.’ (Annex, ‘Regulations Respecting the Laws and Customs of War on Land,’ Articles 4, 44, and 45.) The Third and Fourth Geneva Conventions of 1949, to which virtually all countries are parties, forbid ‘any form of torture or cruelty’ toward prisoners of war and prohibit the use of ‘physical or moral coercion \* \* \* . . . against protected persons, in particular to obtain information from them or from third parties’ as well as ‘taking any measure of such a character as to cause the physical suffering, or extermination of protected



persons \* \* \* (Third Convention, Article 87; Fourth Convention, Articles 31 and 32.)

With the development of more general human rights instruments, the prohibition of torture and inhuman treatment or punishment has been established as a standard for the protection of all persons, in time of peace as well as war [citing Universal Declaration of Human Rights, Art. 5; ICCPR, Art. 7 and non-derogation under Art. 4; American Convention on Human Rights, Art. 5(2); European Convention on Human Rights, Art. 3; African Charter on Human and Peoples' Rights, Art. 5; the 1975 General Assembly Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] . . . .

The Convention is also modeled after four earlier multilateral conventions against terrorist acts, to each of which the United States is a party [citing conventions on aircraft hijacking, aircraft sabotage, protection of diplomats, and hostage taking].<sup>230</sup>

Nothing in the Reagan Administration package, or in the later exchanges between the Bush Administration and the Senate, suggested that the Executive or Senate believed that any of these pre-existing treaty regimes somehow constituted a carve-out or exemption from the Convention Against Torture.

Other aspects of the Reagan Administration's analysis confirm that the ratifying Executive understood that the treaty would apply to military operations, and that it had specifically considered its implications for the military in determining whether and how the United States should ratify the Convention. For example, President Reagan's Summary and Analysis discussed Article 2(2) as follows:

Article 2 provides that no exceptional circumstances, such as war or public emergency, may be invoked as a justification for torture. The use of torture in wartime is already prohibited within the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law. The exclusion of public emergency as an excuse for torture is necessary if the Convention is to have a significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.<sup>231</sup>

This passage makes clear that the Executive understood Article 2(2) as treating war and public emergency equivalently. Neither war nor public emergency could be considered "an excuse" for non-compliance with the Convention. The Convention would apply to both, and Article 2(2)'s admonition was consistent with the fact that the Geneva Conventions and customary international law already prohibited torture in wartime.

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<sup>230</sup> Message from the President, *supra* note 96, at 7-8; Senate Report, *supra* note 120, at 11-12.

<sup>231</sup> Message from the President, *supra*, at 11; Senate Report, *supra*, at 15.

The Reagan transmittal package also discussed the Article 2(3) provision regarding “superior orders” exclusively in terms of its implications for U.S. military justice, and concluded that the Article was consistent with current U.S. military law:

The United States had proposed that the Convention expressly provide that superior orders nonetheless may be considered as a factor in mitigation of punishment, corresponding to the approach taken by the Nuremberg Tribunal. While this proposal was ultimately not adopted, it appears not to have been rejected. Rather, the matter has been left to the judgment of each State Party, and the United States could thus take superior orders into account in imposing criminal punishment for torture.

Under current U.S. military law, obedience to superior orders is not a defense to charges under the Uniform Code of Military Justice, unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. Rule for Court Martial 916(d), *Manual for Courts Martial* (Rev. 1984) . . . . [N]o change in U.S. military law would be required by Article 2 of the Convention.<sup>232</sup>

Although the George H.W. Bush Administration submitted extensive comments and changes to aspects of the Reagan Administration’s transmittal package, it did not object to any of these representations, and in some cases elaborated further on them. Thus, in reaffirming an understanding that had been proposed by the Reagan Administration, which provided that the Article 1 definition of torture “is intended to apply ‘only to acts directed against persons in the offender’s custody or physical control,’” the Bush Administration explained that “[t]his understanding is designed to clarify the relationship of the Convention to normal *military* and law enforcement operations.”<sup>233</sup> In other words, the understanding was intended to make clear that the Article 1 definition of torture *would apply to individuals who were in the custody or control of U.S. military personnel*, but presumably not to persons who were injured through gunshots, the use of artillery, or other non-custodial military operations.

Like the Reagan Administration, the Bush Administration reaffirmed Article 2(2)’s mandate that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Senate Report, at 15. The Bush Administration advised the Senate that

We accept this provision, without reservation. As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.”<sup>234</sup>

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<sup>232</sup> Senate Report, *supra*, at 15-16.

<sup>233</sup> *Id.* at 9 (emphasis added).

<sup>234</sup> Letter from Janet G. Mullins, Assistant Sec’y, Legislative Affairs, Dep’t of State, to Senator Pressler (Apr. 4, 1990), in Senate Report, *supra*, app. B, at 40-41.

The Senate Report on the Convention included all the above statements. The Foreign Relations Committee itself also identified “War/Superior Orders” as one of the “Major Provisions” in the Convention, which it reported specified that “no exceptional circumstances, including war, internal political instability, other public emergencies, or orders from a superior officer or public authorities, may be invoked as a justification for torture.”<sup>235</sup>

In his oral and written testimony to the Senate, Legal Adviser Abraham Sofaer underscored the compatibility of the Convention with existing prohibitions under international law, including international humanitarian law. Thus, he testified,

International law already condemns torture. In that sense, the Convention breaks little new ground. For example, prohibitions against torture and other forms of ill treatment are contained in one form or another in the 1948 Universal Declaration of Human Rights (Article 5), the American Declaration of the Rights and Duties of Man (Articles 15 and 16), and the 1975 United Nations Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Moreover, the Geneva Conventions of 1949 make torture in wartime a grave breach of the Conventions and require its Parties to prosecute or extradite individuals responsible for torture. These declarations and conventions have been widely supported in the international community; for example, the Geneva Convention for the Amelioration of the condition of the wounded and sick on armed forces in the field of 1949 has been ratified by 167 states. The Convention Against Torture builds upon these international human rights instruments by adding an agreed international peacetime regime for cooperation among States in the prevention of torture and the punishment of those who engage in acts of torture.<sup>236</sup>

The written hearing record also included a lengthy paper by Cherif Bassiouni on the historical origins and contemporary challenges relating to torture that included extensive discussions of torture in situations of armed conflict and under the customary and treaty-based law of armed conflict.<sup>237</sup>

Finally, the Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340-2340A, also confirms that Congress understood that the CAT addressed U.S. activities in wartime as well

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<sup>235</sup> Senate Report, *supra*, at 7.

<sup>236</sup> *Senate Hearing, supra* note 43, at 7 (prepared statement of Abraham D. Sofaer). Sofaer’s reference to “build[ing] upon” international human rights instruments “by adding an agreed international peacetime regime” conceivably could be portrayed as suggesting that he viewed the CAT as applying only in peacetime. In context, however, the statement makes clear that international humanitarian law already makes torture a crime and requires States to prosecute or extradite. The CAT thus did, literally, “add” to the peacetime regime. Nothing in this statement, however, suggests that the CAT was intended to apply exclusively to that regime, particularly in light of the extensive statements to the contrary by the Reagan and Bush Administrations. Furthermore, in his oral testimony, Legal Adviser Sofaer made no such suggestion, but addressed international humanitarian law and human rights law coterminously, stating that “[i]nternational law already condemns torture . . . . This convention builds on those [existing international law] declarations and other agreements.” *Id.* at 4.

<sup>237</sup> See M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, in *Senate Hearing, supra* note 43, at 107-96.

as peace. That Act provides that “*Whoever* outside the United States commits or attempts to commit torture” shall be subject to criminal sanction, § 2340A(a) (emphasis added), and provides for jurisdiction over any U.S. national, or any non-national found present in the United States, § 2340A(b). The statute’s definition of “torture” includes the condition that the victim be in the offender’s “custody or physical control,” consistent with the Executive’s requirement for the exemption of ordinary military and law enforcement activities. *Id.* § 2340(1). Moreover, the statute applies to members of the U.S. armed forces, as the United States has expressly acknowledged.<sup>238</sup> The application instead is comprehensive. This is in contrast to some other criminal statutes, such as the Military Extraterritorial Jurisdiction Act, which exempts U.S. military personnel who are subject to the UCMJ from prosecution unless they committed the offense with at least one co-defendant who was not subject to the UCMJ. 18 U.S.C. § 3261(d).

*In short, the overwhelming evidence from the ratification history supports the view that both the ratifying Executive (in two administrations) and the Senate understood that the CAT would apply in situations of armed conflict and found its requirements compatible with the existing IHL regime.* Although the CAT was derived from three existing treaty regimes—treaties governing human rights, international humanitarian law, and counterterrorism, there was no suggestion in the ratification history (and no suggestion in the text of the CAT) that any of those prior treaty regimes would be considered to be exclusive of the CAT. Instead, an act of torture that was committed in the course of an airplane hijacking could be prosecuted under either the aircraft hijacking regime or the legislation implementing the Convention Against Torture. Likewise, an extraterritorial act of torture committed by a U.S. soldier in a situation of armed conflict could be prosecuted either as a grave breach of the laws of war or as a violation of the legislation implementing the Convention Against Torture.

#### **D. Subsequent U.S. Positions**

The Initial Report submitted by the Clinton Administration to the Committee Against Torture devoted little space to addressing armed conflict, other than to reaffirm the Bush Administration’s representation that the definition of torture under Article 1 was conditioned by the U.S. on an understanding that it would apply only to acts against a person “in the offender’s custody or physical control” “in order to clarify the relationship of the Convention to normal military and law enforcement operations.”<sup>239</sup> In the oral presentation, which I gave on behalf of the United States, the matter was not raised.

Neither the Second Periodic Report of the United States to the CAT Committee in 2005, nor the U.S. Response to the List of Issues submitted in 2006, appear to have addressed the question whether the United States acknowledged the application of the CAT to situations of armed conflict, despite providing detailed information regarding U.S. military detention activities in Iraq, Afghanistan, and Guantánamo. In the Second Periodic Report, filed in 2006,

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<sup>238</sup> See *Second Periodic Report of the United States to the Committee Against Torture (2005)*, annex I, Part II, n.22, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) (“A member, or former member, of the U.S. Armed Forces, who is either a national of the United States, or later present in the United States, who, while outside the United States, commits acts that meet the definition of torture under the relevant statute (18 U.S.C. § 2340) is subject to federal prosecution under 18 U.S.C. § 2340A, if not previously prosecuted for the same offense under the UCMJ.”).

<sup>239</sup> Initial Report of the United States, *supra* note 143, at 96.

the U.S. provided a detailed analysis of its detention practices in Iraq and Afghanistan, but it did not state explicitly whether Convention obligations applied to U.S. forces operating in those areas. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999, United States of America (May 6, 2005)*, ¶ 38, annex I, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006).

As far as we can determine, the United States' first public pronouncement to the CAT Committee rejecting application of the CAT in armed conflict came less than seven years ago, with Legal Adviser John Bellinger's opening oral presentation to the Committee on May 5, 2006. Bellinger stated:

[O]ur Second Periodic report and the written answers to your questions contain extensive information about U.S. detainee operations in Guantánamo Bay, Cuba, and in Afghanistan and Iraq. It is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.

As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict.

At the conclusion of the negotiation of the Convention, the United States made clear 'that the convention . . . was never intended to apply to armed conflicts. . . .' The United States emphasized that having the Convention apply to armed conflicts 'would result in an overlap of the different treaties which would undermine the objective of eradicating torture.' [U.N. Doc. E/CN.4/1984 (Mar. 9, 1984)]. No country objected to this understanding.

In any case, regardless of the legal analysis, torture is clearly and categorically prohibited under both human rights treaties and the law of armed conflict. The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict.<sup>240</sup>

This statement is notable in its reliance solely on two pieces of evidence: (1) the single, ambiguous, and unexplained U.S. statement in the record at the end of the CAT negotiations addressed above, which contradicted other aspects of the text and negotiating history and appears to have had no impact on that Convention, and (2) a generalized, and unsupported, assertion that the negotiators were "principally" focused on ordinary domestic process rather than on crafting rules that would govern armed conflict.

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<sup>240</sup> John B. Bellinger, III, Legal Adviser, U.S. Dep't of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture, Geneva, Switzerland, May 5, 2006 (quoting U.N. Doc. E/CN.4/1984, Mar. 9, 1984), <http://www.state.gov/j/drl/rls/68557.htm>.

On May 8, 2006, Legal Adviser Bellinger stated further as follows:

Even while we are engaged in an armed conflict, the Convention Against Torture continues to apply, in accordance with its terms. For example, the Convention obviously applies to the treatment of prisoners in domestic U.S. prisons that are not governed by the law of armed conflict. Our view is simply that U.S. detention operations in Guantánamo, Afghanistan, and Iraq are part of ongoing armed conflicts and, accordingly, are governed by the law of armed conflict, which is the *lex specialis* applicable to those particular operations.

...

Mr. Mariño also asked about the United States' statement about its understanding that the Convention 'was never intended to apply to armed conflicts,' which forms part of the *travaux préparatoires* of the Convention. The United States made this statement over twenty years ago, during the final session of the Working Group negotiations on the draft convention in February 1984<sup>[241]</sup> and confirmed that statement in its final observations contained in the Secretary-General's October 1984 report to the General Assembly on the draft convention.<sup>[242]</sup>

As I explained on Friday, the United States was concerned that application of the Convention to situations governed by the law of armed conflict, which also prohibits torture, 'would result in having an overlap of the different treaties which would undermine the objective of eradicating torture.'<sup>[243]</sup> It is important to note that we were not alone in expressing this concern. Indeed, the *travaux* contain similar statements by other countries, including Switzerland,<sup>[244]</sup> Norway,<sup>[245]</sup> and Israel.<sup>[246]</sup> We will provide the Committee with citations to all of these documents in writing.<sup>247</sup>

The citations in the United States' May 8, 2006 oral statement do not substantiate the U.S. assertion. The statement twice refers to the brief spring 1984 statement by the U.S. negotiator discussed above. The U.S. final observations in the Secretary General's October 1984 report that are invoked make no reference to the U.S. views regarding armed conflict, but simply generally affirm U.S. positions in the negotiation.<sup>248</sup> The reference to "similar" statements by

<sup>241</sup> See U.N. Doc. E/CN.4/1984/72, *supra* note 215, ¶. 5.

<sup>242</sup> See Report of the Secretary-General, U.N. Doc. A/39/499, *supra* note 228, at 20 (Oct. 2, 1984).

<sup>243</sup> See U.N. Doc. E/CN.4/1984/72, *supra* note 215, ¶ 5.

<sup>244</sup> See U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 55 (noting that "human rights regulations and the law of armed conflicts" are "two complementary but distinct legal systems" the characteristics of which vary according to the specific situation in which they are applied).

<sup>245</sup> See U.N. Doc. A/39/499, *supra* note 228, at 15 (referring to U.S. Statement).

<sup>246</sup> See BURGERS & DANIELIUS, *supra* note 61, at 106 (noting statement of the Israeli delegation after adoption of General Assembly resolution 39/46).

<sup>247</sup> *United States' Oral Response to the Questions Asked by the Committee Against Torture*, U.S. DEP'T STATE (May 8, 2006), <http://state.gov/j/drl/rls/68562.htm> (Legal Adviser John Bellinger) (citations in *supra* notes 241-46 in the original).

<sup>248</sup> See U.N. Doc. A/39/499, *supra* note 228, at 20. The U.S. remarks state:

the Swiss, which are portrayed as describing IHL and human rights as “distinct” legal systems, refers to the previously discussed statement in which the Swiss delegate noted that the CAT would apply “in all circumstances” and be “superimposed” on these two legal systems, and thus *affirmed* the Convention’s application in armed conflict.<sup>249</sup> The Norwegian and Israeli statements were more ambiguous than suggested, and at most reflected the view that the CAT should not displace the Geneva regime in international armed conflict. The Norwegian statement actually suggested that the CAT could apply in non-international armed conflicts, and the Israeli statement was offered after the Convention was adopted and was also ambiguous regarding the relationship between the CAT and armed conflict.

More importantly, neither of these United States statements acknowledged or analyzed the far more compelling evidence that the CAT *does* apply to armed conflicts, including (1) aspects of the Convention’s text that explicitly address war or military activities and provide savings clauses, and the absence of any contrary textual provisions; (2) aspects of the negotiating history, including U.S. contributions, that support that understanding, (3) the extensive evidence that the ratifying Executive and Senate understood the Convention to apply in armed conflict, and (4) the fact that the Convention’s implementing legislation applies to the U.S. armed forces. The U.S. position thus failed to grapple in any meaningful way with the core requirements for treaty interpretation, which require examining of all the considerations set forth in VCLT Article 31, including the object and purpose, context, and text of the treaty.

In this regard, the claimed concern that application of the CAT in armed conflict would result in an “overlap” of the treaty regimes and “undermine the objective of eradicating torture” is both unexplained and unfounded in light of the savings clauses in Articles 1(2) and 16(2) of the CAT, which would allow IHL treaties to prevail if they were more protective. The concern is particularly ironic given the fact that at the time this statement was made in May 2006, it was apparently the legal position of the United States that neither the Convention Against Torture, nor the ICCPR, nor Common Article III of the Geneva Conventions, nor any other treatment protection in the Geneva Conventions, nor the U.S. Constitution, applied to al Qaeda detainees in U.S. custody outside the United States. It is not clear, therefore, what assurance was meant to be conveyed by the United States’ assertion to the Committee that torture and CIDT were “clearly and categorically prohibited under both human rights treaties and the law of armed conflict.”

In its 2006 Conclusions and Recommendation, the Committee refuted the United States’ argument that the Convention does not apply to instances of armed conflict “on the basis of the

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During the course of these negotiations, United States representatives made a number of declarations and interpretive statements which are contained in the official records of the negotiations, a part of the legislative history of the convention. The United States Government, in expressing its support for the draft convention and for approval of it by the United Nations General Assembly, maintains all of the declarations and interpretive statements made on its behalf throughout the course of the negotiations.

*Id.* The U.S. then identifies “two elements of the draft convention which the United States Government considers to be essential if the convention is to serve as an effective instrument,” adequate provisions for universal jurisdiction, and adequate provisions for implementation (i.e., articles 19 and 20). *Id.* The U.S. makes no mention of armed conflict.

<sup>249</sup> See U.N. Doc. E/CN.4/1314, *supra* note 62, ¶ 55.

argument that the ‘law of armed conflict’ is the exclusive *lex specialis* applicable, and that the Convention’s application ‘would result in an overlap of the different treaties which would undermine the objective of eradicating torture,’” noting the savings clauses of Articles 1 and 16.<sup>250</sup> The Committee recommended that the United States “should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the Convention’s provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its Articles 1 and 16.”<sup>251</sup>

In its one-year Response to Specific Committee Recommendations, in addressing the Committee’s recommendation, also discussed in Part II, that the United States “should rescind any interrogation technique” that constitutes CIDT “in all places of detention under its de facto effective control,” in addition to rejecting the Committee’s view that “de facto effective control” was the appropriate test, the United States stated that

the United States is in an armed conflict with al-Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention, is the applicable legal framework governing these detentions.<sup>252</sup>

The newfound *lex specialis* position the United States articulated in 2006 appears to have been part and parcel of a series of legal positions that were developed between 2001 and 2006 to avoid legal constraint on U.S. counter-terrorism efforts against al Qaeda. These included legal opinions asserting an extremely restrictive interpretation of the definition of torture,<sup>253</sup> concluding that principles of necessity or self-defense could override U.S. CAT obligations<sup>254</sup> as well as the domestic extraterritorial Torture Act,<sup>255</sup> asserting that an order of the President could

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<sup>250</sup> U.N. Doc. CAT/C/USA/CO/2, *supra* note 157, ¶ 14.

<sup>251</sup> *Id.*

<sup>252</sup> United States Response to Specific Recommendations Identified by the Committee Against Torture (2007), *supra* note 158, at 7 (citations omitted); *see also id.* at 5 (accord).

<sup>253</sup> Memorandum from Jay Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 1, 6 (Aug. 1, 2002), <http://f1.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memo]; *see also* DEP’T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003) *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 289 (Karen J. Greenberg & Joshua L. Dratel, ed., 2005) [hereinafter Dep’t of Defense, Working Group Report].

<sup>254</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to William J. Haynes II, General Counsel of the Dep’t of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, at 58 (Mar. 14, 2003) [hereinafter Yoo Memo March 2003] (“Thus, if interrogation methods were inconsistent with the United States’ obligations under CAT, but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law. Although these actions might violate CAT, they would still be in service of the more fundamental principle of self-defense that cannot be extinguished by CAT or any other treaty.”).

<sup>255</sup> Bybee Memo, *supra* note 253, at 2 (“under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A”).



override U.S. CAT obligations,<sup>256</sup> that U.S. domestic statutes purporting to prohibit the torture of detainees were unconstitutional,<sup>257</sup> that the U.S. reservation to CAT Article 16 meant that the Article did not apply to non-citizens abroad,<sup>258</sup> that the U.S. non-self-executing declaration meant that the U.S. was not bound to comply with the non-derogation principle of CAT Article 2,<sup>259</sup> that neither the extraterritorial torture statute nor other U.S. domestic criminal law applied to detainee abuse on Guantánamo, that Common Article 3 of the Geneva Conventions did not apply to the U.S. conflict with al Qaeda and the Taliban, and that “customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners,”<sup>260</sup> to name a few.

Most, if not all, of these positions have now been rejected by this Administration. In a few cases, these positions have been reversed by the courts. Moreover, legislation such as the Detainee Treatment Act and amendments to Section 2340-2340A, the Supreme Court decision in *Hamdan* and the President’s Executive Order 13491 have now made clear that other U.S. domestic and international legal obligations prohibit CIDT and torture abroad, including in all situations of armed conflict. The Bush Administration position was not supported by reasoned legal analysis. This Administration remains free to conclude, as part of its upcoming CAT presentation, that that position does not serve the long-term policy interests of the United States. It also does not appear to be consistent with the position of the vast majority of our close military allies and other States Parties to the CAT.<sup>261</sup>

Finally, I conclude that application of ordinary international law principles relating to *lex specialis* support, rather than weigh against, application of the CAT in armed conflict. The *lex specialis* maxim provides that “whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.”<sup>262</sup> Nothing in this rule, however,

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<sup>256</sup> Yoo Memo March 2003, *supra* note 264, at 58 (“Further, if the President ordered that conduct [actions violating the CAT], such an order would amount to a suspension or termination of the Convention. In so doing, the President’s order and the resulting conduct would not be a violation of international law because the United States would no longer be bound by the treaty.”).

<sup>257</sup> Bybee Memo, *supra* note 253, at 39 (“Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”).

<sup>258</sup> Responses from Alberto R. Gonzales (then Nominee for Attorney General) to the written questions of Senator Dianne Feinstein, in *Confirmation Hearing on the Nomination of Alberto Gonzales to be Att’y Gen. of the United States Before the S. Judiciary Comm.*, 109th Cong. 240, 249 (Jan. 6, 2005) (“[A]s a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.”).

<sup>259</sup> Dep’t of Defense, Working Group Report, *supra* note 253, at 5 (“Article 2 . . . provides that acts of torture cannot be justified on the grounds of exigent circumstances, such as a state of war or public emergency . . . . The United States did not have an Understanding or Reservation relating to this provision (however, the U.S. issued a Declaration stating that Article 2 is not self-executing.”).

<sup>260</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Dep’t of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees 37 (Jan. 22, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>.

<sup>261</sup> In a comprehensive review of the positions of States Parties taken before the CAT Committee since 2000 in the UNHCHR database, we have found only one other State (Israel) that has asserted that IHL displaces the CAT in situations of armed conflict as the *lex specialis*.

<sup>262</sup> Rep. of the Int’l Law Comm., Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Sess., May 1, 2006-June 9, 2006 and July 3, 2006-Aug. 11, 2006, at 408, ¶ 5, U.N. Doc. A/61/10 (2006).

suggests that the CAT must be displaced in situations of armed conflict. Most of the provisions of the CAT are consistent with the relevant rules of armed conflict, and thus pose no conflict. More protective aspects of the IHL treaty regime can be accommodated under the Article 1(2) and 16(2) savings clauses. And to the extent that some aspects of the CAT may differ from the preexisting law of armed conflict (particularly with respect to procedures for considering State compliance before the CAT Committee), the CAT is best understood as the later-in-time convention, of both greater specificity with respect to a State's obligations not to torture and of general application, which textually indicates its applicability to situations of armed conflict. *Under these circumstances, to the extent that the CAT may impose some (quite limited) additional obligations on a State beyond the traditional rules of armed conflict, within its substantive and geographic realm of application, I conclude that it is the Convention Against Torture that controls.*

## V. CONCLUSION

For all the above reasons, I recommend that in its upcoming CAT Presentation, the United States should **(1) reject any legal position claiming a categorical bar against the Convention's extraterritorial scope or its application in situations of armed conflict; and (2) acknowledge that the best reading of the words "any territory under its jurisdiction" in the CAT is one that limits the positive obligations of the United States to take the actions specified in those articles to those contexts over which a State exercises sufficient effective control: i.e., where it has relevant effective legal or regulatory authority to do so.**

A thorough review of the object and purpose, text and context of the CAT, relevant subsequent State practice, the Convention's negotiating history, the negotiations regarding the Optional Protocol to the Convention, and the U.S. Executive Branch and Senate understandings at the time of ratification all support both of these conclusions. Taking these two positions would align our legal arguments with our current policies and require only modest modification of prior positions that were asserted without adequate legal support. Most importantly, it would allow the United States to reassert our global standing and leadership in our commitment to humane treatment.

*s/Harold Hongju Koh*

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