

2006

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Recommended Citation

Craig Forcese, *A New Geography of Abuse - The Contested Scope of U.S. Cruel, Inhuman, and Degrading Treatment Obligations*, 24 BERKELEY J. INT'L LAW. 908 (2006).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol24/iss3/5>

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A New Geography of Abuse?

The Contested Scope of U.S. Cruel, Inhuman, and Degrading Treatment Obligations

By
Craig Forcese*

I. INTRODUCTION

On January 6, 2005, the current Attorney General of the United States, Alberto Gonzales, was asked by Senators during his confirmation hearing whether “it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture.”¹ The question was directed specifically to U.S. obligations under Article 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).² Article 16 supplements the treaty’s bar on torture by calling on states to curb cruel, inhuman, or degrading treatment and punishment (“CID treatment”).³

In response, Gonzales noted the reservation entered by the United States upon its ratification of the treaty in 1994: “the United States considers itself

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1. *Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearings Before the S. Judiciary Comm.*, 109th Cong. 121 (2005) [hereinafter *Nomination Hearing*].

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) (entered into force on June 26, 1987, ratified on Oct. 21, 1994) [hereinafter *Torture Convention*], available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

3. *Id.*

bound by the obligation under article 16 . . . only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the [U.S. Constitution’s] Fifth, Eighth, and/or Fourteenth Amendments.”⁴ Aliens “interrogated by the U.S. *outside the United States*,” he observed “enjoy no substantive rights under the Fifth, Eighth and 14th Amendment.”⁵ The U.S. reservation to the Torture Convention, therefore, had the effect of incorporating these U.S. constitutional geographic limiters into U.S. obligations under the treaty. In a follow-up letter to U.S. Senator Feinstein, Gonzales asserted squarely that “[t]here is no legal prohibition under the ‘Convention Against Torture’ on cruel, inhuman or degrading treatment with respect to aliens overseas.”⁶

The position taken by the Attorney General has important ramifications that extend beyond the Torture Convention. The United States’ reservation to that instrument was replicated during U.S. ratification of the International Covenant on Civil and Political Rights (“International Covenant” or “Covenant”), in relation to that treaty’s CID treatment provision. Given the parallel reservations, the Attorney General’s approach to the Torture Convention would presumably also inform his interpretation of U.S. obligations under the International Covenant.

For these reasons, Gonzales appears to believe that, as a matter of international law, U.S. personnel may engage in CID treatment not amounting to torture, so long as it is only foreigners who are ill-treated and everyone is out of the country when it happens. Put another way, the Attorney General proposed a new geography of abuse, a patch-work quilt of circumstances in which, as a matter of international law, the United States may commit acts it readily acknowledges may not be done on its own soil.

The Gonzales interpretation provoked a vigorous response from critics. In 2005, Senator McCain sponsored an amendment to the 2006 Department of Defense Appropriations Bill prohibiting cruel, inhuman, and degrading treatment of persons detained by the U.S. government.⁷ In so doing, he complained of the Bush administration’s “strange legal determination . . . that

4. Declarations and Reservations by the United States of America to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Reservation I(1)), in 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004, at 283, 286-87, U.N. Doc. ST/LEG/SER.E/23, U.N. Sales No. E.05.V.3 (2005) [hereinafter CID Reservation]; see also Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, <http://www.ohchr.org/english/countries/ratification/9.htm#reservations> (last visited Mar. 19, 2006).

5. *Nomination Hearing*, *supra* note 1 (emphasis added).

6. 151 CONG. REC. S699 (daily ed. Feb. 1, 2005) (statement of Sen. Feinstein, quoting Gonzales letter), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all &page=S699&dbname=2005_record.

7. Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005) (enacted).

the prohibition in the Convention Against Torture against cruel, inhuman, or degrading treatment does not legally apply to foreigners held outside the United States.”⁸

Human rights groups echo this objection. Human Rights First—the former Lawyers Committee for Human Rights—declared that the Attorney General’s interpretation “flies in the face of the [torture] treaty’s ratification history and would remove serious human rights violations from legal prohibition.”⁹ For its part, Human Rights Watch labeled the Gonzales interpretation “as unprecedented as it is implausible: the [torture] treaty unambiguously calls on governments to stamp out torture and ill-treatment to the fullest extent of their authority. This clearly covers acts by U.S. agents anywhere in the world.”¹⁰ In a speech delivered at Canada’s foreign ministry in April 2005, Human Rights Watch Director Kenneth Roth argued that the U.S. position constituted an illicit supplemental reservation to its existing obligations under the Torture Convention and urged Canada to object vigorously to this action.¹¹ Underlying these complaints from human rights groups are concerns that the U.S. government is prepared to abuse prisoners and detainees as part of its war on terror.¹²

This article takes up the question raised by these events and probes the legal merits of the Gonzales position. Part II examines the scope of U.S. CID treatment treaty obligations contained not only in the Torture Convention, but also in the International Covenant. It juxtaposes these requirements with the substantive standards existing under the Eighth, Fifth, and Fourteenth Amendments. It also contrasts the geographic reach of the U.S. Constitution and the two treaties. Part III analyzes the ratification history of the two international conventions to determine the extent to which U.S. constitutional geographic limiters are incorporated into this treaty law. It also examines the

8. 128 CONG. REC. S11063 (daily ed. Oct. 5, 2005) (statement of Sen. McCain).

9. Press Release, Human Rights First, Human Rights First Opposes Alberto Gonzales To Be Attorney General (Jan. 24, 2005), *available at* http://www.humanrightsfirst.org/us_law/etm/gonzales/statements/hrf-opp-gonz-full-012405.pdf.

10. Press Release, Human Rights Watch, U.S.: Justifying Abuse of Detainees (Jan. 25, 2005), *available at* <http://hrw.org/english/docs/2005/01/25/usint10072.htm>.

11. The author summarizes Mr. Roth’s position from notes taken at the talk.

12. *Id.* Human Rights Watch, for instance, noted immediately after its condemnation of the Gonzales position that the “CIA is believed to hold a number of detainees in multiple secret locations around the world. The U.S. government has denied these detainees access to international monitors such as the International Committee of the Red Cross.” *Id.* In an October 2004 report, it discussed the human rights implications of these “disappearances,” and the prospect that detention *incommunicado*—a human rights abuse—will lead to other forms of mistreatment. HUMAN RIGHTS WATCH, THE UNITED STATES’ “DISAPPEARED:” THE CIA’S LONG-TERM “GHOST DETAINEES” (2004), *available at* <http://www.hrw.org/background/usa/us1004/us1004.pdf>. Press reports, meanwhile, point to use of extreme interrogation techniques at places like Bagram, Afghanistan and Guantanamo Bay, Cuba. *See, e.g.,* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. TIMES, May 20, 2005, at A1; David Johnston, *More of F.B.I. Memo Criticizing Guantánamo Methods Is Released*, N.Y. TIMES, Mar. 22, 2005, at A17. *See also* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

international law of reservations to assess the likelihood of the international community accepting the interpretation proffered by the Attorney General.

This article concludes that the Gonzales position is largely a fiction if considered with an eye to the sum of U.S. international obligations. Geographic limitations on U.S. obligations under the Torture Convention clearly exist, but flow from the express terms of the convention itself, not from the U.S. reservation. A review of the ratification history surrounding the U.S. reservations to the Torture Convention and the International Covenant lends little support to the Gonzales concept of implied geographic limitations. The reservations therefore do not constrain the limited geographic reach of the Torture Convention or the more expansive extraterritorial scope of the International Covenant. Moreover, even if they were intended to have this effect, there is good reason to believe that the U.S. derogations are inconsistent with the international law of reservations. Not least, the treaty reservations cannot be treated as a derogation of customary international law principles banning CID treatment.

II.

POTENTIAL SCOPE OF U.S. OBLIGATIONS IN RELATION TO CID TREATMENT

The International Covenant and the Torture Convention are both broadly ratified international treaties that include a prohibition on CID treatment.¹³ Article 16 of the Torture Convention specifies that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁴ Likewise, Article 7 of the International Covenant provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁵ Article 10 contains a complementary obligation: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁶

13. The International Covenant had 154 parties as of May 2005. Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (last visited Mar. 19, 2006). The Torture Convention had 139. Multilateral Treaties Deposited with the Secretary-General, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (last visited Mar. 19, 2006).

14. Torture Convention, *supra* note 2, art. 16.

15. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Oct. 5, 1977, ratified June 8, 1992) [hereinafter ICCPR], available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm.

16. See U.N. Human Rights Comm., *General Comment No. 20*, ¶ 2, U.N. Doc. A/47/40 (1994) [hereinafter *General Comment No. 20*] (noting that Article 10 “complements” the obligations in Article 7).

The United States is a party to these treaties.¹⁷ In both cases, however, it entered reservations upon ratification. As noted, the United States reservation to Article 16 of the Torture Convention reads: “‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”¹⁸ The United States entered an identical reservation with respect to Article 7—though not Article 10—of the International Covenant.¹⁹

The connotation of the word “means” in these reservations is clear. “Means,” used as a verb, is defined as: “to serve or intend to convey, show, or indicate.”²⁰ Used in the reservations, “means” connects CID treatment with the cruel and unusual treatment barred by constitutional norms. In so doing, the reservation clearly ties CID treatment to the *sort* of treatment that is also outlawed by the constitutional provisions. Looked at this way, the reservation is purely substantive. As noted above, however, Attorney General Gonzales proffered a second, more “procedural” interpretation at his Senate confirmation: the ban on CID treatment exists only *where* the Fifth, Eighth, or Fourteenth Amendments of the Constitution would also apply. But, this second interpretation is neither mandated nor excluded by the plain meaning of the words in the reservations.

The U.S. reservations therefore must be assessed by asking two important questions. First, what exactly is the substantive and geographic scope of the CID treatment treaty obligations and does it truly vary from that of the Eighth, Fifth, and Fourteenth Amendments? Second, given the reach of the constitutional provisions, to what extent do the reservations actually incorporate this geography into U.S. international obligations? The first question is addressed in this Part and the second in Part III.

17. The ICCPR entered into force for the United States on September 8, 1992 and the Torture Convention on November 20, 1994. See OFFICE OF THE LEGAL ADVISER, U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2005, at 429, 513 (2005), available at [http:// www.state.gov/documents/organization/53678.pdf](http://www.state.gov/documents/organization/53678.pdf).

18. CID Reservation, *supra* note 4, at 286-87.

19. See *id.* The United States did lodge an understanding of Article 10’s subsections on imprisonment of accused persons with convicts and on the purposes of imprisonment being rehabilitation. Neither of these understandings have a bearing on the core Article 10 obligation to treat persons deprived of their liberty humanely.

20. Merriam-Webster Online, <http://www.m-w.com/dictionary.htm> (last visited Mar. 19, 2006).

A. Potential Substantive Scope of U.S. CID Treatment Obligations

1. Substantive Content of CID Treatment Standard in International Law

a) General Principles

Exactly what constitutes CID treatment in international law is uncertain. CID treatment is not defined in either the Torture Convention or the International Covenant. Whatever else it may be, CID treatment is clearly something other than torture. "Torture" is defined by the Torture Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain enumerated purposes, such as punishment or interrogation.²¹ CID treatment is commonly viewed as egregious treatment that falls short of outright torture.²²

No clear standard determines, however, how outrageous this conduct must be to constitute CID treatment. The U.N. General Assembly has urged that the term be "interpreted so as to extend the widest possible protection against abuses, whether physical or mental."²³ However, the U.N. Human Rights Committee—the treaty body established by the International Covenant—has declined to "draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment [barred by Article 7 of the International Covenant]; the distinctions depend on the nature, purpose and severity of the treatment applied."²⁴ It has further observed that "what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."²⁵

In at least one instance, the Committee has accepted that the rationale for the treatment may be relevant in determining its legal character. In a case against Australia, it held that a state's legitimate fear of the flight risk posed by prisoners warranted the shackling of those individuals and rendered this act

21. Torture Convention, *supra* note 2, art. 1.

22. See, e.g., Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 2, U.N. Doc. A/10034 (Dec. 15, 1975) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt., at 5 (1987) (citing *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) ¶ 167 (1978) for the proposition that "[t]he difference between torture and cruel, inhuman, or degrading treatment or punishment 'derives principally from a difference in the intensity of the suffering inflicted'").

23. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 5, cmt. c, U.N. Doc. A/34/46 (Dec. 17, 1979).

24. See *General Comment No. 20*, *supra* note 16, ¶ 4.

25. *Vuolanne v. Finland*, U.N. Human Rights Comm., Communication No. 265/1987, ¶ 9.2, U.N. Doc. CCPR/C/35/D/265/1987 (1989), available at <http://www.unhchr.ch/tbs/doc.nsf/0/19ab6bc5558b2fbbe1256abd002fd613?OpenDocument>.

something other than CID treatment.²⁶ The Committee has been reluctant, however, to extend this line of reasoning too far. It appears, therefore, to reject state justifications for certain forms of treatment, including corporal punishment,²⁷ a state action the Committee readily declares to be CID treatment.²⁸ It has also indicated that where an act does, in fact, constitute CID treatment, no justification exonerates the injuring state. Article 4 of the International Covenant precludes derogation from Article 7 even in times of national emergencies, presumably the most potent public interest motivation imaginable.²⁹

b) Specific Examples

Despite an unwillingness to define *ex ante* the exact contours of the CID treatment standard, both the Human Rights Committee and its counterpart under the Torture Convention, the U.N. Committee Against Torture, have identified specific state practices that they view as constituting CID treatment.

For instance, the Committee Against Torture has declared all of the following forms of CID treatment: substandard detention facilities lacking basic amenities such as water, electricity and heating in cold temperatures,³⁰ long periods of pre-trial detention and delays in judicial procedure coupled with incarceration in facilities ill-equipped for prolonged detention,³¹ the beating of prisoners who are also denied medical treatment and are deprived of food and proper places of detention;³² virtual isolation of detainees for a period of a

26. *Bertran v. Australia*, U.N. Human Rights Comm., Communication No. 1020/2001, ¶ 8.2, U.N. Doc. CCPR/C/78/D/1020/2001 (2003), available at <http://www.unhchr.ch/tbs/doc.ns.f/0/e9d23042cfec8e86c1256dad00535a94?Opendocument>.

27. *Osbourne v. Jamaica*, U.N. Human Rights Comm., Communication No. 759/1997, ¶ 9.1, U.N. Doc. CCPR/C/68/D/759/1997 (2000), available at <http://www.unhchr.ch/tbs/doc.nsf/0/339e324bcf148a04c125690c00359dd6?Opendocument> (“Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.”).

28. *General Comment No. 20*, *supra* note 16, ¶ 5.

29. *Id.* ¶ 3 (“The text of article 7 allows no limitation. The Committee reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provision must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”). See also J. 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* 150 (1988) (“Unlike in the definition of torture . . . the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment.”); SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 212 (2d ed. 2004).

30. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 183, U.N. Doc. A/56/44 (Oct. 12, 2001).

31. *Id.* ¶ 119(c).

32. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 175, U.N.

year;³³ use of electro-shock belts and restraint chairs as means of constraint;³⁴ acts of police brutality that may lead to serious injury or death;³⁵ and deliberate torching of houses.³⁶

Commenting specifically on interrogation techniques, the Committee Against Torture has also identified the following as CID treatment: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill"³⁷

Specific acts identified by the Human Rights Committee as constituting CID treatment do not differ greatly from those invoked by the Committee Against Torture. The latter include abduction of an individual followed by detention without contact with family members;³⁸ denial of food and water;³⁹ denial of medical assistance after ill-treatment;⁴⁰ death threats;⁴¹ mock executions;⁴² whipping and corporal punishment;⁴³ failure to notify a family of

Doc. A/53/44 (Sept. 16, 1998) [hereinafter *1998 Report of the Committee Against Torture*].

33. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶¶ 58(e), 61(c), U.N. Doc. A/55/44 (Jan. 1, 2000).

34. *Id.* ¶¶ 179(e), 180(c).

35. *1998 Report of the Committee against Torture*, *supra* note 32, ¶ 64.

36. Dzemajl v. Yugoslavia, U.N. Human Rights Comm., Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b5238fc275369719c1256c95002fca4f?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b5238fc275369719c1256c95002fca4f?OpenDocument).

37. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 257, U.N. Doc. A/52/44 (Jan. 1, 1997).

38. N'Goya v. Zaire, U.N. Human Rights Comm., Communication No. 542/1993, ¶ 5.5, U.N. Doc. CCPR/C/56/D/542/1993 (1996), available at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/aaaaa7610e02b4ea8025670b0041e2c3?OpenDocument>; Atachahua v. Peru, U.N. Human Rights Comm., Communication No. 540/1993, ¶ 8.5, U.N. Doc. CCPR/C/56/D/540/1993 (1996), available at <http://www.unhchr.ch/tbs/doc.nsf/0/1fa0463b1dc827dd8025670b0041986a?OpenDocument>.

39. Miha v. Equatorial Guinea, U.N. Human Rights Comm., Communication No. 414/1990, ¶ 6.4, U.N. Doc. CCPR/C/51/D/414/1990 (1994), available at [http://www.unhchr.ch/tbs/doc.nsf/doc.nsf/\(Symbol\)/df4e3b9dad48924480256724005b7029?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/doc.nsf/(Symbol)/df4e3b9dad48924480256724005b7029?OpenDocument).

40. See *id.*; see also Bailey v. Jamaica, U.N. Human Rights Comm., Communication No. 334/1988, ¶ 9.3, U.N. Doc. CCPR/C/47/D/334/1988 (1993), available at <http://www.unhchr.ch/tbs/doc.nsf/0/f005e1b6505911d78025678900523ffc?OpenDocument>.

41. Hylton v. Jamaica, U.N. Human Rights Comm., Communication No. 407/1990, ¶ 9.3, U.N. Doc. CCPR/C/51/D/407/1990 (1994), available at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/21f4971b30964fc6802567240059b27d?OpenDocument>.

42. Linton v. Jamaica, U.N. Human Rights Comm., Communication No. 255/1987, ¶ 8.5, U.N. Doc. CCPR/C/46/D/255/1987 (1992), available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/ec922b6b4f8a9fe280256730004f1c47?OpenDocument&Highlight=0,CCPR%2FC%2F46%2FD%2F255%2F1987>.

43. Higginson v. Jamaica, U.N. Human Rights Comm., Communication No. 792/1998, ¶ 4.6, U.N. Doc. CCPR/C/74/D/792/1998 (2002), available at <http://www.unhchr.ch/tbs/doc.nsf/0/40dc97b15fe67797c1256bed004ac91a?OpenDocument>; Sooklal v. Trinidad and Tobago, U.N. Human Rights Comm., Communication No. 928/2000, ¶ 4.6, U.N. Doc. CCPR/C/73/D/928/2000 (2001), available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/060472c5f719c37cc1256b0c0037d251?OpenDocument&Highlight=0,CCPR%2FC%2F73%2FD%2F928%2F2000>.

the fate of an executed prisoner;⁴⁴ prolonged detention on death row when coupled with "further compelling circumstances relating to the detention;"⁴⁵ and detention in substandard facilities;⁴⁶ and conditions of incarceration.⁴⁷

Examples of CID treatment stemming from the conditions of detention include: incarceration for fifty hours in an overcrowded facility, resulting in prisoners being soiled with excrement, coupled with denial of food and water for a day;⁴⁸ incarceration in circumstances falling below the standards set in the U.N. Standard Minimum Rules for the Treatment of Prisoners, coupled with detention *incommunicado*, death and torture threats, deprivation of food and water and denial of recreational relief;⁴⁹ solitary incarceration for ten years in a tiny cell, with minimal recreational opportunities;⁵⁰ solitary incarceration *incommunicado* for various periods;⁵¹ and incarceration with limited recreational opportunities, no mattress or bedding, no adequate sanitation, no ventilation or electric lighting, in addition to denial of exercise, medical treatment, nutrition and clean drinking water.⁵²

Detention in these and similar circumstances may also run afoul of Article 10 of the International Covenant, guaranteeing that states treat persons deprived of their liberty with humanity and dignity. In its General Comment 21, the

44. *Schedko v. Belarus*, U.N. Human Rights Comm., Communication No. 886/1999, ¶ 10.2, U.N. Doc. CCPR/C/77/D/886/1999 (2003), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.77.D.886.1999.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.77.D.886.1999.En?OpenDocument).

45. *Bickaroo v. Trinidad and Tobago*, U.N. Human Rights Comm., Communication No. 555/1993, ¶ 5.6, U.N. Doc. CCPR/C/61/D/555/1993 (1998), available at <http://www.unhchr.ch/tbs/doc.nsf/0/9af6a8733b3fe740802566da003fa2ec?OpenDocument>.

46. *Adams v. Jamaica*, U.N. Human Rights Comm., Communication No. 607/1994, ¶ 3.14, U.N. Doc. CCPR/C/58/D/607/1994 (1996), available at <http://www.unhchr.ch/tbs/doc.nsf/0/ebc4844f722cb0db80256715005766c?OpenDocument>.

47. *Deidrick v. Jamaica*, U.N. Human Rights Comm., Communication No. 619/1995, ¶ 9.3, U.N. Doc. CCPR/C/62/D/619/1995 (1998), available at <http://www.unhchr.ch/tbs/doc.nsf/0/cef4724191a33b4f802566d4005588c8?OpenDocument>.

48. *Portorreal v. Dominican Republic*, U.N. Human Rights Comm., Communication No. 188/1984, ¶¶ 9.2, 11, U.N. Doc. CCPR/C/31/D/188/1984 (1987), available at <http://www.unhchr.ch/tbs/doc.nsf/0/b967d6e3245a920ac1256abd00286766?OpenDocument>.

49. *Mukong v. Cameroon*, U.N. Human Rights Comm., Communication No. 458/1991, ¶¶ 9.3, 9.4, U.N. Doc. CCPR/C/51/D/458/1991 (1994), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3ee540dcbeda7a580256727005a484b?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3ee540dcbeda7a580256727005a484b?OpenDocument).

50. *Edwards v. Jamaica*, U.N. Human Rights Comm., Communication No. 529/1993, ¶ 8.3, U.N. Doc. CCPR/C/60/D/529/1993 (1997), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f57f2c81c25f5479802566e100383c0c?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f57f2c81c25f5479802566e100383c0c?OpenDocument).

51. *Campos v. Peru*, U.N. Human Rights Comm., Communication No. 577/1994, ¶ 8.4, U.N. Doc. CCPR/C/61/D/577/1994 (1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3c730ccb89509e8802566d7005d370d?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3c730ccb89509e8802566d7005d370d?OpenDocument) (discussing detention *incommunicado* for nine months); *Shaw v. Jamaica*, U.N. Human Rights Comm., Communication No. 704/1996, ¶ 7.1, U.N. Doc. CCPR/C/62/D/704/1996 (1998), available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311a2a0a02cd480cb55802566d4005d0901?OpenDocument&Highlight=0,CCPR%2FC%2F62%2FD%2F704%2F1996> (discussing detention *incommunicado* for eight months in overcrowded and damp conditions).

52. *Brown v. Jamaica*, U.N. Human Rights Comm., Communication No. 775/1997, ¶ 6.13, U.N. Doc. CCPR/C/65/D/775/1997 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/02a9cd65e31d7fda8025679000466c8a?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/02a9cd65e31d7fda8025679000466c8a?OpenDocument).

Human Rights Committee concluded that Article 10 rights attach to “any one deprived of liberty under the laws and authority of the State,” including those who are held in prisons or “detention camps.”⁵³ Article 10 has been interpreted as prohibiting acts less severe than outright CID treatment, particularly where a person has been detained in generally poor conditions but has not been singled out for particularly egregious treatment.⁵⁴ The Committee has also found violations of Article 10 when detainees are held *incommunicado* for periods of time shorter than those declared cruel, inhuman or degrading in other cases.⁵⁵ Compliance with the U.N. Standard Minimum Rules for the Treatment of Prisoners⁵⁶ may also be relevant in determining whether a state complies with Article 10.⁵⁷ These Rules establish detailed standards in such areas as hygiene, food, clothing and bedding, exercise and sport, medical services, discipline and punishment, and contact with the outside world.

2. Substantive Content of the Eighth, Fifth and Fourteenth Amendments

a) Eighth Amendment

Substantively, the core prohibition on cruel and unusual treatment in the U.S. Constitution—the Eighth Amendment—prohibits the infliction of “cruel and unusual punishments” without defining this expression further. Thus, like its international counterparts, the U.S. Constitution contains no definitive list of acts considered cruel or unusual. Nor have U.S. courts proposed a comprehensive category of such behaviors. In *Roper v. Simmons*, the U.S. Supreme Court recently reiterated its long-held view that the list of acts considered to violate the Eighth Amendment is not fixed. Instead, the validity of these acts is measured against “the evolving standards of decency that mark the progress of a maturing society.”⁵⁸ Nevertheless, the Supreme Court has also

53. U.N. Human Rights Comm., *General Comment No. 21*, ¶ 2, U.N. Doc. A/47/40 (1994) [hereinafter *General Comment No. 21*].

54. Griffin v. Spain, U.N. Human Rights Comm., Communication No. 493/1992, ¶ 6.3, U.N. Doc. CCPR/C/53/D/493/1992 (1995), available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/d5f8acdcc9bec684802566e30034a0b5?OpenDocument&Highlight=0,CCPR%2FC%2F53%2FD%2F493%2F1992> (concluding that Article 10 applied in relation to generally poor conditions of incarceration, even where Article 7 CID treatment was not established). See discussion in JOSEPH ET AL., *supra* note 29, at 277, ¶ 9.139.

55. Gilboa v. Uruguay, U.N. Human Rights Comm., Communication No. 147/1983, ¶ 14, U.N. Doc. CCPR/C/26/D/147/1983 (1985), available at <http://www.unhchr.ch/tbs/doc.nsf/0/90c4cedc1808aef2c1256ab9004b4fe0?OpenDocument> (incommunicado detention for 15 days is a violation of Article 10).

56. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, annex I, A (1956), approved July 31, 1957, E.S.C. Res. 663(c), 24 U.N. ESCOR Supp. (No. 1), at 11, U.N. Doc. E/3048 (1957), amended May 13, 1977, E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1), at 35, U.N. Doc. E/5988 (1977), available at <http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf>.

57. See *General Comment No. 21*, *supra* note 53, ¶ 5.

58. *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citing *Trop v. Dulles*, 356 U.S. 86,

said that the Eighth Amendment bars both “barbarous” acts and those actions “which, although not physically barbarous, ‘involve the unnecessary and wanton infliction of pain,’ or are grossly disproportionate to the severity of the crime.”⁵⁹

The Supreme Court has noted that acts “totally without penological justification” constitute “unnecessary and wanton infliction of pain.”⁶⁰ Exactly when actions cross this threshold depends on the context. In practice, the Eighth Amendment has been confined to cases involving convicted prisoners, an approach mandated by the Supreme Court’s interpretation of the word “punishment” in the Amendment.⁶¹ Broadly speaking, the Supreme Court’s cases on prisoner treatment by prison officials have examined two sorts of punishment issues: the conditions in which inmates are detained and excessive use of force by guards.⁶² The different tests applied to these two scenarios in turn appear to reflect the exigencies of the circumstances in which prison officials act.

Thus, in *Hudson v. McMillan*,⁶³ the Court distinguished circumstances in which prison authorities are confronted with an urgent need to employ force to meet legitimate objectives, on the one hand, from situations where no such countervailing need exists, on the other. As an example of the latter situation, the Court offered that “the State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.”⁶⁴ In this instance, whether state officials act in a cruel and unusual fashion is judged by a standard of “deliberate indifference,” a state of mind that may be inferred from the fact that “the risk of harm is obvious.”⁶⁵ The Court has since implied

100-01 (1958) (plurality opinion)).

59. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion) (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion))).

60. *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (citing *Rhodes v. Chapman*, 452 U.S. at 346).

61. *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (holding that “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions”); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (deciding that “the Due Process Clause [in the Fifth and Fourteenth Amendments] protects a pretrial detainee from the use of excessive force that amounts to punishment” and that “[a]fter conviction, the Eighth Amendment ‘serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified’” (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986))).

62. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (holding that “[i]n its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates’” (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984))).

63. 503 U.S. 1, 5 (1992).

64. *Id.* at 6.

65. *See Hope v. Pelzer*, 536 U.S. at 738 (quoting *McMillan*, 503 U.S. at 8). *See also Farmer v. Brennan*, 511 U.S. at 842. Note, however, that the test is a subjective one. *Id.* at 837 (finding that deliberate indifference requires that “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn

that the “deliberate indifference” standard extends to all cases involving non-emergency prison conditions.⁶⁶ For instance, the violation of the “deliberate indifference” standard was “obvious” where an already subdued prisoner was handcuffed to a “hitching post” in a non-emergency situation for a 7-hour period and exposed to “the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks.”⁶⁷

In comparison, *McMillan* held that guards employing force to quell a prison riot are evaluated against a different standard. In such circumstances, state officials “must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force” and must make decisions in haste and under pressure. In these circumstances, the test for cruel and unusual punishment is whether “force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”⁶⁸

In *McMillan*, the Court extended this approach to all allegations concerning use of excessive force by prison guards in dealing with inmates. Even where the injury is insignificant, “[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated,”⁶⁹ and the Eighth Amendment is transgressed. Ultimately, whether force violates the Eighth Amendment hinges not only on the injury suffered, but also on “the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’”⁷⁰

b) Fifth and Fourteenth Amendments

For its part, the Fifth Amendment to the U.S. Constitution provides that no person shall be deprived “of life, liberty, or property, without due process of law.” The Fourteenth Amendment makes this same guarantee applicable to the states. These guarantees include a substantive component, one designed to prevent the government “from abusing [its] power, or employing it as an

that a substantial risk of serious harm exists, and he must also draw the inference”). Obviousness serves as evidence of whether this subjective knowledge existed or not. *Id.* at 842.

66. *Hope*, 536 U.S. at 737-38 (deciding that “[i]n making this determination [of whether there has been unnecessary and wanton inflictions of pain] in the context of prison conditions, we must ascertain whether the officials involved acted with ‘deliberate indifference’ to the inmates’ health or safety” (citing *McMillan*, 503 U.S. at 8)).

67. *Id.* at 738.

68. See *McMillan*, 503 U.S. at 6 (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). See also *Whitley*, 475 U.S. at 320-21 (“Where a prison security measure is undertaken to resolve a disturbance, . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’”).

69. *McMillan*, 503 U.S. at 9.

70. *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321).

instrument of oppression.”⁷¹ The traditional test applied by the court is “whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”⁷² The Supreme Court has suggested that a sufficient governmental interest in an aggressive interrogation may influence the outcome of this “shock the conscience” test.⁷³ Those same judgments imply, however, that interrogation by torture is capable of shocking the conscience and of constituting a violation of substantive due process,⁷⁴ an approach endorsed by the lower courts.⁷⁵

The Supreme Court has also noted that “the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”⁷⁶ The Fifth and Fourteenth Amendments may, however, include supplemental elements more restrictive of government use of force than the Eighth Amendment, at least for detainees not convicted of a crime. In its jurisprudence, the Supreme Court has emphasized that the “State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.”⁷⁷ Substantive due process standards are offended when pretrial conditions “amount to punishment of the detainee.”⁷⁸ Consequently, the Due Process Clause protects “a pretrial detainee from the use of excessive force that amounts to punishment.”⁷⁹ Whether a given act amounts to punishment depends on both its nature and its purpose.⁸⁰ Lower courts have held that “a restriction is ‘punitive’ where it is intended to punish, or where it is ‘excessive

71. *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989) (citing *Davidson v. Cannon*, 474 U.S. 344, 348 (1986))).

72. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

73. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (holding that “official conduct ‘most likely to rise to the conscience-shocking level,’ is the ‘conduct intended to injure in some way unjustifiable by any government interest’” (citing *Lewis*, 523 U.S. at 849)).

74. *Id.* at 773 (suggesting that substantive due process makes unlawful certain government conduct, e.g. police torture or other abuse forcing a confession, regardless of whether the confession is then used at a defendant’s trial).

75. *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000); *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (holding that it would shock the conscience and thus violate the due process clause when police “brutally and incessantly questioned” a person “after he had been shot [during his altercation with police] in the face, back, and leg and would go on to suffer blindness and partial paralysis, and [when police] interfered with his medical treatment while he was ‘screaming in pain . . . and going in and out of consciousness’”), *cert. denied*, 542 U.S. 953 (2004).

76. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

77. *United States v. Lovett*, 328 U.S. 303, 317-18 (1946); *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979).

78. *Bell*, 441 U.S. at 535.

79. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

80. *See Bell*, 441 U.S. at 538 (“If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’ Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.”).

in relation to [its non-punitive] purpose,' . . . or is 'employed to achieve objectives that could be accomplished [by] so many alternative and less harsh methods.'"⁸¹

3. *Comparison of Constitutional and International CID Standards*

Given this discussion, there are both similarities and differences between U.S. constitutional approaches to cruel and unusual punishment and those developed by U.N. bodies in relation to CID treatment under the Torture Convention and the International Covenant.

In terms of similarities, while the Human Rights Committee probably goes further than do U.S. courts in outright condemning behaviors like corporal punishment, the jurisprudence of both bodies typically focuses on egregious acts. In practice, the behaviors declared inappropriate both by the Committee against Torture and the Human Rights Committee are extreme. In many instances, prison officials are likely maltreating prisoners with deliberate indifference to the harm caused or using excessive force maliciously. In either instance, their actions would be clear violations of the Eighth Amendment.

On the other hand, some qualities of the Eighth Amendment's case law may affect its reach in a fashion alien to the CID treatment concept. First, preoccupied with both CID treatment and punishment, the U.N. Committee Against Torture has proposed a list of suspect interrogation tactics. In comparison, the Eighth Amendment's focus has been confined to post-conviction incarceration, not pre-trial detention. Likely for this reason, the Eighth Amendment is not rich in cases focused on custodial interrogation,⁸² an activity provoking much controversy in the current "war on terror." For this reason, legitimate questions arise as to whether, substantively, the Eighth Amendment standards extend to the treatment of untried detainees in this conflict.

Furthermore, court interpretations of the Eighth Amendment are much more concerned with the motivation underlying suspect acts than are the international standards. Ironically, the Eighth Amendment's emphasis on motivation may produce requirements that are both more demanding and more forgiving than their international equivalents. For instance, under the Eighth

81. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (citations omitted); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) ("The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose."); *Robles v. Prince George's County*, 302 F.3d 262, 269 (4th Cir. 2002).

82. On this point, see an October 2002 memorandum on interrogation tactics at Guantanamo Bay drafted by the U.S. Department of Defense: "There is a lack of Eighth Amendment case law relating in the context of interrogations." Memorandum from Diane E. Beaver, Staff Judge Advocate, Dep't of the Army, to Commander, Joint Task Force 170 (Oct. 11, 2002), reprinted in KAREN GREENBURG & JOSHUA DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 231 (2005).

Amendment, even insignificant injuries are precluded when inflicted out of malice. No similar doctrine has emerged in the deliberations of the international human rights bodies, which tend to turn on the nature of the injury suffered, not on the nastiness of the government official's motivation.

On the other hand, the Eighth Amendment excessive force cases suggest that good faith application of force for a good cause might survive Eighth Amendment scrutiny.⁸³ In an October 2002 memorandum on interrogation tactics at Guantanamo Bay, the U.S. Department of Defense extrapolated from these cases and urged that the Eighth Amendment is not violated "so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm."⁸⁴

International law is probably less forgiving. Case law from the Human Rights Committee does suggest that the legal characterization of two identical acts—one done for a legitimate penological purpose, the other not—may vary.⁸⁵ Yet, the non-derogable nature of CID obligations makes it unlikely that a perceived broader public good, like detecting terrorists, would sanitize what might otherwise be considered CID treatment.

Read together, these two key differences between international and Eighth Amendment law—namely, questions as to the latter's application to untried detainees and its pliability based on the motivations behind the abuse—suggest that the U.S. CID reservations may relax the international obligations by which the United States would otherwise be bound, at least in relation to the controversial interrogations of terrorist suspects in the "war on terror." This conclusion is, however, suspect for at least three reasons.

First and most importantly, the constitutional doctrines incorporated into U.S. international obligations by the U.S. reservation extend beyond the Eighth Amendment. Also in play are the Fifth and Fourteenth Amendments, constitutional guarantees much more preoccupied than is the Eighth Amendment with pre-trial interrogations. The Supreme Court has implied that the "shock the conscience" test for a Fifth and Fourteenth Amendment due process violation may be influenced by the governmental interest served by an aggressive interrogation, a conclusion inconsistent with the international approach to torture.⁸⁶ On the other hand, the Fifth and Fourteenth Amendments bar any acts in relation to pre-trial detainees that are intended as punitive or are excessive in relation to a non-punitive purpose. Exactly what this would mean in relation to

83. See *Hudson v. McMillan*, 503 U.S. 1, 6 (1992), and discussion at *supra* note 63 and accompanying text.

84. Beaver, *supra* note 82, at 233.

85. See Bertran, U.N. Human Rights Comm., Communication No. 1020/2001, ¶ 8.2 and discussion at *supra* note 26 and accompanying text.

86. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003).

interrogees in the “war on terror” is unclear. However, the incorporation of Fifth and Fourteenth Amendment standards of treatment into U.S. treaty CID treatment obligations arguably imposes a very rigorous standard. Now *any* punitive motivation may suffice to render actions by U.S. actors inconsistent with U.S. international obligations.

Second, if a court were for some reason to apply the Eighth Amendment to pre-trial detainees, rather than rely on the Fifth and Fourteenth Amendments, it is a leap of logic to assume, as the Department of Defense has in its 2002 memo, that Eighth Amendment standards for the good faith and proportionate use of force used to maintain and restore *prison discipline* necessarily extends to the use of force as an *interrogation tactic*. As the Supreme Court held in *McMillan*, whether a given act constitutes the unnecessary and wanton infliction of pain transgressing the Eighth Amendment is very much a situational analysis.⁸⁷ A test developed in assessing the force reasonable to deal with unruly prisoners may be applied reluctantly by a court asked to evaluate a tactic employed to extract information in an interrogation of a subdued detainee undertaken in non-emergency conditions. Here, the standard applied is much more likely to be that of “deliberate indifference.”⁸⁸ The Amendment would be offended where an official disregards an excessive risk to a person’s health or safety.

Third, the U.S. reservations extend only to the formal CID treatment provisions in the Torture Convention and Article 7 of the International Covenant, but not to Article 10 of the Covenant. This latter provision clearly comes into play when persons are detained, obliging humane treatment. Article 10 might be violated by an aggressive interrogation regime, even if those acts were somehow sanitized from Article 7 review by the U.S. reservation.

In sum, the U.S. reservations to the International Covenant and the Torture Convention likely do not greatly debase the substantive international standards of behavior the United States must meet. In some situations, they may actually impose a higher bar of behavior. In this context, the more pressing concern truly is the relative geographic scope of international and U.S. constitutional laws, a matter discussed in the next section.

B. Potential Geographic Scope of U.S. Obligations

1. Geographic Scope of the Torture Convention and International Covenant

In relation to CID treatment, Article 7 of the International Covenant simply provides that “no one shall be subjected” to such acts. Likewise, Article 10 extends the entitlement of human treatment of detainees to “all persons.” Article 16 of the Torture Convention, in comparison, obliges state efforts to prevent CID treatment “in any territory under its jurisdiction.” On its face, it thus

87. See *McMillan*, 503 U.S. at 6 and discussion at *supra* note 63 and accompanying text.

88. See *Hope*, 536 U.S. at 737-38 and discussion at *supra* note 65 and accompanying text.

appears to contain a geographical limiter not found in the Covenant.⁸⁹ This first impression is somewhat misleading, as is discussed below. It is true, however, that the Torture Convention has a narrower geographic scope than does the Covenant.

This focus on territoriality runs through the Torture Convention. Thus, the phrase “in any territory under its jurisdiction” in Article 16 is also repeated in Article 2 of the treaty. The latter describes the obligation of a state to take all legal steps to stop torture “in any territory under its jurisdiction.” This language evolved during the course of the treaty’s drafting. The original draft of the Torture Convention employed the broader formulation “under its jurisdiction” in Article 2. France expressed concern, however, that the latter phrase was too sweeping and would oblige a state to regulate the conduct of its citizens residing in another state.⁹⁰ The inclusion of “in any territory” would instead confine the Article 2 obligation to the territorial bounds of a state, ships and aircraft registered to a state, and to any occupied territory.⁹¹

This view prevailed not only in Article 2 but also in Article 16. Subsequently, publicists have interpreted the repeated references in the Convention to the words “in any territory under its jurisdiction” as capturing a state’s “land territory, its territorial sea and the airspace over its land and sea territory,” as well as territories under military occupation, colonial territories, and “any other territories over which a State has factual control.”⁹²

It would be incorrect to assume, however, that the Torture Convention is alone in confining the reach of its provisions. Despite the absence of an express geographic modifier in Articles 7 and 10 of the International Covenant, the Covenant contains such a constraint in Article 2(1). Article 2(1) of the Covenant describes the precise scope of state duties under that treaty, tempering the reach of all Covenant rights, including those in Articles 7 and 10. Article 2(1) speaks of a state’s obligations under the Covenant as extending to all individuals “within its territory and subject to its jurisdiction.”

Notably, this phrasing does not link territory and jurisdiction in the manner employed in the Torture Convention. Whereas the Torture Convention speaks of territories subject to a state’s jurisdiction, Article 2 of the Covenant talks about territory *and* jurisdiction, implying that the two concepts are alternative descriptions of the International Covenant’s reach. This possibility is

89. Article 16 also specifies that states “undertake to prevent” CID treatment, a qualifier not found on the face of Article 7. This seemingly equivocal language does not truly debase the potency of the CID treatment obligation in the Torture Convention. Its tone does not differ greatly from that in Article 2(1) of the International Covenant, describing the scope of state obligations under that treaty. Notably, Article 2(1) contains language largely identical to that in the Torture Convention: each state “undertakes to respect and to ensure” the rights in the Covenant. See ICCPR, *supra* note 15, art. 2, para. 1.

90. See BURGERS & DANIELIUS, *supra* note 25, at 48.

91. *Id.*

92. *Id.* at 131, 149 (discussing Article 5 and extending the Article 5 observations to Article 16).

accommodated by international law, which clearly views jurisdiction and territory as separate concepts. For instance, states may exercise prescriptive jurisdiction in relation to their nationals irrespective of their location.⁹³

The Human Rights Committee has, in fact, read Article 2 of the Covenant as including a significant extraterritorial reach. In its recent General Comment 31, it noted that “a State party must respect and ensure the rights laid down in the Covenant to anyone within *the power or effective control* of that State Party, even if not situated within the territory of the State Party.”⁹⁴ Rights are guaranteed “to those *within the power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”⁹⁵ The Committee has applied this approach in its case law—for example, by allowing a complaint against Uruguay brought by an individual kidnapped in Argentina by the Uruguayan security forces.⁹⁶ In its review of state compliance reports, the Committee has also raised Covenant compliance concerns in relation to a state’s armed forces stationed abroad.⁹⁷

Recently, the International Court of Justice referred to this Committee jurisprudence in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In that advisory opinion, it concluded that a state’s Covenant obligations had extraterritorial reach: “the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”⁹⁸

In sum, the CID treatment obligation under the Torture Convention

93. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) (Generally, “a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.”).

94. U.N. Human Rights Comm., *General Comment No. 31*, ¶ 10, U.N. Doc. A/59/40 (2004) (emphasis added).

95. *Id.* (emphasis added); see also Lilian Celiberti de Casariego v. Uruguay, U.N. Human Rights Comm., Communication No. 56/1979, ¶ 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (1981), available at <http://www.unhchr.ch/tbs/doc.nsf/0/ac4353a8003bec76c1256ab2004c9b11?OpenDocument> (noting that Article 2(1)’s references to jurisdiction and territory “does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”).

96. Lopez v. Uruguay, U.N. Human Rights Comm., Communication No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981), available at <http://www.unhchr.ch/tbs/doc.nsf/0/e3c603a54b129ca0c1256ab2004d70b2?OpenDocument>.

97. See, e.g., U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: New Zealand, ¶ 8, U.N. Doc. CCPR/CO/72/NET (2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.72.NET.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.72.NET.En?Opendocument) (relating to the “alleged involvement of members of the [Netherlands] State party’s peacekeeping forces in the events surrounding the fall of Srebrenica, Bosnia and Herzegovina, in July 1995”).

98. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. General List No. 131, ¶ 11 (July 9, 2004), 43 I.L.M. 1009.

arises where a state exercises sufficient control over a territory. The reach of the International Covenant, however, is greater. It extends to those circumstances where the state controls the actors perpetrating the abuse, even on territories unlinked to that state.

2. Geographic Scope of the U.S. Constitutional Norms

The U.S. Constitution does not always “follow the flag.” Its application to acts committed beyond the territory of the United States is limited. In *United States v. Verdugo-Urquidez*, a seminal case on the matter, the Supreme Court held that the Fourth Amendment governing search and seizure did not apply extraterritorially, except in relation to a U.S. citizen.⁹⁹ In dismissing an expansive geographic scope for the Fourth Amendment, the Court reasoned that:

Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures that occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.¹⁰⁰

The Court’s broadly crafted language in *Verdugo-Urquidez* casts doubt on the extraterritorial reach of any constitutional provision. Indeed, the Court cited with approval a much earlier decision, *Johnson v. Eisentrager*,¹⁰¹ in which the Court rejected the application of the Fifth Amendment to enemy aliens arrested in China and imprisoned at a U.S. administered prison in Germany after World War II. *Johnson* held that “the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”¹⁰²

Despite these holdings, U.S. jurisprudence on the extraterritorial reach of the Constitution is quite uncertain where a foreign territory is subject to some level of U.S. control. Even in *Johnson*, the Supreme Court emphasized that the plaintiff had never been within the “territorial jurisdiction” of the United States during the course of his captivity.¹⁰³ By implication, the outcome in *Johnson* might have varied had such territorial jurisdiction existed.

Meanwhile, in the venerable “Insular Cases,”¹⁰⁴ the Supreme Court

99. 494 U.S. 259, 274-75 (1990).

100. *Id.* at 275.

101. 339 U.S. 763 (1950).

102. *Id.* at 785.

103. *Id.* at 768.

104. See, e.g., *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).

distinguished between non-U.S. territories acquired for the purposes of potential statehood and those obtained with different ends in mind. In the former lands, the U.S. Constitution applied with full force. Even in the latter, however, the inhabitants were entitled at least to "fundamental" constitutional rights,¹⁰⁵ including due process.¹⁰⁶

Lower courts relying on these Supreme Court decisions have concluded that constitutional principles may apply where the United States exercises sufficient control over a territory.¹⁰⁷ For instance, in *Gherebi v. Bush*,¹⁰⁸ the Ninth Circuit considered whether federal courts could exercise habeas corpus jurisdiction in relation to alien detainees held at the Guantanamo Bay military base. The court reasoned that at Guantanamo the United States exercised a "potentially permanent exercise of complete jurisdiction and control."¹⁰⁹ In these circumstances, the United States enjoyed "territorial jurisdiction" sufficient to empower the exercise of federal court habeas oversight.¹¹⁰ The Court of Appeals distinguished Guantanamo from the facility at issue in *Johnson*, Landsberg Prison in Germany, explaining that at the latter, the United States exercised only a "limited and shared authority . . . on a temporary basis."¹¹¹

Language in the Supreme Court's recent decision in *Rasul v. Bush* supports this holding.¹¹² In *Rasul*, the Court held that whatever the constitutional doctrines expressed in *Johnson* in relation to habeas relief, they did not apply to the federal court's statutory jurisdiction to extend such a remedy. Most importantly for this article, the Court also appears to have confined *Johnson* to its predicate facts, none of which were present in relation to detainees of the "war against terror" at Guantanamo Bay. The Guantanamo detainees were not

105. See *Examining Bd. of Eng'rs, Architects & Surveyors v. Otero*, 426 U.S. 572, 599 n.30 (1976).

106. See *Ralpho v. Bell*, 569 F.2d 607, 618 (D.C. Cir. 1977) (dealing with U.S.-administered U.N. trust territory, and holding that "there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law" and the fact that "the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories") (citations omitted).

107. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992) (holding that the Fifth Amendment extended to Guantanamo Bay, a place where the court had exclusive control and jurisdiction), *vacated as moot*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993); *United States v. Tiede*, 86 F.R.D. 227, 249 (U.S. Ct. for Berlin 1979) (holding that non-citizens before a U.S. occupation court in Berlin should have constitutional rights, in part because they were before a U.S. court); *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2001) (rejecting the extraterritorial extension substantive due process principles to a case of torture overseas, but in a fashion suggesting that the outcome may have been different had the victim been "tortured in a country in which the United States exercised de facto political control").

108. 374 F.3d 727 (9th Cir. 2004).

109. *Id.* at 734.

110. *Id.* at 737.

111. *Id.* at 734.

112. *Rasul v. Bush*, 542 U.S. 466 (2004) (concluding that U.S. courts have jurisdiction to consider legal appeals from foreign citizens held by the military at Guantanamo Bay).

nationals of a country at war with the United States. They had denied engaging in acts of aggression against the United States. A tribunal had not adjudicated their case. Finally, "for more than two years they had been imprisoned in territory over which the United States exercises *exclusive jurisdiction and control*;" that is, subject to a robust leasing arrangement just short of full sovereignty.¹¹³

Pointing to this latter passage and to the Insular Cases, the District Court for the District of Columbia held recently in *In re Guantanamo Detainee Cases* that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment."¹¹⁴

These developments in U.S. constitutional law are quite new and not yet definitive. Nevertheless, they suggest that the U.S. Constitution does have some extraterritorial reach to aliens, even outside the sovereign territory of the United States, so long as the United States exercises sufficient *de facto* control over the place in which the constitutional infractions take place. The amount of control necessary remains unclear. However, in places like Guantanamo where the United States exercises all powers short of formal sovereignty, the Constitution likely will follow the flag.¹¹⁵

3. Comparison of Constitutional and International Geographic Standards

This discussion points to a marked similarity between the geographic limits

113. *Id.* at 475 (emphasis added). See also *id.* at 487 (Kennedy, J., concurring) (observing that "the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it"). The Court described the lease governing the U.S. presence in Guantanamo as follows: "The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (citations to lease agreement omitted).

114. 355 F. Supp. 2d 443, 464 (D.D.C. 2005). At the time of this writing, this case was on appeal and set for hearing before the D.C. Circuit in March 2006. See also *O.K. v. Bush*, 377 F. Supp. 2d 102, 112 (D.D.C. 2005).

115. On the other hand, *Johnson v. Eisentrager*, 339 U.S. 763, may suggest that constitutional rights do not extend to a Landesberg Prison situation; one in which the United States lacks exclusive jurisdiction and exercises a more intermediate level of control on a temporary basis. As noted above, *Johnson* may be distinguished on other bases; not least, the fact that detainees in the modern "war on terror" are citizens of countries with no declared war against the United States and are held without trial. Nevertheless, U.S. courts would develop new constitutional doctrine were they to assert extraterritorial constitutional jurisdiction over foreign detainees housed in territories over which the United States exercises less than full, proto-sovereign control. For this reason, many of the other venues in which the war on terror is being fought—for example, the various "undisclosed," foreign locations in which terrorism suspects are being held—may not be subject to constitutional oversight.

incorporated into the U.S. Constitution and those found in at least Article 16 of the Torture Convention. Given recent U.S. constitutional case law, both instruments now focus on territorial control, rather than simple sovereignty. Both appear to extend to circumstances, like those in Guantanamo Bay, where the state exercises substantial *de facto* control. Whether either instrument reaches further to lesser forms of territorial control, such as temporary military bases, remains uncertain.

A much clearer and definite dissonance exists between the U.S. Constitution and the International Covenant. The latter instrument extends its reach to precisely those circumstances where the U.S. Supreme Court's *Johnson* case implies that the U.S. Constitution should not apply: anyone within the effective control of that state's military, even when operating on territory not subjected to U.S. sovereignty or real control.

Given these conclusions, whether the U.S. reservation to the International Covenant in fact folds the U.S. Constitution's limited geographic reach into U.S. obligations under Article 7 is an important question, to be addressed in Part III.

III.

THE INTERNATIONAL LEGAL EFFECT OF THE U.S. RESERVATIONS

International law determines the effect that the U.S. reservations have on the United States' obligations under the Torture Convention and the International Covenant. Two important questions of international law are raised by these reservations. First, is there any factual or legal basis for the Attorney General's claim concerning the geographic effect of the U.S. reservation, as assessed against the law of treaty interpretation? Second, even if there is such a basis, is the reservation to the International Covenant consistent with the international law of reservations?

A. Interpretation of the U.S. Reservations

The Vienna Convention on the Law of Treaties is the starting point for assessing the effect of any reservation. While the Vienna Convention lacks universal membership—and indeed the United States is not a party—commentators regard its provisions as customary international law.¹¹⁶ The

116. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980, not ratified) [hereinafter Vienna Convention], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. The treaty had 105 members by January 2006. The customary status of the treaty has been readily acknowledged in the United States. See Letter of Submittal to the President, S. EXEC. DOC. L, 92d Cong., 1st sess. (1971), at 1 (observing that “[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. (“This Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the

Vienna Convention provides that “[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.”¹¹⁷ Where this approach leaves the meaning of a provision “ambiguous or obscure” or prompts a “result which is manifestly absurd or unreasonable,” recourse may be had to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”¹¹⁸

The Vienna Convention defines a “reservation” as a unilateral statement operating “to exclude or to modify the legal effect of certain provisions of the treaty in their application” to the reserving state.¹¹⁹ The Convention contains no specific rules on the interpretation of reservations. Nevertheless, the approach it applies in relation to treaties may sensibly be extended to reservations; specifically, a preference for ordinary meaning and recourse to *travaux préparatoires* where ambiguity remains. Because the ordinary meaning of the U.S. reservations at issue in this article is contested, a review of the relevant *travaux préparatoires* is required. In this case, the *travaux préparatoires* is the U.S. ratification history.

1. Ratification History of the International Covenant

The U.S. ratification history of the International Covenant is terse. Accounts in the record suggest that the International Covenant reservation was motivated by fears that, substantively, CID treatment could include acts not covered by the U.S. Constitution, including prolonged judicial proceedings in death penalty cases, corporal punishment, and solitary confinement.¹²⁰ However, there is nothing in the record suggesting that the reservation was constructed as a geographic limiter on U.S. obligations.¹²¹ Nor did the United States enter a reservation, understanding, or declaration concerning the geographic reach of the Covenant contained in Article 2(1).¹²²

United States even though the United States has not adhered to the Convention”); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 n.5 (2d Cir. 2004) (“Although the United States has never ratified the Vienna Convention, we treat the Vienna Convention as an authoritative guide to the customary international law of treaties.”) (citations omitted); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“According to a widespread legal conviction of the international community, the Vienna Convention is largely a restatement of customary rules, binding States regardless of whether they are parties to the Convention. . . . The United States recognizes the Vienna Convention as a codification of customary international law.”) (citations omitted).

117. Vienna Convention, *supra* note 116, art. 31.

118. *Id.* art. 32.

119. *Id.* art. 2.

120. U.S. Senate, Comm. on Foreign Relations, *Report on the International Covenant on Civil and Political Rights*, S. EXEC. REP. NO. 102-23 (2d Sess. 1992), reprinted in 31 I.L.M. 648, 651, 654 (1992) [hereinafter *Senate Report on ICCPR*]; Explanation of Bush Administration Conditions, reprinted in *id.* at 653 [hereinafter *Explanation of Bush Administration*].

121. That record is reproduced at *id.*

122. The United States entered an understanding in relation to Article 2(1), but only with respect to its prohibition on discrimination in the way rights are guaranteed to individuals. *Id.*

In fact, although the Covenant predates the Torture Convention by more than a decade, U.S. ratification of the Covenant was contemplated only after similar consideration was given to the Torture Convention. The U.S. CID treatment reservation to the International Covenant was copied expressly from that proposed for Article 16 of the torture treaty.¹²³ The reservation was made to “ensure uniformity of interpretation” between the Covenant and the Torture Convention “on this point,” that is, the substantive reach of the CID treatment obligation.¹²⁴ It is therefore instructive to review the ratification history of the Torture Convention to understand the scope of the International Covenant’s reservation.

2. Ratification History of the Torture Convention

Ironically, the rationale for the U.S. reservation to the Torture Convention is admirably summarized in an August 1, 2002 memorandum to then-White House Counsel Alberto Gonzales from Assistant Attorney General Jay Bybee. Famously, in that memorandum, Bybee confined the definition of torture to only the most egregious of acts; that is, those producing lasting psychological damage such as post-traumatic stress disorder or physical pain of an “intensity akin to that which accompanies serious physical injury such as death or organ failure.”¹²⁵

More importantly for this article, Bybee explained that the U.S. reservation to the CID treatment provision in the Torture Convention was sparked by the “vagueness” of the phrase and the fear that it “could be construed to bar acts not prohibited by the U.S. Constitution.”¹²⁶ The United States would not agree, for instance, that “refusal to recognize a prisoner’s sex change might constitute degrading treatment.”¹²⁷ The language employed by Bybee emphasizes the effect of the reservation on the *type* of acts constituting CID treatment. Thus, Bybee reasoned that because of the reservation, “[t]reatment or punishment must . . . rise to the *level of action* that U.S. courts have found to be in violation

123. See *Senate Report on ICCPR*, *supra* note 120, at 651, 654 (describing the Article 7 reservation as “consonant with the reservation proposed by the Administration and adopted by the Senate” in relation to the Torture Convention); Explanation of Bush Administration, *supra* note 120, at 654 (“Since the United States is already proceeding towards ratification of the more detailed [Torture Convention] . . . on the basis of several carefully crafted reservations . . . it will be made clear in the record that we interpret our obligations under Article 7 of the Covenant consistently with those we have undertaken in the Torture Convention.”).

124. *Id.*

125. Memorandum from Jay Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reproduced as *Memo 14*, in GREENBURG & DRATEL, *supra* note 78, at 214. The U.S. government has since distanced itself from this interpretation. See Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Coney, Deputy Attorney General (Dec. 30, 2005), available at <http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf>.

126. GREENBURG & DRATEL, *supra* note 78, at 186-87 (Bybee memo).

127. *Id.*

of the U.S. Constitution” before the treaty’s provision on CID treatment is triggered.¹²⁸

The Bybee assessment is supported by the Torture Convention’s ratification history. In documents reproduced in the Senate ratification report, the Department of State, for instance, viewed the reservation as necessary given the “unclear” meaning of CID treatment or punishment.¹²⁹ It did raise concerns that CID treatment could include acts of a nature not covered by U.S. constitutional norms, particularly in the area of degrading treatment or punishment.¹³⁰ These concerns are echoed in Senate hearings¹³¹ and are used to justify the U.S. reservation.¹³² There is, however, little in the ratification record suggesting that the reservation was also designed to impose a geographical limitation on U.S. obligations.¹³³ Indeed, given that Article 16 is confined on its face to territories under U.S. jurisdiction, it is not surprising that

128. *Id.* at 187 (emphasis added).

129. Letter from Janet G. Mullins, Assistant Sec’y, Legislative Affairs, Dep’t of State, to Senator Pressler (Apr. 4, 1990), reprinted in U.S. Senate, Comm. on Foreign Relations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. EXEC. REP. NO. 101-30, at 40 (2d Sess. 1990) [hereinafter *Committee Report on Torture Convention*].

130. Reagan Administration Summary and Analysis of the Convention (May 20, 1988), reprinted in *Committee Report on Torture Convention*, *supra* note 129, at 25 (noting that the phrase “cruel” and “inhuman” treatment or punishment “appears to be roughly equivalent to the treatment or punishment barred in the United States by the 5th, 8th and 14th Amendments” but then observing that degrading treatment or punishment “has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution.”).

131. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101th Cong. 101-718, at 3 (1990) (statement of Sen. Pressler) (“I do not know what the terms, ‘cruel, inhuman and degrading’ mean outside the U.S. Constitution. Despite the proposed reservation for article 16, that reservation does not speak to anything outside of punishment — for example, arrest, confinement and interrogation.”).

132. *Id.* at 11 (statement of Hon. Abraham D. Sofaer, Legal Advisor, Dep’t of State) (“We would expect . . . that our Constitution would prohibit most (if not all) of the practices covered in Article 16’s reference to cruel, inhuman and degrading treatment or punishment. Nevertheless, we are aware that some countries give a broader meaning to this provision . . . [I]t is prudent that the U.S. specify that, because the Constitution of the United States directly addresses this area of the law, and because of the ambiguity of the phrase ‘degrading,’ we would limit our obligations under the Convention to the proscriptions already covered in our Constitution”); *id.* at 18 (statement of Mark Richard, Deputy Assistant Att’y Gen., Criminal Division, Dep’t of Justice) (“the terms ‘cruel, inhuman or degrading treatment or punishment’ . . . are vague and are not evolved concepts under international law. This is especially the case concerning the scope of what constitutes degrading treatment.”).

133. The only statement suggesting that the reservation is meant to apply geographically is the oral transcript accompanying the Statement of Hon. Abraham D. Sofaer, Legal Advisor, Department of State, *id.* at 5-6 (“We do not want to see a bunch of different rules and standards developed with respect to cruel, unusual and inhumane treatment, and therefore, we have proposed that *within the United States* the meaning of ‘cruel and inhumane treatment’ will be the same as the meaning of our Constitution’s cruel and unusual penalties clause”) (emphasis added). It is unclear that much can be read into the phrase “within the United States,” or whether Mr. Sofaer simply misspoke when explaining the State Department position, substituting “within” for “for.” Certainly, as noted, no geographic impulse is found in the formal explanations or document trail made by executive or Senate officials. Notably, Mr. Sofaer has since indicated that the Gonzales view on the Torture Convention’s scope “is language” of the treaty. Robert Collier, *Gonzales OK Could Be Seen as OK for Torture Rules*, S.F. CHRON., Feb. 2, 2005, at A12.

the issue of a geographic delimiter was never squarely raised.

In sum, the ratification history strongly suggests that the U.S. reservations to both the Torture Convention and the International Convention were driven by substantive concerns: U.S. policymakers wished to limit the application of the treaties to those types of acts also inconsistent with the U.S. Constitution's Eighth, Fifth, and Fourteenth Amendments. On the other hand, the argument that the reservations also impose a separate geographic limiter enjoys little support from the ratification history.

B. The Legality of the U.S. Reservations

Even if the Attorney General were correct in his assessment of the reservations' impact, it would not automatically follow that the international community would give the desired effect to these instruments. Article 19 of the Vienna Convention permits reservations to treaties, but only so long as the derogations in question are not barred by the convention itself and are not "incompatible with the object and purpose of the treaty."¹³⁴

This "object and purpose" standard imposes several difficulties. First, it is not always easy to decide when a reservation runs counter to the "object and purpose" of a treaty. As noted in the Restatement on the Foreign Relations Law of the United States, the "object and purpose" language, while supposedly amounting to an objective standard for assessing a reservation, "introduces an element of uncertainty and possible disagreement."¹³⁵

Second, it is not always clear who may adjudicate the object and purpose question. Certainly, other states parties to a treaty are free to protest a reservation and denounce it as contrary to a treaty's object and purpose. Indeed, the Vienna Convention sets out this objection procedure and notes that these protestations may relieve both the objecting and the reserving parties of their obligations in relation to the disputed treaty provision.¹³⁶ Unfortunately, such rules poorly accommodate reservations to multilateral human rights treaties. Derogations from these treaties affect individuals, not states. Here, whether a reservation is effective as between states in their bilateral relations is largely irrelevant. The more important question is whether the reservation truly relieves the reserving state of a human rights obligation owed to individuals. The Vienna Convention is silent on who decides this question.

For these very reasons, the Human Rights Committee has declared its intent

134. Vienna Convention, *supra* note 116, art. 19.

135. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. c.

136. Vienna Convention, *supra* note 116, art. 21, para. 3 ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.").

to pronounce on the legality of reservations to the International Covenant.¹³⁷ It must do so, urges the Committee, both because of the inadequacies of the Vienna Convention regime¹³⁸ and for practical reasons. The validity of a reservation must be assessed if the Committee is to perform its functions under the Covenant, including reviewing state compliance reports or addressing individual complaints under the Optional Protocol to the Covenant.¹³⁹ The Committee presumably would also be obliged to undertake such an assessment in response to a complaint brought by one state against another concerning adherence to the Covenant, a prospect permitted by Article 41.¹⁴⁰

In practice, the Committee would likely apply the "object and purpose" test in any of these sorts of proceeding by considering whether the reservation transgresses a universal prohibition and whether it violates a treaty-specific prohibition. Both of these matters are discussed below.

1. Universal Prohibition

Some reservations are barred, regardless of the precise objective and purpose of the treaty at issue. In particular, reservations that purport to derogate from treaty articles that are also peremptory or even plain-vanilla customary norms are ineffective.¹⁴¹

Reservations running counter to peremptory norms are an obvious legal impossibility. Indeed, a treaty is void if it conflicts with a peremptory

137. U.N. Human Rights Comm., *General Comment No. 24*, ¶ 18, U.N. Doc. A/50/40 (1994) [hereinafter *General Comment No. 24*] ("It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.").

138. *Id.* ¶ 17 (observing that "it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties").

139. *Id.* ¶ 18. Reporting obligations exist under Article 40. The Optional Protocol, meanwhile, allows individuals to address complaints of ill-treatment to the Committee, against state parties that have ratified the Protocol. The United States has not agreed to the Protocol. See Optional Protocol to the International Covenant on Civil and Political Rights., art. 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302.

140. The Article 41 procedure is only available as against states that have lodged a declaration accepting it the jurisdiction of the Committee in relation to inter-state complaints. The United States issued such a declaration upon ratification. See Ratification by the United States of America, 1676 U.N.T.S. 543, 545, *available at* <http://untreaty.un.org/ENGLISH/bible/englishintemetbible/partI/chapterIV/treaty7.asp> (depositing Declaration under Article 41 recognizing the competence of the Human Rights Committee with ratification instrument).

141. *General Comment No. 24*, *supra* note 137, ¶ 8 ("Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.").

principle.¹⁴² *A fortiori*, a reservation to an otherwise valid treaty cannot modify the terms of that convention in a fashion inconsistent with peremptory concepts.

The rationale for disallowing reservations derogating from an article that codifies simple—that is, non-peremptory—customary law requires lengthier discussion. Certainly, treaties may supplant and replace customary law. A reservation to a treaty term intended to codify (and not modify or replace) customary law should not, however, have that effect. Notoriously, reservations “bilateralize” multilateral treaties, creating unique rules applicable as between the reserving state and other states parties that differ from the standards applicable to those other parties *inter se*.¹⁴³ It would be incongruous if a bilateral understanding were permitted to impose an exception to the customary international law applicable as between the reserving state and the international community. If reservations were to operate in this fashion, the codification of customary law into treaties would facilitate something states could not otherwise accomplish: the derogation from a universal principle to which they had not persistently objected during its emergence as customary law. An effort to render a customary norm in writing would, ironically, be turned on its head and used to gut its universality. It follows that a reservation to a treaty term codifying customary law does violence to the treaty’s object and purpose and is therefore impermissible.

Turning specifically to CID treatment, in its general comment on reservations to the International Covenant, the U.N. Human Rights Committee observed that “a State may not reserve the right to . . . subject persons to cruel, inhuman or degrading treatment or punishment.”¹⁴⁴ It urged that this and other rights, like the prohibition on torture, are customary international laws.¹⁴⁵ An outright reservation to Article 7 (and presumably Article 16 of the Torture Convention) would, therefore, be impermissible.

The U.S. reservation to Article 7 of the International Covenant obviously does not relieve the United States of all its obligations under that provision. Nevertheless, to the extent that it prompts U.S. performance under Article 7 falling short of the (admittedly ambiguous) customary law standard of CID treatment, questions will arise as to whether the reservation is proper.

142. Vienna Convention, *supra* note 116, art. 53.

143. See *id.* art. 21, paras. 1-2 (“A [properly established] reservation . . . modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and modifies those provisions to the same extent for that other party in its relations with the reserving State. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.”); see also *id.* art. 21, para. 3 (discussing the impact of the reservation on bilateral obligations where a state objects to the reservation).

144. *General Comment No. 24*, *supra* note 137, ¶ 8.

145. *Id.*

2. Treaty-Specific Prohibition

Discerning the circumstances in which a reservation offends the specific object or purpose of the treaty at issue is an even more difficult undertaking. Treaties often do not define their specific object and purpose, a pattern reflected in the International Covenant.

Nevertheless, the precise “object and purpose” of the International Covenant has been considered in a general comment issued by the Human Rights Committee. In its words, “[t]he object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify.”¹⁴⁶ Reviewing the U.S. reservation to the Covenant with an eye to this standard, the Human Rights Committee has noted that it:

[R]egrets the extent of the [U.S.] State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to . . . article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.¹⁴⁷

States parties to the Covenant have also objected to the Article 7 reservation. As already noted, the Covenant specifies in Article 4 that states may not derogate from certain rights, even in times of national emergency. Article 7, in its entirety, is listed as one of the provisions from which derogations may not be made. Pointing to Article 4, several European states have objected to the U.S. reservation as a derogation from Article 7, incompatible with the object and purpose of the Covenant.¹⁴⁸

The Human Rights Committee’s finding and these objections do not, of course, give rise to true legal penalties.¹⁴⁹ They do suggest, however, that the United States would be hard pressed to rely on its reservation to justify *any* actions found to be inconsistent with Article 7 by—at least—the U.N. Human Rights Committee. From this, it seems certain that the Committee and some portion of the international community would reject a claim by the United States

146. *Id.* ¶ 7.

147. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶¶ 266, 279, U.N. Doc. A/50/40 (1995), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b7d33f6b0f726283c12563f000512bd1?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b7d33f6b0f726283c12563f000512bd1?Opendocument).

148. See Objections by Denmark, Netherlands, Norway, Spain, and Sweden to the United States Reservations to the ICCPR, in 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 2004, *supra* note 4, at 185, 186-91, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>. Finland and (less clearly) Portugal, meanwhile, consider the U.S. reservation an impermissible use of a country’s domestic law to justify non-compliance with an international obligation. *Id.*

149. The European objections mean that those countries are free to view Article 7 as inapplicable between them and the United States. See Vienna Convention, *supra* note 116, art. 21.

that its reservation relieves it of all CID obligations vis-à-vis the treatment of aliens by its forces and agents deployed internationally.

IV. CONCLUSION

All told, Attorney General Gonzales' assertions concerning the scope of the United States's CID treatment obligations are unpersuasive. His comments on the geographic reach of U.S. obligations apply, in part, to Article 16 of the Torture Convention, but only by reason of that provision's own geographic limiter and not to the extent the Attorney General urges. Meanwhile, for a number of reasons, his interpretation does not adequately capture the extent of U.S. obligations under other instruments, most notably, the International Covenant.

First, the U.S. ratification history for both the Torture Convention and the International Covenant suggest that the U.S. reservations were never designed to free U.S. personnel operating outside of U.S. territory from the strictures of U.S. CID treatment obligations. Instead, they were motivated by concerns about the substantive meaning of CID treatment. The Attorney General's current interpretation is therefore an *ex post facto* spin, one that greatly alters the apparent intended effect of the reservations.

If the reservations do not have the geographic effect claimed by Gonzales, the reach of U.S. obligations under the International Covenant and the Torture Convention is unimpaired. Under the International Covenant, and as per Article 2, U.S. obligations apply to U.S. forces and agents, irrespective of location. Under the Torture Convention, U.S. obligations extend to territories under *de facto* U.S. control.

Second, even if the U.S. reservations did impose an implied geographic limitation tied to U.S. constitutional law, the geographic reach of the U.S. Constitution likely extends further than the Attorney General's statements suggest. While the matter has not yet been fully adjudicated by the U.S. Supreme Court, lower courts have held that U.S. personnel enjoy no constitutional *carte blanche* in places like Guantanamo Bay, even in relation to aliens.

Third, even if the Attorney General were correct in his assessment of the reservations and U.S. constitutional law, the United States would be hard pressed to rely successfully on the reservation in responding to an international complaint concerning its compliance with Article 7 of the International Covenant. The Human Rights Committee has already condemned the CID treatment reservation—even when proffered without Gonzales' interpretation—as contrary to the object and purpose of the Covenant, and thus invalid.

Finally, even if the reservations did immunize U.S. personnel for their extraterritorial actions in relation to aliens, those reservations were entered only with respect to Article 16 of the Torture Convention and Article 7 of the

International Covenant. Thus, Article 10 of the latter instrument would continue to apply. Given the fashion in which the Human Rights Committee has interpreted Article 10 and the geographic reach of the Covenant, Article 10 would likely fill any space left by a truncated Article 7. Specifically, it would bar inhumane treatment by U.S. personnel directed at persons within their custody, even while overseas and even if these persons were aliens.

For all of these reasons, the patchwork quilt of international CID obligations proposed by the Attorney General likely does not exist. International law does not authorize zones in which a state may act with impunity in its treatment of detainees. The United States's CID treatment obligations do not, in other words, have an uneven geography.