

LETTING THE CAT OUT OF THE BAG: PROVIDING A CIVIL RIGHT OF ACTION FOR TORTURE COMMITTED BY U.S. OFFICIALS ABROAD, AN OBLIGATION OF THE CONVENTION AGAINST TORTURE?

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I. INTRODUCTION: TORTURE AT ABU GHRAIB AND THE
LACK OF AN ADEQUATE REMEDY

A recent lawsuit filed against government contractors operating at Abu Ghraib prison depicts egregious abuse against detainees at the hands of U.S. officials and civilian contractors.¹ One plaintiff, referred to in the litigation only as Saleh, had been imprisoned and tortured in Abu Ghraib prison under the Saddam Hussein regime.² After his release from prison, he fled to Sweden where he became a citizen.³ Following the fall of Saddam Hussein in 2003, Saleh returned to Iraq, responding to the call for expatriates to assist in the rebuilding effort.⁴ As he attempted to enter the country with funds to invest in the rebuilding effort, U.S. officials detained him—they tied him up, placed a hood on his head and placed him in the back of a truck.⁵ Within a few days, Saleh was sent to Abu Ghraib prison, where he was subjected to outrageous emotional, sexual and physical abuse.⁶

Saleh's story is one of many accounts of abuse at Abu Ghraib prison in the lawsuit. Of course, the stories in the lawsuit are supported by the shocking photographs of uniformed American soldiers posing with nude Iraqi prisoners at Abu Ghraib⁷ and the reports of multiple investigations of the abuse.⁸ The law suit, the photos and the Reports detail "numerous instances of 'sadistic, blatant, and wanton criminal abuses' at Abu Ghraib."⁹

The Bush administration responded by blaming the conduct on a "few bad apples": rogue soldiers acting well outside the scope of their orders to guard

¹ Third Amended Complaint, *Saleh v. Titan Corp.*, No. 1:05CV1165 (D.D.C. filed Sept. 12, 2005), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/CACL_3rd_amended_complaint.pdf.

² *Id.* ¶ 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.* ¶ 113.

⁶ *Id.* ¶ 115.

⁷ James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15, available at 2004 WLNR 14923155 (quoting a transcript of 60 Minutes II).

⁸ See THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND THE PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., 2004) [hereinafter ABU GHRAIB INVESTIGATIONS].

⁹ SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 22 (2004) (quoting Report of Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, http://www.npr.org/iraq/2004/prison_abuse_report.pdf [hereinafter HERSH, CHAIN OF COMMAND]).

prisoners.¹⁰ However, the reports describe a climate in which the soldiers who committed the abuse—those pictured posing with Iraqi detainees—were encouraged to do so.¹¹ U.S. intelligence officers in charge of the prison had ordered the guards to “set the conditions for interrogations.”¹² The abuse was not the conduct of a few twisted individuals, the reports indicate, nor of the civilian contractors alone, but part of a larger plan by U.S. military and intelligence officials.¹³

By most accounts, gross violations of human rights had occurred. By some accounts, the guards and interrogators had committed torture.¹⁴ Under international law, violations of human rights obligate the offending party “to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury.”¹⁵ The United States responded to the allegations of abuse by commissioning further investigations and prosecuting the soldiers in court-martial proceedings.¹⁶ The initial court-martials against the six “bad apples,” all of whom were very low in the chain of command, left many wondering whether higher-ranking officials should bear responsibility and accountability for the abuse.¹⁷

Although some U.S. soldiers were held accountable, to date, the United States has not met obligations to compensate the victims of abuse. In his

¹⁰ See Johanna McGeary, *Pointing Fingers: The Top Brass Says the Scandal at Abu Ghraib Can Be Blamed on a Few Bad Apples, but Did the Pentagon's Zealous Pursuit of Intelligence Give a License for Abuse?*, TIME, May 24, 2004, at 44.

¹¹ See ABU GHRAIB INVESTIGATIONS, *supra* note 8.

¹² HERSH, CHAIN OF COMMAND, *supra* note 9.

¹³ See ABU GHRAIB INVESTIGATIONS, *supra* note 8; see also McGeary, *supra* note 10; HERSH, CHAIN OF COMMAND, *supra* note 9.

¹⁴ Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, available at 2004 WLNR 9613890.

¹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 901 (1987) [hereinafter RESTATEMENT]; see also Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 30, 31, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter Draft Articles on State Responsibility].

¹⁶ See ABU GHRAIB INVESTIGATIONS, *supra* note 8. See also Kate Zernike, *The Reach of War: The Verdict; U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at A1, available at 2005 WLNR 567563.

¹⁷ Eric Schmitt, *The Reach of War: Atrocities 4 Top Officers Cleared by Army in Prison Abuses*, N.Y. TIMES, Apr. 23, 2005, at A1, available at 2005 WLNR 6340858; Kate Zernike, *The Conflict in Iraq: Abu Ghraib Scandal; High-Ranking Officers May Face Prosecution in Iraqi Prisoner Abuse, Military Officials Say*, N.Y. TIMES, Jan. 17, 2005, at A8, available at 2005 WLNR 620824.

testimony before the Senate Armed Services Committee, Secretary of Defense Donald Rumsfeld promised to "seek[] a way to provide appropriate compensation to those detainees who suffered grievous and brutal abuse and cruelty at the hands of a few members of the U.S. military."¹⁸ Not apparent in Secretary Rumsfeld's promise is the fact that a number of international norms obligate the United States to make good on that promise.¹⁹

This Note focuses on the U.S. obligation under Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²⁰ which requires states to implement mechanisms in their legal systems to ensure redress and an "enforceable right to fair and adequate compensation."²¹ The United States claims to have met its obligations under the CAT, notwithstanding a reservation that purports to limit the scope of Article 14's obligation to acts of torture committed "in territory within its jurisdiction."²² Currently, where an act of torture occurs on U.S. soil, a victim has a right of action in U.S. courts.²³ Even for acts of torture committed on foreign soil at the hands of a foreign official, the victim may have a right of action in U.S. courts against the foreign official, regardless of the victim's nationality.²⁴ However, where a U.S. official commits an act of

¹⁸ Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees 4 (May 7, 2004), <http://www.defenselink.mil/speeches/2004/sp20040507-secdef1042.html>. Referring to compensation of victims, Mr. Rumsfeld stated: "It is the right thing to do. I'm told we have the ability to do so. And so we will—one way or another." *Id.*

¹⁹ See U.N. Econ. & Soc. Council [ESOSOC], Hum. Rts. Comm., *Draft, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights Law and [Serious] Violations of International Humanitarian Law*, ¶¶ 8-11, U.N. Doc. E/CN.4/2004/57 (Nov. 10, 2003) [hereinafter *Basic Principles*].

²⁰ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

²¹ *Id.* art. 14.

²² U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01 (daily ed. Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html> [hereinafter U.S. RUDs].

²³ Federal Tort Claims Act, 28 U.S.C. § 1346 (1997); 28 U.S.C. § 2671 (2000); see also 42 U.S.C. § 1983 (1996); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁴ 28 U.S.C. § 1350 (2005) (providing a right of action for an alien to sue for a tort in violation of a treaty of the United States or customary international law). See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980). See also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992)

torture on foreign soil, U.S. law does not provide an adequate mechanism by which a victim may seek reparations from the U.S. government or its officials.²⁵ Thus, a significant gap remains under existing U.S. law. A foreign citizen who is the victim of abuse at the hands of U.S. government officials on foreign soil does not have an adequate remedy.²⁶

Because Article 14 of the CAT obligates states to provide compensation to victims of torture at the hands of its officials, this Note argues that the United States should reform its domestic law to provide a civil right of action against U.S. officials analogous to the Torture Victim Protection Act,²⁷ in spite of the relevant reservation to Article 14. First, this Note argues that the reservation is a misinterpretation of the CAT and that the concerns underlying the reservation do not apply to a situation where a U.S. official has committed the act. Next, this Note shows that the domestic mechanisms currently in place in the United States to satisfy its obligation under Article 14 claim do not provide an adequate remedy. Finally, this Note suggests reforms that U.S. lawmakers should make in order to insure that the United States meets its treaty obligations.

Following this Introduction, Part II describes the CAT, focusing specifically on the scope of Article 14. Part II.B discusses the U.S. response to human rights treaties generally and to the CAT specifically. Part III.A analyzes the U.S. reservation to Article 14. Part III.B analyzes current available domestic remedies for torture victims, concluding that they fail to provide for fair and adequate compensation in accordance with Article 14. The analysis concludes that, in spite of the reservation to Article 14 and in light of the policy implications of failing to provide a right of action, the United States should reform its current domestic law in order to provide a civil right of action to a victim of torture committed by a U.S. official on foreign soil.

Although this analysis is roughly fifteen years removed from the United States adoption of the CAT, its implications have been brought into sharp focus by the events at Abu Ghraib—acts of torture committed by U.S. officials

(codified at 28 U.S.C. § 1350).

²⁵ See *infra* Part III.B.

²⁶ As will be discussed in Part III.B, a victim may have a right of action against an individual. However, this Note will argue that such a right of action, as it currently exists, is inadequate to meet the obligations of the CAT.

²⁷ Torture Victim Protection Act, 106 Stat. 73.

on foreign soil.²⁸ Thus, although much of this analysis occurs in the hypothetical, the Abu Ghraib situation acts as a lens for this analysis.²⁹

II. BACKGROUND: THE CONVENTION AGAINST TORTURE AND THE U.S. RESPONSE

A. *The Purpose and Scope of the Convention Against Torture and Article 14*³⁰

The CAT fits into a larger body of international and regional human rights instruments forged during the latter half of the twentieth century to protect “an array of civil, cultural, economic, political and social rights.”³¹ The CAT is “[t]he most important U.N. treaty for controlling, regulating, and prohibiting torture and related practices.”³² The United Nations (U.N.) Commission on Human Rights began the work of drafting a text for a Convention Against

²⁸ This analysis may apply to acts alleged by detainees at Guantanamo Bay as well. However, Guantanamo is more likely to be considered territory within the jurisdiction of the United States, thus the extraterritoriality analysis would not apply. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003).

²⁹ In using the Abu Ghraib situation as its lens, the analysis does not detail the events that occurred there. This matter has been sufficiently treated elsewhere. *See* HERSH, CHAIN OF COMMAND, *supra* note 9. Further, using Abu Ghraib as a lens requires the analysis to make a few assumptions. First, it assumes that an act of torture has occurred that meets the definition in the CAT. Second, it assumes that the act has occurred on foreign soil. Realistically, these issues would likely be disputed in a proper treatment of the Abu Ghraib prison scenario. Finally, it does not take into account the law of war or the status of the detainees as prisoners of war.

³⁰ Because this analysis engages in the task of treaty interpretation, it acknowledges the framework established by Articles 31 and 32 of the Vienna Convention. The Vienna Convention requires interpretation by looking first to the ordinary meaning of the terms, then to the object and purpose of the treaty, then to other contemporaneous instruments, then to the subsequent practices of the parties. Vienna Convention on the Law of Treaties art. 31, May 22, 1969, 1155 U.N.T.S. 331. If necessary, the interpreter may look to the negotiating history of the treaty, the *travaux préparatoires*. *Id.* art. 32.

³¹ Office of the U.N. High Commission for Hum. Rts. [OHCHR], 1 *Human Rights, A Collection of International Instruments*, foreword by Secretary-General Kofi Annan, xiii, U.N. Doc. ST/HR/1/Rev. 6 (2002), available at <http://www.ohchr.org/english/about/publications/docs/part1.pdf> [hereinafter *United Nations, Human Rights*].

³² Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 97 (2001).

Torture in 1977.³³ The Commission finalized the draft in 1984. The U.N. General Assembly adopted it, and it was entered into force in 1988.³⁴

Article 14 of the CAT requires states to provide a right of action to victims of torture to ensure “fair and adequate compensation.”³⁵ Although not the most prominent measure of the CAT, Article 14 provides an important enforcement and prevention tool in the fight against torture. Part 1 of Article 14 states:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.³⁶

The drafters of the CAT specifically intended (1) to offer clarity and structure in order to strengthen existing norms prohibiting torture,³⁷ (2) to provide state specific obligations,³⁸ and (3) to establish mechanisms for the prevention of torture.³⁹ Article 14 serves these purposes. It seeks to clarify and support existing norms regarding compensation of victims of torture, focuses its obligations on states as the entity most likely to engage in torture, and it seeks to prevent torture in addition to merely providing a sanction as punishment.⁴⁰ Further, Article 14 provides a remedy to individual victims rather than to the victim state—a feature of many modern human rights treaties.⁴¹

³³ 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* 31 (1988).

³⁴ *Id.* at 1.

³⁵ CAT, *supra* note 20, art. 14(1).

³⁶ *Id.*

³⁷ BURGERS & DANIELIUS, *supra* note 33, at 1.

³⁸ *Id.*

³⁹ Nagan & Atkins, *supra* note 32, at 90.

⁴⁰ *See infra* Parts II.A.1-3.

⁴¹ *See infra* Part II.A.4.

1. *Offering Clarity and Structure to Existing Norms*

The drafters of the CAT recognized that "torture and other cruel, inhuman or degrading treatment or punishment" was "already outlawed under international law."⁴² The preamble of the CAT affirms this notion, explicitly recalling the other instruments outlawing torture.⁴³ Thus, the CAT's principal aim is not to outlaw torture—as a number of the human rights instruments drafted in the wake of World War II and years following include provisions prohibiting torture.⁴⁴ Rather, the CAT aims "to *strengthen* the existing prohibition of such practices by a number of supportive measures."⁴⁵

To support these earlier restrictions, the CAT puts in place a number of substantive measures obligating state parties to implement standards within their domestic law, including a definition of torture, a requirement to criminalize torture, and mechanisms providing for education, investigation and compensation.⁴⁶ "For the first time, it was established under treaty law which specific obligations for the development of the ban on torture . . . enjoyed

⁴² BURGERS & DANIELIUS, *supra* note 33, at 1.

⁴³ CAT, *supra* note 20, pmbl. The preamble notes Article 55 of the Charter of the United Nations, Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the General Assembly on December 9, 1975). *Id.*

⁴⁴ BURGERS & DANIELIUS, *supra* note 33, at 1. Although "abolition of torture in criminal law swept virtually all of Europe during the eighteenth and nineteenth centuries," in the early twentieth century, a number of totalitarian regimes used torture as the means by which they retained their power, giving rise to the need for further proscription. *Id.* at 10 (quoting EDWARD PETERS, TORTURE 4-5 (1985)). Thus, the 1948 U.N. Universal Declaration of Human Rights specifically included torture in Article 5: "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Further, the 1966 International Covenant on Civil and Political Rights (ICCPR) includes a clause virtually identical to Article 5 of the Universal Declaration. Further, the ICCPR makes the prohibition of torture non-derogable. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966). A number of regional human rights instruments also contain prohibitions of torture, including the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples Rights, and the Universal Islamic Declaration of Human Rights. See *United Nations, Human Rights*, *supra* note 31, ch. 3.

⁴⁵ BURGERS & DANIELIUS, *supra* note 33, at 1.

⁴⁶ CAT, *supra* note 20, arts. 1, 4, 10, 12, 14.

universal agreement.”⁴⁷ Thus, the CAT created clarity and structure to undergird the existing norms prohibiting torture.

Just as with the rest of the CAT, the right to redress found in Article 14 was an established principle of human rights law at the time of drafting. A number of international human rights instruments in existence at the time of the drafting of the CAT provide for “the right of every individual to an ‘effective remedy’ by competent national tribunals for acts violating human rights.”⁴⁸ Article 8 of the Universal Declaration of Human Rights, for example, provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁴⁹ The International Convention on Civil and Political Rights (ICCPR) “ensure[s] that any person whose rights or freedoms . . . are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁵⁰

Additionally, norms in international humanitarian law instruments provide a right to a remedy. The Hague Conventions “provide[] for the obligation of the contracting party to pay indemnity in case of violation of the regulations.”⁵¹ The Geneva Conventions provide that “[n]o High Contracting Party shall be allowed to absolve itself to any other High Contracting Party of any liability incurred by itself or another High Contracting Party” with respect to “grave breaches involving such acts as ‘wilful (sic) killing, torture or inhuman treatment.’”⁵² They further provide that a prisoner of war may make a claim for compensation if his rights under the convention are violated.⁵³

Although these instruments clearly include obligations to compensate victims, they leave “flexibility in the mechanisms by which [victims] receive

⁴⁷ CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 83 (2001).

⁴⁸ U.N. Comm. on Hum. Rts., *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶ 26, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (prepared by Theo van Boven) [hereinafter van Boven Report]. Theo van Boven was also co-author of the *Basic Principles* cited *supra* in note 19.

⁴⁹ Universal Declaration of Human Rights, *supra* note 44, art. 8.

⁵⁰ International Covenant on Civil and Political Rights, *supra* note 43, art. 2(3)(a) (emphasis added).

⁵¹ van Boven Report, *supra* note 48, ¶ 35 (referring to The Hague Convention Regarding the Laws and Customs of Land Warfare).

⁵² *Id.* ¶ 36 (quoting Geneva Convention relative to the Treatment of Prisoners of War, arts. 130, 131).

⁵³ *Id.* ¶ 37 (quoting Geneva Convention relative to the Treatment of Prisoners of War, art. 68).

it.”⁵⁴ Because the earlier instruments do not make the scope and content of the right to redress entirely clear, Article 14 aims to clarify the existing norms by providing specificity in its obligation.⁵⁵

2. *Influencing State Behavior and Responsibility*

A second aim of the CAT was to influence the behavior of its state parties and to hold them accountable for preventing acts of torture.⁵⁶ Generally, torture is most likely to occur where there is an imbalance of power—an opportunity to abuse authority.⁵⁷ The CAT recognizes, therefore, that public officials and others acting in an official capacity are most likely to commit torture.⁵⁸ Thus, it seeks to influence government officials by focusing its obligations on its state parties.

Article 1's definition of torture demonstrates the focus on state responsibility. It defines torture narrowly, focusing solely on “pain and suffering . . . administered at the instigation, consent, or acquiescence of a public official or another person acting in an official capacity.”⁵⁹ A focus on official conduct assumes that “the normal machinery of justice will operate” if private persons commit torture, “and punishment will follow under the normal conditions of the domestic legal system.”⁶⁰ However, government officials committing torture may avoid the domestic legal system if they are responsible for the “machinery of investigation and prosecution.”⁶¹ Thus, the CAT requires states to implement measures criminalizing acts of torture committed by officials and those in authority.

⁵⁴ Katherine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT'L LEGAL PERSP. 30, 36 (2004).

⁵⁵ The scope and content of Article 14 may also be gleaned from other sources. The Special Rapporteur on Torture, a position created by the U.N. High Commissioner on Human Rights, affirms and fleshes out the requirements in Article 14 in his general recommendations on torture. The Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur, on the Question of Torture*, U.N. OHCHR, 61st Sess., U.N. Doc. E/CN.4/2005/62 (2004). Further, the United Nations has set out to develop a set of basic principles focused specifically on compensation of victims of human rights violations. See *Basic Principles*, *supra* note 19.

⁵⁶ BURGERS & DANIELIUS, *supra* note 33, at 1.

⁵⁷ Nagan & Atkins, *supra* note 32, at 91.

⁵⁸ BURGERS & DANIELIUS, *supra* note 33, at 1.

⁵⁹ Nagan & Atkins, *supra* note 32, at 93 (citing CAT, art. 1). Article 1 applies to conduct “inflicted by or at the instigation of . . . a public official or other person acting in an official capacity.”

⁶⁰ BURGERS & DANIELIUS, *supra* note 33, at 120.

⁶¹ *Id.*

Article 2 also demonstrates the CAT's focus on states. It reads: "Each state Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."⁶² This provision "highlights the importance of state compliance in the effective application of the [CAT]."⁶³

Article 14 follows suit, placing its obligations squarely on the state, like the other substantive provisions of the CAT. Thus, each state must make remedies available "in its legal system."⁶⁴ This requirement indicates that compensation must not be made on an ad hoc, case-by-case basis. Rather, in line with the principles of Article 2, the state party must have in place a concrete mechanism by which to provide compensation. "[C]ompensation can be granted as an *ex gratia* measure in appropriate cases," that is, on a case-by-case basis without recognizing that any liability or legal obligation is insufficient.⁶⁵ The state must have a structure in place which ensures "redress" and "fair and adequate compensation."⁶⁶

Article 14 does not specify from whom the victim may seek redress. It merely requires that state parties provide "redress" and "fair and adequate compensation" in their legal systems.⁶⁷ The term "redress" refers to "an official recognition of the wrong that has been done to the person concerned" in the form of an apology.⁶⁸ "Compensation" on the other hand refers to payment of an amount of money.⁶⁹ While "redress" clearly contemplates the state acknowledging responsibility, it is unclear from the terms of the treaty whether the state must be the source of the compensation. Article 14 does not prohibit the state from establishing the right to seek compensation from the perpetrator of the crime individually—and may encourage it. But whether the state is obligated to do more than provide the right is unclear from the

⁶² CAT, *supra* note 20, art. 2. Although this Article appears to limit its scope to territories under its jurisdiction, other parts of the instrument extend the scope beyond the borders of the state parties. *Id.* art. 5(b) (requiring jurisdiction over offenses "when the alleged offender is a national of that State").

⁶³ Nagan & Atkins, *supra* note 32, at 99.

⁶⁴ CAT, *supra* note 20, art. 14(1).

⁶⁵ BURGERS & DANIELIUS, *supra* note 33, at 146. A member of the Committee Against Torture has suggested "that [compensation and redress] must be an automatic response and that . . . 'it should not be necessary to go to court in order to obtain them.'" INGELSE, *supra* note 47, at 371.

⁶⁶ CAT, *supra* note 20, art. 14(1).

⁶⁷ *Id.*

⁶⁸ BURGERS & DANIELIUS, *supra* note 33, at 146.

⁶⁹ *Id.*

language of Article 14. Relying on the law of state responsibility, the U.N. Special Rapporteur on Reparations has indicated that states are responsible for making reparations for violations of human rights "attributable to the State."⁷⁰ Further, according to the UN's Basic Principles, the state's responsibility to make reparations includes both compensation and redress.⁷¹ This understanding supports the interpretation that the state must actually pay the required compensation to the victim.⁷² However, it may also suffice for the state to provide a mechanism whereby a victim has a right of action against an individual torturer.⁷³ In that case, the state must ensure that the mechanism provides for fair and adequate compensation, and if the perpetrator is not able to pay, the state must assume liability.⁷⁴ Further, it follows that the higher up the chain of command a "defendant" in such an action is, the closer to the CAT's aim of state responsibility.

3. *Prevention*

A third aim of the CAT is the obligation to *prevent* torture. Because the effects of torture cannot be undone once suffered, "emphasiz[ing] the prevention of torture" is of the utmost importance in the scheme of the CAT.⁷⁵ Thus, Article 2 establishes an obligation "not only to prohibit but to prevent acts of torture."⁷⁶ Further, the obligation in Article 2 is to take *effective* measures to prevent torture. Thus, the measures taken must not merely prohibit torture, nor merely enact toothless prevention measures, for "a formal prohibition is not sufficient, but the acts shall actually be prevented."⁷⁷

The CAT contains provisions that place obligations on states to take both *ex post* and *ex ante* action against an act of torture, each of which serves the

⁷⁰ van Boven Report, *supra* note 48, ¶ 40.

⁷¹ *Basic Principles*, *supra* note 19, ¶¶ 8-11. "Compensation shall be provided for any economically assessable damage resulting from human rights violations." *Id.* ¶ 9. What Burgers and Danelius refer to as "redress," the Basic Principles refer to as "satisfaction and guarantees of non-repetition." *Id.* ¶ 11. The content of the obligation is the same.

⁷² INGELSE, *supra* note 47, at 371-73 (discussing the Committee Against Torture's interpretation of the CAT in regards to whether states or individual perpetrators should be held liable for compensating victims).

⁷³ *Id.* at 372.

⁷⁴ *Id.*

⁷⁵ Nagan & Atkins, *supra* note 32, at 99.

⁷⁶ BURGERS & DANIELIUS, *supra* note 33, at 123.

⁷⁷ *Id.*

aim of preventing torture.⁷⁸ Some *ex post* measures serve to stigmatize torturous conduct or to create criminal or civil liability for an act of torture.⁷⁹ Other *ex post* measures require states to investigate once an act of torture occurs, to prevent reoccurrence.⁸⁰ Each of the provisions, however, attempts to meet the end goal of prevention—to ensure that fewer acts of torture ever occur.

The obligations in Article 14, to provide for redress and compensation, correlate to the obligation in Article 2 to put measures in place to prevent torture. First, the concept of redress includes preventing repetition of the abusive conduct. The U.N. has established that one of the forms of reparation required of a state is to make “guarantees of non-repetition and prevention.”⁸¹ The content of the term “redress” in the text of Article 14 does not explicitly require such guarantees, yet the Basic Principles indicate that part of making the victim whole is to provide such measures in a state’s legal system.⁸²

Requiring states responsible for torture to provide compensation to victims, in addition to satisfying victims’ damages, provides an incentive to the offending state to prevent torture from occurring again.⁸³ If such an obligation is consistent internationally, other states that are aware of potential financial liability for committing torture have an incentive to refrain. It may be argued that the threat of financial liability does little to affect state behavior, especially a state willing to commit torture. However, Article 14 does not provide the CAT’s sole torture prevention mechanism. Thus, although a requirement to compensate may not provide enough incentive on its own to prevent a state from committing torture, it fits within the entire scheme of the CAT, which aims to prevent torture by states.

⁷⁸ For example, Article 10, an *ex ante* measure, requires states to provide “education and information regarding the prohibition against torture” in the training of public officials and others “who may be involved in the custody, interrogation or treatment of any individual subjected to . . . arrest, detention or imprisonment.” CAT, *supra* note 20, art. 10. On the other hand, Article 5’s criminal framework and Article 14’s civil framework provide *ex post* measures.

⁷⁹ *Id.* arts. 4–6, 14.

⁸⁰ *Id.* art. 12.

⁸¹ *Basic Principles*, *supra* note 19, ¶ 25.

⁸² *Id.*

⁸³ Further, in requiring states responsible for torture to compensate victims, the obligations of Article 14 may be analogized to tort law. One of the goals of tort law is “to punish wrongdoers and deter wrongful conduct.” RESTATEMENT (SECOND) OF TORTS § 901c (1979). See generally TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001).

4. *Focus on Victims*

Although primarily concerned with establishing state responsibility for acts of torture, Article 14 also focuses on individual victims of torture.⁸⁴ This focus stems from the principles established in earlier human rights instruments. Traditionally, the law of state responsibility focused not on remedies available to individuals, but on remedies available to states.⁸⁵ A victim of a human rights violation would have to rely on her home state to make a claim.⁸⁶ However, many of the human rights instruments promulgated in the latter half of the twentieth century gave individuals the right to recover, thus shifting the focus of state responsibility in international human rights law.⁸⁷

Article 14 of the CAT follows suit, requiring redress to an individual, rather than to the nation of the individual. Further, Article 14, by referring to "an act of torture," indicates that the application of the Article is not necessarily limited to systematic torture rising to the level of a crime against humanity.⁸⁸ Thus, even if only one individual is subject to torture, the obligation under Article 14 is implicated. Further, the provision creates a right to "fair . . . adequate compensation." This phrase indicates that compensation must not be merely symbolic.⁸⁹ "[I]t must be required that compensation be paid for any costs which the victim may have had for medical or psychological treatment. . . . [T]he non-material damage which [the victim] suffered as a consequence of the torture must also be compensated in a significant way."⁹⁰

⁸⁴ This focus on the victim, distinguishes Article 14, along with Articles 13 and 15, from the rest of the CAT's focus on states and the perpetrators of torture. Article 13 provides the right of complaint to victims, which begins the investigation process. CAT, *supra* note 20, art. 13. Article 15 provides protection from the consequences of statements made under torture. CAT, *supra* note 20, art. 15.

⁸⁵ See RESTATEMENT § 711 cmt. a.

⁸⁶ *Id.*

⁸⁷ See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, art. I, at 59, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (Mar. 23, 1976). See also International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

⁸⁸ In contrast, the Rome Statute, creating the International Criminal Court and providing redress for torture victims or other victims of human rights violations, made civil liability dependent upon a finding of systematic torture rising to the level of a crime against humanity. Rome Statute of the International Criminal Court, 37 I.L.M. 999, art. 7(1)(f) (1998), *reprinted in* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1193 (2d ed. 2000).

⁸⁹ BURGERS & DANIELIUS, *supra* note 33, at 147.

⁹⁰ *Id.*

Thus, Article 14 establishes clear obligations that states must put in place in favor of victims.

B. The U.S. Response to the CAT: RUDs

The United States “played a leading role in developing and drafting the [CAT],” culminating in its adoption by the General Assembly in 1984.⁹¹ The United States signed the CAT in 1988 and the Reagan administration submitted it to the Senate for its advice and consent, which was granted in 1990.⁹² However, “[t]he executive branch apparently decided that the Convention should not be ratified until Congress enacted implementing criminal legislation required by the Convention. Congress finally enacted such legislation in April 1994 and the United States ratified the [CAT] in October 1994.”⁹³ The Senate, at the suggestion of the executive branch, conditioned its advice and consent upon a package of reservations, understandings and declarations (RUDs).⁹⁴

The United States has made it a standard practice to attach a significant list of RUDs to its ratification of human rights treaties.⁹⁵ The practice of attaching RUDs to human rights treaties began as an effort to appease opponents of ratification, as “a way to commit . . . to human rights treaties in the international arena while accommodating domestic concerns.”⁹⁶ Generally,

⁹¹ Harold Hongju Koh and James E. Castello, *Briefing on the Initial Report of the United States of America to the UN Committee Against Torture*, Oct. 15, 1999, available at http://www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html. Koh stated that the convention was signed in 1992. However, the Senate gave its advice and consent in that year. The United States signed the treaty in 1988.

⁹² S. REP. NO. 101-30 (1990).

⁹³ Louis Henkin, Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 348 (1995) [hereinafter Henkin, *U.S. Ratification*]. The treaty was not ratified upon the Senate’s advice and consent, but required implementation legislation, because the Reagan administration declared that the treaty was not self-executing. For a discussion of the non-self-executing doctrine, see generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* (2d ed. 1996).

⁹⁴ U.S. RUDs, *supra* note 22. “No government had previously asserted such an extensive list of reservations, declarations, and understandings as that proposed by the U.S. . . .” Nagan and Atkins, *supra* note 32, at 98.

⁹⁵ Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 423 (2000). In addition to the CAT, the United States attached similar packages of RUDs to the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination. See Henkin, *U.S. Ratification*, *supra* note 93.

⁹⁶ Bradley & Goldsmith, *supra* note 95, at 400-01. Professors Bradley and Goldsmith place

RUDs "are designed to harmonize the treaties with existing requirements of U.S. law and to leave domestic implementation of the treaties to Congress."⁹⁷ They address the concerns and objections of those opposed to ratification of human rights treaties.⁹⁸ Each of the RUDs in the typical package of U.S. reservations, in turn, seeks to address these domestic concerns and objections.⁹⁹

Likewise, the RUDs to the CAT reflect a number of domestic concerns. President Reagan submitted the CAT to the Senate with seventeen proposed conditions.¹⁰⁰ The Bush administration trimmed the number to ten by the time the Senate Foreign Relations Committee considered it in 1990,¹⁰¹ the same number with which Senate granted its advice and consent that year.¹⁰² The RUDs include "reservations" limiting the U.S. obligation under Article 16 and opposing the "ICJ clause" of the treaty,¹⁰³ "understandings" regarding U.S.

domestic concerns about human rights treaties into three categories: substance, scope, and structure. *Id.* at 401.

⁹⁷ *Id.* at 416.

⁹⁸ Domestic concerns include the following concerns: that treaty obligations would "conflict with either constitutionally guaranteed rights (like the First Amendment) or well settled and democratically popular practices (such as capital punishment for heinous crimes)"; that "vague and open-ended" treaty language would "generate . . . uncertainty regarding the application and validity of . . . domestic laws"; that treaties would undermine principles of federalism—both with respect to bicameralism and to the division of federal-state power; and that treaty obligations would undercut the sovereignty of the United States, either by subjecting it to the jurisdiction of an international tribunal or by imposing obligations not "democratically" created. *Id.* at 400; see also Henkin, *U.S. Ratification*, *supra* note 93, at 341 (describing a number of "principles" that guide the practice of attaching RUDs).

⁹⁹ Thus, just as domestic concerns may be categorized, so may U.S. RUDs: those that "decline to commit the United States to certain substantive provisions in the treaties"; those that "declare that the treaties are not self-executing and thus not enforceable in U.S. courts until implemented by congressional legislation"; and those that "express an understanding that some provisions of the treaties may be implemented by state and local governments rather than by the federal government." Bradley & Goldsmith, *supra* note 95, at 401.

¹⁰⁰ S. REP. NO. 101-30, at 7 (1990).

¹⁰¹ *Id.* at 7-10.

¹⁰² U.S. RUDs, *supra* note 22.

¹⁰³ *Id.* ¶ 1(2). Article 30(2) of the CAT established that a state may "declare that it does not consider itself bound by" Article 30(1), which provides that disputes may be referred to the International Court of Justice. CAT, *supra* note 20, art. 30(1).

interpretation of Articles 1,¹⁰⁴ 3,¹⁰⁵ and 14,¹⁰⁶ in addition to “understandings” regarding the death penalty¹⁰⁷ and a federal-state limitation,¹⁰⁸ and “declarations” that the substantive part of the CAT is “not self-executing”¹⁰⁹ and “recogniz[ing] the competence of the Committee Against Torture” with certain limitations.¹¹⁰ Finally, the RUDs include a “proviso,” not to be attached to ratification, that required the President to notify “ratifying parties . . . that nothing in this Convention requires or authorizes legislation, or other action, by the [United States] prohibited by [its] Constitution . . . as interpreted by the [United States].”¹¹¹ The U.S. reservation to Article 14 limiting the scope of the obligation to acts of torture committed “in territory under the jurisdiction” of the United States is the focus of this analysis.¹¹²

¹⁰⁴ U.S. RUDs, *supra* note 22, ¶ II(1)(a)-(e). The understandings regarding Article 1 attempt, among other things, to limit the CAT’s definition of torture to acts that have the specific intention of “inflict[ing] severe physical or mental pain or suffering.” *Id.* ¶ II(1)(a). This understanding has been particularly controversial.

¹⁰⁵ *Id.* ¶ II(2). The understanding regarding Article 3 relates to non-refoulement policy, adopting what it claims is a “more stringent” standard. S. REP. NO. 101-30, at 10. This choice has been the subject of much debate.

¹⁰⁶ U.S. RUDs, *supra* note 22, ¶ II(3). This understanding is the subject of analysis *infra*.

¹⁰⁷ *Id.* ¶ II(4) (asserting a U.S. understanding that the CAT obligations do not require the United States to prohibit the death penalty). This provision is similar to a reservation in the ICCPR.

¹⁰⁸ *Id.* ¶ II(5) (limiting the U.S. implementation “to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention . . .”).

¹⁰⁹ *Id.* ¶ III(1). In its initial report to the Committee Against Torture, the United States made the following assertions regarding the non-self-executing treaty doctrine:

[P]rovisions of a treaty . . . denominated “nonselfexecuting” . . . may not be invoked or relied upon as a cause of action by private parties in litigation. Only those treaties denominated as “selfexecuting” may be directly applied or enforced by the judiciary when asserted by private parties in the absence of implementing legislation. This distinction derives from the U.S. Supreme Court’s interpretation of article VI, cl. 2, of the Constitution. The distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law.

Initial Report of the United States to the U.N. Committee Against Torture, U.N. CAT, Initial Reports of States Parties Due in 1995, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999) [hereinafter Initial Report].

¹¹⁰ U.S. RUDs, *supra* note 22, ¶ III(2).

¹¹¹ *Id.* ¶ IV. This proviso was received as a communication to the U.N. Secretary General on June 3, 1994. Because a treaty is part of the “supreme law of the land,” just as with any other statute, a treaty obligation may not, as a matter of U.S. law, conflict with the Constitution. U.S. CONST. art. VII; *Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *see also* RESTATEMENT § 111 cmt. a. Thus, the proviso is merely a statement of this principle.

¹¹² U.S. RUDs, *supra* note 22, ¶ II(3). This analysis uses “reservation” interchangeably with

III. ANALYSIS: THE U.S. "UNDERSTANDING" AND ITS APPLICATION IN U.S. COURTS

An analysis of the U.S. reservation to Article 14 and of the domestic law relied upon to implement U.S. obligations under that provision reveals that the domestic concerns which generated the reservation do not reach the scenario at issue here, where a U.S. official commits an act of torture on foreign soil. The reservation's underlying concern was, primarily, the possibility of universal civil jurisdiction—where a foreign official commits an act of torture against a foreign victim—not with jurisdiction over all conduct committed on foreign soil.¹¹³ The reservation fails to make a distinction that the CAT makes elsewhere—between jurisdiction over non-territorial acts of torture committed by aliens (universal jurisdiction) and non-territorial acts committed by nationals (nationality jurisdiction or active personality jurisdiction). The application of jurisdiction based on nationality is not the focus of the U.S. reservation; thus, a failure to provide a right of action to a victim of torture committed by an American official is unwarranted by the concerns compelling the reservation.

A. Analysis of the U.S. "Understanding" of Article 14 and its Jurisdictional Scope

The U.S. "understanding" of Article 14 reads as follows: "Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."¹¹⁴ The U.S. reservation acknowledges some of the basic requirements of Article 14, such as the requirement to provide a civil right of action to victims of torture. Thus, it acknowledges that Article 14 requires the United States to have a mechanism in its domestic legal system that gives victims the right to sue for damages.¹¹⁵

"understanding" because, as a matter of treaty law, an "understanding" is in effect the same as a reservation and must be treated as such. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 100-05 (2000).

¹¹³ S. REP. NO. 101-30 (1990).

¹¹⁴ U.S. RUDs, *supra* note 22, ¶ II(3). This reservation was one of a number of reservations. "No government had previously asserted such an extensive list of reservations, declarations, and understandings as that proposed by the U.S. State Department's letter of December 19, 1989." Nagan & Atkins, *supra* note 32, at 98.

¹¹⁵ Whether "damages only" meets Article 14's definition of "fair and adequate

As with the other U.S. RUDs, the United States made reservations to Article 14 in order to meet specific domestic concerns and objections to the ratification of the treaty. The U.S. Senate's Summary and Analysis of the CAT (Summary and Analysis), prepared by the State Department prior to submission to the Senate for advice and consent, implies that one of the domestic concerns underlying the reservation was a concern that Article 14 may create a " 'universal' right to sue."¹¹⁶ Were Article 14 to apply universal civil jurisdiction, just as Article 5 applied universal criminal jurisdiction, it would require states to provide a right of action where a foreign official had committed an act of torture against a foreign victim on foreign soil. Particularly, the concern of the administration was that, without the reservation, Article 14 would "open U.S. courts to cases having no nexus whatsoever to the United States, essentially providing the civil analogue to 'universal jurisdiction' in the international criminal field."¹¹⁷ Although U.S. courts had recognized such a right of action under the Alien Tort Statute (ATS),¹¹⁸ the U.S. government sought to avoid creating a treaty obligation, enshrining a right of action for foreign citizens against foreign citizens.¹¹⁹ In short, the Reagan and Bush administrations opposed the use of the ATS to allow human rights claims in U.S. courts, as the Second Circuit had allowed in *Filartiga v. Pena-Irala*.¹²⁰ As long as such a claim was a part of U.S. domestic law and not an obligation under the treaty, Congress could amend the

compensation" is debatable, but is not the subject of this analysis. See *Basic Principles*, *supra* note 19. Further, the United States has acknowledged that "[a] question could be raised whether Article 14 is intended to require a victim compensation scheme or whether it is sufficient that victims have a right to bring a civil suit against the alleged torturer." S. REP. NO. 101-30, at 24. It concludes that "[e]ither approach would seem to provide 'an enforceable right to fair and adequate compensation.'" *Id.* While this conclusion may be correct, the debate is not within the scope of this analysis.

¹¹⁶ S. REP. NO. 101-30, at 24. The Summary and Analysis also reflects a concern that Article 14 would affect "the immunities from civil jurisdiction and liability that States and certain individuals enjoy." *Id.*

¹¹⁷ David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 460 (1991) (stating Stewart was an official with the State Department during the Bush administration and a proponent of the reservations).

¹¹⁸ 28 U.S.C. § 1350 (providing a right of action for an alien to sue for a tort in violation of a treaty of the U.S. or of customary international law). See, e.g., *Sosa*, 542 U.S. 692; *Filartiga*, 630 F.2d 876. See also *supra* Part II.A. The statute is interchangeably referred to as the Alien Tort Claims Act and the Alien Tort Statute. Because it was a statute in the Judiciary Act of 1789, Alien Tort Statute is a more appropriate moniker.

¹¹⁹ S. REP. NO. 101-30, at 10.

¹²⁰ *Filartiga*, 630 F.2d 876.

domestic legislation. The executive branch did not believe that Article 14 compelled the extension of a right for conduct on foreign territory, as contained in the ATS.¹²¹ Thus, the reservation limited the application of Article 14 to territory under U.S. jurisdiction.

In the Summary and Analysis, the United States argued that its understanding was consistent with the negotiating history of the CAT.¹²² It claimed that "Article 14 was in fact adopted with express reference to 'the victim of an act of torture committed in any territory under its jurisdiction.'" ¹²³ It offered the explanation that "[t]he quoted wording appears to have been deleted by mistake."¹²⁴ Although the initial Swedish draft of the Convention did not contain a clause limiting it territorially,¹²⁵ Burgers and Danelius confirm that, in 1981, the Working Group responsible for drafting the CAT adopted a proposal by the Netherlands "to insert the words 'committed in any territory under its jurisdiction' after the word 'torture.'" ¹²⁶ However, neither the *travaux préparatoires*, the Burgers and Danelius work, nor the U.S. analysis offers an adequate explanation for why the language was removed before the treaty's submission to the General Assembly for approval.¹²⁷ The Reagan administration argued that its "interpretation [of Article 14] is confirmed by the absence of any discussion of the issue since the creation of a 'universal' right to sue would have been as controversial as was the creation of 'universal jurisdiction' [in the criminal provisions]" ¹²⁸ Had the deletion been intentional, it follows that the debate would have been recorded, as it had been for the debate over universal criminal jurisdiction. Therefore, the United States reasoned, the omission must have been a mistake.¹²⁹ The

¹²¹ Stewart, *supra* note 117; see also S. REP. NO. 101-30, at 23-24.

¹²² S. REP. NO. 101-30, at 23-24.

¹²³ *Id.* at 24.

¹²⁴ Initial Report, *supra* note 109, ¶ 268.

¹²⁵ BURGERS & DANIELIUS, *supra* note 33, at 68.

¹²⁶ *Id.* at 74. Burgers and Danelius each participated in the drafting of the Convention. Burgers was part of the Netherlands delegation and was elected Chairman-Rapporteur of the Working Group in 1982. *Id.* at vi, 77.

¹²⁷ Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 83, at 537. Byrnes argues that the U.S. explanation is the most plausible alternative to the possibility that the deletion was inadvertent. *Id.*

¹²⁸ *Id.* at 456.

¹²⁹ However, this reasoning does not take into account that many state parties already provided for victim compensation schemes in their domestic criminal law. See, e.g., Second Periodic Report of France to the Committee Against Torture, CAT, ¶ 150, U.N. Doc.

U.S. reasoning is not conclusive and the possibility remains that the omission of the territorial limitation was intentional.¹³⁰ It does not explain how the treaty was submitted to and adopted by the General Assembly with the omission going unnoticed.

Article 14 does not specify whether it requires application of its terms to torture occurring in a territory outside a state's jurisdiction.¹³¹ Several of the provisions of the CAT give the impression that it intends its obligations to apply territorially.¹³² For example, Article 2, setting forth the guiding principle for the remaining substantive provisions,¹³³ requires states to commit to prevent torture "in any territory under its jurisdiction."¹³⁴ This general principle may indicate that Article 14, because it does not explicitly provide for extraterritorial jurisdiction, should apply only territorially. However, Article 2 does not indicate that each of the substantive provisions of the CAT must apply exclusively territorially.

The criminal provisions in Article 5 require that a state's obligations extend outside of its jurisdictional territory—for torture committed anywhere, including on foreign soil. Article 5(2) specifically provides for universal criminal jurisdiction.¹³⁵ Thus, states must establish criminal jurisdiction over

CAT/C/17/Add.18 (Oct. 8, 1997). Article 3 of the French Code of Criminal Procedure states, "a civil action may be brought at the same time and before the same court as the prosecution" and French law requires that reparation for the injury suffered by the victim must be made 'in full, not just to some extent.' " *Id.* ¶¶ 150, 155. Thus, for those states with victim compensation schemes in their domestic criminal law, the universal jurisdiction requirement in Articles 5, 6 and 7 would, in addition to providing for universal criminal jurisdiction, provide for a "universal" victim compensation scheme. Thus, the deletion of the language "committed in any territory under its jurisdiction" may not have warranted a debate.

¹³⁰ The Committee Against Torture, which has some authority under the CAT to provide interpretation has not spoken specifically on this issue.

¹³¹ Wendy Adams, *In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION*, *supra* note 83, at 247, 262.

¹³² Byrnes, *supra* note 127, at 542.

¹³³ See *supra* Part II.A.2.

¹³⁴ CAT, *supra* note 20, art. 2. Many of the other provisions have territorial application. For example, the provisions regarding investigation, education, and right to information apply territorially. CAT, *supra* note 20, arts. 10, 13. See generally Byrnes, *supra* note 127, at 542.

¹³⁵ AHCENE BOULESBAÛ's work refers to the jurisdiction required in Article 5(2) as "multi-state jurisdiction." AHCENE BOULESBAÛ, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 205 (1999). It claims that 5(2) does not require universal jurisdiction because "jurisdiction in the Torture Convention [is] . . . limited to the States Parties of the [CAT] which is intended to deny torturers safe haven in such States." *Id.*

alleged torturers, regardless of where the act of torture was committed and regardless of the nationality of the accused or the victim. A national of state X, who committed an act of torture in state Y against a national of state Y, is subject to the criminal jurisdiction of state Z (or any other state). The universal jurisdiction provisions of the CAT were intended to "make[] it as difficult as possible for torturers to find a safe-haven in a foreign country."¹³⁶

In addition to requiring universal jurisdiction, Article 5 requires that states assert jurisdiction over conduct committed by its nationals (nationality jurisdiction) even if that conduct occurs on foreign territory.¹³⁷ Paragraph 1(b) of Article 5 of the CAT requires criminal jurisdiction "[w]hen the alleged offender is a national of that State."¹³⁸ Under the principle of nationality jurisdiction, a state may assert jurisdiction over "activities, interests, status, or relations of its nationals outside . . . its territory."¹³⁹ Although the most common basis for the exercise of jurisdiction is territorial, international law does recognize that nationality provides a sufficient link for a state to exercise jurisdiction.¹⁴⁰ Thus, under Article 5(1)(b), a national of state X, who commits an act of torture in state Y against a national of state Y, must be subject to the jurisdiction of state X, his home nation. Article 5 thus distinguishes between two types of jurisdiction that may be applied to acts occurring outside the territory of the state party: universal jurisdiction and nationality jurisdiction.

Like the criminal provisions in Article 5, Article 14 is an enforcement mechanism, intended to place a penalty on an act of torture.¹⁴¹ Thus, in line with the CAT's torture prevention aim, it follows that Article 14 applies extraterritorially, at least where the torturer is a national of the state. However, whether or not Article 14 extends the universal jurisdiction in the criminal realm to the civil realm is not at issue in this analysis.¹⁴² Rather, this analysis focuses on whether Article 14 requires jurisdiction over acts committed by

¹³⁶ BURGERS & DANIELIUS, *supra* note 33, at 58. The U.S. delegate to the Working Group that was drafting the CAT expressed that universal jurisdiction "was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials who conduct torture [And] [i]t could be utilized against official torturers who travel to other States." *Id.* at 79.

¹³⁷ CAT, *supra* note 20, art. 5(1)(b).

¹³⁸ *Id.*

¹³⁹ RESTATEMENT § 402(2).

¹⁴⁰ *Id.* § 402 cmts. a, c.

¹⁴¹ *See supra* Part II.B.5.

¹⁴² For arguments on either side of the question of whether Article 14 requires universal jurisdiction, see Byrnes, *supra* note 127. *See also* Ingelse, *supra* note 47, at 362.

nationals of a state party—to make it as difficult as possible for torturers to find safe haven in their home nation.

Given its focus on state responsibility, Article 14 likely envisions a right of action based on nationality jurisdiction, even if it does not require universal jurisdiction. Notably, scholars have assumed that Article 14's obligations extend to conduct for which a state is responsible. For example, arguing that Article 14 does not require universal jurisdiction, Professor Andrew Byrnes notes, "[A] person may be tortured abroad, in State X, by agents of State Y. In such a situation, State Y could not plead the extraterritorial location of the torture so as to escape its duty to provide redress for acts of torture for which it bears responsibility."¹⁴³ Further, Professor Byrnes states that Article 14 "should . . . be understood as limited to requiring remedies only for torture committed under the jurisdiction of the State party (and for which it is responsible)."¹⁴⁴ Professor Byrnes does not provide any basis for the interpretation in the parenthesis, instead stating it as if it is understood to be true. Nationality jurisdiction under Article 14 for an act of torture, at least to Byrnes, is obvious.¹⁴⁵

The idea that Article 14 envisions a state-provided civil right of action for conduct committed by its nationals on foreign soil resonates with the notion of state responsibility.¹⁴⁶ A state is responsible as a matter of international law to compensate a victim of an act of torture for which it is responsible—regardless of where that act occurs.¹⁴⁷ Thus, given the CAT's focus on holding states responsible and the other international norms regarding reparations, it stands to reason that Article 14's requirement that a state provide a right of action when a national of that state commits torture is an obligation on that state, regardless of where the torture occurs.

Although the U.S. understanding of Article 14 does not distinguish between universal jurisdiction and nationality jurisdiction, the understanding appears to apply to both, limiting the right of action based on territory, regardless of who commits the act of torture. The U.S. Summary and Analysis regarding Article 14 seems most concerned with universal jurisdiction, rather than nationality jurisdiction, as noted above.¹⁴⁸ Thus, the breadth of the U.S.

¹⁴³ Byrnes, *supra* note 127, at 540 n.9.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* Parts II.A.3.

¹⁴⁷ See *Basic Principles*, *supra* note 19.

¹⁴⁸ See *supra* text accompanying notes 115-20.

reservation extends beyond its intended concerns.¹⁴⁹ The reservation might have been limited to an "understanding" that Article 14 does not require a "universal right to sue" or that it does not require jurisdiction without a nexus.¹⁵⁰ However, the U.S. reservation engrafts all conduct committed on foreign territory.

The concerns of the United States regarding the universality principle do not apply in the scenario where a U.S. citizen has committed an act of torture. The concern of universality is that a court would have to hear a claim for which it has no nexus—a foreign plaintiff, a foreign defendant, a cause of action stemming from conduct on foreign territory. In the scenario at issue in this analysis, however, the nationality of the defendant is the same as that of the forum. Thus, the court would have a sufficient nexus to assert jurisdiction.

The United States should acknowledge Article 14's inherent obligation to provide a civil right of action for victims to sue based on the nationality of the torturer. However, the United States has made a reservation to a treaty and, as such, unless specifically implemented by Congress, a private cause of action is only available to the extent that it exists under domestic law.¹⁵¹ The United States claims that "existing U.S. law already establishes private rights of suit sufficient to implement Article 14."¹⁵² The United States acknowledges the obligation under Article 14, but does not require it, "some U.S. courts have held that current U.S. law provides a right of action for acts of torture occurring outside the United States."¹⁵³ However, existing domestic law does not provide a right of action to torture victims for an act of torture committed by an officer of the U.S. government on foreign territory.

B. Analysis of Existing U.S. Domestic Remedies

Although the United States claimed in its Summary and Analysis that existing U.S. law at the time was sufficient to meet its obligations under Article 14, existing domestic mechanisms available to victims of torture committed by a U.S. official on foreign soil are inadequate.¹⁵⁴ Regarding its

¹⁴⁹ See Henkin, *U.S. Ratification*, *supra* note 93, at 342 (discussing U.S. reservations to the ICCPR).

¹⁵⁰ *Id.*

¹⁵¹ See *supra* text accompanying note 108.

¹⁵² See S. REP. NO. 101-30, at 24.

¹⁵³ *Id.*

¹⁵⁴ See Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib, Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian*

obligations under Article 14, the United States has assured the Committee Against Torture that the mechanisms currently in place provide “ample possibility for recovery of ‘adequate reparation.’”¹⁵⁵ In spite of its understanding of Article 14, the U.S. report to the Committee notes that “the rights and remedies [available] . . . may be broader than the U.S. interpretation of the statute.”¹⁵⁶ “[I]n some circumstances, U.S. law provides a potential remedy for foreign victims of torture occurring outside the United States.”¹⁵⁷ However, the two remedies that apply to acts committed outside the United States, the Alien Tort Statute (ATS)¹⁵⁸ and the Torture Victim’s Protection Act (TVPA),¹⁵⁹ do not provide a remedy for a victim of an act of torture committed by a U.S. official on foreign soil.¹⁶⁰

Contractors, 2005 BYU L. REV. 371 (describing potential remedies available to Abu Ghraib detainees). This Comment also addresses the viability of the Foreign Claims Act (FCA), 10 U.S.C. § 2734 (2005), which provides for the creation of a claims commission in countries where the U.S. has a significant military presence. *Id.* at 376. The Comment concludes, based on anecdotal evidence, that the FCA has not provided an adequate remedy to injured Iraqis. *Id.* at 377.

¹⁵⁵ Initial Report, *supra* note 109, ¶ 270. The Initial Report includes the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b); 28 U.S.C. § 2671, in the possible remedies available to torture victims. That statute “waives [the] sovereign immunity of the United States for certain torts,” which may shed some light on this analysis. Initial Report, *supra* note 109, ¶ 275. However, the statutory scheme also excludes “any claim arising in a foreign territory.” 28 U.S.C. § 2680(k) (2000). A recent decision by the Supreme Court, *Sosa v. Alvarez-Machain*, struck down the use of “headquarters doctrine” which had been used to obviate the foreign territory exclusion of the FTCA. 542 U.S. 692, 734-35 (2004). The Supreme Court reasoned that, as a matter of tort law, the law that applies to a particular case is the law of the place where the injury occurs. Thus, because the intent of the exclusion was to avoid the application of foreign substantive law in U.S. courts, the “foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” *Id.* at 741. See Anthony J. Sebok, *Could Suits Against the U.S. Government by Iraqis Subject to Abuse in Abu Ghraib Prison Succeed?*, FINDLAW’S WRIT, May 31, 2005, <http://writ.news.findlaw.com/sebok/20040531.html> (discussing the possibility of using the FTCA against the U.S. government).

¹⁵⁶ Initial Report, *supra* note 109, ¶ 268.

¹⁵⁷ *Id.*

¹⁵⁸ 28 U.S.C. § 1350 (2005).

¹⁵⁹ Torture Victim Protection Act of 1991, 106 Stat. 73.

¹⁶⁰ Borrowman, *supra* note 154, at 416 (suggesting that a Bivens claim may be available to detainees at Abu Ghraib). However, the author does not resolve whether or not a constitutional claim, such as a Bivens claim, would be available to a non-U.S. citizen. *Id.* at 415-18.

1. *The Alien Tort Statute and the Torture Victim Protection Act*

The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶¹ By establishing a right of action based on international law in U.S. federal courts, the framers sought to avoid conflicts with other nations and to provide some remedy for foreign diplomats.¹⁶² Scholars have argued that the framers enacted the ATS to “avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens.”¹⁶³

*Filartiga v. Pena-Irala*¹⁶⁴ was the first case to apply the ATS in the modern era. Under *Filartiga*, the ATS has become a mechanism for victims of human rights violations to bring claims in U.S. courts.¹⁶⁵ The *Filartiga* Court confirmed the notion, “consistent[] with identifiable expectations in the 1790s,”¹⁶⁶ that the ATS grants not merely jurisdiction, but also “open[s] the

¹⁶¹ 28 U.S.C. § 1350. The ATS was included in the Judiciary Act of 1789 as section 9. Originally, the statute provided that a district court “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of the nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). It was enacted, in large part, because of the framers’ concerns of ensuring that international law could be applied in the U.S., particularly, to protect foreign individuals. See William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491 (1986).

¹⁶² The Marbois affair offers a case in point. In 1784, Marbois, a French ambassador, was assaulted in Philadelphia by the Chevalier De Longchamps, a French national. *Id.* (quoting *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784)). Although the case was eventually criminally adjudicated in state court, “Congress was powerless to deal with the matter.” *Id.* at 491-92.

¹⁶³ Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (arguing that Article III of the U.S. Constitution, particularly the alienage jurisdiction provision, was the framers’ response to this need).

¹⁶⁴ *Filartiga*, 630 F.2d 876. The case arose when Dr. Joel Filartiga and his family filed suit under the ATS against Pena-Irala, the former Inspector General of the Police in Asuncion, Paraguay. The Filartiga family had reason to believe that Pena had been responsible for the kidnapping and torture of their son, Joelito. When Dolly Filartiga, the sister of Joelito and a U.S. resident learned that Pena-Irala was living in Brooklyn, New York, she initiated a civil suit under the ATS against him for the wrongful death by torture of her brother. *Id.*

¹⁶⁵ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

¹⁶⁶ Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249 (2004).

federal courts for adjudication of the rights already recognized by international law.”¹⁶⁷ By way of analogy, *Filartiga* made clear that torture is the new piracy, and torturers are the new pirates.¹⁶⁸ The *Filartiga* decision may have been the prime reason for the U.S. reservation to the CAT. The Reagan administration did not want to enshrine the *Filartiga* interpretation of the ATS.

Since the *Filartiga* decision, a number of cases have applied the *Filartiga* reasoning to claims of violations of international human rights law.¹⁶⁹ The Supreme Court recently confirmed, in *Sosa v. Alvarez-Machain*, that “the door is still . . . open to [claims under] a narrow class of international norms today”—particularly grievous breaches of international law corresponding to the common law offenses of “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”¹⁷⁰ Given *Filartiga*’s statement that torture is the new piracy, the *Alvarez-Machain* decision, which held that the plaintiff’s rights had not been violated under the facts of that case, left the door open to a claim of torture as defined in the CAT.¹⁷¹

In 1991, the U.S. government supplemented the ATS with the TVPA.¹⁷² The act provides in part:

An individual who, under actual or apparent authority, or color of law, of any foreign nation— (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.¹⁷³

Building upon the success of human rights claims under the ATS during the 1980s, the TVPA extended the right to sue for torture to U.S. citizens.¹⁷⁴

¹⁶⁷ *Filartiga*, 630 F.2d at 887. *But see Tel-Oren*, 726 F.2d at 798.

¹⁶⁸ *Tel-Oren*, 726 F.2d at 798.

¹⁶⁹ *See Borrowman*, *supra* note 160.

¹⁷⁰ *Sosa*, 542 U.S. 692, 743, 752.

¹⁷¹ *Id.*

¹⁷² Torture Victim Protection Act, 106 Stat. 73.

¹⁷³ *Id.* § 2(a).

¹⁷⁴ Senate Report on the Torture Victim Protection Act, S. REP. NO. 102-249 (1991), *reprinted in* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1071 (2d ed. 2000) [hereinafter *Senate Report on the TVPA*]. The Senate Report on the TVPA notes that the legislation “will carry out the intent of the [CAT] . . . [which] obligates state parties to adopt measures to ensure that torturers within their territories

However, the TVPA applies only to torturers acting under the "authority . . . of any foreign nation."¹⁷⁵ This limitation prevents the invocation of the statute against domestic officials. Further, sovereignty limits on the TVPA and similar limits on the ATS effectively bar claims against states and have major implications on the ability of torture victims to sue state officers.

2. Sovereign Immunity and the ATS/TVPA Right of Action

The Senate Report on the TVPA notes that "the legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued . . . under any circumstances."¹⁷⁶ Courts read a similar limitation into the ATS under the Foreign Sovereign Immunities Act (FSIA).¹⁷⁷ In *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁷⁸ the Supreme Court held that "the FSIA [provides] the sole basis for obtaining jurisdiction over a foreign [s]tate in [United States] courts."¹⁷⁹ Thus, a plaintiff cannot bring a claim under the ATS against a foreign sovereign unless that state has waived its immunity or fits under some exception.

While the TVPA's requirement that the torture be committed under the authority of a foreign state in order to be actionable specifically excludes claims against the U.S. government, a rule similar to the FSIA has been applied in cases brought against the U.S. government under the ATS. In *Jama v. U.S. I.N.S.*, the court held that "[a]bsent a specific waiver of [sovereign] immunity the United States and its agencies are immune from suit and courts lack jurisdiction over them."¹⁸⁰ In dismissing the claims against the Immigration and Naturalization Service (INS),¹⁸¹ the court stated that the ATS, "in

are held legally accountable for their acts." *Id.* at 1070.

¹⁷⁵ Torture Victim Protection Act, 106 Stat. 73.

¹⁷⁶ Senate Report on the TVPA, *supra* note 174.

¹⁷⁷ Pub. L. No. 94-583, 90 Stat. 2891 (1988) (codified as amended at 28 U.S.C. § 1330(a) (2000)). "[T]he FSIA sets forth the general rule that foreign states are immune from the jurisdiction of both federal and state courts in the United States, subject to certain exceptions." *Siderman de Blake v. Argentine Republic*, 965 F.2d 699, 706 (9th Cir. 1992).

¹⁷⁸ *Argentina Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

¹⁷⁹ *Id.* at 434.

¹⁸⁰ *Jama v. U.S. I.N.S.*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998) (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 474-75 (1994)).

¹⁸¹ The Immigration and Naturalization Service was subsumed by the U.S. Citizenship and Immigration Services, a bureau of the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S.C.).

providing jurisdiction and a right of action under the law of nations, does nothing to displace sovereign immunity.”¹⁸² Thus, the sovereign immunity doctrine would bar a foreign victim of an act of torture committed by a U.S. government official from bringing a claim under the ATS against the U.S. government or one of its agencies.

Some scholars have argued that because torture is a *jus cogens* norm, a violation of the norm is not a sovereign act and, accordingly, does not attract state immunity.¹⁸³ Thus, with a state’s sovereign immunity removed, a court freely may assert jurisdiction over the state. This reasoning would apply equally to an act by a foreign state and to an act by the United States. However, the case of *Siderman de Blake v. Argentine Republic*¹⁸⁴ dealt squarely with this argument and, relying on *Amerada Hess*, held that a violation of a *jus cogens* norm does not provide an exception to the FSIA.¹⁸⁵ Similarly, such a violation would not constitute a waiver of U.S. sovereign immunity. Therefore, the sovereign immunity doctrine would bar a suit against the U.S. government or its agencies, brought by a foreign victim of an act of torture by a U.S. official.

3. *Sovereign Immunity and Individuals*

Sovereign immunity likely bars a claim against a government under the ATS and TVPA, but it may not bar all claims against individuals who act on behalf of states.¹⁸⁶ According to the Senate Report on the TVPA, the TVPA specifically allows for suits against foreign government officials.¹⁸⁷ It uses a similar line of reasoning as that rejected by *Siderman*—that a violation of a *jus cogens* norm could not be the act of a sovereign, therefore, entitlement to sovereign immunity is removed for such an act.¹⁸⁸ The Senate Report of the TVPA expresses that the Act of State doctrine,¹⁸⁹ a corollary to the sovereign immunity doctrine, does not . . . provide a shield from lawsuit for former officials.¹⁹⁰ It reasons that because the Act of State doctrine “applies only to

¹⁸² *Jama*, 22 F. Supp. 2d at 365.

¹⁸³ Adams, *supra* note 131.

¹⁸⁴ *Siderman de Blake v. Argentine Republic*, 965 F.2d 699 (9th Cir. 1992).

¹⁸⁵ *Id.* at 718-19.

¹⁸⁶ See, e.g., *Kadic*, 70 F.3d 232.

¹⁸⁷ Senate Report on the TVPA, *supra* note 174, at 1071.

¹⁸⁸ *Id.*

¹⁸⁹ See *Banco Nacional de Cuba v. Sabbatino*, 375 U.S. 398 (1964).

¹⁹⁰ Senate Report on the TVPA, *supra* note 174, at 1071.

'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation."¹⁹¹ Thus, under the TVPA, a victim may sue a state official (at least a former official) for acts that purportedly were the acts of the state. This reasoning creates the fiction that the acts are not acts of the sovereign because they are violations of *jus cogens* norms.¹⁹²

The same logic should be applied to suits against U.S. officials who commit acts of torture under the ATS. Indeed, some courts have allowed suits to be brought against U.S. officials under the ATS. For example, in *Jama*, the court held that, although the INS was immune from suit, federal employees could be sued under the ATS in their individual capacities.¹⁹³ Further, one court has held that "[w]hile sovereign immunity acts as an absolute bar to damage claims against federal governmental entities, the doctrine does not completely shield federal officers who act beyond the scope of their authority, in derogation of established constitutional and statutory principles, i.e. so-called 'ultra vires' conduct."¹⁹⁴ However, where a government official acts in his official capacity, courts have held that the doctrine of sovereign immunity bars a suit.¹⁹⁵ Thus, under the ATS as it currently exists, if an official acts in an official capacity, a right of action may not exist. However, an individual official who commits an act of torture outside "the scope of authority" or "in derogation of established constitutional and statutory principles" may be subject to a right of action.¹⁹⁶

C. Chain of Command: Applying the Logic of the TVPA to U.S. Officials

A suit against a low level official may not provide the level of accountability envisioned by Article 14.¹⁹⁷ However, because it is unlikely that the U.S. government or one of its agencies could be held accountable under

¹⁹¹ *Id.* See also *Filartiga*, 630 F.2d 876 (holding that the Act of State doctrine probably does not apply to acts of a foreign government official that are wholly unauthorized and expressly forbidden by the foreign sovereign).

¹⁹² See *Adams*, *supra* note 131.

¹⁹³ *Jama*, 22 F. Supp. 2d at 365. But see *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

¹⁹⁴ *Navy, Marshall & Gordon, P.C. v. U.S. Int'l Dev.-Cooperation Agency*, 557 F. Supp. 484, 488-89 (D.D.C. 1983).

¹⁹⁵ *Sanchez-Espinoza*, 770 F.2d at 207.

¹⁹⁶ *Navy*, 557 F. Supp. at 489.

¹⁹⁷ See *supra* text accompanying notes 66-73.

existing domestic law for committing torture abroad, a right of action against an individual may be the only remedy available. A state that commits an act of torture may not rely on claims against “a few bad apples” in order to satisfy its responsibilities under the CAT. In order to provide the level of accountability required by the CAT, officers further up the chain of command must be fair game.

If an officer (a soldier, for example) is ordered to commit an act that constitutes torture, or commits torture as part of a plan, the victim should have a right of action against those who gave the orders or condoned the conduct. It stands to reason that the higher up the chain of command, the closer to the level of state accountability envisioned by the CAT. Under the ATS, as it now exists, the further away an official is from the actual commission of the act (and the higher up the chain of command), the less likely he will be subject to suit.¹⁹⁸ However, under the TVPA, the victim has a right of action not only against the individual torturer, but against higher officials as well. In describing who may be sued, the Senate Report on the TVPA states:

The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. . . . [A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.¹⁹⁹

In passing the TVPA, the Senate expressly intended to “carry out the intent of the [CAT] . . . to ensure that torturers within their territories are held legally accountable for their acts.”²⁰⁰

The United States should apply the logic of the TVPA to its own officials in order to ensure that “torturers within their territories are held legally accountable for their acts.”²⁰¹ A court may not waive sovereign immunity for conduct within an officer’s official capacity because of separation of powers

¹⁹⁸ See, e.g., *Sanchez-Espinoza*, 770 F.2d at 207.

¹⁹⁹ Senate Report on TVPA, *supra* note 174, at 1071-72.

²⁰⁰ *Id.* at 1070.

²⁰¹ *Id.*

concerns.²⁰² However, in *Sanchez-Espinoza v. Reagan*, then Circuit Judge Scalia distinguished foreign sovereign immunity, based on “considerations of international comity,” from domestic sovereign immunity, based on “separation of powers.”²⁰³ Thus, if Congress amended the ATS to include higher officials, as it did under the TVPA, such separation of powers concerns would be removed. Were the United States to provide a civil right of action against all those who ordered, abetted, or assisted in the torture, the level of accountability for U.S. actions would increase dramatically and would fall more closely within the meaning of Article 14.²⁰⁴

IV. CONCLUSION: PROVIDING A RIGHT OF ACTION FOR TORTURE COMMITTED BY U.S. OFFICIALS ABROAD

The United States should recognize a cause of action for a victim of torture, where the torture was committed by a U.S. official on foreign territory. Because the U.S. concern over universal jurisdiction is not implicated in this scenario and because current domestic law does not provide an adequate remedy, the United States should recognize the right of victims of torture to “fair and adequate compensation,”²⁰⁵ in spite of its reservation to Article 14 of the CAT.

Recent suits against government contractors working under U.S. intelligence officers and the court-martials of the “few bad apples” do not reach the level of accountability envisioned in the CAT. The CAT envisions accountability on the state level. To date, beyond the investigations and court martials, the United States has assumed very little accountability for the abuse at Abu Ghraib.

The United States has long been an advocate of human rights and an outspoken opponent of state sponsored torture. In 2003, President George W. Bush, in commenting on the United Nations International Day in Support of Victims of Torture, said:

²⁰² *Sanchez-Espinoza*, 770 F.2d at 207 (citing *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983)).

²⁰³ *Id.* This opinion did not address whether Congress had the authority to waive foreign sovereign immunity under the TVPA.

²⁰⁴ Alternatively, the United States may achieve an appropriate level of accountability by waiving the foreign country exception to the FTCA. See Sebok, *supra* note 155.

²⁰⁵ Second Amended Complaint, *Saleh v. Titan*, 353 F. Supp. 2d 1087 (S.D. Cal. 2004), No. 04CV1143, available at <http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf>. See also *Ibrahim v. Titan* (case no. unknown), <http://news.findlaw.com/cnn/docs/torture/ibrahimtitan72704cmp.html>.

The United States is committed to the world wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.²⁰⁶

One of the justifications for invading Iraq was to prevent torture under the regime of Saddam Hussein.²⁰⁷ “[T]he United States [arguably] remains . . . the greatest protector of individual rights in the world [because] of its . . . constitutional and democratic processes.”²⁰⁸ Thus, as a model for the rest of the world, the United States has a responsibility to meet the obligations imposed by the CAT. Since it is a model, U.S. non-compliance “reduces the gravitational moral pull of human rights law.”²⁰⁹ In order to prevent torture on a global scale, a cause to which it has committed, the United States must prevent torture by its own officials and hold them accountable for such conduct. Providing a civil right of action for foreign victims of torture committed by U.S. officials according to the principles established in the TVPA would approach the level of accountability imposed by Article 14.

²⁰⁶ President George W. Bush, Statement on the United Nations International Day in Support of Victims of Torture (June 26, 2003), <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>. On the same day, State Department Spokesman Richard Boucher issued a similar statement:

We continue to be appalled by the actions of governments that use torture or turn a blind eye to its occurrence. They may try to escape international scrutiny and accountability for their actions, but as long as torturers around the world spread fear and suffering, the United States will not waver in its commitment to eliminate torture.

Richard Boucher, Press Statement, United Nations International Day in Support of Victims of Torture, June 26, 2003, <http://www.state.gov/r/pa/prs/ps/2003/21976.htm>.

²⁰⁷ Briefing with Paul Wolfowitz, Deputy Secretary of Defense, *Eliminating the Threat to World Security Posed by the Iraqi Regime and Halting the Torture, Imprisonment and Execution of Innocents*, Foreign Press Center Briefing (Mar. 28, 2003), <http://fpc.state.gov/fpc/19202.htm>.

²⁰⁸ Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365, 371 (1998).

²⁰⁹ *Id.* at 372.

