

Understanding Accountability for Torture: The Domestic Enforcement of International Human Rights Treaties

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INTRODUCTION

The United States government has perpetrated numerous acts of torture in violation of multiple international treaties.¹ During the “War on Terror,” the CIA transported individuals to black sites across the globe and subjected them to unspeakable torture.² This practice of abducting foreign nationals, without process, by U.S. officials and their contractors, and transferring them either to foreign or CIA custody overseas, typically to be subject to extended interrogation and torture is often referred to as Extraordinary Rendition. The United States Senate Report about CIA Torture confirms that the CIA used tactics such as waterboarding, sleep deprivation, starvation, medically unnecessary “rectal feedings,” and more to interrogate individuals, many of whom were never formally charged with a crime.³ The Senate Report specifically names 119 individuals who were detained by the CIA, 26 of whom the Report acknowledges were wrongfully held.⁴ It is believed that many other individuals were extraordinarily rendered to sites outside of U.S. control for purposes of interrogation by torture.⁵

North Carolina has a tragic and undeniable link to these acts of torture.⁶ The CIA transported individuals to these black sites through planes that flew out of a small county airport in Johnson County, NC and the North Carolina Global TransPark in Kinston, NC.⁷ Both the airport, a political subdivision of the state of North Carolina and the Global TransPark, managed

¹ See Prof. Deborah M. Weissman, Kristin Emerson, Paula Kweskin, Catherine Lafferty, Leah Patterson, Marianne Twu, Christian Ohanian, Taiyyaba Qureshi, & Allison Whiteman, *The North Carolina Connection to Extraordinary Rendition and Torture*, (Jan. 2012), <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf> [hereinafter *NC Torture Report*].

² See *Id.*

³ S. Rep. 113-288, *Rep. of the Senate Select Comm. on the Study of the Central Intelligence Agency’s Det. & Interrogation Program*, 82-86, available at <https://www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf> (declassified, Dec. 3, 2014).

⁴ *Id.* at 14.

⁵ *NC Torture Report*, *supra* note 1, at 45-50. The declaration of Abou Elkassim Britel details his rendition into Pakistani custody. He describes both physical and psychological torture, including extreme beatings, sleep deprivation, being told the women in his family would be raped, being forced to wear a diaper, and more.

⁶ *Id.* at 24-25.

⁷ *Id.* at 17-23.

by the NC Department of Transport, lease hangar space and provide other services to a company called Aero Contractors, Ltd.⁸ Aero Contractors is incorporated in the state of North Carolina, and is believed by many to be a CIA shell company.⁹ These “torture taxis” rendered numerous individuals outside of the jurisdiction of the United States where they were subjected to atrocious acts of torture.¹⁰ Of the 119 named in the Senate Report, an unknown number—but at least 20 individuals were flown in planes that began their journey in North Carolina.¹¹ An unknown number, but at least another 13, were flown to foreign locations with the understanding that they would be tortured.¹²

The United States has been unwilling to prosecute or hold any individuals associated with torture accountable for their acts. Even after the Senate Torture Report confirmed the use of torture by the CIA, the United States has refused to acknowledge that these acts violate fundamental human rights. The United States has also continued to evade any responsibility for these acts despite its obligations under international human rights treaties. The question, thus, becomes whether there is a way to hold the United States, and North Carolina specifically, accountable for their human rights violations.

This policy report examines various international human rights treaties as it explores this fundamental question in greater detail. Chapter One, An Overview of International Law and the Implementation of Human Rights Treaties, first introduces key information concerning customary law and treaty law as they relate to international law. It then explains international human rights treaties and their significance. Particularly, it emphasizes the impact of two

⁸ *Id.* at 17-20.

⁹ *Id.*

¹⁰ *Id.* at 20-21.

¹¹ At the time of publishing this policy report, human rights organizations continue to research rendition circuits and it is believed that the number of individuals flown on NC planes is higher and could be as much as 51. *Aero Flew Them*, NCSTN.ORG, <http://ncstn.org/content/aero-flew-them/> (last visited Apr. 17, 2016).

¹² *Id.*

international human rights treaties on the United States' use of torture: (1) the International Covenant on Civil and Political Rights, and (2) the Covenant Against Torture.

Chapter Two, *The United States, The Supremacy Clause, and its Treaty Reservations, Understandings, and Declarations (RUDs): Contextual Implications to Human Rights Treaties*, explains and analyzes the U.S. RUDs in the enforceability context. This chapter defines RUDs within the meaning and obligations set forth in the text of the Supremacy Clause and the Vienna Convention on Treaties. It examines those RUDs that declare treaties to be either self-executing or non-self-executing treaties. This chapter explains how human rights treaties differ from other treaties, and therefore, affect the interpretation of RUDs. The Chapter further addresses the United States' RUDs contained within the International Covenant of Cultural and Political Rights and the Convention Against Torture.

Chapter Three, *Tortured Reasoning: International Human Rights Law, Federalism and the CIA's Extraordinary Rendition and Torture Program* revisits the history, purpose, and interpretative development of the Supremacy Clause within the context of the U.S. system of federalism. It considers the constitutional grants and limits to enforcement of international norms and treaties before tackling the availability of remedies for treaty violations. This Chapter parses some of the conflicting academic views of customary international law and the extent of the power of the federal courts to interpret customary international law in holding individual and state parties accountable. After demonstrating torture as a violation of peremptory norms and surveying all of these intersecting nodes of power, this Chapter makes clear that the United States is not only capable but obliged to rectify the transgressions of international and domestic law that resulted in widespread and unchecked human rights abuses.

Chapter Four, Does Domesticating International Law to Ensure Compliance Mean Accountability for Extraordinary Rendition?. looks at the egregious human rights atrocities committed under the extraordinary rendition program, as well as federal laws that have domesticated international laws. The first section provides an overview of extraordinary rendition. The second section highlights the international, federal, and state statutes that prohibit torture and extraordinary rendition, and which can be used to hold participants liable for their role in the extraordinary rendition program. The last section discussed North Carolina as a State Actor and its power and obligations to prosecute North Carolina actors responsible for torture.

CHAPTER ONE

AN OVERVIEW OF INTERNATIONAL LAW AND THE IMPLEMENTATION OF HUMAN RIGHTS TREATIES

International law and human rights treaties are complicated topics that are rarely discussed outside of specific legal contexts. Thus, to understand how international law and human rights treaties may be used to hold the United States and North Carolina accountable, this chapter provides an overview of this body of law, and lay the necessary foundation for the coming chapters. Section I explores the field of international law and its two primary sources, customary international law and treaty law. Additionally, it defines international human rights treaties. Section II will examine two specific international human rights treaties, the International Convention on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. This section further explores the language of these treaties and the obligations under them. It will also discuss the governing bodies, which serve to implement these treaties. Finally, it addresses independent advocacy groups that seek to use these treaties to hold member states accountable.

I. WHAT IS INTERNATIONAL LAW?

International law encompasses a large body of law that governs relations between countries. It is defined as “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”¹

There are two main sources of international law: (1) customary international law (CIL), and (2) treaty law.² Both are binding international law, but are also very unique from each other.

¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987).

² Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997).

Treaty law contains formal and codified law, which countries consent to and adopt. There is a physical document that can be viewed and countries voluntarily choose to abide by its terms.

CIL, however, is less straightforward.

A. CUSTOMARY INTERNATIONAL LAW

CIL is commonly defined as the “general and consistent practice of states followed by them from a sense of legal obligation.”³ As evidenced by this definition, customary law has two main components: (1) “the state practice itself, which must be assessed in terms of its generality, duration, and consistency;” and (2) “*opinio juris*, that is, the psychological belief of states engaged in the relevant practice that their action is required by international law.”⁴ The first component, widely accepted state practice, can be ascertained through a variety of sources including international treaties, resolutions of the UN General assembly, diplomatic correspondences, press releases, and other documents.⁵ The second component, *opinio juris*, is often inferred from the actions of countries because countries rarely articulate the rationale behind particular actions.⁶ Under *opinio juris*, countries feel obligated to abide by certain accepted norms despite never having formally consented to be legally bound by these norms.

By its very nature, customary law is a bit ambiguous and unclear. For example, the international community largely agrees that CIL prohibits crimes such as torture, genocide, and slavery.⁷ However, these terms lack any uniform definition. Countries can, thus, either interpret them independently, or can reject that something is customary law altogether. For instance, many

³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 1, § 102.

⁴ Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 373 (2002).

⁵ *Id.*

⁶ *Id.*

⁷ Bradley & Goldsmith, *supra* note 2, at 818.

countries advocate that certain economic and social rights have become CIL, and many others reject that notion.⁸ Despite the ambiguous nature of CIL, it is as legally binding as treaty law.⁹

In recent years, conceptions of CIL have been expanding. As international treaties began to address human rights issues more frequently, so did customary law. The international community, thus, began to advocate for a broader range of protection under CIL. Specifically, countries expanded CIL to include social and economic rights, as well as a right for a free education.

It is well established that international law, which includes customary law, is part of United States federal law. As stated in *The Paquete Habana* in 1900, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁰ However, the relationship between CIL and federal courts remains unclear; it is particularly unclear as to how these courts are to enforce this body of law. For many years, CIL was predominantly viewed as enforceable in the United States as federal common law.¹¹ Recently, the transition from international law primarily addressing direct international relations to also regulating a nation’s relationship with its citizens has sparked a new debate about the source of enforceability. Particularly, the Court’s decision in *Erie Railroad Co. v. Tompkins*, which eliminated federal common law, challenged the earlier position that held that CIL was enforceable.¹² Consequently, there has been a great deal of scholarship surrounding the status of customary law in the United States.

⁸ *Id.*

⁹ *Id.*

¹⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹¹ Young, *supra* note 4, at 367.

¹² *Id.*

Jus cogens (“compelling law”) is a set of norms within CIL. *Jus cogens* is often referred to as the “peremptory norms of international law.”¹³ Legally, peremptory refers to something that is “final; conclusive; incontrovertible.”¹⁴ Thus, *jus cogens* are the norms of international law that cannot be derogated or deviated from. There is no situation that would warrant derogation from a norm considered to be *jus cogens*. Therefore, a country that violates *jus cogens* breaks international law regardless of whether it ever formally consented to that norm.¹⁵ A commonly accepted *jus cogens* is the prohibition against genocide or slavery.¹⁶

B. WHAT IS INTERNATIONAL TREATY LAW?

The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law...”¹⁷ An international treaty is thus an agreement that creates obligations among the ratifying countries, namely those that agree to be bound by the treaty’s terms.¹⁸ Representatives from various countries negotiate the terms of the treaty until they agree upon specific terms and language.¹⁹ The representatives then return to their countries where the law of that country dictates whether the country will sign or ratify the treaty.²⁰

¹³ Chrissy Fox, *Implications of the United States’ Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations*, 11 TUL. J. INT’L & COMP. L. 303, 321-22 (2003).

¹⁴ *Peremptory*, BLACK’S LAW DICTIONARY (10th ed. 2014), available at Westlaw BLACKS.

¹⁵ Bradley & Goldsmith, *supra* note 2, at 840.

¹⁶ *Id.*

¹⁷ Vienna Convention on the Law of Treaties, art. 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁸ Kenneth Gallant, *American Treaties, International Law: Treaty Interpretation after the Biden Condition*, 21 ARIZ. ST. L. J. 1067, 1070 (1989).

¹⁹ See Aida Torres Perez, *The Internationalization of Lawmaking Processes: Constraining or Empowering the Executive?*, 14 TULSA J. COMP. & INT’L L. 1, 9 (2006).

²⁰ See Julia Yoo, *Participation in the Making of Legislative Treaties: The United States and Other Federal Systems*, 41 COLUM. J. TRANSNAT’L L. 455 (2003).

For a treaty to fully enter into force, a country must both sign and ratify the international document.²¹ When a country signs but does not ratify a treaty, it is nonetheless bound not to directly violate the terms of the agreement.²² When a country ratifies an international treaty, its government is required to take affirmative steps to uphold the mandates and requirements of that treaty.²³ In other words, once a country ratifies a treaty, it is legally bound by that treaty and obligated to comply with its terms and provisions.²⁴ Consequently, whether a country has only signed a treaty or the country has both signed and ratified it can impact the country's obligations under that treaty.

In the United States, the Executive Branch possesses the authority to negotiate, sign, and ratify a treaty.²⁵ However, before the President can ratify a treaty, a two-thirds majority of the Senate must consent to the ratification.²⁶ Often the Senate's consent is conditioned on the President communicating certain reservations, understandings, and declarations (RUDs) about the treaty to the other parties.²⁷ While the United States has signed and ratified many international treaties, whether these treaties are actually enforceable domestically remains a contested question for some but for others, the answer is an unequivocal yes.²⁸

C. WHAT IS AN INTERNATIONAL *HUMAN RIGHTS* TREATY?

²¹ Office of the High Commissioner on Human Rights, Fact Sheet No. 30/Rev.1: *The United Nations Human Rights Treaty System*, at 58-60 (Aug. 2012), available at <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> [hereinafter OHCHR Fact Sheet No. 30]. A state may also become a party to a treaty through accession. Accession involves a country depositing an "instrument of accession" with the Secretary General of the UN. It has the same legal effect as signing, and ratifying a treaty. It is distinct only in that it is a one step process.

²² *Id.* at 59.

²³ *Id.* at 58-59.

²⁴ *Id.*

²⁵ Gallant, *supra* note 18, at 1070.

²⁶ *Id.*

²⁷ *Id.*

²⁸ RUDs will be discussed more fully in Chapter Two.

Prior to World War II, international treaties primarily addressed “*inter-national* matters such as the rules of war, maritime boundaries, and diplomatic immunity.”²⁹ However, the atrocities of the Holocaust transformed what the international community sought to address through international treaties.³⁰ Previously, how an individual country treated its own citizens may have strictly been a matter for that country. After World War II, however, the international community began attempts to protect human rights through international declarations and treaties.³¹

The modern movement to promote and defend human rights began with the United Nations Charter and the General Assembly’s 1948 Universal Declaration on Human Rights (UDHR).³² The UDHR listed numerous rights such as equal dignity of all human beings, a right not to be enslaved or tortured, and a right to an effective remedy.³³ Upon adopting the UDHR, member states “pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”³⁴ Significantly, the UDHR held that “[a]ll human beings are born free and equal in dignity and rights,”³⁵ and that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³⁶ The UDHR, however, is not a treaty, and, consequently, there is no mechanism for enforcement as it does not carry the force of international treaty law.³⁷

²⁹ Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, I GREEN BAG 2D 365, 365 (1998).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR].

³⁴ *Id.* at preamble.

³⁵ *Id.* at art. 1.

³⁶ *Id.* at art. 5.

³⁷ Goldsmith, *supra* note 29, at 365.

It has, nevertheless, entered the realm of CIL and has been especially influential in shaping international human rights law and is universally understood to establish human rights standards.

Following the UDHR, the international community, led by the UN, began the process of drafting and promulgating treaties that sought to protect human rights issues across the globe. To date, there are nine core international human rights treaties:

1. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
2. International Covenant on Civil and Political Rights (ICCPR);
3. International Covenant on Economic, Social and Cultural Rights (ICESC);
4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
5. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT);
6. Convention on the Rights of the Child (CRC);
7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
8. International Convention for the Protection of all Persons from Enforced Disappearance; and
9. Convention on the Rights of Persons with Disabilities.³⁸

Each of these treaties addresses distinct human rights issues and seeks to create international standards for protecting fundamental human rights. Furthermore, these treaties clearly demonstrate the shift in the international community towards regulation of a nation's relationship with its citizens. Currently, the United States has only signed and ratified the ICCPR, ICERD, and CAT.³⁹

II. WHAT DO INTERNATIONAL HUMAN RIGHTS TREATIES SAY?

For purposes of understanding the human rights obligations undertaken by the United States, it is important to explore the text and language of the relevant treaties, and their

³⁸ The Core International Human Rights Instruments and their Monitoring Bodies, OHCHR.ORG, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited April 16, 2016).

³⁹ Ratification Status for the United States of America, OHCHR.ORG http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN (last visited April 17, 2016).

significance. The ICCPR and the CAT are the primary treaties that govern issues related to extraordinary rendition and torture. The Vienna Convention on the Law of Treaties provides necessary background to both of those treaties and provides a context for interpreting a country's obligation under an international human rights treaty.

A. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The rules governing all international treaties were established by the Vienna Convention on the Law of Treaties. Originally initiated by the UN General Assembly, a group of 34 publicists worked for over two decades to design the treaty.⁴⁰ Called the “treaty of treaties[.]”⁴¹ the final work has eight parts that elucidate how to create treaties, how to amend and interpret treaties, and how to invalidate and terminate treaties.⁴²

The Vienna Convention on the Law of Treaties (Vienna Convention) sought to codify certain customary law principles. Specifically, it sought to promote “the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations.”⁴³ While the United States has never formally ratified this treaty, it has nevertheless found it to be binding as CIL.⁴⁴ The United States has stated its agreement that “according to a widespread *opinion juris*, legal conviction of the international community, the Vienna Convention represents a treaty which to a large degree is a restatement of customary rules, binding States regardless of whether they are parties to the Convention.”⁴⁵ Thus, in a sea

⁴⁰ *Id.*

⁴¹ *Id.* (citing Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970)).

⁴² *Id.* at 438.

⁴³ Vienna Convention, *supra* note 17, preamble.

⁴⁴ Statement by U.S. Department of State on the Vienna Convention Law of Treaties, <https://www.state.gov/s/l/treaty/faqs/70139.htm>, last viewed Jan. 3, 2017, John N. Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 891 (1999).

⁴⁵ *Id.* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281, 285 (1987).

of uncertainty about whether treaties are binding or not, it seems that the “treaty of treaties”⁴⁶ is one in which the process of signing and ratifying to ensure implementation of the treaty is not necessary.

Under Article 18 of the Vienna Convention, “[a] State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) [i]t has signed the treaty...”⁴⁷ This language demonstrates the treaty authors’ intent and understanding that state parties to a treaty must and will act in accordance with the articulated principles. Member states are to act in accordance with not only the specific mandates of the treaty, but also the purpose of the treaty. Additionally, Article 26, which codifies what is known as *pacta sunt servanda* (“agreements must be kept”), states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴⁸ This article demonstrates the expectation that member nations will act in good faith to fulfill the obligations expressed in the treaties they have entered into. Both of these articles illustrate the drafters’ intent for these treaties to be enforceable through the text of the treaty alone.

Articles 19 and 20 establish an important precedent for all future treaties. These articles provide that a ratifying country can make their ratification contingent upon certain reservations, understandings, and declarations (RUDs).⁴⁹ A reservation generally restricts the applicability of certain articles of an international treaty.⁵⁰ An understanding, however, clarifies the ratifying country’s interpretation of the relevant article. A declaration proclaims a country’s direct stance

⁴⁶ Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495 (1970).

⁴⁷ Vienna Convention, *supra* note 17, art. 18.

⁴⁸ *Id.* at art. 26.

⁴⁹ *Id.* at arts. 19, 20.

⁵⁰ For example, in the ICCPR, Article 7 held that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The United States maintained a reservation, which stated it was bound to Article 7 only to the extent “‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.”

on a particular provision. A country can, thus, seemingly reject portions of the treaty provided it did so formally in an RUD. Many countries, including the United States, frequently only ratify international treaties with express RUDs. One of the most known and most criticized declarations is the United States' declaration that these international treaties are not self-executing, which will be discussed more fully in subsequent Chapters.⁵¹

Article 31 attempts to prevent future confusion over interpretations of the text of this treaty. It sets forth the general rule of interpretation, requiring that treaties entered into must 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.”⁵² Consequently, member states are to interpret a treaty purely by the ordinary meaning of the terms in a way that honors and respects the object and purpose of the treaty.

The Vienna Convention, thus, establishes the foundation for understanding a country's obligations under an international treaty. A country that has adopted the Vienna Convention must apply its terms to any subsequent treaty it adopts. The United States, as a country that has accepted the Vienna Convention as international customary law, is therefore bound by this treaty and must interpret its international obligations under the Vienna Convention's provisions.

B. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Following the UDHR, the Commission on Human Rights began drafting an international treaty that codified the fundamental human rights of the UDHR.⁵³ The hope was that through this treaty, the UDHR would be legally binding on ratifying countries and carry the force of law

⁵¹ U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Declaration 1.

⁵² Vienna Convention, *supra* note 17, art. 31.

⁵³ OHCHR Fact Sheet No. 30, *supra* note 21, at 7.

internationally.⁵⁴ While the Commission initially pursued a single treaty, it ultimately drafted two treaties: (1) The International Covenant on Civil and Political Rights⁵⁵ (ICCPR), and (2) International Covenant on Economic, Social and Cultural Rights⁵⁶ (ICESC). Together, these treaties are known as the International Bill of Human Rights.⁵⁷ They were adopted in December of 1966 by the General Assembly and entered into force in 1976.⁵⁸ While the United States has signed and ratified the ICCPR, it has only signed the ICESCR.

The ICCPR remains one of the most important human rights treaties. This treaty protects an expansive number of rights including the rights to life, liberty, privacy, freedom of expression, thought, religion, and basic criminal procedure protections. In addition to the primary treaty, the ICCPR also has two Optional Protocols. The First Optional Protocol establishes a mechanism for individual complaints to be brought against a member state to the Human Rights Committee.⁵⁹ The Second Optional Protocol eliminated the death penalty, but allowed countries to make a reservation for executions made “in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.”⁶⁰

Under Article 2 of the ICCPR a member state has an obligation to “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”⁶¹ Consequently, a state has an affirmative duty to actualize these rights within its jurisdiction, and not just prevent the violation of these rights. The ICCPR further establishes that a member state must “ensure that any person whose rights or freedoms as herein recognized are

⁵⁴ *Id.*

⁵⁵ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵⁶ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

⁵⁷ OHCHR Fact Sheet No. 30, *supra* note 21, at 6-7.

⁵⁸ *Id.* at 7.

⁵⁹ ICCPR, *supra* note 55, First Optional Protocol.

⁶⁰ *Id.* at Second Optional Protocol.

⁶¹ *Id.* at art. 2, para. 2.

violated shall have an effective remedy.”⁶² The right to a remedy is a powerful right. It requires that a member state provide its citizens a mechanism to remedy a violation of any of the other rights established in the ICCPR. ICCPR member states are obligated “to develop the possibilities of judicial remedy”⁶³ and “ensure that the competent authorities shall enforce such remedies when granted.”⁶⁴ The ICCPR treaty thus strongly establishes that nations that ratify this treaty must ensure that individuals who fall victim to a violation have a way to remedy that wrong.

The provisions of the ICCPR further create binding obligations upon state parties. Article 5 provides “[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”⁶⁵ By establishing that there may be no valid derogation from treaty terms means that under no circumstance is a country exempt from recognizing the fundamental human rights set forth in the document. Frequently, countries attempt to justify derogation from upholding human rights principles during wartime. Countries often argue that extreme tactics, such as torture, may be necessary during wartime to protect innocent civilians. However, Article 5 of the ICCPR rejects such a claim. The purpose of Article 5 is clear and contemplates no exceptions from treaty obligations. Furthermore, the treaty utilizes the term “pretext” to refer to attempts to deny or limit the rights within this treaty. The use of “pretext” clearly demonstrates that any explanation or justification, such as wartime, does not warrant derogation. Rather these explanations will be interpreted as artificial attempts to circumvent a country’s obligations under an international treaty.

⁶² *Id.* at art. 2, para. 3(a).

⁶³ *Id.*

⁶⁴ *Id.* at art. 2, para. 3(b).

⁶⁵ *Id.* at art. 5, para. 2.

Article 7 speaks directly to the subject matter of this policy report, stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” , “no one shall be subjected without his free consent to medical or scientific experimentation.” This Article specifically demands countries to abstain from torture. Coupled with Article 5, which prohibits derogation, the language of the treaty indicates that there are no circumstances in which a country can justify torture. It does not matter that they are in wartime, or that a terrorist threat exists. The terms are unequivocal and clear: according to this treaty, torture can never be justified.

Similarly, Article 9 protects an individual’s criminal procedural rights, which are often violated in cases of extraordinary rendition. It establishes that an individual has the following procedural rights:

- (1) “No one shall be subjected to arbitrary arrest or detention.”⁶⁶
- (2) They shall be informed of charges against them.⁶⁷
- (3) Brought before judge, entitled to trial within reasonable time or release⁶⁸
- (4) They have a right to contest the unlawfulness of detention⁶⁹
- (5) “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”⁷⁰

Article 10, further states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁷¹ Thus, even when an individual is lawfully detained or incarcerated, they must be treated with respect. They should not be dehumanized or tortured, because incarceration does not negate an individual’s humanity and inherent worth. Consequently, incarcerated individuals must still be treated in a way that

⁶⁶ *Id.* at art. 9, para. 1.

⁶⁷ *Id.* at art. 9, para. 2.

⁶⁸ *Id.* at art. 9, para. 3.

⁶⁹ *Id.* at art. 9, para. 4.

⁷⁰ *Id.* at art. 9, para. 5.

⁷¹ *Id.* at art. 10, para. 1.

honors their inherent humanity and worth by guaranteeing them certain procedural protections and rights.

The ICCPR's text also established enforcement mechanisms that govern the treaty. Article 28 creates the Human Rights Committee, which is the governing body that oversees compliance with the ICCPR.⁷² By establishing this governing body, the treaty authors ensured that there would be a legal mechanism by which to protect the rights set out in the agreement. Article 40 requires that state parties submit reports about the measures each country has taken to give effect to the rights in the ICCPR.⁷³ Thus, Article 40 creates affirmative obligations for the state's party to this international treaty. The role of the Human Rights Committee will be discussed more fully in a subsequent section.

C. THE 1984 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

While the ICCPR contains a provision prohibiting torture and inhumane treatment, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) sought to further “develop a legal scheme aimed at both the prevention and punishment of these practices.”⁷⁴ The CAT begins by defining torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷⁵

⁷² *Id.* at art 28.

⁷³ *Id.* at art 40.

⁷⁴ OHCHR Fact Sheet No. 30, *supra* note 21, at 10.

⁷⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

Significantly, this definition acknowledges both physical and mental torture, each of which can have lasting effects on an individual. According to the treaty's definition, the serious infliction of pain must be for an impermissible purpose.⁷⁶ For example, the perpetrator must be hoping to gain a confession or knowledge from the victim through torture.⁷⁷ It also demonstrates that torture performed by agents of a public official still violate this treaty provision. A state, therefore, cannot delegate or outsource its torture to a third party as a means to avoid the obligations of this treaty.

The CAT then establishes an affirmative duty to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”⁷⁸ This creates an obligation for member state to do more than just abstain from torturing people, but must actually take steps to *prevent* torture. The CAT creates another affirmative obligation of the member states under Article 4, requiring that “[e]ach State Party shall ensure that all acts of torture are offenses under its criminal law.”⁷⁹ Member states, thus, must outlaw torture in their own countries and allow for the prosecution of those accused of such a crime.

The CAT requires not only for criminal recourse against offenders, but also provides for civil mechanisms for curing wrongs caused by torture. Article 14 holds that “[e]ach 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.”⁸⁰ Consequently, a member state must not only prosecute those who

⁷⁶ See Oona Hathaway, Aileen Nowlan, Julia Speigel. *Tortured Reason: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 806-07 (2012).

⁷⁷ *Id.* However, it does not require that the torturous act be successful in achieving that purpose.

⁷⁸ CAT, *supra* note 75, art. 2, para. 1.

⁷⁹ *Id.* at art. 4.

⁸⁰ *Id.* at art. 14, para. 1.

torture within their borders, but they must create avenues for victims to pursue compensation. This obligation serves to recognize the harm that torture causes and that victims have “an enforceable right” to make whole.

The CAT not only prohibits a member state from committing acts of torture, but it also prohibits what is known as *refoulement*. Article 3 of the CAT prevents a country from “expel[ing], return[ing] (“*refouler*”) or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁸¹ Member states thus have an obligation to prevent torture that might occur outside of their jurisdiction by other countries. The prohibition against *refoulement* demonstrates the breadth of the CAT, and its purpose in seeking to eliminate torture globally. Article 3 ensures that fundamental rights are respected internationally and seeks to eliminate torture wherever it may occur.

Evoking the principle of non-derogation contained in the ICCPR, the CAT holds that “[n]o exceptional circumstances warrant torture.”⁸² Under this paragraph, war and the possibility of terrorist acts or other national security threats can never justify the use of torture. It unequivocally holds that there are *no exceptional circumstances* that justify the use of torture. The CAT further states “orders from a superior may not be invoked as a justification”⁸³ and, therefore, denies perpetrators of torture the defense that “they were just following orders.” It acknowledges that individuals are responsible for their actions and cannot escape responsibility solely because they were ordered to do something.

As with the ICCPR, the CAT also creates a governing body for the purposes of overseeing the implementation of this treaty. Article 17 establishes the Committee Against

⁸¹ *Id.* at art. 3, para. 1.

⁸² *Id.* at art. 2, para. 2.

⁸³ *Id.* at art. 2, para. 3.

Torture.⁸⁴ This Committee “shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity.”⁸⁵ Under Article 19, member states are required to submit an initial report to the Committee one year after the treaty has entered into force, which details the steps the member state has made to comply with the obligations of the treaty.⁸⁶ The member state must then submit a report on its progress every four years and any other supplementary report the Committee requests.⁸⁷ Additionally, an Optional Protocol to the CAT (OPCAT) went into force in June of 2006.⁸⁸ OPCAT’s objective was to “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”⁸⁹

Both the ICCPR and the CAT seek to protect fundamental human rights that directly pertain to the use of torture. The language of the ICCPR and CAT demonstrates that the drafters intended for these treaties to be enforceable without exception and provide remedies for individuals whose rights have been violated. Furthermore, the Vienna Convention on Treaties articulates how these treaties are to be interpreted and establishes that these treaties create enforceable obligations for the ratifying countries.

D. GOVERNING BODIES AND ENFORCEMENT OF THE ICCPR AND CAT

The intent for the ICCPR and CAT treaties to be internationally implemented and enforceable is best demonstrated through the establishment of governing bodies which oversees treaty compliance through monitoring processes and special procedures. These governing bodies

⁸⁴ *Id.* at art. 17, para. 1.

⁸⁵ *Id.* at art. 17, para. 2.

⁸⁶ *Id.* at art. 19, para. 1.

⁸⁷ *Id.* at art. 19, para. 2.

⁸⁸ *Id.* at Optional Protocol.

⁸⁹ *Id.* at Optional Protocol, art. 1.

help materialize these treaties and ensure that they are not just empty promises and wishful thinking. However, it should be noted that these governing bodies are not identical to courts of law. Their jurisdiction is limited and somewhat conditioned on a member states' willingness to participate. Whether they possess the ability to truly punish or penalize a country that is not complying with the treaty remains a contested issue. This section will explore the mechanisms utilized by both the UN Human Rights Committee and the Committee Against Torture. It will also discuss the Human Rights Council and the Universal Periodic Review, which serve as additional means to hold countries accountable for human rights violations.

1. UN Human Rights Committee

Article 28 of the ICCPR establishes the UN Human Rights Committee as the governing body that oversees implementation and enforcement of the ICCPR.⁹⁰ This provision establishes the mandatory reporting procedure for member states.⁹¹ Member states must submit a report that describes how rights are being implemented one year after acceding to the Convention and thereafter every four years.⁹² Upon receiving these reports, the Human Rights Committee then addresses its concerns and recommendations in what it calls “concluding observations.” In these concluding observations, the Human Rights Committee generally acknowledges the positive steps the country has taken and then notes areas for improvement.

Article 41 of the ICCPR establishes the procedure for “inter-state complaints.” Under this provision, member states can initiate complaints against other member states if it is believed a state is not abiding by the terms of the Convention.⁹³ Initially, these complaints remain strictly

⁹⁰ ICCPR, *supra* note 55, art. 28.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at art. 41 para. 1.

between the two member nations.⁹⁴ However, if the matter is not resolved between the parties within three months, either party can refer the matter to the Committee.⁹⁵

In addition to overseeing the reporting procedures established by the ICCPR, the Human Rights Committee issues general comments. Through these general comments, the Human Rights Committee publishes its interpretations of certain human rights provisions. These comments address both thematic issues as well as methodologies for implementing human rights work. For example, the Human Rights Committee might issue a general comment on a thematic issue such as widespread abuse of migrant workers, but it may also issue a comment about how countries are implementing protections for those workers.

2. The Committee Against Torture

The Committee Against Torture is a body of ten independent experts that monitor implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. Similar to the Human Rights Committee, the Committee Against Torture monitors the implementation and reporting requirements established by the CAT.⁹⁶ As with the ICCPR, state parties are required to submit an initial report one year after ratifying the convention and thereafter once every four years.⁹⁷ Article 20 authorizes the Committee Against Torture with greater investigatory power than that possessed by the Human Rights Committee. If the Committee Against Torture receives reliable information that a member state is systematically torturing those within its jurisdictions, it can invite that state to participate

⁹⁴ *Id.* at art. 41 para. 1(a).

⁹⁵ *Id.* at art. 41 para. 1(b).

⁹⁶ *Id.* at art.17 para. 1.

⁹⁷ *Id.* at art.19 para. 1.

in an examination of the suspected activity.⁹⁸ However, if the Committee Against Torture finds that process insufficient, it can also make a confidential inquiry into the matter.⁹⁹

Article 22 authorizes the Committee Against Torture to receive individual complaints from victims of torture from state parties that have declared that they accept the complaint process and recognize the Committee's authority to entertain the complaint.¹⁰⁰ It is noteworthy that the CAT articulates the Committee's authority in the main treaty body in comparison with the ICCPR, which only authorizes the Human Rights Committee to receive individual complaints as part of the Second Optional Protocol. A state party, nonetheless, must still signal their assent to the complaints process and declare that they are willing to accept individual complaints.¹⁰¹ As a result, a state party may be able to evade this review in an effort to limit the Committee Against Torture's authority.

3. The Human Rights Council and the Universal Periodic Review

The Human Rights Council, although not a direct governing body for either of the discussed treaties, functions as a relevant and significant enforcing body. The Human Rights Council is an "inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them."¹⁰² The Council holds hearings throughout the year that address both thematic issues as well as specific human rights violations to be addressed.¹⁰³

⁹⁸ *Id.* at art. 20 para. 1.

⁹⁹ *Id.* at art. 20 para. 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at art. 20, para. 2.

¹⁰² Welcome to the Human Rights Council, OHCHR.ORG,

<http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited April 16, 2016).

¹⁰³ *Id.*

The Human Rights Council also established a monitoring process known as the Universal Periodic Review (UPR), which involves a review of the human rights records of all UN member states.¹⁰⁴ The UPR is a state-driven and cooperative process that allows states to demonstrate what actions they have taken to improve human rights conditions in their countries.¹⁰⁵ The UPR was created in 2006, and by 2011 it has successfully reviewed the records of all 193 UN member states.¹⁰⁶ Perhaps of greatest significance, every UN member state is subject to review by the Human Rights Council and will have their human rights record considered through the UPR process without regard to whether it has ratified the ICCPR or the CAT.

All three of these governing bodies – the Human Rights Committee, Committee Against Torture, and the Human Rights Council – demonstrate the enforceable nature of these treaties. The ICCPR and the CAT were intended to be enforceable and carry legal consequences when violated. Furthermore, these governing bodies were established to ensure that countries remained committed to protecting fundamental human rights and were continually accountable for their measures to protect those rights.

E. THE UNITED STATES' RELATIONSHIP WITH THE ICCPR AND CAT

There are a number of treaties that the United States has signed but not ratified. The United States, however, has signed and ratified both the ICCPR and the CAT.¹⁰⁷ Thus, the United States is subject to the jurisdiction of these treaties' three main governing bodies. Accordingly, the United States, in keeping with its treaty obligations, *should* be required to take affirmative steps to uphold treaty provisions, to act in concert with the purposes of the treaties, and to be accountable to the governing bodies. The United States, however, has adopted multiple

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Universal Periodic Review, OHCHR.ORG, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx> (last visited April 16, 2016).

¹⁰⁷ Ratification Status for the United States of America, *supra* note 39.

RUDs for each of these treaties in an effort to limit the full effect of treaty standards.¹⁰⁸

Notwithstanding the proclamations that it is a leader in human rights globally, the United States often receives rather negative reviews when appearing before treaty bodies in large part due to its wide use of RUDs. This section will address the greatest concerns of the Human Rights Committee and the Committee Against Torture when assessing US treaty implementation with regard to the issue of torture.

1. ICCPR and the Human Rights Committee's Concluding Observations

The United States signed the ICCPR in 1977 but significantly delayed ratification until 1992, at which time it finally bound itself to undertake affirmative steps towards realization of the treaty protections. The United States, however, has refused to sign or ratify either of the Optional Protocols of the ICCPR. The First Optional Protocol abolished the death penalty. It is true, nonetheless that although the United States rejected this protocol, it has made significant strides in restricting the death penalty in recent years. For example, the United States has abolished the death penalty for juveniles,¹⁰⁹ the intellectually disabled,¹¹⁰ and restricted it to only first-degree homicide charges.¹¹¹ Notably, these new limitations on the death penalty were largely due to the influence of international human rights law.¹¹² The Second Optional Protocol authorizes the Human Rights Committee to receive and hear individual complaints from people who claim that their fundamental human rights as protected under this treaty were violated.

¹⁰⁸ This will be discussed more fully in Chapter Two, The United States and Their RUDS: Contextual Implications to Human Rights Treaties.

¹⁰⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹¹⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

¹¹¹ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹¹² *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.”).

The United States most recently appeared before the Human Rights Committee in 2014. This was the country's fourth periodic review.¹¹³ While the Human Rights Committee offered some positive comments about human rights enforcement measures undertaken by the United States, the majority of the Committee's concluding observations were unfortunately negative.

The Human Rights Committee's first concern about the United States was its continued refusal to accept that the treaty applies to "individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence."¹¹⁴ This position, taken together with the United States' declaration that this treaty is non-self-executing, (i.e., judicially enforceable only upon the enactment of legislation) "considerably limit[s] the legal reach and practical relevance of the Covenant (art. 2)."¹¹⁵ The Committee demonstrated significant concern with regard to the United States' practice of Extraordinary Rendition and its efforts to attempt to circumvent its ICCPR treaty obligations.

The Committee also explicitly requested the United States to reconsider its declaration that the ICCPR is non-self-executing and to give ordinary meaning to the words of the treaty.¹¹⁶ Furthermore, it admonished the United States that in light of the non-self-executing declaration, as a state party, it must ensure that legislative action is taken to give force to this treaty at the federal, state and local level.¹¹⁷ All these requests demonstrate that the Committee is not satisfied with the United States' actions and interpretation of the ICCPR.

¹¹³ Concluding Observations on the Fourth Periodic Report of the United States of America, Human Rights Committee (April 22, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=187.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Next, the Committee stated its concern about the lack of accountability for previous human rights violations.¹¹⁸ Specifically, the Committee expresses concern about

the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the United States Government, including private contractors, for unlawful killings during its international operations, and the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called “enhanced interrogation techniques.”¹¹⁹

The Committee urged the United States to ensure that all cases of torture, unlawful killing, unlawful detention and more, be investigated and properly prosecuted.¹²⁰ The Committee also asked the United States to promote transparency by declassifying the entire Senate Report on Torture.¹²¹

The Committee criticized the United States for its “lack of comprehensive legislation criminalizing all forms of torture, including mental torture, committed within the territory of the State party” as well as its lack of mechanisms for victim compensations.¹²² The Committee urged the United States to ensure there are adequate criminal and civil mechanisms to address valid claims of torture.

The final related recommendation concerned the United States’ relationship with non-refoulement. The Committee acknowledged that the United State has demonstrated respect for this principle in many contexts, but expressed grave concern that the State Department has continued to maintain that the ICCPR does not cover the principle of non-refoulement.¹²³ The Committee expressed concern that the United States relies on diplomatic assurances from other

¹¹⁸ *Id.* at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 6.

¹²³ *Id.*

countries, which often lack the necessary safeguards, rather than strictly abiding by the terms of the ICCPR.¹²⁴

All of these concerns and recommendations demonstrate that the United States is not fully living up to its obligations under the ICCPR in regard to torture. Rather, the Human Rights Committee is clearly concerned that the United States is circumventing important obligations and undermining the purposes of the treaty through its RUDs.

2. The CAT and the Committee Against Torture’s Concluding Observations

In April of 1988, the United States signed the CAT, and subsequently ratified it in 1994.¹²⁵ As with the ICCPR, the United States has not adopted the Optional Protocol of the CAT. However, the United States remains subject to the Committee Against Torture and must submit reports and undergo regular reviews before the Committee.

The United States most recently appeared before the Committee Against Torture in 2014. This review addressed the third to fifth periodic reviews of the United States.¹²⁶ As with the ICCPR, the Committee gave the United States brief praise, but primarily focused on significant weaknesses with regard to its treaty obligations. The Committee Against Torture made a number of recommendations to improve the United States’ protection of human rights under the CAT.

The Committee Against Torture first expressed concern over the United States’ failure to criminalize torture at a federal level and its overly restrictive understandings of the CAT.¹²⁷ It requested that the United States withdraw some of its reservations and understandings, particularly noting, “under international law, reservations that are contrary to the object and

¹²⁴ *Id.*

¹²⁵ Hathaway, *supra* note 76, at 806-07.

¹²⁶ Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, Committee Against Torture (Dec. 18, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=187.

¹²⁷ *Id.* at 2.

purpose of a treaty are not permissible.¹²⁸ The Committee was specifically concerned about the United States' introduction of the subjective element, "prolonged mental harm," in its definition of psychological torture.¹²⁹ With regards to this definition, the Committee went as far as to say that "serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity."¹³⁰

While the Committee applauded the United States' "unequivocal commitment to abide by the universal prohibition of torture and ill-treatment everywhere," it strongly criticized its use of reservations to create legal arguments to justify interrogation tactics that amount to torture.¹³¹ The Committee, thus, acknowledged that some of the US' RUDs undermine CAT's terms and purpose. Such RUDs violate the Vienna Convention on the Law of Treaties and should not be upheld.

The concluding observations of both governing bodies demonstrate the international dissatisfaction with United States' actions under both of these treaties. The United States continues to skirt its obligations under the ICCPR and the CAT while lauding itself as a leader in human rights.

3. Advocacy Groups

Beyond the governing bodies of these treaties, non-governmental organizations (NGOs) and other advocacy groups work towards full implementation of international human rights treaties. Such groups conduct independent investigations and reviews of US action and then publish reports on their findings. Specifically, they identify problems and make independent

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 3.

recommendations on how these issues can be resolved. Most significantly, many of these reports advocate for the enforceability of international human rights treaties.

One prominent group is the US Human Rights Network (USHRN). The USHRN is comprised of organizations and individuals across the United States who are committed to defending and realizing human rights.¹³² The USHRN has a taskforce devoted to enforcing both the ICCPR and the CAT.¹³³ One of the most influential things that these taskforces do is coordinate the production of shadow reports, which are then submitted to the governing bodies during the formal review process.

Civil bodies such as public interest law firms, civil rights attorneys, and human rights experts write shadow reports, or alternative reports. These reports seek to assist the governing bodies by providing on the ground information about what is happening in the United States in relation to these treaties.¹³⁴ They often provide firsthand accounts of human rights violations, which often give victims a voice that they would not otherwise have. The USHRN assists individuals in writing these reports and will also consolidate them for submission to the relevant governing bodies.¹³⁵ Many of the recommendations of these reports have been incorporated into the governing bodies' concluding observations. This advocacy, thus, serves two important functions: (1) to give victims an opportunity to tell their story and have that story heard, and (2) to advocate directly to the governing bodies and offer recommendations for better human rights protections.

III. CONCLUSION

¹³² About Us, USHRNETWORK.ORG, <http://www.ushrnetwork.org/about-us> (last visited April 17, 2016).

¹³³ Projects and Campaigns, USHRNETWORK.ORG, <http://www.ushrnetwork.org/our-work/projects-campaigns> (last visited April 17, 2016).

¹³⁴ See 10 Steps to Writing a Shadow Report, USHRNETWORK.ORG (2012), *available at* <http://www.ushrnetwork.org/resources-media/10-steps-writing-shadow-report>.

¹³⁵ *Id.*

This chapter explored international law and the specific language of both the ICCPR and the CAT. The language of these treaties demonstrates that the drafters intended for these treaties to be enforced and implemented in the member states. The provisions of the ICCPR and the CAT were not meant to be hollow words, but rather legally binding documents that guarantee protection for certain human rights. Particularly, considering the Vienna Convention, the ICCPR and the CAT together establish that the right to be free from torture is a right that is not subject to any derogation. Under these treaties, there is no situation that a country can use to justify the use of torture; consequently, if a country does resort to torture, that country violates international law. The United States' confirmed use of torture during the "War on Terror" violated the language and spirit of these treaties. The remaining question is, thus, whether the ICCPR and the CAT can be used as effective means to hold the United States and North Carolina accountable for these unjustified violations.

CHAPTER TWO

THE UNITED STATES, THE SUPREMACY CLAUSE, AND ITS TREATY RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS: CONTEXTUAL IMPLICATIONS TO ENFORCING HUMAN RIGHTS TREATIES

Perhaps the greatest challenges to understanding the issues relating to the enforceability of treaties derive from the practice of attaching treaty limitations through Reservations, Understandings, and Declarations (RUDs), and how such limitations square with the text and history of the Supremacy Clause of the United States Constitution. As described in this Chapter, the text of the Supremacy Clause states unequivocally that treaties shall be the law of the land. However, the United States consistently appends RUDs that not only serve as an attempt to limit treaty obligations but also act to deny automatic treaty enforceability without further domesticating legislations. This Chapter first reviews RUDS and then considers the unresolved debates about their limitations and enforceability—especially those that declare a treaty to be non-self-executing. It then reviews the text and history of the Supremacy Clause as a way to resolve concerns about treaty enforceability. Chapter Three further explores related issues pertaining to federalism and treaty enforceability.

I. WHAT ARE RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS?

Reservations, understandings, and declarations (commonly referred to as RUDs) are attachments to treaties that modify how a treaty party interprets and follows the treaty. The Vienna Convention on the Law of Treaties has defined a reservation as “a unilateral statement, however phrased or named . . . whereby [a State] purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.”¹ Therefore a Reservation is technically both an Understanding and a Declaration. In the case of the United States, RUDs

¹ Vienna Convention on the Law of Treaties, Art. 1(d) *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

have particular bearing on whether and how a treaty provision is enforced in the U.S. judicial system. RUDs may attempt to limit the applicability of a provision and further denote whether the treaty is self-executing, thus requires no further implementing legislation to be enforceable, or whether the treaty is non-self-executing and requires the additional passage of domesticating statutes.²

Some have questioned whether the use of RUDs should be allowed at all when signing and ratifying a treaty because RUDs can effectively undermine the purpose behind the original treaty. The Vienna Convention on the Law of Treaties sets forth guidelines for RUDs and whether and how they should be allowed. Section 2, Article 19 of the Convention provides that

[a] State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless: (a) [t]he reservation is prohibited by the treaty; (b) [t]he treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) [i]n cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.³

For purposes of determining the effect of U.S. RUDs, sub-paragraph (c) is vitally important. It means that if the RUD attached to the treaty by the reserving country falls outside of or defeats purpose or spirit of the treaty, it should not and cannot be allowed.

There has been no clear definition provided by the International Court of Justice (ICJ) or any other international treaty body that purports to define what makes a particular RUD “incompatible with the object and purpose of the treaty.”⁴ As international law scholar Louis Henkin has noted, “[o]f particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure

² Human Rights in the U.S.: A handbook for Legal Aid Attorneys, 18 (2013).
http://www.americanbar.org/content/dam/aba/events/international_law/2014/06/international-families/domestic6.authcheckdam.pdf

³ Vienna Convention, art. 19.

⁴ *Id.*

compliance with Covenant obligations. No real international rights or obligations have thus been accepted.”⁵

Countries that attach RUDs may be less reliable treaty partners as they may use RUDs to avoid full compliance. However, the consequences of disallowing RUDs are also troubling. It is possible that fewer countries would ratify treaties without modification of obligations, thus jeopardizing treaty usefulness which depends on a certain number of signatories to ensure that the standards and values can be effectively implemented. Given the choice between signing and ratifying a treaty with the inclusion of certain RUDs or not signing and ratifying the treaty at all, many international law scholars and advocates believe it is important to encourage treaty ratification notwithstanding limitations created by the RUDs. Nations that include RUDs are incorporated into the treaty monitoring systems and thus must comply with reporting obligations and agree to a monitoring process by the various treaty bodies. Thus, encouraging states to ratify with limitations may allow more oversight than would be possible if the state did not ratify at all.

On the other hand, allowing the use of RUDs as a means to diminish the full import of a treaty may contribute to the overall diminishment of international human rights mechanisms. This may be an outcome more detrimental to genuine human rights enforcement than countries leaving the treaty. The treaty would exist but would have little if any effect. Thus, many scholars argue that treaty bodies should consider ways to regulate the RUD processes of state parties.

On consideration, it seems that it is more beneficial for human rights bodies to disallow state parties to attach RUDs that undermine the treaty and that are not countenanced by the Vienna Convention on Treaties, Section 2 Article 19. Countries would thus have to decide whether to be included in a treaty system with mutual obligations and commitments, including

⁵ Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 343, note 11 (1995).

the opportunity to monitor other nations, or stand outside of the treaty mechanisms with little to no influence.

II. RUDS, THE SUPREMACY CLAUSE AND THE DEBATE ABOUT SELF-EXECUTING VS. NON-SELF-EXECUTING TREATIES.

A. SELF-EXECUTING VS. NON-SELF-EXECUTING TREATIES

The United States has attached reservations, understandings, and declarations (RUDs) to every human rights treaty that it has signed and ratified, including the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).⁶ One of the most problematic RUDs attached by the United States is that which asserts that the ratified treaty is non-self-executing.⁷ A self-executing treaty is one that can be directly applied as part of domestic law in the United States immediately upon signing and ratification.⁸ Treaties that are deemed non-self-executing require implementing legislation to provide U.S. courts with legal authority to execute the functions and obligations intended by the treaty or to make them enforceable by private parties in court remains a contested matter.⁹

The scholarship that examines when treaties are self-executing and when they require further implementing legislation is neither straightforward and the ongoing debates have done little to resolve the issues. Indeed, federal courts have noted that the issue is “the most confounding” in international treaty law.¹⁰ International law scholar Professor Vázquez who argues that treaties should be presumptively declared self-executing, acknowledges that there

⁶ SEAN D. MURPHY, *PRINCIPALS OF INTERNATIONAL LAW* 234 (2nd ed. 2006).

⁷ *Id.* at 254.

⁸ Murphy, *supra* note 6, at 254.

⁹ Michael John Garcia, *International Law and Agreements: Their Effect upon U.S. Law*, CONGRESSIONAL RESEARCH SERVICE, 12 (Feb. 8, 2015), <https://fas.org/sgp/crs/misc/RL32528.pdf>.

¹⁰ *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *United States v. Noriega*, 808 F.Supp. 791, 797 (S.D. Fla. 1992).

certain types of treaties that might be non-self-executing treaties.¹¹ Others suggest that a treaty or treaty provision should be determined to be self-executing or not by ascertaining the collective intent of the treaty parties.¹² The *Restatement (Third) of Foreign Relations Law* takes a different view and states that it is the intent of the United States treaty makers that should be dispositive on whether a treaty or treaty provision is self-executing.¹³ As Bradley observes, “[t]he *Restatement* reasons that whether a treaty is self-executing concerns a matter of internal implementation and thus is normally something to be decided by each country individually.”¹⁴

The *Restatement’s* view has been criticized for being inconsistent with the Supremacy Clause, the treaty makers’ powers under Article II of the Constitution, and early Supreme Court decisions on the matter.¹⁵ As one writer has observed, “the long-debated distinction between self-executing and non-self-executing treaties is, from a constitutional standpoint, no debate at all. All treaties are and must be self-executing because there is no general constitutional power on the part of Congress to execute their terms once the treaty is enacted as law.”¹⁶ Others have similarly stated, that “the trend toward non-self-executing treaty declarations is unfortunate and should be resisted. Domestic judicial application of international treaties should be encouraged in the interests of effective enforcement of international law as well as the development of a body of jurisprudence under the treaties.”¹⁷ Professor Henkin proffers the view that however the debate as to whether all treaties should be presumptively automatically enforceable is resolved,

¹¹ Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2176–83 (1999). Professor Vázquez describes these as (1) unconstitutional treaties; (2) nonjusticiable treaties; (3) treaties that do not create a private right of action; and (4) treaties addressed to the legislature. *Id.*

¹² Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 543 (2008).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 54, 55 (2002-2003).

¹⁶ Gary Lawson, *Original Foreign Affairs Federalism*, 97 B.U. L. Rev. 301, 308 (2017).

¹⁷ Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 Chi.-Kent L. Rev. 515, 518 (1991).

they are legally binding on the United States and are the supreme law of the land.¹⁸ Henkin asserts it is the President's or Congress' obligation to ensure that a treaty is incorporated into the domestic law of the United States and in accordance with the Supremacy Clause and the United States' international obligations, they must develop it into a rule for the courts if the treaty so requires, "or if making it a rule for the courts is a necessary or a proper means for the United States to carry out its obligation."¹⁹ At least one court agrees and has given domestic effect to treaty provisions even if such treaty was declared to be non-self-executing.²⁰ International law scholar Professor David Sloss further points out that without a consistent understanding that treaties are enforceable as domestic law, RUDs that attempt to select some as self-executing and others as non-self-executing will impair the President's ability to conduct foreign policy.²¹

Finally, the Vienna Convention on the Law of Treaties provides guidance on the implementation of treaties declared to be non-self-executing. It is true that if the Senate attached a non-self-execution declaration, it would appear that its members intended that the treaty or treaty provision be non-self-executing. However, one must also examine the intent of a state party in signing and ratifying the treaty. The Vienna Convention on the Law of Treaties states that an RUD "cannot be incompatible with the object and purpose of a treaty."²² As the Human Rights Committee has observed, "reservations violative of the treaty's object and purpose may be severed from the instrument of ratification, such that the treaty remains 'operative for the reserving party without the benefit of the reservation.'"²³ Surely, a non-self-execution

¹⁸ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 201 (Clarendon Press, 2nd ed. 1997).

¹⁹ *Id.* at 201, 203–204.

²⁰ *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y., 2002).

²¹ Sloss, *supra* note 15, at 51 n. 225.

²² Vienna Convention, Art. 19.

²³ Human Rights Committee, *General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

declaration, if used for the purpose of avoiding treaty enforceability, is violative of the treaty's object and purpose since one of the most central purposes of a treaty is that it be implemented and its terms obeyed. As the next section demonstrates, the Supremacy Clause, its history and text, suggests that treaties should be considered enforceable and that their provisions function as the law of the land.

B. SELF-EXECUTING VS. NON-SELF-EXECUTING TREATIES AND THE SUPREMACY CLAUSE

The development of non-self-executing treaties through RUDs has garnered significant debate and criticism and goes to the heart of the meaning of the Supremacy Clause of the Constitution. In its entirety, the Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land*; and the *judges in every state shall be bound thereby*, anything in the constitution or laws of any state to the contrary notwithstanding.²⁴

While only eighteen words make up the Clause, it continues to be a contested passage when it comes to its interpretation. One crucial question surrounding the language of the Supremacy Clause is whether it signifies that treaties are self-executing and require nothing further to be enforceable or whether they are non-self-executing and require additional legislation for implementation. Scholars from both sides argue either that (1) treaties should be enforceable immediately after ratification or (2) treaties need subsequent legislation before they can be implemented, specifically at the state level. They support their arguments largely by making use of historical accounts, textual analysis, and the intent of the Framers.

1. A historical Analysis of the Supremacy Clause Shows that Treaties Entered into by the United States are Self-Executing Immediately after Ratification.²⁵

²⁴ U.S. CONST. art. VI, cl. 2 (emphasis added).

²⁵ For a thorough examination of the history of the Supremacy Clause, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89. AM. J. INT'L L. 695 (1995).

Some scholars point to the circumstances of the creation of the Constitution and note that the framers were aware of the challenges of treaty enforcement during the period of the Articles of Confederation during 1781-1789.²⁶ During this period, the government faced the challenge of enforcing international treaties. Specifically, the enforcement authority of the federal government with regard to the Treaty of Peace with Great Britain²⁷ was undermined because the individual states did not feel compelled to abide by the terms of the document.²⁸ These scholars have observed that the federal government's lack of authority when trying to achieve compliance was a reflection of Great Britain's practices with regard to treaties interpreted to require further action by the states for treaty enforcement. As Professor Vázquez has observed, states often refused or neglected to enact the required statutes and otherwise resisted Congressional efforts aimed at making treaties "binding and obligatory."²⁹

In essence, until the drafting of the Supremacy Clause, the United States had little-to-no means of enforcing treaty terms at the level of the domestic.³⁰ When addressing the enforceability dilemma at the Constitutional Convention, the Framers considered two different plans, both of which discussed ways to manage treaties. The Virginia Plan advocated for the need of subsequent legislation before treaties became domestic law, but also allowed federal legislation to act in place of state laws.³¹ Conversely, the New Jersey plan included a variation of the Supremacy Clause and stated that the Constitution, federal laws, and treaties would receive

²⁶ National Archives Education Staff, *Articles of Confederation*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=3> (last visited Apr. 12, 2016).

²⁷ The Treaty of Peace with Great Britain was the official document recognizing America as a sovereign nation and no longer under Great Britain's control. *Treaty with Great Britain (1783)*, BARTLEBY.COM, <http://www.bartleby.com/43/18.html> (last visited Apr. 12, 2016).

²⁸ Vázquez, *supra* note 25, at 697-98.

²⁹ *Id.*, at 698.

³⁰ *Id.*

³¹ *Id.*

automatic enforcement domestically, including recognition within the courts.³² The Framers ultimately selected the New Jersey plan, choosing to address and avoid treaty enforcement problems that persisted under British rule and the Articles of Confederation.³³ The Supremacy Clause requires courts to consider treaty provisions without additional legislation and “effectuated a wholesale incorporation of U.S. treaties into domestic law, dispensing with the need for retail transformation of treaties into domestic law by Congress.”³⁴ In his commentary on the Constitution, Justice Joseph Story observed that the Supremacy Clause was inserted as an effort to “‘obviate [the] difficulty’ of ‘the gross disregard[]’ of treaties by the states” which handled treaties “not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution.”³⁵ The concerns that existed at the time of the Clause’s enactment remain today: relying solely on the “good will” of the government at any level presents too many opportunities for human rights treaty violations for which there will be no remedy.³⁶

2. A Textual Analysis Finds that Treaties are Required to Become Legally Binding and Applied Domestically Immediately After Ratification.³⁷

As international law scholar Professor Jordan Paust observes, the United States Constitution does not require that a treaty be deemed “self-executing in order to be supreme law of the land.”³⁸ From the text of the Supremacy Clause of the United States Constitution, it would appear that treaties should be regarded as similar in level of authority to statutes passed by

³² *Id.*

³³ *Id.* at 699

³⁴ *Id.*

³⁵ Vázquez, *supra* note 25, at 697 (quoting Joseph Story, 3 Commentaries on the Constitution of the United States 696 (1833)).

³⁶ *Id.* at 699.

³⁷ This textual analysis mainly focuses on the research presented by Davis Sloss, an international law scholar who is well known for his published works advocating for domestic enforcement of international laws. The following textual argument is drawn principally from his article *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002).

³⁸ Jordan Paust, *Self-Executing Treaties*, 82 AM. J. OF INT’L L. 760, 767(1988).

Congress and signed by the President.³⁹ In fact, the Supremacy Clause states that “all” treaties made under the authority of the United States “shall” have the status of the supreme law of the land.⁴⁰ Therefore, the Supremacy Clause can be interpreted to mean that treaties do not require an act of Congress to translate them into law because they are already the law of the land.⁴¹

The Supremacy Clause was purposely included along with every other section in the Constitution.⁴² It was created to strike an “appropriate balance between competing rule of law and separation of powers principles,”⁴³ and it directly supports treaties being automatically applied domestically.⁴⁴ And while some sections of the Constitution are arguably unclear and may require thousands of pages of interpretation and numerous cases to determine the correct function, the Supremacy Clause is not one of them.⁴⁵ It makes evident that there are some theories that have been presented but cannot be accepted because they “are flatly inconsistent with the text of the Supremacy Clause.”⁴⁶ By simply reading the Clause, one would find that interpreting it further is unnecessary, and that it supports making all treaties domestic law.⁴⁷

Analyzing the “relevant parts” of the Clause shows that treaties create binding duties on the United States, not only internationally but also domestically.⁴⁸ This specific concept is called the qualified automatic conversion rule, which states

[s]pecifically, the phrase ‘*all Treaties*’ includes, at a minimum, all treaty provisions that create primary international legal duties binding on the United States. The phrase ‘*supreme Law of the Land*’ means that treaty provisions that create primary international duties have the status of primary domestic law. The phrase ‘*shall be*’ means that primary treaty duties must be converted into primary

³⁹ *Id.* at 766.

⁴⁰ *Id.*

⁴¹ Henkin, *supra* note 18, at 199.

⁴² Sloss, *supra* note 15 at 4.

⁴³ *Id.* See Chapter Three *infra*.

⁴⁴ Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156-57 (1999).

⁴⁵ Sloss, *supra* note 42, at 46.

⁴⁶ *Id.*

⁴⁷ Vázquez, *supra* note 44, at 2169.

⁴⁸ Sloss, *supra* note 15, at 47.

domestic law, either by means of implementing legislation or automatically by the force of the Supremacy Clause itself. Finally, the phrase ‘*made . . . under the Authority of the United States*’ excludes treaty provisions from the scope of the qualified automatic conversion rule insofar as the treaty makers lack the constitutional power to create a particular domestic legal rule by means of the treaty power.⁴⁹

In his argument that treaties should be enforced in domestic courts, Professor Vázquez points to the language in the Supremacy Clause that states that “The judges in every state shall be bound thereby” and argues that “[w]hen a treaty binds the United States to behave in a way towards a particular individual, the treaty is ‘judicially enforceable’ by the individual just as any statute or constitutional provision would be . . .”⁵⁰ As discussed above, the Framers gave treaties the power of domestic law in courts in order to avoid foreign relations issues that may arise from potential violations.⁵¹ Along with this, individuals are able to litigate any wrongdoings in court, which the Supreme Court has recognized as the “rule of equivalent treatment.”⁵² By adding domestic concepts, such as incorporating treaties into federal laws and the Constitution, the Supremacy Clause is able to “supplement international law mechanisms for enforcing treaties.”⁵³

Professor Henkin states that it is clear both from the Supremacy Clause and the language of Chief Justice Marshall, “that in the United States the strong presumption should be that a treaty or treaty provision is self-executing, and that a non-self-executing treaty is extremely rare.”⁵⁴ Henkin asserts:

The difference between self-executing and non-self-executing treaties is commonly misunderstood. Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not ‘a rule for the Court’; he did not suggest that it is not law for the President or for Congress. It is their

⁴⁹ *Id.* at 46-48 (emphasis added).

⁵⁰ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 605 (2008).

⁵¹ *Id.* at 605-606.

⁵² *Id.* at 606.

⁵³ *Id.*

⁵⁴ Henkin, *supra* note 41, at 201.

obligation to see to it that it is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts if the treaty requires that it be a rule for (p.204) the courts, or if making it a rule for the courts is a necessary or a proper means for the United States to carry out its obligation.⁵⁵

Moreover, he observes that it is “anti-constitutional in spirit” and “highly problematic as a matter of law” to attach a non-self-executing declaration to treaties that by their terms and by their character are or could be self-executing.⁵⁶

3. A Contrary View: Treaties Need Not Be Applied Domestically Without Further Congressional Action.

According to John C. Yoo, an interpretation of the Supremacy Clause is only credible through the lens of a different view of the history surrounding its creation other than those put forth by the scholars in the above section.⁵⁷ Unlike Vázquez who, as described above, argues that the Framers wanted to learn from the mistakes of the British government, Yoo contends that it is important to realize that the Framers were former citizens of the British Empire and had likely applied many legal theories that can only be understood in a British context to the U.S. Constitution.⁵⁸ He argues that the Framers were cognizant of the allocation of distinct treaty power between the Crown and Parliament and would have been in favor of this type of separation. Furthermore, he argues that the American Revolution was, in part, about defending the idea that foreign affairs and internal matters were distinct.⁵⁹

4. A Muddied View: Supreme Court jurisprudence on the Supremacy Clause.

Early Supreme Court cases do little to provide clarity. In 1829, the Court in *Foster v. Neilson* recognized that the Supremacy Clause creates a general rule that treaties are as

⁵⁵ *Id.* at 203-204.

⁵⁶ *Id.* at 202.

⁵⁷ John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, COLUM. L. REV. 1955, 1985 (1999).

⁵⁸ *Id.* at 1986.

⁵⁹ *Id.* at 2006.

enforceable in courts as the Constitution and federal statutes, but that in this instance, the treaty specified that further action was needed for the treaty to have legal effect.⁶⁰ Four years later, however, in *United States v. Percheman*, appeared to have regretted reading the text of the same treaty provision in *Foster* as contemplating legislative implementation.⁶¹ Chief Justice Marshall stated, “They may import that they ‘shall be ratified and confirmed’ by force of the instrument itself.”⁶² As Paust explains, under the test used by Marshall, “no particular subject matter would render a treaty inherently non-self-operative.”⁶³ He further explains that Chief Justice Marshall suggested that to be non-self-executing, a treaty should specifically call for future legislation.⁶⁴

In 1919, the Court decided *Missouri v. Holland* in which case the State of Missouri argued that the Migratory Bird Treaty Act of 1918 unconstitutionally interfered with state’s rights in violation of the Tenth Amendment.⁶⁵ The Act implemented a 1916 treaty between the United States and Great Britain that made it unlawful to hunt or capture any migratory birds covered by the terms of the treaty. Justice Holmes, writing for the court, relied on the Supremacy Clause and held that any limits on the treaty power were delegated expressly by Article II § 2 of the Constitution and “by Article VI treaties made under the authority of the United States... are declared the supreme law of the land.”⁶⁶

Medellin v. Texas is one of the more recent cases interpreting treaty enforcement.⁶⁷ In this case, the defendant was a Mexican national who was charged with murder and sentenced to death. Although his *Miranda* warnings were read to him, Medellin was never informed of his

⁶⁰ *Foster v. Neilson*, 27 U.S. 253, 310 (1829). Paust, *supra* note 38, at 768.

⁶¹ *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 607 (2008).

⁶² 32 U.S. at 88.

⁶³ Paust, *supra* note 38, at 769.

⁶⁴ *Id.*, at 771,

⁶⁵ *Missouri v. Holland*, 252 U.S. 416 (1919).

⁶⁶ *Holland*, 252 U.S. at 432.

⁶⁷ *Medellin v. Texas*, 552 U.S. 491 (2008).

right under the Vienna Convention to contact the Mexican consulate.⁶⁸ Medellín challenged his conviction based on a failure to notify him of these rights, citing the International Court of Justice's (ICJ) recent decision in *Case Concerning Avena and Other Mexican Nationals (Avena)*, which found that the United States had violated a group of Mexican nationals' rights under the Vienna Convention.⁶⁹ The ICJ ordered the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals."⁷⁰ As Curtis Bradley observed, "[t]he Court construed the phrase 'undertakes to comply' in Article 94(1) of the United Nations Charter, a phrase that is addressed to potential ICJ judgments that may or may not be rendered with respect to a particular state, as not being a 'directive to domestic courts.'"⁷¹ The Court ultimately found that the *Avena* decision was not automatically binding domestic law because the treaty obligations required subsequent implementing legislation, which did not exist.⁷²

The decision has left many to attempt to decipher whether the Court endeavored to resolve the issue of non-self-executing treaty enforceability. In his analysis, Vázquez offers a plausible reading of the case:

Medellin can be understood to have found the relevant treaty to be non-self-executing because the obligation it imposed required the exercise of nonjudicial discretion. So read, *Medellin* is an example of an entirely distinct form of non-self-execution, and is thus consistent with a reading of *Percheman* as having established presumption that treaties are self-executing in the *Foster* sense.⁷³

5. The better view: treaties are self-executing under the Supremacy Clause

⁶⁸ *Id.* at 501.

⁶⁹ *Id.* at 497-98.

⁷⁰ *Id.*

⁷¹ Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008).

⁷² *Id.* at 506.

⁷³ Vázquez, *supra* note 50, at 608.

While some scholars support the theory that treaties designated as non-self-executing may not be enforced without enabling legislation, and despite the lack of clarity provided by the courts, there is greater support for the viewpoint that treaties are the law of the land upon ratification and immediately enforceable. The historical analysis that attempts to shore up non-self-executing treaties as unenforceable without more relies largely on the dissenting Framers' viewpoints even though their positions ultimately failed in application. Moreover, Yoo presents little evidence proving this theory but instead relies on conjecture, the possibilities of these events taking place, and on debates that were already overruled at the time the Constitution was created. As is the prevailing notion, every single word of the Supremacy Clause was chosen carefully during the writing process. Moreover, as set forth in Chapter Three, a well-reasoned analysis of the Supremacy Clause in the context of the principles of federalism argues in favor of self-executing treaties as the presumptive structure. For these reasons, the better view is that the Supremacy Clause was written to make treaties self-executing—that is, the law of the land and immediately enforceable upon ratification.

III. RUDS AND THE DIFFERENCE BETWEEN HUMAN RIGHTS TREATIES AND OTHER TREATIES

There are additional reasons to support the view that treaties, and in particular, human rights treaties are fully enforceable without subsequent legislation. The Vienna Convention on the Law of Treaties does not distinguish between different types of treaties; environmental, human rights, and economic, for example, are all treated equally under the Vienna Convention.⁷⁴ As others have observed, “the rules of the law of treaties permeate the whole body of

⁷⁴ Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281, 285 (1987).

international regulation and create the fundamental framework within which this regulation operates.”⁷⁵

Human rights treaties, however, arguably create a different set of obligations for the signatories and ratifiers that other treaties simply do not impose.⁷⁶ Much of international law is reciprocal in nature.⁷⁷ Jack Goldsmith uses the example of diplomatic immunity in his article “International Human Rights Law and the United States Double Standard.”⁷⁸

“Whether by treaty or customary law, the immunity of ambassadors has been viewed as a necessary prerequisite to successful diplomatic intercourse since at least the beginning of the nation-state. This law persists because of the mutual advantage it brings. Nations forgo the relatively small benefit of enforcing local laws against foreign diplomats in order to realize the broader benefits that accrue from relations with foreign nations. But unless both nations provide immunity, neither will do so and both will be worse off.”⁷⁹

According to some, however, international human rights law is the exception to this “prisoner’s dilemma.”⁸⁰ States may gain nothing from one another if they sign a treaty to increase the magnitude of human rights that their citizens are granted domestically.⁸¹ Some argue that they have no duty to one another to ensure compliance, because the two countries do not depend on one another for the mutual benefit that the treaty promises to bring. The beneficiary of the treaty is the individual citizen of the country rather than the other signees to the treaty. Without some other sort of incentive to convince signees to uphold the individual rights of their citizens, such as economic aid or threatened military intervention, a state party may feel no pressure to assure the protection of individual rights, let alone to increase those rights.⁸² Thus, “the efficacy of

⁷⁵ *Id.*

⁷⁶ See Chapter Three *infra*.

⁷⁷ See Jack Goldsmith, *International Human Rights Law & The United States Double Standard*, 1 GREEN BAG 2D 365, 69 (1998).

⁷⁸ *Id.*

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Id.* (“Nations involved in indefinite relationships will forgo private, short-term advantage to achieve superior long-term benefits that can only be gained by mutual cooperation.”).

⁸¹ *Id.*

⁸² *Id.*

international human rights law in a nation . . . depends on the willingness of other nations to sanction noncompliance.”⁸³ Furthermore, states rarely want to expend the resources to ensure that another country’s individual human rights are being upheld.⁸⁴

There are two principal reasons why a country would use its own resources to affect the human rights of another country.⁸⁵ The first instance occurs when the human rights violation in one country threatens the well-being of a second country.⁸⁶ In that case, the second country will step in to combat the human rights violation out of its own self-interest.⁸⁷ The second instance occurs when a country stands to gain some political capital for helping another country in need while the costs of doing so are low.⁸⁸ If the costs of enforcement are high and the likelihood of success is low or uncertain, then countries are unlikely to intervene.⁸⁹

RUDs provide countries with a loophole in the enforcement of human rights treaties. Because the countries are technically compliant with the version of the treaty that they signed, states that have RUDs must, arguably, uphold their duty according to treaty obligations. However, this inability to sanction technically noncompliant countries because of the RUDs seriously inhibits the true purpose of the treaty itself because it cannot hold noncompliant countries truly accountable without first proving that the RUDs are ineffectual.

One solution is to outlaw RUDs in all human rights treaties. RUDs in other treaties might be permitted because the state parties make each other responsible to uphold the burden that they shoulder. However, since there is no reciprocal responsibility to hold countries accountable to one another within human rights treaties, RUDs create loopholes that may render treaties

⁸³ *Id.*

⁸⁴ *Id.* at 370.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

ineffective. RUDs allow signatories of treaties to enjoy the domestic and international benefits of signing the treaty while allowing them to remain passive in their role to support the individual rights of their citizens in a human rights context. While RUDs may be less problematic in other treaty contexts where reciprocity is a driving force, they allow for too much under-enforcement in the context of a human rights treaty. Consequently, the burden that they place on any international enforcement body is greater than any benefit that they could bring to a country.

By eliminating RUDs, each country will be on the same footing with one another, since each will know the exact duties that it is expected to uphold. As the system currently functions, countries do not and cannot hold each other accountable for their human rights violations. As Professor Goldsmith has stated, “[w]eak and sporadic enforcement means that a nation can through ratification minimize the stigma of non-ratification at little if any cost to its domestic political arrangement.”⁹⁰ Without this necessary self-regulation, the force and efficacy of human rights treaties becomes severely lacking. As Professor Paust has argued, the doctrine of non-self-execution is “anathema to the very notion of human rights as rights of individual human beings, and thus destructive of the very object and purpose of a human rights treaty[.]”⁹¹

IV. A FOCUS ON THE UNITED STATES AND ITS USE OF RUDS IN HUMAN RIGHTS TREATIES

Though never mentioned in the Constitution, the United States Senate has been attaching RUDs to treaties since 1796 and has appended RUDs to every human rights treaty that it has signed and ratified.⁹² As others have noted, the stated purpose motivating the United States to enact RUDs is to ensure that treaties do not interfere with federal law or otherwise supersede

⁹⁰ *Id.*

⁹¹ Jordan Paust, *Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. R. 1257, 58 (1993).

⁹² Human Rights in the U.S.: A handbook for Legal Aid Attorneys, *supra* note 2, at 6.

domestic law.⁹³ For example, if a treaty mandated equal pay for men and women—a legal obligation that the United States has considered but refused to enact⁹⁴ – it could consider attaching an RUD that would provide an exception to such a requirement. This might be likely to occur through the drafting of an Understanding that such treaty provision means that men and women would have equal opportunity to negotiate for their pay, or that they would have equal opportunity to achieve the same job. Thus, the United States would still be able to ratify the treaty if it so desired, but would not be bound by the strictures of that particular clause of the treaty.

Professor Henkin has argued that “[r]eservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile. . . . Even “friends” of the United States have objected that its reservations are often incompatible with treaty purpose and are therefore invalid.”⁹⁵ Nonetheless, the United States continues to attach RUDs to each treaty it has ratified without effective sanction. For these reasons, the United States has suffered international criticism and its U.S. treaty ratification processes have been described as “specious, meretricious, hypocritical.”⁹⁶

The failure of international human rights bodies to take definitive action with regard to the United States treaty ratification and RUD processes may be a matter of realpolitik motivations. These bodies recognize that the United States’ power is, at this point in time, without peer. They are an economic, military, and social world leader. Without their signature on a treaty, many other countries might forego treaty ratification. There could be a fear on behalf of

⁹³ Curtis A. Bradley, Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 69 (1998).

⁹⁴ Roberta W. Francis, *The History Behind the Equal Rights Amendment*, THE EQUAL RIGHTS AMENDMENT, <http://www.equalrightsamendment.org/history.htm> (last visited Apr. 18, 2016).

⁹⁵ Louis Henkin, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,” 89 AM. J. INT’L LAW, 341, 343 (1995).

⁹⁶ *Id.* at 341.

international treaty organizations that if the treaty bodies were to disallow RUDs, the United States would leave the international human rights system, which might, in turn, persuade other countries to follow suit, resulting in a weakened human rights oversight system. However weak treaty powers may be, these circumstances might further weaken human rights systems.

However, given that the United States exerts tremendous international influence over the actions of other state parties, if the United States ignores its obligations under treaties, other countries may be likely to do the same. As with other countries, treaty bodies would do better to require the United States to decide whether it wanted to be associated with human rights in a meaningful way, or to stand outside of the international human rights framework and renounce its assumed position as global leader in the realm of human rights.

In fact, the Human Rights Committee, a governing body responsible for upholding the treaties has been critical of the U.S.-practice of appending RUDs to its human rights treaties. In 2013-2014, the Committee conducted the fourth periodic report of the United States' implementation of the ICCPR.⁹⁷ One of the Human Rights Committee's "principal matters of concern and recommendations" was the "applicability of the Covenant at [the] national level."⁹⁸ The Committee found that taken together, the US prevention of jurisdiction to the ICJ, the fact that "the State party has only limited avenues to ensure that state and local governments respect and implement the covenant,"⁹⁹ and the non-self-executing doctrine combined together "considerably limit[ed] the legal reach and practical relevance of the Covenant."¹⁰⁰ The Committee offered the advice that the United States should implement the Covenant at greater

⁹⁷ Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, Committee Against Torture (Dec. 18, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=187.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.*

levels, find ways to prosecute under federal law since the treaty is non-self-executing, and “strength[en] and expand existing mechanisms mandated to monitor the implementation of human rights at federal, state, local and tribal levels.”¹⁰¹

The Human Rights Committee was also “concerned at the limited number of investigations, prosecutions and convictions of members of the Armed Forces . . . for unlawful killings during its international operations, and the use of torture or . . . degrading punishment of detainees in United States custody.”¹⁰² To combat this, the Committee advised that “all cases of unlawful killing, torture, or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently, and impartially investigated[.]”¹⁰³

In November 2014, the Human Rights Committee also released its concluding observations for the CAT pertaining to the United States.¹⁰⁴ Like the concluding observations of the ICCPR, the Committee noted both positive and negative aspects to the United States’ enforcement of the CAT. One of its “principal subjects of concern and recommendation”¹⁰⁵ was the United States’ “definition and criminalization of torture.”¹⁰⁶ Specifically, the Human Rights Committee thought that there should be a torture statute at the federal level, which would “strength[en] the human rights protection framework.”¹⁰⁷ The Human Rights Committee also explicitly stated that the United States “should give further consideration to withdrawing its interpretative understandings and reservations. In particular, it should ensure that acts of

¹⁰¹ *Id.*

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, Committee Against Torture (Dec. 18, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=187.

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.* at 2.

psychological torture are not qualified as ‘prolonged mental harm.’”¹⁰⁸ The Human Rights Committee also advised that the United States should “take effective measures to prevent acts of torture not only in its sovereign territory but also ‘in any territory under its jurisdiction.’”¹⁰⁹ The Human Rights Committee also noted that the United States should strive to eliminate its CIA extraordinary rendition program per its non-conformity to Article 2, paragraph 2 of the CAT, which states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹¹⁰

Through its comments, it is clear that the Human Rights Committee has taken issue with some of the US’s RUDs attached to CAT in the same manner that it has towards the RUDs attached to the ICCPR. The Committee notably commented that the United States should rethink some of its RUDs pertaining to the CAT.

V. THE FINAL (PRACTICAL) WORD: THE TEXT OF U.S. RUDS DO NOT PROVIDE A SHIELD

An examination of the text of the RUDs attached to the ICCPR and CAT suggests that for purposes of extraordinary rendition and torture, they do not provide any shield against liability extraordinary rendition and torture even if they were deemed to have limiting force.

A. THE ICCPR

In addition to declaring the treaty non-self-executing, the United States has applied five reservations to the ICCPR. The one that is relevant to extraordinary rendition and torture states: That the United States considers itself to be bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.* at 4 (internal citation omitted).

prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.¹¹¹

Article 7 of the ICCPR outlaws both torture and “cruel, inhuman or degrading treatment or punishment.”¹¹² The United States was quick to point out that its interpretation of this article is limited to the meaning that the Constitution gives to cruel and unusual punishment. It would be beyond reason to suggest that the program of extraordinary rendition and torture as detailed in the government’s own declassified documents would not constitute cruel and unusual punishment pursuant to U.S. Constitutional definitions, and in fact, the Senate, through the release of this report, as well as the President of the United States, have admitted to torture.¹¹³

B. CAT

Other than declaring the treaty to be non-self-executing, the United States attached two reservations, only one of which pertains to extraordinary rendition and torture. The relevant reservation limits the meaning of “cruel, inhuman or degrading treatment or punishment” to the limitations of the Fifth, Eighth, and Fourteenth Amendment.¹¹⁴ As is the case with the ICCPR reservation, the United States cannot plausibly argue that the extraordinary rendition and torture program did not rise to the level of conduct prohibited by such Amendments. Moreover, the United States has enacted federal statutes to “domesticate” CAT.¹¹⁵

In sum, the Supremacy Clause states plainly and without equivocation that treaties shall be the “*the supreme law of the land; and the judges in every state shall be bound thereby,*

¹¹¹ Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1, at 14 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992) [hereinafter Senate Comm. Report]

¹¹² *Id.* at art. 7.

¹¹³ Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Interrogation and Detention Program December 2014 at <https://assets.documentcloud.org/documents/1377177/sscistudy2.pdf>; Carol E. Lee & Siobhan Gorman, Obama ‘Torture’ Comments Reopen Debate, Wall Street J., Aug. 14, 2014, at <https://www.wsj.com/articles/obama-u-s-crossed-a-line-by-using-enhanced-interrogation-1406928167>.

¹¹⁴ U.S. reservations, declarations and understandings, CAT, Cong. Rec. S17486-01 (1990).

¹¹⁵ See *infra* Chapter Four.

anything in the constitution or laws of any state to the contrary notwithstanding.” The Vienna Convention on the Law of Treaties prohibits treaty appendages that would otherwise undermine the treaty and requires fulfillment with the obligations incorporated in such document. And finally, putting aside all debates and questions about the advisability or limitations of U.S. RUDs with regard to the ICCPR and CAT, it is clear that there can be no reasonable interpretation that could save the United States from the conclusion that it violated the treaty provisions that prohibit extraordinary rendition and torture.

CHAPTER THREE

TORTURED REASONING: INTERNATIONAL HUMAN RIGHTS LAW, FEDERALISM AND THE CIA'S EXTRAORDINARY RENDITION AND TORTURE PROGRAM

I. INTRODUCTION

In addition to addressing the enforceability of treaties with regard to the Supremacy Clause and the general problematic nature of RUDS, issues pertaining to federalism must also be considered. This Chapter examines the interplay between international human rights law and the American federalist structure—a complex and multifaceted relationship. Certain fundamental disputes about the meaning of constitutional language persist despite the growing need for consistency in a rapidly globalizing world. In light of the role of the United States in perpetrating egregious violations of customary international law (“CIL”) and specific disregard for language in multilateral treaties, there is an urgent need for legal clarity. What is now referred to as the U.S. Extraordinary Rendition and Torture Program (“The Program”), which had previously been euphemistically discussed as “enhanced interrogation,” represents a disregard for both duly ratified treaties as well as customary international human rights norms. While other sections of this paper discuss the applicability of these treaties and norms to the United States more generally, this Chapter reviews the federalism question and its relationship to *remedies*. What recourse is available to victims of the Program in the federal and state courts? How can these mechanisms be enforced against individual perpetrators as well as state and municipal sponsors that result in real, concrete restitution? With new evidence coming to light implicating the United States government as well as state and local actors, can we now hope to overcome the paralysis in the courts that has stymied efforts to correct a widespread miscarriage of justice?

Answers to these questions may unfold from the top down. As this Chapter sets forth, we must look carefully at the constitutional grants and limits to enforcement of international norms and treaties before we can understand the availability of remedies. This Chapter addresses the confusion revolving around the federalist structure. It revisits the Supremacy Clause and the language incorporating “treaties” as the “supreme law of the land” for the purposes of enforceability as well as the concept of federalism generally and the application of the 10th Amendment. It next parses the conflicting academic views of CIL in the judiciary and the extent of the power of the federal courts to interpret CIL in holding individual and state parties accountable. After surveying all of these intersecting nodes of power, this Chapter makes clear that the United States is not only capable but obliged to rectify the transgressions of international and domestic law that resulted in widespread and unchecked human rights abuses. Though the constitution mandates a delicate balance and separation of the various apparatuses of governance, the unique structure of U.S. federalism does not remove the onus placed on governmental and private actors to enforce and comply with international obligations. The problem is convoluted, but it is not opaque. The approaches taken to date by the courts and by state governmental offices may have fallen far short of the duties delineated to them by constitutional and international law but the way forward is clear.

II. THE SUPREME LAW OF THE JUNGLE

A. HISTORY AND COMMON SENSE IN THE SUPREMACY CLAUSE

From a cursory glance at the text of Article VI, section 2 of the Constitution, it would seem that the question of the enforceability of international treaties domestically is a closed case. This provision, known as the Supremacy Clause reads,

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the

authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.¹

The Supremacy Clause provides that federal law shall preempt state law, that any state law, even of state constitutional stature shall be subordinate to the Constitution and to the law of the federal government. The text of the Supremacy Clause includes treaties in its designation of what is the “supreme law of the land” and explicitly states that judges *in every state* shall be bound thereby. One might think we can close the book on this then. One might think that we can state affirmatively that the Convention Against Torture, duly ratified by the United States, prohibits the use of “enhanced interrogation” that amounts to the treaty’s definition of torture. One might also think that state judges are bound to follow that treaty and to enforce its provisions. That would appear to be a common sense reading of the text. However, as Chapter Two indicates, and as is often so pervasive in the law, the common-sense reading does not always prevail.

There are two reasons why the common-sense reading is often contested by some in the legal or judicial community. First, there is ardent disagreement about the meaning of “treaty” historically in the text of the Supremacy Clause. Second, as is referred to elsewhere in this paper, both the use of RUDs and the persistent dispute surrounding the “self-execution” of treaty provisions complicate the domestic enforcement of international treaties.²

A certain esteemed wing of the international legal academy contends that “treaty” in its original meaning for the purposes of constitutional interpretation does not include the imposition of an international obligation on a state government.³ Despite the clear inclusion of language that

¹ U.S. Const. Art. VI sect. 2. For an in depth look at Supremacy Clause issues, *see* Chapter Two, *supra*.

² *See* Chapter Two, *supra*.

³ *See*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

binds “the judges in every state,”⁴ it is contended that “treaty” for the framers included only agreements between nation-states and obligations imposed on those relations.⁵ According to this interpretation, the federalist structure precludes states from participating in the treaty ratification process and isolates them from the burdens derived from international accords.⁶ That is to say, the original intent of the framers was to include treaties in the Supremacy Clause to bind the federal and state governments only to apply the legal obligations that controlled the relations between the United States and foreign governments.⁷ According to this view, the original intent of “treaties” in this clause could not contemplate the arrival of global human rights norms or multilateral treaty provisions that might affect powers traditionally reserved to the states.⁸ The Tenth Amendment explicitly reserves all powers that are not delegated by the Constitution to the federal government or prohibited by the Constitution to the state governments (or to “the people”).⁹ For this side of the debate, principally advanced by Professors Goldsmith and Bradley, powers traditionally left to the states governing various aspects of racial and gender equality, criminal procedure and punishment and religious freedom are the subject of international human rights law in the form of CIL and treaty provisions and are not, thereby, enforceable against the states without an acceptable basis in domestic law.¹⁰

The change in the meaning of international law on this front is a relatively recent development. Historically, treaties were, by and large, inter-national as opposed to intra-national

⁴ U.S. Const. Art. VI sect. 2.

⁵ Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2274 (1998).

⁶ Bradley, *supra* note 3, at 393.

⁷ *Id.*

⁸ Bradley and Goldsmith, *supra* note 5.

⁹ U.S. Const. Amend. X.

¹⁰ Bradley, *supra* note 3 at 397.

agreements.¹¹ After the human rights atrocities of World War II shook the global conscience, the multilateral treaties entered by various nations began to include provisions that had the effect of governing domestic policy.¹² That trend has only escalated. Rather than solely creating instruments that govern the conduct of nations with respect to each other, this new way in treaty-making creates rights that individuals may assert against their own governments.¹³ As Professor Bradley points out, this change is “so fundamental that it alters the very essence of international commitments.”¹⁴ It makes the likelihood of conflict with existing domestic law more plausible and introduces a special complication into the system of the United States, which involves overlapping layers of lawmaking and enforcement powers.¹⁵

Arguably, the import of Tenth Amendment and the sphere of state power to self-govern have steadily waned alongside the globalization and the enlargement of international obligations with intra-national implications. As the Supreme Court began to issue opinions containing broader readings of the federal government’s domestic lawmaking power, the issue of state sovereignty became less important.¹⁶ The expansions of the Commerce and Tax and Spending Clauses throughout the twentieth century made questioning the plenary authority of the treaty power seem to be a forgone conclusion. However, with a string of decisions that seemed to indicate the Court’s renewed protection of structural federalism, the question of the scope of the treaty power and its meaning within the Supremacy Clause has begun, again, to raise questions about the domestic enforceability of international law. In *New York v. United States*, the Court

¹¹ Stewart Jay, THE STATUS OF THE LAW OF NATIONS IN EARLY AMERICAN LAW, 42 Vand. L. Rev. 819, 821-22 (1989).

¹² Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831 (1997).

¹³ See Jay, note 11 *supra* at 822.

¹⁴ Bradley, *supra* note 3 at 397.

¹⁵ *Id.*

¹⁶ *Id.*

invalidated a statute compelling state disposal of radioactive waste.¹⁷ In *United States v. Morrison*, the Court found a federal statute giving victims of gender-motivated violence a civil remedy in federal court was beyond congressional authority under the Commerce Clause or Fourteenth Amendment.¹⁸ In *United States v. Printz*, the Court upheld a federal statute to enable state law enforcement officials to conduct background checks on purchasers of handguns to “compromise the structural framework of dual sovereignty.”¹⁹

B. THE NATIONALIST VIEW OF THE TREATY POWER

With the resurgence of federalism as a substantial structure in federal jurisprudence, the scholarship on the meaning of the treaty power has been bifurcated into two camps. On the one hand, there is the “nationalist view,” the view that the treaty power is plenary and treaty obligations are binding at every level of government within the federalist structure;²⁰ in other words, the treaty power is external to and unaffected by the limits imposed by federalism. On the other hand, there is the Goldsmith-Bradley view: the current configuration of international law has outpaced the original meaning of the treaty power, and the federalist structure dictates that treaty obligations that bind state and local actors are not enforceable without concurrent legislation that executes them, unless they govern matters of international concern. This latter view contends that the treaty power is limited “either by subject matter, by the reserved powers of the states, or both” because during the founding period, “the Constitution was viewed as delegating limited powers to the federal government.”²¹

There are historical and legal precedents that support both views. However, accepting the Goldsmith-Bradley view means that we must adopt a very narrow reading of the seminal

¹⁷ *New York v. United States*, 504 U.S. 144 (1992).

¹⁸ *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 1744, 146 L. Ed. 2d 658 (2000).

¹⁹ *United States v. Printz* 117 S. Ct. 2365, 2383 (1997).

²⁰ Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 99 (2000).

²¹ Bradley, *supra* note 3 at 417.

Supreme Court decision on this subject. As noted in Chapter Two, in *Missouri v. Holland*, the State of Missouri argued that the Migratory Bird Treaty Act of 1918 unconstitutionally interfered with state’s rights in violation of the Tenth Amendment.²² The Act implemented a 1916 treaty between the United States and Great Britain that made it unlawful to hunt or capture any migratory birds covered by the terms of the treaty. Justice Holmes, writing for the court, held that any limits on the treaty power were delegated expressly by Article II § 2 of the Constitution and “by Article VI treaties made under the authority of the United States... are declared the supreme law of the land.”²³ The Court found that any limits on the treaty power “must be ascertained in a different way”²⁴ than limits on domestic powers. In other words, raising the Tenth Amendment as a defense against enforcement was not sufficient to prevent the implementation of the treaty against the state of Missouri.²⁵ The Goldsmith-Bradley view is that despite the federal courts’ reading of the treaty power to take precedence over state interests, we are to assume a subject matter limitation on the treaty power—the contours of which, it seems, are not readily definable.

Professors Goldsmith and Bradley point to the introduction (and eventual failure) of the so-called “Bricker Amendment” to support the existence of an implied subject matter limitation.²⁶ The “Bricker Amendment” was a proposed Amendment to the Constitution that would overturn *Missouri v. Holland*. One of the versions of this amendment provided that “[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.”²⁷ The opponents of the Amendment noted the

²² *Missouri v. Holland*, 252 U.S. 416 (1919).

²³ *Holland*, 252 U.S. at 432.

²⁴ *Holland*, 252 U.S. at 433.

²⁵ This differs from the view of the Tenth Amendment’s role in ascertaining the extent of the treaty power in a later case, *Bond v. United States*, 131 S.Ct. 2355 (2011), discussed *infra*.

²⁶ Bradley, *supra* note 3 at 431.

²⁷ *Id* at 427, citing S. Rep. No. 83-412, at 1 (1953).

existence of a subject matter limitation to argue against the necessity for a constitutional amendment that would prohibit the use of the treaty power to compel the states to act in accordance with its terms. If such a subject matter limitation were to exist, it would curtail the use of the treaty power in regulating matters “which do not necessarily affect the actions of nations in relation to international affairs, but are purely internal.”²⁸ The subject matter limitation, which distinguishes Goldsmith and Bradley from the “nationalist view” of plenary authority inhering in the treaty power, is that treaties should be limited to matters of “international concern.”²⁹ Human rights treaties, in their view, do not fall within this limitation. The intent of the framers, as well as the assumption of the federal courts, carried through the *Holland* decision, they argue, imply the existence of this limitation against the authority of the federal government to negotiate international obligations that must be applied to state actors.

In the 1970s and 80s, the notion of a subject matter limitation began to fall out of favor, with the Restatement (Third) of foreign affairs expressly rejecting it.³⁰ Since the Court in *Holland* enervated the use of the Tenth Amendment to constrain the treaty power, the absence of an implied subject matter limitation would, in theory, grant the federal government unchecked power vis-à-vis the states through the exercise of its treaty making authority. The rejection of the implied subject matter limitation leans heavily on Professor Henkin’s contention that it would be impossible to distinguish between “external” and “internal” matters when it came to the exercise of the treaty power.³¹ He argued that “every treaty, regardless of subject, serves the external

²⁸ *Id* at 431, citing Treaties and Executive Agreements: Hearings on S.J. Res. 1 Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong. 183 (1955).

²⁹ Bradley, *supra* note 3 at 431, citing Restatement (Second) of the Foreign Relations Law of the United States § 117(1)(a) (1965).

³⁰ See Restatement (Third), *supra* note 13, § 302 cmts. c-d; Restatement (Third), *supra* note 13, § 302 reporters’ notes 2-3; Restatement (Third), *supra* note 13, § 303 cmt. b.

³¹ Bradley, *supra* note 3 at 434, citing Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996).

purposes of the United States.”³² In order to completely divorce federalism concerns from the treaty power’s field, Henkin observes that “since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material.”³³ *Holland* supports this contention. However, as a contrary point, Professor Bradley points out, Tenth Amendment review applies to many powers expressly delegated to the federal government. He states, “the fact of delegation says nothing about the scope of delegation.”³⁴ The Court has not provided a clear and unambiguous body of jurisprudence to define the Tenth Amendment in this regard, but there is no reason to conclude that it has no place in the exercise of the Treaty power. That is to say, there is no reason that would distinguish it from the exercise of any other expressly delegated federal constitutional power.

In *Bond v. United States*, the issue of the Tenth Amendment’s limitations on the treaty power came before the court again.³⁵ In *Bond*, without deciding the merits of the case, the Court held that individuals, and not just states, have standing to raise Tenth Amendment challenges to federal law.³⁶ *Bond* involved the implementation statute for the Chemical Weapons Convention, an international treaty. Carol A. Bond was a microbiologist from Philadelphia who discovered that her friend Myrlinda Haynes was pregnant with her husband’s child. Carol threatened revenge against Haynes initially by making threatening phone calls, using phrases like “I [am] going to make your life a living hell.”³⁷ In 2005, Bond was convicted of harassment in state court.³⁸ After her conviction, Bond began smearing poisonous chemicals that she stole from her workplace on Haynes’ car and mailbox—she apparently did this 24 times between 2005 and

³² *Id.*

³³ *Id.*, citing Louis Henkin, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 191 (2d ed. 1996).

³⁴ Bradley, *supra* note 3 at 435.

³⁵ *Bond v. United States*, 131 S.Ct. 2355 (2011).

³⁶ *Id.*

³⁷ Dahlia Lithwick, *The Case of the Poisoned Lover*, SLATE, Feb. 22, 2011.

³⁸ *Id.*

2007.³⁹ On one occasion, Haynes burned her thumb when she came in contact with the chemicals.⁴⁰ Bond was ultimately charged with violating 18 U.S.C. § 229, otherwise known as the Chemical Weapons Convention Implementation Act of 1998.⁴¹ Bond argued that the statute was an unconstitutional intrusion of the powers of the states reserved to them by the Tenth Amendment, specifically the state authority to resolve its own criminal justice matters. Bond was convicted at trial and the Third Circuit ruled on appeal that Bond lacked standing to challenge her conviction.⁴²

In a unanimous decision, the Supreme Court reversed the Third Circuit ruling and found that Bond had standing to argue that 18 U.S.C. § 229 impermissibly intruded on police powers constitutionally reserved to the states.⁴³ The Supreme Court did not discuss the merits of Bond's challenge to the statute and remanded the case to the Third Circuit.⁴⁴ On remand, the Third Circuit found that while the Supreme Court's decision gave Bond standing to raise questions of federalism about the power of the federal government to enforce implementing legislation, *Missouri v. Holland* controlled the resolution of the case on the merits.⁴⁵ The Third Circuit held that *Holland* provided that the legislation was valid because the treaty was valid.⁴⁶ When the

³⁹ *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009), rev'd, 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

⁴⁰ *Bond*, 581 F.3d at 132.

⁴¹ The District Court denied Bond's motions. It ruled that § 229 did not impinge on principles of federalism because it "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [to] comply with the provisions of a treaty." *Bond*, 581 F.3d at 133.

⁴² "Bond fell within the ambit of the federal chemical weapons statute by strategically employing toxic chemicals with the intent to harm Haynes. As a private party acting independently of a state, she lacks standing to challenge the constitutionality of this statute on the basis of the Tenth Amendment, and her claims that the statute is vague and overbroad fall short of the mark. ... For these reasons, we affirm the judgment of the District Court." *Bond*, 581 F.3d at 141-42.

⁴³ *Bond*, 131 S.Ct. 2355.

⁴⁴ *Id.*

⁴⁵ *United States v. Bond*, 681 F.3d at 151.

⁴⁶ *Id.*

case returned to the Supreme Court in 2014, the Court ruled that the Implementation Act did not reach Bond's conduct and avoided addressing the constitutional issue.⁴⁷

Thus, *Bond* leaves us with more questions than answers. Though the Third Circuit cited *Holland* as a bar to invalidating the statute, the Supreme Court dodged the constitutional meat of the case both times it was before it. The question concerning whether an implied subject matter limitation must exist to abridge the enforceable content of international treaties against the states was not conclusively resolved or even referenced outright by *Bond*.

C. A SUBJECT MATTER LIMITATION WITH A BACKBONE

There is a middle way to consider the principles of federalism and treaties as supreme law of the land. *Holland* was decided “at a time when customary international law, rather than treaties was the dominant form of international law.”⁴⁸ Since that time, there has been a proliferation of treaties that regulate a wide variety of subjects with greater specificity such that “[v]irtually every human activity is to some degree the object of some treaty.”⁴⁹ Among these proliferated treaties stands the body of international human rights law, which regulates the relations between nations and their citizens. For Bradley, this means that there is a “greater potential for conflict between treaty law and U.S. domestic law.”⁵⁰ The possibility that customary international law could serve as the backbone for a subject matter limitation is not eclipsed by these points. This does not have to mean customary international law as a whole, but should at least seriously be considered when it comes to those components of CIL that rise to the level of *jus cogens* preemptory norms. When it comes to the enforcement of treaties against state actors wherein the action undertaken in violation of treaty provisions comes into direct conflict

⁴⁷ *Bond v. United States*, 134 S.Ct. 2077 (2014).

⁴⁸ Bradley, *supra* note 3 at 459.

⁴⁹ *Id.* at 460 (quoting Mark W. Janis, *An Introduction to International Law* 13 (2d ed. 1993).

⁵⁰ *Id.*

with *jus cogens* norms, there should be no Tenth Amendment concern. This is not because the Treaty Power inherently occupies an exceptional position outside the federalist system, but because any subject matter limitation on that Treaty Power cannot prevent its enforcement against crimes of such stature as to be recognized by the non-derogation principle that is implied by the concept of *jus cogens*.

One might accept “foreign affairs orthodoxy,” which rejects the existence of a subject matter limitation on the exercise of the Treaty Power and undercuts the federalist system altogether, threatens the balance of power between the levels of our constitutional government. However, flatly insulating the states from international obligations, even those of such magnitude as to be popularly understood to be governed by a non-derogation principle, contradicts even the most conservative reading of the limits federalism imposes on the treaty power. An unqualified removal of the states from the treaty power’s sphere of influence also undercuts *Holland* as meaningful precedent.⁵¹ The most cogent approach is to accept the implication of a subject matter limitation on the treaty power, given character by the most solemn degrees of international custom, and to assume the irrelevance of the Tenth Amendment *in those instances* because of the magnitude of the provision at issue. Such a reading remains faithful to the central holding of *Holland* without expanding its implications to either overinflate federal power or to contradict later rulings. Though for the *Holland* court, the magnitude of the treaty provision in question was linked to the fact that only working in concert with another nation could make

⁵¹ The Court qualified its determination several times throughout the course of the *Holland* opinion, “[w]e do not mean to imply that there are no qualifications to the treaty-making power,” *Holland* 252 U.S. at 434. The Court also noted that “[w]e must consider what this country has become in deciding what [[[the Tenth] Amendment has reserved[.]” *Id.*

enacting the treaty's object possible.⁵² Furthermore, the alleged Tenth Amendment obstacle was disposed of by the degree of impetus for enforcement of the treaty.

It is no different in cases of genocide, enforced disappearance or torture. These are crimes recognized, in some cases by our own federal court system,⁵³ to be so heinous as to merit international condemnation always and everywhere. The eradication of these heinous acts requires the cooperation of the international community as they often take place in transnational circumstances. Surely the Treaty Power, even if conceded to be constrained by subject matter limitations and the Tenth Amendment, cannot be paralyzed from enforcing the law in cases of such gravity.

III. WITHHOLDING JUDGMENT

Reaching a conclusion that the Treaty Power may be exercised against the states without the independent restraint of the Tenth Amendment in the event that an implied subject matter limitation is satisfied by CIL raises another international legal complication—the role of the federal judiciary in interpreting CIL. Some important distinctions, as well as some basic historical background concerning the development of international law and the common law powers of the federal courts must be parsed out here. First, the difference between customary international law and *jus cogens* preemptory norms must be recognized before we can understand the content of a subject matter limitation that might rely on either concept independently. Second, the use of CIL and *jus cogens* norms as precepts of common law raises unique complexities at the federal level that are not necessarily problems in state courts. Third, the power of the federal courts to resolve disputes and issue remedies is limited by the constitutional role provided by Article III, and any use of CIL or *jus cogens* norms in federal

⁵² *Id.*

⁵³ *See, Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. N.Y. 1980).

court must fall within the scope of the courts' jurisdictional limitations. Concerns for federalism in the judiciary are subject to the federal judiciary's particular role and function. Holding state actors accountable would likely involve the use of the federal court system and understanding the intricacy of that system in the midst of these questions is paramount.

A. PREEMPTORY NORMS AND ORDINARY CUSTOM

A *jus cogens*, or preemptory norm is a fundamental principle of international law from which no state may derogate.⁵⁴ Ordinary CIL requires consent and the obligations within its framework may be subject to alteration through the use of treaties. A preemptory norm cannot be violated by any state, and no legal device may relieve a state of its obligation to comply with such a norm.⁵⁵ There is no universal agreement regarding precisely what composes *jus cogens* norms, but it is generally accepted that preemptory norms include prohibitions of genocide, maritime piracy, slavery (as well as the slave trade), torture, refoulement and wars of aggression.⁵⁶ Under the Vienna Convention on the Law of treaties, “[a] treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general international law.”⁵⁷ Such a norm is one that is “accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁵⁸ Since the time of the Nuremberg Trials, *Jus cogens* norms may apply to individuals as well as to states. On the other hand, general customary international law is a source of international legal principles that are derived from

⁵⁴ Judge Antonio Caseese, INTERNATIONAL CRIMINAL LAW 278 (Paola Gaeta et al. eds., 3rd ed. 2013).

⁵⁵ *Id.*

⁵⁶ M. Cherif Bassiouni. (Autumn 1996) *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”* LAW AND CONTEMPORARY PROBLEMS. Vol. 59, No. 4, Pg. 68.

⁵⁷ Vienna Convention on the Law of Treaties, Article 53, May 23, 1969, 1155 U.N.T.S 331, 8 *International Legal Materials* 679 (1969).

⁵⁸ *Id.*

“evidence of a general practice accepted as law.”⁵⁹ Such general practice is based essentially on consensus among states exhibited by widespread conduct and a sense of obligation. The substantive content of customary international law may be altered or expanded by bilateral or multilateral treaties. Only those acts and obligations that are considered to be *jus cogens* cannot be changed or derogated from.

B. TORTURE AS A PREEMPTORY NORM

The United States has explicitly recognized certain *jus cogens* norms that apply domestically. Torture is among those norms. In the 1980 decision of *Filartiga v. Pena-Irala*, the Second Circuit held that deliberate torture, perpetrated under color of official authority violates universally accepted norms of international human rights law.⁶⁰ In *Filartiga*, plaintiff’s father and daughter, were citizens of Paraguay. The father, Dr. Joel Filartiga was a political dissident and opponent of the government of then President Alfredo Stroessner. Plaintiffs alleged that defendant, Americo Norberto Pena-Irala, then Inspector General of Police in Asuncion, Paraguay, acting under color of law kidnapped, tortured and killed Joelito Filartiga, brother and son of plaintiffs. After Joelito’s murder, Plaintiff Dolly Filartiga attained political asylum in the United States and took up residence in Washington D.C. Some time later, Pena-Irala, the alleged murderer of Joelito Filartiga moved to Brooklyn, New York. Upon learning of his presence inside the United States, Dolly Filartiga initiated a civil proceeding, against Pena-Irala in the United States District Court for the Eastern District of New York. The District Court dismissed the complaint for lack of subject matter jurisdiction. The action was predicated on 28 U.S.C.S. § 1350, the Alien Tort Statute (ATS), which the District Court construed narrowly. The District

⁵⁹ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE ARTICLE 38(1)(B), 55 Yale L.J. 1318 (1946).

⁶⁰ “[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.” *Filartiga* 630 F.2d at 880.

Court construed § 1350, in accordance with the traditional interpretation of that statute, to exclude from its conception of the “law of nations” that law which governs a state’s treatment of its own citizens. The Court found that the prohibition against torture was an international norm, (casting state-sanctioned torture as a *jus cogens* offense) and practice of torture by a state official therefore violated the law of nations and on that basis, the exercise of federal jurisdiction was appropriate under the Alien Tort Statute.

The holding of *Filartiga* that grants “universal jurisdiction” in federal court on the basis of torture’s status as an international preemptory norm may now be dubious, especially in light of later case law concerning the Alien Tort Statute.⁶¹ However, even these later rulings do not dismantle the position the Second Circuit took with regard to torture as a *jus cogens* offense. In reaching this conclusion, the Second Circuit relied on the United Nations Charter, which guarantees certain “human rights and fundamental freedoms.” The Court reasoned that “although there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture.”⁶²

The Court also relied on the Declaration on the Protection of All Persons from Being Subjected to Torture, which provides that “[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.”⁶³ The Court noted that torture was once a routine practice in criminal interrogations in many nations, but found that torture is prohibited expressly or implicitly by the

⁶¹ See *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (U.S. 2013).

⁶² *Filartiga*, 630 F.2d at 882.

⁶³ *Id.* at 883.

constitutions of over fifty-five nations, including both the United States and Paraguay.⁶⁴ The Court also notes that it has been the general experience of the State Department that governments do not assert a right to torture their own citizens. Where reports of torture “elicit some credence,” a state usually denies that torture has taken place, or, in some instances, will assert that the conduct was unauthorized or “constituted rough treatment short of torture.”⁶⁵ The Court finds this to be evidence for the existence of an international norm.

The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.⁶⁶

In fact, the behavior of the United States government at the time reports of our own torture program “elicited some credence” that it engaged in torture. The United States government referred to the actions undertaken during the Extraordinary Rendition and Torture Program euphemistically as “enhanced interrogation,”⁶⁷ and asserted flatly that the “United States does not torture.”⁶⁸ Never during the course of the Program’s implementation did the United States admit to engaging in torture, for this would not only violate specific treaty obligations, but would also violate a preemptory norm of international law as it is recognized by American courts. Only once when the Program had been ended and a new administration inaugurated did President Obama admit that the United States engaged in torture.⁶⁹

Before moving on to the question of whether this norm conferred jurisdiction in the federal courts to adjudicate the claim under the Alien Tort Statute, the Second Circuit held that

⁶⁴ *Id.* at 884, citing U.S. Const. Amend. VIII.

⁶⁵ *Id.* at 884.

⁶⁶ *Id.* at 884, citing J. Brierly, *The Outlook for International Law* 4-5 (Oxford 1944).

⁶⁷ *CIA tactics: what is ‘enhanced interrogation’?* BBC NEWS, December 10, 2014.

⁶⁸ *Bush says U.S. ‘doesn’t torture people,’* ASSOCIATED PRESS, October 5th, 2007.

⁶⁹ During a news conference in 2014, Barack Obama candidly stated that “[w]e tortured some folks.” Josh Gerstein, *Obama: ‘We tortured some folks’*, POLITICO, August 1st, 2014.

“[t]he treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments.”⁷⁰ According to the Second Circuit, official torture is prohibited clearly and unambiguously by the law of nations and international law grants the right to redress against perpetrators of official torture.

C. THE NEXUS PROBLEM

The ruling in *Filartiga* was not only concerned with establishing the status of official torture as a preemptory norm, however. The Court went a step further and held that because of this status, the federal courts were empowered to exercise universal jurisdiction over Pena-Irala to adjudicate the dispute under the Alien Tort Statute. This holding been enervated by the later case of *Kiobel v. Royal Dutch Petroleum Co.*,⁷¹ but the concept of universal jurisdiction has been a matter considered to be constitutionally suspect by a number of critics including human rights advocates. It is important to briefly address this problem as it relates to the resolution of international human rights disputes if only to show how it is not a problem in the cases of the victims of the United States’ torture program.

So-called “universal jurisdiction” is a theory that is essentially purely academic for the purposes of constitutional adjudication in the United States. It has not been used to resolve a claim in federal court, except in *Filartiga* and then again in *Kiobel*, where it was found to be outside of the federal courts’ Article III powers. There stands especially the idea that a claim arising on the basis of a *jus cogens* crime is so horrendous as to be in violation of the law of

⁷⁰ *Filartiga* 630 F.2d at 884-85 (2d Cir. 1980), citing 22 U.S.C. s 2304(a)(2) (“Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”); 22 U.S.C. s 2151(a) (“The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms”).

⁷¹ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. at 1664.

nations and thus a crime against the international community as a whole. Because the injury is to the stability of the community of nations, any nation may exercise the adjudicative jurisdiction of its courts to punish the accused.⁷² It is a form of jurisdiction that falls outside the traditional modes of personality (jurisdiction exercised over a citizen of a nation, in their capacity as a citizen) or territoriality (jurisdiction exercised over a person when the crime was committed within the physical boundaries of a nation state).⁷³ Theoretically, any person committing such a heinous crime as to be categorized as a *jus cogens* norm anywhere in the world may be hailed to court by any nation.⁷⁴

In *Filartiga*, for example, the plaintiffs were foreign nationals who had been injured by a foreign government by crimes committed in a foreign state. No basis for jurisdiction existed in the federal courts of the United States that could be tied to the concepts of personality or territoriality. The Second Circuit found the existence of universal jurisdiction by first finding that the accused had violated a preemptory international *jus cogens* norm, namely, official torture. The federal courts are only permitted to adjudicate disputes “arising under” the Constitution or “laws of the United States and treaties made, or which shall be made under their authority.”⁷⁵ The ruling in *Filartiga* was not based on any particular treaty but by making the general concept of international legal norms interchangeable with the “laws of the United States”—something that is problematic for the constitutional and federalist structure of the judiciary. The “laws of the United States” language of Article III, coupled with the history and jurisprudence of the so-called “case or controversy requirement,” implies that the authority of the federal courts may only be exercised according to the traditional personality and territoriality modes of

⁷² Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150.

⁷³ *Id.* at 151.

⁷⁴ *Id.*

⁷⁵ U.S. Const. Art. III, sect. 2.

jurisdiction.⁷⁶ To extend such authority over foreign nationals committing crimes in foreign states fundamentally contradicts the limited, delegated powers of the Court in matters of legal interpretation. There must be a “nexus” that connects the litigant to the United States in order for jurisdiction to be proper.

This problem was recognized in *Kiobel v. Royal Dutch Petroleum Co.* In *Kiobel*, petitioner (Nigerian nationals) sued respondents (British, Dutch and Nigerian corporations) under the Alien Tort Statute (ATS), alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.⁷⁷ After Nigerian civilians began protesting the environmental impact the corporation’s activities had on the area, Nigerian military forces allegedly attacked petitioners, and the corporations allegedly aided and abetted the Nigerian Government in contravention of the law of nations.⁷⁸ The Court found that the ATS was not intended to imply extraterritorial application without a link to citizens or interests of the United States, and thus to federal law.⁷⁹ The Court held that this presumption “reflects ... that United States law governs domestically but does not rule the world.”⁸⁰ The Court stated further that such a presumption against extraterritorial jurisdiction “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁸¹ The Supreme Court in *Kiobel* explicitly held that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.” While the issue at stake in *Kiobel* did not rise to the level of a universally recognized *jus cogens* offense, in the vein of genocide, or crimes against humanity, the Court did

⁷⁶ This is because international law cannot be properly considered “the laws of the United States” after the common law powers of the federal courts were altered by *Erie*. See *infra*. See also, Bradley and Goldsmith, *supra* note 5.

⁷⁷ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (U.S. 2013).

⁷⁸ *Id.*

⁷⁹ *Kiobel*, 133 S. Ct. 1659 at 1663.

⁸⁰ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. at 1664, quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007).

⁸¹ *Id.*, quoting, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991).

not use this as a defining characteristic in its decision emphasizing a presumption against extraterritoriality in the ATS as a jurisdictional provision.

The portion of the *Filartiga* opinion holding that universal jurisdiction is not barred under Article III because international law operates as federal common law and therefore “arises under” the laws of the United States for the purposes of jurisdiction⁸² is also a disappointing and debatable finding. The acceptance of customary international law as federal common law is a pervasive belief among legal scholars, but it has not been critically explored enough to expect that the Supreme Court might understand it to permit extraterritorial jurisdiction without a traditional nexus. This assumption rests on hollow historical contentions and an extremely liberal reading of the Constitution’s jurisdictional grants to the federal courts. First, the precursor to federal common law as it is understood in a post-*Erie* world, known historically as “general common law,” was not considered to be part of the “laws of the United States” for the purposes of Articles III and VI of the Constitution.⁸³ Cases arising under general common law did not, without more, establish federal question jurisdiction, nor were federal court interpretations of general common law binding on the states.⁸⁴ When the federal courts utilized “general common law” to “provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign,”⁸⁵ customary international law was conceptualized as part of its corpus. A “state constitution or legislative provision in violation of customary international

⁸² *Filartiga* 630 F.2d 876 at 877.

⁸³ Bradley and Goldsmith, *supra* note 12 at 825; See 1 Charles Cheney Hyde, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 290 (1922).

⁸⁴ Bradley and Goldsmith, *supra* note 12 at 825; See Hyde, *supra* note 83 at 290.

⁸⁵ See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1798: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515, 1517 (1984).

law [was] valid unless in conflict with a Federal constitutional provision or an act of Congress.”⁸⁶

The question of universal jurisdiction does not affect any claim that can be made against the United States in relation to the torture Program, however. There is no lack of a traditional nexus between victims of official torture carried out and sanctioned by United States officials and the United States itself. Both domestic law and international treaties provide a sufficient basis for jurisdiction “arising under” the laws of the United States. The jurisdictional question in *Kiobel* and *Filartiga* is merely illustrative to show the extent of the implications of those decisions and how international law in the federal courts can quickly become murky. It also shows the differential ways in which the federal courts have treated claims based on general CIL (*Kiobel*) and those based on a recognizable preemptory norm (*Filartiga*). What is important to glean from these decisions is that the United States has recognized certain *jus cogens* norms to be not only instructive, but obligatory in the federal court system. Returning to our discussion of Tenth Amendment impediments and the “subject matter limitation,” official torture, as a clear and unambiguous violation of fundamental preemptory norms, is by its very nature a matter of international concern, not subject to such federalism limitations as domestic criminal acts might be.

D. THE “LAWS OF THE UNITED STATES” AND CUSTOMARY INTERNATIONAL LAW

Customary International Law and even *jus cogens* preemptory norms may not stand alone as the “laws of the United States” for the purposes of conferring federal jurisdiction because the elimination of expansive federal common law powers by *Erie v. Tompkins* separates such common law principles from the laws upon which the federal courts may base adjudicative

⁸⁶ Bradley and Goldsmith, *supra* note 12 at 824; Quincy Wright, THE CONTROL OF AMERICAN FOREIGN RELATIONS 161 (1922).

proceedings.⁸⁷ However, this does not imply that the federal courts cannot consider or utilize international legal principles in deciding a case properly before them. In establishing the content of a “subject matter limitation” on the Treaty Power that would inform how far the Tenth Amendment goes in limiting the enforcement of treaty provisions against states, not only are these international legal principles warranted, but they are necessary. Courts must consider the nature of the international legal principles involved in order to determine whether they fall within the definition of “international concern.” We still must be able to trace the role played by CIL and preemptory norms in the federal courts to reach a robust level of clarity concerning the intersection of international law and the Tenth Amendment.

Whether a state must comply with international treaty obligations is a fundamental question about the efficacy of international law in the United States. Our federalist structure could render duties and obligations that we freely entered into as a nation meaningless if states cannot be held to the same standards we set for the nation as a whole. The Tenth Amendment cannot be treated as a freestanding bulwark against the operation of international norms within our borders. However, we also cannot simply dismiss structural and constitutional limits placed on the various branches and departments of the government for the sake of a swift and simple resolution. *Erie* eliminated the use of general common law by the federal courts in holding that “except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁸⁸ It is still an unsettled question as to whether *Erie* governs customary international law operating in the federal courts as a matter of substance (as opposed to a basis for an exercise of adjudicative jurisdiction). The finding of universal jurisdiction, predicated on the nature of torture as a preemptory norm, in *Filartiga*, seemed to

⁸⁷ Bradley and Goldsmith, *supra* note 12 at 825.

⁸⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

imply that the Second Circuit took for granted that customary international law did not fall under the holding of *Erie*. To reach this conclusion, the Second Circuit relied on precedent that predated the *Erie* decision, which applied the norms of customary international law as general common law, and not as federal law.⁸⁹

Filartiga confers jurisdiction on nondiverse aliens advancing claims under the ATS by assuming that customary international law is a component of federal common law. *Kiobel* demonstrates that the Supreme Court will refuse to grant jurisdiction to the extraterritorial application of the ATS without a nexus with the United States—intimating that the component of the *Filartiga* opinion, which liberalizes the jurisdiction of the domestic courts in the context of international law, is flawed. The *Kiobel* Court also explicitly stated that federal law would permit jurisdiction over international offenses in a modest number of circumstances.⁹⁰ Those circumstances essentially orbit around the necessity for a claim that “touch[es] and concern[s] the United States.”⁹¹ This would seem to indicate that the Supreme Court did not accept the view that the whole body of CIL was incorporated into the federal common law for the purposes of Article III jurisdiction, but that issues of international concern are still cognizable by the federal courts. However, it does not provide us with a workable model of how CIL does operate in the federal courts, where jurisdiction is proper, and where the matters before the court are of exigent international caliber. The lack of a substantive model becomes further complicated when we remember that the *Holland* decision predates *Erie* and the elimination of general federal common law powers, while the distinguishable, but relevant decision in *Bond* follows it.

Fortunately, as it relates to our specific line of inquiry—whether the Tenth Amendment prevents the enforcement of international treaties on torture against states—the abstract debate

⁸⁹ See, *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

⁹⁰ *Kiobel*, 133 S. Ct. at 1663.

⁹¹ *Id.* at 1669.

over the use of CIL in federal court is largely irrelevant. Not only did *Filartiga* explicitly characterize state-sanctioned torture as a crime controlled by *jus cogens* norms of international law, Congress subsequently codified it in federal law.⁹² Putting aside the jurisdictional quandary that may be posed in certain cases, the Torture Victim Protection Act of 1991 expanded § 1350 of the Alien Tort Statute to include official acts of torture under color of law in foreign nations to provide a cause of action for civil damages in the federal courts.⁹³ That is to say, even if the jurisdictional ruling of *Filartiga* was constitutionally suspect, Congress acted to create a cause of action in federal law specifically addressing torture due to its magnitude in maintaining international stability.

Our question does not depend on the issue of extraterritorial application of federal law, or the authority of the courts to adjudicate claims predicated on customary international law without a basis in the laws of the United States. Our question is, whether given the treatment of torture, by both the courts and the legislature as a universal act, state complicity in such an act is beyond the reach of federal adjudication.⁹⁴ The answer is clearly “no.” Even if we assume that the enforcement of treaty obligations against states must be limited by the nature of those obligations as “of international concern,” and we assume that customary international law is not, in its general configuration, an independent component of the “laws of the United States,” the states must still be held legally accountable for participation in torture. That could come about as civil damages,⁹⁵ criminal sanctions, or some other form of relief. State sanctioned torture is not

⁹² TORTURE VICTIM PROTECTION ACT OF 1991, 1992 Enacted H.R. 2092, 102 Enacted H.R. 2092, 106 Stat. 73.

⁹³ *Id.*

⁹⁴ There are further questions beyond the scope of this analysis concerning the different mechanisms of enforcement. E.g., whether criminal proceedings against state actors under color of international treaties would raise Eleventh Amendment concerns of sovereign immunity, or whether Congress could act to abrogate immunity in certain circumstances (or may have been seen to have done so with already existing law). This is simply the answer to the currently indeterminate theoretical question of the Tenth Amendment’s outright constitutional bar to enforcement of international obligations against the states.

⁹⁵ E.g., under the Alien Tort Statute 28 U.S.C.S. § 1350.

simply one custom of international law among others; it implicates international equanimity by its very nature. The most constrained reading of the Tenth Amendment on this point would still lead to a conclusion that the U.S. Constitution does not prevent the federal government from ensuring state compliance with a prohibition against official torture.

IV. THE CAT'S OUT OF THE BAG

Neither the structures of federalism nor of the Tenth Amendment prevent the enforcement of international treaty obligations prohibiting torture against states that may have remained complicit in such acts. Even given the original intent of the Supremacy Clause to create uniformity in the United States' relations with other nation states, as opposed to international legal precepts governing domestically, domestic acts that directly impact explicitly international concerns are not abrogated by the Tenth Amendment. Powers traditionally reserved to the states may overlap with the actions of the United States abroad. Even if we accept a reading of the Tenth Amendment that limits enforcing provisions of treaties to those conforming to a subject matter limitation of international consequence, torture falls under that heading. Every branch of our government has recognized official torture as an act that not only implicates international concerns, but an act included in a foundational legal and ethical category from which no nation is permitted to derogate. The treaty provisions contained in international legal devices are reflected in our domestic law and our domestic jurisprudence. The authority reserved to the states by the Constitution does not include powers to contradict or insulate themselves from basic tenets of governance that apply to the United States as a participant in a global community.

Though the federal courts are limited in their authority to adjudicate disputes to those that arise under the laws of the United States and may not be permitted to introduce freestanding claims on the basis of customary international law, the use of torture is neither an ordinary

customary international legal claim nor outside of the cognizance of the laws of the United States. With the existence of a nexus between the complaining party and the United States itself, provisions of treaties against torture have cognates in domestic statutes and have been recognized by the courts to merit the status of preemptory norms. Victims of the Extraordinary Rendition and Torture Program perpetrated by the United States with the complicity of state actors should meet with no legal impediment to having their claims against state actors heard on the basis of federalism. Our federalist structure is meant to diversify power and to prevent excessive centralization of authority exercised at the expense of the people. It was not instituted, and should not be manipulated to relieve states from a duty to comply with provisions put in place to protect persons domestically and abroad from illegal and ethically reprehensible conduct.

CHAPTER FOUR

DOES DOMESTICATING INTERNATIONAL LAW TO ENSURE COMPLIANCE MEAN ACCOUNTABILITY FOR EXTRAORDINARY RENDITION?

I. INTRODUCTION

This policy report has already addressed in significant detail whether treaties are enforceable. In considering the two major international human rights treaties that the United States has signed and ratified, despite reservations, understandings, and declarations, the ultimate issue is whether these treaties—The International Covenant on Civil and Political Rights, and the Convention Against Torture – and their subsequent enabling legislation are enforceable. As previously discussed, the Vienna Convention on Treaties, which the United States has held to be binding, acknowledges that RUD's that thwart the main purpose of a treaty are invalid and do not render international law void. This section of the policy report examines federal statutes that serve as enabling legislation for international law, and explores whether state actors can be prosecuted under these statutes.

The United Nations Special Rapporteurs have advocated that under no circumstances shall torture be justified, and any findings indicating that torture has occurred “must be [publicly] investigated” with victims receiving legal recourse.¹ Furthermore, the prohibition against torture does not arise only on select occasions, nor does it matter whether government officials carried out the torture or authorized it on domestic soil or abroad—all actors are accountable under

¹ Prof. Deborah M. Weissman, Kristin Emerson, Paula Kweskin, Catherine Lafferty, Leah Patterson, Marianne Twu, Christian Ohanian, Taiyyaba Qureshi, & Allison Whiteman, *The North Carolina Connection to Extraordinary Rendition and Torture*, LAW.UNC.EDU, 16 (Jan. 2012), <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf> [hereinafter *NC Torture Report*]. (“As noted by the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the U.N. Working Group on Arbitrary Detention, and the U.N. Working Group on Enforced or Involuntary Disappearances, these serious human rights violations ‘cannot be justified under any circumstances, including states of emergency’ and must be investigated with findings made public, and victims should be provided with legal remedies and reparation.”).

international law. Specifically, since this policy report has already concluded that the greater weight of the legal arguments demonstrate that treaties are binding law in the United States, this section will look at the egregious human rights atrocities committed under the extraordinary rendition program, federal laws that have domesticated international laws, and how international, federal, and state statutes can be used to hold participants liable for their role in the extraordinary rendition program.

II. EXTRAORDINARY RENDITION OVERVIEW: ITS ORIGIN, EXPANSION, AND PERPETUATION OF TORTURE

A. GENERAL HISTORY OF EXTRAORDINARY RENDITION

The United States has prided itself at being a human rights leader, but “the world begs to differ.”² Courts around the world have suggested that the United States may condone human rights abuses in the manner that it authorizes torture against individuals.³ With the assistance of federal government agencies, the United States Central Intelligence Agency (C.I.A) established a program that allowed the detention and interrogation of foreign nationals suspected of being involved in terroristic acts committed against the United States, without being formally charged of any crime.⁴ This program, called extraordinary rendition, held individuals suspected of terrorism or terroristic ties in custody, against their will, and questioned them with “unprecedented harshness” in locations such as Uzbekistan, Egypt, Iraq, Pakistan, Syria, and

² Jamil Dakwar, *The United States Considers Itself a Human Rights Champion, The World Begs to Differ*, ACLU HUM. RTS. PROGRAM, <https://www.aclu.org/blog/speak-freely/united-states-considers-itself-human-rights-champion-world-begs-differ>; *Report pulls back veil on CIA's rendition program*, NBC NEWS (Feb. 5, 2013), http://usnews.nbcnews.com/_news/2013/02/05/16853156-report-pulls-back-veil-on-cias-rendition-program?lite [hereinafter “NBC Report on CIA Rendition”]

³ NBC Report on CIA Rendition, *supra* note 2.

⁴ Am. Civil Liberties Union, *Fact Sheet: Extraordinary Rendition*, <https://www.aclu.org/fact-sheet-extraordinary-rendition> [hereinafter ACLU Factsheet]; see Jane Mayer, *Outsourcing Torture: The Secret History of America's “Extraordinary Rendition” Program*, NEW YORKER (Feb. 14, 21, 2005), at 106, available at <http://www.newyorker.com/printables/fact/050214fa fact6> (citation omitted); see also CIA ‘Outsourcing Torture,’ AGENCE FRANCE PRESSE (Feb. 7, 2005), available at <http://www.commondreams.org/headlines05/0207-12.htm> (“Scott Horton - an expert on international law who has examined CIA renditions - estimates that 150 people have been picked up in the CIA net since 2001.”).

Afghanistan.⁵ It is estimated that more than fifty countries have assisted the United States in detaining foreign nationals at these undisclosed locations known as “black sites.”⁶ Frequently, foreign nationals were transported under the specific authority of the CIA, to countries where “federal and international legal safeguards do not apply.”⁷ The extraordinary rendition program was initially linked to the national policy agenda of former President Ronald Reagan and expanded under the Bill Clinton and George W. Bush administrations.⁸

B. EXTRAORDINARY RENDITION POST 9/11

While the extraordinary rendition program was initially limited in scope, it expanded significantly after the September 11th attacks increased the perceived threat of terrorism against the United States under former President George W. Bush.⁹ Congress has affirmatively held that it is against United States policy to “expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”¹⁰ To support this policy, Congress has refused to fund any program that “subject[s] any person in the custody or under the physical control of the United States to cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”¹¹ However, the extraordinary program, in its current state, exists

⁵ Kate Kovarovic, *The Business of Torture: The Domestic Liability of Private Airlines in the U.S. Extraordinary Rendition Program*, 19 U. MIAMI BUS. L. REV. 147, 152; Kovarovic, *supra* note 5, at n. 26 (citing Barry et al., *The Roots of Torture*, NEWSWEEK (May 24, 2004), available at <http://www.newsweek.com/roots-torture-128007>).

⁶ Kovarovic, *supra* note 5, at 153; NBC Report on CIA Rendition, *supra* note 2 (“As many as 54 nations aided the United States in rendition and detention operations that swept up more than 130 people as part of the Central Intelligence Agency’s global counterterrorism efforts, according to a report released Tuesday by the Open Society Justice Initiative, a human rights advocacy group.”).

⁷ ACLU Factsheet, *supra* note 4.

⁸ *Id.*; Kovarovic, *supra* note 5, at 149.

⁹ ACLU Factsheet, *supra* note 4.

¹⁰ *Id.* (citing Foreign Affairs Reform and Restructuring Act of 1998, (“FARRA”), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (Oct. 21, 1998), reprinted in 8 U.S.C. § 1231, Historical and Statutory Notes (1999)).

¹¹ P.L. 109-13, § 1031 (2005); ACLU Factsheet, *supra* note 4 (“Congress has recently reaffirmed this policy... that it will not authorize the funding of any program that “subject[s] any person in the custody or under the physical

under the guise of national security and allows “U.S. agents or their proxies [to] seize the person abroad for transport to the custody of a third country” to interrogate and torture, and not to seek justice.¹² Extraordinary rendition is illegal under both international and domestic law.¹³

Under the extraordinary rendition program, foreign nationals have no legal protections in the facilities where they are detained. They are held without due process or the formal charge of any offense.¹⁴ While being detained, and without access to due process, those captured under the extraordinary rendition program are tortured, often brutally and inhumanely.¹⁵ Usually, the victims are “stripped, shackled, and flown blindfolded” to black sites against their will.¹⁶ To carry out these operations, the CIA uses private companies to plan and execute the flights of the foreign nationals detained under the extraordinary rendition program.¹⁷ While it is likely that these private companies did not create or supervise the extraordinary rendition program, their participation significantly aided the program by providing transportation and handling pre-flight and post-flight logistics and details.¹⁸

C. NORTH CAROLINA’S INVOLVEMENT IN EXTRAORDINARY RENDITION

control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”).

¹² David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INTL’ L. 585, 588-89 (2006) (“The new form of extraordinary rendition typically targets a person who is not formally charged with any crime in the United States. Instead, U.S. agents or their proxies seize the person abroad for transport to the custody of a third country. Today, the term ‘extraordinary rendition’ is used exclusively as a euphemism to describe abduction of terror suspects not in order to bring them to justice in the United States, but rather to transfer them to a third country.”).

¹³ Matteo M. Winkler, *When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 LOY. L.A. INT’L & COMP. L. REV. 33, 38 (2008) (“This article addresses the illegality of the ERP. In fact, ERP actions raise important legal questions from both domestic and international viewpoints.”).

¹⁴ ACLU Factsheet, *supra* note 4; Kovarovic, *supra* note 5, at 152 (“The denial of due process was apparent at every stage of an extraordinary rendition.”).

¹⁵ ACLU Factsheet, *supra* note 4.

¹⁶ Kovarovic, *supra* note 5, at 152.

¹⁷ Paula Kweskin, Taiyyaba Qureshi, Marianne Twu, & Deborah M. Weissman, *The International Legal Landscape of Extraordinary Rendition: U.S. Obligations Under ICCPR, CAT, and the Nuremberg Principles* 1, 5 UNIV. N. C. SCH. OF LAW, available at <http://www.law.unc.edu/documents/clinicalprograms/theinternationallegalandscapeofextraordinaryrendition.pdf>.

¹⁸ Kovarovic, *supra* note 5, at 155.

The Senate Select Committee on Intelligence’s Study of the Central Intelligence Agency’s Detention and Interrogation Program (“Senate Intelligence Committee”) released a 525-page executive summary (“Senate Torture Report”) to the public in December 2014.¹⁹ This report provided factual information about the CIA’s participation in extraordinary rendition post September 11th and its use of illegal torture to interrogate alleged victims. The release of the Senate Torture Report confirmed much of the speculation that had existed for years regarding extraordinary rendition, but did not proffer to hold those individuals and corporations involved accountable for their actions.²⁰ While the Report provides some of the most accurate information about the CIA Extraordinary Rendition program to date, the executive summary is a mere fraction of the complete 6,500 plus page report that has still not been released to the public.²¹ Nonetheless, the released executive summary of the Senate Torture Report confirmed that Aero Contractors Ltd. (“Aero”) participated in government sponsored torture, despite the prohibition of torture in domestic legislation and international treaties.²² While it is beyond the scope of this paper to identify and analyze all aspects of the Senate Intelligence Torture Report, it is important

¹⁹ S. Rep. 113-288, *Rep. of the Senate Select Comm. on the Study of the Central Intelligence Agency’s Det. & Interrogation Program*, available at <https://www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf> (declassified, Dec. 3, 2014) [hereinafter “Torture Report”].

²⁰ Ali Watkins, *With CIA Torture Rep. Set for Controversial Release, Washington Braces for Fallout*, HUFFINGTON POST, (Dec. 8, 2014), http://www.huffingtonpost.com/2014/12/08/senate-cia-report-release_n_6290944.html (“[The]... release will mark the end, for now, of the bitterly fought battle over the document waged between the White House, its chief intelligence agency and the Senate panel. Even though the committee voted in April to declassify the report’s summary, the public revelation was held up by protracted disputes over information that the White House and CIA wanted to keep secret, but that the Senate committee wanted to publicize.”).

²¹ *Id.* (indicating that the entire Senate Report has not been released).

²² See Irving Figueroa, *et. al.*, *Assessing Recent Developments: Achieving Accountability for Torture*, 1, § 2 UNIV. N. C. SCH. OF LAW (Feb. 2016), available at <http://www.law.unc.edu/documents/academics/humanrights/tortureaccountability.pdf> (although Aero Contractors is not explicitly named in the Senate Torture Report, there is conclusive support that Aero Contractors was the company used); see Figueroa, Gardzalla, Gurlitz, & et. al, *supra* note 22, at 69 (“After enduring both psychological and physical torture... Britel was kidnapped and extraordinarily rendered on board an Aero Contractors operated...”); See North Carolina Commission of Inquiry on Torture, *Background*, <http://www.nccit.org/background/> (“In December 2014, the Senate Intelligence Committee report on CIA torture confirmed that the CIA systematically tortured detainees, many of them innocent of any connection to terrorism, and lied to the media and government officials about the RDI program.”).

to highlight crucial components to understand the role North Carolina played in the extraordinary rendition program and the need to hold North Carolina-based Aero accountable.

Through public information contained in the Senate Torture Report, the investigative reports of journalists, and flight records, it has been confirmed that at least two Aero operated planes are connected to CIA extraordinary rendition flights that occurred between 2001 and 2006.²³ Aero is based in Smithfield, North Carolina and operates aircraft from and leases hangar space at the Johnston County Airport.²⁴ Aero was incorporated in 1979 by a former CIA pilot and is licensed to operate in North Carolina.²⁵ The Aero planes and crew were flown from North Carolina to Washington D.C where a “rendition team” would either prepare the captured individuals for their rendition flight according to a standardized plan or travel to a pre-identified location.²⁶ After being captured by the CIA, the victims were “shackled, blindfolded and hooded so that they were unable to move, see, or hear” and suffered sensory deprivation throughout the flight before being sent to black sites for intense interrogation sessions.²⁷ Essentially, the extraordinary rendition program allowed the United States to “outsource torture” to other countries where officials knew or were substantially certain that torture would occur.²⁸ Reports have confirmed that at least 18 of these trips were operated by Aero Contractors.²⁹ Over 30 men have been transported by Aero Contractors, all of varying ethnicities and tortured at black sites. At least four of the extraordinary rendition victims have been identified as—Khaled El Masri,

²³ Kweskin, Qureshi, Twu, & Weissman, *supra* note 17, at 5.

²⁴ *Id.*

²⁵ Weissman, Emerson, Kweskin, & *et. al.*, *supra* note 1, at 17.

²⁶ *Id.* at 17.

²⁷ *Id.* at 15.

²⁸ *Id.* at 37.

²⁹ Kweskin, Qureshi, Twu, & Weissman, *supra* note 17, at 5 (“Through the work of plane spotters, investigators and journalists, and the analysis of flight records, two specific Aero-operated planes have been linked to extraordinary rendition flights to black sites around the world in the period between 2001 and 2006; the aircraft with the tail number N313P and the aircraft with the tail number N379P.”).

About Elkassim Britel, Binyam Mohamed, and Bisher Al-Rawi.³⁰ The creation, implementation, and use of the extraordinary rendition program is illegal, and its establishment both violates domestic and international law and raises a significant public policy concern. Extraordinary rendition is not solely an international concern, but is also a state and local issue as well.

Furthermore, the circumstances surrounding the release of the Senate Torture Report indicate that the government was not being as forthcoming and honest with the information that was presented to the public about the extraordinary rendition program. The White House and Congress significantly delayed the release of the Senate Torture Report and continue to advocate against the release of the full report because of the disturbing accounts of information contained within the report and the extent it details the use of illegal torture techniques used by government officials.³¹ Additionally, the Senate, led by North Carolina Senator and Senate Intelligence Committee Leader Richard Burr, made an unprecedented request to have all copies of the report returned and destroyed, fearing national security concerns.³² Because of the secrecy surrounding the extraordinary rendition program, and the refusal of the Senate to release the unredacted Torture Report in its entirety, the exact number of victims could be significantly higher than what is reflected in the flight logs and other information that is publicly available.³³ To date, Aero Contractors has not faced any liability or accountability for supplying “torture taxis” used

³⁰ *Id.* at 5.

³¹ Watkins, *supra* note 20; Jeremy Ashkenas, Hannah Fairfield, Josh Keller, & Paul Volpe, 7 *Key Points from the CIA Torture Report*, N. Y. TIMES (Dec. 9, 2014), *available at* <http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html?action=click&contentCollection=World®ion=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia>.

³² *Id.*

³³ Figueroa, *et. al*, *supra* note 22, at 56 (“While CIA Director Michael Hayden stated that the number was “mid range, two figures,” the Senate Report confirms that the program had at least 119 detainees, and many have suggested that the number is much higher.”).

to transport victims in the extraordinary rendition program, and continues to operate out of Smithfield, North Carolina.³⁴

III. LAWS THAT PROHIBIT TORTURE AND EXTRAORDINARY RENDITION

A. INTERNATIONAL LAWS THAT PROHIBIT TORTURE

International human rights laws should be used as an avenue to “pursue fundamental rights, justice, and equality.”³⁵ As thoroughly discussed in earlier chapters of this policy report, there are international treaties that the United States has signed and ratified that expressly prohibit torture. Additionally, the United States has created enabling legislation to comply with these treaties at a domestic level. Although international treaties are reviewed in Chapter One of this policy paper, the relevant provisions of these treaties are worth reviewing and are briefly summarized below:

1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), a resolution of the General Assembly of the United Nations, identifies critical principles that govern the protection of human rights; torture is one example of a human rights violation.³⁶ Although the UDHR has largely

³⁴ Weissman, Emerson, Kweskin, & *et. al.*, *supra* note 1, at 18 (Aero Contractors is still in business and actively operates out of Smithfield, NC); *see also*, Renee Schoof & David Lightman, *Sen. Richard Burr says he will not hold hearings on torture report*, NEWS & OBSERVER (Dec. 9, 2014), *available at* <http://www.newsobserver.com/news/politics-government/article10188272.html#storylink=cpy> (Furthermore, Burr has indicated that he would not hold hearings on the torture report and that the torture report should be remembered only as a “footnote in [U.S.] history.”)

³⁵ The Opportunity Agenda, *Legal & Policy Analysis: Hum. Rights in State Courts* 1, 2 (2011) *available at* https://sakai.unc.edu/access/content/group/f203dc5d-f2be-416e-8958-fe7f8467b77e/Extraordinary%20Rendition%20and%20torture%20Project/HR%20at%20local%20level/OppAgendaHumanRightsInStateCourts_ExecSumm_8-2011.pdf (“Overview and recommendation for legal advocates.”)

³⁶ U.N. Econ. & Soc. Council, Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andrés Aguilar*, para. 14–15, U.N. Doc.E/CN.4/1985/20 (Feb. 1, 1985), *available at* http://iranhrdc.org/files/pdf_en/UN_Reports/Andres%20Aguilar/E.CN.4.1885.20--Aguilar's%20Report%201985.pdf; Andrea Davis, Jennifer Jiang, Derek Loh, Theresa Viera, & Deborah M. Weissman, *Obligations & Obstacles: Holding North Carolina Accountable for Extraordinary Rendition & Torture* 1, 18 UNIV. OF N.C. SCH. OF LAW (2013).

risen to the level of customary law, it is not binding on Member States.³⁷ However, under the theory of *jus cogens*, torture is prohibited because protection from such abuse is a fundamental human right and no derogation is ever permitted for certain fundamental human rights.³⁸

The relevant provisions of the UDHR in support of this proposition are as follows:

- Article 3 of the UDHR guarantees every person “the right to life, liberty, and security of person.”³⁹ Being secure in your person includes the right from being subjected to torture or inhumane treatment against your will;
- Article 5 specifies that “cruel, inhuman or degrading treatment or punishment” is prohibited; torture, by its very nature, is a form of cruel, inhuman, and degrading treatment and is used as a form of punishment;⁴⁰ and
- Article 6 states that victims of torture everywhere are recognized as “a person before the law” and are guaranteed 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.”⁴¹

2. International Covenant on Civil and Political Rights⁴²

The ICCPR expanded upon many of the rights in the UDHR and includes the following provisions:

- Article 7 states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴³ This treatment includes exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return

³⁷ Davis, Jiang, Loh, Viera, & Weissman, *supra* note 36, at 18-19 (“It is important to note that the UDHR is not a binding treaty; rather, it is a resolution of the United Nations General assembly. The United States has created no mechanism by which the UDHR has binding effect on it or its subdivisions. Nonetheless, many legal scholars, human rights bodies, and international jurists understand its provisions to reflect customary international law.”).

³⁸ Rafael Nieto-Navia, *Int’l Peremptory Norms (Jus Cogens) & Int’l Humanitarian Law*, COALITION FOR THE INT’L CRIM. CT 1, 1 available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf> (“The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law. In this regard, a view has been formed that certain overriding principles of international law exist.”).

³⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 at art. 3 (Dec. 10, 1948) [hereinafter “U.D.H.R.”].

⁴⁰ *Id.* at art. 5.

⁴¹ *Id.* at art. 6, 8.

⁴² The US has made reservations, understandings, and declarations (RUD’s) concerning the ratification of this treaty. However, RUD’s that go against the purpose of the treaty are unenforceable. See Chapter 2 of this policy paper for more in-depth discussion of RUD’s.

⁴³ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter “International Covenant on Civil & Political Rights”].

to another country by way of their extradition, expulsion, or refolement.”⁴⁴ It is immaterial, as to the application and enforceability of the covenants of the treaty, whether the individual subject to torture is within the United States.

- Article 5 states that derogation from these “fundamental rights” is not allowed and that “there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant.”⁴⁵
- Article 2 specifies 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.”⁴⁶

3. Convention Against Torture⁴⁷

Under the Convention Against Torture, the provisions preventing torture are absolute and non-derogable. The relevant provisions concerning torture are as follows

- Under article 1, torture is defined as

the means ...by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁸
- Under article 2, torture is prohibited under all circumstances and there are “no exception[s] [to any] circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency” that would justify using

⁴⁴ See, e.g., Human Rights Committee General Comment No. 20 Concerning Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 7, (Mar. 10, 1992), para. 9 (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refolement.”); see also ALICE EDWARDS, CARLA FERSTMAN, HUMAN SECURITY AND NON-CITIZENS: LAW, POLICY AND INTERNATIONAL AFFAIRS 545 (2010).

⁴⁵ International Covenant on Civil & Political Rights, *supra* note 43, at art. 5.

⁴⁶ *Id.* at art. 2.

⁴⁷ Weissbrodt & Bergquist, *supra* note 12, at 602 (“US had several RUD’s regarding CAT, but for a reservation to prevail, it must be “consistent with the object and purpose of a treaty.”); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 LL.M. 679, entered into force Jan. 27, 1980 art.19.

⁴⁸ Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter “Convention Against Torture”].

torture.⁴⁹ No “government, federal, state or local, *civilian or military*, is authorized to commit or instruct anyone else to commit torture.”⁵⁰

- Under article 3, no state “shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁵¹
- Under article 4, every state “shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”⁵²

In addition to the international laws specified above, these treaties, specifically the Convention Against Torture, have been codified domestically to prohibit torture and to enable compliance at the federal, state, and local levels of government.

B. FEDERAL STATUTES THAT PROHIBIT TORTURE

The traditional view within the United States is that international law is subsidiary to domestic law.⁵³ However, the prohibitions against torture specified in international laws have largely been incorporated into domestic law within the United States. The Federal Torture Statute, War Crimes Act, Foreign Affairs Reform and Restructuring Act, Detainee Treatment Act of 2005, and the National Defense Authorization Act are federal statutes that prohibit the use of torture. In 1994, Bill Clinton signed into law the Federal Torture Statute as enabling legislation to the Convention against Torture because the limitations in existing law did not allow for the complete implementation of the treaty.⁵⁴ At the time of ratification, the Senate stated that

⁴⁹ *Id.* at art. 2.

⁵⁰ Weissbrodt & Bergquist, *supra* note 12, at 613 (emphasis added).

⁵¹ Convention Against Torture, *supra* note 48, at art. 3.

⁵² *Id.* at art. 4.

⁵³ Louise Mallinder, *Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States*, 14 OR. REV. INT’L L. 307, 315 (2012) (“Within the American legal tradition international law is often viewed as having a subsidiary status to domestic law.”).

⁵⁴ Convention Against Torture, *supra* note 48, at art. 2 (Article 2 of CAT requires “member states take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.”); Weissbrodt & Bergquist, *supra* note 12, at 603 (citing Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America*, P 101, U.N. Doc. CAT/C/23/Add.5 (Feb. 9, 2000)).

Congress would not need significant legislation to enact the Convention Against Torture because “any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States.”⁵⁵

The United States Code defines torture as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁵⁶ Additionally, severe physical or mental pain and suffering is further defined as the

intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵⁷

Although this codified definition of torture is more specific than how torture is defined under Article 1 of the Convention Against Torture, treaty obligations should guide the interpretation of the federal statute and supersede any conflicting domestic provisions.⁵⁸ Under the Federal Torture Statute, it is a criminal offense, punishable by fine and up to twenty years imprisonment, to commit, attempt to commit, or conspire to commit torture outside of the United States; the

⁵⁵ Weissbrodt & Bergquist, *supra* note 12, at 604 (“The Senate determined that Congress needed only minimal enacting legislation to comply with the Convention because ‘any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States.’”); Weissbrodt & Bergquist, *supra* note 12, at n. 81.

⁵⁶ 18 U.S. Code § 2340-Definitions (2016); Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–415, § 1(k), Oct. 25, 1994, 108 Stat. 4301; Pub. L. 103–429, § 2(2), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 108–375, div. A, title X, § 1089, Oct. 28, 2004, 118 Stat. 2067.

⁵⁷ *Id.*

⁵⁸ Convention Against Torture, *supra* note 48, art. 1 (defining torture); Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–415, § 1(k), Oct. 25, 1994, 108 Stat. 4301; Pub. L. 103–429, § 2(2), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 108–375, div. A, title X, § 1089, Oct. 28, 2004, 118 Stat. 2067.

United States has jurisdiction over the offense to commit if the offender is a U.S. citizen or if the offender is “present in the United States.”⁵⁹

The War Crimes Act of 1996 imposes similar sanctions as the Federal Torture Statute and defines torture as a war crime.⁶⁰ Under the War Crimes Act, any U.S. citizen or member of the U.S Armed Forces that commits a war crime, either domestically or abroad, *shall be* punished.⁶¹ The War Crimes Act specifically identifies torture and the use of cruel or inhuman treatment as prohibited conduct.⁶² The legislative history indicates that the purpose of using the War Crimes Act is to hold individuals accountable for their role in torture and “fill t[he] gap” of prosecuting “grave breaches” as defined under international law in U.S. Courts.⁶³

Additionally, the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) was enacted to implement Article 3 of the Torture Convention. FARRA specifically provides protection under the Convention Against Torture by stating that it is against the policy of the United States to “expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United

⁵⁹ Kate Riggs, Richard Blakeley, & Jasmine Marwaha, *Prolonged Mental Harm: The Torturous Reasoning Behind a New Standard for Psychological Abuse*, 20 HARV. HUM. RTS. J. 263, 287 (2007) (“Insofar as the OLC offers any arguments as to congressional intent, it relies not on the legislative history nor the goals and objects of the Federal Anti-Torture Statute, but rather on the Senate’s understanding to the CAT.” ...The OLC cites in support of its assertions a 1987 OLC memorandum entitled *Relevance of Senate Ratification History to Treaty Interpretation.*”); see 18 U.S. Code § 2340A; (Added Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–322, title VI, § 60020, Sept. 13, 1994, 108 Stat. 1979; Pub. L. 107–56, title VIII, § 811(g), Oct. 26, 2001, 115 Stat. 381.).

⁶⁰ 18 U.S.C § 2340 (2015); 18 U.S.C § 2441; Mallinder, *supra* note 53, at 314.

⁶¹ 18 U.S.C § 2441 (2015) (emphasis added).

⁶² *Id.* (stating “(1) Prohibited conduct.--In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows: (A) Torture.--The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind. (B) Cruel or inhuman treatment.--The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”).

⁶³ 1996 U.S.C.A.N. 2181, 218132 *Weekly Compilation of Presidential Documents* 1482, Aug. 26, 1996.

States.”⁶⁴ The legislative history shows that it was through FARRA that Congress intended to comply with article 3 of the Torture Convention.⁶⁵

Under the Detainee Treatment Act of 2005, cruel, inhuman, or degrading punishment of “any individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location,” is prohibited.⁶⁶ Specifically, this act would allow for the prosecution of actors involved under the extraordinary rendition program because it is explicitly extended to people under the control of the United States Government, which include CIA officials.

In late 2015, President Obama signed into law § 1045 of the 2016 National Defense Authorization Act (NDAA), an Anti-Torture bill that explicitly prohibits the use of torture by any federal agencies.⁶⁷ The law requires that only lawful methods – those indicated in the Army Field Manual – be used when interrogating individuals held in the custody of the United States.⁶⁸ This law explicitly bans all forms of torture and includes a provision that requires the International Committee of the Red Cross to be notified, and have access to, individuals detained by the U.S. government.⁶⁹

⁶⁴ Weissbrodt & Bergquist, *supra* note 12, at 603-05.

⁶⁵ *Id.* at 604-05 (stating “Congress also enacted legislation to implement Article 3 of the Torture Convention. The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) articulated this policy.”). *Id.* citing (Foreign Affairs Reform and Restructuring Act of 1998, §2242(a), in Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No 105-277 (1998); *see also* H.R. 952 (109th): Torture Outsourcing Prevention Act § 2 no.11 (2005) (stating that “Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (citation omitted) states that ‘It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.’ To do otherwise would violate our obligations under Article 3 of the Convention against Torture.”).

⁶⁶ 42 U.S.C. § 2000 (2015).

⁶⁷ Steven J. Barela, *The New US Anti-Torture Law: A Genuine Step Forward*, Feb. 12, 2016, available at <https://www.justsecurity.org/29273/anti-torture-law-genuine-step/>; Arkady Bukh, *Obama Signs New Anti-Torture Bill*, Feb. 20, 2016, available at <https://www.nycriminallawyer.com/obama-signs-new-anti-torture-bill/>

⁶⁸ Barela, *supra* note 67 (stating the new law restricts all interrogation to techniques found in Army Field Manual 2-22.3 (AFM).”).

⁶⁹ Bukh, *supra* note 67.

1. What do Federal Statutes Mean for Extraordinary Rendition and Accountability?

Federal law provides the basis to hold accountable those actors of the extraordinary rendition program. Under the plain reading of each of the federal statutes identified above, all participants of the extraordinary rendition program, including Aero Contractors, can be held liable for their role in the extraordinary rendition program. It is true, however, that loopholes may exist by which those responsible for torture may seek to avoid prosecution under these federal statutes. For instance, under the Federal Torture Statute, torture outside of the United States is criminalized, but there is no expressly stated extension of this provision to people who have been transferred to the custody of U.S. officials when they are not in the United States.⁷⁰ The legislative history, however, indicates that the purpose of the Federal Torture Statute was to ensure complete compliance with the Convention Against Torture as necessary enabling legislation.⁷¹ There is no indication that the language of the statute was to have a meaning other than complete compliance with the Convention.⁷²

Some courts have created precedent that exploits statutory gaps and restricts FARRA because the language of the Act “does not extend legal rights beyond the removal setting.”⁷³ Another unintended loophole is that FARRA only allows an individual to “raise a claim under the Convention...pursuant to a final order for removal.”⁷⁴ This statutory gap supports the literal reading of Article 3 of CAT because “seizing a person in one country and transferring him” to

⁷⁰ Weissbrodt & Bergquist, *supra* note 12, at 608.

⁷¹ S. Rep. No. 103-107, at 58 (July 23, 1993) (“This section provides the necessary legislation to implement the United Nations Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment.”).

⁷² Riggs, Blakeley, & Marwaha, *supra* note 59, at 287 (“Insofar as the OLC offers any arguments as to congressional intent, it relies not on the legislative history nor the goals and objects of the Federal Anti-Torture Statute, but rather on the Senate’s understanding to the CAT.” ...The OLC cites in support of its assertions a 1987 OLC memorandum entitled *Relevance of Senate Ratification History to Treaty Interpretation.*”).

⁷³ See Weissbrodt & Bergquist, *supra* note 12, at 608-09 (internal citations omitted).

⁷⁴ *Id.* at 610 (“the express language of FARRA precludes an individual from ‘raising a claim’ under the Convention unless it is pursuant to a final order for removal. To that extent, a gap might remain in the scope of the Torture Convention’s potential applicability under U.S. law.”).

another does not constitute “expelling” if the victims were being taken to countries “where they had not previously resided.”⁷⁵ Thus, the challenges to filing a claim under FARRA include the holding of some courts that the Act cannot be used “to contest an intra-territorial transfer.”⁷⁶ While some may argue that the legislative intent is not clear, the Act was implemented to domesticate CAT. When the intent of a statute is not clear, the statute should be first interpreted through the “language in which the act is framed.”⁷⁷ These loopholes are contrary to the legislative intent of Congress and should not be used to avoid compliance with international laws.⁷⁸ Additionally, having observed these loopholes, multiple federal agencies have issued regulations stating that FARRA is to be implemented in the context of “removal and extradition proceedings.”⁷⁹

In addition to the federal statutes codified above, the Alien Tort Statute may provide an

⁷⁵ *Id.* at 608-09 (“It could be argued that the provisions of...Article 3 do not apply to extraordinary renditions occurring outside the United States. Article 3 states that no party shall ‘expel, return (“refouler”) or extradite a person’ to a country where there are substantial grounds to believe that he will be tortured. It could be argued, however, that extraterritorial, irregular renditions are not covered by this provision. Seizing a person in one country and transferring him to another would arguably not constitute ‘expelling’ the suspect. So long as these persons were rendered to countries where they had not previously resided it could also be said that the United States ‘returned’ these persons to countries where they faced torture.”).

⁷⁶ Landon Wade Magnusson, *Tying off all loose ends: protecting American Citizens from Torture Beyond America’s Borders*, 15 *YALE HUM. RTS. & DEV. L.J.* 19, 37-38 (2012) (“The problem is that some courts have interpreted the FARR Act to only allow persons to contest transfers in a petition for review of a final order of removal.”).

⁷⁷ *Id.* at 41; *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

⁷⁸ Weissbrodt & Bergquist, *supra* note 12, at 608 n. 104 (In the Convention Against Torture Senate Hearing, Abraham D Sofaer, Department of State Legal Advisor, stated that “there is no need for the legal protections of the convention against torture in the United States [because] [e]xisting U.S. law makes any act falling within the convention’s definition of torture a criminal offense as well as a violation of various civil statutes.”); Weissbrodt & Bergquist, *supra* note 12, at 609 (“such arguments demonstrate an attempt to defeat the purpose of the Convention, and potentially run afoul of the non-derogability provision in Article 2(2)”); Weissbrodt & Bergquist, *supra* note 12, at 609 n. 111.

⁷⁹ *Id.* at 605 n. 91; *see also*, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, Aug. 24, 2009 *available at* <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html> (In August 2009, the Attorney General announced that he had ordered “a preliminary review into whether federal laws were violated in connection with interrogation of specific detainees at overseas locations.” Assistant U.S. Attorney John Durham assembled an investigative team of experienced professionals to recommend to the Attorney General whether a full investigation was warranted “into whether the law was violated in connection with the interrogation of certain detainees.” Additionally, while the Department of Justice did open an investigation in 2009 concerning the death of detainees in CIA custody under the Detainees Treatment Act of 2005, it later concluded that “further investigation into other cases was not warranted.” Therefore, there was no prosecution of CIA officials under the Detainee Treatment Act of 2005 for their role in the torture and death of detainees, although their prosecution was supported under federal law.

alternative means to hold Aero Contractors liable for their role in the extraordinary rendition program through the principle of corporate complicity.⁸⁰ Under a theory of corporate complicity, criminal charges can be brought against companies that are “complicit in the violation of an individual’s human rights.”⁸¹ Corporations that are “knowingly involved in the crime of another” are accomplices that should be punished.⁸²

There are three categories of corporate complicity: silent, indirect, and direct.⁸³ To be held liable for direct complicity, the corporation must have intentionally participated in the harm.⁸⁴ Moreover, the initial perpetrator does not have to be convicted for the corporation to be held liable, but a court does have to be “convinced that the principal offense did take place.”⁸⁵ Indirect corporate complicity, commonly referred to as “beneficial corporate complicity” occurs when a corporation “benefits from the human rights abuses committed by someone else.” Silent complicity occurs when a company fails to act, but is aware of the human right violations.⁸⁶ Global elements for proving corporate complicity include showing that there is a “principal offender other than the complicit corporation,” and that the corporation had both the *actus reus* and *mens reus* to assist the principal in committing a “human rights violation.”⁸⁷

Aero Contractors could be held liable for its role in the extraordinary rendition program under the theory of corporate complicity because it operated torture taxis and transferred individuals who were subject to torture under the program. The Senate Torture Report confirmed

⁸⁰ Kovarovic, *supra* note 5, at 161 (“In 2005, the Eleventh Circuit Court of Appeals held that the ATS is ‘not limited to claims of direct liability.’ And as a result, “cases alleging corporate complicity might fall under the purview of the ATS.”).

⁸¹ *Id.* at 147; Mara Theophila, “Moral Monsters” Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After *Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L. REV. 2859, 2862 (2011) (“Courts struggle to adjudicate ATS claims according to a consistent set of principles. Much of this difficulty stems from the lack of a clear understanding of the purpose behind the ATS.”).

⁸² Kovarovic, *supra* note 5, at 156.

⁸³ *Id.* at 156-57

⁸⁴ *Id.*

⁸⁵ *Id.* at 157-58, n. 49.

⁸⁶ *Id.* at 157; n. 50.

⁸⁷ *Id.* at 158; n. 55.

that the extraordinary rendition program did exist, that individuals were tortured in the program, and that despite being prohibited under international and federal laws, human rights violations occurred. The information contained in the Senate Torture report along with flight logs and other investigative bodies demonstrates that Aero Contractors had a direct role of transporting victims detained in the CIA sponsored extraordinary rendition program, which would be sufficient to indicate that they were knowingly involved in the commission of a crime; therefore, Aero Contractors would satisfy the global requirements necessary to be held liable under a theory of direct corporate complicity.⁸⁸ Given the information contained in the Senate Torture Report regarding Aero Contractors actions, flight logs and other pertinent information, it is unlikely that Aero could make an argument indicating it was ignorant of the human right abuses in which it participated with regard to the extraordinary rendition program. It is important to acknowledge that in *Kiobel v. Royal Dutch Petroleum Company*, the Supreme Court of the United States seemingly narrowed the jurisdictional authority of courts applying the Alien Tort Statute by indicating that the Statute did not apply extraterritorially.⁸⁹ In our case, however, a claim alleging corporate complicity would still be viable under the ATS given the known facts regarding Aero's actions because a portion of the alleged torts were committed domestically.

Lastly, the Torture Outsourcing Prevention Act, which was introduced in 2005, had failed

⁸⁸ There is no data that supports that Aero was held against its will or forced to participate in the extraordinary rendition program.

⁸⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (“The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.... The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the Alien Tort Statute.”) *Kiobel v. Royal Dutch Petroleum Co.*, at 1665 (“The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”); *see also*, Rich Samp, *Supreme Court Observations: Kiobel, Petroleum, & the Future of Alien Tort Statute*, FORBES (April 18, 2013), <http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/#4e1cec185040> (stating that “for the past several decades, the ATS has served as the favorite vehicle of human rights activists seeking to challenge the overseas business practices of U.S. corporations, but the Supreme Court has now ruled that the ATS applies only to conduct within the United States or on the high seas. Congress is presumed not to intend its statutes to apply outside the United States unless it provides a “clear indication” otherwise.”).

to be enacted into law; this bill was deeply rooted in international law and illustrates the binding effect of international law.⁹⁰ The Torture Outsourcing Prevention Act specifically relied on the Universal Declaration of Human Rights to advocate that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”⁹¹ The proposed Act reiterated the “prohibition [against] torture and other ill treatment” that has been incorporated into human rights treaties, signed and ratified by the United States, and subsequent domestic legislation. Although the Act failed to become law, it had 77 co-sponsors and further illustrates the commitment that international law is binding authority and enforceable as the “supreme law of the land” upon ratification.⁹²

C. STATES MUST COMPLY WITH INTERNATIONAL AND FEDERAL LAW: WHY THE SUPREMACY CLAUSE REIGNS “SUPREME”

As noted elsewhere in this policy report, it has been argued that North Carolina has been preempted from taking action against actors of the extraordinary rendition program within its jurisdiction because the issue is one of foreign affairs. Furthermore, such arguments insist that treaties regulate foreign affairs and therefore, international law is not binding on individual states.⁹³ However, this premise is inaccurate. State governments must comply with not only federal, but international law for several reasons already discussed herein. In particular, the United States government is responsible for the actions of constituent states when it comes to

⁹⁰ H.R. 952 (109th): Torture Outsourcing Prevention Act (2005) (This bill was introduced in a session of Congress on Feb. 17th, 2005, but was not enacted into law).

⁹¹ *Id.* at § 2 (describing Congress’ findings and the reliance on international law. For instance, “the Universal Declaration of Human Rights states that ‘No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.’”).

⁹² See Torture Outsourcing Prevention Act, *supra* note 90 (indicating that the bill had 77 sponsors).

⁹³ See Ian M. Kysel, *Domesticating Human Rights Norms in the United States: Considering the Role and Obligations of the Federal Government as Litigant*, 46 GEO. J. INT’L L. 1009, 1019 (“Because these treaties regulate the duties of states to protect the rights of individuals, their evolution has raised particularly complicated questions about when and how international law obligations must be incorporated into domestic orders and when they come to be breached.”)

enforcing international law.⁹⁴ Article VI of The United States Constitution, the Supremacy Clause, states that “all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land.”⁹⁵ By ratifying a treaty, the United States is authorizing and consenting to the obligations of a treaty. In addition to ensuring that all jurisdictions within its territories comply with international law, the U.S. Constitution requires that “[j]udges in every State shall be bound” by treaties.⁹⁶ Through ratification, treaties become the “supreme Law of the Land” and the government is obligated to take affirmative steps to ensure consistent measures are taken at both the federal and state level.⁹⁷ Additionally, if the implementation of international law is inconsistent with any law within the state, international law reigns supreme.⁹⁸ When ratifying ICCPR, the Senate acknowledged that states were bound under treaties. Before ratifying ICCPR, the Senate held that

[t]his Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that

⁹⁴ THIRD RESTATEMENT OF FOREIGN RELATIONS LAW § 207, Reporters’ n. 3 (“The United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar responsibility on the part of the national governments of other federal states.”).

⁹⁵ U.S. CONST. art. VI.

⁹⁶ *Id.*

⁹⁷ *Id.* Kysel, *supra* note 93, at 1010 (stating that “When the United States ratified these agreements...the treaty-makers also indicated their ‘understanding’ that these treaties would be ‘implemented’ by officials at all levels of the government.”); Kysel, *supra* note 93, at n. 2 (referring to ICCPR, “The understanding approved by the Senate associated with the ICCPR reads

This Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over matters covered therein, and otherwise by the *state and local governments*; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the treaties.

See LEE SWEPTSON, THE DEVELOPMENT IN INTERNATIONAL LAW OF ARTICLES 23 AND 24 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 4 (2014) (“When governments ratify international conventions they obligate themselves in international law to observe their requirements.”)

⁹⁸ Jordan Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 314 (1999) (“With respect to state competence, by necessary implication the very fact that under the Supremacy Clause state courts are bound to apply international law enhances their power to do so.”).

the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.⁹⁹

Furthermore, the federal government reported that state governments have the means and obligation to comply with international law.¹⁰⁰ The United States government stated in its Fourth Periodic report to the UN Committee on Human Rights that perpetrators of torture could be prosecuted under other *federal or state* laws and there is “a range of federal and state laws [that] prohibit conduct constituting torture or cruel, inhuman or degrading treatment or punishment.”¹⁰¹ Examples of state laws that state actors could be prosecuted under for their role in extraordinary rendition include kidnapping, and a number of conspiracy offenses.

As discussed in the preceding chapter of this policy paper, there may be support for arguments supporting separation of powers under federalism. However, although criminal matters (which usually incorporate torture, cruel or inhuman punishment) are largely left to the authority of states, “to the extent that state and local governments exercise jurisdiction over a matter, the Federal government shall take measures appropriate to the federal system to the end that competent authorities of the state or local governments may take appropriate measures for the fulfillment of the covenant.”¹⁰² Therefore, the delegation of jurisdiction to a state or local government does not release the federal government from ensuring compliance with international laws. As illustrated through the Supremacy Clause, neither the federal government

⁹⁹ Kysel, *supra* note 93, at 1011 (citing 138 CONG. REC. 8068 (1992) (explicitly committing the “US. Federal, state, and local governments, and pledge that the federal government will take ‘appropriate measures to ensure fulfillment of the treaties.’”).

¹⁰⁰ *Id.*

¹⁰¹ *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, (Dec. 30, 2011) available at <http://www.state.gov/j/drl/rls/179781.htm>. [hereinafter “ICCPR Report”] (The report further describes several cases where individuals have been prosecuted under federal statutes for cruel or inhumane treatment, but there have been no similar prosecutions related to the extraordinary rendition.)

¹⁰² *Id.*

nor the states can ignore a matter of international law after ratifying a treaty under the theory that it is beyond the scope of its Constitutional authority.

While the federal government has the necessary authority under international law and domestic legislation to hold actors of extraordinary rendition liable, the problem may not be the lack of implementing domestic legislation to enforce international laws. Rather the failure to hold actors responsible for torture reflects that lack of political will as manifested through the discretion that federal prosecutors have in deciding which cases to prosecute.¹⁰³ Scholars have noted that “even in cases where prosecution would be clearly justified, most legal systems allow for selectivity in the identification of persons against whom the law will be enforced and in the charges to be brought.”¹⁰⁴ This prosecutorial discretion, while broad and “generally unregulated by the courts,” is a contributing factor as to why the federal government has failed to take action for prosecuting those individuals involved in the extraordinary rendition program.¹⁰⁵ In the One-Year Follow- Up Response of the United States of America to Recommendations of the Committee Against Torture, the U.S. held that

the decisions following the attacks of September 11, 2001, relating to this former [extraordinary rendition] program are part of our history and are not representative of the way we deal with the threat from terrorism we still face today. One of the great aspects of our democracy is that we are willing to look at our past, identify where we could and should do better, and make important improvements, which we continue to do.¹⁰⁶

This statement illustrates that it is unlikely that the federal government intends to prosecute actors involved in the extraordinary rendition program, and instead has adopted a “forward

¹⁰³ Mallinder, *supra* note 53, at 324.

¹⁰⁴ *Id.* at n. 69.

¹⁰⁵ *Id.* at 325 (“Prosecutorial discretion within the United States is thus “broad” and “generally unregulated” by the courts.”) (citations omitted).

¹⁰⁶ U.S. Dept. State, *One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports*, § 9 (Nov. 27, 2015), available at <http://www.state.gov/j/drl/rls/250342.htm>.

looking approach.”¹⁰⁷ This “forward looking approach” suggests that if responsible actors will not be prosecuted under applicable federal statutes, the North Carolina government should look to state statutes for accountability.

IV. NORTH CAROLINA AS A STATE ACTOR AND THE POWER TO PROSECUTE

The underlying principle of the human rights framework is that such rights start at home and are nurtured through the collective efforts of local, state, and federal governments.¹⁰⁸

Eleanor Roosevelt famously stated at a UN ceremony, that universal human rights had to be implemented at the state and local level for them to be have a meaningful effect anywhere else:

Where, after all, do universal rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world... Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹⁰⁹

Human Rights treaties were expected to be implemented at both the regional and local levels because human rights abuse often deal with issues delegated to states. In the Fourth Periodic Report to the UN Committee on Human Rights, Secretary of State Hilary Clinton has stated that “human rights are universal, but their experience is local.”¹¹⁰ Clinton’s statement indicates that states and localities have a responsibility to ensure that human rights are protected; also, this statement further supports the argument that states’ statutes are implemented to guarantee that the United States is fulfilling its obligations under international law.¹¹¹ For

¹⁰⁷ *Id.*

¹⁰⁸ Human Rights Institute, *The Campaign for a New Domestic Human Rights Agenda; State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework*, COLUMBIA LAW SCHOOL.

¹⁰⁹ Eleanor Roosevelt, “*In Our Hands*” (1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights), *available at* <http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml>

¹¹⁰ ICCPR Report, *supra* note 101, at intro. (As Secretary of State Hillary Clinton has stated, “Human rights are universal, but their experience is local.”)

¹¹¹ *Id.* (“This is why we are committed to holding everyone to the same standard, including ourselves. In implementing its treaty obligation under ICCPR Article 40, the United States has taken this opportunity to engage in

instance, states usually have jurisdiction on criminal matters, which consist of human rights abuses.¹¹² However, although these abuses may be a matter of state concern, states cannot fail to enforce federal statutes or create statutes that are contrary to federal statutes.¹¹³ In the first domestic report to the Committee Against Torture, the Clinton administration reiterated that

[n]o official of the Government, federal, state or local, civilian or military, is authorized to commit or instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form...United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment...The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.¹¹⁴

Actions that take place in Johnston County, North Carolina are indeed within the territory of the United States.

A. NORTH CAROLINA'S CONSTITUTION

While the federal government has failed to take action and hold CIA personnel and its affiliates liable for their participation in the extraordinary rendition program, a cause of action to hold Aero Contractors liable exists under state law. Article I, Section 19 of the North Carolina Constitution specifies that

*[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.*¹¹⁵

a process of stock-taking and self-examination. The United States hopes to use this process to improve its human rights performance. Thus, this report is not an end in itself, but an important tool in the continuing development of practical and effective human rights strategies by the U.S. Government.”).

¹¹² Columbia Law School, *Ensuring Human Rights Implementation at the Federal, State, and Local Levels 1*, available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/subnational_fact_sheet.pdf.

¹¹³ *Id.* (supporting the notion that the “under-resourced approach to human rights education, reporting, and implementation” does not provide sufficient measures for states and localities to protect human rights or police the enforcement of their abuse.).

¹¹⁴ Weissbrodt & Bergquist, *supra* note 12, at 613-14.

¹¹⁵ N. C. CONST. art. 1 § 19 (emphasis added).

In addition to the guarantees provided under the North Carolina Constitution that “no person shall be taken, imprisoned... or deprived of his life liberty, or property,” North Carolina laws related to kidnapping, involuntary servitude, human trafficking, and criminal conspiracy are all grounds to hold Aero accountable for its role in operating the planes used to transport victims in the extraordinary rendition program.¹¹⁶

B. NORTH CAROLINA STATE STATUTES

Surprisingly, under North Carolina General Statutes, “torture” is only defined in the context of animal cruelty. Nonetheless, state statutes indicate that torture is behavior that satisfies an element for offenses against the person and is a felony.¹¹⁷ Although limited, torture is defined in the North Carolina General Statute as “any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death.”¹¹⁸ It is uncontested that a felony offense was committed when victims of the extraordinary rendition program were tortured, although there may be debate about the extent of their torture.¹¹⁹

North Carolina General Statute 14-39 makes it illegal for any person to kidnap (defined as “unlawfully confin[ing], restrain[ing], or remov[ing] from one place to another”) if the purpose is to do “serious bodily harm to or terrorizing the person” restrained.¹²⁰ Other lesser criminal offenses include involuntary servitude and human trafficking. An individual is engaged

¹¹⁶ *Id.*

¹¹⁷ N.C. Gen. Stat. §14-360 (2015) (defining torture in the context of animals by stating that “[i]f any person shall maliciously torture...any animal...as used in this section, the words "torture", "torment", and "cruelly" include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death”). Torture is not defined in the context of offenses against the person; *see* N.C. Gen. Stat. §14-1(2015) (defining felony crimes).

¹¹⁸ *Id.* at §14-360.

¹¹⁹ *See id.* at §14-1 (defining felony crimes).

¹²⁰ *Id.* at § 14-39 (“Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, ... such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:...(2) [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or (3) [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or (4)[h]olding such other person in involuntary servitude.”).

in involuntary servitude by “knowingly and willfully hold[in] another” against their will.¹²¹ A person “commits the offense of human trafficking when that person knowingly recruits, entices, harbors, *transports*, provides, or obtains by any means another person” against their will.¹²²

As illustrated in the very nature of the extraordinary rendition program—taking individuals against their will, from their homes, and transporting them to a foreign country constitutes kidnapping. Although Aero Contractors did not directly “unlawfully confine, restrain” the victims from their home, Aero affiliates were responsible for “unlawfully ... remov[ing]] [the victims] from one place to another” with knowledge that “serious bodily harm to or terrorizing the person” restrained would occur.¹²³ Therefore, the statutory requirements of committing the crime of kidnapping by Aero Contractors have been met.

The law specifically states that “any firm or corporation convicted of kidnapping shall be punished by a fine...and its charter and right to do business in the State of North Carolina shall be forfeited.”¹²⁴ Here, reports support the finding that Aero Contractors operated the planes that transported the victims of the extraordinary rendition program to and/or from black sites where they were subject to torture and other inhumane treatment.¹²⁵ Furthermore, under the terms of the lease for the hangar space rented to Aero planes, the terms indicate that the hangar would be used solely “for the erection of a portable, all metal aircraft hangar to use or rent for storage of aircraft, and for no other purpose.”¹²⁶ Although the lease was to be renewed automatically unless either party requested its termination, it specifically indicated that it would “make no unlawful

¹²¹ *Id.* at § 14-43.12.

¹²² *Id.* at § 14-43.11.

¹²³ These are the elements necessary to meet the crime of kidnapping as identified in the preceding paragraph.

¹²⁴ N.C. Gen. Stat. §14-39 (2015) (“Any firm or corporation convicted of kidnapping shall be punished by a fine ... and its charter and right to do business in the State of North Carolina shall be forfeited.”) (emphasis added).

¹²⁵ Figueroa, Gardzalla, Gurlitz, & et. al., *supra* note 22, at 165.

¹²⁶ Weissman, Emerson, Kweskin, & et. al., *supra* note 1, at 17.

use of said space...if so, this lease may be terminated by Lessor.”¹²⁷ However, Aero Contractors has not had its charter revoked nor has the company lost its privilege of doing business in the state of North Carolina as a result of its participation in the extraordinary rendition program.¹²⁸

C. NORTH CAROLINA CASE LAW

Aero Contractors can be held liable under state criminal conspiracy law since the victims of the extraordinary rendition were not actually tortured in North Carolina.¹²⁹ Although it is unknown whether Aero pilots and the crew directly engaged in the torture of the victims, their participation in the extraordinary rendition program by transporting the victims and operating “torture taxis” is a sufficient basis to hold Aero liable under North Carolina statutes involving the participation in and furthering of a criminal conspiracy to commit a felony.

The North Carolina Supreme Court has defined criminal conspiracy, a felony offense, as “the unlawful concurrence of two or more persons in a wicked scheme, the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means.”¹³⁰ Under North Carolina law, a conspiracy to commit a felony is “complete when the agreement is made” and unlike other jurisdictions does not require an overt act.¹³¹ Under North Carolina law, to be convicted of a criminal conspiracy, the defendant must meet the following

¹²⁷ *Id.*

¹²⁸ Aero Contractors is still in business as of 4/10/2016, *see* <http://www.jsfirm.com/job/Aero-Contractors,-Ltd/Smithfield-North%20Carolina/8209/companyprofile>.

¹²⁹ Weissman, Emerson, Kveskin, & et. al., *supra* note 1, at 11 (“As a private entity established in the United States, Aero may not engage in the unlawful acts that comprise extraordinary rendition, secret detention, and torture. A majority of these flights were deliberately disguised through the filing of “dummy” flight plans. ...Aero and the individuals who comprise Aero and participated in these flights are not immune from consequences of such acts, even if they were committed by Aero as a private or government contractor at the request of a public official.”).

¹³⁰ *State v. Gallimore*, 272 N.C. 528, 508 (1968) (citing many cases (citations omitted) but indicating that “a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means.”); *State v. Goldberg*, 261 N.C. 181, 134 (1984) (citing many cases (citations omitted) but indicating that “The conspiracy is the crime and not its execution,” “[n]o overt act is necessary to complete the crime of conspiracy” and “[a]s soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete.”).

¹³¹ The crime is complete when the agreement is made. *State v. Davenport*, 227 N.C. 475, 470 (1945) (internal citations omitted); *State v. Horton*, 170 S.E.2d 466, 469 (1969) (“Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act.”).

elements: (1) “the defendant and [another] entered into an agreement,” (2) “the agreement was to commit [a crime]”, and (3) “the defendant and [co-conspirator] intended that the agreement be carried out at the time it was made.”¹³² Aero should be held accountable for its participation in extraordinary rendition under the NC criminal conspiracy theory. Aero, entered into lucrative contracts with the CIA, and received benefits directly from the CIA, for its participation in operating “torture taxis” to and from black sites.¹³³ Furthermore, even though an overt action is not required under North Carolina law to meet the elements of criminal conspiracy, the Senate Torture Report confirms that torture, a felony offense, was carried out accordingly at the black sites that the victims of extraordinary rendition were transported. Therefore, Aero, as a corporation that is domiciled and licensed in North Carolina, can be held criminally liable for its role in the extraordinary rendition program.

As discussed throughout this policy report, the parties involved in the extraordinary rendition program can be held accountable under international, federal, and state laws. The victims of extraordinary rendition are entitled to justice under treaties that the United States has signed, ratified, and domesticated through enabling legislation. As evidenced throughout the chapters of this policy report, arguments that international law does not bind the United States are not valid. The United States has an obligation, under international and federal law, to ensure that torture is not committed by any individual in any jurisdiction within the United States. In addition to being prosecuted under federal statutes, the state of North Carolina has a basis to

¹³² NC Pattern Jury instructions for Criminal Cases: Felony Conspiracy *available at* <https://www.sog.unc.edu/resources/microsites/north-carolina-pattern-jury-instructions/north-carolina-pattern-jury-instructions-criminal-cases>.

¹³³ Affiliates of other airline companies have publicly commented that they received lucrative pay for flying planes in the CIA Extraordinary Rendition Program. Kovarovic, *supra* note 5, at 177 (stating “During an internal corporate meeting several years ago, Jeppesen’s Managing Director of International Trip Planning Bob Overby explained to his coworkers that ‘[w]e do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it some of these flights end up that way...it certainly pays well. They [the CIA] spare no expense. They have absolutely no worry about costs.’”).

prosecute Aero Contractors for their role in operating torture taxis in the extraordinary rendition program under state law.

V. CONCLUSION

Human rights abuses anywhere, pose a threat to justice everywhere.¹³⁴ With increased awareness and the demand for accountability for all actors of the extraordinary rendition program, justice may still be possible for the victims of torture. In North Carolina, significant efforts have been undertaken and increased pressure placed on state representatives to act. Several coalitions are working to create a public record with the aim of achieving full accountability. For instance, the North Carolina Stop Torture Now is a coalition of grassroots supporters that aim to “stop torture everywhere” with the purpose of exposing the role of North Carolina in the C.I.A. sponsored extraordinary rendition program.¹³⁵ Additionally, the North Carolina Commission of Inquiry on Torture (NCCIT) supports community efforts of raising awareness about torture in North Carolina.¹³⁶

NCCIT is a non-profit that is supported by people of different religions, ethnicities, political perspectives, and civic groups.¹³⁷ NCCIT was founded to “gather and create a complete *public* record of North Carolina’s involvement in detained abuse through the Rendition, Detention & Interrogation Program led by the CIA.” It also analyzes how North Carolina “airports were allowed to continue facilitating torture after elected officials” were informed of the human right abuses that occurred in connection with a North Carolina company and “recommend how North Carolina can take responsibility for transparency,

¹³⁴ See Dr. Martin Luther King, Jr, *Letter from Birmingham Jail* (1963) (stating that “injustice anywhere is a threat to justice everywhere”). This threat of injustice can be associated to human rights abuses.

¹³⁵ For more information, see the website of North Carolina Stop Torture Now, *available at* <http://ncstn.org/content/about/>

¹³⁶ For more information, see the website of the North Carolina Commission of Inquiry on Torture, *available at* <http://www.nccit.org/>

¹³⁷ *Id.*

acknowledgement, apology, and restitution ...under the Convention Against Torture.”¹³⁸ NCCIT has been endorsed by over 1200 people, and continues to organize, educate, and research North Carolina’s involvement in the extraordinary rendition program.¹³⁹ Additionally, North Carolina School of Law has supported NCCIT with continuous research and reports that document North Carolina’s participation.¹⁴⁰ It is imperative that to prevent human rights abuses and ensure the federal government is abiding by its obligations under international law to prevent torture, that the parties involved in the extraordinary rendition program are held accountable for their actions under international, federal or state laws.

¹³⁸ NCCIT Brochure, *available at* <http://www.nccit.org/brochure/>.

¹³⁹ *Id.*

¹⁴⁰ For more information about how North Carolina School of Law has supported NCCIT, see the Human Rights Policy Lab course website *available at* <http://www.law.unc.edu/academics/transitiontopractice/hrpolicy.aspx>.

<http://www.law.unc.edu/documents/academics/humanrights/understanding-accountability-for-torture.pdf>