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Torture, American Style: A Recipe for Civil Tort Immunity

Matthew J. Jowanna

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Torture, American Style: A Recipe for Civil Tort Immunity

Matthew J. Jowanna*

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Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.

—Eleanor Roosevelt¹

. . . one nation, indivisible, with liberty and justice for all.

—Francis Bellamy²

I. INTRODUCTION

If someone is tortured, at a minimum, an intentional tort has been committed against that person. This Article specifically addresses the civil tort remedy, or lack thereof, for victims who are tortured by employees of the United States.³ In

1. Anna Maria Gabrieliadis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 139 (2006); Patty Allread, *Making Human Rights a Global Reality*, C. AVENUE, Fall 2006, at 10; Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 38 (2003).

2. John W. Baer, *The Pledge of Allegiance: A Short History* (1992), <http://www.oldtimeislands.org/pledge/pledge.htm> (on file with the *McGeorge Law Review*). See generally John W. Baer, *THE PLEDGE OF ALLEGIANCE, A REVISED HISTORY AND ANALYSIS, 1892-2007*, at 5 (2007).

3. This Article specifically addresses only civil tort issues and, therefore, does not address constitutional issues. Potential remedies for constitutional violations and the legal vehicle (and to whom this legal vehicle is available or not available) that can be used to bring suit for constitutional violations, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), are beyond the immediate scope of this Article. However, generally speaking, constitutional rights and privileges do not apply extraterritorially to nonresident aliens. See *Zadvydas v. Davis*, 533 U.S. 678, 692-93 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950); cf. *Boumediene v. Bush*, 553 U.S. 723 (2008). Likewise, because the main focus of this Article is civil tort remedies for victims of torture, criminal liability and related issues are also beyond the scope of this Article. *But see, e.g.*, 18 U.S.C. §§ 2340, 2340A, 2340B (2006) (the Federal Torture Statute); 42 U.S.C. § 2000dd (2006) (Section 1003 of the Detainee Treatment Act of 2005). Moreover, this Article concentrates on civil tort liability for actions by employees of the United States. Therefore, liability for contractors of the United States is also beyond the scope and focus of this Article. However, as a general statement of law, the United States is not liable for the acts or inactions of its contractors.

ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in its subsequent reporting to the United Nations Committee Against Torture, the United States has consistently denounced torture and proclaimed itself to be a nation that provides for civil remedies against torturers. However, this Article will draw attention to the hypocrisy and self-protection tactics of the United States when dealing with torturers employed by the United States, as opposed to foreign torturers. One of the key inequities addressed in this Article is the current application of the Westfall Act codified, in part, in 28 U.S.C. § 2679.⁴

This Article begins with an examination of how the United States has allowed, and even promoted, the availability of civil tort remedies against foreign torturers.⁵ Next, a critical comparison is made in regard to the availability, or lack thereof, of civil tort remedies when the alleged torturer is an employee of the United States Government. Particularly, this Article will examine how the Westfall Act, and the torture-relevant exceptions to the Federal Tort Claims Act, can leave victims of torture without any tort remedy at all when the perpetrator is an employee of the United States—while victims of torture by foreign nationals are permitted to seek civil tort remedies in United States courts.⁶

This Article then addresses two international human rights treaties ratified by the United States: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights.⁷ By and through these two treaties, the United States is obligated under international law to condemn torture and provide victims with adequate legal remedies for compensation. Next, this Article will examine the reservations, understandings and declarations asserted by the United States when ratifying these treaties and explain the effect of these conditions on treaty enforcement by torture victims. Additionally, this Article will address how the Westfall Act, in combination with the torture-relevant exclusions to the Federal Tort Claims Act, violates the international treaty obligations of the United States. Finally, this Article recommends that the United States amend 28 U.S.C. § 2679 in order to comply with its obligations under international law and provide a domestic civil tort remedy to victims of torture by the United States.

See 28 U.S.C. § 2671 (2006) (“As used in this chapter and sections 1346(b) and 2401(b) of this title, the term ‘Federal agency’ . . . does not include any contractor with the United States.”).

4. Pub. L. No. 100-694 (Federal Employees Liability Reform and Tort Compensation Act of 1988) was partitioned and codified in various sections of the U.S. Code that are part of the Federal Tort Claims Act. See 28 U.S.C. §§ 2671, 2674, 2679 (2006). This legislation is commonly referred to as the “Westfall Act” – named after the Supreme Court of the United States case of *Westfall v. Erwin*, 484 U.S. 292 (1988), which was legislatively abrogated by the Westfall Act. See *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 110 (D.D.C. 2007). The Federal Tort Claims Act, in its entirety, is codified at 28 U.S.C. §§ 1346(b), 2671-2680.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

II. FOREIGN TORTURERS

If a foreign national is tortured by a fellow foreign national, the United States will, indeed, allow the foreign victim to sue his or her foreign torturer in a United States court. The Alien Tort Statute (ATS), a statute that is over 220 years old and which was rarely used or cited until 1980, allows a foreign national who has been the victim of a tort, such as torture, to file suit in the courts of the United States against his or her foreign torturer.⁸

A. *Filartiga and the Alien Tort Statute*

In the 1980 landmark decision of *Filartiga v. Pena-Irala*,⁹ the Second Circuit Court of Appeals held that “whenever an alleged torturer is found and served with process by an alien within our borders, [the ATS] provides federal jurisdiction” because “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”¹⁰

The *Filartiga* case was filed by Dr. Joel Filartiga and his daughter, Dolly Filartiga, both citizens of Paraguay, in regard to Dr. Filartiga’s seventeen-year-old son, Joelito.¹¹ The Filartigas alleged that Americo Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay at the time, kidnapped, tortured and murdered Joelito in retaliation for Dr. Filartiga’s political views and activities.¹² Specifically, Dolly Filartiga alleged that the Asuncion police escorted her to Pena-Irala’s home and showed her the torture-marked body of her dead brother.¹³ As Dolly Filartiga fled the property in a horrified state, Pena-Irala actually ran after her, shouting: “Here you have what you have been looking for for so long and what you deserve. Now shut up.”¹⁴

After the death of her brother in 1978, Dolly Filartiga entered the United States under a visitor’s visa, applied for permanent political asylum and took-up residence in Washington D.C.¹⁵ Around the same time, Pena-Irala also entered the United States and began residing in Brooklyn under a visitor’s visa.¹⁶ However, Pena-Irala remained in the United States beyond the terms of his visa.¹⁷ When Dolly Filartiga learned of his unlawful presence in the United States, she

8. See 28 U.S.C. § 1350 (2006); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 608-10 (2004).

9. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

10. *Id.* at 878.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 879.

16. *Id.* at 878.

17. *Id.* at 878-79.

reported him to the Immigration and Naturalization Service.¹⁸ As a result, Pena-Irala was arrested, detained and ordered to be deported.¹⁹ Before he was deported, Dolly Filartiga had Pena-Irala formally served with a civil tort lawsuit, filed under the ATS, for the kidnapping, torture and murder of her brother.²⁰

The District Court granted Pena-Irala's motion to dismiss for lack of federal jurisdiction.²¹ In reversing the District Court's order of dismissal, the Second Circuit Court of Appeals held that torture by a state official is a violation of established norms and, therefore, a violation of international law.²² Accordingly, there was federal jurisdiction under the ATS, which reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations [international law] or a treaty of the United States."²³ As *Filartiga* noted, "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."²⁴ "Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced."²⁵ Thus, the seminal *Filartiga* case made clear that the judiciary will not tolerate torture and that a foreign victim may sue a foreign torturer in the courts of the United States if personal jurisdiction can be obtained.

While *Filartiga* clearly demonstrates that a foreign national may use the ATS to sue another foreign national, it is less clear whether a foreign national may use the ATS to sue a citizen employee of the United States. In the case of *Lopez v. Richardson*,²⁶ the District Court for the Northern District of Georgia, without elaborating on exactly what the "obvious reasons" were or how "a significant change to the legal landscape" would result, held that "[w]hile there is nothing in the language of the Alien Tort Statute that precludes its use against domestic U.S. actors, there are obvious reasons why allowing domestic actors to be held liable under the Alien Tort Statute would result in a significant change to the legal landscape."²⁷ However, in the case of *In re Iraq and Afghanistan Detainees Litigation*,²⁸ a 2007 case of which the 2009 *Lopez* court certainly should have been aware, the foreign plaintiffs did just what the *Lopez* court later denounced—they used the ATS as a tort vehicle to sue citizen employees of the United

18. *Id.* at 879.

19. *Id.* at 879-80.

20. *Id.*

21. *Id.* at 879-80.

22. *Id.* at 880.

23. *Id.* at 878; 28 U.S.C. § 1350 (2006).

24. *Filartiga*, 630 F.2d at 881.

25. *Id.* at 884.

26. *Lopez v. Richardson*, 647 F. Supp. 2d 1356 (N.D. Ga. 2009).

27. *Id.* at 1363-64.

28. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).

States.²⁹ As will be more fully discussed below, however, the Westfall Act renders moot the specific legal vehicle chosen when filing a tort claim against an employee of the United States. Whether a tort suit is brought by a foreign national against an employee of the United States using the legal vehicle of the ATS or the Federal Tort Claims Act (FTCA), or both, the absolute statutory immunity of the Westfall Act can be invoked by a defendant employee of the United States.³⁰ Therefore, no matter what tort statute is invoked when suit is originally filed, “[t]he litigation is thereafter governed by the Federal Tort Claims Act.”³¹

B. The Torture Victim Protection Act of 1991

It took twelve years, but in 1992, the Congress of the United States bolstered the sentiment and message of *Filartiga* by passing and implementing the Torture Victim Protection Act of 1991 (TVPA).³² Specifically, the TVPA sets forth the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, *of any foreign nation*—

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

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

29. *Id.* at 109-116; *see also* *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009).

30. *Osborn v. Haley*, 549 U.S. 225, 230 (2007).

31. *Id.*

32. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (The TVPA was introduced as a bill in 1991 but was not actually passed into law until 1992). The ATS and TVPA are both anti-torture legislation, and they are both codified at 28 U.S.C. § 1350. However, the ATS is primarily a source of subject matter jurisdiction while the TVPA provides a substantive cause of action and legal remedy for torture victims. *Id.*; *see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005).

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

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

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

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

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

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

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.³³

33. *Id.* (emphasis added).

In one sense, the TVPA took the reasoning in *Filartiga* one step further—but is still one critical step short of being universally fair and equitable. In *Filartiga*, the plaintiffs were foreign nationals and relatives of a foreign torture and murder victim, who brought suit against a foreign national defendant for acts committed on foreign soil. While the TVPA adds a caveat for exhaustion of “adequate and available” local remedies, which one may consider as being applicable to foreigners, standing is not actually limited to foreign national plaintiffs.³⁴ Under the TVPA, a victimized plaintiff filing suit in the United States may be either a citizen or non-citizen of the United States.³⁵ The TVPA’s expansion of the potential class of plaintiffs over that of the ATS, where a potential plaintiff may only be “an alien,” is certainly a progressive step forward.³⁶ But while the TVPA expands the potential class of plaintiffs over the ATS, it constricts the class of defendants by explicitly limiting claims to acts committed under the color of law “of any foreign nation,” as opposed to those of the United States.³⁷ As a result, the TVPA contains a double-standard and a hypocritical message—torture committed by foreign nations is universally wrong and will not be tolerated while torture committed by the United States remains exempt from the rules.

Filartiga, the ATS and the TVPA send a very clear message that torturers from other nations are not to use the United States as a safe haven. However, noticeably absent is the message that the United States will also hold its own employees civilly liable in tort for acts of torture.

III. TORTURERS EMPLOYED BY THE UNITED STATES

Before *Westfall v. Erwin*³⁸, federal employees generally held common law tort immunity for any actions within the scope of employment.³⁹ The Supreme Court established in *Westfall* that the federal scope of employment tort immunity is limited, not absolute, which prompted Congress to pass the Westfall amendment to the Federal Tort Claims Act.⁴⁰

A. *Westfall v. Erwin*

On January 13, 1988, the Supreme Court issued its unanimous opinion in the case of *Westfall v. Erwin*.⁴¹ *Westfall* was not actually about torture.⁴² Rather,

34. *See id.*

35. *See id.*

36. *Compare id. with* 28 U.S.C. § 1350 (2006).

37. *See* § 2, 106 Stat. at 73.

38. *Westfall v. Erwin*, 484 U.S. 292 (1988) *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No 100-694, 102 Stat. 563.

39. *See generally id.*

40. *See generally id.*

41. *Id.*

42. *See id.* at 293-94.

Westfall was about exposure to toxic soda ash.⁴³ William Erwin was a civilian employee of the federal government working at the Anniston Army Depot in Anniston, Alabama.⁴⁴ After being exposed to soda ash dust that had spilled from a bag at his worksite, he suffered chemical burns to his eyes and throat.⁴⁵ Erwin then filed a state-law tort claim in Alabama state court alleging that three Executive Branch employees were responsible for his injuries due to their negligence in routing, storing and warning him about the soda ash.⁴⁶ One of the defendants was Rodney P. Westfall, who was in charge of receiving at the Army Depot.⁴⁷

The defendants removed the case to the United States District Court for the Northern District of Alabama.⁴⁸ There, the District Court granted summary judgment in favor of the defendants, holding that “any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs.”⁴⁹ Erwin then appealed the District Court’s decision to the Eleventh Circuit Court of Appeals.⁵⁰ The Circuit Court of Appeals reversed the District Court’s decision, holding that a federal employee enjoys absolute immunity from suit “only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor’s line of duty.”⁵¹ Accordingly, a federal employee would not be immune for conduct that was non-discretionary or an ordinary job function. The defendants then sought certiorari from the Supreme Court, which was granted.⁵²

The United States Supreme Court first explained the reason for common law absolute immunity for federal employees as follows:

The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits. (citations omitted). This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official.

43. *Id.*

44. *Id.* at 292.

45. *Id.* at 294.

46. *Id.* at 293-94.

47. *Id.* at 293 n.1.

48. *Id.* at 294.

49. *Id.*

50. *Id.*

51. *Id.* (quoting *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985)).

52. *Id.* at 295.

Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.⁵³

The Court went on to explain that “absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature.”⁵⁴ Accordingly, a federal employee simply following procedures and guidelines in his or her employment would not enjoy absolute immunity, while a federal employee involved in policymaking would enjoy absolute immunity so that the fear of possible suits would not interfere with his or her discretionary job function.⁵⁵

“[T]he scope of absolute official immunity afforded federal employees is a matter of federal law, ‘to be formulated by the courts in the absence of legislative action by Congress.’”⁵⁶ “Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context.”⁵⁷ Therefore, Congress did exactly that after the Supreme Court issued the *Westfall* decision—it took action and provided guidance by enacting the Federal Employees Liability Reform and Tort Compensation Act, which is more commonly referred to as the Westfall Act.⁵⁸

B. *The Westfall Act*

The intent of the Westfall Act was to abrogate the United States Supreme Court decision in *Westfall v. Erwin* and to stop the judicial erosion of common law immunity from tort suits for rank and file government employees sued for actions occurring within the scope of their employment.⁵⁹ Congress clearly explained the purpose of the Westfall Act was “to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.”⁶⁰ Congress was concerned that the “erosion of immunity of Federal employees from common law tort liability ha[d] created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation

53. *Id.*

54. *Id.* at 297-98.

55. *Id.*

56. *Id.* at 295 (quoting *Howard v. Lyons*, 360 U.S. 593, 597 (1959)).

57. *Id.* at 300.

58. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679).

59. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563.

60. § 2(b), 102 Stat. at 4564.

for the entire Federal workforce.”⁶¹ Moreover, Congress found that “[t]he prospect of such liability [would] seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.”⁶² Therefore, to remedy the issue, Congress replaced judicially eroding common law immunity with absolute statutory immunity for government employees sued in tort for acts committed within the scope of their employment.

However, Congress failed to consider the Westfall Act would leave tort victims, including victims of torture, with no civil tort recourse at all when: (1) the government employees have absolute immunity; (2) the United States is the party defendant; and (3) the United States enjoys absolute sovereign immunity due to the fact that the tort at issue, such as torture, falls under an exception to the FTCA. Congress, through the Westfall Act, has provided government employees with the first part of the recipe for absolute tort immunity from torture claims. In order to be declared absolutely immune from suit in tort for acts of torture, be dropped from the lawsuit and have the United States substituted in as the party defendant, all a federal employee must do is have the Attorney General, or a designee, certify that the tortious conduct at issue was performed while acting within the scope of employment for the United States.⁶³ If the Attorney General refuses to do so, then the government employee need only move the court to hold that the employee performed the tortious conduct at issue within the scope of his or her employment with the United States government.⁶⁴

If the court drops the government employee as a party defendant and substitutes in the United States, one would think a torture victim could then receive some sort of civil tort redress directly from the United States. After all, this was the express intent of Congress in the public law comments to the Westfall Act.⁶⁵ In regard to torture claims, however, a court may soon thereafter dismiss the United States as a party due to the torture relevant exceptions to the FTCA.

C. Federal Tort Claims Act

As an independent and sovereign nation, the United States of America enjoys sovereign immunity—meaning that “the United States cannot be sued without its

61. *Id.* § 2(a)(5).

62. *Id.* § 2(a)(6).

63. 28 U.S.C. § 2679(d)(1) (2006).

64. *Id.* § 2679(d)(3).

65. See §2(b), 102 Stat. at 4564 (“It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.”) (emphasis added).

consent.”⁶⁶ However, “Congress alone has the power to waive or qualify that immunity.”⁶⁷ By enacting the Federal Tort Claims Act (“FTCA”),⁶⁸ Congress did just that.⁶⁹ With various exemptions and exceptions, the FTCA generally lends the United States to civil tort liability for:

[I]njury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁷⁰

At first blush, this waiver appears to establish a *prima facie* basis for torture liability in tort. Torture is certainly a “personal injury.”⁷¹ It is inflicted as a result of the “wrongful act . . . of . . . [an] employee of the government while acting within the scope of his [or her] office or employment.”⁷² Torture is also a *jus cogens* violation under international law and is, therefore, prohibited by law in “the place where the act . . . occurred.”⁷³

However, while the Westfall Act provides absolute statutory immunity to the individual government employee and then substitutes the United States as the party defendant, the Westfall Act also permits the United States to assert any affirmative defense it may have under the FTCA in order to completely dismantle the claim.⁷⁴ If an exception to the FTCA applies, then the United States has not waived its sovereign immunity and is still absolutely immune from liability in tort.⁷⁵ This is especially true in torture claims which lend themselves to FTCA exceptions to torts. Examples include claims: (1) involving discretionary duties or functions—even if such discretion is abused;⁷⁶ (2) arising from assault, battery, false imprisonment, false arrest, malicious prosecution or abuse of process—unless committed by an investigative or law enforcement officer of the United States, which is defined as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law”;⁷⁷ (3) arising out of combatant activities of the military, naval forces

66. Federal Housing Administration v. Burr, 309 U.S. 242, 244 (1940).

67. United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926).

68. The Federal Tort Claims Act (“FTCA”) is comprised of 28 U.S.C. §§ 1346(b), 2671-2680.

69. See 28 U.S.C. § 1346(b).

70. *Id.* § 1346(b)(1).

71. *Id.*

72. *Id.*

73. *Id.*

74. See 28 U.S.C. §§ 2674, 2679(d)(4).

75. See *id.* § 2680.

76. *Id.* § 2680(a).

77. *Id.* § 2680(h).

or the Coast Guard during times of war;⁷⁸ or (4) committed in a foreign country.⁷⁹ This is not an exhaustive list of the exceptions to the FTCA. Rather, it is a list of the FTCA exclusions most applicable to torture claims, and to having torture claims dismissed when the United States is the party defendant. Therefore, these exceptions to the FTCA provide the second part of the recipe for tort immunity for torture – as concocted by Congress.

To escape civil tort liability for torture, the United States may simply torture those deemed enemy combatants in the war on terror by administering such torture on foreign soil. A government employee who is not technically an investigative or law enforcement officer escapes liability when that employee performs a discretionary function of his or her government employment. Under these circumstances, a torture victim cannot successfully sue the United States because of the FTCA, nor can he or she sue the government employees involved due to the Westfall Act. This scenario is not just a hypothetical possibility conjured-up for the purpose of an academic article. The real life cases of *In re Iraq and Afghanistan Detainees Litigation*, *Rasul v. Myers* and *Harbury v. Hayden* painfully illustrate this miscarriage of justice. While the United States has actually reported to the Committee Against Torture that the FTCA provides torture victims with an adequate avenue for redress, these cases certainly demonstrate otherwise.⁸⁰

D. In re Iraq and Afghanistan Detainees Litigation

In the case of *In re Iraq and Afghanistan Detainees Litigation*,⁸¹ the plaintiffs were detained by the United States during military operations in Iraq and Afghanistan.⁸² Subsequently, they alleged that they were severely tortured during their detainment and, therefore, entitled to compensation in tort from Colonel Janis Karpinski, Commander of the 800th Military Police Brigade; Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force-7; Colonel Thomas Pappas, Commander of the 105th Military Intelligence Brigade; Donald Rumsfeld, former Secretary of Defense; and the United States.⁸³ The nine plaintiffs claimed they were detained and tortured by the United States military in

78. *Id.* § 2680(j).

79. *Id.* § 2680(k). In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court of the United States demonstrated the strength of this exclusion when it held that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission [such as where the orders came from] occurred.” *Id.* at 712 (emphasis added).

80. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 9, 2000, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/28/Add.5, ¶¶ 51, 269-70 [hereinafter, U.N. Doc. CAT/C/28/Add.5].

81. 479 F. Supp. 2d 85 (D.D.C. 2007).

82. *Id.* at 88.

83. *Id.* at 88, 90-91.

both Iraq and Afghanistan despite their status as innocent civilians.⁸⁴ They further alleged that after being detained and tortured, they were all eventually released without being charged with any crime.⁸⁵ Specifically, they alleged that they were: (1) hung upside-down from the ceiling by chains until being rendered unconscious; (2) elevated by chains and then dropped to the ground; (3) electrocuted; (4) anally probed; (5) beaten; (6) deprived of water; (7) deprived of sleep; (8) stabbed; (9) urinated on; and (10) subject to mock executions.⁸⁶ Clearly, such alleged acts can be categorized as common law torts in addition to their undoubted characterization as torture.

The plaintiffs claimed the defendants were responsible in tort because “the defendants were directly and personally involved in establishing the interrogation procedures” used on the plaintiffs.⁸⁷ The defendants filed motions to dismiss asserting lack of subject matter jurisdiction and failure to state a valid cause of action.⁸⁸ In specific relevance to this Article, one of the defense assertions was that the defendants enjoyed absolute statutory immunity pursuant to the Westfall Act.⁸⁹

The foreign plaintiffs did not sue the defendants under the FTCA.⁹⁰ Rather, the plaintiffs sued the defendants in tort under the ATS.⁹¹ However, the court noted that whether a tort suit is brought by a foreign national against an employee of the United States using either the ATS or the FTCA, “the Westfall Act provides that, if the Attorney General or his designee certifies that a federal employee was acting within the scope of his [or her] employment when an alleged act or omission occurred, then the lawsuit automatically is converted to one against the United States under the Federal Tort Claims Act, the federal employee is dismissed as a party, and the United States is substituted as the defendant.”⁹²

The plaintiffs argued that their torture-based tort claims should not be barred by the absolute immunity provided by the Westfall Act for three reasons.⁹³ First, the plaintiffs argued that the absolute immunity of the Westfall Act should not apply to intentional torts that violate *jus cogens* norms, such as torture, because the term “negligent or wrongful act or omission” as contained within the Westfall Act is ambiguous and was not congressionally intended to apply to *jus cogens* violations.⁹⁴ Next, the plaintiffs argued that the defendants were acting outside

84. *Id.* at 88.

85. *Id.*

86. *Id.* at 89.

87. *Id.* at 91 n.5.

88. *Id.* at 91.

89. *Id.* at 92.

90. *Id.* at 109-16.

91. *Id.*

92. *Id.* at 110.

93. *Id.*

94. *Id.*; 28 U.S.C. § 2679(b)(1).

the scope of their employment and, therefore, that the Westfall Act should not bar the claim.⁹⁵ Finally, the plaintiffs asserted that violations of international law fall within the Westfall Act's express exception for statutory violations that provide for a cause of action against federal employees.⁹⁶

In response to the first argument, the court refused to even examine the congressional intent of the Westfall Act because such an examination of intent was not appropriate when the intent could be derived from the plain and ordinary meaning of the words Congress used.⁹⁷ Using an ordinary meaning analysis, the court held that an intentional tort, including torture, was clearly included within the meaning of a "wrongful act."⁹⁸ Accordingly, the court concluded that the Westfall Act applies to intentional torts—including torture.⁹⁹

In response to the second argument of the plaintiffs, the court did not accept the plaintiffs' reasoning that *jus cogens* violations could never be considered within the scope of employment simply because the United States deprecates such conduct and is bound to honor international law.¹⁰⁰ Rather, the court held that the Attorney General's certification that the tortious conduct at issue was performed in the course and scope of the defendants' employment with the United States was appropriate because, even if torture was used, "there can be no credible dispute that detaining and interrogating enemy aliens would be incidental to their overall military obligations."¹⁰¹

In response to the third argument, the court noted that there are only two express exceptions precluding application of the Westfall Act: (1) Constitutional violations and (2) actions substantively based upon a federal statute that authorizes recovery against a federal employee.¹⁰² The court found none of the exceptions to the Westfall Act were applicable because the ATS is merely a jurisdictional statute and does not provide any substantive right of recovery against a federal employee.¹⁰³ While the court only addressed the ATS and not the FTCA, it is likely that the court would draw the same conclusion with respect to the FTCA because the FTCA is merely a limited statutory waiver of sovereign immunity for some common law torts and, like the ATS, it does not provide any substantive cause of action or right of recovery against a federal employee.¹⁰⁴ Again using an ordinary meaning approach to the word "statute," the court concluded that international law, including international treaties, did not

95. In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d at 110.

96. *Id.*

97. *Id.* at 110-11; 28 U.S.C. § 2679(b)(1).

98. In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d at 111.

99. *Id.* at 111.

100. *Id.* at 113-14.

101. *Id.* at 114.

102. *Id.* at 111; *see also* 28 U.S.C. § 2679(b)(2).

103. In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d at 112; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) ("the ATS is a jurisdictional statute creating no new causes of action").

104. *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 112.

constitute federal statutes in order to fit under the self-contained exception to the Westfall Act.¹⁰⁵ Accordingly, the court dismissed all of the tort claims against all of the individual defendants as a direct result of the Westfall Act.¹⁰⁶

E. Rasul v. Myers

In *Rasul v. Myers*,¹⁰⁷ four British nationals brought tort claims against former Secretary of Defense Donald Rumsfeld and ten other senior military officials employed by the United States, alleging they were physically mistreated while illegally detained at the United States Naval Base in Guantanamo Bay, Cuba.¹⁰⁸ Much like *In re Iraq and Afghanistan Detainees Litigation*, the plaintiffs asserted their common law tort claims using the ATS to obtain federal jurisdiction.¹⁰⁹ Pursuant to the Westfall Act, the Circuit Court of Appeals affirmed the District Court's dismissal of the tort claims and stated:

We explained that the Westfall Act makes the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2679 *et seq.*, the exclusive remedy for any damages action for torts committed by a federal official 'while acting within the scope of his office or employment.' 28 U.S.C. § 2679(b)(1). The Alien Tort Statute and Geneva Convention claims in Counts 1 to 4 were premised on alleged tortious conduct within the scope of defendants' employment. Since plaintiffs failed to exhaust their administrative remedies as required by the FTCA, the district court lacked jurisdiction over Counts 1 to 4.¹¹⁰

F. Harbury v. Hayden

In the case of *Harbury v. Hayden*,¹¹¹ members of the Guatemalan army tortured and killed a Guatemalan rebel fighter named Efrain Bamaca-Velasquez.¹¹² The slain rebel fighter's widow, Jennifer Harbury, a United States citizen, sued various CIA officials employed by the United States and claimed that these individual employees of the United States were legally responsible for the death of her Guatemalan husband.¹¹³ Pursuant to the Westfall Act, the District Court dismissed the plaintiff's tort claims against the individual defendants and substituted the United States as the party defendant, before proceeding to dismiss

105. *Id.* at 112-13; 28 U.S.C. § 2679(b)(2)(B).

106. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 114-15, 119.

107. 563 F.3d 527 (D.C. Cir. 2009).

108. *Id.* at 527-28.

109. *Id.*

110. *Id.* at 528 n.1 (citations omitted).

111. 522 F.3d 413 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 195 (2008).

112. *Id.* at 415.

113. *Id.*

the tort claims against the United States under the FTCA exception for injuries that occur in a foreign country.¹¹⁴ In affirming the dismissal of the plaintiff's common law tort claims, the Circuit Court of Appeals explained:

The Federal Tort Claims Act is a limited waiver of the Government's sovereign immunity. Under the FTCA, plaintiffs may sue the United States in federal court for state-law torts committed by government employees within the scope of their employment. 28 U.S.C. §§ 1346(b), 2671-80. But the FTCA does not create a statutory cause of action against individual government employees.¹¹⁵

If a plaintiff files a state-law tort suit against an individual government employee, a companion statute – the Westfall Act – provides that the Attorney General may certify that the employee was acting within the scope of employment 'at the time of the incident out of which the claim arose.' U.S.C. § 2679(d)(1). Upon the Attorney General's certification, the tort suit automatically converts to an FTCA 'action against the United States' in federal court; the Government becomes the sole party defendant; and the FTCA's requirements, exceptions, and defenses apply to the suit. *Id.*¹¹⁶

If the Attorney General does not certify that the defendant employee was acting within the scope of employment, the defendant may petition the court to make such a finding. If the court so finds, then the case becomes a federal-court FTCA case against the Government, just as if the Attorney General had filed a certification. 28 U.S.C. § 2679(d)(3)-(4). If the court finds that the government employee was not acting within the scope of employment, then the state-law tort suit may proceed against the government employee in his or her personal capacity.¹¹⁷

...

When one of the FTCA's exceptions applies—that is, when the Government has *not* waived its sovereign immunity—the Attorney General's scope-of-employment certification has the effect of converting the state-law tort suit into an FTCA case over which the federal courts lack subject-matter jurisdiction. In other words, the combination of the scope-of-employment determination and the FTCA's exceptions may absolutely bar a plaintiff's case. (citation omitted).¹¹⁸

114. *Id.* at 417; *see also* 28 U.S.C. § 2680(k).

115. *Harbury*, 522 F.3d at 416.

116. *Id.*

117. *Id.* at 416 n.1.

118. *Id.* at 417 (citation omitted).

In order to avoid the exact procedure and outcome outlined by the court, the plaintiff argued that the Westfall Act did not bar her tort claims because “acts of torture can never fall within the scope of employment.”¹¹⁹ However, the court disagreed and set forth that the individual CIA employee defendants acted within the scope of their employment by conducting covert operations and working with individuals in Guatemala who tortured and killed the plaintiff’s husband.¹²⁰ Therefore, the alleged tortious conduct of the individual defendants was “incidental to their authorized conduct” as undertaken on behalf of the United States.¹²¹ In affirming the complete dismissal of all of the plaintiff’s tort claims against all defendants, the court held:

Because the alleged actions of the individual CIA Defendants were within the scope of their employment, Harbury’s claims against the individual CIA Defendants are properly converted into claims against the Government under the FTCA. But Harbury’s FTCA claims against the Government fall squarely within the FTCA’s exception for claims “arising in a foreign country.” 28 U.S.C. §2680(k).¹²²

G. *Congressional Intent*

While it did not result in a favorable ruling, Barney Frank, United States House Representative for the Fourth Congressional District of Massachusetts, filed an *amicus curiae* brief in favor of the plaintiff *Harbury*.¹²³ Representative Frank was a member of the 100th Congress, which passed the Westfall Act and, in fact, sponsored the bill, wrote the House Report, and led the House debate on the legislation.¹²⁴ Clearly, if anyone knows what Congress truly intended to accomplish by passing the Westfall Act, it should be Representative Frank.

Representative Frank wrote the true intent of the Westfall Act was to do away with the exercise of discretion requirement for federal employees to be absolutely immune from a tort suit, as required by the Supreme Court in *Westfall v. Erwin*.¹²⁵ He also noted that the Westfall Act was intended to make federal employees acting within the scope of their employment absolutely immune from suit and to substitute the United States as a party defendant so that federal employees would not be burdened with garden-variety tort suits.¹²⁶ Instead, plaintiffs would be able to pursue a defendant with a deeper pocket, the United

119. *Id.* at 418.

120. *Id.* at 422.

121. *Id.*

122. *Id.* at 422-23.

123. See Brief of Amicus Curiae United States Representative Barney Frank In Support of Appellant Jennifer K. Harbury, *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2007) (No. 06-5282), 2007 WL 2344799.

124. *Id.* at 1.

125. *Id.* at 3-4.

126. *Id.*

States, for damages.¹²⁷ In his brief, Representative Frank clearly set forth that it was never the intent of Congress to immunize torturers.¹²⁸ Rather, Congress intended that any federal employee who committed outrageous or criminal conduct, such as torture, would always remain personally liable—because such conduct could never be considered as being part of the scope of employment while working for the United States of America.¹²⁹

The position of Representative Frank, as represented in his *amicus* brief, is also well documented in the Congressional record. In a House Report, Representative Frank expressed his intent and understanding with respect to the bill that would become the Westfall Act when he set forth: “If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted . . . and the individual employee remains liable.”¹³⁰ This was also the legal opinion and interpretation of then Deputy Assistant Attorney General Robert L. Willmore, who testified before a Congressional subcommittee that under the Westfall Act, “employees accused of egregious misconduct—as opposed to mere negligence or poor judgment—will not generally be protected from personal liability for the results of their actions.”¹³¹

The problem with Representative Frank’s intent and understanding and with former Deputy Assistant Attorney General Willmore’s interpretation and opinion is that neither clearly represents the actual words of the Westfall Act. If Congress did not want to provide absolute statutory immunity to torturers, then all it had to do was expressly say so. Without actually amending 28 U.S.C. § 2679, it is highly unlikely that the intent of the 100th Congress, as demonstrated by Representative Frank, will ever be judicially recognized.

In conformity with a longstanding canon of statutory interpretation, courts read the words of a statute and apply and enforce the plain, clear, common and ordinary meaning of those words—and will only properly look to the legislative history for congressional intent when an ambiguity in the statutory language does not lend itself to a plain and ordinary meaning.¹³² Absent ambiguity, courts presume that the legislature carefully chose its words and clearly intended what it plainly expressed in the statutory language.¹³³ The mere fact that a statutory word

127. *Id.*

128. *Id.* at 6-10.

129. *Id.*

130. H.R. REP. NO. 100-700, at 5 (1988).

131. *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083, Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 79 (1988) (“Westfall Committee Hearing”), (statement of Robert L. Willmore, Deputy Assistant Att’y Gen., Civil Division, Dept. of Justice).

132. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186-87, 187 n.8 (2004) (advising against interpretation of legislation that would depart with “longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text”).

133. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805) (“Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean

or phrase is not used with a self-contained, express definition does not make the word or phrase ambiguous.¹³⁴ On the contrary, undefined terms are simply read in accordance with their ordinary meaning.¹³⁵ These principles explain how the *Harbury* court, without passion or prejudice, applied the clear and plain language of the Westfall Act and the FTCA exceptions without even addressing the completely contrary legislative intent directly expressed by Representative Frank in his *amicus* brief to the court.

H. *The Problem Continues: Al-Zahrani v. Rumsfeld*

The fact that tort immunity is provided to alleged torturers within the employ of the United States is not an isolated or outdated issue—in fact, it is a recent and continuing issue worthy of immediate congressional intervention. As recently as February 16, 2010, in *Al-Zahrani v. Rumsfeld*,¹³⁶ another torture-based lawsuit was dismissed as a result of the Westfall Act and an exception to the FTCA.¹³⁷ In *Al-Zahrani*, the plaintiffs were the survivors of two detainees that were held at the United States Naval Base in Guantanamo Bay, Cuba, from sometime in 2002 until their deaths on June 10, 2006.¹³⁸ Among others, the plaintiffs sued twenty-four United States Government employees asserting an ATS cause of action.¹³⁹

The operable complaint alleged the detainees, Yasser Al-Zahrani and Salah Ali Abdullah, were deemed by the United States to be enemy combatants and subjected to violent acts of torture at the hands of United States employees.¹⁴⁰ The plaintiffs further alleged that the two detainees were the victims of torturous acts, “including sleep deprivation, exposure to prolonged temperature extremes, invasive body searches, beatings, threats, inadequate medical treatment and withholding of necessary medication”¹⁴¹ The cause of death for both men, as determined by the United States Navy, was suicide by hanging.¹⁴² The government employee defendants moved to dismiss the complaint, while the United States moved to substitute itself as the party defendant, in place of the government employee defendants, and to then dismiss the complaint based on the Westfall Act and an express exception to the FTCA.¹⁴³

what they have plainly expressed, and consequently no room is left for construction.”).

134. See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

135. *Id.* (“In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning”).

136. 684 F. Supp. 2d 103 (D.D.C. 2010).

137. *Id.* at 105-06, 113, 116.

138. *Id.* at 105.

139. *Id.* at 107.

140. *Id.* at 106.

141. *Id.*

142. *Id.* at 107.

143. *Id.* at 108.

The court in *Al-Zahrani* granted the motion for substitution and specifically referenced “the clear holding” in the prior decisions of *Rasul* and *Harbury*.¹⁴⁴ The court dismissed the government employees, substituted the United States as party defendant pursuant to the Westfall Act, and then proceeded to dismiss the United States from the lawsuit under the foreign country exception to the FTCA, while correspondingly rejecting the position of the plaintiffs that the United States Naval Base at Guantanamo Bay was not foreign soil.¹⁴⁵

I. Proposed Amendment

If Congress is troubled by the judicial decisions granting alleged torturers absolute immunity from suit, then the following amendment to the Westfall Act, currently proposed only in this Article, could solve the problem:

28 U.S.C. § 2679(b):

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States;~~or~~

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized;
or

(C) which is brought for acts of torture, violations of *jus cogens* norms, or for conduct which is otherwise egregious or criminal in nature.¹⁴⁶

Besides amending the Westfall Act to better represent and express the true intent of Congress, and to end the gross miscarriage of justice in regard to tort liability for torture, the United States also needs to amend the Westfall Act in

144. *Id.* at 115-16.

145. *Id.* at 119; *see also* 28 U.S.C. § 2680(k).

146. In the author’s proposed amendment to 28 U.S.C. § 2679(b), double strikethrough represents deletion while underlining represents addition.

order to comply with its international treaty obligations. As discussed below, the United States has international treaty obligations that it must satisfy by and through domestic law. The current state of the law, in regard to the Westfall Act and the exceptions to the FTCA, does not satisfy the international human rights treaty obligations of the United States.

IV. INTERNATIONAL HUMAN RIGHTS TREATIES

The United States has ratified two major international human rights treaties in regard to the prohibition of torture: the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁴⁸ By ratifying these two international human rights treaties, the United States has obliged itself under international law to provide individuals with the right to be free from torture and inhuman or degrading treatment,¹⁴⁹ the right to make official complaints of torture,¹⁵⁰ and the right to state compensation for torture.¹⁵¹ Furthermore, the ICCPR requires that the United States “adopt such legislative . . . measures as may be necessary to give effect to the rights recognized in the . . . Covenant.”¹⁵² It also requires the United States to provide “an effective remedy” to victims and “[t]o ensure that any person claiming such a remedy shall have his [or her] right thereto determined by competent judicial, administrative or legislative authorities. . . .”¹⁵³

The CAT requires the United States to “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. . . .”¹⁵⁴ With the existing loopholes in the Westfall Act and the exceptions to the FTCA, the United States clearly is not complying with its international treaty obligations to provide torture victims with an adequate remedy and compensation for torture committed by United States employees. However, despite what is set forth in the CCPR and the CAT, the problem for victims of torture is that nothing in these treaties can be directly enforced against the United States by a torture victim using the courts of the United States.

147. International Covenant on Civil and Political Rights, Oct. 5, 1977, 999 U.N.T.S. 171 [hereinafter CCPR].

148. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 18, 1988, 1465 U.N.T.S. 85 [hereinafter CAT].

149. CCPR, *supra* note 147, at Art. 7; CAT, *supra* note 148, at Art. 16.

150. CAT, *supra* note 148, at Art. 13.

151. *Id.* at Art. 14.1.

152. CCPR, *supra* note 147, at Art. 2.2.

153. *Id.* at Art. 2.3.

154. CAT, *supra* note 148, at Art. 14.1.

A. *Non-Self-Executing*

Before addressing, in detail, that the United States has adopted the CCPR and the CAT under the condition that both conventions are non-self-executing, it is important to identify what a non-self-executing treaty is, why the United States deems some treaties to be non-self-executing, and what effect it has on judicial enforcement of legal protections against torture committed by United States employees.

Briefly stated, “non-self-executing” means that one cannot go down to his or her local courthouse and file a lawsuit for breach of a treaty obligation. But, the analysis is a bit more complex than just this simple, yet accurate, description. In the seminal Supreme Court case of *The Paquete Habana*,¹⁵⁵ Justice Gray set forth: “International 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.”¹⁵⁶ Article III, Section 2, of the Constitution of the United States, reads, in part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made*, or which shall be made, under their Authority”¹⁵⁷ The Supremacy Clause, contained within Article VI of the Constitution of the United States, 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁵⁸ Therefore, it appears, at least initially, that all courts in the United States would treat international human rights treaties as “the supreme Law of the Land.”¹⁵⁹ However, a review of judicial interpretation reveals that the words of the United States Constitution are not so deceptively clear.

While the Supremacy Clause of the Constitution references “*Treaties*,”¹⁶⁰ the Supreme Court makes a distinction between treaties that are the judicial equivalent of legislative acts and treaties that are merely contracts of politics between nations—with the later not being a judiciable issue for the courts until

155. 175 U.S. 677 (1900).

156. *Id.* at 700; *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

157. U.S. CONST. art. III, § 2 (emphasis added).

158. U.S. CONST. art. VI (emphasis added).

159. *Id.*

160. *Id.*

and unless the legislature enacts positive domestic legislation thereon.¹⁶¹ In *Foster v. Neilson*,¹⁶² the United States Supreme Court set forth:

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision*. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, *the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court*.¹⁶³

Accordingly, treaties have been judicially assigned into two distinct categories of justiciability: self-executing and non-self-executing.¹⁶⁴ “[W]hile treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’”¹⁶⁵ To provide further clarity on the issue, the Supreme Court has set forth precisely what it means:

The label ‘self-executing’ has on occasion been used to convey different meanings. What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.¹⁶⁶

However, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”¹⁶⁷ Based on this legal presumption, several federal appellate courts have held that absent express treaty language to the contrary, international treaties do not create privately enforceable rights and, therefore, do not create justiciable issues for individuals to litigate in domestic courts.¹⁶⁸

161. *Foster v. Neilson*, 27 U.S. 253, 254 (1829), *overturned, in part, on other grounds by United States v. Percheman*, 32 U.S. 51 (1833).

162. *Id.*

163. *Id.* (emphasis added).

164. *See Medellín v. Texas*, 128 S.Ct. 1346, 1356 (2008).

165. *Id.* (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

166. *Id.* at 1356 n.2.

167. *Id.* at 1357 n.3 (citing 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907, cmt. a, p. 395 (1986)).

168. *Id.*; *see, e.g., United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v.*

While treaties may be binding international law, the bottom line is that treaties ratified by the United States in non-self-executing fashion are, domestically, nothing more than unenforceable ideals.¹⁶⁹ Why would the United States not allow suits against itself or its employees in the courts of the United States for its violations of ratified treaties—especially those that prohibit torture? There are at least two possible theories: The “safety valve” theory and the “window dressing” theory.¹⁷⁰

The “safety valve” theory asserts that the domestic law of the United States is not a complete redundancy of treaty rights. Therefore, the non-self-executing declarations act as a safety valve to preclude the judiciary from domestically enforcing any treaty rights that are not codified in existing national law.¹⁷¹ The United States takes the position that its domestic laws envelop its international human rights obligations.¹⁷² But, just in case there is a new treaty right that is not redundant of national law, a non-self-executing declaration acts as a safety valve to prevent any separate and unique treaty-based right from being asserted in a national court.¹⁷³

The “window dressing” theory contends the United States makes domestic law understandings and non-self-executing declarations as a form of window

Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60-61 (1st Cir. 2000) (en banc); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *see also, e.g.*, Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Aya Gruber, *Sending the Self-Execution Doctrine to the Executioner*, 3 F INT’L U. L. REV. 57 (2007); Gabriellidis, *supra* note 1; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

169. *See, e.g.*, *Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (holding that non-self-executing treaties are not binding on the courts); *White v. Paulsen*, 997 F. Supp. 1380, 1386-87 (E.D. Wash. 1998) (holding that no private cause of action can be brought under the CCPR or the CAT in domestic courts); *see also* Gabriellidis, *supra* note 1, at 156; Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, *supra* note 168, at 1120-23; Vázquez, *supra* note 168, at 2175-88; *see generally* Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431 (2004).

170. Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, *supra* note 168, at 189-90.

171. *Id.*

172. U.N. Doc. CAT/C/28/Add.5, *supra* note 80, at ¶ 60; International Covenant on Civil and Political Rights, April 17, 1995, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America (continued)*, U.N. Doc. CCPR/C/SR.1402, ¶ 3 [hereinafter U.N. Doc. CCPR/C/SR.1402]; International Covenant on Civil and Political Rights, April 17, 1995, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America*, U.N. Doc. CCPR/C/SR.1401 [hereinafter U.N. Doc. CCPR/C/SR.1401], ¶ 34; International Covenant on Civil and Political Rights, April 17, 1995, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America*, U.N. Doc. CCPR/C/81/Add.4, ¶ 8 [hereinafter U.N. Doc. CCPR/C/81/Add.4].

173. Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, *supra* note 168, at 189-90.

dressings that enables the United States to comply with its treaty obligations while, at the same time, not disturbing preexisting national law.¹⁷⁴ This window dressing is then used as an enticement to secure the Senate votes necessary to ratify the treaties in the first place.¹⁷⁵ In contrast to a situation where ratification would require comprehensive changes to domestic law, if the national law already complies with treaty obligations then there is certainly more incentive for the Senate to vote in favor of ratification.

Under either theory or reasoning, it appears clear that the use of non-self-executing treaty declarations with international torture treaties is just another way the United States has insulated itself, and its employees, from domestic civil tort liability while, at the same time, allowing for tort liability against foreign torturers. An argument could be made that, under either theory, the United States has violated general principals of international law by not ratifying the treaties in good faith. It is arguably less than good faith to enter into a treaty that may grant new and unique rights when a “safety valve” is also inserted in order to ensure that any treaty rights are not wholly judicially enforceable. It is also arguably less than good faith to enter into a treaty that may require some modification of existing national law, and then to hang a negating “window dressing” to garner the ratifying votes of lawmakers. Under either theory, the effect of the Westfall Act, when coupled with the exceptions to the FTCA, is to deny civil redress for torture committed by employees of the United States—in clear violation of many international human rights treaties.

B. Reservations, Understandings and Declarations

When the United States ratified the CCPR and the CAT, it only did so conditionally by including a number of reservations,¹⁷⁶ understandings¹⁷⁷ and declarations¹⁷⁸—sometimes referred to as RUDs. While the United States references the rights it ratified under these treaties in understanding to its own constitution,¹⁷⁹ the United States nevertheless made a point to declare that the rights contained within the ratified treaties are not self-executing.¹⁸⁰ But it is circular reasoning for the United States to adopt international human rights treaties with the basic understanding that it already complies with those treaties through its existing national law, while at the same time reducing its treaty obligations to non-justiciable issues in national courts. In terms of entering into and complying with the intent and purpose of the treaties, this certainly seems

174. *Id.*

175. *Id.*

176. *See infra* app. A.

177. *See infra* app. B.

178. *See infra* app. C.

179. *See infra* app. B.

180. *See infra* app. C.

like a somewhat less-than-good-faith effort on the part of the United States. This is especially true when the Westfall Act and the FTCA deny torture victims the very redress and compensation the United States promised by signing the international treaties. And what only adds insult to injury is that, because of the non-self-executing nature of the treaties, torture victims cannot even sue the United States for its clearly apparent treaty violations.

The reservations, understandings and declarations made by the United States concerning the CCPR did not go unnoticed by the international community. Belgium,¹⁸¹ Denmark,¹⁸² Finland,¹⁸³ France,¹⁸⁴ Germany,¹⁸⁵ Italy,¹⁸⁶ the Netherlands,¹⁸⁷ Norway,¹⁸⁸ Portugal,¹⁸⁹ Spain¹⁹⁰ and Sweden¹⁹¹ all raised comments or objections to the conditioned ratification of the CCPR by the United States. Likewise, the reservations, understandings and declarations made by the United States concerning the CAT did not go unnoticed. Finland,¹⁹² Germany,¹⁹³ the Netherlands¹⁹⁴ and Sweden¹⁹⁵ also raised comments or objections to the United States' conditioned ratification of the CAT.

In their objections, Finland, the Netherlands, Portugal and Sweden appear to have hit the nail squarely on the head. Specifically concerning the CCPR, Finland correctly objected that "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."¹⁹⁶ Portugal further objected "that the reservation . . . in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law."¹⁹⁷ Sweden argued that it was completely unsatisfactory for the United States to take the position that it can comply with a treaty by and through its already existing national law. Specifically, Sweden objected:

181. See *infra* app. D.

182. See *infra* app. E.

183. See *infra* app. F.

184. See *infra* app. G.

185. See *infra* app. H.

186. See *infra* app. I.

187. See *infra* app. J.

188. See *infra* app. K.

189. See *infra* app. L.

190. See *infra* app. M.

191. See *infra* app. N.

192. See *infra* app. O.

193. See *infra* app. P.

194. See *infra* app. Q.

195. See *infra* app. R.

196. See *infra* app. F.

197. See *infra* app. L.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.¹⁹⁸

In regard to the CAT, the Netherlands objected by saying that “it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation.”¹⁹⁹ Sweden, through the same method it used to object to the CCPR, asserted an additional objection to the CAT based on the same reasoning.²⁰⁰ Likewise, while commenting on the CAT, but referring to its previous objection regarding the CCPR, Finland set forth:

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also . . . subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.²⁰¹

Finland, the Netherlands, Portugal and Sweden appear to be uniform in their opposition to the United States’ attempt to limit its international human rights responsibilities and obligations to its understanding of the scope and provisions of the Constitution and other domestic law. These countries raise a very valid point. The reservations, understandings and declarations made by the United States in ratifying the CCPR and the CAT may substantially frustrate the true intent and purpose of the treaties. By conditioning the human rights elicited from the CCPR and the CAT to the confines of existing domestic law, the United States deprives the international community of its commitment to the full scope

198. *See infra* app. N.

199. *See infra* app. Q.

200. *See infra* app. R.

201. *See infra* app. O.

of the rights these treaties purport to provide. Moreover, by not making the treaty obligations self-executing, the United States also denies individuals, mainly victims of torture, the right to domestic enforcement of treaty rights which are not properly codified in existing national law—for example, the tort immunity for torturers provided by the Westfall Act and the exceptions to the FTCA. It seems completely hypocritical for the United States to use its domestic law as a justification for making treaties non-self-executing when, as with the Westfall Act and the FTCA, United States domestic law does not comply with its international treaty obligations.

Besides the initial reaction of other countries to the conditioned ratification, the reporting requirements found in the CCPR²⁰² and the CAT²⁰³ are of particular interest. These reporting provisions require all participating members to report to the Secretary-General of the United Nations as to exactly what the reporting members have done, legislatively, judicially and administratively, to give effect to the provisions in each ratified convention. Afterwards, the reports are considered by the appropriate committee. With suggestions, recommendations and comments from other members, each respective committee then reports, through the Secretary-General, to the General Assembly of the United Nations.²⁰⁴

As part of this treaty reporting process, the United States continues to make clear that in ratifying international human rights treaties it does not intend to create any enforceable causes of action to be litigated in domestic courts.²⁰⁵ The United States has done this purposefully through a mandate by the Executive Branch and the Senate.²⁰⁶ Despite this fact, the United States maintains that it does not affect the international treaty obligations of the United States when it ratifies a treaty that cannot be domestically enforced.²⁰⁷ In fact, the United States, as misguided and uninformed as it is, continues to uphold that it already does everything required by the ratified international human rights treaties through enforcement of already existing laws.²⁰⁸ The addendum to the United States'

202. CCRP, *supra* note 187, at Art. 40.1.

203. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 18, 1988, 1465 U.N.T.S. 85, Art. 19.1.

204. CCRP, *supra* note 187, at Art. 40; 1465 U.N.T.S. 85 at Art. 19.

205. U.N. Doc. CAT/C/28/Add.5, *supra* note 80, at ¶ 56; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 12; U.N. Doc. CCPR/C/81/Add.4, *supra* note 172, at ¶¶ 8, 129, III(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 19, 2000, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention (continued)*, U.N. Doc. CAT/C/SR.427, ¶ 8 [hereinafter U.N. Doc. CAT/C/SR.427]; International Covenant on Civil and Political Rights, Apr. 24, 1995, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (continued)*, U.N. Doc. CCPR/C/SR.1405, ¶ 7 [hereinafter U.N. Doc. CCPR/C/SR.1405].

206. U.N. Doc. CCPR/C/SR.1405, *supra* note 205, at ¶ 8; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 12.

207. U.N. Doc. CAT/C/SR.427, *supra* note 205, at ¶ 8; U.N. Doc. CAT/C/28/Add.5, *supra* note 80, at ¶¶ 57, 60; U.N. Doc. CCPR/C/SR.1405, *supra* note 205, at ¶¶ 7, 8; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶¶ 38, 46; U.N. Doc. CCPR/C/81/Add.4, *supra* note 172, at ¶ 8.

208. U.N. Doc. CAT/C/28/Add.5, *supra* note 80, at ¶ 60; U.N. Doc. CCPR/C/SR.1402, *supra* note 172, at ¶¶ 3, 25, 37; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 34; U.N. Doc. CCPR/C/81/Add.4, *supra* note

initial report to the Committee on the Elimination of Racial Discrimination, in relation to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁰⁹ is an illustrative example. In another human rights convention that it conditionally ratified, the United States specifically references the CCPR and the CAT by saying:

This [non-self-executing] declaration has no effect on the international obligations of the United States or on its relations with States parties. However, it does have the effect of precluding the assertion of rights by private parties based on the Convention in litigation in U.S. courts. In considering ratification of previous human rights treaties, in particular the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1994) and the International Covenant on Civil and Political Rights (1992), both the Executive Branch and the Senate have considered it prudent to declare that those treaties do not create new or independently enforceable private rights in U.S. courts. However, this declaration does not affect the authority of the Federal Government to enforce the obligations that the United States has assumed under the Convention through administrative or judicial action.²¹⁰

...

The United States is aware of the Committee's preference for the direct inclusion of the Convention into the domestic law of States parties. Some non-governmental advocacy groups in the United States would also prefer that human rights treaties be made 'self-executing' in order to serve as vehicles for litigation.²¹¹

...

As was the case with prior human rights treaties, existing U.S. law provides protections and remedies sufficient to satisfy the requirements of the present Convention.²¹²

...

Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law. Neither does it contravene any provision of the

172, at ¶ 8.

209. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

210. International Convention of the Elimination of All Forms of Racial Discrimination, Oct. 10, 2000, *Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CERD/C/351/Add.1, ¶ 170.

211. *Id.* at ¶ 173.

212. *Id.* at ¶ 171.

treaty or restrict the enjoyment of any right guaranteed by U.S. obligations under the Convention.²¹³

If this is true, however, then why is it necessary to be “prudent” in excluding international human rights treaties from domestic enforcement? This is a critical question especially when there are clear gaps between the national law and the international treaties—as illustrated in this Article. Moreover, the respective treaty committees do not appear to agree with the United States’ position on this issue.²¹⁴ The respective treaty committees would prefer if the United States implemented the ratified human rights treaties by directly including the conventions into domestic law.²¹⁵ In fact, the respective committees have taken the position that the stance of the United States on this issue actually contradicts the principle that international treaties should take precedence over domestic law.²¹⁶ Furthermore, it has been relayed to the United States that it should rescind its non-self-executing declarations in order to demonstrate full support of the conventions.²¹⁷ This would certainly be another way to bridge the gap between the domestic law and the Westfall Act and FTCA exceptions with the rights provided in the CCPR and the CAT.

The flaws in the position of the United States can be illustrated with the simplest of rhetorical questions: If the United States holds that it already guarantees the rights recognized under the covenants through domestic law, then why are the domestic courts being deprived of the opportunity to rely on the conventions as the true law of the land?²¹⁸ Would it not be preferable to make ratified human rights treaties self-executing so that individuals could invoke them

213. *Id.* at ¶ 172.

214. U.N. Doc. CCPR/C/SR.1405, *supra* note 205, at ¶ 7; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶¶ 34, 46; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, July 25, 2006, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/USA/CO/2, ¶ 40 [hereinafter U.N. Doc. CAT/C/USA/CO/2]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 12, 2006, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/SR.703, ¶ 72 [hereinafter U.N. Doc. CAT/C/SR.703]; Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 8, 2006, *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America*, U.N. Doc. CAT/C/USA/Q/2, ¶ 5 [hereinafter U.N. Doc. CAT/C/USA/Q/2]; see also Margaret Thomas, “Rogue States” Within American Borders: Remediating State Noncompliance with the International Covenant on Civil and Political Rights, 90 CAL. L. REV. 165, 177 (2002); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 461 (1996).

215. U.N. Doc. CCPR/C/SR.1402, *supra* note 172, at ¶¶ 22, 27; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 46.

216. U.N. Doc. CCPR/C/SR.1402, *supra* note 172, at ¶ 22; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 35.

217. U.N. Doc. CAT/C/USA/CO/2, *supra* note 214, at ¶ 40; U.N. Doc. CAT/C/SR.703, *supra* note 214, at ¶ 72; U.N. Doc. CAT/C/USA/Q/2, *supra* note 214, at ¶ 5; U.N. Doc. CCPR/C/SR.1402, *supra* note 172, at ¶ 22; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 48; U.N. Committee Against Torture, *Report of the Committee Against Torture*, ¶ 180, U.N. Doc. A/55/44 (Nov. 8-19, 1999; May 1-19, 2000).

218. U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 34.

in domestic legal proceedings?²¹⁹ In 2000, a Canadian national and the Chairperson of the Committee Against Torture, Peter Thomas Burns, believed so.²²⁰ At the 424th meeting in which the Committee Against Torture considered the United States' initial report regarding the CAT, Mr. Burns stated: "Articles 1 to 16 were non-self-executing and yet, according to the report, their provisions indirectly formed part of United States law. Under those circumstances, would it not be preferable to make them self-executing so that individuals could invoke them in legal proceedings?"²²¹ Since the conventions were intended to benefit individuals, exactly how are individuals being protected if the convention rights cannot be domestically enforced where domestic law may fall short of treaty obligations?²²² And that is exactly what the Westfall Act and the FTCA do—fall short of treaty obligations. As Omran El Shafei, an Egyptian national and a member of the Human Rights Committee, noted in 1995 at the 1401st meeting in which the Human Rights Committee considered the initial report of the United States in regard to the CCPR: "[T]he purpose of treaties . . . [is] for States to undertake new obligations, and in the case of the International Covenant on Civil and Political Rights, to conform domestic law to international standards enshrined in the Covenant. It . . . [is] regrettable that by its decision, the [United States] Government . . . [has] prevented the Covenant from being tested in the United States courts."²²³ Despite the United States' clearly inaccurate representations that it fully complies with its treaty obligations through its already existing national law, it is especially regrettable that the Westfall Act and the FTCA fall well short of complying with international human rights treaties—especially since torture victims cannot use the conventions themselves to seek a judicial remedy.

V. CONCLUSION

Whether or not they are fully implemented in domestic law, the United States is obligated to respect the international treaties it ratifies.²²⁴ The Westfall Act and the exceptions to the FTCA currently deny victims of torture an adequate civil tort remedy. Not only do the Westfall Act and the FTCA result in violations of the United States' international treaty obligations, they also result in a

219. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 9, 2001, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/SR.424, ¶ 16.

220. *Id.*

221. *Id.*

222. U.N. Doc. CAT/C/USA/Q/2, *supra* note 214, at ¶ 5; U.N. Doc. CCPR/C/SR.1405, *supra* note 205, at ¶ 7; U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 34.

223. U.N. Doc. CCPR/C/SR.1401, *supra* note 172, at ¶ 46.

224. Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1235 (2005); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 752 (2004), ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

miscarriage of justice that is clearly contrary to the represented intent of Congress. The end result is the United States takes a purely self-protectionist, hypocritical position when compared to its position on civil tort liability for torturers from other countries.

Accordingly, it is time for Congress to fix the problem it has created. While House Representative Barney Frank has represented that it was never the intent of Congress to shield torturers from civil tort liability, the fact remains that Congress is obviously aware of the problem and, to date, has done nothing to remedy the situation.²²⁵ Therefore, Congress should amend the Westfall Act to allow civil tort suits against employees of the United States when the tortious conduct at issue is for torture and other *jus cogens* violations. Alternatively, the United States Senate and the State Department should withdraw the non-self-executing declarations in regard to the CCPR and the CAT so that torture victims can use the conventions as a source of legal rights not currently provided by the national law—namely, the Westfall Act and the FTCA. An ideal situation would be for the United States to do both. A change is clearly necessary to finally burn the recipe for torture-related tort immunity.

225. See United States Code Classification Tables, Office of the Law Revision Counsel, <http://uscode.house.gov/classification/tables.shtml> (on file with the *McGeorge Law Review*).

APPENDIX A

[CCPR reservations made by the United States]

(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by article 7 to the extent that '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.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT reservations made by the United States]

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case. (Oct. 21, 1994). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX B

[CCPR understandings made by the United States]

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to 'exceptional circumstances' in paragraph 2 (a) of article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this 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 the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mt_dsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT understandings made by the United States]

(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'

(3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not

prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention. (Oct. 21, 1994). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mt_dsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX C

[CCPR declarations made by the United States]

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that the right referred to in article 47 may be exercised only in accordance with international law. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtDsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT declarations made by the United States]

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing. (Oct. 21, 1994). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtDsg_no=IV-9&chapter=4&lang=en#Participants.

The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary. (Apr. 18, 1988). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtDsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX D

[Comments of Belgium in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

The Government of Belgium wishes to raise an objection to the reservation made by the United States of America regarding article 6, paragraph 5, of the Covenant, which prohibits the imposition of the sentence of death for crimes committed by persons below 18 years of age.

The Government of Belgium considers the reservation to be incompatible with the provisions and intent of article 6 of the Covenant which, as is made clear by article 4, paragraph 2, of the Covenant, establishes minimum measures to protect the right to life.

The expression of this objection does not constitute an obstacle to the entry into force of the Covenant between Belgium and the United States of America. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX E

[Comments of Denmark in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

Having examined the contents of the reservations made by the United States of America, Denmark would like to recall article 4, para 2 of the Covenant according to which no derogation from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.

These objections do not constitute an obstacle to the entry into force of the Covenant between Denmark and the United States. (Oct. 1, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mt_dsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX F

[Comments of Finland in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Understanding (1) pertaining to articles 2, 4 and 26 of the Covenant is therefore considered to constitute in substance a reservation to the Covenant, directed at some of its most essential provisions, namely those concerning the prohibition of discrimination. In the view of the Government of Finland, a reservation of this kind is contrary to the object and purpose of the Covenant, as specified in article 19(c) of the Vienna Convention on the Law of Treaties.

As regards reservation (2) concerning article 6 of the Covenant, it is recalled that according to article 4(2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

As regards reservation (3), it is in the view of the Government of Finland subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

For the above reasons the Government of Finland objects to reservations made by the United States to articles 2, 4 and 26 [*cf.* Understanding (1)], to article 6 [*cf.* Reservation (2)] and to article 7 [*cf.* Reservation (3)]. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the Covenant between Finland and the United States of America. (Sept. 28, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX G

[Comments of France in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

At the time of the ratification of [the said Covenant], the United States of America expressed a reservation relating to article 6, paragraph 5, of the Covenant, which prohibits the imposition of the death penalty for crimes committed by persons below 18 years of age.

France considers that this United States reservation is not valid, inasmuch as it is incompatible with the object and purpose of the Convention.

Such objection does not constitute an obstacle to the entry into force of the Covenant between France and the United States. (Oct. 4, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mt_dsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX H

[Comments of Germany in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

The Government of the Federal Republic of Germany objects to the United States' reservation referring to article 6, paragraph 5 of the Covenant, which prohibits capital punishment for crimes committed by persons below eighteen years of age. The reservation referring to this provision is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of the Federal Republic of Germany interprets the United States' 'reservation' with regard to article 7 of the Covenant as a reference to article 2 of the Covenant, thus not in any way affecting the obligations of the United States of America as a state party to the Covenant. (Sept. 29, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX I

[Comments of Italy in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

The Government of Italy objects to the reservation to art. 6 paragraph 5 which the United States of America included in its instrument of ratification.

In the opinion of Italy reservations to the provisions contained in art. 6 are not permitted, as specified in art.4, para 2, of the Covenant.

Therefore this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant.

Furthermore in the interpretation of the Government of Italy, the reservation to art. 7 of the Covenant does not affect obligations assumed by States that are parties to the Covenant on the basis of article 2 of the same Covenant.

These objections do not constitute an obstacle to the entry into force of the Covenant between Italy and the United States. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mt_dsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX J

[Comments of the Netherlands in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States. (Sept. 28, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX K

[Comments of Norway in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

1. In the view of the Government of Norway, the reservation (2) concerning capital punishment for crimes committed by persons below eighteen years of age is according to the text and history of the Covenant, incompatible with the object and purpose of article 6 of the Covenant. According to article 4 (2), no derogations from article 6 may be made, not even in times of public emergency. For these reasons the Government of Norway objects to this reservation.

2. In the view of the Government of Norway, the reservation (3) concerning article 7 of the Covenant is according to the text and interpretation of this article incompatible with the object and purpose of the Covenant. According to article 4 (2), article 7 is a non-derogable provision, even in times of public emergency. For these reasons, the Government of Norway objects to this reservation.

The Government of Norway does not consider this objection to constitute an obstacle to the entry into force of the Covenant between Norway and the United States of America. (Oct. 4, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX L

[Comments of Portugal in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

The Government of Portugal considers that the reservation made by the United States of America referring to article 6, paragraph 5 of the Covenant which prohibits capital punishment for crimes committed by persons below eighteen years of age is incompatible with article 6 which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of Portugal also considers that the reservation with regard to article 7 in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law.

The Government of Portugal therefore objects to the reservations made by the United States of America. These objections shall not constitute an obstacle to the entry into force of the Covenant between Portugal and the United States of America. (Oct. 5, 1993). Available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&msgid=IV4&chapter=4&lang=en#Participants>.

APPENDIX M

[Comments of Spain in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

After careful consideration of the reservations made by the United States of America, Spain wishes to point out that pursuant to article 4, paragraph 2, of the Covenant, a State Party may not derogate from several basic articles, among them articles 6 and 7, including in time of public emergency which threatens the life of the nation.

The Government of Spain takes the view that reservation (2) of the United States having regard to capital punishment for crimes committed by individuals under 18 years of age, in addition to reservation (3) having regard to article 7, constitute general derogations from articles 6 and 7, whereas, according to article 4, paragraph 2, of the Covenant, such derogations are not to be permitted.

Therefore, and bearing in mind that articles 6 and 7 protect two of the most fundamental rights embodied in the Covenant, the Government of Spain considers that these reservations are incompatible with the object and purpose of the Covenant and, consequently, objects to them.

This position does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America. (Oct. 5, 1993). Available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&msgid=IV-4&chapter=4&lang=en#Participants>.

APPENDIX N

[Comments of Sweden in response to the reservations, understandings and declarations of the United States in regard to the CCPR]

In this context the Government recalls that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

SWEDEN THEREFORE OBJECTS TO THE RESERVATIONS MADE
BY THE UNITED STATES TO:

- article 2; cf. Understanding (1);
- article 4; cf. Understanding (1);
- article 6; cf. Reservation (2);
- article 7; cf. Reservation (3);
- article 15; cf. Reservation (4);
- article 24; cf. Understanding (1).

This objection does not constitute an obstacle to the entry into force of the Covenant between Sweden and the United States of America. (June 18, 1993). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV4&chapter=4&lang=en#P participants.

APPENDIX O

[Comments of Finland in response to the reservations, understandings and declarations of the United States in regard to the CAT]

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

The Government of Finland therefore objects to the reservation made by the United States to article 16 of the Convention [(cf. Reservation I.(1)]. In this connection the Government of Finland would also like to refer to its objection to the reservation entered by the United States with regard to article 7 of the International Covenant on Civil and Political Rights. (Feb. 27, 1996). Available at:http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX P

[Comments of Germany in response to the reservations, understandings and declarations of the United States in regard to the CAT]

[W]ith respect to the reservations under I (1) and understandings under II (2) and (3) made by the United States of America upon ratification “it is the understanding of the Government of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as State Party to the Convention.” (Feb. 26, 1996). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX Q

[Comments of the Netherlands in response to the reservations, understandings and declarations of the United States in regard to the CAT]

The Government of the Netherlands considers the reservation made by the United States of America regarding the article 16 of [the Convention] to be incompatible with the object and purpose of the Convention, to which the obligation laid down in article 16 is essential. Moreover, it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United States of America.

The Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention:

II. 1 a This understanding appears to restrict the scope of the definition of torture under article 1 of the Convention.

1 d This understanding diminishes the continuous responsibility of public officials for behaviour of their subordinates.

The Government of the Kingdom of the Netherlands reserves its position with regard to the understandings II. 1b, 1c and 2 as the contents thereof are insufficiently clear. (Feb. 26, 1996). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mt_dsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX R

[Comments of Sweden in response to the reservations, understandings and declarations of the United States in regard to the CAT]

The Government of Sweden would like to refer to its objections to the reservations entered by the United States of America with regard to article 7 of the International Covenant on Civil and Political Rights. The same reasons for objection apply to the now entered reservation with regard to article 16 reservation I (1) of [the Convention]. The Government of Sweden therefore objects to that reservation.

It is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfill the obligations undertaken therein. (Feb. 27, 1996). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

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