



October 29, 2014

President Barack Obama
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear President Obama:

We write to urge you to affirm that US obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention against Torture”) apply to all official US conduct, including conduct outside the territorial United States.

In November, the United States will appear before the United Nations Committee against Torture in Geneva as part of the Committee’s regular review of the US government’s record under the convention. By directing the US delegation before the Committee to acknowledge the extraterritorial reach of US obligations under the Convention against Torture, you would be making a valuable contribution toward affirming and strengthening the global ban on torture and other ill-treatment. Such a decision would also widen the break you made from the US government’s policies and practices on interrogation and detention during the last administration, which resulted in numerous egregious human rights violations.

Within days of taking office in 2009, you took important steps to reverse the previous administration’s harmful record and legacy on torture, including by issuing an executive order reinforcing the ban on torture. However, to ensure that such practices are not adopted by future administrations, it is critical that the United States also abandon the distorted interpretations of international law through which the George W. Bush administration sought to justify torture and ill-treatment and transfers to similar abuse.ⁱ

Conversely, were the United States to assert the same position as the previous administration on extraterritoriality, it would signal to the American public and the rest of the world that the United States is not fully willing to dispense with the unlawful practices of the past. Such a position will make it harder for key US allies, many of whom recognize extraterritorial application of the Convention against Torture, to cooperate with the US on international security matters. It will also raise questions as to whether the US government is seeking to preserve legal arguments for use in protecting US complicity in, or use of, torture and abuse abroad.

Thus, we are concerned by recent media reports indicating that your administration is debating whether to embrace mistaken Bush administration positions, including one put forward by former Attorney General Alberto Gonzales concerning the US reservation to Article 16 of the Convention.ⁱⁱ This reservation defines “cruel, inhuman or degrading treatment” under the treaty to mean ill-treatment prohibited by the Fifth, Eighth or Fourteenth Amendments to the US Constitution.ⁱⁱⁱ

Alberto Gonzales asserted this position during his Senate confirmation hearing for Attorney General to argue that the Convention did not apply to US officials interrogating or detaining non-citizens abroad. Gonzales argued that because US courts have held that these amendments do not protect “aliens” outside the US, the treaty was inapplicable to US overseas conduct toward non-citizens.^{iv}

Abraham Sofaer, the US State Department legal adviser under President Ronald Reagan as well as under President George H.W. Bush when the Convention against Torture was presented to the US Senate for ratification in 1990, has rejected Gonzales’s position as “untenable” as have many other commentators, including your administration’s former State Department Legal Advisor, Harold Koh.^v The reservation was intended to apply to the substantive “meaning” of the words, not the geographic scope, Sofaer wrote in a letter to Senator Patrick Leahy on January 21, 2005, objecting to the prior administration’s reading of the reservation.^{vi} “Restricting enforcement of Art. 16 to US territory,” he also wrote in an op-ed at the time, “would fundamentally undermine the treaty’s purpose of preventing ‘cruel, inhuman or degrading’ treatment by any State in any place it has ‘jurisdiction.’”^{vii}

Additionally, several US responses to the Committee’s questions submitted as part of its 5th Periodic Report also suggest that the United States is attempting to preserve similar arguments in relation to a number of other articles of the treaty.^{viii} For example, instead of responding directly to the Committee’s questions on extraterritorial reach, the US report opens in the introduction with a statement that the US “does not address the geographic scope of the Convention as a legal matter,” but instead responds to questions from the Committee on the issue in “factual terms.”^{ix} It then invokes this position when answering several specific questions from the Committee about extraterritorial obligations, providing answers only as a “factual” matter, as a matter of “policy,” or by reiterating other legal obligations.^x

A position that denies the extraterritorial applicability of the Convention against Torture has no solid basis in international law. Authoritative interpretations of the Convention clarify that—even with regard to treaty articles that reference geographic scope, obligations under the treaty apply when a state has “effective control” or “de facto” control over a state or a certain situation.^{xi} As the Committee stated in its General Comment No. 2, “The reference to ‘any territory’ in Article 2, like that in articles 5, 11, 12, 13, and 16, refers to prohibited acts not only committed on board a ship or aircraft registered by a State party but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities or other areas over which a state exercises factual or effective control.”^{xii}

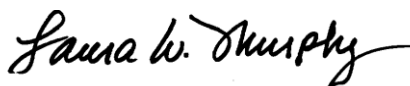
Similarly, when negotiating Article 3’s prohibition on transferring a person to another state where there are substantial grounds for believing that they would be in danger of torture, treaty negotiators made clear that they wanted to ensure that the ban “afford[ed] the greatest possible protection against

torture,” and that it would reach all types of government transfers of persons.^{xiii} The Committee has since made clear that the obligation exists when transferring detainees from one state’s *de facto* or *de jure* control to another state’s control, even if the transfer occurs solely within the territory of a single state, such as those that have taken place between the United States or the United Kingdom and Iraq or Afghanistan.^{xiv}

During the US review by the Committee, the US should make clear that it rejects the prior administration’s interpretation of its reservation to Article 16, the inapplicability of the Convention against Torture outside the US more broadly, and renounce any legal positions, opinions or interpretations of the Convention issued by the Justice Department between September 11, 2001 and January 20, 2009 that were used to justify torture and ill-treatment of non-citizens overseas. US affirmation of the extraterritorial obligations of the Convention against Torture would reflect changes to US law and policy that you ordered or supported. The United States is already subject to essentially similar obligations under multiple other instruments, including: Executive Order 13491, which requires US personnel to treat all persons in US custody or “effective control” humanely; the Detainee Treatment Act of 2005, which prohibits US personnel from subjecting any individual in their “physical control” — “regardless of location” — to acts of cruel, inhuman, or degrading treatment; Common Article 3 to the four Geneva Conventions of 1949, which prohibits “mutilation, cruel treatment and torture; ... outrages upon personal dignity, in particular humiliating and degrading treatment” during armed conflict; and the US Anti-Torture Act, which establishes criminal jurisdiction over all acts of torture committed outside the United States.^{xv} Customary and conventional law already prohibited torture and cruel, inhuman and degrading treatment before the Convention against Torture even came into force -- the Convention primarily strengthens and makes existing prohibitions clearer and more effective.^{xvi}

Accordingly, we urge your administration to seize the opportunity it has in Geneva to unequivocally reject previous interpretations that are contrary to international law, and endorse the extraterritorial application of the Convention against Torture as a matter of legal obligation, not only policy. Doing so will help to strengthen the global prohibition against torture and ill-treatment and break with the abusive and illegal practices of the past.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office
ACLU



Maria McFarland, Co-Director
US Program
Human Rights Watch

¹ See for example Memorandum from Steven G. Bradbury, principal deputy assistant attorney general, to John A. Rizzo, senior deputy general counsel, CIA, regarding “Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al

Qaeda Detainees,” May 30 2005, http://ccrjustice.org/files/05-30-2005_bradbury_40pg_OLC%20torture%20memos.pdf (accessed Oct. 29, 2014) (arguing that because article 16 of the Convention does not apply to US conduct outside of US territory, a whole range of abuses against detainees are permissible; withdrawn April 15, 2009); see also “U.S.: Justifying Abuse of Detainees,” Human Rights Watch, January 25, 2005, <http://www.hrw.org/news/2005/01/24/us-justifying-abuse-detainees> (accessed Oct. 29, 2004).

ⁱⁱ Charlie Savage, “Obama Could Reaffirm a Bush-Era Reading of a Treaty on Torture,” *New York Times*, Oct. 18, 2014, http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0 (accessed October 26, 2014).

ⁱⁱⁱ “U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” 136 Cong. Rec. S17486-01 (Oct. 27, 1990).

^{iv} See Confirmation Hearing on the Nomination of Alberto R. Gonzales, Senate Judiciary Committee, Serial No. J-109-1 (January 6, 2005) (testimony and response to the written questions of Senator Dianne Feinstein), p. 249.

^v Abraham D. Sofaer, “No Exceptions,” *Wall Street Journal*, November 26, 2005 at A11, <http://online.wsj.com/articles/SB113296749780207080> (accessed October 28, 2014). See also “Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict,” January 21, 2013, former State Department Legal Advisor Harold Koh, (hereinafter “Koh Memo”), <http://www.nytimes.com/interactive/2014/03/07/world/state-department-koh.html> (accessed October 29, 2014), pp. 43-52.

^{vi} Letter of Abraham D. Sofaer to Hon. Patrick J. Leahy, Jan. 21, 2005, available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/sofaer-leahy-cat-art16-093005.pdf> (accessed Oct. 29, 2014).

^{vii} Abraham D. Sofaer, “No Exceptions,” *Wall Street Journal*, November 26, 2005 at A11, <http://online.wsj.com/articles/SB113296749780207080> (accessed October 28, 2014).

^{viii} United States Department of State, Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports), August 12, 2013, available at <http://www.state.gov/documents/organization/213267.pdf>. (accessed Oct. 29, 2014).

^{ix} See *ibid*, para. 6.

^x *Ibid*, paras. 15, 66, 119, 127, 258; see also Beth Van Schaack, “Time to Give the Sleeves From Our Vest and Acknowledge the Extraterritoriality of the Convention Against Torture,” *Just Security*, October 20, 2014, <http://justsecurity.org/16560/convention-torture/> (accessed Oct. 26, 2014).

^{xi} See UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf (accessed Oct. 29, 2014), para. 16; see also generally Koh Memo.

^{xii} UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf (accessed Oct. 29, 2014), para. 16.

^{xiii} United Nations, Econ. & Soc. Council, Comm’n on Human Rights, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 44, U.N. Doc. E/CN.4/L.1470 (Mar. 12, 1979), reprinted in Rep. of the Comm’n on Human Rights, 35th Sess., Feb. 12 - Mar. 16, U.N. Doc. E/CN.411347, at 35, 40 (1979); J. Hermann Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention* 125 (1988).

^{xiv} See Concluding Observations http://www.univie.ac.at/bimtor/dateien/topic6_cat_2004_concob_uk.pdf CAT/C/CR/33/3, para. 4(b), 5(e); see also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008), p. 199, para. 181.

^{xv} Executive Order 13491 §3(a); Detainee Treatment Act, 42 U.S.C. §2000dd(a); 18 U.S. Code § 2340A – Torture; Geneva Conventions. See also Koh memo, pp 50-52.

^{xvi} Convention against Torture, Preamble.