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# EXTRATERRITORIAL VIOLATIONS OF HUMAN RIGHTS BY THE UNITED STATES

Gerald L. Neuman\*

## INTRODUCTION

Affluent nations' perception of a refugee crisis has led them to explore various methods for preventing refugees from entering their refugee processing systems from the outset.<sup>1</sup> These strategies often include shifting the scene of encounters with refugees to the high seas or to the territory of poorer neighbors, thereby raising the question of the extent to which a state can liberate itself from legal obligations by transferring its operations outside its borders.<sup>2</sup> This Article explores one version of that question: international human rights constraints on the return of refugees stopped outside the territory of the returning nation. Because the U.S. Supreme Court has held that the primary nonrefoulement obligation contained in the 1951 Convention Relating to the Status of Refugees<sup>3</sup> does not apply extraterritorially, this Article will concentrate on nonrefoulement obligations that arise from sources other than the Refu-

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\* Professor of Law, Columbia University School of Law. I owe thanks to Lori Fisler Damrosch, Edith Friedler, Claudio Grossman, and above all to Louis Henkin. I should disclose that I have advised counsel for Haitian refugees, and have written amicus briefs in support of thple aintiffs in the Haitian Centers Council litigation.

1. David A. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 CORNELL INT'L L.J. 753, 754 (1993); Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503 (1993).

2. Under the United States Constitution, the answer appears to be yes, sometimes. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that U.S. agents' search of a nonresident alien's home in Mexico was not governed by the Fourth Amendment); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 971-76 (1991) (analyzing *Verdugo-Urquidez*).

3. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

gee Convention, in particular, the Convention Against Torture<sup>4</sup> and the International Covenant on Civil and Political Rights.<sup>5</sup>

### I. NONREFOULEMENT AS A RIGHT, REMEDY, AND RULE OF STATE RESPONSIBILITY

The French verb "refouler," and the noun "refoulement," are used in international law to describe the unacceptable return of an individual to a country where she faces serious mistreatment. They are commonly associated with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol,<sup>6</sup> which contain the particular prohibition of refoulement to a place where an individual faces persecution on one of the five Refugee Convention grounds.<sup>7</sup> The two terms may also be used, however, in connection with other norms prohibiting return due to other forms of anticipated mistreatment.<sup>8</sup> This Article will use the term "refoulement" in its generic sense, as well as in the technical senses that particular legal contexts refine for it.

It will be useful to begin by considering three different ways of thinking about obligations not to engage in refoulement: as independent human rights, as remedies for violations of human rights, and as rules of state responsibility for violations of human rights. One may conceive of the right of nonrefoulement under the Refugee Convention as a distinct legal right not derived from any other legal right or set of rights. To say that a refugee fears persecution in her country of nationality does not require a determination that the country of nationality is violating a human right guaranteed by customary international law or by a

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention].

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

6. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating the substantive provisions of the Convention, but making them applicable to a broader class of refugees). The United States is a party to the Protocol, not to the original Convention. *Id.*

7. See Refugee Convention, *supra* note 3, art. 33 at 176 (providing that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

8. Torture Convention, *supra* note 4, art. 3.

treaty to which that country is a party. Indeed, the Refugee Convention came so early in the development of binding international human rights law after the Second World War,<sup>9</sup> that few refugees would have been protected if that had been a criterion. As an independent legal right, the scope of the right of nonrefoulement may vary with the particular instrument (or customary rule) under which it arises, as may the relationship that must exist between an individual and a state before the individual can assert the right against that state.

Alternatively, we may think of nonrefoulement as a remedial rule, supplementing the individual's self-help remedy of flight to escape severe human rights violations in her own country. The inability of refugees to obtain protection of their rights from their own country provides a traditional justification for assigning a duty of protection to another country.<sup>10</sup> The obligation of a specific state to afford that protection may derive from a particular instrument like the Refugee Convention, or from more general rules concerning the scope of a state's obligation to protect human rights. This approach construes nonrefoulement as an affirmative act by the state for the individual's benefit.

Finally, we may think of nonrefoulement as a rule concerning state responsibility for violations of human rights. States must refrain from refoulement in order to avoid complicity in serious human rights violations committed by others. A state that knowingly (or with awareness of sufficient risk) compels an individual to return to a country where her rights will be violated is not merely neglecting to protect her, but helps cause the violation. This approach emphasizes the active character of refoulement. The state's obligation to refrain from refoulement may derive from a particular instrument like the Refugee Convention, or from more general rules regarding a state's responsibility for the consequences of its actions.

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9. Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 6-11 (Louis Henkin ed., 1981).

10. See JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 124 (1991) (explaining that "refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming"). The remedial approach also informs the recent "state-centered" model under which cross-border refugee flows are avoided by intervening to rectify abuses or creating in-state protection zones. See T. Alexander Aleinikoff, *State-centered Refugee Law: From Resettlement to Containment*, 14 *MICH. J. INT'L L.* 120 (1992) (describing and evaluating this development); Martin, *supra* note 1 (same).

These three aspects of nonrefoulement obligations are not mutually exclusive, and do not exhaust the conceivable alternatives. They afford, however, varied insights into an individual's claim on a state that threatens refoulement. As examples will illustrate, the adoption of one approach to the exclusion of the others may lead to different conclusions regarding the scope of a state's duty of nonrefoulement.

## II. HIGH SEAS INTERDICTION OF REFUGEES AND *SALE V. HAITIAN CENTERS COUNCIL, INC.*<sup>11</sup>

The U.S. Supreme Court's recent decision in *Sale v. Haitian Centers Council, Inc.* highlights the problem of extraterritorial violations of refugees' rights. In *Sale*, the Court upheld the Bush-Clinton policy of intercepting boats off the coast of Haiti and returning their occupants to Haiti without providing an opportunity for those occupants to demonstrate their refugee status, despite a challenge based on the statutory prohibition of refoulement in section 243(h) of the Immigration and Nationality Act.<sup>12</sup> The majority rested its decision on the conclusion that neither the statutory prohibition nor the prohibition of refoulement in the Refugee Convention applied outside the borders of the United States.

### A. THE LIMITS OF *SALE*<sup>13</sup>

The *Sale* decision overturned a Second Circuit ruling that found the plain language of section 243(h) to preclude any geographical limitation. The Supreme Court's contrary interpretation resulted in part from its reading of the legislative history of section 243(h)<sup>14</sup> and in part from invocation of a presumption against extraterritoriality in statutes.<sup>15</sup> Legislative history provides some support for this interpretation; although the Refugee Act of 1980, which gave section 243(h) its current significance, was generally intended to conform United States statutory law to the requirements of the Refugee Convention, the consequence most visibly contemplated was the extension of the refoulement prohibition to exclusion proceedings.<sup>16</sup>

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11. 113 S. Ct. 2549 (1993).

12. 8 U.S.C. § 1253(h) (1993).

13. The purpose of the article is not to analyze the *Sale* decision, but to sketch it fully enough to provide a background for discussion of issues it left unaddressed.

14. *Sale*, 113 S. Ct. at 2560-61.

15. *Id.* at 2560, 2567.

16. *See id.* at 2561, n.33 (citing House and Senate Reports). Exclusion is the

The reliance on a presumption against the extraterritorial application of statutes, however, was more dubious. The Immigration and Nationality Act affords a peculiar occasion for invoking this presumption—its very purpose is to regulate cross-border movement of aliens, and it governs the activities of an agency with both domestic and overseas offices.<sup>17</sup> In fact, the majority proved glaringly inconsistent in its treatment of the presumption against extraterritoriality, drawing upon it to limit the scope of the refoulement prohibition of section 243(h), but never bringing it to bear on section 212(f) of the same Act,<sup>18</sup> the supposed statutory basis for the president's establishment of the extraterritorial interdiction program.<sup>19</sup> This broad reading of a provision which granted the executive branch power over immigration was hardly unusual. Several weeks after the Court's decision, a unanimous Ninth Circuit panel upheld the authority of the Immigration and Naturalization Service (INS) to conduct law enforcement activities on the high seas on the basis of the extraterritorial nature of the immigration laws, without mentioning either the *Sale* decision or the presumption against extraterritoriality.<sup>20</sup>

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process for denying aliens entry into the United States, as opposed to deportation, which is the process for expelling aliens who have already entered.

17. *Id.* at 2576-77 (Blackmun, J., dissenting); see 8 C.F.R. § 100.4 (1993) (listing INS offices in Athens, Bangkok, Calgary, Frankfurt, Freeport, Guadalajara, Hamilton, Hong Kong, Manila, Mexico City, Monterrey, Montevideo, Montreal, Naples, Nassau, Ottawa, Palermo, Rome, Seoul, Singapore, Toronto, Vancouver, Victoria, Vienna, and Winnipeg).

18. 8 U.S.C. § 1182(f) (1993).

19. *Sale*, 113 S. Ct. at 2559, 2567. Finding authority for high seas interdiction in § 212(f) was, as Justice Blackmun mildly put it, "somewhat of a stretch." *Id.* at 2573 n.9 (Blackmun, J., dissenting). It is obvious from the structure of the statute that the purpose of § 212(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem appropriate," is to empower the President to make temporary additions (absolute or conditional) to the list of statutory grounds of exclusion from the United States contained in § 212. With the single exception of Haitian interdiction, that is the only purpose for which § 212(f) has ever been used. *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 244 (1981) (stating that § 212(f) has not been used since its enactment until 1981); Proclamation No. 6636, 58 Fed. Reg. 65,525 (1993); Proclamation No. 6574, 58 Fed. Reg. 34,209 (1993); Proclamation No. 6569, 58 Fed. Reg. 31,897 (1993); Proclamation No. 5887, 53 Fed. Reg. 43,185 (1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (1988); Proclamation No. 5517, 51 Fed. Reg. 30,470 (1986); Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985).

20. *United States v. Chen*, 2 F.3d 330, 333-34 (9th Cir. 1993), cert. denied, 114 S.Ct. 1558 (1994); see also *United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir.

Although the Supreme Court stated in *Sale* that the "presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility,"<sup>21</sup> it seemed really to be saying that grants of power to the president are presumptively extraterritorial, while limitations on his power are presumptively not. Nothing in the Supreme Court's recent case law emphasizing a presumption against extraterritoriality has justified a distinction between statutes granting the government power and statutes limiting government power. Indeed, the current vogue for the presumption originated in *EEOC v. Arabian American Oil Co.*,<sup>22</sup> which rejected the Equal Employment Opportunity Commission's efforts to apply federal anti-discrimination laws to a U.S. corporation's treatment of its U.S. employees abroad.<sup>23</sup>

The Court also checked its interpretation of section 243(h) against the prohibition of refoulement in the Refugee Convention. Upon examination of the negotiating history of the 1951 Convention, the Court claimed that it found affirmative evidence that Article 33 was not intended to apply extraterritorially.<sup>24</sup> The *travaux préparatoires* contain a discussion, of ambiguous significance,<sup>25</sup> which actually relates to a different issue, whether the prohibition of refoulement includes a prohibition of rejection at the frontier (i.e., an obligation to *admit* refugees). The Court somehow found a territorially limited meaning inherent in the French verb "refouler,"<sup>26</sup> and bolstered this interpretation with citations to early commentators on the Refugee Convention.<sup>27</sup> The Court added: "A more

1989), (upholding extraterritoriality of criminal immigration statutes) *cert. denied*, 498 U.S. 1046 (1991).

21. *Sale*, 113 S. Ct. at 2567.

22. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

23. This is not to say that one cannot divine an unexplained preference for unfettered executive power behind a body of case law that refuses extraterritorial application to statutes creating private causes of action, judicial jurisdiction over civil cases, and limitations on executive power, and permits extraterritorial application of criminal statutes and statutes granting executive power.

24. *Sale*, 113 S. Ct. at 2565-67.

25. *See id.* at 2567 (noting that "the significance of the President's comment that the remarks should be 'placed on record' is not entirely clear"); *id.* at 2571-72 (Blackmun, J., dissenting) (arguing that the record merely documented views of individual delegates).

26. *Id.* at 2563-64.

27. *Id.* at 2564 n.40 (citing N. ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENT AND INTERPRETATION 162-63 (1953), and A. GRAHL-MADSEN, THE STATUS OF REFUGEE IN INTERNATIONAL LAW 94 (1972)).

recent work describes the evolution of non-refoulement into the international (and possibly extraterritorial) duty of non-return relied upon by respondents, but it also admits that in 1951 non-refoulement had a narrower meaning and did not encompass extraterritorial obligations."<sup>28</sup>

### B. BEYOND *SALE*

While the Supreme Court upheld the interdiction program in *Sale*, it did not provide an unqualified endorsement. Justice Stevens, who wrote the majority opinion, included some passages that other Justices might have omitted. He conceded the "moral weight" of the argument "that the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders."<sup>29</sup> He observed:

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.<sup>30</sup>

He concluded the opinion by quoting Judge Harry Edwards' comment on an earlier phase of the Haitian interdiction controversy: "Although the human crisis is compelling, there is no solution to be found in a judicial remedy."<sup>31</sup>

Thus, the Court's argument in *Sale* appears to be technical and positivistic, rather than a justification of the interdiction program. The Court focused on nonrefoulement as a particular prohibition embodied in the 1951 Refugee Convention. It concluded that the drafters of the Convention had neglected to prohibit schemes like high seas interdiction. As a result, a court could not find interdiction to be a violation of the United States' obligations under the Protocol. If one accepts this inter-

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28. *Sale*, 113 S. Ct. at 2564 n.40 (citing G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74-76 (1983)).

29. *Sale*, 113 S. Ct. at 2563.

30. *Id.* at 2565.

31. *Id.* at 2567 (quoting *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring)).



pretation of the Convention,<sup>32</sup> then a gap appears in international refugee law that may need to be filled from sources outside the Convention.

Actually, the Court's decision does not necessitate the existence of a gap; it only determines that the Convention and federal statutes implementing the Convention do not cover high seas interdiction. The 1951 Refugee Convention and its 1967 Protocol are not the only international law sources of nonrefoulement obligations. The decision leaves open the compatibility of interdiction with other sources of law, including customary international law<sup>33</sup> and other treaties to which the United States may be a party. This article discusses two examples of other human rights treaties that impose nonrefoulement obligations: the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights.<sup>34</sup>

### III. NONREFOULEMENT AND THE TORTURE CONVENTION

The Torture Convention establishes mechanisms designed "to make more effective the struggle against torture and cruel, inhuman or degrading treatment or punishment throughout the world."<sup>35</sup> It includes, *inter alia*, requirements that states prevent their agents from inflicting torture,

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32. *But see* U.N. High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993) (stating that "the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. . . . UNHCR considers the Court's decision a setback to modern international refugee law. . . .").

33. The plaintiffs in *Sale*, who were challenging an Executive Order that dispensed with the requirement of inquiries into refugee status before repatriation to Haiti, did not ask the Court to find that the President was acting in violation of customary international law, presumably because they expected that the Court would find that the Executive Order was a "controlling executive act" precluding judicial enforcement of customary law within the meaning of *The Paquete Habana*, 175 U.S. 677 (1900). *See* Restatement (Third) of the Foreign Relations Law of the United States § 115, Reporters' Note 3 (1987) (stating that various Supreme Court statements suggest that courts will not compel the President to comply with international law); Agora, *May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (debating the extent of the President's power under this doctrine).

34. This article will not discuss the implications of the Inter-American human rights system for U.S. nonrefoulement obligations. For an introduction to that system, see Thomas Buergerthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439 (Theodor Meron ed., 1985).

35. Torture Convention, *supra* note 4, pmbl.

educate them in their obligations, investigate incidents of torture, compensate victims of torture, and prosecute perpetrators of torture.<sup>35</sup>

The Torture Convention includes an explicit prohibition of the return of aliens to countries where they face torture. Article 3(1) provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.”<sup>37</sup> This prohibition shares some common ground with, but is independent of, the refoulement prohibition of the Refugee Convention. Not every refugee is fleeing from the prospect of torture, and not every person threatened with torture is a “refugee” within the meaning of the 1967 Protocol.

In fact, the Torture Convention specifically defines “torture,” and its operative meaning includes an element of official action not normally present in the definition of torture. Article 1 defines the term, for purposes of the Convention only,<sup>38</sup> as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not

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36. See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 2-3 (1988) (summarizing the substantive provisions of the Torture Convention).

37. Torture Convention, *supra* note 4, art. 3. Of course, this protection is not limited to aliens, but for reasons of context I will emphasize this aspect of the prohibition.

Although the Torture Convention includes provisions requiring protection against other forms of “cruel, inhuman or degrading treatment or punishment,” these do not include a nonrefoulement obligation relative to such treatment or punishment. *Id.* art. 16(1). The Convention does not, however, purport to contradict nonrefoulement obligations arising under other sources of law. *Id.* art. 16(2); see BURGERS & DANIELIUS, *supra* note 36, at 149-50 (noting that the protection of other international instruments on the issue of extradition will not be affected by the Convention).

38. See Torture Convention, *supra* note 4, art. 1(2) (clarifying that the definition of “torture” is not intended to prejudice the use of other definitions in other contexts). The linkage between torture and government action in the Torture Convention further narrows the definition. See BURGERS & DANIELIUS, *supra* note 36, at 119-20 (explaining that this choice was made because the mechanisms of the Convention were considered unnecessary for the suppression of private torture).

include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.<sup>39</sup>

Most importantly, the definition is not limited to torture inflicted on grounds of race, religion, nationality, membership in a particular social group, or political opinion. Accordingly, an alien's rights under the Torture Convention do not depend on whether the alien is also a refugee, or on a characterization of the torture as a form of "persecution."

Thus, the Torture Convention does not invite the kind of hair-splitting over the torturer's motive that the Supreme Court's decision in *I.N.S. v. Elias-Zacarias*<sup>40</sup> has encouraged in the implementation of the United States refugee laws, and that the Board of Immigration Appeals (BIA) has practiced in a series of recent cases involving Sikhs from India.<sup>41</sup> When the United States becomes a party to the Torture Convention, Article 3 will forbid the BIA to tell an alien, "Sure you're going to be tortured, but you're not going to be tortured on grounds of political opinion, so we'll send you back."<sup>42</sup>

As of this writing, the United States has not yet ratified the Torture Convention. The Senate gave its consent to ratification in October 1990, but it postponed ratification until the passage of the criminal legislation needed to implement the Convention.<sup>43</sup> Congress finally enacted the

39. Torture Convention, *supra* note 4, art. 1(1); *see infra* note 47 and accompanying text (noting that the U.S. modification of this definition). The exception for "lawful sanctions" is somewhat confusing. BURGERS & DANIELIUS, *supra* note 37, at 121-22. The United States, in the reservations, understandings, and declarations that the Senate attached to its consent to the Convention, takes the position that this sentence does not provide a loophole through which a State Party could eviscerate the Convention. *See* 136 CONG. REC. S17,491 (daily ed. Oct. 27, 1990) (Understanding No. 1(c)) (asserting that a State Party could not defeat the object and purpose of the Convention through its domestic sanctions).

40. 112 S. Ct. 812, 816 (1992) (upholding a BIA decision that a guerilla's threat to kill represented an effort to coerce enlistment rather than punishment for political opposition).

41. Matter of R-, Int. Dec. No. 3195 (BIA Dec. 15, 1992), *remanded sub nom.* Rana v. Moshorak, No. CV 93-0274-SVW (C.D. Cal. July 15, 1993); Matter of K- S-, Int. Dec. No. 3209 (BIA Oct. 5, 1993); Charnjit Singh v. Ilchert, No. C-93-2086-MHP, 1993 U.S. Dist. Lexis 16992 (N.D. Cal. Nov. 15, 1993); Harpinder Singh v. Ilchert, 1993 U.S. Dist. Lexis 16975 (N.D. Cal. Nov. 15, 1993).

42. Actually, one does not have to wait for ratification of the Torture Convention for this prohibition to take effect; such conduct is already a violation of Article 7 of the International Covenant on Civil and Political Rights. *See infra* text accompanying notes 68-69.

43. *See* David P. Stewart, *The Torture Convention and the Reception of Interna-*

implementing legislation in April 1994,<sup>44</sup> but President Clinton has not yet deposited the instrument of ratification.<sup>45</sup> Ratification is presumably only a matter of time.

The Senate's consent to ratification included a series of reservations, understandings and declarations, most of which the administration proposed, that modify or clarify U.S. obligations under the Torture Convention.<sup>46</sup> For example, the understandings specify more fully the definition of torture.<sup>47</sup> More significantly for our purposes, one understanding<sup>48</sup> equates the "substantial grounds for believing" standard of article 3 with the "more likely than not" standard derived from the Supreme Court's decision in *INS v. Stevic*.<sup>49</sup> This elevation of the burden of proof represents the United States' only effort to limit its nonrefoulement obligations under the Torture Convention.

Final ratification of the Convention will therefore require broadening the practice of avoiding deportation in cases involving probable torture. This requirement, however, may not be judicially enforceable as such. No legislation implementing nonrefoulement is contemplated, and the Senate has declared that substantive provisions of the Torture Convention are non-self-executing.<sup>50</sup> Nonetheless, the United States will be

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*tional Criminal Law within the United States*, 15 NOVA L. REV. 449, 450 & n.4 (1991) (explaining that ratification of the Torture Convention requires implementing legislation) [hereinafter Stewart, *Torture Convention*].

44. See Pub. L. No. 103-236, § 506, 108 Stat. 463 (adding 18 U.S.C. §§ 2340-2340B).

45. *Id.*

46. See 136 CONG. REC. S17,486-87 (daily ed. Oct. 27, 1990) (statement of Sen. Pell) (noting that the Senate received the Torture Convention with conditions attached by the Reagan and Bush Administrations). I will not enter here into the question of whether these are all valid reservations, or whether some of them are invalid due to their incompatibility with the object and purpose of the Convention.

47. 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (Understandings Nos. 1(a)-(e)); Stewart, *supra* note 43, at 455-56 (explaining the purpose of the Understandings).

48. 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990) (Understanding No. 2); see *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. 18 (1990) (testimony of Mark Richard, Deputy Assistant Attorney General for the Criminal Division) [hereinafter Richard Testimony] (explaining the administration's rationale for modifying the burden of proof); Stewart, *Torture Convention*, *supra* note 43, at 457-58 (same).

49. 467 U.S. 407, 429-30 (1984) (holding that an alien must show that persecution is more likely than not in order to be protected from refoulement under § 243(h) of the Immigration and Nationality Act).

50. See Stewart, *Torture Convention*, *supra* note 43, at 467-68 (discussing the

obligated to comply with Article 3, and responsibility for compliance in the immigration context will fall to the Attorney General and her delegates.<sup>51</sup> The Attorney General has a variety of discretionary tools available that she can use to avoid sending aliens back to a country where torture is likely, including parole,<sup>52</sup> prosecutorial discretion, deferred enforced departure,<sup>53</sup> and (in some cases) suspension of deportation.<sup>54</sup> Different subordinates within the Justice Department, however, possess delegated authority to wield these various tools.<sup>55</sup> Once the United States ratifies the Torture Convention, it would be advisable for the Attorney General to issue regulations clarifying how existing discretion will be used to comply with Article 3.

Whether the nonrefoulement obligation of the Torture Convention has a broader territorial scope than that attributed to the Refugee Convention by the Supreme Court presents a difficult question. The Torture Convention was opened for signature in December 1984.<sup>56</sup> The Supreme Court

decision to declare the Convention non-self-executing). I assume *arguendo* that the declaration can suffice to make the treaty non-self-executing. *But see* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 527 (1991) (arguing that the Senate cannot defeat the self-executing character of a treaty provision without adequate reason); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 631-32 (1991) (denying any binding character of the declaration that the Torture Convention is not self-executing).

51. *See* Richard Testimony, *supra* note 48, at 15 (explaining that "Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. Under existing law, the competent authorities for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation").

52. Parole enables the Attorney General to permit an alien who has not yet "entered" the country in legal terms to enter the country physically. 8 U.S.C. § 1182(d)(5)(A) (Supp. V 1993).

53. *See* T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 610-14, 844 (2d ed. 1991) (characterizing prosecutorial discretion and deferred enforced departure as administrative tools for postponing, possibly forever, the removal of an alien who has already legally entered).

54. *See* 8 U.S.C. § 1254(a)(1) (1988) (permitting the suspension of deportation as a procedure for granting permanent residence status to aliens who have been in the country for more than seven years and who would face "extreme hardship" if deported).

55. *See* 8 C.F.R. § 212.5(a) (1993) (authorizing INS district directors to grant parole); 8 C.F.R. §§ 244.1, 3.1(b)(2) (1993) (authorizing immigration judges and the Board of Immigration Appeals to suspend deportation).

56. Torture Convention, *supra* note 4, at 197.

has recognized that the concept of refoulement may have come to embrace extraterritorial action by that date.<sup>57</sup> As one commentary on the Torture Convention explains, Article 3 "is intended to cover all measures by which a person is physically transferred to another State."<sup>58</sup> Because a *jus cogens* norm of customary international law binding on all states already prohibits state-condoned torture,<sup>59</sup> law-abiding states have particularly strong reason to avoid complicity in other states' torture practices. On the other hand, the language of Article 3 of the Torture Convention says only "expel, return ('refouler') or extradite," offering a parallel to the wording "expel or return ('refouler')" in Article 33 of the Refugee Convention.<sup>60</sup> Some commentators have suggested that the drafters of the Torture Convention used the term "refouler" in order to avoid resolving disagreements over the scope of the obligation.<sup>61</sup>

Uncertainty about the scope of the nonrefoulement obligation under the Torture Convention may yet be clarified by international institutions. Article 17 of the Torture Convention creates a Committee Against Torture, to which State Parties are obliged to report periodically.<sup>62</sup> The Committee also has nonmandatory competence to consider complaints of

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57. See *Sale*, 113 S. Ct. at 2564-65, n.40 (citing G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74-76 (1983)) (addressing the evolution of non-refoulement into an extraterritorial obligation).

58. BURGERS & DANELIUS, *supra* note 36, at 126.

59. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 and cmt. n (1987) (identifying torture as a violation of a *jus cogens* norm and explaining the consequences); BURGERS & DANELIUS, *supra* note 36, at 1 (stating that the Torture Convention "is based upon the recognition that the above-mentioned practices are already outlawed under international law").

60. See BURGERS & DANELIUS, *supra* note 36, at 126 (describing Article 33 of the Refugee Convention as a source of inspiration). Unlike Article 33 of the Refugee Convention, however, Article 3 of the Torture Convention has no exception clause making reference to an alien's posing "danger to the security of the country in which he is," a factor that the *Sale* majority considered relevant to determining the territorial scope of the refoulement prohibition under that Convention. *Sale*, 113 S. Ct. at 2563. *But see Sale*, 113 S. Ct. at 2570 (Blackmun, J., dissenting) (discounting this argument).

61. Kay Hailbronner & Albrecht Randelzhofer, *Zur Zeichnung der UN-Folterkonvention durch die Bundesrepublik Deutschland*, 1986 *EUROPÄISCHE GRUNDRICHTE-ZEITSCHRIFT* 641, 643 (1986). These authors were, however, discussing the question of rejection at the frontier, not the question of return of refugees captured on the high seas.

62. Torture Convention, *supra* note 4, art. 19; see BURGERS & DANELIUS, *supra* note 36, at 156-59 (describing the responsibilities of State Parties to the Committee under Article 19).

Convention violations filed by other State Parties or by individual victims, and to investigate on its own motion indications that torture is being systematically practiced in the territory of a State Party.<sup>63</sup> Although the United States plans to accept the competence of the Committee to receive complaints from other State Parties (which are unlikely)<sup>64</sup> and to investigate reports of systematic torture, it does not intend to accept the competence of the Committee to receive complaints from individual victims.<sup>65</sup> Thus, guidance from the Committee Against Torture regarding the territorial scope of the nonrefoulement obligation under Article 3 is more likely to arise in the course of the reporting procedure or in connection with complaints brought against other signatories rather than in connection with a specific complaint against the United States.

#### IV. NONREFOULEMENT AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The United States became a party to the International Covenant on Civil and Political Rights in 1992. The Covenant is a binding international agreement, designed to ensure the observance of traditional civil and political rights like life, liberty, physical integrity, privacy, equality before the law, and freedom of thought, conscience and expression, as

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63. Torture Convention, *supra* note 4, arts. 20, 21, 22, 28. See BURGERS & DANIELIUS, *supra* note 36, at 159-67 (elaborating on the authority given to the Committee Against Torture under Articles 20, 21, 22, and 28).

64. See Committee on International Human Rights, *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 42 REC. ASS'N BAR CITY N.Y. 235, 248-49 (1987) (noting that State Parties are reluctant to file complaints under other human rights treaties).

65. See 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990) (Declaration No. 2) (recognizing the competence of the Committee Against Torture under Article 21 for complaints made by a State Party, but not by individual victims); Stewart, *Torture Convention*, *supra* note 43, at 469-70 (explaining that the United States will not recognize the competence of the Committee to receive individual complaints). The acceptance of the Article 20 procedure for investigation on the Committee's own motion will follow from the absence of a declaration under Article 28 of the Torture Convention. See *id.* at 469 & n.47 (explaining the effect of Articles 20 and 28). The United States will also decline to be bound by the Article 30(1) dispute resolution procedures of the Convention, involving compulsory arbitration and jurisdiction of the International Court of Justice over disputes between State Parties. 136 CONG. REC. S17,491 (daily ed. Oct. 27, 1990) (Reservation No. 2); see Stewart, *Torture Convention*, *supra* note 43, at 470 (stating that the United States reserves its right not to follow dispute resolution procedures).

well as the right of citizens to political participation.<sup>66</sup> Understanding the implications of the Covenant for refoulement practices requires a lengthier series of steps.

The Covenant contains no right of asylum or prohibition of refoulement in express terms. Rather, specific nonrefoulement obligations arise in connection with specific human rights that would be violated by the return of an alien to a country where those rights would be violated. Such obligations have been recognized particularly in connection with the right to life (article 6)<sup>67</sup> and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7).<sup>68</sup> Thus a paradox emerging from the nonrefoulement system of the Torture Convention—that an alien may be protected against return to the hands of a torturer, but not against return to the hands of an assassin—is obviated under the Covenant.

#### A. THE EXTRATERRITORIALITY OF OBLIGATIONS UNDER THE COVENANT

The basic obligation imposed on parties to the Covenant is expressed in article 2(1) as follows:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>69</sup>

The question thus arises how one should interpret the dual phrasing “all individuals within its territory and subject to its jurisdiction.” Are these separate and cumulative requirements, meaning that a state undertakes no obligations to respect human rights of individuals who are outside its territory?<sup>70</sup> Are they alternatives equivalent to “all individuals within its territory and all individuals otherwise subject to its ju-

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66. Henkin, *supra* note 9, at 16-21.

67. See Covenant, *supra* note 5, art. 6 (providing that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

68. See *id.* art. 7 (providing that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”).

69. *Id.* art. 2(1) (emphasis added).

70. See Egon Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AM. J. INT’L L. 827, 863 (1968) (adopting this interpretation without much analysis).



isdiction"?<sup>71</sup> Does the language express some other combination of these two jurisdictional bases?

The drafting history of the Covenant suggests that the dual phrasing arose as a result of the dual obligation earlier in the sentence "to respect and to ensure" the enumerated rights.<sup>72</sup> The obligation to "ensure" rights under the Covenant means more than just an obligation not to violate those rights, but rather entails an obligation to protect those rights from violations by third parties.<sup>73</sup> The drafters added the phrase "within its territory" to avoid assigning to states the task of affirmatively protecting persons (e.g., their own nationals) who might be subject to their jurisdiction but who were in the territory of another state.<sup>74</sup> That purpose is consistent with obliging states themselves not to violate the rights of persons subject to their jurisdiction but outside their territory.<sup>75</sup>

This extraterritorial reading of obligations under the Covenant became well-established in the case law of the Human Rights Committee long before the U.S. accession to the Covenant.<sup>76</sup> Two sets of cases, all involving Uruguay, illustrate this interpretation. The first consists of "passport cases," where the state refuses to renew the passports of perceived political opponents who are outside its territory in order to impair the opponents' ability to return to their own country or to travel freely abroad.<sup>77</sup> The Human Rights Committee observed that the rights to

71. See Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 73-75 (Louis Henkin ed., 1981) (proposing that the phrase be read disjunctively).

72. *Id.* at 74; MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 41-42 (1993).

73. NOWAK, *supra* note 72, at 36-38.

74. Buergenthal, *supra* note 71, at 74, 411 n.9; NOWAK, *supra* note 72, at 41.

75. NOWAK, *supra* note 72, at 41-43; DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 181-82 (1991).

76. See A.H. Robertson, *The Implementation System: International Measures*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 332, 337 (Louis Henkin ed., 1981) (explaining that the Covenant creates the Human Rights Committee as the principal international organ to oversee its implementation). The Committee's General Comments and decisions in individual cases have become a major source for interpretation of the Covenant. See generally MCGOLDRICK, *supra* note 75 (expounding covenant on basis of committee's comments and decisions); NOWAK, *supra* note 72 (same).

77. *Vidal Martins v. Uruguay* (No. 57/1979) (1982), reprinted in *Human Rights*

leave any country and to enter one's own country, protected under Article 12 of the Covenant, could be vitiated if they imposed no extraterritorial obligations.<sup>78</sup>

More directly relevant were a pair of cases, decided in 1981, involving extraterritorial abductions by Uruguayan security forces of Uruguayan citizens in neighboring countries.<sup>79</sup> The Human Rights Committee stated:

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5(1) of the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>80</sup>

Professor Tomuschat appended individual concurring opinions in both cases, questioning the applicability of Article 5, but agreeing that a cor-

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Committee, 1 Selected Decisions under the Optional Protocol 122 (1985) [hereinafter Selected Decisions]; *Lichtensztein v. Uruguay* (No. 77/1980) (1983), reprinted in 2 Selected Decisions 102 (1990); *Pereira Montero v. Uruguay* (No. 106/1981) (1983) reprinted in 2 Selected Decisions 136; *Varela Núñez v. Uruguay*, (No. 103/1981) (1983) reprinted in 2 Selected Decisions 143.

78. *Id.*

79. See *López Burgos v. Uruguay* (No. 52/1979) (1981) reprinted in 1 Selected Decisions 88, 91 (finding extraterritorial violations of Articles 7 (including torture) and 9(1) (arbitrary arrest and detention), as well as violations in Uruguay of Articles 7, 9(1), 9(3) (trial without unreasonable delay), 14(3)(d) (right to chosen counsel at trial), 14(3)(g) (right against compelled self-incrimination), and 22(1) (right to trade union activities)); *Celiberti de Casariego v. Uruguay* (No. 56/1979) (1981) reprinted in 1 Selected Decisions 92, 94 (finding an extraterritorial violation of article 9(1), as well as violations in Uruguay of Articles 10(1) (conditions of detention), 14(3)(b) (right to chosen counsel before trial) and 14(3)(c) (trial without undue delay)).

80. *López Burgos*, *supra* note 79, at 91.

rect interpretation of Article 2 includes a nation's responsibility for some activity occurring outside the national boundaries.<sup>81</sup>

Concededly, these cases involve an abduction of the state's own citizens in foreign territory before they are brought within the state's own borders and not an abduction of aliens on the high seas preliminary to forced repatriation. The general principle, however, that a State Party may not evade its obligation to respect human rights by carrying out its activities outside its boundaries applies equally to both situations. A state that "interdicts" vessels on the high seas is exercising jurisdiction over their occupants, and when it deprives refugees of their freedom to sail on, and forcibly returns them to their country of origin, it is actively subjecting them to the authority of their oppressors.

#### B. *SOERING* IN STRASBOURG

To understand the nonrefoulement consequences of the Covenant, it would be useful to turn briefly to the European human rights system. From the U.S. perspective, the European Court of Human Rights delivered one of its most striking decisions in *Soering v. United Kingdom*.<sup>82</sup>

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81. *Id.* at 92. Professor Tomuschat's analysis of Article 2 is too long for the text, but short enough for the margin:

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of State parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign discretion cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant states parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant.

It is unclear how much significance Tomuschat attributed to the fact that the victims were the state's own citizens.

82. 161 Eur. Ct. H.R. 1 (ser. A) (1989).

The court prevented the United Kingdom's extradition of a capital defendant to the United States because the extradition would expose him to a risk of inhuman or degrading treatment in the United States.<sup>83</sup> The case has sparked a great deal of comment<sup>84</sup> and has importance for this article both in its general propositions on human rights and in its influence on U.S. reservations to the Covenant.<sup>85</sup>

Jens Soering was an eighteen year old West German student attending the University of Virginia when he and his girlfriend killed her parents in March 1985.<sup>86</sup> The pair then fled to England, where they were arrested on other charges.<sup>87</sup> Subsequently, the United States requested extradition for trial back in Virginia.<sup>88</sup> The European Court of Human Rights viewed the proposed extradition as a violation of Article 3 of the European Human Rights Convention, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>89</sup> It concluded that the death penalty itself did not necessarily constitute inhuman or degrading treatment or punishment within the meaning of the Convention.<sup>90</sup> Nonetheless, it believed that after a capital sentence in Virginia, U.S. procedures would likely subject Soering to the "death row phenomenon,"<sup>91</sup> which it described as confinement in a strict custodial regime for many years under "the anguish and mounting tension of living in the ever-present shadow of death."<sup>92</sup> In view of

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83. *Id.* at 44-45. Ultimately, the UK extradited Soering after the United States gave assurances that it would not impose the death penalty; he was convicted of both murders and sentenced to two terms of life imprisonment. *Va. Court Upholds Murder Convictions*, WASH. POST, Mar. 17, 1992, at D7.

84. *See, e.g.*, Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991); Michael P. Shea, Note, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases after Soering*, 17 YALE J. INT'L L. 85 (1992); Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990); Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990).

85. *Infra* note 121 and accompanying text.

86. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 11-12.

87. *Id.* at 11.

88. *Id.* at 12.

89. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224.

90. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 39-41.

91. *Id.* at 41.

92. *Id.* at 42.

Soering's age and disturbed mental state,<sup>93</sup> and the practical alternative of extraditing him for trial in Germany (where there is no death penalty)<sup>94</sup> the Court concluded that extradition to the United States would amount to inhuman and degrading treatment.<sup>95</sup>

The United States, of course, is not a party to the European Human Rights Convention, and the Court emphasized that it was not adjudicating U.S. conduct.<sup>96</sup> Rather, it stated, "in so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing state by reason of its having taken action which has as direct consequence the exposure of an individual to proscribed ill-treatment."<sup>97</sup> The Court explained:

It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom, and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intention of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.<sup>98</sup>

This principle of the state's responsibility for the foreseeable consequences of handing over an individual to a country where he fears mistreatment was not an innovation in European human rights jurisprudence. For decades, the European Commission of Human Rights had treated article 3 as prohibiting extradition or deportation to a country where an alien faces serious human rights violations.<sup>99</sup> Since *Soering*, the Europe-

93. *Id.* at 43.

94. *Id.* at 44. German criminal law extends to murders committed by German nationals outside Germany. *Id.*

95. *Id.* at 44-45.

96. *Id.* at 32-36.

97. *Id.* at 36. The Court did not accept the sweeping principle that an individual can never be sent to a country without confidence that the conditions awaiting him fully accord with every provision of the Convention. *Id.* at 33-34. The Court emphasized that it was the fundamental nature of the absolute and nonderogable prohibition in Article 3 that barred the extradition. *Id.* at 34-35.

98. *Id.* at 35.

99. *Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R.

an Court of Human Rights has also confirmed that the same reasoning applies to the foreseeable consequences of a deportation.<sup>100</sup>

### C. NONREFOULEMENT AND THE HUMAN RIGHTS COMMITTEE

The principle that refoulement of refugees to a country where they face inhuman or degrading treatment—or worse—violates a state's obligation not to subject individuals to such treatment also figures in the Human Rights Committee's interpretation of the Covenant. The Committee stated its position clearly in 1992 in its General Comment No. 20 on the prohibition of torture:

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.<sup>101</sup>

The Human Rights Committee recently analyzed the interaction of Articles 6 and 7 with the extradition process in *Kindler v. Canada*,<sup>102</sup> a

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Dec. & Rep. 158 (1984); *Altun v. Federal Republic of Germany*, App. No. 10308/83, 36 Eur. Comm'n H.R. Dec. & Rep. 209, 231-32 (1983); *X. v. Federal Republic of Germany*, App. No. 1802/62, 1963 Y.B. Eur. Conv. on H.R. 462, 480 (Eur. Comm'n on H.R.).

100. See *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at 28 (1991) (Plenary Court) (finding, by an eighteen-to-one vote, no violation on the facts); *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) at 34 (1991) (finding, by an eight-to-one vote, no violation on the facts).

101. General Comment No. 20, ¶ 9 (April 3, 1992) (Prohibition of torture), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 29, U.N. Doc. HRI/GEN/1 (1992). The General Comment on the position of aliens may express a similar interpretation, but it does so less clearly. See General comment No. 15 ¶ 5 (1986), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 29, U.N. Doc. HRI/GEN/1 (1992). "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise." See also *Ines Torres v. Finland*, No. 291/1988 (Hum. Rts. Comm. 1990), reprinted in *Report of the Hum. Rts. Comm.*, 45th Sess., at 96, U.N. Doc. A/45/40, Vol. II (1990) (rejecting, on the facts, the claim that extradition to Spain violated Article 7 due to the likelihood of torture).

102. Comm. No. 470/1991, *Report of the Human Rights Committee*, 48th Sess., at 138, U.N. Doc. A/48/40, Vol. II (1993).

rough parallel to *Soering*. Joseph Kindler, a U.S. citizen, had escaped from prison and fled to Canada after his conviction for capital murder and kidnapping in Pennsylvania.<sup>103</sup> The Canadian Minister of Justice decided to extradite Kindler to the United States without seeking assurances that the U.S. would not impose the death penalty.<sup>104</sup> The Supreme Court of Canada upheld this decision as consistent with the Canadian Charter of Rights and Freedoms.<sup>105</sup> Kindler then challenged the extradition before the Human Rights Committee, alleging, *inter alia*, that the death penalty would violate his right to life, that it was cruel and inhuman, and that conditions awaiting him on death row were cruel, inhuman and degrading.<sup>106</sup> The majority of the Committee found no violation on the merits,<sup>107</sup> but viewed Canada's obligations as depending on the treatment Kindler would receive as a result of his extradition to the United States.<sup>108</sup>

In its analysis of the admissibility of the communication, the Committee majority observed:

Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's right that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place.<sup>109</sup>

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103. *Kindler*, Comm. No. 470/1991, ¶¶ 1, 2.1.

104. *Id.* ¶ 2.3.

105. *Kindler v. Canada*, 2 S.C.R. 779 (S.Ct. Canada 1991).

106. *Id.*

107. *Id.* ¶ 18.

108. *Id.* ¶ 15.3.

109. *Id.* ¶ 6.2.

Thus, the Human Rights Committee agreed with the court's analysis in *Soering* that the prohibition of torture and lesser forms of inhuman and degrading treatment entailed an obligation not to return an alien to a country where a sufficient risk of such treatment existed.<sup>110</sup> In reaching the merits, however, the Committee majority distinguished *Soering* with regard to particular factors that had led to the court's conclusion that the "death row phenomenon" would amount to inhuman or degrading treatment of the individual.<sup>111</sup> The Committee also reiterated its own prior decision that prolonged detention on death row, pending post-conviction remedies, would not ordinarily constitute cruel, inhuman or degrading treatment within the meaning of the Covenant.<sup>112</sup>

The Committee also examined the merits of Kindler's contention that extradition violated his right to life.<sup>113</sup> It emphasized that the proceeding concerned:

[N]ot whether Mr. Kindler's rights have been or are likely to be violated by the United States which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States Canada exposed him to a real risk of a violation of his right under the Covenant.<sup>114</sup>

The majority concluded that the continued existence of the death penalty in the United States, within the limits tolerated by Article 6(2) of the

110. The level of probability contemplated by the Committee as engaging the state's responsibility is not clear; some portions of the text quoted above suggest foreseeability as the standard, whereas other portions suggest certainty or purpose. While analyzing Kindler's situation, the majority looked for a "real risk of a violation" of Article 6. *Id.* ¶ 14.3. Additionally, a separate opinion offered a standard requiring a showing of "reasonable cause to believe that such violations would probably occur." *Id.* app. A ¶ 4 (Mr. Kurt Herndl and Mr. Waleed Sadi, dissenting from finding of admissibility).

111. *Id.* ¶ 15.3 (citing as relevant factors for consideration age, mental state, conditions in state prison, and absence of another state to which the government could extradite the defendant).

112. *Id.* ¶ 15.2 (citing *Martin v. Jamaica*, Comm. No. 317/1988 (Hum. Rts. Comm. 1993)); *Reid v. Jamaica*, U.N. GAOR, Hum. Rts. Comm. No. 250/1987, 45th Sess., Supp. No. 40, at 85, ¶ 11.6, U.N. Doc. A/45/40 (1990); *Pratt & Morgan v. Jamaica*, U.N. GAOR, Hum. Rts. Comm. No. 210/1986, 44th Sess., at 222, ¶ 13.6, U.N. Doc. A/44/40 (1989).

113. *Kindler*, Comm. No. 470/1991, ¶ 13.1.

114. *Id.* The reference to the Optional Protocol concerns the procedure by which individuals who believe that a state party has violated rights under the Covenant may bring their cases before the Human Rights Committee. See NOWAK, *supra* note 72, at 647-49. The United States unlike Canada, has not consented to the committee's receipt of such communications.



Covenant, would not give rise to a violation of Kindler's rights against Canada under Article 6(1) of the Covenant.<sup>115</sup>

Although some of the Committee's analysis of the Article 6 issue was written, like the *Soering* case and like its General Comment No. 20, in terms of the state's obligation not to *expose* an individual to a violation of his rights, other portions stressed Canada's express obligation under Article 6(1) to *protect* the right to life. The second sentence of Article 6(1) provides that the right to life "shall be protected by law."<sup>116</sup> Moreover, the majority explicitly stated:

The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.<sup>117</sup>

These passages reflect a different way of looking at the state's nonrefoulement obligation. The emphasis on exposure to violations of rights treats refoulement as an affirmative state action, engaging the state's responsibility for the resulting violation, and recalling the state's obligation under Article 2 to *respect* (i.e., not violate or participate in violation of) human rights. The emphasis on protection against violations treats refoulement as a failure of state action, falling short of the state's obligation under Article 2 to *ensure* human rights. Nothing in the

115. *Kindler*, Comm. No. 470/1991, ¶¶ 14.3-14.4. Article 6(1) of the Covenant guarantees the right to life, requires its protection, and prohibits arbitrary deprivation of life. Covenant, *supra* note 5, art. 6(1). Article 6(2) of the Covenant provides limits for those states that retain the death penalty. *Id.* art. 6(2). The death penalty may only be imposed for the most serious crimes according to the law effective at the time of the crime. *Id.* Furthermore, the death penalty may only be imposed after a final decision by a competent court. *Id.*

Accordingly, the majority held, "[i]f Mr. Kindler had been exposed through extradition from Canada, to a real risk of a violation of Article 6, Paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6(1)." *Kindler*, Comm. No. 470/1991, ¶ 14.3. Several members of the Committee argued in dissent that Canada, as a state that *had* abolished the death penalty, could not claim the benefit of article 6(2), and was obliged under article 6(1) not to extradite Kindler without seeking assurances that the United States would not impose the death penalty, regardless of whether the United States remained within the limits of article 6(2). *Id.* app. B (Mr. Bertil Wennergren, dissenting); *id.* app. C, ¶ 3.3 (Mr. Rajsoomer Lallah, dissenting); *id.* app. D (Mr. Fausto Pocar, dissenting); *id.* app. E (Ms. Christine Chanet, dissenting); *id.* app. F (Mr. Francisco Jose Aguilar Urbina, dissenting).

116. Covenant, *supra* note 5, art. 6(1).

117. *Kindler*, Comm. No. 470/1991, ¶ 13.1 (emphasis added).

Kindler case required the Human Rights Committee to choose between these interpretations. The variation between the two phrasings suggests that its members may not have focused on the distinction.

As parallel ways of thinking about refoulement, these alternative interpretations supplement each other. The Kindler case then doubly reinforces the conclusion that deporting an alien to a country where he faces extrajudicial killing would violate Article 6 of the Covenant and that deporting an alien to a country where he faces torture, or cruel, inhuman or degrading treatment or punishment would violate Article 7 of the Covenant. In either case, there would be no need to show persecution on one of the five Refugee Convention grounds.

It is conceivable, however, that these interpretations are not alternatives, but rather that the interpretation emphasizing the protection of human rights excludes an emphasis on avoiding exposure to violations as a consequence of the obligation to respect human rights. If this were taken to be the correct interpretation of the Covenant and if the obligations to respect and to ensure human rights have different territorial application, then it might be concluded that the obligations of nonrefoulement under Articles 6 and 7 apply only within a state's territory, and not to all persons otherwise within the state's jurisdiction.

#### D. U.S. ADHERENCE AND RESERVATIONS TO THE COVENANT

The United States has already adhered to the International Covenant on Civil and Political Rights. President Carter originally sent the Covenant to the Senate for its advice and consent in 1978.<sup>118</sup> President Bush renewed the request for Senate action in August 1991,<sup>119</sup> and the Senate gave its consent on April 2, 1992.<sup>120</sup> The United States deposited its instrument of ratification on June 8, 1992, and the Covenant has been in force for the United States since September 8, 1992.<sup>121</sup>

The scope of U.S. obligations under the Covenant, however, must be understood in light of the series of reservations, understandings and declarations with which the United States qualified its ratification.<sup>122</sup>

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118. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, SEN. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 2 (1992) [hereinafter SEN. EXEC. REP.].

119. *Id.*

120. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

121. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 60 nn.12-13 (1993).

122. 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992); David P. Stewart, *U.S.*

While there are doubts about the validity of some of these reservations, understandings and declarations, or about their binding character,<sup>123</sup> this article assumes *arguendo* that they successfully modify the United States' obligations, and examines how the modifications affect the territorial and extraterritorial nonrefoulement obligations under the Covenant.

The second reservation addresses U.S. obligations regarding the right to life.<sup>124</sup> According to the reservation, the United States reserves the right to impose the death penalty on any person convicted in accordance with the law, including minors, but excluding pregnant women.<sup>125</sup> This reservation shields capital punishment policy in the United States from Article 6 of the Covenant, including its prohibition on executing persons who committed crimes as juveniles<sup>126</sup> and its limitation of the death penalty to "the most serious crimes."<sup>127</sup> The reservation, however, relates solely to lawful capital punishment in the United States. There is no reservation, understanding, or declaration limiting U.S. obligation to protect individuals against murder within the United States<sup>128</sup> or its responsibility not to hand refugees over to a foreign country where they face extrajudicial murder.<sup>129</sup>

There is no reservation, understanding or declaration limiting U.S. obligations with regard to torture under Article 7.<sup>130</sup> The third reservation addresses the prohibition against "cruel, inhuman or degrading treatment or punishment" under article 7 as follows:

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*Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77 (1993) [hereinafter Stewart, *US Ratification*].

123. Quigley, *supra* note 121, at 5 nn.32-41; Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1331-32 (1993).

124. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (Reservation No. 2).

125. *Id.*

126. Covenant, *supra* note 5, art. 6(5); SEN. EXEC. REP., *supra* note 133, at 11; see *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding the death penalty for crimes committed by persons at age 17).

127. Covenant, *supra* note 5, art. 6(2); SEN. EXEC. REP., *supra* note 118, at 11.

128. 138 CONG. REC. S4783 (daily ed. April 2, 1992).

129. *Id.* In fact, the reservations may not even exclude a U.S. obligation not to extradite individuals to countries where they face the death penalty for a capital crime committed while under eighteen years of age. *Id.*

130. See *id.* (listing the Reservations to the adoption of the Covenant).

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.<sup>131</sup>

This reservation was motivated by international decisions like *Soering*, holding that the "death row phenomenon" was or could be cruel, inhuman or degrading. The legislative history makes clear that the Bush Administration's attention to the interpretations of the Human Rights Committee and the European Court of Human Rights, and its desire to leave room for capital punishment, corporal punishment, and solitary confinement.<sup>132</sup>

The reservation to Article 7 appears ambiguous. Does it mean that the United States considers itself bound only to respect and ensure the right of individuals not to be subjected to cruel and unusual treatment or punishment when that treatment would violate the listed amendments to the Constitution? Or does it mean that the United States considers itself bound only to respect and ensure the right of individuals not to be subjected to treatment or punishment that, if carried out by official action in the United States, would amount to the cruel and unusual treatment or punishment prohibited by the listed amendments? Unlike the provisions of the Torture Convention, Article 7 of the Covenant, in conjunction with the undertakings clause of Article 2, requires the state to protect individuals against mistreatment by non-state actors.<sup>133</sup> The United States has not attempted to limit its obligation under article 7 to

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131. *Id.* (Reservation No. 3).

132. See SEN. EXEC. REP., *supra* note 118, at 12 (providing the administration's "Explanation of Proposed Reservations, Understandings and Declarations"); Stewart, *US Ratification*, *supra* note 122 (explaining Reservation No. 3). The Senate adopted a similar reservation to the Torture Convention, which has, in addition to its provisions regarding torture, provisions regarding cruel, inhuman or degrading treatment or punishment. See 136 CONG. REC. S17,491 (daily ed. Oct. 27, 1990) (listing Reservation No. 1 to the Torture Convention). The Torture Convention does not, however, prohibit refoulement to a country where an individual faces the danger of cruel, inhuman or degrading treatment or punishment that does not rise to the level of torture.

133. See Human Rights Committee, General Comment No. 20, ¶ 2 (April 3, 1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 29, U.N. Doc. HRI/GEN/I (1992) ("Finally, it is the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority."); Human Rights Committee, General Comment No. 7, ¶ 2 (July 27, 1982).

protect individuals against private torture, nor has it generally used reservations, understandings or declarations to limit its obligations to state action under other articles of the Covenant. Thus, it would appear that the reservation is intended, as its language indicates, to identify "cruel, inhuman or degrading treatment or punishment" with the *kinds* of treatment or punishment forbidden to the federal and state governments by the Fifth, Eighth, and Fourteenth amendments, without otherwise limiting the scope of U.S. obligations under Article 7.

If this interpretation of the reservation is correct, then the reservations, understandings and declarations do not address the nonrefoulement obligations of the United States under Articles 6 and 7 of the Covenant. Even if this interpretation is incorrect, nothing in the reservations, understandings and declarations limits the nonrefoulement obligation under those articles in cases of extrajudicial murder or torture. It is interesting that despite the Bush Administration's attention to the *Soering* case in preserving the prerogative of the United States to subject prisoners to the "death row phenomenon" at home, no attention was paid to the nonrefoulement implications of Articles 6 and 7.<sup>134</sup> This would seem to be equally true of territorial and extraterritorial nonrefoulement obligations. The Human Rights Committee's confirmation of the extraterritorial applicability of the Covenant long antedated the proceedings leading to the ratification of the Covenant under the Bush Administration. None of the reservations, understandings, or declarations purports to limit the territorial scope of the United States' obligations.

The consequences for administrative action are similar to the consequences of the Torture Convention, except that the Covenant is already in force for the United States. The Senate has declared the Covenant to be non-self-executing, meaning to exclude the judicial enforcement of the Covenant as such.<sup>135</sup> The effect of this declaration has been disputed,<sup>136</sup> but in any case it does not affect the Attorney General's authori-

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134. See *International Covenant on Civil and Political Rights: Hearing before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 8-19 (1992) (setting forth Administration testimony, which failed to mention refoulement issues). Moreover, in view of this silence, it is difficult to see how the United States could justify applying the "more likely than not" standard of *Stevic* to its nonrefoulement obligations under the Covenant.

135. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992) (Declaration No. 1); see Stewart, *supra* note 122, at 79 (explaining that the declaration clearly states that domestic implementation of the Covenant will lie solely with Congress and the Executive Branch).

136. Quigley, *supra* note 121, at 63; Jordan J. Paust, *Avoiding "Fraudulent" Exec-*

ty and responsibility to use existing discretionary powers to safeguard the United States from violating the Covenant. The nonrefoulement obligations of the Covenant go beyond those that the United States will have under the Torture Convention, to include cases where aliens face extrajudicial murder. They probably also include cases where aliens face forms of cruel, inhuman, or degrading treatment or punishment that do not rise to the level of torture. Since the Covenant has been in force for the United States since September 1992, the Attorney General should hasten to instruct her subordinates in a preferred means for compliance with these obligations.

### CONCLUSION

If the United States is going to reach out beyond its borders to subject aliens to its jurisdiction, whether through high seas interdiction or by other methods, their human rights against the United States should also extend beyond those borders to limit that exercise of power. The U.S. Supreme Court in *Sale* permitted executive powers read into the Immigration and Nationality Act to extend beyond U.S. borders without accompanying rights; but it did so on highly positivistic grounds, while recognizing the morally questionable character of the conduct it upheld.

Both the Covenant on Civil and Political Rights and the Convention against Torture contain nonrefoulement obligations that will bind the United States as a matter of positive law. The Covenant may provide the best hope among the positive law bases for restoring the proper relation between jurisdiction and rights.

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*utive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993); Hurst Hannum, *Concluding Observations*, 42 DEPAUL L. REV. 1405 (1993).