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Obama Administration's Position on the UN Torture Convention: New? Yes. Significant? Not so much

by [Gabor Rona](#)

November 18, 2014

Could it be that American international law experts and human rights advocates are suffering from some form of Stockholm Syndrome — so many defeats and dashed hopes at the hands of our government that we sometimes take excessive comfort in small and imaginary crumbs that it drops for us? For an example of this, look no further than the United States' [appearance last week](#) before the UN's Committee against Torture in Geneva – the body established by the Convention against Torture (CAT) to monitor State compliance with the Convention.

The background is pretty simple. The U.S. is a party to the UN Convention against Torture. The Convention not only prohibits torture, but consistent with its narrow and specific definition of that term, also prohibits cruel, inhuman and degrading treatment (CIDT) that falls short of torture. It also prohibits a State Party from transferring anyone to another State where the person faces a risk of torture, a practice known as refoulement.

For a long time, and repeatedly during the post-9/11 Bush administration, the U.S. took the view that the treaty's CIDT and non-refoulement provisions do not apply to its conduct abroad. The remarkable view that the treaty prohibits such conduct at home but not when a State Party acts outside of its own borders is unsupported by the treaty text, is rejected by virtually unanimous international jurisprudence, and has long been a stain in the fabric of American claims to be the “indispensable nation” for the projection of international human rights abroad.

In its appearance before the Committee against Torture last week, the U.S. said it was turning a page away from the Bush administration's rejection of extraterritorial

application of the CIDT prohibition. But what the U.S. actually said indicates that little, if anything, has changed. Indeed, the American delegation said that rather than rejecting the treaty's extraterritorial application, it will now accept that the treaty applies "in places outside the United States that the U.S. government controls as a governmental authority."

Why is there less here than meets the eye?

Let's start with the language of the treaty, which provides that a party must "undertake to prevent [CIDT] in any territory under its jurisdiction." The weight of international jurisprudence understands this to mean wherever a state exercises "effective control." That's not quite everywhere that the state may act – an interpretation that would make complete sense given the object and purpose of the treaty to end torture and CIDT by all state parties everywhere – but it's much broader than the new U.S. formulation.

In fact, one could credibly claim that the U.S.'s phrase, "places a government controls as governmental authority" is hardly different than saying one's own territory, except for situations of military occupation in which torture/CIDT are prohibited by distinct provisions of the law of armed conflict.

The U.S. interpretation could, in other words, leave CIDT in CIA operated secret prisons abroad outside the prohibitions of the treaty, depending on how narrowly one construes these terms. ('Yes, we did torture some folks in that secret prison we ran in Poland, but it's not a place our government controls as governmental authority.') The fact that the U.S. statement in Geneva explicitly included Guantanamo but made no mention of even the acknowledged U.S. detention operations in Afghanistan strongly suggests this is a real concern. And given the demonstrated reluctance of the Obama Administration to comply with its obligation to prevent impunity and hold accountable those responsible for Bush-era torture, one might infer why the administration chose to draw the line it did last week in Geneva.

In rejecting the majority "effective control" view, the U.S. gives life to the claim that the treaty does not prohibit a party from engaging in CIDT abroad. This is no biggie concerning U.S. conduct going forward, since U.S. law that came too late to cover CIA

black sites already prohibits CIDT by Americans anywhere in the world. But the message we send to other countries that have no such laws is simply out of sync with the object and purpose of the treaty – to create a universal prohibition against torture and CIDT. What’s more, U.S. laws, especially executive orders, can change.

Some legal experts have opined that CIDT is already categorically prohibited under international law, regardless of CAT’s Article. 16. For example, my colleague, Sarah Cleveland’s [incisive analysis](#) says this:

[T]he purpose of the CAT was not to prohibit acts of torture and CIDT. Instead, the purpose of the CAT was to “make more effective” those prohibitions, which were already universal, by creating express obligations on States to prevent, prosecute, and remedy violations, as the Preamble makes clear.

This is absolutely correct. But it’s just as clear that the U.S. doesn’t buy it. If it did, it would have simply said that CAT obligations apply to all U.S. government conduct as a matter of international law, whether at home or abroad; or at least where the U.S. exercises “effective control” rather than merely where it exercises governmental control.

Former State Department Legal Advisor during the Bush administration, John Bellinger, also weighed in. He [says](#) that the Geneva Conventions already prohibit CIDT anywhere, therefore, there’s no legal gap. What John neglects, though, is that **the Geneva Conventions apply in wartime only and that a great deal of CIDT can occur outside the context of war.**

That’s why Bush lawyers thought it necessary to [malevolently conclude](#) that the Convention’s CIDT prohibition does not operate extraterritorially: if the Geneva Conventions prohibited all CIDT anyway, there would have been no “gain” in denying the extraterritoriality of the CAT prohibition. To be fair, John asserts that it is the combination of the Detainee Treatment Act and the Geneva Conventions that create a seamless web of humane treatment obligations. But the sad fact is that not every country has a Detainee Treatment Act.

There's no doubt that the U.S. statement represents a departure from the prevailing views of the Bush administration on the application of international law. But it's a tiny, and perhaps even meaningless departure when measured against the true scope of the treaty's CIDT prohibition: wherever a party exercises "effective control."

Finally, let me add some further context. There are three more huge problems with U.S. interpretation of its CAT obligations.

First, the U.S. [doesn't construe](#) torture to be torture unless it's "specifically intended to inflict severe physical or mental pain or suffering." For example, if the torturer's intent is to inflict pain just short of torture, but in fact, he crosses the line, that might not be considered by the U.S. to be torture.

Second, the U.S. has still failed to acknowledge that its non-refoulement obligation also applies extraterritorially.

Third, even where the U.S. does acknowledge territorial application of its non-refoulement obligation, it considers itself free to transfer a person to another country unless torture is "more likely than not." In other words, if it's only 50% likely that someone will be tortured if we transfer him to Egypt, then we can transfer him there.

The treaty, by contrast has a much lower threshold triggering the non-refoulement obligation: "substantial grounds for believing that he would be in danger of being subjected to torture."

Sarah Cleveland [says](#) that the Obama Administration's Geneva pronouncements are "significant and welcome modifications of Bush administration positions." Welcome, for sure. But such celebration by international lawyers and human rights advocates may be a bit premature given how little the U.S.'s recent concession actually means in practice, and the work that remains to bring the U.S. into the mainstream of international legal thinking on prohibitions of torture and CIDT.

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