On the Duty of the Legislatures of the United States to Complete the Nation's Compliance with the Convention against Torture

A Memorandum, and a Record of Notice, Issued by the IAJ on Behalf of the People of the United States

Addressed to the members of the Congress of the United States and of the legislatures of the several States

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I. Purpose and Standing of This Memorandum

This memorandum serves two purposes at once, and is written so that each is fully discharged. First, it states, with supporting authority and on behalf of the people of the United States, the constitutional and international duties that rest upon the Nation's legislatures in the matter of torture, and it constitutes formal notice that those duties remain unfulfilled — a notice intended to form part of the record before the Committee against Torture and the Universal Periodic Review. Second, it addresses the lawmakers themselves: not to instruct those well able to govern, but to set a neglected obligation plainly before them, and to observe, in candor, what the continued non-exercise of a legislative power costs the institution that declines it.

The IAJ writes in a deliberate spirit. It does not accuse, and it does not flatter. It proceeds from the premise that the members of the legislatures of the United States are fully capable of discharging the duty described here, and that the office of a lawmaker is owed the respect of a plain account rather than either intimidation or solicitude. What follows is offered in that manner.

II. The People as Sovereign, and Authority as a Trust

In the constitutional order of the United States, public authority is not owned by those who exercise it. It is held in trust for the people, in whose name it is constituted and to whom it answers. The IAJ therefore addresses the legislatures not as a supplicant and not as an adversary, but on behalf of the principal whose interest the lawmaker is bound to serve.

The prohibition of torture illustrates the point exactly. It is not a courtesy the government extends to itself; it is a guarantee secured for every person within the Nation's jurisdiction. When the United States bound itself to that guarantee, it acted as the people's agent, and the benefit of the undertaking belongs to the people as principal. It follows that a legislative power left unexercised, where its exercise is necessary to render the guarantee effective in domestic law, is not merely an institutional omission. It is the withholding from the sovereign people of a protection promised in their name — and it is on their behalf that the omission is here identified.

III. The Binding Commitment

The United States ratified the Convention against Torture in 1994, and by Article VI, clause 2 of the Constitution the treaty thereby entered the supreme law of the land. The obligations it imposes

are, in their essentials, neither contestable nor conditional: to take effective measures to prevent torture (Article 2(1)); to ensure that all acts of torture are offences under the criminal law, punishable in proportion to their gravity (Article 4); and to guarantee victims redress and an enforceable right to fair and adequate compensation (Article 14). The prohibition itself is absolute. No circumstance — war, emergency, or claim of necessity — may be invoked to justify torture, and superior orders furnish no defense (Article 2(2)–(3)).

The prohibition is, moreover, a peremptory norm of general international law, from which no State may derogate. Two settled rules of the law of treaties give the commitment its force in practice: a treaty in force binds the parties and must be performed in good faith, and no State may invoke its internal law — including the arrangement of its own federal structure — to excuse non-performance. These are not the IAJ's propositions; they are the common ground of the international legal order to which the United States has subscribed.

IV. The Evolved Scope of the Prohibition: The Duty Is Not Confined to Custodial Settings

The commitment just described must be understood at its true breadth, for the duty to legislate is only as wide as the obligation it serves. The definition of torture in Article 1 specifies five elements — an act; intentional infliction; severe pain or suffering, physical or mental; by or with the consent or acquiescence of a public official or other person acting in an official capacity; and a prohibited purpose, including any reason based on discrimination. No element among them is a setting. The words "detention," "prison," and "interrogation" appear nowhere in the enacted text. The Convention reaches the official who inflicts severe suffering for a prohibited purpose in any official capacity — and the IAJ, in its definitive guide UNCAT and jus cogens: A contemporary perspective, sets out the analysis at length.

That reading does not rest on treaty text alone, and it does not rest on a claim that peremptory status by itself enlarges the definition. The point is the converse, and the distinction matters: the peremptory status of the torture prohibition does not expand its content, but it does prevent treaty history, domestic architecture, or institutional immunity from narrowing the minimum content of the prohibition below what the treaty text, the Committee's interpretation, and the basic-rights foundation of the norm require. Read without importing a custodial limitation the enacted definition does not contain, that minimum content is the intentional infliction of severe suffering by an official, in official capacity, for a prohibited purpose — without structural limitation to any setting. The International Court of Justice has confirmed the norm's peremptory status and held that the obligations it generates are owed erga omnes — to the international community as a whole, and grounded in the basic rights of persons (Belgium v. Senegal; Barcelona Traction); the Committee against Torture, in General Comment No. 2, extends the Convention's obligations to all branches of government and precludes any categorical institutional exemption for official conduct that otherwise satisfies the Convention's elements. According to the IAJ's considered

reading of these sources in combination, an obligation owed to every person, arising from the basic rights of the human person, and binding every branch of government cannot coherently be confined to those persons who happen to be held in a particular kind of room.

The practical reach of this is concrete, and the IAJ guide identifies the settings in which it most often arises beyond the prison and the police station: courts that compel a vulnerable person's continued participation in proceedings known to cause severe harm; family courts and child-protective agencies that inflict severe suffering through coercive separation; administrative bodies that withhold urgent care or subsistence to coerce compliance; and judicial actors who, under color of lawful process, knowingly impose conditions causing severe physical or mental suffering for purposes of coercion, punishment, or discrimination. These are not strained hypotheticals; they are recurring sites where state authority may be used coercively, and where the treaty's elements must be capable of examination when severe suffering is intentionally inflicted for a prohibited purpose. The persons subjected to such conduct are no less protected by the peremptory norm than the prisoner in his cell.

This does not mean that every adverse ruling, bureaucratic denial, erroneous agency decision, or painful lawful sanction constitutes torture. It means that no institutional setting is categorically exempt where the act, the severity, the official-capacity nexus, the intent, the prohibited purpose, and the lawful-sanctions analysis are all satisfied. Official capacity is necessary but not sufficient; every element of Article 1 must still be met, and the setting is simply not one of those elements.

The contrary reading — that the Convention reaches only detention, custody, interrogation, and imprisonment — produces a result the law cannot accept. It would place permanently beyond the prohibition every coercive family separation, however severe its documented harm; every administrative denial of life-sustaining care imposed to compel obedience; and every instance of judicially inflicted suffering, however deliberate, that satisfies the elements. A construction that immunizes the deliberate infliction of severe suffering merely because it occurs in a courtroom or an agency rather than a cell defeats the object and purpose of the Convention, and is for that reason untenable.

One limit must be stated so that it is not mistaken for a loophole. Article 1 excludes pain or suffering "arising only from, inherent in or incidental to lawful sanctions." That carve-out reaches the ordinary and lawful incidents of a lawful penalty; it does not reach severe suffering inflicted for a prohibited purpose under the color of process, nor suffering inflicted through discrimination, nor harm that no lawful sanction requires. The guide addresses the point in full; it is enough here to say that the carve-out qualifies the prohibition without returning to the State a discretion to inflict torture by procedural means.

The consequence for the legislator is direct. Legislation that conforms the Nation's law to the Convention must reach the official infliction of severe suffering in any official capacity, and **must**

not be drawn narrowly around detention, custody, interrogation, and imprisonment. A torture statute confined to the jail and the interrogation room would leave the larger field of official conduct — judicial and administrative — as unprotected as the patchwork the Committee has already found wanting; to legislate to the custodial case alone is to legislate to a fraction of the duty. Every legislator is therefore on notice that, in the IAJ's assessment, legislation confined to detention, custody, interrogation, and imprisonment will not satisfy the United States' full obligations under the Convention and the evolved peremptory norm.

V. The Documented Deficiency, and the Notice Already Constructively Given

In 2014 the Committee against Torture, the body the States Parties established to assess compliance, reviewed the United States and recorded specific respects in which domestic law had not been brought into conformity with the commitment (CAT/C/USA/CO/3-5). The findings are a matter of record:

- no general federal offence of torture, defined in conformity with Article 1, exists for conduct within the United States, the federal statute reaching only conduct abroad (paragraph 9);
- a reservation and an interpretive understanding remain that the Committee found capable of narrowing the protection and creating avenues to impunity (paragraphs 9–10);
- serious abuses were neither fully investigated nor punished, and victims — among them the survivors of the Chicago police-torture cases, where the absence of a conforming offence allowed limitation periods to bar prosecution — went without remedy (paragraphs 11–12, 26); and
- the enforceable right of victims to redress was not secured in law (paragraph 29).

These findings were transmitted to and received by the Government of the United States in 2014. The deficiency has therefore been known to the Nation, at the level of its responsible institutions, for more than a decade. The Committee's 2014 findings arose in custodial and extraterritorial contexts, but the obligation they vindicate is not so confined; its evolved scope is set out in Section IV above. This memorandum places the same matter before the individual members of the legislatures, so that what has been constructively known to the Government is now expressly known to those alone able to supply the cure. From this point, inaction is not the silence of ignorance.

VI. The Allocation of the Duty Among the Organs of Government, and Its Return to the Legislatures

A supreme-law obligation binds the whole of government, and the IAJ does not single out the legislatures as if the duty were theirs alone. The judiciary is bound to construe and apply domestic law in conformity with the treaty so far as its text permits, to give faithful effect to existing

implementing law, and to adjudicate the constitutional claims through which the prohibition is vindicated; the courts of the several States are bound directly, by the Supremacy Clause, to treat the treaty as supreme over contrary state law. The executive is bound to enforce the law and to refrain from authorizing what the treaty forbids. And each State is independently bound to bring its own law into conformity within its sphere — a duty distinct enough, and weighty enough, to be treated separately in Section VII below.

Within that shared structure, one measure is reserved to the federal legislature in particular. The Supreme Court has held that an obligation of this character becomes domestic law only through legislation enacted by Congress; neither the executive nor the judiciary may supply it.

While, according to IAJ analysis, this does not relieve any court, including the Supreme Court of the United States, of responsibility for ensuring the equivalence promised by the reservations and understandings of ratification, that responsibility is of a particular and bounded kind. The United States did not qualify its consent on the ground that the Convention would go unimplemented, but on the ground that implementation was unnecessary because existing domestic law already afforded equivalent protection — the reservation to Article 16 accepting the obligation only insofar as the prohibited treatment is that already forbidden by the Fifth, Eighth, and Fourteenth Amendments. Equivalence was thus promised in the coin of domestic constitutional law, whose construction is the judiciary's own province. The courts are accordingly the custodians of that equivalence: bound to construe the Acts of Congress so as not to conflict with the Convention, to give faithful effect to such implementing law as exists, and to administer the constitutional guarantees the reservations invoked to a measure consonant with the absolute, non-derogable prohibition to which those guarantees were equated. That this is no abstraction is shown by the same reservation's having been pressed, in the legal memoranda of 2001 to 2009, to advise that conduct amounting to torture might be authorized — the equivalence device turned against its own promise.

The judiciary may not, however, enact the offence that would conform domestic law to Article 1, supply the limitation rules that would keep torture from escaping punishment, or create the enforceable right to redress that Article 14 requires. Those are legislative acts, and responsibility for them remains with the legislature, undiminished and — because the obligation is the Nation's as a whole, binding every State and reaching federal conduct that no State can govern — non-delegable to the States.

Herein lies the decisive point. In resting the Nation's compliance upon existing and largely judge-administered law, the reservations amounted, in practical effect, to a consignment of the Convention's domestic efficacy to the judiciary — the political branches passing to the courts a duty those branches alone could discharge. Yet the judiciary regards itself, correctly under the rule just stated, as without authority to supply what only legislation can supply. The consignment therefore fails on its own terms, and the responsibility it sought to transfer does not vanish. **It**

returns to the legislatures, and returns with redoubled force: for the legislature now confronts not only the original allocation that made the cure its own, but the demonstrated foreclosure of the very alternative on which it relied. The political branches passed the question to the courts; the courts, finding the door closed to them, return it. What this closed circuit establishes is precisely the Committee's conclusion of 2014 — that the deficiency is curable by domestic legislation, and by domestic legislation alone. Every avenue but the legislative one has been shown, by the Nation's own arrangements, to be foreclosed; and the duty to take that one open avenue rests, doubly and inescapably, upon the Congress and the legislatures of the States.

VII. The Distinct and Independent Duty of the Legislatures of the Several States

That the complete federal cure is reserved to Congress does not place the States at the margin of this obligation. Their duty is distinct, independent, and direct. Article VI, clause 2 makes the Convention supreme over any contrary provision of state law and, by its own terms, binds the judges of every State; Article VI, clause 3 binds every state legislator, by oath, to support the Constitution of the United States, of which that supremacy is part; and the constitutions of the several States themselves acknowledge the supremacy of the Constitution and treaties of the United States. The state legislator is thus bound to the Convention not derivatively, through the federal government, but immediately, by the same supreme law the federal legislator serves.

The reach of that duty is, moreover, far from incidental, for much of the conduct the Convention governs occurs within domains administered by the States: prisons, jails, juvenile facilities, and police stations, but also courts, family-law systems, child-protective agencies, disability-accommodation systems, benefits agencies, and the administrative bodies that control access to care, subsistence, liberty, and family integrity. Custody of persons in the United States is, in particular, overwhelmingly a state and local function, operated under state authority and governed by state law; and the plenary police power to define crimes, to regulate the conduct of officers, and to provide remedies for their abuse is the States'. The front line of prevention contemplated by Article 2(1) — and much of the redress contemplated by Article 14 — therefore lies precisely where the state legislatures legislate. That duty is not confined to custody: the courts and administrative agencies a State operates are themselves capable of the official infliction the Convention forbids, as Section IV explains, so the state-legislative duty reaches the conduct of those institutions no less than the conduct of its jails.

The United States' own terms of ratification confirm the point. In consenting to the Convention, the United States understood that it would be implemented by the federal government to the extent of federal jurisdiction, and otherwise by the state and local governments. Whatever the defects of that understanding as a matter of international law, no state legislature may read it as an exemption; it is, on its face, an assignment. The matters within state jurisdiction were, by the Nation's own instrument of ratification, committed to the States to implement. And so, just as Congress may not pass its federal duty down to the States, **a state legislature may not pass its own duty up to**

Congress: the federal cure, however complete, will not reach the state prison, the county jail, the family court, or the administrative agency, and no Act of Congress can conform the law of a State that the State alone may write.

The cost of neglecting this duty is neither hypothetical nor distant, and the Committee's own record supplies the illustration. The torture committed under Commander Jon Burge and others in Chicago between 1972 and 1991 went unpunished as torture not because the conduct was lawful, but because the law of the State furnished no offence adequate to it and the ordinary limitation periods had run before the truth was established. That impunity was a state-legislative gap, and it was a state legislature, not Congress, that was positioned to close it. The lesson generalizes: wherever a State's law lacks an offence equal to the gravity of torture, or attaches to it a limitation that lets it escape, or leaves its victims without an effective remedy, the State holds within its own hands both the failure and its cure.

For the legislatures of the States, then, the course of compliance is as concrete as it is for Congress. It requires that each State ensure that torture and cruel, inhuman, or degrading treatment by any person acting under its authority are fully prohibited and punishable under state law, by an offence equal to their gravity and not defeated by limitation, and reaching such conduct wherever it occurs — in its courts and agencies no less than in its jails and police stations; that its judicial, administrative, correctional, custodial, and policing practices conform to the Convention's standard; that victims of such conduct within the State have an effective remedy and redress; and that its agencies be directed to treat the Convention as the supreme law it is. These are ordinary exercises of the police power the States have always claimed as their own.

Nor is the States' role merely to follow. A State that conforms its law need not wait upon the Nation; it may furnish the example the Nation has yet to complete, and demonstrate within its own borders the equivalence the United States has promised to the world. The IAJ addresses the state legislatures, accordingly, not as subordinate recipients of a federal obligation, but as independent custodians of a supreme-law duty that, across the whole field of official conduct within the State, is more nearly theirs than anyone's.

VIII. The Erosion of Authority Through Its Non-Exercise

It is worth stating plainly, and in the legislatures' own interest, what the prolonged non-exercise of an exclusive power entails. Authority in a constitutional republic is sustained by its exercise. A power that the Constitution commits to the legislature, and that the legislature declines to use in the face of a known and binding obligation, does not simply lie dormant awaiting a more convenient session. Its function migrates: to an executive that comes to conduct the Nation's compliance by representation and assurance rather than by law; to courts pressed to supply through interpretation what the legislature has not enacted; and to international bodies that, in the absence of domestic action, become the only fora in which the obligation is examined at all. The

constitutional design of checks and balances, which presumes that each branch will occupy its own office, is to that extent defeated.

Each such migration diminishes the legislature's standing as the branch that speaks for the sovereign people. The institution that will not perform the duties uniquely its own gradually forfeits the authority that attached to them, and weakens its claim to be the people's first voice in the government. What is said here of Congress holds equally of a state legislature that declines, within its own sphere, the duty Section VII describes. The accountability that follows is not criminal, and it is not the decree of any single tribunal; it is institutional, political, and historical — the judgment of constituents, the assessment of the international community, and the record by which the conduct of a legislature is finally measured. A legislature mindful of its own authority guards that authority by exercising it. The IAJ raises the point not as a threat — it has none to make — but as an observation a responsible institution would wish to have before it. And it is the people who bear the cost — deprived of a protection that is theirs by right, that they are entitled to enjoy, and that their government has assured the world is secure within its borders.

IX. The Capacity of the Nation, and the Expectation of the World

This is a matter for Americans to resolve, and it is well within their competence to resolve it. The obligation is the United States' own, assumed through its own constitutional process; its completion requires nothing more than the ordinary exercise of the legislative power, at both the national and the state level. The international community does not expect the United States to be lectured into compliance. It expects the United States to do what a self-governing people has always claimed the capacity to do: to identify a shortcoming in its own law and to correct it through its own institutions, without external compulsion.

A Republic that has so often urged the observance of human rights upon other nations is fully capable of securing that observance at home, and is expected — by friends and adversaries alike — to furnish the example rather than to require one. Nothing in this memorandum supposes otherwise. It is written in the confidence that the Nation's lawmakers, in the Congress and in the States alike, once the matter is set plainly before them, will prefer to complete the Nation's commitment by their own hand, as befits a people that governs itself.

X. The Course of Compliance

What the duty requires is neither uncertain nor onerous. For the federal legislature, compliance is achieved by enacting a general federal offence of torture conforming to Article 1 — reaching the intentional infliction of severe suffering by any official in any official capacity, including judicial and administrative conduct, and not confined to detention, custody, interrogation, or imprisonment — together with measures addressing cruel, inhuman, or degrading treatment consistent with Article 16, and reaching conduct within as well as outside the United States and the conduct of

federal actors; by securing in law the enforceable right of victims to redress and compensation; by withdrawing the reservation and understanding the Committee identified as sources of impunity; and by establishing a settled practice of timely reporting and of recorded legislative response to the findings of the treaty body, so that no obligation of this kind again goes unattended. The corresponding course for the legislatures of the States is set out in Section VII above. Both are necessary, and neither is answered by the other.

These measures are set out not as conditions imposed by the IAJ, but as the plain content of an obligation the United States has already accepted, read to its full and evolved scope. To enact them is to complete what the Nation began in 1994; to decline them, after notice, and after every other avenue has been shown to be foreclosed, is to choose that the Nation's law shall remain unequal to its word.

XI. Notice and Record

The IAJ records, for the purposes of the international review of the United States and as a statement made on behalf of the people, that the duties described in this memorandum have been set expressly before the members of the Congress and of the legislatures of the several States; that the deficiency they address has been a matter of record since 2014; that every avenue of cure but the legislative one has been shown, by the Nation's own arrangements, to be foreclosed; and that the means of cure — to the full and evolved scope of the peremptory norm — lie within the ordinary competence of the bodies addressed, federal and state alike. The IAJ, in its role as an assessor of compliance, will regard the good-faith taking-up of this duty — its acknowledgment, examination, and pursuit by some effective legislative means — as fidelity to the oath of office, and will regard the continued denial or evasion of the duty, after notice, as its dereliction. This memorandum is the notice.

Appendix — Authorities

- U.S. Constitution, Article VI, clauses 2 and 3; Article I, Sections 5 and 6.
- Oath of office, 5 U.S.C. § 3331, and the corresponding oaths of state legislators; state constitutional provisions acknowledging the supremacy of the Constitution and treaties of the United States.
- Convention against Torture, Articles 1, 2, 4, 14, 16, 19; General Comments No. 2 (2007) and No. 3 (2012).
- IAJ, UNCAT and jus cogens: A contemporary perspective — the IAJ's definitive interpretive standard for assessing the evolved scope of the peremptory norm and its application beyond custodial settings.

— United States reservations and understandings to UNCAT (1990/1994), including the reservation to Article 16, the federal-implementation understanding, and the non-self-execution declaration.

— Committee against Torture, Concluding Observations on the United States, CAT/C/USA/CO/3-5 (2014), paras. 9, 10, 11–12, 26, 29.

— Vienna Convention on the Law of Treaties, Articles 26, 27, 31, 53, and 64.

— Belgium v. Senegal (ICJ 2012); Barcelona Traction (ICJ 1970); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Medellín v. Texas, 552 U.S. 491 (2008).

— International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 2 and 4.

— 18 U.S.C. §§ 2340–2340A.

Issued by the IAJ as a memorandum of legislative duty and a record of notice. It states the law and the obligation; it asserts no claim for relief in any tribunal and alleges no crime by any individual.

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