

**Observations by the United States of America  
on Committee Against Torture General Comment No. 2:  
Implementation of Article 2 by States Parties**

*November 3, 2008*

1. The United States Government takes this opportunity to respond to General Comment 2, adopted by the Committee Against Torture (the “Committee”).<sup>1</sup> The United States of America appreciates the hard work undertaken by the Committee and is pleased to convey these Observations related to certain opinions and recommendations expressed in General Comment 2.
2. The United States recognizes the expertise of the Committee and its extensive experience discussing with States Parties the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention” or “CAT”). To the extent that General Comment 2 reflects the Committee’s policy recommendations for strengthening the protections afforded by the Convention and improving the implementation of the Convention by States Parties, the United States finds little with which to disagree.
3. However, the United States considers it important to be clear with respect to the legal obligations of States Parties under the Convention. In this regard, the United States is concerned that the Committee has expressed many of its policy recommendations in the form of treaty obligations on States Parties. These Observations of the United States focus on those recommendations of the Committee that, while not necessarily unacceptable as a matter of policy, do not reflect the actual legal obligations of States Parties under the Convention.
4. There are a substantial number of legal statements and conclusions in General Comment 2 with which the United States does not agree. These Observations, however, only address a select number of issues, which the United States views as particularly concerning.

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<sup>1</sup> Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, Doc. No. CAT/C/GC/2 (Jan. 24, 2008).

## **I. The Distinction between “Torture” and “Other Cruel, Inhuman and Degrading Treatment or Punishment”**

5. As an initial matter, the United States notes that the stated subject of General Comment 2 -- Article 2 of the Convention -- concerns torture rather than other acts of cruel, inhuman and degrading treatment or punishment that do not amount to torture (termed “ill-treatment”<sup>2</sup> in the General Comment). Nevertheless, as discussed below, General Comment 2 contains extensive commentary and some conclusions pertaining to ill-treatment that are both surprising and without legal basis.
  
6. General Comment 2, paragraphs 3 and 6 state:

“Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and *therefore* the measures required to prevent torture must be applied to prevent ill-treatment . . . . The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment.” (Emphasis added.)
  
7. There is no basis or support for this assertion in international treaty law. While the United States does not doubt the Committee’s conclusion that conditions giving rise to ill-treatment could also facilitate torture, such a finding does not give rise to the creation of new legal obligations of States Parties. As a legal matter, the plain text of the Convention makes clear that Articles 3 to 15 are not all “obligatory” with respect to ill-treatment. Indeed, the treaty expressly provides that only Articles 10 to 13 are obligatory with respect to ill-treatment, in express contradiction to the Committee’s views. Specifically, Article 16 states that “[i]n particular, the obligations contained in *articles 10, 11, 12 and 13* shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.” (Emphasis added.) The Committee’s unsupported assertion on this matter is thus directly inconsistent with the express language of the Convention. In reaching this conclusion, the Committee purports to substitute the conclusory opinions of its appointed experts for the plain text of the treaty negotiated and ratified by States Parties.

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<sup>2</sup> The term “ill-treatment” is not a term of art under international law. For the sake of similarity, these Observations will use that term when describing “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.” CAT, Article 16.

8. The Committee seems to reach the conclusion above in part by characterizing the relationship between torture and ill-treatment as “indivisible” (Paragraph 3). This approach, regrettably, casts aside the decision taken by the Convention’s drafters to fashion distinct and only partially overlapping legal obligations relating to these two separate categories of acts: (1) those that amount to torture as defined under Convention Article 1; and (2) those that constitute “*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,*” as described in Article 16.<sup>3</sup> While the United States agrees with the Committee that the “definitional threshold between ill-treatment and torture is often not clear,” this does not provide a basis for dispensing with the plain language of the Convention and the clear intent of the drafters.
9. Pursuant to customary international law regarding the interpretation of treaties, as reflected in the Vienna Convention on the Law of Treaties, a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>4</sup> In the case of the Convention, the States Parties made a thoughtful and express decision with respect to which articles of the treaty would apply to ill-treatment. There is no basis in international treaty law for the Committee to rewrite, in effect, the clear provisions of the treaty under the guise of interpretation.

## **II. Torture**

10. General Comment 2, paragraph 11, discusses the distinctiveness of the offense of torture, including the need for “naming and defining this crime” as distinct from “common assault or other crimes.” To the extent that Paragraph 11 expresses the Committee’s policy recommendation for States Parties, the United States has no objections to this paragraph. However, to the extent that the Committee believes that the Convention contains a requirement to codify the crime of torture as such in domestic law, the United States does not agree.

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<sup>3</sup> Emphasis added. Similarly, by referring in its title to “torture and *other* cruel, inhuman or degrading treatment or punishment,” the Convention makes clear that torture is a form of cruel, inhuman or degrading treatment or punishment. (Emphasis added.) The Convention itself, however, goes on to create a clear dichotomy between “torture” (as defined in Article 1) and “*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.*” (Emphasis added.) CAT, Article 16.

<sup>4</sup> *Vienna Convention on the Law of Treaties*, Art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

11. Article 4 of the Convention requires that States Parties “ensure that *all acts of torture* are offenses under its criminal law” and that they “make these offences punishable by appropriate penalties which take into account their grave nature.” (Emphasis added.) Thus, the treaty requires that all acts that constitute torture under the Convention be made criminal under a State Party’s laws and subject to appropriately serious criminal penalties. The treaty does not require that States Parties ensure that the *crime of torture* is itself styled as a stand-alone and separate offense under their criminal law or that all acts that satisfy the definition of torture be characterized as such under domestic law. As the United States has previously explained to the Committee, there is no requirement to style as “torture” an offense in the criminal code of a State Party that contains all of the elements of torture, as defined in Article 1 of the Convention.<sup>5</sup> Article 4 does not preclude the use of traditional elements of a State Party’s criminal code -- including criminal offenses, such as aggravated battery or maiming -- to satisfy its obligations under Article 4. Indeed, Article 1, paragraph 2 of the Convention states that the definition of torture is “without prejudice to any . . . national legislation which does or may contain provisions of wider application.”

12. What is critical as a matter of treaty law is that every State Party ensure that every act that falls within Convention’s definition of torture is punishable under its criminal laws by appropriately severe penalties. The precise manner in which a State Party accomplishes this obligation of result, as a matter of its internal domestic law, is left for each State Party to decide for itself, mindful of its general obligation under international law to implement its treaty obligations in good faith. In this context, the United States considers that a State Party’s criminal laws, many of which will long pre-date the Convention, may play an important role in fulfilling a State Party’s obligations. While the Committee may believe that the creation of a separate domestic law crime styled as “torture” may be an especially efficacious way of implementing the Convention, there is no basis in the treaty itself for asserting that this approach is required as a matter of international treaty law. Accordingly, the United States considers the views of the Committee on this matter to be policy recommendations for consideration by States Parties.

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<sup>5</sup> See ¶¶178-182 of U.S. Initial Report. The approach of the United States is explained in paragraph 178 of its Initial Report: “No single federal statute specifically defines or prohibits torture or directly implements the central provisions of the Convention. Nonetheless, at the time of ratification, it was determined that existing state and federal law was sufficient to implement article 4, except to reach torture occurring outside United States jurisdiction, as discussed below under article 5.”

13. Paragraph 10 states that “it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.”
14. As an initial matter, it is possible that this conclusion is based on an assumption that countries have enacted laws with criminal offenses separately styled as “torture” subject to grave penalties and “ill-treatment” subject to less serious penalties. This model has no application for a country like the United States, whose domestic laws typically do not style criminal offenses as torture or ill-treatment.
15. Even on its own terms, however, the above-cited statement in this General Comment does not bear close scrutiny. As noted above, there is no requirement for States Parties to create a new criminal offense styled expressly as “torture”. There is likewise no requirement to “prosecute conduct solely as ill-treatment where the elements of torture are also present.” Pursuant to Convention Article 4, paragraph 2, States have an obligation to punish acts that fall within the Convention’s definition of torture with “penalties which take into account their grave nature.”
16. Further, the Committee’s conclusion on this matter is at odds with the views expressed elsewhere in this General Comment. In particular, Paragraph 3 states that “the definitional threshold between ill-treatment and torture is often not clear” and that the two standards of treatment are “indivisible, interdependent and interrelated.” The United States finds it hard to understand how the Committee could take the view that it is a “violation” of the Convention where a State Party fails to correctly distinguish between the two categories of abuse even in circumstances where it is not possible to do so. It is likewise unclear how such an unnecessary legal requirement -- and one that appears nowhere in the text of the treaty -- would directly advance the Convention’s overarching aim of preventing torture and ill-treatment.

### **III. Obligations Pertaining to Private Conduct**

17. Paragraphs 15 and 18 of General Comment 2 address the issue of the Convention's protection in relation to privately-inflicted abuses. Paragraph 15 states, *inter alia*, that "...each State party should prohibit, prevent and redress torture and ill-treatment in ... contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm." Paragraph 18 states:

“[W]here State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.”

18. While the United States does not necessarily disagree with these views, they are nonetheless confusing and unclear. The definition of torture found in Article 1 of the Convention contains a “state-action” requirement, namely that for an act of torture to take place, it must be “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.” Article 16 similarly provides a similar state-action requirement for ill-treatment. Of course, torture and ill-treatment can, under certain circumstances, involve acts by “private” or “non-State” actors; however, recognition of this fact is not derived from any interpretation or understanding of Article 2 -- the subject of General Comment 2 -- and without the state action requirement found in Articles 1 and 16, such action is beyond the scope of the Convention.

19. The Committee's statements seem to speak to the scope of the state-action requirements in the Convention and could be understood as broadening them beyond what is supported in the text of the Convention. Specifically, it is unclear whether the Committee is purporting to comment upon the matter of what constitutes a state actor's "consent," "acquiescence," or "instigation" within the meaning of CAT Articles 1 and 16. If the Committee's statement uses the terms torture and ill-treatment to include, as they must, the state-action requirements contained in the Convention, then its description is confusing but not particularly problematic. If this statement refers to purely private conduct that does not include the state-action requirements for such conduct to constitute torture or ill-treatment, then it would suggest an array of new obligations that do not have a basis in what States Parties have assumed under the Convention.
20. There could certainly be circumstances under which a State official "consents" or "acquiesces" to an abuse, thereby meeting the requirement for state-action in the definition of torture. However, the United States does not consider that the concept of "due diligence" advanced by the Committee furthers an understanding of the scope of state responsibility under the Convention. The Committee's use of the word "should" in Paragraphs 15 and 18 suggests to the United States that the Committee may not view the concept of "due diligence" as giving rise to requirements *per se* under the Convention. This use of "should" seems appropriate, as the concept of "due diligence" is not included in the Convention itself, and cannot as a matter of international treaty law reasonably be inferred to be within in the meaning of the words "acquiescence" or "consent" in Articles 1 or 16.<sup>6</sup>
21. Accordingly, the Committee's treatment of this issue appears to be in the nature of a general policy recommendation. In this respect, the United States agrees with the general proposition that States owe a moral and political responsibility to their populations to prevent and protect them -- including through the use of positive measures -- from private acts of physical abuse by private individuals. However, governmental action in these areas has been and will remain a matter of criminal law in the fulfillment of a state's general responsibilities incident to ordered government, rather than as a requirement derived from their obligations under the Convention.

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<sup>6</sup> Unlike, for instance, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem do Para"), Article 7 of which obligates States Parties to "apply due diligence to prevent, investigate and impose penalties for violence against women."

#### **IV. Non-Derogability**

22. Paragraphs 1, 3, 5, 6, 7, 17, 25 and 26 refer variously to the “principle of non-derogability” and the “non-derogable” nature of certain Convention obligations.
23. The concept of “derogation” entails a procedure which may be expressly provided for in some treaties under which a State, after it becomes Party to such a treaty, is permitted to be excused from certain treaty obligations it assumed at the time it became a party, generally for a particular period of time. As the Committee is aware, some treaties, such as the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> include provisions that expressly permit a State Party, pursuant to procedures set forth in those treaties, to excuse itself from fulfilling specific treaty obligations through formally “derogating” from certain articles, while prohibiting the derogation from certain other obligations.<sup>8</sup> Though not styled as “derogations,” many treaties also provide for exceptions to general rules that are permissible, but only in the circumstances specified in the treaty itself.
24. The Convention, however, provides for neither an explicit derogation procedure along the lines of the ICCPR nor any specified exemptions to general obligations. Accordingly, it is not clear what the Committee means when it repeatedly invokes this terminology.
25. The United States does not consider it permissible for a State Party to “derogate” from *any* of its obligations under the Convention. In other words, the United States does not read into the Convention an implied right of derogation. Upon consenting to be bound by a treaty, a State takes on a solemn obligation to abide by the terms of that treaty, taking into account any permissible reservations, understandings, or declarations that accompany treaty ratification. After the treaty ratification process is complete, the failure of a State Party to abide by the obligations it has assumed would not be a “derogation,” but rather a violation of its treaty obligations. It may be that the Committee’s phrasing is intended merely to amplify and emphasize the importance of the obligations set forth in the Convention. This would be a matter on which the United States and the Committee are in agreement.

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<sup>7</sup> International Covenant on Civil and Political Rights, Art. 4. *See also* American Convention on Human Rights, Art. 27; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15.

<sup>8</sup> It is notable that Article 4.2 of the ICCPR establishes that Article 7, which prohibits “torture or ... cruel, inhuman or degrading treatment or punishment,” as non-derogable. This means that a State Party may not file a formal notice to derogate from its Article 7 obligations.

## **V. Territory and Jurisdiction**

26. General Comment 2, paragraph 7 states:

“The Committee also understands that the concept of ‘any territory under its jurisdiction,’ linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.”

27. Article 2, paragraph 1 of the Convention states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in *any territory under its jurisdiction*.” (Emphasis added.) This important phrase, which clarifies the scope of certain Convention obligations, also appears in Convention Articles 5, 11, 12, 13, and 16.

28. As explained to the Committee in 2006, the United States does not agree that “‘de facto control’ equates to ‘territory under its jurisdiction.’ There is nothing in the text or the *travaux* of the Convention that indicates that the two are equivalent.”<sup>9</sup> The Committee offers no textual or historical support for its proposition in General Comment 2 that the words “any territory under its jurisdiction . . . includes any territory or facilities . . . subject to the de jure or de facto control of a State party.” The Committee has made similar assertions in its communications to the United States.<sup>10</sup> In these communications, the Committee has likewise not provided a reasoned explanation of how the scope of the Convention’s obligations supposedly depart from the plain meaning of its text.

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<sup>9</sup> See *List of issues to be considered during the examination of the second periodic report of the United States of America – Response of the United States of America*, at pp. 87-89, available at: <http://www.state.gov/g/drl/ht/treaties/> (Apr. 28, 2006). Although as a matter of treaty interpretation the United States does not agree with the Committee on this matter, it notes that U.S. law is more expansive than its treaty obligations in that it provides that “[n]o individual *in the custody or under the physical control of the U.S. government, regardless of nationality or physical location*, shall be subject to cruel, inhuman, or degrading treatment or punishment.” (Emphasis added.)

<sup>10</sup> See *List of issues to be considered during the examination of the second periodic report of the United States of America*, at para 5 and note 12, Doc. No. CAT/C/USA/Q/2 (Feb. 8, 2006); *Conclusions and recommendations of the Committee against Torture: United States of America*, at para. 15, Doc. No. CAT/C/USA/CO/2 (July 25, 2006).

29. The Committee does state, however, that the phrase “any territory under its jurisdiction” is “linked . . . with the principle of non-derogability....” The meaning of this statement is unclear. As described in Section IV above, the United States finds the repeated references to “non-derogability” to be inapposite and confusing. Whether or not obligations under the Convention are properly characterized as “non-derogable,” there can be no doubt about the importance of the preventing acts of torture and ill-treatment wherever they may occur. But if the Committee intends to suggest that the “principle of non-derogability” -- which appears nowhere in the text of the Convention -- somehow expands the carefully considered scope of legal obligations assumed by States Parties, the United States cannot agree. The drafters of the Convention were capable of devising legal obligations with a more expansive reach, as is demonstrated by Convention Article 5, which applies to offenses “committed in any territory under [a State Party’s] jurisdiction *or on board a ship or aircraft registered in that State.*” (Emphasis added.) If the drafters had intended for Article 2 to extend beyond the territory under a State Party’s jurisdiction, they would have reflected that intent in the words of the Convention.

## **VI. Authority and Role of the Committee**

30. The United States observes that General Comment 2 in several different paragraphs overstates the authorities of the Committee and the normative content of its written work products. As an example, paragraph 1, states that “[t]he provisions of article 2 reinforce [the] peremptory *jus cogens* norm against torture and constitute the foundation of the Committee’s authority to implement effective means of prevention....”

31. The United States does not consider this characterization to accurately describe the role of the Committee or the origin of its responsibilities. The Committee’s functions and responsibilities are those, and only those, that it has formally received from the Convention and its Optional Protocol. A review of the Convention reveals no Committee “authority to implement effective means of prevention....” The Committee is not an implementation body; rather, it is a body that carries out specific functions, as set forth in the Convention, to assist States Parties in implementing their obligations. As a matter of treaty law, the United States considers that neither Article 2 nor the characteristic of the norm protected by the Convention are relevant to the Committee’s authority. Rather,

the basis of the Committee's authority can be found in Part II of the Convention (Arts. 17-24), which sets forth various functions and responsibilities of the Committee.<sup>11</sup> In this regard, the United States notes that, unlike other treaty bodies that issue general comments or recommendations for consideration by all States Parties, the Convention authorizes the Committee to issue "general comments" only with respect to the report of a State Party.<sup>12</sup>

32. General Comment 2, paragraphs 12-14 also suggest that the Committee is empowered to pronounce certain "measures" -- other than those set forth in the Convention itself -- as obligatory within the meaning of Article 2. The Committee describes a number of measures that it considers particularly important and states that "article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture." (Paragraph 14.)

33. The "authority" to which the Committee is referring is unclear from this presentation and has no clear basis in the Convention. While the United States respects and values the experience of the Committee, it does not consider that Article 2 provides the Committee with any "authority" not expressly provided for in the text of the Convention. If the point intended by the Committee is simply that "effective measures" is not a static concept, the United States is in agreement. States Parties, to continue to meet their Convention obligations, may need to regularly review their relevant laws and practices. This approach is reflected in Article 11 of the Convention, which requires States Parties to "keep under systematic review" various rules and practices "with a view to preventing any cases of torture."

34. General Comment 2, paragraph 4 states that "States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention *in accordance with the Committee's*

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<sup>11</sup> Although not relevant here, with respect to States Parties to the Optional Protocol, the Committee has additional responsibilities and functions, as set forth in that instrument.

<sup>12</sup> Article 19, paragraph 3 of the Convention states that "Each report [of a State Party] shall be considered by the Committee which may make such *general comments* on the report as it may consider appropriate and shall forward these to the State Party concerned...." (Emphasis added.) Thus, although the Committee is authorized to make "general comments," the Convention is clear that those are to be made "on the report" of a State Party. This differs from other treaty bodies, whose authorities to make general comments or recommendations are not expressly limited to the report of a State Party. *See e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Art. 9, para 2; ICCPR, Art. 40, para. 4; UN Economic and Social Council, resolution 1985/17, operative para. (f) (pertaining to the Committee on Economic, Social and Cultural Rights); Convention on the Elimination of All Forms of Discrimination against Women, Art. 21.1; and Convention on the Rights of the Child, Art. 45(d).

*concluding observations and views adopted on individual communications.”*  
(Emphasis added.)

35. The United States strongly objects to this statement, as it asserts an exceptionally broad, new power for the Committee that the States Parties have not given to the Committee under the Convention. While the Committee’s concluding observations and views on individual communications are deserving of respect and should be considered carefully by States Parties, they do not create legal obligations. Although States Parties to a treaty can agree to establish a third party to render authoritative treaty interpretations or to definitively resolve legal disputes, in this case, no such authorities have been given to the Committee.
36. With respect to the Committee’s concluding observations, the Convention says only that the Committee, after having reviewed the report of a State Party, “may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.” CAT, Article 19, para. 3. With respect to individual communications, the Committee’s competence on this matter depends on whether a State Party has made a declaration pursuant to Article 22. Even in situations in which a State Party has made such declaration -- which the United States has not -- and where the Committee has examined a communication under Article 22, the Convention provides only that “[t]he Committee shall forward its views to the State Party concerned and to the individual.” CAT, Article 22, para. 7. Thus, with respect to both concluding observations and individual communications, the Convention grants no authority to the Committee to issue legally binding views on States Parties’ obligations.
37. Finally, and as a general matter, the United States observes that General Comment 2 is presented in the style of an advisory opinion issued by a juridical body. As discussed throughout these Observations, the General Comment is replete with legal pronouncements, many of which have little or no textual or historical foundation. The United States considers this approach unbefitting of the Committee’s role and reputation as a body charged with assisting and advising States Parties with respect to their implementation of the Convention. Neither does the United States consider the legalistic approach embodied in General Comment 2 to be the most effective means of advancing the objectives of the Convention, namely the prevention of torture and ill-treatment. Having reviewed several hundred reports of States Parties and having considered

numerous individual cases, the Committee is in the unique position of being able to identify the most important themes, patterns, best practices, and lessons learned regarding the prevention of torture and ill-treatment. The United States considers that the Committee, rather than issue conclusory and ill-founded legal pronouncements would be doing a great service by distilling and disseminating such valuable information to the international community.

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38. The United States Government concludes these Observations with a statement of its appreciation for the work of the Committee Against Torture. Although the United States does not agree with a significant number of the Committee's views on the interpretation of the Convention, it fully shares the Committee's absolute opposition to torture and ill-treatment and appreciates the Committee's continuing efforts to advise States Parties on effective means to prevent and punish acts of torture and ill-treatment. The United States looks forward to its continuing dialogue with the Committee on these issues.