
**GIMME SHELTER:
DOES THE UNITED STATES VIOLATE
INTERNATIONAL LAW BY OFFERING
PROTECTION TO CHEN GUANGCHENG AT
THE AMERICAN EMBASSY IN BEIJING?**

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I. INTRODUCTION

In today's complicated world, the distinction between international and domestic issues can be a fine line, and one that States are still in the process of settling.¹ This is especially true for embassies and diplomatic missions, which, among their various duties, must assist with the processing and transportation of refugees.² Furthermore, consuls have in the past provided protection to foreign nationals when such persons have previously been persecuted by their home State.³ But may a State's embassy provide protection to a national of the host State without violating international law?

This question arose in late April of 2012, when Chen Guangcheng escaped from unofficial house arrest in Shandong Province, ultimately seeking protection from American diplomats in Beijing.⁴ The U.S. Embassy sheltered Chen, and the Chinese government condemned the undertaking as violating international law.⁵ However,

1. See EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 461 (3d ed. 2008) (explaining how States direct multiple agencies within foreign States to aid in investment and immigration control in addition to the conveyance of their culture).

2. See generally LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* 107–15 (3d ed. 2008) (presenting an in-depth discussion of consular functions ranging from the protection of nationals to the processing of refugees).

3. See, e.g., Corey Flintoff, *The Current U.S.-China Standoff Has a Precedent*, NPR (Apr. 30, 2012), www.npr.org/2012/04/30/151706572/the-current-u-s-china-standoff-has-a-precedent (referring to Fang Lizhi, who sought protection from the American Embassy in Beijing for over one year after his involvement with the Tiananmen Square protests).

4. *Id.*

5. See *Foreign Ministry Spokesperson Liu Weimin's Remarks on Chen Guangcheng's Entering the U.S. Embassy in China*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (May 2, 2012), <http://www.fmprc.gov.cn/eng/xwfw/s2510/>

China also potentially violated international law by subjecting Chen and his family to torture during his house arrest.⁶

This comment will first discuss the relevant international law applicable in this case, including the Vienna Convention on Diplomatic Relations, the Convention Against Torture, and *jus cogens* norms.⁷ It will then discuss whether China's treatment of Chen constituted a violation of international human rights laws, justifying encroachment into China's internal affairs by the United States.⁸ The comment will conclude that protecting victims of human rights abuses does not amount to interference with the internal affairs of the host state.⁹ Finally, the comment will recommend that the United States clarify its policy regarding Article 41 of the Vienna Convention on Diplomatic Rights and that the Convention Against Torture should include a provision that Article 3 of the Convention applies without geographic limitations.¹⁰

II. BACKGROUND

A. FACTUAL BACKGROUND

Chen, blind since childhood, is a self-taught lawyer from China's rural Shandong province.¹¹ In 2005, Chen filed a class-action lawsuit against officials in his province, accusing them of forcing women to undergo late-term abortions and sterilization under China's one-child

t928382.htm [hereinafter *Remarks on Entering Embassy*] ("The US Embassy in China has the obligation to abide by relevant international laws and Chinese laws, and should not engage in activities irrelevant to its duties.").

6. See Jane Perlez & Andrew Jacobs, *A Car Chase, Secret Talks and Second Thoughts*, N.Y. TIMES, May 2, 2012, www.nytimes.com/2012/05/03/world/asia/a-car-chase-secret-talks-and-second-thoughts.html?_r=1&pagewanted=1&ref=global=home (averring that the Chens were severely beaten when they tried to communicate with the outside world).

7. See discussion *infra* Part II(B)–(D).

8. See discussion *infra* Part III(B) (establishing that officials in China posed a serious threat to Chen's safety that created an obligation for the United States not to return Chen to China).

9. See discussion *infra* Part III(C).

10. See discussion *infra* Part IV (recommending these improvements to prevent comparable occurrences in the future).

11. Sui-Lee Wee, *Blind Chinese Activist's Brother Says Officials Destroyed Abuse Evidence*, REUTERS (June 8, 2012 7:01 AM), <http://www.reuters.com/article/2012/06/08/us-china-dissident-village-idUSBRE8570FP20120608>.

policy.¹² Chen was placed under house arrest beginning in August 2005 and was formally arrested in June 2006 for allegedly disrupting traffic and damaging property.¹³ After serving his four-year sentence, Chen was released from prison in September 2010.¹⁴ Following his release, Chen and his family were placed under house arrest and isolated from the outside world,¹⁵ even though no additional charges were brought against Chen.¹⁶

While under house arrest, Chen and his family were prevented by the local government from communicating with the outside world.¹⁷ Any attempt by Chen or his wife to leave or contact the outside world resulted in beatings from guards hired by local government officials.¹⁸ Moreover, anyone attempting to visit Chen was accosted, beaten, and turned away by the guards.

Chen escaped from house arrest in late April 2012 and sought protection at the American Embassy in Beijing.¹⁹ Once Chen was inside the embassy, American officials negotiated with Chinese Foreign Ministry officials to guarantee his protection should he leave the embassy.²⁰ Since Chen left Shandong province, his remaining

12. *China's Blind Activist Chen Guangcheng*, BBC NEWS (May 19, 2012), www.bbc.co.uk/news/world-asia-17866176.

13. *Id.*

14. Elizabeth M. Lynch, *Slow Killing in Rural China*, CHINA LAW & POLICY (Feb. 29, 2012), <http://chinalawandpolicy.com/2012/02/29/slow-killing-in-rural-china>.

15. *See id.* (describing Chen as “currently under unlawful house arrest with his wife and two small children, guarded 24 hours a day by local thugs, denied access to medical care as well as to all visitors and at times subject to physical abuse”).

16. *See* Perlez & Jacobs, *supra* note 6 (explaining that no charges were pending when the decision was made to turn Chen’s home into a “makeshift prison”); Chen Guangcheng, Op-Ed., *How China Flouts Its Laws*, N.Y. TIMES, May 29, 2012, www.nytimes.com/2012/05/30/opinion/how-china-flouts-its-laws.html (suggesting that Chen was subjected to house arrest without any valid legal basis for the detention).

17. *See* Perlez & Jacobs, *supra* note 6 (“When the Chens broke the rules – by trying to sneak out messages or secretly detailing their mistreatment in a homemade video – they were viciously beaten.”).

18. *See* Erik Eckholm, *Even in New York, China Casts a Shadow*, N.Y. TIMES, June 18, 2012, www.nytimes.com/2012/06/09/world/asia/chen-guangcheng-is-safe-in-new-york-but-thinks-of-china.html?_r=2&hp (describing beatings Chen and his family received from local police).

19. Keith B. Richburg & Steven Mufson, *Chen Guangcheng, Blind Chinese Lawyer-Activist, Escapes House Arrest*, WASH. POST, Apr. 27, 2012, at A8.

20. *See* Perlez & Jacobs, *supra* note 6 (mentioning that Chen chose not to

family members have suffered at the hands of local officials.²¹ Local police beat Chen's brother as well as his brother's family late one night, and Chen's nephew was arrested when he attempted to fight off the intruders.²²

Eventually Chinese and American officials reached an agreement whereby Chen, along with his family, would be allowed to travel to New York City, where he could study law at New York University.²³ Chen and his family left China on May 19, 2012.²⁴ However, the agreement did not stop Chinese officials from condemning the United States' actions, declaring that the United States had violated international law by protecting Chen during his time at the American Embassy.²⁵

After news broke that Chen had escaped house arrest and had sought shelter from the American Embassy in Beijing, the Chinese government wasted little time before publicly protesting. The Chinese spokesperson for the Ministry of Foreign Affairs, Liu Weimen, released several statements in early May accusing the United States of violating international law by meddling in China's internal affairs.²⁶ Although Liu did not explicitly say which

assert an asylum claim in the United States and therefore American officials at first attempted to broker a deal for protection in China).

21. See Eckholm, *supra* note 18 (describing how police "rampaged" through Chen's home, beating those they found there).

22. See *id.* (expounding that his brother's wife now has limited mobility of her right arm due to the beatings); Wee, *supra* note 11 (noting that Chen's nephew now faces homicide charges for resisting officials).

23. Eckholm, *supra* note 18 (noting that Chen's status as a visiting scholar is for an indefinite period of time).

24. *China's Blind Activist*, *supra* note 12.

25. See *Remarks on Entering Embassy*, *supra* note 5 (asserting that the United States violated international law by interfering with China's internal affairs); see also *Foreign Ministry Spokesperson Liu Weimin's Remarks on US Secretary of State Clinton's Public Statement on Chen Guangcheng*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (May 3, 2012), <http://www.fmprc.gov.cn/eng/xwfw/s2510/t928383.htm> (reiterating China's disapproval of the United States' actions) [hereinafter *Remarks on US Secretary of State Clinton's Public Statement*]; Mo Nong, *US Violates International Law*, CHINA DAILY (May 7, 2012), www.chinadaily.com.cn/cndy/2012-05/07/content_15221189.htm ("If the US government follows international laws and the basic norms of relations among nations, it does not have the right to make any demands on the Chinese government. . . . It has broken international laws and Chinese laws and interfered in China's internal affairs.").

26. See *Remarks on Entering Embassy*, *supra* note 5; *Remarks on US Secretary*

international law the United States had violated, the fact that the statement refers to interference in internal affairs suggests Liu was referencing Article 41 of the Vienna Convention on Diplomatic Relations.²⁷ Because Chen is a Chinese citizen, the Chinese government asserts that the American Embassy has no interest in protecting him and has instead engaged “in activities irrelevant to its duties.”²⁸ The Chinese government believes that, as Chen was being handled by local Chinese officials, the situation was outside any of the United States’ diplomatic duties and constituted an interference that was motivated by non-diplomatic reasons.²⁹

In China it is common for the government to physically abuse and torture political and legal activists.³⁰ Additionally, political dissidents receive exceptionally savage mistreatment compared with the average prisoner.³¹ Those who speak out against China’s one-child policy are often granted asylum in the United States because the risk of torture is so severe.³² The United States has even protected

of State Clinton’s Public Statement, supra note 25.

27. See Vienna Convention on Diplomatic Relations art. 41(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention] (“Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.”); see also Julian Ku, *Who Violated International Law in the Chen Case: The U.S. or China?*, OPINIO JURIS (May 3, 2012 3:24 AM), opiniojuris.org/2015/05/03/who-violated-international-law-in-the-chen-case-the-u-s-or-china/ (stating that China probably considered the United States’ actions to violate Article 41 of the Vienna Convention on Diplomatic Relations).

28. *Remarks on Entering Embassy, supra note 5.*

29. See, e.g., Nong, *supra note 25* (alleging that, from a Chinese perspective, the United States’ aid to Chen and interference with China’s internal affairs hinders China’s development).

30. See XIAOBING LI, CIVIL LIBERTIES IN CHINA 120–21 (2010) (asserting that in 2006 “at least 930 cases of police torture took place”); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: CHINA 3 (2011) [hereinafter STATE DEPARTMENT CHINA REPORT], available at <http://www.state.gov/documents/organization/186478.pdf> (affirming that activists continue to suffer official harassment).

31. STATE DEPARTMENT CHINA REPORT, *supra note 30*, at 4 (reporting that political and religious prisoners were subject to tortuous treatment that was particularly harsh compared to that of ordinary prisoners).

32. See, e.g., Cao v. Att’y Gen. of the United States, 407 F.3d 146, 150, 161 (3d Cir. 2005) (granting review of the denial of asylum to protect the applicant from repercussions for exposing abhorrent abortion and infanticide practices in

political activists inside the American Embassy before, just as it did for Chen.³³

B. VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The purpose of the Vienna Convention on Diplomatic Relations is to create a set of rules to govern the interaction between diplomatic missions and sovereign States.³⁴ Most States, including both the United States and China, have ratified this treaty.³⁵ Article 41(1) requires States to both respect the laws of the host State and not interfere with the host State's internal affairs.³⁶

Although few cases have interpreted this particular section, the International Court of Justice has stated that the purpose of this article was to prevent embassy staff from engaging in actions that were an abuse of an embassy's functions, such as espionage.³⁷ Article 41(1) places the obligation of non-interference in internal affairs closely to the obligation to respect the receiving State's laws, making the article difficult to interpret and leading to multiple disagreements over whether conduct constituted interference in internal affairs.³⁸

However, commentary on Article 41 suggests that the rule was formulated to restrict a diplomat's personal comments and activities, executed on his or her own without direction from the embassy.³⁹

Chinese hospitals to a Hong Kong reporter).

33. See Flintoff, *supra* note 3 (referring to the case of Fang Lizhi, an astrophysicist whose writings prompted the Tiananmen Square protests in 1989).

34. See Vienna Convention, *supra* note 27, pmbl.

35. See BARRY E. CARTER, INTERNATIONAL LAW: SELECTED DOCUMENTS 345 (2009–2010 ed. 2009) (listing the multitude of States that have signed the Vienna Convention on Diplomatic Relations, including the United States and China).

36. Vienna Convention, *supra* note 27, art. 41(1).

37. See U.S. Diplomatic Relations and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, 84 (May 24) (revealing that Article 41 was included to ensure that diplomatic missions are not used in ways that are contradictory to diplomatic purposes).

38. See, e.g., DENZA, *supra* note 1, at 466 (recounting a disagreement between the United Kingdom and Burma in which the Burmese government accused the British of meddling in internal affairs because the British Ambassador attempted to visit opposition leader Aung Suu Kyi).

39. *Id.* at 464. But see Curtis J. Milhaupt, *The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards a Principled Interpretation*, 88 COLUM. L. REV. 841, 847 (1998) (disputing such an interpretation and noting that some approach Article 41 as applicable to any

Conflicts have often arisen between a host State's desire to be free from interference in its internal affairs and another State's desire to promote human rights.⁴⁰

C. CONVENTION AGAINST TORTURE AND NONREFOULEMENT

The United Nations General Assembly adopted the Convention Against Torture in 1984, and the Convention went into effect in 1987.⁴¹ The first article in the Convention Against Torture⁴² states that torture may be committed by inflicting pain on a person, or a third person, with the purpose of obtaining information from, punishing, or intimidating the person.⁴³ Arbitrary detention can be considered a form of torture.⁴⁴

The U.S. Court of Appeals for the Ninth Circuit interpreted the definition of torture in *Bromfield v. Mukasey*,⁴⁵ a case involving a Jamaican national plaintiff who claimed he could not be returned to Jamaica because of the violence against homosexuals that he would be subject to there.⁴⁶ The Ninth Circuit held that beatings and killings

activity that "adversely affects the interests of the receiving State or its nationals").

40. DENZA, *supra* note 1, at 465–66; *see also* LEE & QUIGLEY, *supra* note 2, at 77 ("Diplomats and consuls have on occasion assisted receiving State nationals whose human rights may have been violated by the receiving State. Receiving States have at times objected to such activity as interference in their internal affairs.").

41. HANS DANIELIUS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 1 (2008), *available at* http://untreaty.un.org/cod/avl/pdf/ha/catcidtp/catcidtp_e.pdf.

42. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] ("[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.").

43. *Id.*; *accord* 8 C.F.R. § 1208.18 (2012) (codifying obligations under the Convention Against Torture in U.S. domestic law).

44. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995) (recognizing that arbitrary detention is a violation of international law equal to torture, summary executions, and disappearance).

45. 543 F.3d 1071 (9th Cir. 2008).

46. *Id.* at 1073.

constitute acts of torture.⁴⁷ Additionally, it is not necessary to demonstrate that the government will torture the individual, but merely that the government acquiesced or was willfully blind to the performance of torture.⁴⁸ In *Bromfield*, the court found that sufficient evidence existed to demonstrate that the Jamaican government acquiesced to the torture of homosexuals, and remanded the case to determine if the plaintiff would more likely than not be tortured on his return.⁴⁹

The fact that an individual may be unable to assert an asylum claim under United States law does not necessarily bar that individual from relief under the Convention Against Torture.⁵⁰ In addition to preventing torture, the Convention Against Torture also forbids a State from expelling, returning, or extraditing a person to another state if there is a substantial danger that the person would be tortured on his return.⁵¹ This is otherwise known as nonrefoulement, a principle also established in the Refugee Convention.⁵² Article 33 of the Refugee Convention prohibits member States from expelling or returning a refugee to a place where his or her freedom or life is threatened due to race, religion,

47. *Id.* at 1079 (citing *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004)); *accord* *Al-Saher v. INS*, 268 F.3d 1143, 1147–48 (9th Cir. 2001) (holding that Al-Saher was entitled to relief under the Convention Against Torture because the sustained and severe beatings he suffered constituted torture).

48. *Bromfield*, 543 F.3d at 1079; *accord* *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) (“It is enough that public officials could have inferred torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.”).

49. *Bromfield*, 543 F.3d at 1079 (referencing the criminalization of homosexual conduct, the lack of investigation by police into abuse of gay men, and the Country Report showing that gay men are often beaten and killed as the evidence relied on by the court).

50. *See* *Kamalhas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001) (stating that “claims for relief under the Convention are analytically separate for claims of asylum”); *see also* Richard P. Shafer, *Construction and Application of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. FED. 385, § 2 (2003) (detailing authority which holds that the inability to state an asylum claim does not necessarily preclude relief).

51. Convention Against Torture, *supra* note 42, art. 3(1).

52. GUY S. GOODWIN-GILL, CONVENTION RELATING TO THE STATUS OF REFUGEES PROTOCOL RELATING TO THE STATUS OF REFUGEES 4 (2008), available at http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf.

nationality, or membership in a political or social group.⁵³

An important factor to be considered when determining whether there is a risk of torture upon return includes the occurrence of torture in the recent past.⁵⁴ A pattern of mass human rights violations will be considered but that alone is not enough to prove a risk of torture, although the Committee will look at all relevant considerations.⁵⁵ There must be additional grounds to show that the specific individual was at risk for torture on his or her return other than only a pattern of mass violations.⁵⁶

The Inter-American Commission on Human Rights addressed the principle of nonrefoulement in *Haitian Interdiction v. United States*.⁵⁷ In this case, the petitioners claimed that the United States had been intercepting Haitian refugees (“boat people”) and returning them to Haiti where they regularly faced a severe threat of abuse from the Haitian military.⁵⁸ The petitioners demonstrated that military authorities burned down hundreds of houses belonging to activists and supporters of opposing factions.⁵⁹ Once the United States Coast Guard seized the refugees, they were handed over to Haitian immigration authorities where the Haitian military

53. See Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention] (“No 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.”).

54. See Rep. of the Comm. Against Torture, *A.R. v. Neth.*, Communication No. 203/2002, U.N. Doc. A/59/44, at 252 (Nov. 14, 2003) (holding that the complainant, who was previously tortured twenty years beforehand, did not show a violation of the Convention when the time lapse increased the probability that conditions in the receiving State had drastically changed).

55. See Rep. of the Comm. Against Torture, *Bachan Singh Sogi v. Can.*, Communication No. 297/2006, U.N. Doc. A/63/44, at 234 (Nov. 16, 2007) (explaining that when evaluating the risk of torture, “the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights”).

56. See Rep. of the Comm. Against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Swed.*, Communication No. 233/2003, U.N. Doc. A/60/44, at 227 (May 20, 2005) (“[A]dditional grounds must exist to show that the individual concerned was personally at risk.”).

57. Case 10.675, *Inter-Am. Comm’n H.R.*, Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997).

58. *Id.* ¶¶ 2–3.

59. *Id.* ¶¶ 25, 39–41.

interrogated and threatened them.⁶⁰

The petitioners in *Haitian Interdiction* argued that the United States violated customary international law, which prohibits the return of refugees to their home country when they would face persecution or a threat against their life if returned.⁶¹ The United States responded by arguing that Article 33 of the Refugee Convention was a narrow duty that only applied to refugees who had already reached the territory of the contracting State.⁶² The Commission did not agree with the United States, instead holding that “Article 33 ha[s] no geographical limitations.”⁶³

D. *JUS COGENS* NORMS AND HUMAN RIGHTS

Jus cogens norms are principles of international law that are acknowledged by the international community to be of such vital importance that no derogation will be tolerated.⁶⁴ *Jus cogens* norms are at the top of a normative hierarchy, meaning that these norms override treaties, persistent objections, or claims of extenuating circumstances.⁶⁵ States have an interest in human rights violations regardless of where the offense occurs because the obligation to prevent human rights abuses runs to all States.⁶⁶ Diplomatic missions

60. See *id.* ¶¶ 26–27 (submitting evidence that the returnees “were asked why they left Haiti, and were verbally abused by the police,” who periodically “threatened to imprison and kill them”).

61. *Id.* ¶ 3.

62. *Id.* ¶ 71. *Contra* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 25 I.L.M. 543, 115 U.N.T.S. 331 (proclaiming that a State cannot engage in behavior that undermines the purpose of a treaty).

63. *Haitian Interdiction*, Case 10.675 ¶¶ 157, 171 (stating that the United State’s “act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security of the Haitian refugees”).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) [hereinafter RESTATEMENT OF U.S. FOREIGN RELATIONS LAW]; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1996 I.C.J. 595, 765 (July 11) (Kreca, J., dissenting) (affirming that a State may intercede when a human rights violation occurs even if the violation does not concern a national of the State).

65. BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER* 264 (2011).

66. See RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 703

are increasingly concerned with working to preserve human rights for non-nationals.⁶⁷

Similarly, the Inter-American Commission on Human Rights held in *Domingues v. United States* that an American State's law that subjects juveniles to the death penalty does not supersede human rights treaties preventing such punishment.⁶⁸ Domingues, the petitioner, was convicted of two murders and sentenced to death in Nevada.⁶⁹ Domingues was only sixteen years old when he committed the crimes.⁷⁰ Domingues claimed the United States violated a *jus cogens* norm forbidding juvenile offenders from being executed, breaching Article 1 of the American Declaration of the Rights and Duties of Man.⁷¹ To prove a *jus cogens* norm existed, Dominquez relied on various treaties and conventions that forbid the execution of criminal offenders under eighteen years of age.⁷²

cmt. a ("Unless the human rights agreement provides or clearly implies otherwise, the ordinary remedies are available to any state party against a state party violating the agreement, even if the violation did not affect nationals of the claimant state party or any other particular interest of that state."); *see also* ANTONIO CASSESE, INTERNATIONAL LAW 394–95 (2d ed. 2005) (suggesting that human rights violations create community obligations, meaning that any action to correct human rights abuses is exercised on behalf of the entire international community).

67. *See* LEE & QUIGLEY, *supra* note 2, at 208–09 ("These principles would seem to cover the right of a sending State, through its diplomatic and consular personnel, to take a variety of measures in regard to the rights of persons regardless of nationality, over and against an objection by the receiving State that the action is an unlawful interference in its internal affairs").

68. *Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 85 (2002).

69. *Id.* ¶¶ 1–2.

70. *Id.* ¶ 2.

71. *Id.* ¶ 3 (claiming that the United States violated the treaty by failing to prevent the State of Nevada from executing juveniles); *see also* American Declaration of the Rights and Duties of Man art. 1, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30–May 2, 1948, at 38; *reprinted in* Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979) ("Every human being has the right to life, liberty and the security of his person.").

72. *Domingues*, Case 12.285, ¶ 19 (citing, *inter alia*, the Convention on the Rights of the Child art. 37(1), Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3 (preventing execution of those under 18; ratified by 189 of the 191 countries in the United Nations) and the International Covenant on Civil and Political Rights art. 6(5), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (forbidding minors from being executed; ratified by the United States in 1992)).

The Commission found that ratification of treaties since 1987 showed sufficient widespread agreement to constitute a norm disallowing the execution of persons under the age of eighteen.⁷³ In conclusion, the Commission stated that the United States “acted contrary to international norms of *jus cogens* . . . by sentencing Michael Domingues to the death penalty for crimes that he committed when he was 16 years of age.”⁷⁴ Although the United States argued that they were not bound by the norm because of the United States’ persistent objections,⁷⁵ the Commission rejected this argument, holding that a *jus cogens* norm “cannot be validly derogated from, whether by treaty or by objection of a State, persistent or otherwise.”⁷⁶

When a State violates its human rights obligations, any other State may pursue remedies against the violator.⁷⁷ The International Court of Justice has held that States are bound by customary international law not to torture.⁷⁸ For example, the Court ruled that Uganda’s torture of civilians in the Congo, among other atrocities, violated international law.⁷⁹ Torture and prolonged arbitrary detention constitute human rights violations that are prohibited by *jus cogens* norms.⁸⁰

73. *Domingues*, Case 12.285, ¶ 68 (mentioning the acceptance by nearly all States of treaties prohibiting execution of juveniles).

74. *Id.* ¶ 112.

75. *See id.* ¶ 101 (“[T]he United States contends that it has consistently asserted its right to execute juvenile offenders, by making reservations to treaties, filing briefs before national and international tribunals, and making public statements . . .”).

76. *Id.* ¶ 85.

77. RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 703(2), cmt. b (stating that these obligations apply even if the victims are not nationals of the enforcing State and do not affect the enforcing State’s interests).

78. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 80 (Dec. 19) (holding that obligations under international humanitarian law and human rights law not to torture “are binding on the Parties as customary international law”).

79. *Id.* at 77 (concluding that UPDF troops committed “torture and other forms of inhumane treatment of the civilian population . . . and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories”).

80. *See Bromfield v. Mukasey*, 543 F.3d 1071, 1080 (9th Cir. 2008) (affirming that beatings and killings constitute torture); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (stating that torture and arbitrary detention “constitute fully recognizable violations of international law”); *Al-Adsani v. United Kingdom*,

III. ANALYSIS

A. CHINA IS GUILTY OF HUMAN RIGHTS VIOLATIONS BECAUSE ITS TREATMENT OF CHEN AND OTHER POLITICAL ACTIVISTS CONSTITUTES TORTURE UNDER INTERNATIONAL LAW

The Chinese officials' treatment of Chen⁸¹ satisfies the plain meaning of torture under Article 1 of the Convention Against Torture.⁸² To be considered torture, the pain or suffering experienced must be severe and intentionally inflicted.⁸³ Finally, the physical pain inflicted cannot be torture without an accompanying motivation or acquiescence of the government or a public official.⁸⁴

China's treatment of Chen meets the element of pain and suffering. In Chen's case, he was kept under house arrest even though there were no charges against him at that time,⁸⁵ which is a form of mental suffering because he was not allowed to go about his daily life.⁸⁶ In addition, Chen and his wife were physically beaten when they attempted to leave or contact the outside world during their detention.⁸⁷ Visitors to Chen's home were often turned away and harassed in an attempt to intimidate Chen and further increase his isolation and mental anguish.⁸⁸ Furthermore, Chinese officials retaliated against Chen after his escape by both assaulting his

34 Eur. H.R. Rep. 11, 275 (2002) (asserting that "the prohibition against torture has achieved the status of a preemptory norm in international law").

81. See discussion *supra* Part II(A) (discussing the Chinese government's behavior toward Chen).

82. See DANELIUS, *supra* note 41, at 141 (explaining that the definition of torture as set out in the Convention Against Torture is more "elaborate" and "complex" than previous definitions); see also STATE DEPARTMENT CHINA REPORT, *supra* note 30, at 2–8 (reporting on the regular torture and detention of individuals to prevent the expression of opposing viewpoints).

83. Convention Against Torture, *supra* note 42, art. 1(1); see also discussion *supra* Part II(C) (delineating the requirements for an act to constitute torture).

84. Convention Against Torture, *supra* note 42, art. 1(1).

85. Perlez & Jacobs, *supra* note 6 (recounting that Chen had been held captive in his home since his release from jail in September 2010).

86. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995) (recognizing that arbitrary detention is a violation of international law equal to torture, summary executions, and disappearance).

87. *Id.*; Chen, *supra* note 16.

88. See Lynch, *supra* note 14 (reporting that 100 guards and 2 cellphone jammers were employed to keep Chen isolated from the world).

brother's family and attacking his brother's home.⁸⁹

Not only did China inflict pain and suffering on Chen, but the level at which they did so is sufficiently severe to constitute torture.⁹⁰ The local Chinese officials intentionally inflicted this pain and suffering on Chen by beating him and his family in an attempt to control Chen's behavior and to persecute him for his activism.⁹¹ The pain is factually severe because the security officers also inflicted brutal attacks on Chen's visitors and family in addition to confining his family.⁹²

Chen's abuse satisfies one essential element of torture; therefore, the analysis may proceed to address the element of coercion.⁹³ Under the Convention Against Torture, to be considered torture, government action must be undertaken in an effort to intimidate or coerce the victim.⁹⁴ In this case, China's motivations were to pressure Chen to discontinue his efforts at political and legal activism.⁹⁵ In 2005, Chen filed a class-action lawsuit against Chinese officials for imposing the one-child population law through forced, late-term abortions and sterilization.⁹⁶ Chen's defiant actions angered

89. Chen, *supra* note 16.

90. *Cf.* Cao v. Att'y Gen. of the United States, 407 F.3d 146, 150, 154 (3d Cir. 2005) (determining that in the plaintiff's case, beatings administered by public security officers and other prisoners during an interrogation amounted to torture).

91. *See* Bromfield v. Mukasey, 543 F.3d 1071, 1076–77 (9th Cir. 2008) (differentiating between random violence and persecution because of a person's protected status).

92. *Cf.* Rep. of the Comm. Against Torture, Ahmed Hussein Mustafa Kamil Agiza v. Swed., Communication No. 233/2003, U.N. Doc. A/60/44, at 198, ¶ 2.4 (May 20, 2005) (detailing how the petitioner's "wife contended that, if returned she would be detained for many years as the complainant's wife" which was taken into consideration when determining their status under the principle of nonrefoulement).

93. *See* CAROL BOHMER & AMY SHUMAN, REJECTING REFUGEES: POLITICAL ASYLUM IN THE 21ST CENTURY 205 (2008) ("In fact the U.S. law, which expressively makes objection to coercive population control a basis for asylum (like the one-child policy in China), counts this as persecution based on political opinion.").

94. Convention Against Torture, *supra* note 42, art. 1(1); *see also* Omelas-Chavez v. Gonzales, 458 F.3d 1052, 1060 (9th Cir. 2006) (noting that the motivation requirement of torture may also be satisfied by willful blindness).

95. *See* LI, *supra* note 30, at 44–45 (affirming that Chinese authorities harass and torture political and legal activists to restrict their expression on divergent opinions).

96. Richburg & Mufson, *supra* note 19.

the Chinese government.⁹⁷ Since Chen filed suit, Chinese officials have persecuted and imprisoned Chen, charging him with trumped-up charges to silence his criticism of the Chinese government.⁹⁸

The fact that the Chinese officials originally jailed Chen as a response to his legal activism shows a clear intent to punish Chen for opposing Chinese policy.⁹⁹ Furthermore, that Chen was held under house arrest and repeatedly beaten, shows an organized effort to maintain his punishment.¹⁰⁰ Chen had done nothing new to warrant punishment, evidenced by China's failure to file new charges against Chen, which further demonstrates that Chinese officials sought to continue constraining Chen's speech and activity.¹⁰¹

The final requirement for these acts to be considered torture is that they must be committed by someone in an official capacity.¹⁰² In addition to satisfying the previous elements under the Convention Against Torture, Chen's treatment constitutes torture because local officials conducted the abuse. Chen was held under house arrest and beaten by plain-clothed guards hired by local government officials.¹⁰³ Reports indicate that high-level Chinese government officials did not directly participate, and instead local security guards instigated and acquiesced to the torture;¹⁰⁴ this, however, does not preclude a claim

97. See Eckholm, *supra* note 18 (describing widespread acceptance that charges were filed against Chen in 2006 simply because he brought class-action lawsuits against forced abortion policies).

98. See Richburg & Mufson, *supra* note 19 (describing Chen's trial on obstructing traffic charges as a sham that has been largely discredited).

99. See *China's Blind Activist Chen Guangcheng*, *supra* note 12 (affirming that many believe the Chinese government brought charges against Chen simply to silence him).

100. See Lynch, *supra* note 14 (quoting Professor Jerome A. Cohen, a Chinese legal scholar, as saying "[t]his cruel, slow killing seems to be the only way the Party can think of to rid itself of a courageous critic without having him appear to die in its custody").

101. See *id.* ("Lacking any legal basis under Chinese law and in contravention to multiple international treaties, since his 'release,' Chen and his wife have not been able to leave their home.").

102. Convention Against Torture, *supra* note 42, art. 1(1); see also *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (explaining that those in an official capacity need only be willfully blind to the torture).

103. Perlez & Jacobs, *supra* note 6.

104. See *China's Blind Activist Chen Guangcheng*, *supra* note 12 (stating analysts believe that local security was "apparently acting outside the law but with the authorities' approval").

of torture.¹⁰⁵

Even if Chinese government officials did not direct the local officials to torture Chen, his harsh treatment was well documented by human rights organizations and media throughout the world, making it difficult to believe that high-level officials were unaware of the abuse.¹⁰⁶ In addition, the international community condemned China's treatment of Chen in Shandong province, with prominent international figures calling for investigation into the matter.¹⁰⁷ The massive coverage of Chen's circumstances was enough to put China on notice that local officials were conducting torture, yet still China did nothing to remedy the situation or even inquire into the allegations.¹⁰⁸ The Chinese government was at least willfully blind to the torture of Chen by local officials, even though they did not carry out the torture themselves.¹⁰⁹ Moreover, Chinese officials have not objected to claims that local officials tortured Chen nor have they condemned such actions, suggesting tacit approval of the local

105. See Convention Against Torture, *supra* note 42, art. 1 (articulating that torture can be found where there is "acquiescence of a public official").

106. See Richburg & Mufson, *supra* note 19 (referencing several groups monitoring Chen's detention, including the Center on U.S.-China Relations at the Asia Society, Amnesty International, Human Rights Watch, and the Chinese community website Boxun.com); *China's Blind Activist Chen Guangcheng*, *supra* note 12 (reporting on politicians who voiced concern for Chen, such as Secretary of State Hillary Clinton).

107. See *Clinton Presses China on Human Rights Before Hu's Visit*, CHANNEL NEWS ASIA (Jan. 15, 2011), www.channelnewsasia.com/stories/afp_world/view/1104813/1.html (detailing how Secretary of State Clinton urged China to release numerous dissidents, including Chen, before a State visit by Hu Jintao).

108. See Chen, *supra* note 16 (recounting how Chen asked the Chinese government to investigate the abuse, though Chinese officials have done nothing); see also *Political Prisoners in China: Trends and Implications for U.S. Policy Before the Congressional-Executive Commission on China*, 112th Cong. (2010) (statement of Jerome A. Cohen, Professor of Law & Co-Director, US-Asia Law Institute New York University), available at www.cecc.gov/pages/hearings/2010/20100803/statement2.php (testifying that political dissidents are often harassed by police and detained after serving their sentences, suggesting that Chinese officials have knowledge of these practices).

109. See ROBERT MCCORQUODALE, *Impact of Human Rights on State Responsibility*, in INTERNATIONAL LAW BEYOND THE STATE: ESSAYS ON SOVEREIGNTY, NON-STATE ACTORS AND HUMAN RIGHTS 367, 371-72 (2011) (stating that the International Law Commission considers acts committed by any division or agency of the State to be conduct attributable to that State, especially in cases of human rights violations such as torture).

officials' conduct.¹¹⁰

The local officials' maltreatment of Chen is in line with the systematic handling of legal activists in China, further supporting the claim that the Chinese government either knew about or implicitly endorsed the use of torture.¹¹¹ Lawyers in China are often subjected to violence, including the physical assault of lawyers attempting to conduct court business.¹¹² Such actions, like in Chen's case, amount to torture as government officials inflict this physical pain on lawyers¹¹³ to intimidate them to behave in a certain way.¹¹⁴ This evidence shows a generalized tendency of China to violate prohibitions against torture.¹¹⁵ Therefore, because local Chinese officials caused Chen to physically suffer through beatings intended to punish Chen for his past actions and to intimidate him into ceasing his activism in the future,¹¹⁶ the Chinese government's conduct toward Chen amounts to torture.¹¹⁷ Torture is a human rights violation¹¹⁸ and, consequently, a violation of international law.

110. See *Remarks on Entering Embassy*, *supra* note 5 (failing to object to the claim that Chinese officials beat Chen while he was under house arrest).

111. E.g., Thomas Lum & Hannah Fischer, *Human Rights in China: Trends and Policy Implications*, in HUMAN RIGHTS IN CHINA 21 (Lee R. Massingdale ed., 2009) ("Many human rights and defense lawyers have been harassed by officials or beaten by plain-clothes agents of local State agencies or economic interests.").

112. HUMAN RIGHTS WATCH, WALKING ON THIN ICE: CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 41 (2008), available at http://www.hrw.org/sites/default/files/reports/china0408_1.pdf.

113. See *id.* at 44 (detailing how court officials physically assaulted a lawyer who attempted to file a complaint with the court).

114. See Lum & Fischer, *supra* note 111, at 22 ("Lawyers who had publicly offered to defend Tibetan protesters in 2008 were warned not to get involved or they would face disciplinary action.").

115. See *id.* at 20 ("The [S]tate [of China] still wields disproportionate power against citizens and legal activists and continues to interpret the law arbitrarily in many cases.").

116. See MCCORQUODALE, *supra* note 109, at 371–72 (supporting that acts committed by local government officials are still attributable to the State in torture cases).

117. See *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (providing an analytical framework that demonstrates it is sufficient that there was acquiescence on the part of the Chinese government to the treatment of Chen to constitute torture).

118. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 80–81, 116 (Dec. 19) (ruling by a vote of sixteen to one that torture and other abuses conducted by the Republic of Uganda constituted a violation of "its obligation under international human rights law and international

Therefore, China's torture of Chen is both a human rights violation and a violation of international law.

B. THE UNITED STATES IS PROHIBITED FROM FORCIBLY
RETURNING CHEN TO CHINA BECAUSE THERE IS SUFFICIENT
REASON TO BELIEVE CHEN WILL BE SUBJECT TO TORTURE ON HIS
RELEASE FROM THE AMERICAN EMBASSY IN BEIJING

Article 3 of the Convention Against Torture forbids the United States, under the doctrine of nonrefoulement, from returning Chen to China.¹¹⁹ Nonrefoulement prohibits a State from returning an individual to another State where that person is at risk to be tortured.¹²⁰ To determine whether a person is at substantial risk of torture, the sending State must consider both specific and generalized tendencies of the receiving State to use torture.¹²¹ Chen's case satisfies both of these conditions.

China's practices concerning prisoners and detainees demonstrate a significant risk of torture for legal activists like Chen in China. China has a lengthy record of torturing activists like Chen, showing a generalized tendency to engage in torture.¹²² According to the U.S. State Department, China often utilizes "extralegal measures" to intimidate and coerce public interest lawyers and political activists.¹²³

humanitarian law").

119. See Rep. of the Comm. Against Torture, *Bachan Singh Sogi v. Can.*, Communication No. 297/2006, U.N. Doc. A/63/44, at 224 (Nov. 16, 2007) (noting that, if a complainant establishes a substantial risk of torture in his country of origin, the complainant cannot be returned there); see also *Bromfield*, 543 F.3d at 1079 (supporting that courts and tribunals often rely on country reports to establish evidence of an individual's risk of torture or persecution in his or her home State).

120. Convention Against Torture, *supra* note 42, art. 3.

121. See Rep. of the Comm. Against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Swed.*, Communication No. 233/2003, U.N. Doc. A/60/44, at 227 (May 20, 2005) (explaining both particularized and generalized tendencies are required because the existence of one does not necessitate the existence of the other).

122. See LI, *supra* note 30, at 120–22 (highlighting how, although physical abuse of prisoners and detainees is prohibited, torture regularly occurs in China).

123. See, e.g., STATE DEPARTMENT CHINA REPORT, *supra* note 30, at 4 (documenting how Jiang Tianyoung, a lawyer in China, was beaten for two nights although he was ultimately never charged with anything); see also LI, *supra* note 30, at 121–22 (detailing how security guards beat a recent college graduate for failing to carry the proper identification card). But see *China Hits Back on U.S. Human Rights*, CNN (May 25, 2012), articles.cnn.com/2012-05-25/asia_china-us-human-rights_1_human-rights-china-hits-annual-report?_s=PM:ASIA (reporting

Additionally, the risk of torture in China of activists and dissidents is well-documented in asylum cases and claims for other relief brought in American courts under the Convention Against Torture.¹²⁴ Therefore, China's generalized tendencies and practices show that Chen, as a lawyer and activist, faces a substantial risk that he will be tortured on his return.¹²⁵

Similarly, the particularized actions of local officials toward Chen establish that, once he was returned to China from the U.S. Embassy, he faced an exceptional risk of torture. Specifically, Chen and his family were subjected to torture through beatings and arbitrary house arrest.¹²⁶ These instances occurred just days and weeks before he sought protection from the American Embassy.¹²⁷ Furthermore, these actions of abuse against Chen were not part of his previous sentence, which was already completed when he was put under house arrest.¹²⁸ Thus, there is substantial risk that Chen's torture will continue on his return to China as it occurred repeatedly until he sought refuge in the U.S. Embassy.

Historically, nonrefoulement under the Convention Against Torture is applied in cases where the individual is within the territory

Chinese criticism of the State Department's report and claim that "[t]he United States' tarnished human rights record has left it in no state to act as the world's 'human rights justice'").

124. *See, e.g.*, *Cao v. Att'y Gen. of the United States*, 407 F.3d 146, 156, 161 (3d Cir. 2005) (finding a severe enough risk of torture to prevent repatriation).

125. *See* STATE DEPARTMENT CHINA REPORT, *supra* note 30, at 3–4 (noting that although rules of evidence ban the use of information gathered through torture, there are many reports of former prisoners and detainees, especially political and religious dissidents, being tortured).

126. *Cf.* Rep. of the Comm. Against Torture, *Bachan Singh Sogi v. Can.*, Communication No. 297/2006, U.N. Doc. A/63/44, at 235 (Nov. 16, 2007) (finding removal of an Indian national from Canada violated the Convention Against Torture because there was sufficient specific evidence that the national would be tortured upon return to India for his alleged participation in a terrorist organization).

127. *See* Rep. of the Comm. Against Torture, *A.R. v. Neth.*, Communication No. 203/2002, U.N. Doc. A/59/44, at 247–53 (Nov. 14, 2003) (articulating the requirement that acts showing specific tendencies must not have occurred too long before seeking refuge).

128. *See* Convention Against Torture, *supra* note 42, art. 1 (establishing that the Convention does not apply to "pain or suffering arising only from, inherent in or incidental to lawful sanctions").

of the State where they are seeking shelter.¹²⁹ The fact that Chen was not actually within the borders of the United States, but in an American Embassy in his home State, does not undermine the United States' duty to him because nonrefoulement has no geographic limitation.¹³⁰ Although no cases have addressed nonrefoulement under the Convention Against Torture, its language is sufficiently similar to nonrefoulement under the Refugee Convention¹³¹ that the ruling in *Haitian Interdiction* is arguably applicable.¹³²

Under the *Haitian Interdiction* holding, nonrefoulement applies regardless of the protected individual's geographic location. Indeed, Article 5 of the Convention Against Torture suggests that universal jurisdiction applies in torture cases, consistent with the holding in the *Haitian Interdiction* case.¹³³ Additionally, given the intent of the Convention Against Torture is to prevent inhumane and degrading treatment,¹³⁴ returning an individual to a risk of torture just because

129. See Rep. of the Comm. Against Torture, Ahmed Hussein Mustafa Kamil Agiza v. Swed., Communication No. 233/2003, U.N. Doc. A/60/44, at 227 (May 20, 2005) (regarding a complainant who was returned to Egypt by Sweden after seeking asylum in Stockholm).

130. See *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. ¶¶ 71, 157 (1997) (discussing the extension of the nonrefoulement duty under the Refugee Convention regardless of geographic location).

131. Compare Convention Against Torture, *supra* note 42, art. 3(1) (stating 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 subjected to torture"), with Refugee Convention, *supra* note 53, art. 33 (declaring that "[n]o Contracting State shall expel or return 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").

132. See *Haitian Interdiction*, Case 10.675, ¶¶ 71, 88 (indicating that a State breaches its duty under customary international law and Article 33 of the Refugee Convention when it returns a person to a place where he or she faces persecution).

133. Convention Against Torture, *supra* note 42, art. 5(2) ("Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences [of torture] in cases where the alleged offender is present in any territory under its jurisdiction . . .").

134. See DANIELIUS, *supra* note 41, at 1–2 (recounting that the "General Assembly specifically requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Torture Declaration").

he or she was apprehended outside the territorial borders of a nation would defeat the purpose of the Convention.¹³⁵ Thus, being under the authority of a State imposes obligations on the State not to frustrate the purpose of a treaty on a technicality.¹³⁶ In addition, it does not matter that Chen did not seek asylum or refugee status when he reached the American embassy, because nonrefoulement, as imposed under the Convention Against Torture, does not require that the individual be a refugee or asylum-seeker.¹³⁷

Instead of forbidding the United States from taking action, international law actually imposes a duty on the United States to take measures to shelter Chen.¹³⁸ The basic tenets of nonrefoulement prohibit the return of an individual to a State where he or she is at risk of torture, and because Chen is at substantial risk of torture in China, the United States cannot return him there. The Chinese government has shown both generalized and specific tendencies that make it likely that Chen will be tortured on his return to China.¹³⁹ It does not matter that Chen entered American protection outside of U.S. territory because nonrefoulement has no territorial limitations.¹⁴⁰ Since both Article 5 of the Convention

135. See Vienna Convention on the Law of Treaties, *supra* note 62, art. 18, (declaring that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty”); see also Brief of the Office of the United Nations High Commissioner for Refugees as Amici Curiae Supporting Appellees, *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1, 11 (11th Cir. 1992) (No. 91-6060), available at <http://www.unhcr.org/refworld/publisher,UNHCR,AMICUS,HTI,4b03cd4c2,0.html>1992) (arguing that denying individuals seized outside U.S. territory nonrefoulement protection defeats the purpose of the Refugee Convention).

136. See Vienna Convention on the Law of Treaties, *supra* note 62, art. 18 (emphasizing that a State that has expressed its consent to be bound by a treaty is obligated to refrain from acts that would defeat the object of the treaty).

137. See *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001) (holding a claimant may obtain relief under the Convention Against Torture in American law even if the claimant cannot assert an asylum claim).

138. See Convention Against Torture, *supra* note 42, art. 5 (extending universal jurisdiction to torture cases regardless of territory or nationality).

139. See, e.g., *Cao v. Att’y Gen. of the United States*, 407 F.3d 146, 149–59 (3d Cir. 2005) (finding that specific evidence of persecution of a doctor who spoke out about infanticide and evidence of general tendencies of the Chinese government merited protection under Article 3 of the Convention Against Torture).

140. See discussion *supra* Part II(C) (detailing the justifications for broadening Article 3 of the Convention Against Torture beyond geographical limitations to

Against Torture and the *Haitian Interdiction* case impose nonrefoulement duties on State Parties, the United States is bound by these obligations.¹⁴¹

If international law imposes an obligation on a State, that State cannot violate international law while simultaneously fulfilling that duty. Because the United States has a duty not to return Chen to China imposed by Article 3 of the Convention Against Torture,¹⁴² the United States did not illegally infringe on China's internal affairs by protecting Chen at the American Embassy.¹⁴³

By protecting Chen and refusing to return him to China, the United States has complied with its duties under international law.¹⁴⁴ Furthermore, the United States did not interfere any more than was absolutely necessary to meet its obligations under the Convention Against Torture.¹⁴⁵ This shows that the American Embassy intended to stay out of China's internal affairs when possible.¹⁴⁶ Indeed, the United States did not seek out Chen in China, but rather the United States simply protected Chen once he arrived at the American Embassy.¹⁴⁷ Any alleged interference did not occur until after Chen arrived at the Embassy, meaning that the United States could not have meddled in China's internal affairs before the obligation to protect Chen arose.

apply universally).

141. See CASSESE, *supra* note 66, at 170 (mentioning that obligations are only imposed if a State has signed onto or agrees to be bound by a treaty).

142. See, e.g., *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997) (explaining that nonrefoulement protection was extended over Haitian refugees or boat people even though they were not physically on American soil).

143. See discussion *infra* Part III(C) (analyzing the dominance of *jus cogens* norms, particularly torture, over all other treaties).

144. See Convention Against Torture, *supra* note 42, arts. 1–5 (detailing the duty to define torture, to ensure it is criminalized, to assert jurisdiction over torture cases, and to not return a person to a country where they are in danger of being subjected to torture).

145. See Perlez & Jacobs, *supra* note 6 (describing the manner in which Chen came under United States protection, with contact initiated by Chen's supporters, not the United States).

146. See Ku, *supra* note 27 (describing that the United States bargained with Chinese officials for assurances of Chen's safety).

147. See Chen, *supra* note 16 (recounting, in an article written by Chen himself, that he sought refuge in the American Embassy in Beijing after his escape from house arrest).

C. SOME HUMAN RIGHTS VIOLATIONS, SUCH AS ENGAGING IN TORTURE, ARE ALSO VIOLATIONS OF *JUS COGENS* NORMS, JUSTIFYING INTERFERENCE BY THE UNITED STATES IN CHINA'S INTERNAL AFFAIRS

When a conflict between *jus cogens* norms and treaty obligations exists, *jus cogens* norms supersede the treaty obligations.¹⁴⁸ The prohibition of torture is a *jus cogens* norm from which China cannot derogate.¹⁴⁹

Even if China permits such treatment under its domestic laws, these national or local laws do not supersede duties imposed under international human rights law.¹⁵⁰ However, Chinese domestic law actually prohibits torture of prisoners and detainees.¹⁵¹ This alone, however, does not inhibit China from violating international human rights law.¹⁵² Laws that make torture illegal are not enough to comply with *jus cogens* norms, especially when torture regularly occurs regardless of domestic law. The Chinese government was willfully blind to the torture perpetrated against Chen and his family by local officials, which is sufficient to constitute an act of torture.¹⁵³ China's acquiescence to the local officials' torture amounts to a human rights violation.¹⁵⁴

By permitting torture against Chen, the Chinese government not

148. See CASSESE, *supra* note 66, at 177 (explaining that when a treaty conflicts with *jus cogens* norms, the treaty should be construed in a manner that is consistent with the *jus cogens* norm); see also ROTH, *supra* note 65, at 264 (noting that *jus cogens* restricts the substance of treaties by imposing duties that States must follow and must be incorporated in the treaties).

149. See discussion *supra* Part II(D) (establishing the obligations imposed by *jus cogens* norms on the international community).

150. See generally Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Serv.L/V/II.117, doc. 1 rev. 1 ¶¶ 84–87 (2002) (supporting, through precedent, the predominance of human rights law over domestic law).

151. STATE DEPARTMENT CHINA REPORT, *supra* note 30, at 3.

152. See *Omelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) (holding that an inference of torture is sufficient to find government acquiescence).

153. See *Bromfield v. Mukasey*, 543 F.3d 1071, 1072–73 (9th Cir. 2008) (endorsing the concept that willful blindness is sufficient to constitute an official act of torture).

154. See *Omelas-Chavez*, 458 F.3d at 1060 (“It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.”).

only violated the Convention Against Torture, but also violated *jus cogens* norms, which prohibit a nation's officials from engaging in or willfully permitting torture.¹⁵⁵ The argument that China violated *jus cogens* is relatively simple: the prohibition of torture is a *jus cogens* norm,¹⁵⁶ China tortured Chen,¹⁵⁷ and therefore China violated *jus cogens* norm prohibiting torture. More complex is the question of what consequences will or should result from this violation.¹⁵⁸

The Chinese government argues that Article 41 of the Vienna Convention on Diplomatic Relations supersedes the ability of the United States to respond to allegations of torture.¹⁵⁹ However, when a treaty conflicts with a *jus cogens* norm, the inconsistent provision should be interpreted, if possible, to comply with the *jus cogens* norm.¹⁶⁰ The conflict between Article 41 and the *jus cogens* prohibition of torture is that Article 41 seemingly prevents a State from abiding by its obligations in situations where an individual seeks shelter from another State's *jus cogens* violations. Thus, China argues, Article 41 must be construed as inapplicable to situations where an embassy assists a foreign national suffering from severe human rights abuses under the host State.¹⁶¹

Furthermore, because all States have a responsibility to prevent human rights abuses, the United States should take action to do so if possible.¹⁶² States are required to take every measure possible to prevent human rights abuses from occurring within their

155. See CASSESE, *supra* note 66, at 202–03 (declaring that the breach of protection of fundamental interests, which includes the prohibition of torture, is a violation of recognized *jus cogens* norms).

156. *Id.*; see also RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 102 cmt. k (arguing that the rule against torture is part of international law and that *jus cogens* permits no derogation of it).

157. See discussion *supra* Part III(B).

158. See CASSESE, *supra* note 66, at 206–08 (enumerating the legal effects of *jus cogens* norms on international law, including the following: invalidation of a treaty provision, interpretation of a treaty provision to conform with *jus cogens* norms, and granting universal criminal jurisdiction over the transgressors).

159. See Nong, *supra* note 25; Remarks on Entering Embassy, *supra* note 5.

160. CASSESE, *supra* note 66, at 206.

161. See ROTH, *supra* note 65, at 264–65 (noting the importance of *jus cogens* in the normative hierarchy structure).

162. See Convention Against Torture, *supra* note 42, arts. 2, 5 (mandating that each State Party take action to prevent torture from occurring within its territory and to establish jurisdiction over cases of torture).

jurisdiction.¹⁶³ Chen sought out American jurisdiction by fleeing to the American Embassy.¹⁶⁴ Although an embassy is not the territory of the sending State, once a person is granted refuge in an embassy that person is under the sending State's control even though the person is not within the State's physical territory by virtue of the inviolability of the diplomatic mission.¹⁶⁵ Once Chen sought protection from the American Embassy, the United States had an obligation to protect him from torture and human rights abuses.¹⁶⁶

Article 41 of the Vienna Convention prevents interference with the internal affairs of a State, whereas human rights principles are an area of international law; therefore, human rights issues cannot constitute internal affairs.¹⁶⁷ As such, the responsibility to prevent human rights abuses, which runs to all States, cannot logically amount to an impermissible interference in a State's internal affairs.¹⁶⁸ Otherwise, violators could never be punished or held accountable for crimes that are committed within their own State, because those matters could simply be categorized as wholly internal.¹⁶⁹

163. See *Velasquez Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988) (elucidating that protecting individuals from violations is the ultimate goal of human rights law).

164. See *Perlez & Jacobs*, *supra* note 6 (inferring that Chen, with the help of his supporters, subjected himself to American jurisdiction when he fled to the American Embassy and obtained temporary protection from the abuses of the Chinese government).

165. RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 466, cmt. b; see also *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 274–75 (Nov. 20, 1950) (holding that a grant of asylum removes the individual from the host State's jurisdiction even though the individual may still be within the host State's territory).

166. See RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 466, cmt. b (Reporter's note 3) (adding that the United States typically only grants such protection in exceptional cases to political refugees who are in immediate danger).

167. See Vienna Convention, *supra* note 27, art. 41 (preventing interference with *internal affairs* (emphasis added)).

168. CASSESE, *supra* note 66, at 394; see also *Dominquez v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Serv.L/V/II.117, doc. 1 rev. 1 (2002) (declaring that human rights law supersedes domestic law).

169. See CASSESE, *supra* note 66, at 398 (remarking that institutional enforcement mechanisms such as the United Nations "have not yielded conspicuous results").

IV. RECOMMENDATIONS

Chen's case presents an opportunity for the international community to enhance protection for victims of torture and human rights abuses. To avoid future diplomatic conflicts in cases where a national of a host State seeks protection from a foreign State's embassy¹⁷⁰ it is necessary to clarify the law regarding the obligations of States in such circumstances.¹⁷¹

A. THE UNITED STATES SHOULD CLARIFY ITS POLICY REGARDING ARTICLE 41 OF THE VIENNA CONVENTION ON DIPLOMATIC RIGHTS WHEN AN INDIVIDUAL SEEKS PROTECTION WITHIN AN EMBASSY

Article 41's language concerning what actions amount to interference in internal affairs is ambiguous, prompting disagreements over its interpretation. One pivotal issue in Chen's case revolves around what actions constitute interference in the internal affairs of a State.¹⁷² The problem is that international law does not define or even provide guidance on what actions constitute interference in internal affairs of a host State.¹⁷³ If this ambiguity were explicitly clarified, then all States would have a consistent understanding of their duties.¹⁷⁴

170. *E.g.*, Flintoff, *supra* note 3 (referring to Fang Lizhi who experienced abuse similar to that inflicted on Chen).

171. *See* DENZA, *supra* note 1, at 465 ("Most conduct which on the part of a diplomatic agent lays him open to the charge of interference in the internal affairs of the receiving State will at least in democratic societies be permissible under local law and quite proper in the case of a citizen of the receiving State.").

172. *See Remarks on Entering Embassy, supra* note 5 ("China demands the US to apologize for that, carry out a thorough investigation into the incident, deal with those responsible, and promise not to let similar incidents happen again."). *See also* Nong, *supra* note 25 (denouncing the United State's actions as interference in internal affairs by hindering the economic development of China); *US Must Insist on Chen Guangcheng's Safety*, AMNESTY INT'L (May 2, 2012), www.amnestyusa.org/news/news-item/us-must-insist-on-chen-guangcheng-s-safety (arguing the United States, and other governments, have an obligation to protect Chen and other Chinese citizens from human rights abuses).

173. *See* LEE & QUIGLEY, *supra* note 2, at 76 (citing *Memorandum of Reply Concerning the Bill for the Approval of the Vienna Convention on Diplomatic Relations*, 1984 NYIL 308) (stating there are no international guidelines regarding Article 41 and "it should be pointed out that there are any number of ways in which a person could set about interfering in internal affairs").

174. *See* Milhaupt, *supra* note 39, at 847 (asserting that under some interpretations anything negatively affecting or even implicating the host State

The most comprehensive way to clarify Article 41 would be to amend the convention directly. Although it would be impracticable to designate every possible action as either interference or noninterference, it would be possible to prevent interference in internal affairs by providing guidance on what exactly this means.¹⁷⁵ For example, an amendment could specify that interference in internal affairs would not be found where the alleged interfering State is acting under a *jus cogens* or treaty obligation. This would have the added benefit of designating levels of authority, indicating to States which sources of international law supersede others. Thus, in future similar incidents, there would be some kind of precedent revealing what authority binds a State.

Alternatively, it would be helpful to change Article 41(1) to read that there is a “duty not to interfere in the internal affairs of that State through personal activities or comments.” This new construction of Article 41 would make it clear that the rule does not apply to measures taken by an embassy pursuant to its duties under international law simply because they incidentally touch on domestic issues.¹⁷⁶ Amending Article 41 in this way would clarify its ambiguous language, leading to a more consistent understanding of this section.

B. THE CONVENTION AGAINST TORTURE SHOULD INCLUDE A
PROVISION CLEARLY STATING THAT ARTICLE 3 APPLIES
REGARDLESS OF GEOGRAPHIC LOCATION

Another way to clarify States’ responsibilities is to unquestionably extend universal jurisdiction to the doctrine of nonrefoulement. Nonrefoulement provides strong protections to individuals who face persecution in their home countries.¹⁷⁷ Although Article 5 imposes

could be considered interference in internal affairs).

175. See DENZA, *supra* note 1, at 464 (explaining that the rule in Article 41(1) was intended to concern the personal comments or activities conducted by a diplomat in a host State and not to acts carried out on directive from the sending State).

176. See Milhaupt, *supra* note 39, at 847 (examining several alternatives, including, but not limited to, expanding the list of consular functions specified within the Vienna Convention on Diplomatic Relations).

177. See generally Shafer, *supra* note 50, § 2 (exploring the enactment of Convention Against Torture provisions within the United States and American courts’ interpretation of the Convention).

universal jurisdiction regarding instances of torture, the Convention Against Torture does not explicitly state that nonrefoulement applies regardless of geographic limitations.¹⁷⁸

Case law under the Convention Against Torture does not impose geographical limitations on the application of Article 3.¹⁷⁹ However, nonrefoulement as defined in the Refugee Convention has been held to apply without any geographical constraints.¹⁸⁰ The Convention Against Torture should therefore incorporate a provision that encompasses the holding of the *Haitian Interdiction* case. Specifically, to clarify state obligations, such a provision should state that the principle of nonrefoulement applies no matter where an individual comes under the receiving State's protection.¹⁸¹ This clarification would create a uniform nonrefoulement policy.

Modifying the Convention Against Torture, however, is not the only way to ensure the Convention applies regardless of geographic limitations. Instead of an addition to Article 3 of the Convention Against Torture, the United States could also amend the enabling statute that codifies the Convention Against Torture.¹⁸² The United

178. See Convention Against Torture, *supra* note 42, art. 5(2) (stating that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article”).

179. See Rep. of the Comm. Against Torture, *Bachan Singh Sogi v. Can.*, Communication No. 297/2006, U.N. Doc. A/63/44, at 224–35 (Nov. 16, 2007) (focusing mostly on the different factors that the court considered when determining whether a man faced a risk of torture if returned to India); Rep. of the Comm. Against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Swed.*, Communication No. 233/2003, U.N. Doc. A/60/44, at 197 (May 20, 2005) (failing to mention the applicability of nonrefoulement when an individual is brought under protection outside of a State's physical territory); Rep. of the Comm. Against Torture, *A.R. v. Neth.*, Communication No. 203/2002, U.N. Doc. A/59/44, at 247, 252 (Nov. 14, 2003) (recording only factors relevant to determining whether there is a risk of torture).

180. *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 171 (1997) (finding that nonrefoulement applies to Haitian refugees intercepted on the high seas by the U.S. Coast Guard despite not being on American soil).

181. See *Political Prisoners in China*, *supra* note 108 (describing the glacial pace of discussions between the United States and China on human rights issues and encouraging increased dialogue between the two nations).

182. See 60 Fed. Reg. 8478 (Feb. 19, 1999) (referring only to the removal of individuals from the United States and not to any geographic element necessary for

States often clarifies treaty obligations through domestic law.¹⁸³

Although domestic laws do not necessarily create international legal obligations, in this case it could help demonstrate a state practice of applying nonrefoulement regardless of geographic location. In accordance with Congress' own commitment to Article 3,¹⁸⁴ it should apply Article 3 privileges regardless of where an alien enters American protection. This would strengthen the enforceability of the Convention Against Torture in the United States in accordance with international law. Whether it is appended to the Convention Against Torture or to the United States' enabling statute, the new language should state that Article 3 of the Convention Against Torture applies without any geographical limitations.¹⁸⁵

V. CONCLUSION

By protecting Chen at the American Embassy in Beijing, the United States did not violate international law, contrary to the Chinese government's claims.¹⁸⁶ The United States cannot legally return Chen to China because there is sufficient reason to believe that he will be tortured on his return.¹⁸⁷ Because Article 3 of the Convention Against torture imposes a duty on the United States not to return Chen,¹⁸⁸ the American Embassy did not illegally infringe on

protection).

183. *Id.*; see also *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001) (maintaining that an individual may seek relief under the Convention regardless of an asylum claim).

184. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (confirming that Congress intended to uphold Article 3 and that future obligations must be consistent with treaty obligations).

185. See *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 157 (1997) ("The Commission shares the view advanced by the United Nations Commissioner for Refugees in its Amicus Curiae brief in its arguments before the Supreme Court, that Article 33 [establishing nonrefoulement in the Refugee Convention] had no geographical limitations.").

186. See *Remarks on Entering Embassy*, *supra* note 5 (describing the Chinese government's dissatisfaction with the U.S. Embassy's actions); Nong, *supra* note 25 (same).

187. See Convention Against Torture, *supra* note 42, art. 3 (stating that the doctrine of nonrefoulement applies when there are substantial grounds to believe that he or she would be subject to torture in his or her home country).

188. See *Haitian Interdiction v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997) (applying this

China's internal affairs by protecting Chen. Furthermore, China's treatment of Chen amounts to torture,¹⁸⁹ which is a violation of the *jus cogens* norm prohibiting torture.¹⁹⁰ Because no derogation from *jus cogens* norms is permitted, China's violations justify limited encroachment by the United States.¹⁹¹

obligation even to individuals brought under protection outside the territory of the United States).

189. *C.f.* Bromfield v. Mukasey, 543 F.3d 1071, 1073 (9th Cir. 2008) (evaluating the case of a gay man who faced torture in Jamaica).

190. *See* Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Serv.L/V/II.117, doc. 1 rev. 1 ¶¶ 84–87 (2002) (indicating that practices that the global community considers to be inconsistent with prevailing standards of decency violate *jus cogens* norms).

191. *See* RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 64, § 703 (declaring that a State “may pursue international remedies against any other state for a violation of the customary international law of human rights”).