

~~TOP SECRET~~

- The CIA interrogation program, which is conducted outside the special maritime and territorial jurisdiction of the United States, is not subject to the requirements of Article 16 of the CAT.
 - Article 16(1) requires that the United States “undertake to prevent . . . cruel, inhuman or degrading treatment or punishment” only in “*any territory under its jurisdiction.*”
 - The CAT uses the phrase “any territory under its jurisdiction” to refer to territory over which a state may “take . . . legislative, administrative, judicial or other measures.” Art. 2(1); *see also* Art. 5(1).
 - Article 16’s limited territorial reach is confirmed by a reservation under which the United States is bound only with respect to “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments,” provisions that do not apply to aliens outside of the United States.
- The CIA interrogation program would not violate U.S. obligations under Article 16 if it applied.
 - Article 16 would prohibit the United States from treating detainees in a manner that “shocks the conscience.”
 - Whether government conduct shocks the conscience turns primarily on two factors.
 - (1) Whether the conduct is “arbitrary in the constitutional sense.”
 - (2) Whether, considered in light of traditional and contemporary executive practice, the conduct is sufficiently “egregious” to “shock the contemporary conscience.”
 - The CIA interrogation program, which furthers the government’s interest in national security and in which techniques are authorized *only as necessary* to protect that interest, cannot be said to be constitutionally arbitrary.
 - The techniques do not “shock the contemporary conscience,” although their use in other contexts (such as ordinary criminal investigations or traditional armed conflicts) might.
 - Importantly, the CIA interrogation techniques are all adapted from the military Survival, Evasion, Resistance, Escape (“SERE”) training. The fact that the United States uses these techniques on its own troops strongly suggests that these techniques are not categorically beyond the pale.
- Given the vague nature of the shocks-the-conscience test and the lack of precedent in this context, we cannot predict with confidence whether a court would agree with our analysis. But because of the territorial limitation in Article-16 and the fact that it is non-self-executing, we think the question should not reach the courts.

134

~~TOP SECRET~~