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PARLAMENTS PARLAMENTAS
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LE JURISCONSULTE

**SJ-0273/06**
HDT/dp
D(2006)18507

**LUXEMBOURG** 10-04-2006

**NOTE A L'ATTENTION DE M. Carlos COELHO**

Président de la commission temporaire sur l'utilisation alléguée de pays européens par la CIA pour le transport et la détention illégale de prisonniers

(aux bons soins de M. François NÉMOZ-HERVENS, chef du secrétariat)

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**Objet : Droit applicable relatif à la prohibition de la torture**

Par lettre datée du 10 mars 2006, vous avez sollicité le point de vue du Service juridique sur, d'une part, certaines questions concernant le droit international en matière de prohibition de la torture et, d'autre part, sur les règles et interprétations en vigueur aux Etats-Unis en cette matière.

Je vous prie de bien vouloir trouver ci-joint la note de recherche préparée par le Service juridique concernant ces questions, dans laquelle vous trouverez également un résumé.

Au vu de la nature des questions et du caractère essentiellement documentaire des renseignements souhaités, sur lesquels le Service juridique n'est pas appelé à émettre une appréciation propre, cette note ne revêt pas la forme d'un avis juridique protégé par la confidentialité au titre du règlement n°1049/2001 sur l'accès du public aux documents.

Le Service juridique reste à votre disposition pour toute information complémentaire que vous souhaiteriez obtenir.

Gregorio GARZÓN CLARIANA

Annexe

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LEGAL SERVICE

**SJ-0273/06**
HDT/AC/AAM/dp/ab
D(2006)18507

Luxembourg, 10-04-2006

# RESEARCH NOTE

**Re:** **International law concerning the prohibition of torture: its applicability in the European Union Member States and its interpretation by the United States Government**

## EXECUTIVE SUMMARY

International law prohibiting torture

1. General international law and several international treaties, to which European Union Member States and candidate countries are parties, unequivocally prohibit torture as well as cruel, inhuman or degrading treatment or punishment. The prohibition of torture is generally considered as a norm of *jus cogens*, that it is to say a peremptory norm from which no derogation is permitted.

2. According to international law, States have the duty to refrain from engaging in torture through their officials, to define torture as a criminal offence in their national law, to investigate and if necessary, prosecute persons responsible for torture. Moreover, States are prohibited from transferring persons to countries where they may face torture or cruel, inhuman or degrading treatment, also in cases where the persons concerned are refugees.

3. The monitoring mechanisms provided by the above mentioned treaties vary in effectiveness and the way they function. The Geneva Conventions of 1949 on armed conflicts do not provide for a special supervisory body. Within the United Nations framework, the most important role is played by Committees which examine reports and, in some cases, receive complaints from individuals pursuant to the Convention against Torture and the International Covenant on Civil and Political Rights and its Protocol N°1. More generally, the prevention of torture may be enhanced by the role of the U.N. High Commissioner for Human Rights and the Human Rights Commission (which will be replaced by the Human Rights Council in the course of 2006).

4. The supervisory body in the Council of Europe is the European Court of Human Rights, which may receive applications from individuals and has developed a significant body of case-law concerning torture. Its role is supplemented by the Committee for the Prevention of Torture established under the European Convention for the Prevention of Torture and by the Commissioner for Human Rights.

5. Given that a range of international treaties govern the prohibition of torture and cruel, inhuman or degrading treatment, it would be difficult to consider that international law in this area contains serious gaps or that it is insufficient. However, a more precise definition of related obligations incumbent upon States, concerning in particular the prohibition of transferring a person to a country where he or she may subsequently be tortured or subjected to inhuman or degrading treatment, would be useful to avoid differing interpretations of these obligations, in the absence of authoritative interpretation by a judicial body.

6. In terms of effectiveness of monitoring mechanisms, it can be observed that in the framework of the United Nations, the lack of a judicial body empowered to hear individual complaints and order remedies in cases of violations appears to limit the impact of the Convention against Torture and the prohibition of torture found in the International Covenant on Civil and Political Rights. On the other hand, it may be noted that the membership of certain supervisory bodies consists of persons nominated not as representatives of States but because of their personal qualities.

Implementation and interpretation of pertinent International Law instruments by the United States

7. Under United States law, torture, including attempt to and participation in torture, is criminalised whether it is committed within or outside the United States and whether committed by a United States citizen or by a non-citizen.

8. Upon ratification of the Convention against Torture (CAT) the United States Government has specified its own understanding of what constitutes "torture", and in particular that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm. This definition appears to be more restrictive than the definition given in Article 1 of the CAT. Between 2002 and the end of 2004, the official position of the Office of Legal Counsel of the Department of Justice as to the meaning of torture has changed from a definition criticised as too narrow to a broader interpretation.

9. Under United States law as amended in January 2006, cruel, inhuman or degrading treatment or punishment of persons in the custody or control of the United States is expressly prohibited when committed by United States military or other officials whether acting in the United States or abroad. However, United States law does not seem to prohibit removal of aliens from the United States where there is merely a risk of such treatment which, however, does not amount to torture in the sense of point 8 above.

10. The various immigration laws and regulations in force in the United States seem to respect the prohibition of torture in Article 3 of the CAT. However, as a result of an understanding upon ratification by the United States Government, there is a risk that the assessment whether an alien is in danger of being subjected to torture in a given foreign country, is not carried out exactly in the way prescribed by CAT ("*substantial grounds for believing that he would be in danger of being subjected to torture*"), but by using a different and arguably less demanding standard originating in the case-law of American courts ("*it would be more likely than not that a person would be tortured if removed to a particular country*").

11. "Rendition" and "extraordinary rendition" are notions not defined in international law. Extraordinary rendition has been described as the transfer of custody over a person suspected of serious crime to another State, outside the framework of legally defined procedures and for the purpose of arrest, detention and/or interrogation by the receiving State (definition by the Congressional Research Service Report for U.S. Congress).

12. The practice of extraordinary rendition, so defined, is not in and by itself caught by an explicit prohibition under international law or United States law. However, this practice could be considered impermissible to the extent that the authorities of the rendering State would rely on a diplomatic assurance from the receiving State although there is clear evidence that the person to be rendered is in fact exposed to the risk of being subject to torture.

13. The United States interpret the Geneva Conventions of 1949 on armed conflicts, which require persons taking no active part in the hostilities or persons *hors de combat* to be treated humanely in all circumstances, in such a way as to apply only to internal conflicts between a State Party and an insurgent group, and not to a conflict with a non-State entity, such as an international terrorist organisation.

## Introduction

By letter dated 10 March 2006[1], received by the Legal Service on 14 March 2006, Mr Carlos COELHO, Chairman of the Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, requested an opinion of the Legal Service on the following questions:

"*1. What is the state of law applicable to the European Union Member States in the area of torture as arising from binding international texts such as the United Nations Charter, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, the European Convention on the protection of human rights of the Council of Europe (and its related case-law), the Charter of fundamental rights, and any other relevant text?*

*In particular, what supervisory mechanisms do these instruments provide and to what extent are they applicable to all State Parties without reservation?*

[1] Attached hereto.

*In that context, can it be considered that international law in the area of torture has gaps or limitations, both in terms of substantive definitions and the effectiveness of the established supervisory mechanisms?*

*2. In the light of these norms and European practice, it would be useful to have an analysis of norms in force in the United States and the evolution of the doctrine of the American administration in this matter since the presidential order of February 2002. In that context, an analysis of the concepts of "renditions" and "extraordinary renditions" as well as their implications would be particularly valuable."*

The present Research Note describes the state of the law having regard to the allegations and facts known so far to the Temporary Committee.

It is not a legal opinion in the sense of Article 4 of the Regulation (EC) No 1049/2001, regarding public access to European Parliament, Council and Commission documents[2].

## I. International law prohibiting torture

1. The practice of torture is universally condemned. It is, most importantly, prohibited by customary international law which binds all States, irrespective of whether they have signed any agreement to that effect. Secondly, European Union Member States and candidate countries are parties to several international treaties on this subject, which include the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the International Covenant on Civil and Political Rights (1966), the Geneva Conventions on armed conflicts (1949) and the Convention relating to the Status of Refugees (1951). Moreover, EU Member States are bound by conventions adopted within the framework of the Council of Europe, in particular the European Convention on Human Rights (1950) and the European Convention for the Prevention of Torture (1987).

### A. General international law

2. In general international law, the prohibition of torture represents a legal principle of highest significance. Article 5 of the Universal Declaration of Human Rights declares unequivocally that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". Accordingly, law and legal literature in this field use the concepts of "torture", which covers the most severe violations of human integrity, and "cruel, inhuman or degrading treatment", which describes less abhorrent but still impermissible conduct.

3. Both international and national courts have recognized the prohibition of torture as falling into the category of *jus cogens*[3], that is, a "peremptory norm" of international

[2] O. J. L 145 of 31 May 2001, p. 43.

[3] The Vienna Convention on the law of treaties of 23 May 1969 recognises the existence of *jus cogens*. In particular, Article 53 [Treaties conflicting with a peremptory norm of general international law ("jus cogens")] provides that a "*treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having*

law[4]. The Court of First Instance of the European Communities has recently defined *jus cogens* as "*a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible*"[5]. The International Criminal Tribunal for the Former Yugoslavia has explained the implications of this status of the prohibition in the case of *Prosecutor v. Furundzija*[6]. The Tribunal held that States are obliged not only to prohibit and punish torture, but also to forestall its occurrence and that it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.

4. According to the Tribunal, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community. The violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or, in any case, to call for the breach to be discontinued. The Tribunal went on to say that:

> "153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force. [...]
>
> 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. [...] What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. [...]".

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*the same character*". Article 64 [Emergence of a new peremptory norm of general international law ("jus cogens")] provides that if "*a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates*".

[4] See, e.g., *Al-Adsani v. United Kingdom*, judgment of the European Court of Human Rights (Grand Chamber) of 21 November 2001, application no. 35763/97, §§ 60-61. See also the decisions of the House of Lords (United Kingdom) in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197-199 (24 March 1999), and *A(FC) v. Secretary of State for the Home Department* [2005] UKHL 71 (8 December 2005), § 33.

[5] See *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01, judgment of the Court of First Instance of 21 September 2005, § 277.

[6] See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Trial Chamber), Judgment of 10 December 1998, §§ 148-155.

5. The Tribunal also took the view that, where there are international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner[7].

## B. The United Nations Conventions and mechanisms

### 1. *The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

6. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") was adopted on 10 December 1984 by the General Assembly of the United Nations and entered into force on 26 June 1987. Its Article 1 defines torture as:

> "any 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

7. It can be observed from this definition that, in order to be "torture", a treatment must be inflicted by or with the instigation, consent or acquiescence of an official or other person acting in official capacity, must be intentional and it covers treatment inflicted for the purpose of obtaining information or a confession. It can be constituted by physical as well as mental suffering. The concept of torture does not, therefore, refer to the infliction of pain or suffering by a private person.

*a) Obligations*

8. The basic obligation for States under the CAT is to "*take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*"[8]. To emphasise the unconditional character of the prohibition, the CAT makes clear that "*no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*"[9]. Nor can an order from a superior officer or a public authority be invoked[10].

[7] Ibid., § 152.
[8] CAT , Article 2 § 1 (emphasis added).
[9] CAT , Article 2 § 2.
[10] CAT, Article 3 § 3.

9. To implement the CAT, Article 4 obliges states to ensure that all acts of torture, including attempts, complicity or participation therein, are offences under their criminal law. Article 5 requires each State Party to establish its jurisdiction over such offences (i) when they are committed in any "territory under its jurisdiction", (ii) when the alleged offender is a national of that state, and (iii) in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him. Moreover, the CAT also provides that the State Party in whose jurisdiction a person alleged to have committed torture is found, shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution[11]. This provision reflects the principle *aut dedere aut judicare* ("either you extradite or you prosecute"), designed to ensure that torturers do not escape by going to another country.

10. Wherever there is reasonable ground to believe that an act of torture has been committed in any territory under their jurisdiction, competent authorities of a state must proceed to a prompt and impartial investigation. Furthermore, any individual who claims that he or she had been subjected to torture has the right to complain, to have his or her case promptly and impartially examined, to obtain redress and to have an enforceable right to fair and adequate compensation[12].

11. Article 3 of the CAT explicitly prescribes that States shall not "*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*"[13]. This rule is commonly known in international law as the principle of *non-refoulement*. In this context, it may be noted that in order to comply with this obligation, States sometimes resort to "diplomatic assurances", that is, guarantees from the government of the State to which they intend to transfer a person, that he or she will not be subjected to torture after the transfer.

12. With respect to the legality of diplomatic assurances, it is necessary to emphasise that the CAT neither provides for nor prohibits the use of diplomatic assurances as a permissible basis for the transfer of an individual to another State. However, while a diplomatic assurance could be one of the relevant considerations to be taken into account under article 3 § 2 of the CAT in the determination of whether there are "substantial grounds" to believe that an individual is in danger of torture upon transfer, it cannot as such absolve the state which decides to transfer a person from its responsibility under the CAT. According to a recent study on the law applicable to torture ("Torture by Proxy"), "*even if diplomatic assurances are permissible under international law, their implementation in practice raises significant doubts about their reliability as a means of safeguarding against the danger of risk of torture to an individual*"[14].

13. Diplomatic assurances were addressed by the United Nations Special Rapporteur on Torture in a July 2002 Interim Report to the United Nations General Assembly. The Special Rapporteur called on States not to extradite any individual "*unless the government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any*

[11] CAT, Article 7 § 1.
[12] CAT, Articles 12, 13 and 14.
[13] CAT, Article 3 (emphasis added).
[14] See *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, Association of the Bar of the City of New York and the Center for Human Rights and Global Justice of the New York University School of Law, New York (2004) [hereinafter: Torture by Proxy], p. 88.

*other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity*"[15]. The Special Rapporteur subsequently submitted a Report to the UN General Assembly in July 2003, reaffirming the absolute nature of the principle of *non-refoulement*[16].

14. According to the CAT, State parties shall also undertake to prevent "*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture*", 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[17]. The terms "cruel, inhuman or degrading treatment" are not defined and the obligations relating to such treatment are more limited. Most importantly, the CAT does not expressly require State parties to criminalise it, nor does it prohibit expulsion, return or extradition in cases where there is danger of such treatment as opposed to the danger of torture.

*b) Monitoring mechanism*

15. The monitoring mechanism established by Article 17 of the CAT is the Committee against Torture, a body of 10 experts elected by secret ballot by States Parties for a term of four years. It examines reports submitted by states on the measures they have taken to give effect to their obligations under the convention and to make general comments on those reports. The Committee normally holds two regular sessions each year.

16. If the Committee receives reliable information that torture is being systematically practiced in the territory of a State Party, it may "invite that State Party to co-operate in the examination of the information" and, if necessary, make a confidential inquiry with the co-operation of the State Party concerned. This competence, however, may be subject to a reservation by States Parties.

17. States Parties may recognise, pursuant to Article 21 of the CAT, the competence of the Committee to receive and consider communications lodged by one State Party claiming that another State Party is not fulfilling its obligations under the CAT ("inter-state complaints"). However, this type of procedure has never been used.

18. Under its Article 22, States parties may also recognise its competence to receive and consider communications from or on behalf of individuals subject to their jurisdiction who claim to be victims of a violation by a State Party of the provisions of the CAT ("individual communications"). Most European Union Member States and candidate countries have recognised this competence of the Committee, but several have not (Estonia, Latvia, Lithuania, the United Kingdom and Romania).

19. With respect to the obligation of *non-refoulement* provided in Article 3 of the CAT, it is worth noting that on 20 May 2005, the Committee adopted its decision in the case of Ahmed Hussein Mustafa Kamil Agiza, who was deported on 18 December 2001 from Sweden, where he unsuccessfully applied for asylum, to Egypt, where he had previously

[15] Interim Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly A/57/173 (2 July 2002).
[16] Report to UN General Assembly, UN Doc., A/58/120 (3 July 2003).
[17] CAT, Article 16.

been convicted of belonging to a terrorist group[18]. The Committee considered that "*it was known, or should have been known, to the State Party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons*"[19]. It concluded that despite diplomatic assurances given by Egypt to the Swedish authorities that the complainant will not be subjected to torture or other inhuman treatment, his expulsion was "*in breach of Article 3 of the Convention*"[20].

20. In 1997, the Committee has also issued a "General comment No. 1"[21], where it took the view that the phrase "another State" in Article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which he or she may <u>subsequently</u> be expelled, returned or extradited. For the purpose of assessing whether there are substantial grounds for believing that a person would be in danger of being subjected to torture were he or she to be expelled, returned or extradited, the Committee stated that "*the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable*"[22].

21. On 18 December 2002, the United Nations General Assembly adopted the Optional Protocol to the CAT, which will allow independent international experts, who will form a "Subcommittee on Prevention", to conduct regular visits to places of detention within States Parties, that is, states that have accepted this Protocol by ratifying or acceding to it, with the aim of preventing torture or other ill-treatment. The Protocol also requires States Parties to set up one or several national mechanisms to conduct visits to places of detention and to cooperate with the international experts. However, this Protocol has not yet entered into force.

22. It can be observed that the existing system of implementing and monitoring the prohibition of torture in the framework of the CAT is limited in character. It does not give the Committee against Torture the power to order states to change their practices or compensate a victim. Its tools are limited to persuasion, mediation, and exposure of violations to public scrutiny.

### 2. <u>*The International Covenant on Civil and Political Rights*</u>

23. The International Covenant on Civil and Political Rights ("ICCPR"), to which all EU Member States and candidate countries are parties, was adopted by the U.N. General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. It covers a broad range of civil and political rights, including the prohibition of torture found in its Article 7. The wording of the prohibition is identical to

[18] Committee against Torture, *Communication No. 233/2003*, Decisions of the Committee against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/34/D/233/2003 (Jurisprudence).

[19] Ibid., § 13.4.

[20] Ibid.

[21] General comments are opinions which purport to be authoritative although not legally binding interpretations of the treaties.

[22] Committee against Torture, *General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22*, §§ 3-6.

the corresponding provision of the Universal Declaration of Human Rights: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". Article 10 of the ICCPR specifically mentions persons in detention, who "*shall be treated with humanity and with respect for the inherent dignity of the human person*". The scope of the obligations incumbent upon States Parties under the ICCPR is defined in Article 2, which states that State Parties undertake "*to respect and to ensure to all individuals within its territory and subject to its jurisdiction*" the rights recognized therein, to "*take the necessary steps* [...] *to adopt such laws or other measures as may be necessary to give effect to the rights recognized*", and to "*ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*".

24. The body charged with the monitoring of the implementation of the ICCPR is the Human Rights Committee, composed of 18 independent experts who are "*persons of high moral character and recognized competence in the field of human rights*", nominated and elected by secret ballot by State Parties for a term of four years[23].

25. The States Parties are obliged to submit to the Committee regular reports on the measures they have adopted which give effect to the rights recognized therein and on the progress made in the enjoyment of those rights[24]. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations". State Parties can also recognise the competence of the Human Rights Committee to receive and consider communications from one State Party claiming that another State Party is not fulfilling its obligations under the ICCPR ("inter-state complaints"), but as is the case with the analogous procedure under the CAT, this possibility has never been used[25].

26. By ratifying the Optional Protocol to the ICCPR ("Optional Protocol No. 1"), which entered into force on 23 March 1976, States Parties may recognise the competence of the Human Rights Committee to receive and consider communications from individuals subject to their jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant ("individual communications"). All European Union Member States and candidate countries, except the United Kingdom and Turkey, have ratified this protocol.

27. The Human Rights Committee also elaborates "general comments", which are designed to assist States Parties to give effect to the provisions of the ICCPR by providing greater detail regarding the substantive and procedural obligations of States Parties. With respect to the prohibition of torture, General Comment No. 20 (1992) explains that "*prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7*"[26] and that "States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*"[27]. It should be

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[23] ICCPR, Articles 28-45.
[24] ICCPR, Article 40.
[25] ICCPR, Article 41.
[26] Human Rights Committee, *General Comment No. 20* (10 March 1992), § 6.
[27] Ibid., § 9.

noted that this principle is broader than the one found in Article 3 of the CAT which prohibits expulsion or return only where there is danger of torture.

28. Likewise, General Comment No. 31 (2004) specifies that "*it is also implicit in article 7 that State Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power*"[28]. Article 2 requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control "*entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm* [...] *either in the country to which removal is to be effected or in any country to which the person may subsequently be removed*"[29]. The Human Rights Committee observes in the same General Comment that "*a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant*"[30].

29. With respect to the scope of application of the ICCPR defined in its Article 2, the Human Rights Committee has held that "*a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*"[31]. Similarly, the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* recognized that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to "*acts done by a State in the exercise of its jurisdiction outside of its own territory*"[32]. This principle therefore also applies to the prohibition of torture contained in Article 7 of the ICCPR.

30. It may be noted that, as is the case with the Committee against Torture, the procedures available under the ICCPR and carried out by the Human Rights Committee can be described as being of limited effectiveness, as the Committee may only analyse regular reports and, for parties who have ratified the Optional Protocol No. 1, seek to achieve compliance through public exposure of individual cases.

*3. United Nations supervisory bodies*

31. The United Nations system for the promotion and protection of human rights also comprises bodies which have a more general ambit and domain of action.

32. The mission of the Office of the United Nations High Commissioner for Human Rights (OHCHR), headquartered in Geneva, is to "*protect and promote all human rights for all and to prevent the occurrence or continuation of human rights abuses throughout the*

[28] Human Rights Committee, *General Comment No. 31 on the "Nature of the General Legal Obligation Imposed on States Parties to the Covenant"* (26 May 2004), § 8 (emphasis added).
[29] Ibid., § 12 (emphasis added).
[30] Ibid., § 15.
[31] Ibid., § 10 (emphasis added).
[32] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004 (9 July 2004), § 111. See also *Situation of detainees at Guantanamo Bay*, a joint report submitted by five holders of mandates of special procedures of the Commission on Human Rights, United Nations Economic and Social Council, 15 February 2006, § 11.

*world*". The High Commissioner is the principal UN official with responsibility for human rights issues and is accountable to the Secretary-General. His or her mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of human rights. Louise Arbour of Canada has been the High Commissioner for Human Rights since July 2004.

33. The Human Rights Commission is the main standing body in the framework of the United Nations concerned with human rights. It is composed of representatives of 53 U.N. Member States, who gather in Geneva for six weeks each year to discuss, study, elaborate and monitor human rights standards. As a functional body of the United Nations Economic and Social Council, the Commission adopts resolutions, decisions and statements on a wide range of human rights issues. The Sub-Commission on the Promotion and Protection of Human Rights is a subsidiary body of the Commission. With 26 experts, it undertakes research on the various aspects of the effective protection of human rights and makes recommendations to the Commission.

34. Under the so-called "1503 procedure", the Human Rights Commission may examine a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms occurring in any country of the world. Any individual or group claiming to be the victim of such human rights violations may submit a complaint, as may any other person or group with direct and reliable knowledge of such violations. The Commission discusses these complaints in closed sessions. However, because its members are State representatives rather than independent experts, the Commission has been subjected to criticism that it deals with human rights issues as matters of international politics and diplomacy.

35. On 15 March 2006, the General Assembly of the United Nations adopted the resolution A/60/L.48 establishing a Human Rights Council which will replace the existing Human Rights Commission. Members of the Council will be elected by an absolute majority of the members of the General Assembly, by secret ballot. The General Assembly, by a two-thirds majority of members present and voting, can suspend the rights of membership of a Council Member State who committed gross and systematic human rights violations. Council members are expected to uphold the highest standards in the promotion and protection of human rights, to fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership. It may be noted that the European Parliament has adopted, on 16 March 2006, a resolution in which it welcomed the General Assembly's resolution creating the Human Rights Council[33].

C. The Geneva Conventions concerning armed conflicts

36. Even before the adoption of the CAT and the ICCPR, the prohibition of torture was declared in the four Geneva Conventions of 12 August 1949 which form part of international humanitarian law, the body of law governing the conduct of States, armies

[33] P6_TA-PROV(2006)0097.

and soldiers in armed conflicts[34]. These conventions would apply, for instance, to persons who were captured or arrested in the context of the armed conflict in Afghanistan. Their applicability to alleged members of Al Qaeda will be examined below (see part II-C). All European Union Member States and candidate countries are parties to these conventions.

1. *The Geneva Convention relative to the Treatment of Prisoners of War*

37. The legal protection afforded by the Geneva Convention relative to the Treatment of Prisoners of War ("Geneva III ")[35] covers "prisoners of war" as defined in Article 4 of Geneva III, in particular members of the armed forces as well as, under certain conditions, members of militias or volunteer corps forming part of such armed forces and members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power, who have fallen into the power of the enemy. According to Article 5 of Geneva III, if there is doubt as to whether captured persons fall into these categories, such persons "*shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal*"[36].

38. Article 13 of Geneva III lays down the fundamental principle that "*prisoners of war must at all times be humanely treated*". Specifically, "*any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention*". Moreover, "*prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity*". Geneva III also emphasises that "*no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever*"[37].

39. Geneva III outlines specific requirements concerning the transfer of prisoners. Prisoners of war may not be transferred to other states unless those states are also parties to Geneva III and only after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply it. When prisoners of war are transferred under such circumstances, responsibility for the application of Geneva III rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, Geneva III provides that the Power by whom the prisoners of war were transferred shall "*take effective measures to correct the situation or shall request the return of the prisoners of war*"[38].

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[34] The first two Geneva Conventions concern the amelioration of the condition of the wounded and sick in armed forces in the field (U.N. Treaty Series, Vol. 75, p. 31, entered into force on 21 October 1950) and the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (U.N. Treaty Series, Vol. 75, p. 85, entered into force on 21 October 1950).
[35] Geneva Convention relative to the Treatment of Prisoners of War, U.N. Treaty Series, Vol. 75, p. 135, entered into force on 21 October 1950.
[36] Geneva III, Article 5.
[37] Geneva III, Article 17 § 4.
[38] Geneva III, Article 12.

### 2. The Geneva Convention relative to the Protection of Civilian Persons in Time of War

40. The Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Geneva IV")[39] provides similar protection to civilians ("protected persons"), defined as "*those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*"[40]. No physical or moral coercion can be exercised against protected persons, in particular to obtain information from them or from third parties.[41] States are also prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment or mutilation but also to "*any other measures of brutality whether applied by civilian or military agents*"[42].

41. Article 45 of Geneva IV states that protected persons may be transferred by the Detaining Power only to a Power which is a party to it and only after satisfying itself of the "willingness and ability" of such transferee Power to apply it. If that Power fails to do so, the Detainee Power must take effective measures to correct the situation or request the return of the protected persons. However, in no circumstances can a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

### 3. Common Articles 2 and 3 of the Geneva Conventions

42. Article 2, which is common to all four Geneva Conventions, states that the provisions of the Conventions shall apply "*to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*". However, the four Conventions also contain a common Article 3, which defines certain minimum principles to be applied in armed conflicts that are "*not of an international character*".

43. Article 3 requires that "*persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely*". Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, torture and outrages upon personal dignity, in particular humiliating and degrading treatment, are expressly prohibited. The International Court of Justice in the *Case concerning military and paramilitary activities in and against Nicaragua* has referred to these principles as the "*elementary considerations of humanity*" and expressed the view that " *there is no doubt that these rules also constitute a minimum yardstick in the event of international armed conflict*"[43].

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[39] Geneva Convention relative to the Protection of Civilian Persons in Time of War, U.N. Treaty Series, Vol. 75, p. 287, entered into force on 21 October 1950.

[40] Geneva IV, Article 4.

[41] Geneva IV, Article 31.

[42] Geneva IV, Article 32.

[43] See *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, General List No. 70, International Court of Justice, Judgment of 27 June 1986, 76 int. law rep. 1, § 218.

44. Parties to the Geneva Conventions have also undertaken to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the "grave breaches" prohibited in the conventions, which are defined to include torture or inhuman treatment[44]. Furthermore, every Party is "*under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts*"[45].

4. The Additional Protocols to the Geneva Conventions

45. The Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts ("Protocol I") and the Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II") were adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. They entered into force on 7 December 1979. All EU Member States and candidate countries except Turkey are parties to both protocols.

46. Article 75 of Protocol I provides fundamental guarantees to the effect that "*persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances* [...]"[46]. The Article expressly prohibits "*(a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault* [...] *(e) threats to commit any of the foregoing acts*". These acts are prohibited "*at any time and in any place whatsoever, whether committed by civilian or by military agents*".

47. Article 4 of Protocol II provides fundamental guarantees to "*all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted*". These include the prohibition of "*violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment*", as well as of "*outrages upon personal dignity, in particular humiliating and degrading treatment*" and threats to commit any of the aforementioned acts.

D. The Convention relating to the Status of Refugees

48. Article 33 of the Convention relating to the Status of Refugees, adopted on 28 July 1951 and which entered into force on 22 April 1954, lays down the principle of "*non-refoulement*" which applies to the category of refugees. It states that "*no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the*

[44] Geneva III, Articles 129 and 130, Geneva IV, Articles 146 and 147.
[45] Geneva III, Article 129, Geneva IV, Article 146.
[46] Emphasis added.

*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". The second paragraph of the same article provides an exception to the effect that "the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country"*.

49. It may be observed that the principle of "*non-refoulement*" is not limited to persons in danger of torture, as it is under Article 3 of the CAT, but extends to a larger notion of ill-treatment that is often referred to as "persecution". This Convention has been ratified by all EU Member States and candidate countries.

## E. The Council of Europe

### *1. The European Convention on Human Rights*

50. The prevention of torture also plays an important part in the conventions established under the auspices of the Council of Europe. The most important is the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which entered into force on 3 September 1953, has been ratified by all EU Member States and candidate countries, and has since been supplemented with several protocols. Commonly known as the "European Convention on Human Rights" ("the Convention"), it provides in Article 3 that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*". This prohibition, unlike certain other provisions of the Convention, is absolute and cannot be derogated from under any circumstances[47]. Pursuant to Article 13, States signatories to the Convention have also undertaken to guarantee, in the case of any violation of its provisions, an "*effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*"[48].

51. The body charged with supervising the compliance with the provisions of the Convention is the European Court of Human Rights ("ECHR") in Strasbourg, which "*may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto*"[49]. The case-law of this Court provides the most comprehensive guidance as to the obligations of European Union Member States and candidate countries relating to the prohibition and prevention of torture.

52. In line with other international instruments but with a slightly different wording, the Convention distinguishes between "torture" and other forms of "inhuman or degrading treatment", with the former requiring a greater or more intense degree of suffering that the latter. The standard of severity required to establish "torture" depends on different

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[47] ECHR, Article 15 § 2.
[48] ECHR, Article 13.
[49] ECHR, Article 34. It must be noted that until the entry into force of the 11th Protocol to the Convention in 1998, the supervisory mechanism also included a European Commission on Human Rights, which has since been abolished.

circumstances, such as physical or mental effect, duration, or the characteristics of the victim. In *Ireland v. United Kingdom*, a case decided in 1978, the ECHR classified the interrogation practices used by the police in Northern Ireland to obtain confessions (deprivation of sleep, food or drink; subjection to noise; making detainees stand legs apart with their hands up against a wall for hours; covering their heads with a dark coloured bag) as inhuman and degrading treatment but not as torture[50].

53. In the more recent case of *Selmouni v. France*, decided in 2000, the ECHR has applied a more rigorous assessment and found that a large number of blows and humiliations inflicted on a detained suspect over a number of days was particularly cruel and must therefore be regarded as "torture". It indicated that "*having regard to the fact that the Convention is a living instrument which must be interpreted in the light of present day conditions, certain acts which were classified in the past as 'inhuman or degrading treatment' as opposed to 'torture' could be classified differently in future*"[51].

54. Treatment has been held by the ECHR to be "inhuman" because, *inter alia,* it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3[52].

55. Extradition or deportation will amount to inhuman or degrading treatment if there is a "real risk" of ill-treatment by either private groups or the state, of the person concerned[53]. In the *Soering* judgment, where it considered the question of a murder suspect to be extradited from the United Kingdom to the United States, the ECHR held that:

> "88. [...] It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article 3. [...]
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> 91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the

[50] *Ireland v. United Kingdom* (1978) 2 EHRR 25.
[51] *Selmouni v. France* (2000) 29 EHRR 403, § 101.
[52] *Labita v. Italy*, Judgment (Grand Chamber) of 6 April 2000, application no. 26772/95, § 120.
[53] *Soering v. United Kingdom* (1989) 11 EHRR 439, §§ 88 and 99.

Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. [...]".

56. However, since the decision to expel can only be made with reference to facts known to the state at the time of expulsion, a State will not be in breach of the ECHR if those facts indicated only a "mere possibility" and not a "real risk" of inhuman treatment[54]. On the other hand, if such a risk does exist, there can be no balancing of the interests of the individual against those of the deporting state. The activities of the individual in question, however undesirable or dangerous, cannot be a material consideration[55]. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the Convention on the Status of Refugees (see point 47 above).

57. It is important to note, in this regard, that the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, with the purpose of bringing fugitive offenders to justice, provided that such cooperation does not interfere with any specific rights recognised in the Convention. In particular, the ECHR has held, in analysing the transfer, from Kenya to Turkey, of Abdulah Öcalan, the leader of the Kurdistan Worker's Party, that subject to its being the result of "cooperation between the States concerned" and provided that the legal basis of the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention[56]. The Court explained that:

> "87. As regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5. [...]
>
> 90. Irrespective of whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question which only falls to be examined by the Court if the host State is a party to the Convention – the Court requires proof in the form of concordant inferences that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law (see, *mutatis mutandis*, *Stocké v. Germany*, judgment of 19 March 1991, Series A no. 199, p. 19, § 54). Only then will the burden of proving that the sovereignty of the host State and international law have been complied with shift to the respondent Government."

58. In order to give full effect to the prohibition of torture and inhuman or degrading treatment or punishment, the ECHR has interpreted Article 3 as requiring an effective

[54] *Vilvarajah v. United Kingdom* (1991) 14 EHRR 248.
[55] *Chahal v. United Kingdom* (1996) 23 EHRR 413, § 80.
[56] *Öcalan v. Turkey*, Judgment (Grand Chamber) of 12 May 2005, application no. 46221/99, § 89. The legality of the transfer was analysed from the standpoint of Article 5 of the Convention which guarantees the right to liberty and security of person.

official investigation where an individual raises an arguable claim that he has been ill-treated by authorities. Such an investigation should be capable of leading to the identification and punishment of those responsible[57].

59. Moreover, the ECHR has also applied Article 3 to the conditions of detention. A severely overcrowded and unsanitary environment, its detrimental effect on the detainee's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, may, even in the absence of any indication that there was a positive intention of humiliating or debasing him, by itself amount to degrading treatment[58].

2. *The European Convention for the Prevention of Torture*

60. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")[59], signed on 26 November 1987 and entered into force on 1 February 1989, has been ratified by all EU Member States and candidate countries. It is a convention that establishes a non-judicial preventive machinery to protect detainees and does not contain substantive provisions concerning torture.

61. The CPT provides for a preventive system of unannounced confidential visits to prisons and other closed facilities by a special body, the European Committee for the Prevention of Torture[60]. According to Article 1 of the Convention, the Committee's task is "*to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment*".

62. All parties to the CPT are under a duty to "*permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority*". Visits are carried out by delegations, usually of two or more CPT members, accompanied by members of the Committee's Secretariat. After each visit, the Committee draws up a report on the facts found, taking account of any observations which may have been submitted by the Party concerned.

3. *The Commissioner for Human Rights*

63. Another relevant institution in the framework of the Council of Europe is the Commissioner for Human Rights. According to Article 3 of the resolution establishing the Commissioner, he or she is to promote the awareness of and respect for human rights in the Member States, to contribute to the effective observance and full enjoyment of human rights and to identify possible shortcomings in the law and practice of Member States[61].

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[57] *Assenov v. Bulgaria*, (1998) 28 E.H.R.R. 652, § 102.
[58] *Kalashnikov v. Russia* (2002) 36 EHRR 34, §§ 101-103.
[59] European Treaties Series (ETS) No. 126.
[Available on: http://www.cpt.coe.int/en/documents/ecpt.htm].
[60] The Committee consists of a number of members equal to that of the parties.
[61] See Resolution (99) 50 of the Council of Europe adopted by the Committee of Ministers on 7 May 1999.

64. Under Article 1 of this Resolution, the Commissioner is a non-judicial institution and shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the European Convention on Human Rights and under other human rights instruments of the Council of Europe. The present Commissioner is Thomas Hammarberg, who, as of 3 April 2006, has succeeded Alvaro Gil-Robles.

F. European Union standards on fundamental rights

65. Article 6, § 1 and 2, of Treaty on European Union[62] provides that the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and in particular that the "*Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*".

66. The Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, provides in Article 3 § 1 that "*everyone has the right to respect for his or her physical and mental integrity*". Article 4 states that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*". It should be noted that presently, the Charter of Fundamental Rights is not a legally binding instrument and that, in any event, Article 51 § 1 limits its scope to the actions of the institutions and bodies of the Union and to the Member States when they are implementing Union law.

G. General observations

67. The prohibition of torture is unequivocally established in general international law and in several international treaties. It is also considered a norm of *jus cogens*, that is to say a norm from which no derogation is permitted. In addition, it has to be noted that the membership of certain supervisory bodies consists of persons nominated not as representatives of States but because of their personal qualities.

68. In spite of this important range of international treaties and instruments governing the prohibition of torture and cruel, inhuman or degrading treatment or punishment, some shortcomings might be detected in the present situation of international law.

69. As a matter of fact, a more precise definition of related obligations incumbent upon States, concerning in particular the prohibition of transferring persons to a country where they may subsequently be tortured or subjected to inhuman or degrading treatment or punishment, would be needed to avoid differing interpretations of these obligations.

70. It can be observed that, in the framework of the United Nations Conventions, the lack of a judicial body empowered to hear individual complaints and order remedies in cases of violations appears to limit the impact of the CAT and the prohibition of torture found in the ICCPR.

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[62] Article 7 § 1 of the Treaty on European Union establishes a procedure to determine that there is clear risk of a serious breach by a Member State of principles mentioned in Article 6 § 1 and to address recommendations to that State. Article 7, § 2 and 3, provides the procedure to determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6 § 1 and indicates possible sanctions.

## II. The implementation and interpretation of pertinent International Law instruments by the United States

A. American federal law on torture

1. *The prohibition of torture in American federal law*

71. To implement Articles 4 and 5 of the CAT (see point 9 above), the United States Congress did not enact a new provision to criminalise acts of torture committed in the United States. It was considered that such acts would be covered by existing applicable federal and state statutes, such as those criminalising assault, manslaughter, and murder.

72. However, in order to fully discharge its obligations under these articles of the CAT, the United States adapted its federal criminal law by enacting sections 2340 and 2340A of title 18 of the United States Code[63]. These sections were adopted to implement the CAT specifically with respect to acts of torture occurring outside the United States. Section 2340 (definitions) states that "*(1) torture means an act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) severe mental pain or suffering means the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;* [...]".

73. Section 2340A (Torture) lays down the following definitions and principles: "*(a) Offence. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. (b) Jurisdiction. - There is jurisdiction over the activity prohibited in subsection (a) if - (1) the alleged offender is a national of the United States; or - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender* [...]".

74. These sections therefore establish criminal liability for Americans as well as for others, if found in the United States, who committed torture abroad. However, they do not impose criminal liability for "cruel, inhuman, or degrading" acts. Under a reservation adopted by the U.S. Senate when it authorised the ratification of the U.N. Convention, "*the United States considers itself bound by the obligation under Article 16 to prevent*

[63] The United States Code is the official compilation of federal statutes under 50 title headings. Title 18 deals with crimes and criminal procedure.

*'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States*". To better explain this "reservation" - which is not explicitly provided for in the Convention[64] -, it is important to point out that the United States formulated, upon signature, the following declaration: "*The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, integrative understandings, or declarations as are deemed necessary*".

75. Moreover, the United States Senate pointed out when authorising the ratification, that its advice and consent was subjected, among others, to the following understandings: "*(1)(a)That with reference to Article 1* [of the CAT], *the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. (b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.* [...]"[65]. These understandings were deposited with the U.S. instrument of ratification. Further particularities of the United States ratification are examined below, point 93 and following.

2. The interpretation of the prohibition of torture

76. The legislative provisions described above have been interpreted by the Office of Legal Counsel, a special division of the Department of Justice charged with assisting the Attorney General "*in his function as legal advisor to the President and all the executive branch agencies*". The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. Although these legal opinions do not have the force of law, the Office has been characterised as the "*most important legal office in the United States government*"[66].

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[64] Article 19 (Reservations) of the Vienna Convention on the law of treaties of 1969 provides that a "*State may, when signing, ratifying, accepting or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservations in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and 8b), the reservation is incompatible with the object and purpose of the treaty*".

[65] Source: Declarations and Reservations to the CAT, Office of the High Commissioner for Human Rights [http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm].

[66] See Harold Hongju Koh, "A world without torture", 43 *Columbia Journal of International Law* 2005 [hereinafter: Koh], p. 645.

77. Upon the request of the Counsel to the President of the United States, the Office of Legal Counsel issued, on 1 August 2002, a memorandum containing a formal legal opinion interpreting the CAT and the above criminal provisions[67]. This legal opinion analysed the term "severe physical or mental pain" used by Section 2340 of the U.S. Code, which it interpreted to encompass only "*extreme acts*"[68]. Where the pain is "*physical, it must be of an intensity akin to that which accompanies serious physical injury, such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment, fail to rise to the level of torture*"[69]. The opinion therefore would seem to establish a high threshold that had to be met for treatment to be classified as torture.

78. This legal opinion became public and it was subsequently subject to severe criticisms. Certain commentators pointed out that this is a narrow definition of torture which would effectively mean that many practices used by torturers, such as electric shocks, beating, burning, tying up or hanging in painful positions, breaking of limbs or denial of food and water, would not constitute torture and would therefore not be punishable under applicable criminal law[70].

79. In addition, it was pointed out that this legal opinion could be interpreted to allow for an extensive application of the inherent power of the U.S. President under the Commander-in-Chief power in Article II of the U.S. Constitution. The legal opinion claimed that "*the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy*"[71] and that "*under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional*"[72]. Moreover, the opinion went on to add that "*even if an interrogation method might violate Section 2340A, necessity or self-defence could provide justifications that would eliminate any criminal liability*"[73].

80. On 30 December 2004, the Office of Legal Counsel issued another legal opinion which explicitly superseded the views expressed in their opinion of 1 August 2002[74]. The Office stated that "*although Congress defined 'torture' under sections 2340 and 2340A to require conduct specifically intended to cause 'severe' pain or suffering, we do not believe Congress intended to reach only conduct involving 'excruciating and agonizing' pain or suffering*". Nevertheless, since this change of position took place more than two

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[67] Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (1 August 2002) [hereinafter: Memorandum of 1 August 2002], p. 46. This memorandum is often referred to as "the Bybee memo" [see also: http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html].
[68] Ibid.
[69] Ibid.
[70] See Koh, p. 647.
[71] Memorandum of 1 August 2002, p. 31.
[72] Ibid., p. 46.
[73] Ibid.
[74] Memorandum opinion for the Deputy Attorney General, *Legal Standards applicable under 18 U.S.C. §§ 2340-2340A* (30 December 2004).

years after the original legal opinion was issued, the former legal opinion may have inspired some decisions or actions of the United States Presidency before the latter one was drafted.

81. In the more recent opinion, the Office of Legal Counsel concluded that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if does not involve "severe physical pain". The list of predicate acts of Section 2340 (see point 66 above) of Title 18 of the U.S. Code was exclusive and consistent with both the text of the Senate's understanding for the ratification of the CAT, and the fact that the understanding was adopted out of concern that the CAT's definition of torture would otherwise not meet the requirement of clarity in defining crimes. Adopting an interpretation of Section 2340 that expands the list of predicate acts constituting "severe mental pain or suffering" would amount to an impermissible rewriting of that provision.

3. *Explicit prohibition of cruel, inhuman and degrading treatment of detainees (the "McCain Amendment")*

82. The United States Congress has recently approved additional legal rules concerning the treatment of enemy combatants and terrorist suspects detained. Two Acts[75] signed into law on 30 December 2005 and 6 January 2006, contain identical provisions that require Department of Defense personnel to employ United States Army Field Manual guidelines while interrogating detainees, and prohibit the cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government. These provisions were added to the defense appropriations and authorization bills via amendments introduced by Senator John McCain (popularly referred to as "McCain Amendment")[76].

83. The McCain amendment, as modified and enacted into law, contains three provisions. The first concerns persons in the custody or effective control of the U.S. Department of Defense or detained in one of its facilities. This provision provides that no such person shall be subject to any interrogation treatment or technique that is not authorised by and listed in the U.S. Army Field Manual on Intelligence interrogation. The McCain amendment does not require agencies which are not under the Department of Defense, such as non-military intelligence and law enforcement agencies, including the CIA, to employ Field Manual guidelines with respect to interrogations they conduct.

84. The second provision prohibits persons in the custody or control of the U.S, Government, regardless of their nationality or physical location, from being subjected to cruel, inhuman or degrading treatment or punishment. It is particularly important, because the prohibition is without geographical limitation as to where and when the U.S. Government must abide by it. Therefore, it appears that this provision is intended to ensure that persons in U.S. custody or control abroad cannot be subjected to treatment

[75] The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163).
[76] See the CRS Report for Congress on the *Interrogation of Detainees: Overview of the Mc Cain Amendment* (updated on 24 January 2006).

that would be deemed unconstitutional if it occurred in the United States according to the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

85. Unlike the first provision, the second covers not only Department of Defense activities, but also intelligence and law enforcement activities by the United States occurring inside and outside the United States. Yet, this provision does not appear to prohibit U.S. agencies from transferring persons to other countries where those persons would face cruel, inhuman, or degrading treatment or punishment so long as such persons were no longer in U.S. custody or control. Such transfers might nonetheless be limited by applicable treaties and statutes.

86. The third provision of the McCain amendment provides a legal defence to U.S. personnel in any civil or criminal action brought against them on account of their participation in the authorised interrogation of suspected foreign terrorists. The amendment specifies that a legal defence exists to civil action and criminal prosecution when the U.S. agent "*did not know that the* [interrogation] *practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful*".

B. American federal law on transfer of persons to another country

*1. Rendition and "extraordinary rendition": definitions*

87. A person suspected of having committed a crime in one country but who is present in another country may be transferred to the former for the purpose of interrogation, detention, prosecution or carrying out of a sentence. Ordinarily, the process used to transfer such persons is "extradition"[77], a formal procedure, generally regulated by a treaty, whereby the individual concerned is surrendered from one State to another State on the basis of decisions by the administrative or judicial authorities of the requested State. It is regulated by both international law, in particular the extradition treaties among States, and national law. However, a transfer may also be realised in the absence of extradition treaties, for instance in case of removal of an alien from a State based on the latter's authority to determine which non-nationals can enter and stay within its borders.

88. In international law, "rendition" and "extraordinary rendition" are not legally defined terms. The Black's Law Dictionary defines "rendition" as "*the return of a fugitive from one State to the State where the fugitive is accused or convicted of a crime*"[78].

89. Some sources indicate that the two expressions are sometimes used as synonyms. For example, the Report of the Secretary General of the Council of Europe on the question of secret detention and transport of detainees suspected of terrorist acts, published on 28 February 2006, states that these terms "*are normally understood to mean the apprehension and subsequent transfer of a person from one jurisdiction to another,*

[77] International extradition is defined as "*extradition in response to a demand made by the executive of one nation on the executive of another nation*" and it is "*regulated by treaties*". See *Black's Law Dictionary*, 7th edition, 1999, p. 605.

[78] See *Black's Law Dictionary*, p. 1298.

*outside the framework of legally defined procedures such as extradition, deportation or transfer of sentenced persons and possibly with the risk of being subjected to torture or inhuman and degrading treatment*"[79].

90. However, most sources distinguish between "rendition" and "extraordinary rendition". According to a definition used in the "Torture by Proxy" study (see above point 12 of the present Research Note), "extraordinary rendition" is the "*transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman or degrading treatment*"[80]. Another definition is provided by the Congressional Research Service (CRS)[81] Report for Congress, which states that the terms "irregular rendition" and "extraordinary rendition" have been used to refer to "*the extrajudicial transfer of a person from one state to another, generally for the purpose of arrest, detention and/or interrogation by the receiving state*"[82]. The present research note uses the notion of "extraordinary rendition" in this sense.

91. According to the Opinion given by the European Commission for Democracy through Law ("Venice Commission"[83]) of 17-18 March 2006, on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners, the term "rendition" refers to "*one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State*". The term "extraordinary rendition" appears "*to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedure applying in the State where the person was situated at the time*"[84].

*2. The law and practice of "renditions"*

92. U.S. Government officials acknowledge only the existence of the practice of "rendition to justice". This practice was developed in the late 1980s when the technique was apparently established in order to allow U.S. law enforcement personnel to apprehend wanted individuals in "lawless" States like Lebanon during its civil war. In the early 1990s, renditions to justice were allegedly exclusively law enforcement operations in

[79] See Council of Europe, Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies (28 February 2006), § 22.
[80] See Torture by Proxy, cited in footnote 14, p. 4.
[81] The Congressional Research Service is the public policy research arm of the United States Congress. As a legislative branch agency within the Library of Congress, CRS works exclusively and directly for Members of Congress, their Committees and staff.
[82] See Congressional Research Service Report for Congress, *Renditions: Constraints Imposed by Laws on Torture* (22 September 2005) [hereinafter: CRS Report on renditions], p. 1.
[83] The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. It was established in 1990 and plays a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. The Venice Commission, composed of independent members acting in their individual capacity, has become an internationally recognised legal think-tank [http://www.venice.coe.int/site/main/presentation_E.asp].
[84] See Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners*, adopted at the 66th Plenary Session (17-18 March 2006), § 30.

which suspects were apprehended by covert CIA or FBI teams and brought to the United States or other States for trial or questioning.

93. According to the "Torture by Proxy" study, an overview of the relevant U.S. legislation (statutes, regulations, directives or other actions) shows that there is no legal source authorising "extraordinary rendition" if it is understood as an extra-judicial procedure which involves the sending of criminal suspects to countries other than the United States for imprisonment and interrogation[85]. The same study takes the view that the United States Government is obliged to prevent extraordinary rendition under the provisions of the CAT[86].

94. The United States ratified the CAT in 1994, subject to certain declarations, reservations, and understandings, inspired by the United States Senate (see also, points 74 and 75 above). The U. S. Senate's advice and consent to the ratification of the CAT was also subject to the declaration that the provisions of Articles 1 through 16 of the CAT are not self-executing. A non-self-executing agreement will not have effect as law in the absence of necessary domestic implementation. Of course, the United States has an international obligation to adjust its law as necessary to give legal effect to international agreements and treaties.

95. With respect to Article 3 of the CAT which provides that "*no State Party shall expel, return 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*", the CRS Report for Congress on renditions states that "*the U.S. ratification of CAT was contingent on its understandings that this requirement refers to situations where it would be 'more likely than not' that a person would be tortured if removed to a particular country, a standard commonly used by U.S. courts when determining whether to withhold an alien's removal for fear of persecution*".

96. In order to implement this article of the CAT, the Foreign Affairs Reform and Restructuring Act (FARRA)[87] was adopted in 1998. The Act and the regulations adopted to give it effect (the FARRA Regulations) do not directly deal with transfers originating outside the United States by U.S. officials. However, some commentators consider that, given the fact that the FARRA Regulations prohibit the removal or extradition of an individual to a State where this person is more likely than not to be subjected to torture, it can be inferred that Congress intended to prohibit any transfers (whether originating in the U.S. or elsewhere), with the involvement of U.S. officials, to States where the individual is more likely than not to be tortured[88].

97. The FARRA consists of three parts. First, Section 2242 (a) of the FARRA implements Article 3 of CAT by providing that the United States will not "*expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States*". Second, Section 2242 (b) requires relevant agencies to promulgate and enforce regulations to implement CAT, fully respecting the understandings, declarations, and

[85] Torture by Proxy, p. 20.
[86] Torture by Proxy, p. 35.
[87] Pub. L. No. 105-277, Div. G, § 2242 (1998) [hereinafter: FARRA].
[88] Torture by Proxy, p. 20.

reservations expressed in the Senate resolution on ratification. Third, Section 2242 (c) instructs agencies that when adopting their regulations, they should, "*consistent with the obligations of the United States under the Convention*", exclude from protection non-citizens described in Section 241(b)(3)(B) of the Immigration and Nationality Act (INA) (see point 102 below)[89].

98. The FARRA Regulations broadly address three categories of people: (i) individuals subject to "summary exclusion", also known as "expedited removal", (ii) individuals subject to "removal orders", and (iii) individuals subject to "extradition orders". The scope of CAT protection varies both among and within these categories.

99. Generally speaking, an individual arriving in the United States may be summarily removed if the individual is found inadmissible pursuant to relevant provisions of the INA, for example, because of the lack of required documents or misrepresentation), or if the individual is considered to be a threat to national security. For individuals who are subject to removal orders, the determination of a CAT claim is made by an immigration judge. Generally, an applicant for non-removal under Article 3 of CAT has the burden of proving that it is more likely than not that he or she would be tortured if removed to the proposed State.

100. In the context of extradition, pursuant to Sections 3184 and 3186 of title 18 of the United States Code, the Secretary of State is the U.S. official responsible for the final determination of whether to surrender an alleged fugitive to a foreign State by means of extradition. These provisions quote Article 3 of CAT, and specify that in order to implement the obligation assumed by the United States pursuant to this provision, the State Department has to consider the question of whether a person facing extradition from the U.S. is more likely than not to be tortured in the State requesting extradition when appropriate in making this determination.

101. CAT implementing regulations concerning the removal of aliens from the United States are primarily found in Sections 208.16 to 208.18 of Title 8 of the Code of Federal regulations (CFR)[90]. They prohibit the removal of persons to countries where they would more likely than not face torture.

102. Section 241(b)(3)(B) of the INA provides an exception to the general U.S. prohibition on the removal of aliens to countries where they would face persecution, which may include actions constituting torture. An alien may be removed despite the prospect of likely persecution if he or she: assisted in Nazi persecution or engaged in genocide; ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; having been convicted of a particularly serious crime, is a danger to the community of the United States; is strongly suspected to have committed a serious non-political crime outside the United States prior to arrival; or is believed, on the basis of reasonable grounds, to be a danger to the security of the United States.

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[89] The Immigration and Nationality Act (INA) was established in 1952. The Act has been amended many times over the years, but is still the basic text of the U.S. immigration law.

[90] The Code of Federal Regulations (CFR) is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the United States federal government. It is divided into 50 titles that represent broad areas subject to federal regulation. Title 8 deals with aliens and nationality, while Title 2 contains regulations on immigration.

103. Nevertheless, according to the CRS Report on renditions, thus far U.S. regulations concerning the removal of aliens and extraditions of fugitives have actually prohibited the removal of all persons from the United States where they would more likely than not be tortured, regardless of whether they are described in the above mentioned section of INA[91].

*3. Diplomatic assurances*

104. The United States take into consideration diplomatic assurances as a ground for the transfer of alien detainees or asylum seekers to States where the individual faces the risk or danger of torture. More specifically, regulations implementing CAT provide that if assurances are obtained by the Secretary of State from the government of a specific State that an alien would not be tortured if he or she were removed to that country, such assurances are forwarded to the Attorney General or the Secretary of Homeland Security. The official to whom this information is forwarded shall determine, in consultation with the Secretary of State, whether such assurances are sufficiently reliable to permit the alien's removal to that State without violating U.S. obligations under Article 3 of CAT.

105. Under U.S. law, if diplomatic assurances satisfactory to the Attorney General are provided, an alien detainee's claims for protection under Article 3 of the CAT shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer, and the alien may be removed[92]. The detainee has no opportunity to challenge the Attorney General's determination, and the Attorney General's decision is not subject to any judicial or administrative review.

106. Although there is no mention of diplomatic assurances in the regulations dealing with the application of the CAT in the context of extradition, section 95.3(b) of Title 2 of the CFR provides that once the Secretary of State has received review and analysis from relevant policy and legal offices in relation to a CAT claim, he or she may decide "*to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions*". Such conditions would appear to include diplomatic assurances.

## C. The interpretation of the Geneva Conventions

107. The United States position[93] on the Geneva Conventions is mainly expressed in the War Crimes Act (WCA) of 1996, a federal statute set forth at Section 2241 of title 18 of the United States Code. This Act states that it is a federal crime for any U.S. national, whether military or civilian, to violate the Geneva Conventions by engaging in murder, torture or inhuman treatment. The federal statute applies not only to those who carry out

[91] See CRS Report on renditions, p. 8.
[92] See Section 208.18(c) 3 of Title 8 of the CFR.
[93] For the interpretation of the relevant provisions (common Articles 2 and 3) see also the Presidential Order of 7 February 2002 outlining treatment of Al Qaeda and Taliban detainees (see point below 119) as well as a Memorandum of 22 January 2002 of the Office of Legal Counsel of the U.S. Department of Justice for the Counsel of the President of United States and for the General Counsel of the Department of Defense [this Memorandum can be found at the following Internet site: http://lawofwar.org/Torture_Memo_analysis.htm].

the acts, but also to those who order them, know about them, or fail to take steps to stop them. There appears to be no record of any person being prosecuted under this law[94].

108. Section 2241 renders certain acts punishable as "war crimes". This Section has no prescription period, which means that a war crimes complaint can be filed at any time. It lists four categories of war crimes, the third of these being the criminalisation of violations of the common Article 3 of the Geneva Conventions[95]. Therefore, the term "war crime" also includes any conduct that violates the common Article 3.

109. With respect to common Article 3, the U.S. Government endorsed the position that common Article 3 complements common Article 2 of the Geneva Conventions[96]. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more Parties to the Conventions, even if the state of war is not recognised by one of them. Article 3 covers "armed conflict not of an international character" which occurs within the territory of one of the Parties.

110. According to the interpretation of common Article 3 by the United States Government, this Article provides a substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory. It does not refer to all armed conflicts, nor does it address a gap left by common Article 2 for international armed conflicts that involve non-State entities (such as an international terrorist organisation) as parties to the conflict.

111. According to this position, an analysis of the background to the adoption of the Geneva Conventions in 1949 confirms that understanding of Article 3, because it would appear that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general international concern at the time, that is to say, armed conflict between nation-states (governed by Article 2), and large-scale civil war within a nation-state (governed by Article 3).

112. It may be noted that some commentators have justified this interpretation of the relevant Articles of the Geneva Conventions (that have to be read in the entire legal context of the Conventions) by reasoning that the conditions established in Article 4 of Geneva III are "*aimed at facilitating the bedrock customary distinction between combatants and civilians,* [and] *also establish a second fundamental distinction under customary law, that between lawful and unlawful combatants. Only lawful combatants - that is, members of fighting units that comply with all four conditions - are licensed to engage in military hostilities.* [...] *Unlike lawful combatants, unlawful combatants have no right to engage in hostilities and enjoy no immunity from prosecution for their military activities, nor they receive the protections afforded under the laws of war to captured prisoners of war*"[97].

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[94] See the Memorandum from U.S. Civil Society Organization to the Members of the U.N. Committee against Torture of 16 September 2005.

[95] See for this Article point 43 above.

[96] See the Memorandum of 25 January 2002 from Alberto R. Gonzales to the U.S. President [this Memorandum is available at the following Internet site: http://lawofwar.org/Torture_Memo_analysis.htm; it is also available at http://www.msnbc.msn.com/id/4999148/site/newsweek/].

[97] See John C. Yoo and James C. Ho, "The Status of Terrorists", University of California, Berkeley School of Law, Public Law and Legal Theory Research Paper No. 136, 2003 [hereinafter: The Status of Terrorists], p.13-14.

113. This interpretation seems to question the reasoning given in the judgment of the International Court of Justice in the *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)* of 1986[98], which stated that there is no doubt that common Article 3 of the Geneva Conventions, even if it is aimed at a conflict of non-international character, also constitute a minimum yardstick in the event of international armed conflict[99].

114. The United States Government appears to consider that the International Court's interpretation of common Article 3 ignores the text and the context in which it was ratified by the United States[100]. It reasons that if the State Parties had intended the Geneva Conventions to apply to all forms of armed conflict, they could have used broader and clearer language. Otherwise, there would be a risk of expanding the scope of Article 3 and effectively amending the Geneva Conventions without the approval of the States Parties.

115. In accordance with this approach, the United States Government considers that conflicts between a nation-State and a trans-national terrorist organisation, such as Al Qaeda, were not provided for in the Geneva Conventions[101].

116. Therefore, the WCA's prohibition on violation of common Article 3 would apply only to internal conflicts between a State Party and an insurgent group, rather than to all forms of armed conflict not covered by common Article 2 of the Geneva Conventions.

117. In addition, it may be noted that the United States has not ratified the two Protocols added to the Geneva Conventions to adapt the Conventions to the conditions of contemporary hostilities (see point 44 above) and hence cannot be bound by the interpretation of the Geneva Conventions that these Protocols imply. One of the primary purposes of Protocol I Additional to the Geneva Conventions was to expand the categories of individuals who would be protected under any of the four original 1949 Geneva Conventions. From the point of view of opponents of the Protocol, its Article 44(3)[102] "*would significantly dilute the traditional requirement under customary law and GPW* [Geneva III] *that combatants must distinguish themselves from civilians and otherwise comply with the laws of war as a condition of protection under the Geneva Conventions*"[103].

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[98] See point 43 above.

[99] According to the International Court of Justice, the rules defined in common Article 3 reflect "elementary considerations of humanity" (see *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States*, cited in footnote 43, § 218).

[100] In this sense, see the Memorandum of 22 January 2002, cited in footnote 90, at p. 8 and footnote 23: the conflict between the *contras'* forces and those of the Government of Nicaragua was recognisably "*a civil war between a State and an insurgent group, not a conflict between or among violent factions in a territory in which the State had collapsed. Thus there is substantial reason to question the logic and scope of the ICJ's interpretation of common Article 3, which, in any event, is not binding as a matter of domestic law on the United States*".

[101] See the Memorandum of 22 January 2002, p. 1 and p. 9.

[102] Article 44(3) of Protocol I provides: "*In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, providing that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate*".

[103] Yoo and Ho, "The Status of Terrorists", p.18.

118. Consequently, the U.S. State Department opposed ratification of Protocol I, pointing out that "*Article 44(3), in a single subordinate clause, sweeps away years of law 'recognizing' that an armed irregular 'cannot' always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combating terrorism*"[104].

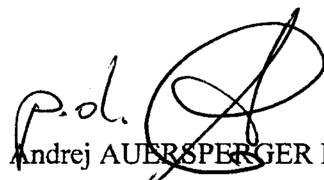
119. Following that approach, it may be argued that the United States President, in his quality of Commander-in-Chief, has the power to determine that the Taliban militia or the Al Qaeda members have to meet the criteria provided for in Article 4 of Geneva III in order to be entitled to the status of lawful combatants, and, as a result, to the protections accorded to prisoners of war under that Convention.

120. It can be noted that in accordance with that view, the U.S. President has determined, in his Order of 7 February 2002, that none of the provisions of Geneva III applies to the conflict with Al Qaeda but that it applies to the members of the Taliban militia. He also determined that the common Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "*armed conflict not of an international character*".

121. However, it may be recalled that Article 5 of Geneva III (as referred to in point 37 above) does require that individuals who are alleged to be members of the Taliban militia or Al Qaeda enjoy the protection given by Geneva III until such time as their status has been determined by a competent tribunal. Nevertheless, it has to be pointed out that the situation of Al Qaeda members can be different if they were not captured during the armed conflict in Afghanistan and were not accompanying Taliban combatants, but, for example, have been captured before or after the hostilities, or by other forces and subsequently rendered to United States forces or authorities. In such a case, the protection of Article 5 does not apply, but such detainees would in principle have to be treated according to the United States criminal law and procedure.

Harry DUINTJER TEBBENS

António CAIOLA



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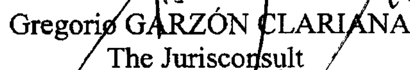

Gregorio GARZÓN CLARIANA
The Jurisconsult

Encl.

[104] U.S. Treaty Doc. 100-2, 100th Cong., 1st Sess., at 4 (1987).

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ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ
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**COMMISSION TEMPORAIRE TDIP**
**(Commission temporaire sur l'utilisation alléguée de pays européens par la CIA pour le transport et la détention illégale de prisonniers)**
- LE PRÉSIDENT -

Ref.: D(2006)13645

303507 10.03.2006

Monsieur Gregorio GARZÓN CLARIANA
Jurisconsulte
Service Juridique

Monsieur le Jurisconsulte,

Dans le cadre du mandat qu'elle a reçu du Parlement européen le 18 janvier 2006, la commission que je préside souhaiterait, dans un premier temps, obtenir un avis du Service juridique sur les questions suivantes:

1. Quel est l'état du droit applicable aux Etats membres de l'Union européenne en matière de prohibition de la torture, au regard des textes internationaux en vigueur, parmi lesquels : la Charte des Nations unies, la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984, la Convention européenne de sauvegarde des droits de l'homme du Conseil de l'Europe (et la jurisprudence afférente), la Charte des droits fondamentaux de l'Union européenne, et tout autre texte approprié ?

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En particulier, quels mécanismes de contrôles ces instruments prévoient-ils et dans quelle mesure sont-ils applicables sans réserve à tous les États parties ?

Dans ce contexte, peut-on considérer que le droit international en matière de torture comporte des lacunes ou insuffisances, tant en termes de définitions matérielles que d'effectivité des mécanismes de contrôle qu'il instaure ?

2. Au regard de ces normes et des pratiques européennes, il serait utile de disposer d'une analyse des normes en vigueur aux Etats Unis d'Amérique et des évolutions de la doctrine de l'Administration américaine en la matière depuis l'ordre présidentiel de février 2002. Dans ce contexte, une analyse des notions de "renditions" et "extraordinary renditions" et de leurs implications serait particulièrement précieuse.

En vous remerciant d'une réponse si possible avant la fin de ce mois de mars, je vous prie de croire, Monsieur le Jurisconsulte, en l'assurance de ma meilleure considération.

Carlos COELHO