



# Torture: an overview of the law\*

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Both torture and inhuman and degrading treatment have long been proscribed by international law instruments. Conceptions of what constitutes torture under international law have evolved from narrow definitions that required infliction of excruciating pain to a broader understanding that, at a minimum, torture encompasses acts that cause severe pain and suffering –whether physical or emotional. There is an absolute prohibition in international law against torture. The prohibition applies even in times of national emergency or war, and there are no exceptions or justifications. But while there is general consensus on a baseline definition of torture, there is little international agreement on what constitutes inhuman and degrading treatment and on where to locate the line that separates such treatment from torture. This article explores how different international and national bodies have defined both torture and inhuman and degrading treatment, and analyzes the consequences of divergent definitions for governmental obligations under international law, with a focus on United States policies and practices.

**Key words:** Torture; Inhuman and Degrading Treatment; War on Terror; Extraordinary Rendition; Diplomatic Immunity.

## What is torture?

Methods comparable to the rack and the thumbscrew are still employed in many parts of the world, but current notions of what may amount to torture reflect both the employment of increasingly sophisticated techniques and the growing awareness of their effect on victims. Torture was defined in the past as the infliction of excruciating pain, but this is now too narrow a description. Not all legal texts proscribing torture define the term. Article 3 of the European Convention on Human Rights (ECHR) provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or

punishment” without further definition, leaving it to case law to elaborate on what that means. Article 1 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does, however, provide a definition and, though expressed to be for the purposes of that Convention, it represents a general consensus as to what constitutes torture under international law.<sup>1</sup>

Article 1 is expressed to be “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.” For example, torture under the Statute of the International Criminal Court has a wider definition in that it is not limited to acts by a public official.<sup>2</sup> The Inter-American Convention to Prevent and Punish

\* This is a slightly modified version of an article published in Chatham House’s journal “International Affairs,” available at [http://www.chathamhouse.org.uk/pdf/research/il/BP\\_torture.pdf](http://www.chathamhouse.org.uk/pdf/research/il/BP_torture.pdf).

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1 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.

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Torture also defines torture more broadly and includes acts "to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."

141 States have become parties to the UN Convention, indicating worldwide support for it. Its principal aim was not to outlaw torture, which was already prohibited under international law, but to "make more effective" the existing prohibition (Burgers and Danelius 1988, 1). It is not only "torture" that is prohibited by the Convention, but also "*acts of cruel, inhuman or degrading treatment or punishment*" (Article 16). While the Convention does not give a definition of such treatment, it would include acts or omissions by a public official that cause physical or mental suffering, even if not severe enough to constitute torture nor necessarily carried out with a specific purpose such as obtaining a confession. There are various international decisions relating to UN human rights conventions and other international and regional legal frameworks that help to describe what is included in torture or ill-treatment. For example, in the case of *Selmouni v. France*, involving maltreatment suffered in police custody, the Court gave a useful description of inhuman and degrading treatment, as follows: "[t]he acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."<sup>3</sup> Similarly, the Inter-American Court of Human Rights explained in *Loayza Tamayo v. Peru* that:

the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of and physical psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.<sup>4</sup>

In February 2006, five UN representatives submitted a report to the Human Rights Commission which was highly critical of the regime at the US detention centre at Guantánamo Bay (HRC

2006). The report reiterated that only the infliction of severe pain or suffering meets the Convention's definition of torture. Nevertheless, according to the report, some of the techniques allegedly used at Guantánamo, such as the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering, and their simultaneous use was "even more likely to amount to torture." At the very least, the prohibition on inhuman and degrading treatment was engaged.

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Assessment of what constitutes ill-treatment is necessarily subjective: the same acts might constitute torture or inhuman treatment depending on the circumstances of the case and the characteristics of the victim. The severity element qualifies the pain and suffering of the victim, not the treatment or punishment itself. Therefore the same act can constitute ill-treatment or torture depending on the effects and the purpose of the act. Since both are prohibited under international law, it might be thought that it does not matter whether a particular form of cruel treatment is labelled as torture or not, except for the particular stigma attached to torture. But the UN Convention treats them differently, and States may have different obligations in relation to the two kinds of treatment. This issue, as will appear below, has become important in relation to US practice.



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2 The ICC has jurisdiction over crimes committed in internal armed conflicts where non-state actors are also parties to the conflict. See the definition of torture contained in the ICC Statute.  
3 Eur. Ct. of H.R. *Case of Selmouni v. France*. Judgment of July 28, 1999.  
4 *Loayza Tamayo v. Peru*, Judgment of September 17, 1998, Inter-Am. C.H.R. (Ser. C) No. 42 (1998), para. 57.



## United States practice

The position taken by the US has, since 9/11, become a matter of significant controversy both in that country and around the world. High-level legal memoranda circulated within the US Administration, and leaked outside, discussed the reach and scope of US anti-torture obligations under domestic and international law. A memorandum of August 2002 from the Office of the Legal Counsel in the US Department of Justice described torture as “encompassing only extreme acts;” more specifically, “it must be equivalent in intensity to that which accompanies serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>5</sup> The so-called Torture Memo also advised that, under the doctrine of “necessity,” the President could override national and international laws prohibiting torture. While this Memo was subsequently disavowed, the legal arguments put forward in a number of later memoranda appear to have been influential in attempts to justify the treatment of detainees and interrogation techniques used in Afghanistan, Iraq, and at the detention centres at Guantánamo Bay and other locations (Sands 2006, chapter 9; Mayer 2006, 32).<sup>6</sup>

When the US ratified the UN Convention, the US Senate’s advice and consent were accompanied by reservations and understandings dealing with the various aspects of the application of the Convention in US law, including the definition of torture in Article 1 and the meaning of cruel, inhuman or degrading treatment or punishment in Article 16. These were intended to restrict the meaning of the Convention to existing standards in US domestic law although it is questionable whether they had this effect under international law.<sup>7</sup>

The Senate’s reservation on Article 16 ties its applicability in the US “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.” Based on this reservation, the US Administration interpreted the scope of Article 16 as covering acts prohibited by the US Constitution only when such acts are committed within US territory or when the acts are committed against a US national abroad (See Garcia 2006). The Administration also argued that the Federal Torture Statute,<sup>8</sup> which applies to acts committed outside the United States, only criminalises torture and not other inhuman treatment; therefore nothing in US law prohibited ill-treatment committed by U.S. non-military personnel (like CIA agents) against foreign nationals outside US territorial borders (See Garcia 2005).

Responding to concerns about US policy regarding the treatment of terrorist suspects detained and incarcerated abroad, a statement by the US Secretary of State on December 2005 made clear that as a matter of policy the prohibition against using ill-treatment in the UN Convention applies to all U.S. personnel, whether at home or abroad.<sup>9</sup> Subsequently, the so-called McCain Amendment removed the geographical limitation attached to the legal prohibition of inhuman treatment. Now incorporated in the Detainee Treatment Act of 2005, it provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.”

The prohibition applies wherever the acts are committed, and covers not only military activities, but also intelligence and law enforcement activities occurring both inside and outside the United States. Nevertheless, the reservation put forward on ratification of the UN Convention will continue to apply to what will constitute prohibited conduct. Attaching the definition of ill-treatment to US domestic law instead of international law may mean that different conclusions are reached about whether a particular interrogation method constitutes ill-treatment.

- 5 Memorandum from the Office of the Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).
- 6 In the works cited, Philippe Sands and Jane Mayer discuss arguments now made public which were and are current within the Administration.
- 7 Finland, Germany, The Netherlands and Sweden stated on ratifying the Convention that such reservations and understandings could not relieve the United States from its responsibility to fulfil the obligations undertaken as a party to the Convention, <http://www.ohchr.org/english/countries/ratification/9.htm#reservations>.
- 8 18 U.S.C. §§ 2340-2340B. When the United States ratified the UN Convention it enacted special provisions of the US Criminal Code prohibiting torture occurring outside the United States (the Federal Torture Statute) in order to ensure compliance with the UN Convention obligations contained in Article 5 to criminalise acts of torture wherever occurring and regardless of the nationality of the victim or the perpetrator.
- 9 US Secretary of State Condoleezza Rice on 07/12/2005 stated that the prohibition against using cruel treatment applies to all U.S. personnel, either at home or abroad.

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## The prohibition of torture and ill-treatment

Torture and other ill-treatment are prohibited in all the major international treaties dealing with civil and political rights,<sup>10</sup> by the four Geneva Conventions of 12 August 1949 and their two Additional Protocols covering armed conflicts, and in national constitutions and domestic legislation throughout the world. Article 2(2) of the UN Convention Against Torture specifies that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public emergency, may be invoked as a justification for torture.”

The prohibition of torture amounts to what is known in international law as *ius cogens*, or a “peremptory norm” of international law, which is binding on all States and to which no exception or derogation can be made even in times of war or public emergencies.<sup>11</sup> Both the Inter-American and the European Court of Human Rights confirmed that the prohibition of torture is absolute.<sup>12 13</sup> In other words, the right not to be tortured cannot be “balanced” against other rights such as the right to security of others. This applies as much to times of armed conflict as to times of peace, and to prisoners or war as to any kind of detainee.

### The “ticking bomb” scenario

There is often discussion about the hypothetical situation in which the extraction of information from one person about how to defuse a bomb could save the lives of thousands. Is not an absolute prohibition of torture in such circumstances unrealistic? Arguments that there should be *no* justification for torture, even in such circumstances, go beyond legal considerations,

but include the point that even from a utilitarian point of view the “ticking bomb” justification is weak, since torture rarely extracts useful information –the evidence that it works is at best mixed. The argument is also forcefully made that torture is so inimical to the morality of our society, so damaging to the torturer as well as the tortured, that it cannot be allowed in any way that is morally consistent (Bellamy 2006).

## Obligations of States

International law requires States to: abstain from conduct involving torture or inhuman treatment; to “take effective legislative, administrative, judicial or other measures” to prevent such conduct in their territory<sup>14</sup>; to investigate and prosecute such conduct, or to extradite the suspects to countries which will prosecute; not to use in proceedings information obtained by torture; not to deport, extradite or otherwise transfer a person to a country where he would be in danger of being tortured; and to afford effective remedies and adequate reparation to the victims.

### Measures to prevent torture and ill-treatment

To achieve the eradication of torture and other forms of ill-treatment in practice, States must take steps to protect those in custody, since it is when persons are in the custody of State officials that they are most vulnerable. In particular, States must: train law enforcement and other personnel coming into contact with those in custody and review interrogation rules<sup>14</sup> regularly; monitor “under systematic review” the effectiveness of measures to prevent torture or other ill-treatment such as regular inspection of places of detention;<sup>15</sup> and put in place “custodial

10 The Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966; the UN Torture Convention of 1984; the European Convention of Human Rights; the American Convention of Human Rights; the African Charter on Human and People's Rights; the Inter-American Convention to Prevent and Punish Torture; and implicitly by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

11 *Prosecutor v. Tadic*, Appeal on Jurisdiction of October 2, 1995. ICTY, IT-94-1-AR72.; See also the Human Rights Committee General Comment 20 on Article 7 of the International Covenant on Civil and Political Rights. (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

12 See *Caesar v Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 123 (2005).

13 Eur. Ct. H.R., *Case of Chahal v United Kingdom*. Judgment of November 15, 1996.

14 Article 10 of the UN Convention against Torture.

15 Article 11 of the UN Convention against Torture.

16 Principles 15-19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA Res. 43/173, 9 December 1988); see also CPT, 12th General Report, the CPT Standards: substantive sections of the CPT's General Reports, CPT/Inf/E (2002) - Rev. 2003, para.40.



safeguards" which include the right of access to lawyers, physicians and family members<sup>16</sup> and, in the case of foreign nationals, diplomatic and consular representatives.<sup>17</sup>

There are agreed international procedures that arrange for visits to places of detention. For example, the Optional Protocol to the United Nations Convention against Torture set up a Subcommittee of the UN Committee against Torture with the mandate to conduct unrestricted visits to places of detention in the territory of State Parties. Other international mechanisms, such as the UN Committee against Torture and the UN Commission on Human Rights Special Procedures, have the capacity to conduct on-site visits, including visits to detention facilities, upon authorisation by the States concerned.

the suspect. In other words, the obligation to bring a suspect to justice exists regardless of where the crime was committed and the nationality of the victim or alleged perpetrator.

The Pinochet case<sup>18</sup> in the English courts provides an example. A Spanish extradition request sought the extradition of the former head of State of Chile for alleged acts of torture, among other crimes, committed in Chile during his tenure of office. But international law traditionally provides wide immunities to foreign officials from jurisdiction in other States in order to allow international relations to be carried out effectively. The House of Lords was therefore faced with a tension between this principle of international law on the one hand and the need to bring people to justice for appalling crimes on the other. The House of Lords held, by a majority, that the effect of the UN Convention was that General Pinochet could not claim immunity, although the alleged acts occurred when he was head of State. While heads of State or foreign ministers continue to enjoy immunity in foreign courts during their term of office,<sup>19</sup> the *Pinochet* case shows that this immunity does not last beyond the holding of the office in question.



## The prohibition of the use of information obtained by torture enforces the obligation of States to prevent acts of torture while questioning at the same time the reliability of information extracted by torture, and protecting the right to a fair trial.

### Investigation and prosecution of acts of torture

Article 7(1) of the UN Convention states that "[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence [of torture] is found, shall . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." States thus have a duty to investigate reported incidents of torture or inhuman treatment promptly and impartially. If a suspect is in a State's territory that State must either refer the case to its own authorities or extradite

### Prohibition on the use of information extracted by torture in legal proceedings

Article 15 of the UN Convention states that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The prohibition of the use of information obtained by torture enforces the obligation of States to prevent acts of torture while questioning at the same time the reliability of information extracted by torture, and protecting the right to a fair trial. This rule forms part of, or is derived from, the general and absolute prohibition of torture. In other words, this prohibition is unconditional and applies at all times and under any circumstances.<sup>20</sup> It relates to

17 Principle 16 (2) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Res. 2076 (LXII), 13 May 1977). The International Court of Justice has in the *LaGrand Case (Germany v United States of America)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 2001, pp. 32-41, para.77 and the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 2004, recognised that Article 36 (1) of the Vienna Convention on Consular Relations creates individual rights for the national concerned.

18 *Reg v Bow Street Magistrate ex parte Pinochet (No 3)* [2000] 1 AC 147.

19 *Arrest Warrant of April 11th 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Merits, para. 78.D.2, 41 ILM 536 (2002) (also known as the *Yerodia Case*).

20 HRC General Comment 20; *P.E. v France*, 19 December 2002, Communication No. 193/2001, CAT/C/29/D/193/2001.

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any proceedings<sup>21</sup> and irrespective of the territory where the ill-treatment took place. It applies equally to torture performed by States other than the one seeking to use the information.<sup>22</sup>

The argument that "torture information" cannot be used as evidence in legal proceedings but that it can be used by State officials, like the police or security forces, outside formal proceedings is still controversial.<sup>23</sup> One of the main reasons behind the obligation to exclude torture information is the discouragement of ill-treatment: in many countries torture is often applied for the purpose of extracting information for use in judicial proceedings, and prohibiting its use thus removes an incentive to torture (Burgers and Danelius 1988).<sup>24</sup> It can be argued that the same reason should apply to the use of torture to extract information to be used for intelligence purposes. Where the police receive information of an imminent threat to public safety, they must however act on it, whatever the circumstances in which the information was obtained. But if the State receiving the information is perpetuating the demand for the supply of information derived from torture, that State will be instrumental in continuing the torture. Collaboration by a State's own officials would of course be contrary to the Convention.

### Obligation not to transfer to torture or ill-treatment

A person may not be sent to a country where there is a real risk that he will be subjected to torture or other ill-treatment.<sup>25</sup> This is an important restriction on the ability of States to expel, deport or extradite terrorist suspects to other States. In deter-

mining whether there are "substantial grounds for believing that [a person] would be in danger of being subjected to torture," as specified in the UN Convention, the human rights record of the State concerned must be taken into account.

The prohibition is absolute; that is, the requirement not to send a person to a country where he is in danger of being tortured cannot be balanced by other factors, for example, national security interests.<sup>26</sup> In *Suresh v Canada*, the Supreme Court of Canada stated that "international law rejects deportation to torture, even where national security interests are at stake"<sup>27</sup> but left room for balancing the prohibition with other considerations in "exceptional circumstances" (without saying what these might be). The Committee against Torture criticised the Court for failing "to recognise at the level of domestic law the absolute nature of the protection of article 3 of the Convention that is subject to no exception whatsoever."<sup>28</sup>

The question whether the obligation is an absolute one which is not to be balanced against other interests is currently before the European Court of Human Rights. The UK, together with Lithuania, Portugal, and Slovakia is arguing in the case of *Ramzy v the Netherlands*<sup>29</sup> that the Court should revisit its earlier case law and allow deporting authorities to consider not only the risk of torture but also the nature and degree of the national security threat posed by the individual. The Netherlands has not advanced this argument, but it is simply disputing (on the facts of the case) that the applicant would be at risk of torture or ill-treatment if returned.

- 21 In its decisions in *P.E. v France*, and *G.K. v Switzerland*, 12 May 2003, Communication No. 219/2002, CAT/C/30/D/219/2002, the Committee against Torture noted the broad nature of the phrase "any proceedings", and held that Article 15 also applies to extradition proceedings.
- 22 Committee against Torture, Concluding Observations: United Kingdom, 25 November 2004, UN Doc CAT/C/CR/33/3.
- 23 Article 15 of the UN Convention states that the prohibition applies to "any proceedings." The Committee against Torture has read this phrase as relating not only to judicial but to all kinds of formal proceedings. In *A and Others* it was said *obiter* that information could be used by State officials such as the police or intelligence services although it could not be used in the SIAC proceedings. *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71.
- 24 The UN Committee against Torture too has expressly applied these rationales in its work: see, e.g., 'Summary record of the public part of the 289th meeting: Mexico, Paraguay', 26 August 1997, CAT/C/SR.289, at para. 34, sub-heading 'D. Subjects of Concern.'
- 25 See Article 3 of the UN Convention.
- 26 In *Soering* (a death-row case) and in subsequent cases, the European Court of Human Rights held that the obligation, inherent in Article 3 of the ECHR, was unconditional. Eur. Court H.R., *Case of Soering v. United Kingdom*, Judgment of July 7, 1989; see also Eur. Court H.R., *Case of Ahmed v. Austria*, Judgment of December 17, 1996; *Case of Chahal v United Kingdom*. Judgment of November 15, 1996. Similarly, the UN Human Rights Committee has interpreted Article 7 of the ICCPR as prohibiting transfers to a risk of torture or ill-treatment in absolute terms. See HRC General Comment No. 20; and No. 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004). For individual communications, see *Chitat Ng v. Canada* Communication 469/1991, CCPR/C/49/D/469/1991 (1994) 14.1; *Cox v. Canada* Communication 539/1993, CCPR/C/52/D/539/1993 (1994); *G.T. v. Australia* Communication No. 706/1996, U.N. Doc. CCPR/C/61/D/706/1996 (1997).
- 27 *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3.
- 28 Committee against Torture, Concluding Observations: Canada 34th Session CAT/C/CO/34/CAN.
- 29 ECHR Application no 25424/05.



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What does "substantial grounds for believing" there is a "danger" of torture actually mean? On ratification of the Convention against Torture, the US said it means "if it is more likely

country."<sup>32</sup> In similar terms, the UN Human Rights Committee has said the obligation under the ICCPR arises "where there are substantial grounds for believing that there is a real risk of irreparable harm"<sup>33</sup> and the Inter-American Commission for Human Rights has referred to "substantial grounds of a real risk of inhuman treatment."<sup>34</sup>



**A person may not be sent to a country where there is a real risk that he will be subjected to torture or other ill-treatment. This is an important restriction on the ability of States to expel, deport or extradite terrorist suspects to other States. In determining whether there are "substantial grounds for believing that [a person] would be in danger of being subjected to torture," as specified in the UN Convention, the human rights record of the State concerned must be taken into account.**

### The question of diplomatic assurances

In order to avoid breaking their obligations by transferring an individual to a country where there is a real risk of torture, States try to ensure in different ways that the country concerned will not in fact torture the transferred individual. The UK for example is concluding "memoranda of understanding" which contain diplomatic assurances by a State receiving a deportee that humane treatment will be accorded. The same has been done by other States. These assurances, on their own, are not effective. The country concerned will already have signed up to various of the international agreements prohibiting torture; a new non-binding commitment will not add to its legal obligations. The assurances are not enough to offset an existing risk of torture.<sup>35</sup> Further, the very fact that a State seeks such assurances amounts to a recognition that a person would be at risk of torture or ill-treatment if transferred to another State; assurances are not sought from a country which has no record of ill-treatment of prisoners. A system of monitoring cannot guarantee that the person will not be tortured. It cannot prevent further abuse either; it is very difficult to ensure that the prisoner will be entirely free to complain of ill-treatment to a visitor sent to monitor his condition.

To prevent torture and ill-treatment in any State, effective legislative, judicial and administrative measures must be in place. Rather than focus on unenforceable assurances that

than not that [the person] would be tortured."<sup>30</sup> The US test may set the threshold higher than the interpretation given by the Committee against Torture to that Article. According to the Committee, "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."<sup>31</sup> Under the European Court of Human Rights the test is whether "substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving

30 See Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.ohchr.org/english/countries/ratification/9.htm#reservations>

31 CAT General Comment No. 1 on the application of article 3, cited in CAT Communication No. 222/2002: Switzerland. 20/05/2005. CAT/C/34/D/222/2002.

32 Eur. Court H.F. *Case of N v. Finland*. Judgment of July 26, 2005.

33 HRC General Comment 31.

34 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LN/II.116, Doc. 5 rev. 1 corr.22 (2002).

35 The European Court of Human Rights in the *Chahal* case and the Committee against Torture in the *Agiza* case, have pointed out that assurances do not suffice to offset an existing risk of torture. Courts in Canada (*Mahjoub*), the Netherlands (*Kaplan*), and the United Kingdom (*Zakaev*) have blocked transfers because of the risk of torture despite the presence of diplomatic assurances. This view is shared by a growing number of international human rights bodies and experts including the UN Special Rapporteur on Torture (see Report of Special Rapporteur on Torture to the General Assembly, 2004 A/59/324 at para. 40); the Committee for Prevention of Torture (see CPT 15th General Report 2004-2005, CPT/Inf (2005) 17, at paras. 39-40); the Council of Europe Commissioner on Human Rights (see report by Council of Europe Commissioner for Human Rights (2005, §§ 12-3)); and the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (see report of the UN Independent Expert UN Doc E/CN.4/2005/103, 07/02/2005 at 19-30)).

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the person concerned will be treated as an exceptional case, it would be far better for a country wishing to transfer persons to another State to work with that State to rid the police and prison service from torture within the whole system, including by support for an independent judiciary.

### The question of “Extraordinary Renditions”

The practice of transferring persons from a third country to another in an irregular manner without legal proceedings has become known as “rendition”<sup>36</sup> and, in circumstances where there is a real risk (or even intention) that the individual will be subjected to torture or cruel, inhuman or degrading treatment, as “extraordinary rendition.”

Recent controversy has arisen over allegations that the US transfers suspected terrorists to States known to practise torture systematically where the suspects can be detained and interrogated with the employment of techniques otherwise prohibited in the US thus “outsourcing” torture or torturing “by proxy.” Inquiries were launched into these allegations, and the existence of CIA secret prisons in Eastern Europe, by the Council of Europe and the European Parliament. While the US administration has not disputed charges that persons have been transferred to foreign States generally believed to practise torture, officials have denied transferring persons for the purpose of interrogation involving torture. The US Secretary of State stated on 5 December 2005 that “[t]he United States has not transported anyone, and will not transport anyone, to a country when [the United States] believes he will be tortured.”<sup>37</sup> This language is in keeping with the US understanding as to the meaning of Article 3 of the Convention which sets a higher threshold to determine whether there is a risk of torture (that

“substantial grounds for believing” means “if it is more likely than not that [the person] would be tortured.”).

What is the responsibility of a State through which a person is being transported on a journey of extraordinary rendition? For example, what is the UK’s responsibility if it is alleged that the CIA is using UK airfields for refuelling while bringing a person to another country for interrogation with unlawful techniques? A State is responsible under international law if it allows its territory to be used for unlawful purposes when it has knowledge of the relevant circumstances. No such responsibility applies if the transfer is carried out by foreign authorities without the State’s knowledge, but the State must take effective measures to safeguard against transfers carried out for an illegal purpose and must conduct a prompt and effective investigation into credible allegations that a person has been transferred through its territory to a risk of torture or ill-treatment.<sup>38</sup>

### The duty to afford effective remedies

Article 14.1 of the UN Convention obliges States to ensure effective remedies to victims of torture. There are two difficult questions relating to this obligation. First, it is not clear whether the Convention requires a State to provide the possibility for all victims of torture to sue in its courts, regardless of where the act of torture occurred. Secondly, the possibility of suing a foreign State for torture in a civil court (as opposed to an individual in criminal proceedings) conflicts with the principle that States are generally immune from proceedings in the courts of other States. In the small number of cases in which a foreign State has been sued for serious human rights violations, domestic courts have diverged in their analysis of state immunity and on the end result.<sup>39</sup>

36 It is important to note that even if a “rendition” does not infringe the sovereignty of the hosting State (i.e. the abduction is performed with its consent) and is carried out with the purpose of sending the individual to stand trial, without involving any form of torture or ill-treatment, it can still constitute an arbitrary detention/expulsion and a breach of the right of due process. The ICCPR specifically prohibits State parties to arbitrary detain and/or expel individuals outside legal procedures. See HRC *Cleberti de Caariego v. Uruguay* Communication No. R13/56, 29 July 1981. The European and American Human Rights Conventions have similar obligations. See Inter-American Juridical committee, Legal Opinion Regarding the Decision of the Supreme Court of the United States of America C.J.I./RES/II/15/91.

37 Speech by Secretary of State Rice at the Andrews Air Force Base on 5 December 2005, available at <http://www.state.gov/secretary/rm/2005/57602.htm>

38 Eur. Court of H.R., *Case of Caloc v. France*. Judgment of July 20, 2000; 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 by the Venice Commission at its 66th Plenary Session/CDL-AD(2006)009.

39 In some cases domestic courts have denied the applicability of immunity where cases concerned *ius cogens* violations (like torture). See the *Distomo case* in Germany, BGH, Decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488; and the *Ferrini case* in Germany, BUNDESVERFASSUNGSGERICHT 2 BVR 1379/01 vom 28.6.2004, Absatz-Nr. (1-45).



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In *Ron Jones v Saudi Arabia*,<sup>40</sup> an English case currently on appeal to the House of Lords, the Court of Appeal found that the Kingdom of Saudi Arabia enjoyed immunity for civil proceedings relating to torture but denied the protection of immunity to the individual State officials. A similar position was reached by the Ontario Court of Appeal in *Bouzari*.<sup>41</sup> Despite the recognition by the Court of the lack of remedies available for the victim in the country where he was tortured, it upheld the State's claim of immunity. Following this judgment, the Committee against Torture in its examination of Canada's most recent State party report, addressed the implications of Article 14 in its consideration of the Canadian legal system. It criticised "the absence of effective measures to provide civil compensation to victims of torture in all cases" and recommended Canada "to review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."<sup>42</sup>

### Enforcement of the law

The UN Convention establishes a Committee against Torture in charge of monitoring State compliance with its provisions. Every four years States parties to the Convention must report to the Committee on the implementation of their conventional obligations. The Committee examines the reports and issues concluding observations in which it includes its main findings and makes recommendations to the State party. In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the inquiry procedure, the examination of inter-

State complaints and the examination of individual complaints.

In addition to prosecutions under national criminal law which States must bring in their national courts, torture comes within the jurisdiction of the International Criminal Court (ICC) when such acts are committed as part of a widespread or systematic attack directed against a civilian population (therefore constituting a crime against humanity). It is important to note that although a single and isolated act of torture constitutes an international crime, the jurisdictional limitations of the ICC reflect the nature and capacity of its proceedings; therefore, the ICC does not entertain cases of isolated instances of torture.<sup>43</sup>

### CONCLUSION

**O**n most points the law is clear. Torture and inhumane and degrading treatment are prohibited without exception. The prohibition applies to all States and is not limited to actions within their territories. States are barred from using information in proceedings which has been obtained under torture. States break international law if they transfer persons to countries where they face a real risk of torture or ill-treatment or if they are complicit in such actions by others. Indefinite detention can constitute a form of torture if it causes severe mental or physical suffering. Harsh interrogation techniques which cause severe mental or physical suffering are prohibited, wherever they are used. Cruel treatment is prohibited and cannot be justified by the need to put an end to the "war on terror."

40 *Jones v. The Ministry of the Interior of Saudi Arabia & Lt. Col. Abdul Aziz and Secretary of State for Constitutional Affairs, The Redress Trust (Intervenors) and Mitchell, Walker And Sampson v. Ibrahim Al-Dali & Others*, [2004] EWCA Civil 1394.

41 *Bouzari v. Iran (Islamic Republic) Ont. C.A.* (2004), 243 DLR (4th) 406 (OCA).

42 Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture*, 34th Session (May 2005), CAT/C/CO/34/CAN at para. C (4)(g).

43 Torture is one of the acts covered by the jurisdiction of the ICC Statute when it constitutes a "crime against humanity." A crime against humanity entails acts of torture "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". See Article 7(2)(e) of the Rome Statute of the International Criminal Court.

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