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STUDY

**THE QUESTION OF TORTURE: GENERAL FRAMEWORK AND
RECOMMENDATIONS TO THE EUROPEAN PARLIAMENT**

Abstract:

There is no universally agreed definition of torture. The most widely quoted definition is from the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"). Article 1 of that Convention 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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THE QUESTION OF TORTURE: GENERAL FRAMEWORK AND RECOMMENDATIONS TO THE EUROPEAN PARLIAMENT

"I don't feel like I am the same person. I feel that my brain or my inner soul does not want to think about what's going on. My soul is trying to distract itself from reality."—Maher Arar, tortured in Syria in 2002¹

"To work towards the prevention and the eradication of all forms of torture and ill-treatment within the EU and world-wide is a strongly held policy view of all EU member states." –Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1. What is torture?

There is no universally agreed definition of torture. The most widely quoted definition is from the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Convention against Torture"). Article 1 of that Convention 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".

Torture is a form of cruel, inhuman or degrading treatment or punishment ("ill-treatment"). Ill-treatment can be understood to comprise both torture and other forms of physical or mental abuse, including inhumane conditions of detention and cruel, inhuman or degrading punishments such as amputation and flogging.

Torture and other cruel, inhuman or degrading treatment or punishment are prohibited under the leading international and regional human rights instruments (see below, section 3). The formulations in these instruments can be seen as encompassing a class of prohibited behaviour. Often it is not necessary to distinguish among the different elements of the formulations, since the entire class of behaviour—torture and other ill-treatment—is prohibited. Thus, for example, all the obligations of states parties with regard to Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture and ill-treatment) apply to all of the behaviour described in Article 7, and all of these obligations are absolute, non-derogable and unqualified.

There is no clear, absolute dividing line between torture and other ill-treatment. In cases where it is necessary for legal reasons to decide whether a particular treatment constituted torture (for example, in applying certain articles of the Convention against Torture which refer only to torture), such judgments are to be made on a case-by-case basis. But the leading international and regional human rights instruments do not distinguish between torture and other ill-treatment. Both are banned, at all times and in all places.

The lack of absolute definitions has allowed for developments which can enrich the understanding of the right not to be subjected to torture or ill-treatment, in line with evolving notions of human rights. In this spirit, pronouncements of authoritative international and regional bodies have added to the understanding of the scope of acts prohibited under the ban on torture and ill-treatment. Cases of enforced

¹ Maher Arar, a Canadian citizen of Syrian origin, was detained by US authorities in New York in 2002 and "rendered" to Syria, where he was tortured. After 10 months, he was released without charge.

disappearance, prolonged incommunicado detention, the "death row phenomenon", forcible house destruction and excessive use of force in law enforcement have been deemed to constitute torture or ill-treatment by the UN Human Rights Committee, the UN Committee against Torture, the European Court of Human Rights and other authoritative bodies.

There has also been in recent years an increasing awareness of the obligation of states to protect people from abuses by private individuals which are contrary to the prohibition of torture and ill-treatment. Thus, in its General Comment 20 on Article 7 of the International Covenant on Civil and Political Rights, adopted in 1992, the UN Human Rights Committee stated that states parties to that Covenant have a duty to afford everyone protection against torture and ill-treatment "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." Similarly, in the case of *A v. UK*, the European Court of Human Rights held in 1998 that the obligation of states parties under Article 1 of the European Convention on Human Rights to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3 of that Convention (prohibition of torture and ill-treatment), "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals". The Court found in that case that the repeated beatings suffered by a nine-year-old boy at the hands of his stepfather reached "the level of severity prohibited by Article 3" of the European Convention on Human Rights and that the failure of the national law to provide adequate protection against such treatment constituted a violation of Article 3.

The approaches taken by international and regional human rights bodies in these and other instances have several implications. First, they imply that an act committed by a private individual can constitute torture or ill-treatment within the meaning of international and regional human rights standards. Second, the obligation of states parties to international human rights treaties to respect and ensure the prohibition of torture and ill-treatment entails an obligation to take measures to protect people under their jurisdiction against acts of torture or ill-treatment committed by private individuals. Third, these measures include ensuring that the framework of the law provides adequate protection, and taking reasonable practical steps to avoid a risk of torture or ill-treatment of which the authorities know or should know. It follows that the right of any person under international human rights treaties not to be subjected to torture or ill-treatment can be violated if he or she becomes the victim of an act of torture or ill-treatment committed by a private individual and the state has failed to fulfil the above obligations. And as a result of such a violation, the state may be required to provide reparation to the victim.

2. Current challenges

Some time after the horrific attacks of 11 September 2001 in New York and Washington, reports began to emerge of torture and ill-treatment being used in connection with the ensuing "war on terror". The related actions that have come to light have included the use of secret detention; the holding of prisoners for prolonged periods with minimal safeguards and no opportunity to challenge their detention; the transfer of detainees to countries where there is a real risk of their being tortured ("extraordinary rendition"); and the elaboration of legal doctrines purporting either to redefine "torture" so as to allow certain interrogation techniques that would not be permitted under internationally accepted definitions of torture, or to exclude certain categories of detainees from the protection afforded by international law.

In December 2005 the US Congress adopted a legal provision (the "McCain amendment", incorporated in the Detainee Treatment Act of 2005) stating that "No 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".

However, the same legislation also contained a provision relating to US detainees at Guantanamo Bay in Cuba (the "Graham-Levin amendment") which severely restricted the scope of US courts to hear petitions of habeas corpus or "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay". This drastic

restriction of procedural rights would appear to make it almost impossible for detainees at Guantanamo Bay to seek relief in the courts from torture or ill-treatment.

In connection with these events, some EU member states have allegedly become involved in practices conducive to torture through the presence of secret detention sites in their countries or by allowing their airports to be used in renditions. Questions have also been raised about the possible involvement of the national security services of member states in the arrest or abduction of people who were subsequently transferred out of the country. Investigations into the allegations are currently being conducted by the European Parliament's Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, by the Secretary General of the Council of Europe, by the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the Council of Europe, and by investigative authorities and parliamentary committees in several member states. Referring to the ongoing European Parliament and Council of Europe investigations, the CLAHR rapporteur and the EU Commissioner for Freedom, Security and Justice stated on 23 February 2006 that "the full co-operation of member states of both the EU and the Council of Europe was vital to establish the truth".

The European Parliament has expressed its "deep concern at the allegations concerning the role of the CIA in the illegal kidnapping, transportation, secret detention and torture of terrorist suspects, as well as at the alleged presence of CIA secret detention sites inside the territory of the European Union, and the accession and candidate countries" and has stated that "it is of the utmost importance to carry out a full investigation into any allegation of US breaches of human rights and the rule of law and the complicity of European governments, given the very serious implications for the respect of fundamental rights in the European Union" (resolution P6-TA-PROV(2005)0529 of 15 December 2005).

Faced with the threat of terrorism inspired by the 9/11 attacks, some European governments have introduced practices which are incompatible with their obligations regarding the prohibition of torture and ill-treatment (see section 6). Among these are the practice of sending detainees to countries where torture is regularly practiced after receiving "diplomatic assurances" that the person will not be tortured or ill-treated, and the use in judicial proceedings of information obtained through torture.

Soon after 9/11, articles by US intellectuals began appearing, arguing that torture may sometimes be ethically justified. The acceptance of such arguments would be a severe blow to the international prohibition of torture, resting as it does on widespread public condemnation of the practice. The fact that these arguments are treated seriously is already a bad sign. Even US commentators who dislike the US practices are now characterizing European criticisms as displaying a "moral aloofness" that is oblivious to the realities of the "war on terror"—forgetting that much of Europe has had to cope with its own terrorist attacks over the past decades.

3. The prohibition of torture in international and national law

When the members of the United Nations drafted the *Universal Declaration of Human Rights* (adopted in 1948) in an effort to banish forever the atrocities of the recent world war, they placed the prohibition of torture and ill-treatment among its foremost provisions. Article 5 of the Universal Declaration of Human Rights states:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The ban on torture and ill-treatment was subsequently incorporated in the *International Covenant on Civil and Political Rights* (adopted in 1966), and in three of the core international human rights treaties—the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

(Convention against Torture), the *Convention on the Rights of the Child* and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.²

Under the International Covenant on Civil and Political Rights, the prohibition of torture and ill-treatment is non-derogable: states parties must respect the prohibition, even in time of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4). Similarly, under the Convention against Torture "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" (Article 2(2)).

The International Covenant on Civil and Political Rights also provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (Article 10(1)).

The four *Geneva Conventions of 1949* prohibit "torture or inhuman treatment" as war crimes in international armed conflicts. Article 3, common to the four Geneva Conventions and applicable in non-international armed conflicts, states that "violence to life and person, in particular...cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" "are and shall remain prohibited at any time and in any place whatsoever". Torture and ill-treatment are also prohibited under *Additional Protocol I* (relating to international armed conflicts) and *Additional Protocol II* (relating to non-international armed conflicts) to the Geneva Conventions.

The prohibition of torture and ill-treatment has also been incorporated in the major regional human rights treaties—the *European Convention on Human Rights*, the *American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights*. Similarly, the *Charter of Fundamental Rights of the European Union* (Article 4) states that no one shall be subjected to torture or ill-treatment.

Many national constitutions, inspired by the Universal Declaration on Human Rights, reaffirm the right not to be subjected to torture or ill-treatment. Some countries have incorporated a specific crime of torture in their penal codes, but even where this has not happened, torture and various forms of ill-treatment are normally punishable under the headings of crimes such as assault. It can confidently be stated that torture is prohibited under the laws in all countries, whether explicitly or implicitly.

The UN Human Rights Committee, the expert body charged with monitoring the implementation of the International Covenant on Civil and Political Rights, has stated that the obligation not to subject people to torture or ill-treatment is a rule of *customary international law* and that the prohibition of torture is a *peremptory norm of general international law* (also known as a rule of *jus cogens*)—a norm applicable to all states, from which no derogation is permitted.

4. The struggle to eliminate torture: control and evaluation mechanisms

The persistence of torture and ill-treatment in the world is one of the paradoxes of the human rights struggle. Despite all the efforts to outlaw it, torture and ill-treatment remains widespread, as can be seen from the reports of intergovernmental bodies and mechanisms, the annual US Department of State *Country Reports on Human Rights Practices*, the annual human rights reports produced by

² In addition to these treaties, which contain explicit prohibitions of torture and ill-treatment, other human rights treaties contain prohibitions of the infliction of bodily or mental harm under which various acts of torture or ill-treatment would clearly be prohibited. Thus, Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* obliges states parties to guarantee the right of everyone to "security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution". Also, the Committee on the Elimination of Discrimination against Women established under the *Convention on the Elimination of All Forms of Discrimination against Women*, in its General Recommendation 19 on violence against women, has enumerated the right not to be subjected to torture or ill-treatment among the rights impaired or nullified by gender-based violence, constituting discrimination within the meaning of that Convention

the foreign ministries of various European countries, the reports of international human rights organizations and many other sources.

There are various reasons for the persistence of torture and ill-treatment, including, in various countries, a lack of resources to maintain adequate prison standards or to conduct proper police investigations of crime. Also, discrimination against certain groups can heighten their vulnerability to torture. And in times of political tension, the spectre of torture can return in places where the practice was thought to have been eradicated. Greece in the 1960s, Northern Ireland in the 1970s, Spain in the 1980s and Algeria in the 1990s are just four of the many post-World War II examples.

The persistence of torture poses a challenge to the international community, which had outlawed it so unambiguously in 1948. The international community has responded, repeatedly and forcefully, through the elaboration of international treaties and "soft law" standards and the creation of international mechanisms for action.

At the international level, the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Convention against Torture"), adopted in 1984, is a binding treaty providing an international basis for the prosecution of alleged torturers. The Convention provides for the establishment of a *Committee against Torture* which reviews state party reports and can consider individual complaints from countries that have made declarations under the relevant article of the Convention.

The *Optional Protocol* to the Convention against Torture, adopted in 2002, provides for regular national and international systems of visits of inspection by designated advisory bodies to places of detention. The Optional Protocol will come into force after 20 states have ratified it.

The draft *International Convention for the Protection of All Persons from Enforced Disappearance* also sets out valuable safeguards for detainees which would afford protection against torture and ill-treatment. The text of the draft Convention was adopted by a working group of the UN Commission on Human Rights in September 2005 and forwarded to that Commission for consideration. Non-governmental organizations (NGOs) are pressing for its adoption by the UN General Assembly in 2006.

Under the Rome Statute of the International Criminal Court, adopted in 1998, the *International Criminal Court* is empowered to try certain persons accused of acts of torture or ill-treatment constituting war crimes, crimes against humanity or genocide. Existing international criminal tribunals—the *International Criminal Tribunal for the Former Yugoslavia* and the *International Criminal Tribunal for Rwanda*—have handed down convictions for torture, rape and other sexual violence, and ill-treatment, including inhumane conditions of detention, as war crimes, crimes against humanity or genocide.

One of the most important international mechanisms for the control of torture is the UN *Special Rapporteur on torture* (established in 1985), one of the UN "special procedures" in the field of human rights. The Special Rapporteur is an independent expert empowered to send urgent communications to governments in suspected cases of torture, and to conduct country visits. The Special Rapporteur reports annually to the UN Commission on Human Rights (now superseded by the Human Rights Council).

Among the most important "soft law" (non-binding) international standards are the UN *Standard Minimum Rules for the Treatment of Prisoners*, the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "Istanbul Protocol"). Also, the UN General Assembly adopts annual resolutions containing recommendations on torture, as has the UN Commission on Human Rights (now the Human Rights Council).

At the regional level, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (European Convention for the Prevention of Torture), adopted in 1987, establishes a *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (European Committee for the Prevention of Torture, CPT) empowered to visit places of detention in Europe. Among the important regional "soft law" standards are the *European Prison Rules* (amended in 1987).

Under the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE), adopted on 29 June 1990, the participating states of the CSCE (now the *Organization for Security and Co-operation in Europe*, OSCE) affirmed "their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, [and] to take effective legislative, administrative, judicial and other measures to prevent and punish such practices". The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) conducts training and educational programs and has produced a handbook, *Preventing Torture*, with advice on investigation and reporting in international operations involving a local field presence.

States parties to the European Convention on Human Rights are subject to the jurisdiction of the *European Court of Human Rights*, which can hear complaints that a state has violated its obligations concerning the right not to be subjected to torture or ill-treatment. The equivalent in the inter-American system is the *Inter-American Court of Human Rights*.

The measures needed to prevent and eradicate torture are many. The UN Special Rapporteur on torture has produced a valuable set of *consolidated recommendations* stemming from nearly 20 year's experience on the issue. Further recommendations may be found in *The Torture Reporting Handbook* and *Combating Torture: A Manual for Judges and Prosecutors*, published by the Human Rights Centre of the University of Essex, United Kingdom.

Torture and ill-treatment have elicited many responses from victims' families, lawyers and supporters and domestic non-governmental organizations (NGOs), backed up at the international level by international NGOs. Forms of action include both urgent interventions to protect people from torture and longer-term efforts to obtain justice and redress, to provide rehabilitation, to improve prison conditions, to overcome impunity and to institute preventive safeguards. Seven of the leading international NGOs undertake joint activities in the *Coalition of International NGOs against Torture* (CINAT). Many NGOs operate websites containing useful information and contacts.

Impressive as the international and regional standards and mechanisms are, they can only work if states cooperate. A high priority for the EU in its work to combat torture should be to press all states to ratify the relevant international treaties and to cooperate with the recommendations of the relevant international bodies and mechanisms.³

Unlike the death penalty, which is eliminated once it has been abolished in law, torture and ill-treatment must be not merely prohibited, but abolished in practice. And even with the best safeguards, one can never preclude the possibility that some public official will some day commit an act of torture or ill-treatment -- just as one can never ensure that no public official will ever commit a crime. The eradication of torture by state agents should rather be seen as the achievement of conditions in which

- torture and ill-treatment are extremely unlikely;
- they will occur, if at all, only in isolated cases; and
- if they do occur, there will be a corrective reaction from the authorities which prevents other public officials from doing the same.

Two staff members of the International Committee of the Red Cross have devised a model for the control of torture. The model comprises "regulatory mechanisms" which come into play in reaction to cases of torture or ill-treatment. The mechanisms are both "internal" (referring to all the means which civil society has—including human rights groups, the news media and democratic institutions—to make its voice heard in such cases) and "external" mechanisms, including other states and international NGOs.

³ Among the most important treaties, the *International Covenant on Civil and Political Rights* had been ratified by 155 states and the *Convention against Torture* by 141 states as of 26 January 2006. All EU member states have ratified both treaties. As of 7 April 2006 the *Optional Protocol to the Convention against Torture* had been ratified by 18 states, including six EU member states (Denmark, Malta, Poland, Spain, Sweden and the United Kingdom). Thirty-six other states including 11 EU member states (Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Italy, Luxembourg, the Netherlands and Portugal) had signed the Optional Protocol, indicating their intention to ratify it at a later date.

This model shows the importance of pressure being brought to bear, both within the countries where torture occurs and from outside.

5. The EU Guidelines on torture and the EU Regulation on trade in goods which could be used for capital punishment or torture

In April 2001 the Council of the EU adopted the *Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Guidelines on torture). Their purpose, as stated in the Guidelines, is

"to provide the EU with an operational tool to be used in contacts with third countries at all levels as well as in multilateral human rights fora in order to support and strengthen on-going efforts to prevent and eradicate torture and ill-treatment in all parts of the world."

The Guidelines proclaim a strong commitment to end torture, both in the EU and outside:

"To work towards the prevention and the eradication of all forms of torture and ill-treatment within the EU and world-wide is a strongly held policy view of all EU member states. Promotion and protection of this right is a priority of the EU's human rights policy."

Specifically, the objective is

"To influence third countries to take effective measures against torture and ill-treatment and to ensure that the prohibition against torture and ill-treatment is enforced."

Supplemented by the *Working Paper on the Implementation of the EU Guidelines on Efforts to Prevent and Eradicate Torture* (issued by the Council in December 2002), the Guidelines envisage various forms of action, including demarches, public statements, political dialogue, monitoring and action by EU Heads of Mission (including sending observers to trials, visiting places of detention and talking with local NGOs), bilateral cooperation (including training), funding of projects to improve conditions of detention, funding of NGOs and other organizations working for the prevention of torture and the rehabilitation of torture victims, support of relevant resolutions at the UN General Assembly and the UN Commission on Human Rights, and lobbying for ratification of the Convention against Torture.

The Guidelines set out a comprehensive list of over 40 measures which third countries should take to combat torture and ill-treatment. They are fully consonant with the approaches of other intergovernmental organizations, citing over 40 international and regional standards which will guide the EU's work or which may be invoked with third countries. They state that the EU supports actively the work of other relevant actors such as the UN Committee against Torture, the UN Human Rights Committee, the UN Special Rapporteurs, the European Committee for the Prevention of Torture and relevant OSCE actors and that it will stress the need for states to cooperate with the relevant international and regional mechanisms.

Like the ground-breaking *Guidelines to EU policy towards third countries on the death penalty* (adopted in 1998), the Guidelines on torture mark a new stage in the international human rights struggle, where a group of countries decides to take strong collective action to address an egregious worldwide human rights abuse on a systematic basis. But whereas the death penalty Guidelines are now well established and are clearly having an impact, the implementation of the Guidelines on torture appears to have proved more difficult. The December 2004 *Council Conclusions on the implementation of EU human rights policy* welcomed "the positive assessment of the implementation of the EU guidelines on the death penalty, in particular by the extensive action undertaken towards third countries, such as integrating death penalty in bilateral dialogues and systematically making demarches on death penalty cases" but noted "that the EU guidelines on torture need further implementation".

The 2005 *EU Annual Report on Human Rights* cites demarches on the death penalty to 16 states plus the Palestinian Authority; in contrast, it states that the EU raised concerns on torture through demarches and political dialogue, but no countries are mentioned.

A further development in the EU's opposition to torture occurred in 2005 when the Council of the EU adopted *Regulation No. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment* (Regulation on trade in goods which could be used for capital punishment or torture). This regulation, due to come into force on 30 July 2006, prohibits the export to or import from third countries of "goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment" and requires national authorization of exports of goods that "could be used" for torture or other ill-treatment.

The goods covered by the Regulation are listed in two Annexes. Goods which may not be exported are various execution devices and one restraint device—electric shock belts (Annex II). Goods whose export must be authorized are certain restraint devices including shackle boards, leg-irons and thumb-cuffs, portable electric shock devices, and portable chemical incapacitation devices (Annex III). The two lists may be amended by the Commission.

Anyone seeking to export goods listed in Annex III from an EU member state must request authorization from a designated national authority, who shall refuse authorization if there are reasonable grounds to believe that those goods "might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority or any natural or legal person in a third country". The authority shall take into account the findings and reports of relevant international bodies and other relevant information including reports from civil society organizations. If it dismisses an application or annuls an authorization, it must inform the designated authorities of all other member states and the Commission. Any other designated national authority which considers that it should authorize an "essentially identical transaction" within the next three years must consult the authority which dismissed the previous application, and if it then decides to grant the authorization, it must immediately inform the designated authorities of all other member states. Member states are to publish annual reports on activities in connection with the Regulation.

In adopting the Regulation, the EU has recognized that certain police and security equipment is especially prone to abuse in the infliction of torture or ill-treatment. The Regulation is a welcome contribution to the effort to prevent and eradication torture and ill-treatment worldwide. However, its promulgation leaves unresolved a number of related issues. Among these are the manufacture and possible use within member states of items covered by the Regulation; the need for controls on transfers of such items outside EU customs territory which are brokered by EU nationals or residents; and what to do about the abuse of items not covered by the Regulation, such as ordinary handcuffs.

As mentioned above, the EU Guidelines on torture envisage a strong role of monitoring and action by EU missions in third countries, and the Guidelines state that the EU will urge third countries to "prevent the use...of equipment which is designed to inflict torture or other cruel, inhuman or degrading treatment or punishment and prevent the abuse of any other equipment to these ends". The Regulation is intended specifically to help ensure that equipment exported from the EU is not used in these ways. However, the Regulation does not provide for any role of EU missions in its implementation.

6. Obligations of EU member states

Torture and cruel, inhuman or degrading treatment or punishment is prohibited under customary international law. Like all other states, EU member states must therefore not permit their agents to inflict torture or ill-treatment. This obligation derives also from treaties to which all member states are parties, including the *European Convention on Human Rights* (Article 3), the *International Covenant on Civil and Political Rights* (Article 7), the *Convention against Torture* and the four *Geneva Conventions of 1949* and the Additional Protocols of 1977.

Under the International Covenant on Civil and Political Rights (Article 4), the prohibition of torture and ill-treatment must not be suspended under any circumstances.

As parties to the *International Covenant on Civil and Political Rights*, EU member states must "adopt such legislative or other measures as may be necessary to give effect" to the right not to be subjected to torture or ill-treatment (Article 2(2)). In its General Comment 20 on Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture and ill-treatment), the UN Human Rights Committee has stated that "it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime". The General Comment refers to obligations of prevention as well as investigation, punishment and reparation. There is, thus, an obligation not merely to prohibit torture and ill-treatment but to prevent it. Member states must respect and ensure the right not to be subjected to torture or ill-treatment under the International Covenant on Civil and Political Rights, the Convention against Torture and other human rights treaties to which they are parties.

As parties to the *Convention against Torture* (Article 3), EU member states must not forcibly return anyone to a country where there are substantial grounds for believing that they would be in danger of being subjected to torture. More broadly, the European Court of Human Rights has held that Article 3 of the European Convention on Human Rights entails an obligation not to extradite or expel a person to a country where they would be at risk of torture or ill-treatment. Obligations of non-refoulement exist also under the *Convention relating to the Status of Refugees* (Article 33(1)) and the International Covenant on Civil and Political Rights (Article 7; see General Comment 20 of the Human Rights Committee, cited above).

EU member states are obliged to comply with the provisions of the *Convention against Torture*, the *Geneva Conventions of 1949* and the *Rome Statute of the International Criminal Court* concerning the prosecution of alleged torturers. They must ensure that anyone subjected to torture or ill-treatment has an effective remedy (International Covenant on Civil and Political Rights, Article 2(3)) and that the victim of an act of torture has an enforceable right to fair and adequate compensation and to rehabilitation (Convention against Torture, Article 14).

Other specific obligations are established in the individual treaties. In particular, as parties to the *Convention against Torture*, member states must ensure that complaints and reports of torture or ill-treatment are promptly and impartially investigated (Articles 12, 13) and that statements made as a result of torture are not invoked in any proceedings, except against a person accused of torture as evidence that the statement was made (Article 15). In addition, member states are subject in their trade with third states to the prohibitions and restrictions set out in the 2005 EU Regulation on trade in goods which could be used for capital punishment or torture.

Member states are obliged to cooperate with the monitoring and inspection mechanisms established under the International Covenant on Civil and Political Rights, the Convention against Torture, the European Convention for the Prevention of Torture and any other international treaties to which they are parties, as well as with the individual and inter-state complaint procedures under the Convention against Torture, the International Covenant on Civil and Political Rights and its (first) Optional Protocol. They are also subject to the jurisdiction of the *European Court of Human Rights* and of any other international court empowered to consider complaints that they have not fulfilled their obligations under the relevant treaties.

Member states also have obligations towards each other—for example, under the Convention against Torture, Article 3 (non-refoulement) and Articles 5-9 (cooperation in prosecuting alleged torturers).

Article 6(1) of the *Treaty on European Union* provides that "The 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". Article 6(2) states that the EU shall respect fundamental rights as guaranteed by the European Convention of Human Rights. Article 7 provides for action where "there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)".

7. Preventing torture within the EU

Like other members of the Council of Europe, all EU member states are parties to the European Convention for the Prevention of Torture. That Convention establishes a Committee for the Prevention of Torture (CPT) empowered to visit any place within the jurisdiction of a state party where persons are deprived of their liberty by a public authority. After a visit, the CPT transmits its findings to the state, which is required to respond within a set time limit.

Since the beginning of 2004 the CPT has published reports on visits to 14 EU member states. Reports on other member states have been published in previous years. The reports include allegations of ill-treatment and describe conditions of detention which appear to amount to inhuman or degrading treatment. They offer detailed recommendations, including recommendations for the introduction of safeguards against ill-treatment and the improvement of conditions of detention. Often they reiterate recommendations from previous visits which have not been implemented.

During the same period, the UN Committee against Torture examined the periodic reports of eight EU member states. The Committee's conclusions and recommendations addressed a range of issues including reports of ill-treatment; people forcibly returned to countries where they were allegedly tortured; inadequate investigations into complaints and reports of torture; inadequate definitions of the crime of torture in national laws; and poor conditions of detention. Like the CPT, the Committee against Torture often noted a lack of action to implement recommendations made on previous occasions.

The UN Special Rapporteur on torture also has taken action in relation to EU member states. In the summary of information issued in conjunction with his report to the 61st (2005) session of the UN Commission on Human Rights, the Special Rapporteur indicated that he had sent communications in 2004 to eight EU member states. The communications concerned allegations of torture or ill-treatment and cases of failed asylum-seekers about to be returned to countries where they would allegedly risk being tortured or ill-treated. In most cases the governments concerned replied to the communications. The Special Rapporteur also made observations in relation to several member states.

The Commissioner for Human Rights of the Council of Europe also has visited EU member states and made recommendations concerning conditions of detention and the violent behaviour of some police officers.

Reports and recommendations concerning the prevention of torture and ill-treatment by EU member states have also been issued by a number of NGOs.

8. Conclusions and recommendations

All EU member states are formally committed to the prohibition of torture as parties to the European Convention on Human Rights and major international human rights and humanitarian law treaties. The right not to be subjected to torture or ill-treatment has been incorporated in the EU Charter of Fundamental Rights. The Council has established the eradication of torture and ill-treatment as a priority within the Common Foreign and Security Policy. EU actors are engaged in various efforts in the fight against torture, including the funding of projects under the European Initiative for Democracy and Human Rights (EIDHR). But the credibility of these efforts will be undermined if the EU responds inadequately to the incidence of torture or ill-treatment persisting in member states, and new challenges have arisen over the alleged involvement of EU states in illegal practices in connection with counter-terrorism.

The time has come for the development of an integrated EU approach to the worldwide eradication of torture. The following recommendations have been formulated with this end in mind.

The European Parliament

1. The European Parliament should consider conducting a comprehensive review of the EU's efforts for the prevention and eradication of torture and ill-treatment in third countries. The review should make recommendations for enhancing the coherence and effectiveness of those efforts; along the lines of the Committee on Foreign Affairs draft report and resolution on "Human rights in the world and the EU's policy on the matter" (Provisional 2005/2203(INI), 2 February 2006). The views of other relevant actors such as the UN High Commissioner for Human Rights, the relevant UN special procedures and treaty-monitoring bodies, the Commissioner for Human Rights of the Council of Europe, the European Committee for the Prevention of Torture (CPT), the Office for Democratic Institutions and Human Rights of the OSCE and NGOs should be sought.

2. The review should also examine and make recommendations on how the EU could best help fulfill the goal of preventing and eradicating torture and ill-treatment within the EU, complementing the work of other relevant actors including those mentioned above. It should consider how the EU might monitor the findings of relevant actors such as the CPT, the UN Committee against Torture and the UN Special Rapporteur on torture with a view to encouraging member states to implement their recommendations.

3. The review should consider how the European Parliament itself can best contribute to the EU's anti-torture effort, for example, where appropriate, by encouraging national parliaments to make legislative improvements for the prevention of torture and the institution of protective safeguards and/or to ratify the relevant international instruments. The Parliament should consider engaging with the national parliaments of the EU member states to ascertain whether all relevant legislative and administrative provisions are adequately and consistently covered in the member states. The Parliament should also encourage EU member states to support programs for the rehabilitation of torture victims in their countries.

4. The European Parliament should call on EU member states to adopt controls, where necessary, aimed at ensuring that EU-manufactured police and security equipment not covered by the *Regulation on trade in goods which could be used for capital punishment or torture*, such as ordinary handcuffs, is not used in the infliction of torture or ill-treatment in third countries. Such controls should not preclude the possibility that such equipment may one day be added to the goods covered by the Regulation.

5. In connection with counter-terrorism, the European Parliament should call on EU member states to refrain from any practices which are incompatible with their international obligations concerning the prohibition of torture and ill-treatment, including the use in judicial proceedings of information obtained through torture and the practice of forcibly sending people to countries where they could face a real risk of torture after obtaining "diplomatic assurances" that they will not be subjected to such treatment.

6. The European Parliament should urge EU member states that have not already done so to ratify the Optional Protocol to the Convention against Torture and to set up national preventive mechanisms as provided under that Protocol.

7. In response to the emergence of arguments and legal doctrines attempting to establish that torture or ill-treatment is sometimes permissible, the European Parliament, joining forces with the parliaments of EU member states, should call for the organization of public awareness campaigns aimed at demonstrating that the prohibition of torture and ill-treatment is universal and that the right not to be subjected to torture or ill-treatment applies to everyone, at all times and in all places.

The Council

8. The adoption of the *Guidelines on torture* in 2001 marked an important step in the struggle against torture and ill-treatment, but the implementation of the Guidelines has been sporadic and slow. The Council should intensify the implementation of the Guidelines on a systematic basis as a matter of priority, with special attention to demarches in individual cases and to action by EU missions and human rights ambassadors of EU member states.

The EU's concerns about torture should also be raised in political dialogues, in human rights dialogues and consultations and in meetings with third countries based on first, second and third pillar arrangements. Other activities envisaged in the Guidelines, such as co-sponsorship of the annual UN resolutions on torture, should continue. Third countries should be regularly encouraged to cooperate with other relevant actors such as the UN Committee against Torture, the UN Human Rights Committee, the UN Special Rapporteur on torture and the CPT, to implement their recommendations, to submit periodic reports to the relevant monitoring bodies within the established deadlines, and to contribute to the UN Voluntary Fund for Victims of Torture.

9. In connection with counter-terrorism, the EU should press the US Administration to desist from any practices which are incompatible with international human rights and humanitarian law norms, and to ensure that anyone arrested, captured or detained by or at the behest of US agents is fully protected against torture and ill-treatment, including protection through procedural rights.

10. At the same time, the EU should not leave any doubt as to the standards it expects its member states to uphold in the fight against terrorism. The Council should take its responsibility in making this unequivocally clear, preferably at the highest level. The EU should endeavour to ensure that all member states cooperate fully in the investigation of the European Parliament's Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, and in the inquiries on the same subjects being conducted by the Council of Europe. The Council should furthermore ensure that protection against torture and ill-treatment is fully reflected in connection with the negotiations on the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the EU.

11. The EU should continue pressing third countries to ratify the Convention against Torture and its Optional Protocol and should encourage them to set up national preventive mechanisms as provided under that Protocol. Training and technical assistance to these ends may be beneficial. Third countries should also be encouraged to make declarations under Articles 21 and 22 of the Convention against Torture providing for inter-state and individual complaints.

12. With a view to strengthening the international safeguards for the protection of persons deprived of their liberty and thereby enhancing the protection against torture, the EU should give priority to the adoption by the UN General Assembly in 2006 of the draft *International Convention for the Protection of All Persons from Enforced Disappearance* as agreed in 2005 by the UN working group entrusted with drafting the instrument. The European Parliament may wish to underline that priority.

13. Complementing the controls on external trade to be established under the Regulation on trade in goods which could be used for capital punishment or torture, the Council should introduce an EU-wide ban on the manufacture of goods listed in Annex II of the Regulation, and controls analogous to those in the Regulation on transfers between member states of goods listed in Annex III. The Council should promote the establishment of strict guidelines on the use of police and security equipment in member states, including handcuffs and chemical incapacitating agents, in conformity with applicable international and regional standards on the use of force and firearms by law enforcement officials.

The Commission

14. The EU should continue its funding for the prevention of torture and the rehabilitation of torture victims as a priority under the EIDHR.

15. The EU should also consider how its development and cooperation assistance can best be used to further the prevention of torture, particularly under the headings of governance, access to justice, institutional reform and capacity-building, for example in the training of law enforcement personnel and judicial officials. The EU goal of preventing and eradicating torture should be mainstreamed in relevant areas of bilateral and multilateral cooperation, for example in assistance to the judiciary and penitentiary reform...

16. The Commission should publish a report on the implementation of the Regulation on trade in goods which could be used for capital punishment or torture within two years of its entry into force. The Commission should consider expanding the lists of goods in Annexes II and III of the Regulation (for example, by transferring thumb-cuffs and thumbscrews from Annex III to Annex II). In consultation with other relevant actors, the Commission should explore ways in which the monitoring and action functions of EU missions under the Guidelines on torture might contribute to the effective implementation of the Regulation.

"They are doing this to people and it is wrong, wrong, wrong. This is an evil practice, and I want them to acknowledge it. I want them to acknowledge that what they did to me was wrong."—
Maher Arar

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