

CRS Report for Congress

Undisclosed U.S. Detention Sites Overseas: Background and Legal Issues

Updated January 23, 2007

Jennifer K. Elsea
Legislative Attorney
American Law Division

Julie Kim
Specialist in International Relations
Foreign Affairs, Defense, and Trade Division



Prepared for Members and
Committees of Congress

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Summary

President Bush's announcement on September 6, 2006, that 14 "high-value detainees" suspected of terrorist activity have been transferred from locations abroad to the U.S. detention facility at the Guantanamo Bay Naval Station confirmed for the first time the existence of secret U.S. prison facilities abroad, the subject of previously unsubstantiated media allegations and investigations by foreign governments and human rights bodies. Before September, the Bush Administration had neither admitted nor denied the allegations, but had defended the related long-standing practice of transporting terrorist suspects to other countries through a process known as "extraordinary rendition." President Bush stated that no more suspects were being held in CIA prisons but that the Administration reserved the option of establishing overseas prisons to hold and interrogate terrorist suspects that may be captured in the future.

The arrest, transfer, detention, and treatment of persons are governed by a web of human rights treaties and, in some cases, treaties regulating the conduct of armed conflict (humanitarian law), as well as customary international law related to either category of law. In the context of the "Global War on Terrorism" (GWOT), there are significant differences of opinion as to which legal regimes govern the arrest and detention of suspected terrorists. The Bush Administration has characterized the arrests and detentions as the wartime capture and internment of combatants, and has argued that human rights law is thus inapplicable. Prior to the Supreme Court's decision in *Hamdan v. Rumsfeld*, the Administration argued that treaties regarding humanitarian law did not apply to the detainees. However, the Supreme Court rejected the position that Al Qaeda fighters captured in Afghanistan are not entitled to any protection under the Geneva Conventions, finding instead that all persons captured in the context of an armed conflict are entitled at least to the minimum protections required under Common Article 3. Congress, in enacting the Detainee Treatment Act of 2006 (P.L. 109-163), prohibited cruel, inhuman, or degrading treatment of detainees in U.S. custody regardless of their geographical location; the 110th Congress may remain engaged on related aspects of detainee treatment.

States parties to human rights treaties generally agree to prevent violations of the civil rights of persons under their jurisdiction, which ordinarily entail the right to a trial or other process of law before a person can be deported or subjected to prolonged detention. The existence of secret prisons on a state's territory or the use of its airfields to transport prisoners, with or without the involvement or knowledge of the government involved, may entail a breach of international obligations.

This report provides background information regarding the subject and discusses the possible legal frameworks that may apply. It is based on available open-source documentation, as cited, and not on any independent CRS investigation. It focuses on protections accorded to persons under international law, and is not intended to address intelligence operations or policy. It includes in its appendix a status discussion concerning relevant investigations being conducted by the European Parliament and the Council on Europe.

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Introduction

Aspects of U.S. tactics in conducting the global war on terrorism have come under increasing international scrutiny, as allegations have emerged in recent years of possible illegal activity by U.S. and international intelligence agencies. On September 6, 2006, in an address that was part of a series of speeches on the war on terrorism, President Bush provided new information on the capture and detention of suspected terrorists since September 11.¹ He announced the transfer of 14 terrorist suspects to the U.S. military facility at Guantanamo Bay from CIA custody in locations outside of the United States. While the central thrust of the speech promoted the President's proposal to use military commissions to try terrorists,² it also provided for the first time official acknowledgment of the existence of a previously classified international CIA program to detain and question suspected terrorists and operatives. The *Washington Post*, and subsequently several other news sources, had reported on a CIA network of secret detention facilities in November 2005 (see background section, below), but U.S. officials neither confirmed nor denied their existence until the President's speech.

According to President Bush, the CIA program remains vital to the security of the United States and has "saved innocent lives" by providing key information to intelligence agencies that helped prevent terrorist attacks on the United States, identifying further suspects, and revealing details about how al Qaeda operates. President Bush stated that the CIA program detained "only a limited number of terrorists at any given time." He also said that, with the announced transfer of the 14 detainees to Guantanamo, there are "now no terrorists in the CIA program."

President Bush said he would not reveal where the CIA's detention facilities had been located, how many of them there were, or how many suspects had been questioned under the program. He stated that the program, reportedly set up pursuant to a secret presidential directive he issued September 17, 2001,³ was subject to

¹ For full text of the speech, see "President discusses creation of military commissions to try suspected terrorists," Office of the Press Secretary, the White House, September 6, 2006.

² For more on current proposals for military commissions, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

³ See David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sep. 10, 2006, at 1, 20.

multiple legal reviews and conducted by carefully selected and screened CIA officers. He reiterated that “the United States does not torture.”

Administration officials claimed that the President’s address would resolve unchecked media speculation about secret prison sites. By consolidating detainees in a single site at Guantanamo with some international access, they said the United States and its allies could “turn a page” on the matter of unknown classified detainee locations.⁴ Others, however, believe that President Bush’s announcement has only fueled greater interest into the U.S. program and the practices of U.S. intelligence agencies overseas. In Europe, especially, numerous international organizations and human rights groups have been seized with this issue for some time. Some European officials have said that the President’s announcement has given new impetus to the importance of their ongoing investigations and future inquiries. In addition, as the Administration has asserted the right to revive the CIA program in the future, the topic may not just concern past practices but also ongoing policies.

Additional details about the detention and transport of terrorist suspects continue to emerge from state investigations and judicial proceedings in some European countries. In one high-profile case in Italy, prosecutors have accused 26 Americans, allegedly CIA agents, with involvement in the abduction of an Egyptian cleric from Milan in 2003.⁵ Other cases, as well as national inquiries into local official involvement in terror suspect transfers, may follow.

There are significant differences of opinion within the world community as to which legal regimes govern the arrest and detention of suspected terrorists. The Bush Administration has characterized the arrests and detentions as the wartime capture and internment of combatants. Other states, however, may not share the view that the “Global War on Terrorism” is an actual armed conflict taking place on all territories, in particular with respect to operations carried out on their own territory. They may regard their obligations under international law with respect to persons arrested in, transported through, or detained on their territory in terms of human rights treaties in addition to or in lieu of humanitarian law. There may also be differences with respect to the interpretation of substantive provisions of the various treaties and other sources of law.

This report provides background information regarding the controversy and discusses the possible legal frameworks that may apply. It is based on available open-source documentation, as cited, and not on any independent CRS investigation into factual allegations. It focuses on protections accorded to persons under international law, and is not intended to address intelligence operations or policy. It also focuses primarily on the allegations relating to Europe, although the practice extended elsewhere, and includes in its appendix a status discussion concerning the

⁴ See “Update on detainee issues and military commissions legislation,” briefing by John Bellinger III, State Department Legal Advisor, September 7, 2006, *available at* [<http://www.state.gov/s/rls/71939.htm>].

⁵ “Rendition trial opens in Milan,” National Public Radio *All Things Considered*, January 9, 2007.

relevant investigations conducted by the European Parliament and the Council on Europe.

Background

After September 11, periodic news stories addressing the conduct of the global war on terrorism would focus on the capture, treatment, and extra-judicial transfer of suspected terrorists from U.S. custody to third countries. A November 2, 2005, *Washington Post* story went beyond earlier reporting on terrorist transfers and described a global prison system set up by the CIA after the September 11 terrorist attacks. This system reportedly extended well beyond publicly known U.S. detention centers in Iraq, Afghanistan, and Guantanamo Bay, Cuba, to include secret facilities (referred to as “black sites”) in eight countries, including Thailand, Afghanistan, and “several democracies in Eastern Europe.” The newspaper said it was withholding the names of the European countries at the request of senior U.S. officials.⁶ It said that the CIA set up the facilities under its covert action authority. The internment policy, as reported, in some cases incorporated the already known practice of extraordinary rendition, in which covert means are used to detain terrorist suspects and transport them to certain countries for purposes such as interrogation.⁷

Shortly thereafter, the non-governmental organization Human Rights Watch (HRW) stated that its independent research corroborated the *Washington Post* allegations about the existence of detention facilities in eastern Europe. Utilizing flight records, HRW’s research asserted that the CIA made use of airfields and other military facilities in Poland and Romania to move prisoners to and from Europe, Afghanistan, and the Middle East in 2003 and 2004. It said that these sites in Poland and Romania could therefore be possible locations for the alleged secret detention facilities.⁸

On April 5, 2006, Amnesty International (AI) released a report on the U.S. rendition program.⁹ It cited the cases of three individuals who allege that they had been detained by the United States, held in secret facilities, possibly in Djibouti, Afghanistan, and “Eastern Europe,” and eventually released. The report speculated that the sites in Europe could have been located in the Balkans or South Caucasus states. AI officials alleged that “literally thousands” of CIA flights have been carried out into Europe for detention in black sites and rendition outside of Europe.¹⁰

⁶ Priest, Dana. “CIA holds terror suspects in secret prisons,” *The Washington Post*, November 2, 2005, p. A1. Subsequent *Post* stories on this topic continued to refrain from naming specific east European countries.

⁷ Well before the aforementioned *Washington Post* story, several media reports, especially in Europe, addressed the subject of post-September 11 rendition flights from Europe.

⁸ Human Rights Watch press release, Nov. 7, 2005.

⁹ “Below the radar: Secret flights to torture and disappearance,” Amnesty International Report, AMR 51/051/2006, April 5, 2006. Text available at [<http://www.amnesty.org>].

¹⁰ “Amnesty International report details secret U.S. prisons,” National Public Radio, April (continued...)

The allegations made in these and other reports triggered several actions by international organizations in Europe. In particular, the Council of Europe and the European Parliament have taken the lead in launching inquiries and formal investigations. The Venice Commission, an advisory body of the Council of Europe, issued a preliminary legal opinion on member states' obligations on human rights and treatment of detainees.¹¹ The U.N. Human Rights Committee recommended in July, 2006, that any secret detention facilities be abolished and that all detainees enjoy full legal protections.¹²

Most of these efforts have involved inquiries into European, rather than U.S., actions, in accordance with the mandates of those institutions. By the end of 2006, none had found specific evidence to confirm the existence of the U.S. secret prisons in Europe. However, various additional allegations about aspects of European government cooperation with U.S. intelligence have been raised and investigations into possible violations of human rights obligations continue. Moreover, the allegations and disclosure of the CIA program have spurred greater European public interest in U.S. intelligence activities in Europe and European oversight, or lack thereof, over such activities.

[A status discussion concerning the reports and findings of the European Parliament and Council of Europe inquiries is included in the Appendix.]

Some international reaction to President Bush's disclosure of the CIA program, especially in Europe, was skeptical. Terry Davis, Secretary-General of the Council of Europe, called it "just one piece of the truth." In particular, many officials have called on the United States to reveal the location of the sites, which the Administration has stated it will not do. Officials leading the European investigations said that the disclosure justified their further inquiries.

On the other hand, some observers have suggested that European governments may not be eager to insist on investigating CIA activities in Europe too closely, or provide information that might reveal their cooperation with the CIA. Some European investigators have complained bitterly about what they charge has been only limited cooperation in their inquiries from European governments. Since September 11, the United States and many European countries, as well as the European Union as an institution, have promoted intensive trans-Atlantic cooperation on counter-terrorism and judicial processes. U.S.-European cooperation in countering the terrorist threat has been a consistent theme of annual U.S.-EU summits. U.S.

¹⁰ (...continued)
5, 2006.

¹¹ Formally known as the European Commission for Democracy Through Law, the Venice Commission advises the Council of Europe on constitutional matters. For full text of its Opinion, see [[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp)] [hereinafter "Venice Commission Report"].

¹² See Human Rights Committee, Consideration of Reports Submitted By States Parties under Article 40 of the Covenant (Advance Unedited Version), United States of America (87th. Sess. July 2006), *available online at* [<http://www.ohchr.org/english/bodies/hrc/hrcs87.htm>].

officials often emphasize the close U.S.-European relationship in information and intelligence sharing and in law enforcement efforts.¹³

U.S. Responses

Before President Bush's disclosure in September 2006, U.S. officials refrained from publicly responding to allegations on U.S. intelligence activities, including alleged detention sites beyond U.S. detainee operations in Guantanamo Bay, Afghanistan, and Iraq. They would neither confirm nor deny the existence of a global detention program, or allegations regarding specific sites and their locations.

Shortly after the *Washington Post* story broke in late 2005, Secretary of State Rice addressed several aspects of U.S. conduct in the war on terror to the international media in the context of her trip to Europe in December 2005. She elaborated on policy aspects related to the transfer of terrorism suspects and common challenges and dilemmas faced by Europe and the United States in prosecuting the war on terrorism. Among other things, she asserted that the United States fully upholds and complies with its laws and treaty obligations, which prohibit acts of torture or other cruel and inhuman treatment. She also defended the decades-long practice of rendition of suspects from place of capture to their home country or to third countries. She asserted that renditions have been carried out by many countries, not just the United States, that they are permissible under international law, and that they provide a "vital tool in combating transnational terrorism."¹⁴

Media accounts of Secretary Rice's private meetings with her European counterparts suggested that many officials, if not the European media or non-governmental sector, were assuaged by their discussions and by Rice's elaboration of U.S. policy regarding international legal obligations. In March, U.S. Attorney General Alberto Gonzales addressed European concerns about rendition during a visit to London. Denying allegations of mistreatment of detainees, Gonzales stated that the United States does not transport anyone to countries where it is believed that individual will be tortured, and that the United States seeks assurances from countries receiving custody of a detainee that the individual will not be tortured.¹⁵ In a meeting with the U.N. Committee Against Torture in May, State Department Legal Advisor John Bellinger III, while not commenting on alleged intelligence activities, urged outside observers not to concentrate disproportionately on the allegations or believe every allegation that emerged.¹⁶

¹³ For example, see Fried, Daniel, Assistant Secretary for European and Eurasian Affairs, testimony before the House International Relations Committee, March 8, 2006.

¹⁴ "Remarks upon her departure for Europe," Secretary of State Condoleezza Rice, Andrews Air Force Base, December 5, 2005, *available at* [<http://www.state.gov/secretary/rm/2005/57602.htm>]. For more statements by Administration officials on rendition and torture, see CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael Garcia.

¹⁵ U.S. Fed News Service, March 7, 2006.

¹⁶ Opening Remarks, John B. Bellinger, III, May 5, 2006, at [<http://www.usmission.ch>].

Some media reports suggest that the CIA program had been the topic of internal debate within the Bush Administration for the past two years, finally culminating in Bush's announced transfer of the 14 detainees to Guantanamo from secret CIA facilities.¹⁷ U.S. officials are reportedly trying to emphasize that the United States has ceased to use extraordinary rendition to transport terrorist suspects, although they reserve the right to do so. Human rights organizations have questioned this claim.¹⁸

Legal Framework and Issues

The arrest, transfer, detention, and treatment of persons are governed by a web of human rights treaties and in some cases, treaties regulating the conduct of armed conflict,¹⁹ as well as relevant tenets of customary international law.²⁰ In general, during peacetime, human rights law applies. The law of war, also called international humanitarian law, applies only during an armed conflict. The extent to which human rights law remains in force during wartime is the subject of debate.

In the context of the "Global War on Terrorism" (GWOT), there are significant differences of opinion as to which legal regimes govern the arrest and detention of suspected terrorists. The Bush Administration characterizes the arrests and detentions as the wartime capture and internment of combatants, and argues that human rights law is thus inapplicable.²¹ The Administration previously took the

¹⁷ Linzer, Dafna and Glenn Kessler, "Decision to move detainees resolved two-year debate among Bush advisers," *The Washington Post*, September 8, 2006.

¹⁸ Dinmore, Guy, "U.S. Tries to Assure Allies That Extraordinary Renditions Are Over," *Financial Times*, December 27, 2006.

¹⁹ In particular, the Geneva Conventions of 1949 regulates the treatment of wartime prisoners. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter "GPW"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter "GC"], (entered into force Oct. 21, 1950)[hereinafter referred to collectively as the "Geneva Conventions"].

²⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (describing customary international law of human rights as prohibiting states from practicing, encouraging, or condoning, among other violations, "prolonged arbitrary detention," the "disappearance of individuals," and "torture or other cruel, inhuman, or degrading treatment or punishment"). The United States has taken the position that the prohibition against arbitrary detention exists as a norm under customary international law. See RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 136 (3d ed. 1995) (citing Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 182 n.36 (Jan. 12, 1980)).

²¹ See, e.g., Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba to the Inter-American Commission on Human Rights, Organization of American States 25 (2002)("It is humanitarian law, and not human rights (continued...)

position that the Geneva Conventions applicable to international armed conflicts²² do not apply with respect to Al Qaeda, because Al Qaeda is neither a state nor a party to the Conventions, and that the minimal set of rights set forth in the Conventions for armed conflicts “not of an international nature” do not apply because the GWOT is international in scope.²³ However, the Supreme Court rejected that position in *Hamdan v. Rumsfeld*,²⁴ interpreting Common Article 3 of the Geneva Conventions to apply regardless of the nature of the conflict. *Hamdan* left ambiguous whether any part of the Geneva Conventions applies with respect to terrorist suspects captured in territory where no actual armed conflict is taking place.²⁵ However, the Bush Administration appears to have accepted that Common Article 3 covers the “war against Al Qaeda.” Congress, in enacting the Detainee Treatment Act of 2006 as part of National Defense Authorization Act for FY2006 (P.L. 109-163), used human rights terminology in explicitly prohibiting the “cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government.” This provision, known as the McCain Amendment, defines “cruel, unusual, and inhuman treatment or punishment” to cover those acts prohibited under the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as stated in U.S. reservations to the U.N. Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment (CAT).²⁶ In addition, the House of Representatives in the 110th Congress has passed the Implementing the 9/11 Commission Recommendations Act of 2007 (H.R. 1), which contains a reporting requirement, § 1433, urging the Administration to implement the

²¹ (...continued)

law, that governs the capture and detention of enemy combatants in an armed conflict.”); Letter by the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, to the Office of the High Commissioner for Human Rights (Jan. 31, 2006), *reprinted as* Appendix II to the United Nations High Commission on Human Rights, Report of the Chairman of the Working Group on Arbitrary Detention *et al.* on the Situation of Detainees at Guantanamo Bay, E/CN.4/2006/120 (Feb. 15, 2006)(disputing report’s assumption that the International Covenant on Civil and Political Rights [ICCPR] applies to Guantanamo detainees “because the United States ‘is not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions’”).

²² Common Art. 2 of the Geneva Conventions defines “international armed conflict” as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” GPW art. 2.

²³ For more history and analysis, see CRS Report RL31367, *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*, by Jennifer K. Elsea.

²⁴ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

²⁵ For a summary and analysis of the *Hamdan* decision, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the ‘Global War on Terrorism’*, by Jennifer K. Elsea.

²⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereafter “CAT”]. Ratified by the United States in 1994, CAT prohibits parties from engaging in torture, and requires them to take measures to prevent “cruel, unusual, and inhuman treatment or punishment” within any territories under their respective jurisdictions. *Id.* arts. 1-3, 16.

recommendation of the 9/11 Commission that the United States “should work with friends to develop mutually agreed-on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country’s criminal laws” drawing from Common Article 3 of the Geneva Conventions.

Although the *Hamdan* decision respecting the application of humanitarian law to Al Qaeda was generally viewed abroad as a positive development, its legal implications are unclear. Many in the world community see the GWOT as a “fight” or “struggle” against terrorists²⁷ — but not a war — implying that apart from the conventional battlefield operations such as those conducted in Afghanistan, law enforcement measures are the appropriate means for addressing the terrorist threat. Under this view, at least those suspected terrorists who are captured outside of a theater of conventional armed conflict are entitled to the protection of human rights treaties. From this perspective, such persons would be entitled in most cases to a trial or other process of law to determine the lawfulness of their continued detention.

Many take the position that human rights treaties continue to apply regardless of whether a situation of armed conflict exists, except for those portions of the treaties that allow states to derogate in an emergency²⁸ and provisions that are superseded by a more specific provision of humanitarian law.²⁹ According to this perspective, all captives are protected by human rights law, but persons picked up in circumstances of an armed conflict or occupation are to be treated according to humanitarian law.³⁰ In any event, some argue, the legal regimes that exist with respect to various types of detainees are not really very different in application.³¹ It

²⁷ See, e.g., Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349 (2004); Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 81 (2005); see also Venice Commission Report, *supra* note 10, at ¶¶ 32 *et seq.* (applying relevant agreements for international cooperation in the “fight against terrorism,” which prescribe law enforcement measures); *id.* at ¶¶ 78-80 (opining that “the organised hostilities in Afghanistan before and after 2001 have been an “armed conflict” . . . [but] sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an ‘armed conflict’ in the sense that they trigger the applicability of International Humanitarian Law”).

²⁸ International human rights treaties provide for the suspension of some rights in public emergencies in accordance with procedures set forth therein. See, e.g., Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 64-65 (2002) (outlining derogation procedures in various human rights treaties).

²⁹ Under the concept of *lex specialis*, in cases where two different rules may be applied to the same subject-matter, the more specific rule controls. See Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006) (describing *lex specialis* rule and noting its apparent wide-spread acceptance).

³⁰ See Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 15, 20 (2005).

³¹ See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367 (continued...)

is widely held by international legal experts that, at a minimum, all detainees are entitled to humane treatment that meets their basic needs, are to be protected against treatment that amounts to torture or inhumane, cruel or degrading treatment, and may not be subjected to punishment without a fair trial.

Human Rights Treaties

States have made numerous international agreements aimed at protecting the liberty of individuals from unlawful infringement by governments and others. The Universal Declaration of Human Rights (UDHR) prohibits arbitrary arrest, detention or exile.³² The International Covenant on Civil and Political Rights (ICCPR) prohibits the deprivation of liberty except as established by law.³³ The European Convention on Human Rights (ECHR) obligates each state party to secure the right to liberty and security of every person within its jurisdiction, and limits the circumstances under which persons may be arrested, detained, or deported.³⁴ The U.N. Convention Against Torture (CAT) prohibits torture and cruel, inhuman or degrading treatment of persons, including the extradition or transfer of an individual

³¹ (...continued)
(2004).

³² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Although it is a General Assembly Resolution rather than a treaty, and is therefore technically non-binding, some if not most provisions are considered to be customary law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 82 (1989).

³³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]. Article 9 provides in part that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” ICCPR art. 9(1).

³⁴ European Convention on Human Rights (ECHR) art. 5, Rome, 4.XI.1950, *available at* [<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>]. Detentions are limited to the following cases:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

to a foreign country where it is likely that the person will be subjected to torture.³⁵ CAT parties may transfer persons to other countries if they receive “diplomatic assurances” from the receiving state that the individual will not be subject to torture, but the transferring state may retain some responsibility for ensuring proper treatment after the transfer.³⁶

Although the right to be free from arrest and detention without established process of law appears to be generally well-recognized, the scope of persons to whom a state owes protection from violations is less well-established. Generally, a state is obligated to protect persons within its *jurisdiction*, but there are many types of jurisdiction a state may be entitled to exercise, and its obligations to persons may vary accordingly. For example, the ICCPR obligates each member to

respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added).³⁷

It may be argued that the plain text of the ICCPR obligates states to protect only those individuals who are both within the territory of a state *and* subject to its jurisdiction, in which case a state’s obligation may be limited depending on how both “territory” and “jurisdiction” are defined.³⁸ If “territory” is understood to include only the exclusive sovereign territory of a state, for example, a state would incur no liability for conduct inconsistent with the standards set forth in the ICCPR if such conduct occurs in an area under its control or administration but outside its boundaries. If “jurisdiction” is understood to be territorially based, then the term would appear to be redundant, unless it can be read to limit the scope of jurisdiction within a state’s territory, possibly excluding, for example, foreign military bases and embassies within the sovereign territory of the state, or persons not ordinarily subject to the jurisdiction of its courts, such as foreign heads of state and diplomats. Under this reading, it is possible to argue that neither the United States nor the country on whose territory a U.S.-run prison is located has any obligation under the ICCPR to persons held there. Even using a narrow definition of jurisdiction, however, many commentators point out that it would be difficult to argue that a state has no obligations regarding persons on its territory relative to their potential arrest or removal from its territory without due process of law.

³⁵ CAT, *supra* note 25. CAT Article 3 provides that no state party “shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” For an analysis of CAT applicability to the renditions, see CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

³⁶ See Committee against Torture, Communication No 233/2003: Sweden. 24/05/2005 (Agiza v. Sweden), CAT/C/34/D/233/2003 (2005).

³⁷ ICCPR, *supra* note 32, art. 2(1).

³⁸ For a discussion of the debate on extraterritorial application of human rights treaties, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119 (2005).

However, if “jurisdiction” is interpreted as an additional factor describing the scope of the ICCPR’s application, such that the convention obliges states to protect individuals within their territory *and* individuals subject to their jurisdiction, then a state’s obligations might be read to extend beyond its borders into other areas where it exercises jurisdiction, such as on board its ships and aircraft and any territory overseas where it in fact exercises legal authority over persons, even if the state might not necessarily exercise control over the area. Under this construction, both the United States and the country on whose territory a U.S.-run prison is located would have an obligation to ensure that the rights of individuals detained there are respected pursuant to the ICCPR.

The U.N. Human Rights Committee, established by the ICCPR to monitor the implementation of its provisions,³⁹ has taken the second, broader position, namely that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power *or effective control* of that State party, *even if not situated within the territory of the State party.*”⁴⁰ The Committee has read art. 2(1) of the ICCPR to include actions taken by the agent of a state on the territory of another state, with or without that state’s permission.⁴¹ The International Court of Justice (ICJ) concluded that while the jurisdiction of states is primarily territorial, the ICCPR also extends to “acts done by a state in the exercise of its jurisdiction outside of its own territory.”⁴² Not all provisions of the ICCPR lend themselves to extraterritorial application,⁴³ but it appears to be widely accepted among European commentators that agents of a state are bound to respect the rights of persons over whom they exercise power and *de facto* jurisdiction without regard to the territory where the conduct takes place.⁴⁴ The European Court of Human Rights (ECHR) applies a similar rule when interpreting the ECHR, which according to its terms applies to “everyone [within the] jurisdiction” of states parties,⁴⁵ finding that a state’s

³⁹ ICCPR, *supra* note 32, art. 40. The Human Rights Committee’s published comments interpreting the treaty are not legally binding, but are widely considered to be persuasive and have been implemented by some states parties. *See* Jinks, *supra* note 27, at 60 & n.16.

⁴⁰ Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para. 10.

⁴¹ *See* Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, 87 INT’L REV. RED CROSS 39, 61 (2005) (citing *Lopez Burgos v. Uruguay* (Comm. No. 52/1979), UN Doc. CCPR/C/13/D/52/1979 (1981)).

⁴² International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004, at ¶ 111 (2004).

⁴³ It may be argued that the obligations of a state toward individuals outside its territory are limited to the so-called negative obligation not to infringe individuals’ rights. *See* Borelli, *supra* note 40, at 101.

⁴⁴ *See* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 79 (1995) (noting that the extraterritorial application of the ICCPR has “almost never been questioned and has long ceased to be the preserve of scholars; it has obtained the imprimatur of the Human Rights Committee and UN rapporteurs”).

⁴⁵ ECHR, *supra* note 33, art. 1.

obligations may extend beyond the national territory in limited circumstances,⁴⁶ including persons within the control of any authorized agent of that state.⁴⁷ The Venice Commission, in its opinion discussing the alleged renditions to U.S.-run prisons in Europe, adopted the view that both the ICCPR and the ECHR apply to extraterritorial conduct by agents of a state in some circumstances.⁴⁸

The United States has construed human rights treaties to apply only to conduct that occurs on U.S. territory.⁴⁹ The Bush Administration rejected the assertion that the ICCPR applies with respect to detainees held at Guantanamo Bay Naval Station, Cuba, noting the jurisdictional language in article 2 of the ICCPR and arguing that the law of war, not human rights agreements, applies.⁵⁰

The Law of Armed Conflict

If the GWOT is regarded as an armed conflict in the legal sense, the international law of armed conflict constrains belligerents and provides protections to individuals who are caught up in it. The four Geneva Conventions of 1949⁵¹ play an important role. Each of the conventions provides specific protections for a defined category of persons who are not, or are no longer, taking part in hostilities, including those who are detained for any reason. They prescribe rules for the

⁴⁶ See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 128 (2003) (citing *Loizidou v. Turkey* (Preliminary Objections), 20 EUR. H.R. REP. 99, para. 52 (1995)). The necessary control to bring about jurisdiction requires “the exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State’s control.” *Id.* (citing *Bankovic v. Belgium*, Eur. Ct. H.R. (2001), which found that NATO aerial bombardment of an area did not bring injured inhabitants under the jurisdiction of the defendant NATO countries for purposes of the ECHR).

⁴⁷ *Stocké v. Federal Republic of Germany*, 199 Eur. Ct. H.R. (ser. A) at 24 (1991); *Ocalan v. Turkey*, at 88 (Eur. Ct. H.R., May 5, 2005).

⁴⁸ See Venice Commission Report, *supra* note 10, at ¶¶ 62-66.

⁴⁹ See JAG’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 54 (Maj. Derek I. Grimes ed., 2005), available at [<http://www.jagcnet.army.mil/clamo>] (stating that the United States interprets human rights treaties to apply only “to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community”).

⁵⁰ Letter by the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, to the Office of the High Commissioner for Human Rights (Jan. 31, 2006), *reprinted as* Appendix II to the United Nations High Commission on Human Rights, Report of the Chairman of the Working Group on Arbitrary Detention *et al.* on the Situation of Detainees at Guantanamo Bay, E/CN.4/2006/120 (Feb. 15, 2006).

⁵¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter “GPW”]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter “GC”], (entered into force Oct. 21, 1950).

detention, treatment, and transfer of wartime prisoners, including measures regarding communication with family and representatives of their home state or designated Protective Power.

Prisoners of War. Prisoner of war (POW) status under the third Geneva Convention (“GPW”) offers the highest level of protection. Prisoners of war may be interned until hostilities end,⁵² but are entitled to certain privileges,⁵³ including the right to maintain contacts with family members⁵⁴ and to receive visits from the International Committee of the Red Cross (ICRC).⁵⁵ They may not be punished for lawful acts of war, and may be punished for unlawful acts only after a fair trial.⁵⁶ They may be transferred under humane conditions, but must be officially notified of their departure and their new postal address in time for them to pack their belongings and notify their next of kin.⁵⁷ POWs who are wounded or sick or who have been detained for a long period of time may be transferred to a neutral country, with the agreement of the new host country,⁵⁸ but only if the host country is a party to the Convention and the transferring state is satisfied of the ability of the host country to fulfill the obligations of the Convention.⁵⁹ In the event the host country fails to carry out the provisions of the Convention, the transferring state is required to take effective measures to correct the problem or to ask for the prisoners’ return.⁶⁰

Protected Civilians. The fourth Geneva Convention (GC) covers as “protected persons” those who fall into the hands of a belligerent who are not entitled to POW status or status under the first or second Conventions, except for nationals of a state that is not a party to the Conventions.⁶¹ The GC protections may vary according to whether the protected person is an “enemy alien” within the domestic

⁵² See GPW art. 21; See JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 47 (1975) (“Prisoners will be released and repatriated as soon as there are no longer any reasons for captivity, that is to say, at the end of active hostilities.”).

⁵³ See GPW art. 21:

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

⁵⁴ GPW art. 71.

⁵⁵ GPW art. 126.

⁵⁶ GPW art. 108.

⁵⁷ GPW arts. 46-48.

⁵⁸ GPW art. 109-111.

⁵⁹ GPW art. 12.

⁶⁰ *Id.*

⁶¹ GC art. 4.

territory of a belligerent state or on foreign territory occupied by a belligerent state. The fourth Convention does not contemplate the arrest or internment of enemy civilians on neutral territory. Where the GC applies, protected persons may be interned only if they pose a danger to the security of the state,⁶² and they may be imprisoned as a punitive measure only after a regular trial, subject to the protections in articles 64 through 77. Article 45 provides that protected persons may be transferred from the territory of a belligerent only if the receiving power is a party to the convention, under similar rules that apply to prisoners of war. Extradition is permitted of protected persons accused of offences against the ordinary criminal law pursuant to pre-existing treaties, but “in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or political opinions or religious beliefs.” Article 49 prohibits the “individual or mass forcible transfers, as well as deportations of protected persons” from occupied territory to any other country, regardless of the motive for transporting them, unless such displacement is unavoidable. Additionally, article 33 provides that “no protected person may be punished for an offence he or she has not personally committed,” and prohibits all forms of collective penalties and intimidation.

There is also a prohibition against removing protected persons from occupied territory. GC art. 49 states:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

There is an exception that allows the temporary evacuation of an area when absolutely necessary for the security of the population or for imperative reasons of military necessity. However, evacuees are not to be transported outside the occupied territory unless such a measure is unavoidable. Under GC art. 147, the “unlawful deportation or transfer or unlawful confinement of a protected person” is a “grave breach” of the convention. It may also be permissible to relocate persons outside of the occupied territory when it is to their benefit. GC art. 132 allows parties to the Geneva Conventions to “conclude agreements for the . . . accommodation in a neutral country . . . certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

Other Prisoners. Some argue that there is a class of persons who, as terrorists or “unlawful combatants” in the context of an international armed conflict, are neither entitled to POW status nor civilian rights under the Geneva

⁶² GC art. 42, applicable to aliens within the domestic territory of a belligerent state, states:

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

GC art. 78, which applies in occupied territory, permits assigned residence or internment of protected persons only for “imperative reasons of security,” and requires some sort of appeals process and periodic review of internment decisions.

Conventions.⁶³ U.S. military doctrine has long held that even persons who commit hostile acts but are not entitled to POW status have the status of civilians.⁶⁴ Traditionally, such persons, as “unprivileged” or “unlawful combatants,” may be punished for acts of violence for which legitimate combatants could not be punished.⁶⁵ GC art. 5 appears to contemplate the treatment of “unlawful combatants,” providing some exceptions for the treatment of protected persons deemed security risks:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.⁶⁶

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

GC art. 143, providing that the delegates of the Protecting Power or ICRC are to have unlimited access to prisoner of war camps and internment facilities for interviewing protected persons, also contains an exception for security. The Detaining Power may prevent such visits for reasons of “imperative military necessity,” but only as an “exceptional and temporary measure.”

⁶³ For an explanation of the “unlawful combatant” issue, see CRS Report RL31367, *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*, by Jennifer K. Elsea.

⁶⁴ See Department of the Army, FM 27-10, *The Law of Land Warfare* (hereinafter “FM 27-10”) para. 78 (1956) states:

If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW, not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4, GC. (internal citations omitted).

The Council of Europe considers that to the extent the GWOT amounts to an “armed conflict,” “[p]ersons who are suspected to be members of an international terrorist network, such as Al-Qaeda, and who have been arrested in connection with an armed conflict, will fall either into the category of other “protected persons” or into the category of POWs.” Venice Commission Report, *supra* note 10, at ¶ 83.

⁶⁵ See Maj. Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323,343 (1951) (explaining that such belligerent acts are not violative of international law, but are merely unprotected by it).

⁶⁶ Rights of communication are communication with the outside world, including those defined in articles 25 (correspondence of a personal nature with family members), 30 (visitation by ICRC representatives and other relief organization personnel), 106 (right to notify family of internment), and 107 (right to send and receive mail).

Nationals of a state that is not a party to the conventions are not “protected persons” under GC, and nationals of neutral or co-belligerent states are not regarded as protected persons “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”⁶⁷ It is widely accepted that persons not covered by more favorable provisions of the Geneva Conventions retain protection under Common Article 3 to the Geneva Conventions.⁶⁸

Customary International Law and Common Article 3. Common Article 3, which specifically covers armed conflicts that are not international in nature, does not specifically authorize or regulate detentions, except by providing minimum standards below which the treatment of detained persons is under no circumstances permitted to fall. The authority to detain persons for security purposes is derived from the power of the sovereign on whose territory the armed conflict takes place, and is conducted in accordance with its own law. The non-sovereign party to the conflict does not automatically receive combatant rights, and may be tried for acts of violence under the domestic law of the territory, although the sovereign may find it politically expedient to recognize belligerent rights in order to exercise them itself.

⁶⁷ GC art. 4.

⁶⁸ The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3, expressly applicable only to conflicts “not of an international nature,” has been described as “a convention within a convention” to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. *See* PICTET, *supra* note 51, at 32 (1975). Originally a compromise between those who wanted to extend the Convention’s protection to all insurgents and rebels and those who wanted to limit it to wars between states, Common Article 3 is now considered to have attained the status of customary international law. *See* KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 188 (2001). Common Article 3 is now widely considered to embody the minimum set of rights applicable to persons in international armed conflicts, whether or not they fall into a specific category of protected status. *See, e.g.*, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 218, 255 (June 27); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction ¶¶ 65-74 (Aug. 10, 1995); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 692-95, 813-14, 816-17 (2d ed. 2000); *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, *COMMENTARY ON THE GENEVA CONVENTIONS* 14 (J. Pictet, ed., 1960) (“This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.”). Reciprocity is not considered necessary for its application to a state party. *See id.* at 38 (noting that “the effect on [a state party] of applying Article 3 [in an insurgency] cannot be in any way prejudicial; for no Government can possibly claim that it is ‘entitled ‘to make use of torture and other inhuman acts prohibited by the Convention, as a means of combating its enemies’”).

With respect to prisoners and all others who are not directly participating in hostilities (including those who previously participated),⁶⁹ Common Article 3 prohibits

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . . .

For wars that are neither international nor non-international within the meaning of the Geneva Conventions, if such wars exist, the laws of war as defined by the customs and usage of nations are considered by many expert observers to apply. Some argue that these laws, many of which are codified in the international agreements regulating conduct during war, continue to apply whether the Geneva Conventions apply to a conflict or not. In particular, there is broad agreement that the principles embodied in Common Article 3 of the Geneva Conventions apply to all wars, whether international or non-international, and that persons who are not entitled to better treatment retain the protections contained therein.⁷⁰

In addition, although the United States has not ratified them, portions of the Additional Protocols to the Geneva Convention⁷¹ may provide some detail to

⁶⁹ GPW art. 3 applies to:

- 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

⁷⁰ See *supra* note 67.

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3., reprinted in 16 I.L.M. 1391 (“Protocol I”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (“Protocol II”). The United States has signed but not ratified Protocol II and declined to sign Protocol I, arguing that to recognize terrorists as combatants would allow them to “enjoy many of the benefits of the law of war without fulfilling its duties, and with the confidence that the belligerent state has no real remedy under the Protocol to deal with this matter.” See Abraham Sofaer, *The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 A.J.I.L. 784, 786 (1988). But see George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 A.J.I.L. 1, 6-7 (1991) (arguing that U.S. position mistakenly presumed that the Protocol would allow terrorists to enjoy POW status); Hans-Peter Gasser, *Some Legal Issues Concerning Ratification of the 1977 Geneva Protocols*, in ARMED CONFLICT AND THE NEW LAW 81, 96 (1989) (arguing that recognizing members of non-state armed forces would not advance the cause of terrorism).

facilitate the interpretation of Common Article 3. In particular, article 75 of Additional Protocol I to the Geneva Conventions may be regarded as embodying the minimum standards for persons who do not meet the criteria for better protection.⁷² Article 75 provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions . . . shall be treated humanely in all circumstances.” Further, art. 75 states

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

⁷² The United States has not ratified Protocol I, but article 75 is widely considered to be universally binding as customary international law. *See Venice Commission Report, supra* note 10, at ¶ 82 (stating that art. 75 of Protocol I reflects customary international law).

Appendix

The following section addresses responses to the allegations of CIA-run prison sites in Europe by the Council of Europe and the European Parliament, including synopses of their reports to date and status of their inquiries.

Council of Europe

The 46-member Council of Europe, Europe's lead guardian organization over human rights, democracy, and the rule of law,⁷³ initiated an extensive set of actions in response to the allegations of clandestine detention sites. The Parliamentary Assembly of the Council of Europe assigned its Committee on Legal Affairs and Human Rights to conduct an investigation and appointed Swiss legislator Dick Marty to lead this effort. The Council of Europe's Secretary-General, Terry Davis, invoked a procedure under the European Convention on Human Rights (Article 52) to ask all Council of Europe member states to respond to formal inquiries for information on the matter. The Committee also asked the Council of Europe's Venice Commission to prepare a legal opinion on member states' obligations on human rights and treatment of detainees.⁷⁴ The Council of Europe can make recommendations but has no enforcement authority over its member states.

Status. The Council of Europe's investigation and inquiry have produced three reports and a legal opinion, as well as several recommendations for members of the Council of Europe to consider in relation to aspects of this issue. The Council of Europe's Parliamentary Assembly will continue its investigation.

Preliminary Assessment. Mr. Marty released an interim assessment of the Council of Europe investigation on January 22, 2006.⁷⁵ In it he stated that at this stage of the investigations, "there is no formal, irrefutable evidence of the existence of secret CIA detention centers in Romania, Poland, or any other country." In the case of Poland and Romania, Marty cited no new information that contradicted Polish and Romanian government denials about knowing anything about possible secret detentions centers in their countries. Marty asserted that reliable and varied sources on this matter justified further investigative work.

Most of Marty's reported findings and preliminary analysis focused on the acknowledged U.S. practice of rendition, the possible involvement or knowledge of

⁷³ For more information on the Council of Europe, see its web page at [<http://www.coe.int>]. The Council of Europe was founded in 1949 and is separate and distinct from the European Union. Its membership includes the 25 member states of the European Union, along with Turkey, Russia and several former Soviet republics, the western Balkan states, and other non-EU European countries. The United States is not a member but has observer status.

⁷⁴ Formally known as the European Commission for Democracy Through Law, the Venice Commission advises the Council of Europe on constitutional matters.

⁷⁵ Full text of the Marty memorandum can be found at [http://assembly.coe.int/Committee_Docs/2006/20060124_Jdoc032006_E.pdf].

several European governments of this practice, and cases that exposed links between rendition and torture in third countries outside of Europe. Marty charged that the United States had established a system involving the abduction, transport, and handing over of individuals to different destinations in Europe and then to other countries where they have been tortured. He also said that it was “highly unlikely” that European governments and their intelligence services were unaware of the CIA flights and the renditions.

In this first report, Marty also called for a continuation of the Council of Europe’s inquiries and a widening of the probe to explore broader issues related to actions undertaken to counter terrorism and the protection of human rights.

Davis Report on Questionnaire Results. On February 28, Council of Europe Secretary-General Terry Davis reported findings of a questionnaire he issued to the Council’s 46 member states in November 2005.⁷⁶ Overall, Davis criticized the safeguards European countries have in place to control or even monitor activities of foreign intelligence services on European soil or in European airspace. He expressed concern that limited oversight controls increased the risk for individuals becoming subject to multiple human rights violations at the hands of foreign agents, for which European states might bear some responsibility.

In the questionnaire, European governments were asked to provide responses to questions relating to: how their laws provided for controls over foreign agencies in their country; how they acted to prevent the unlawful deprivation of an individual’s liberty in their country; how they responded to alleged violations of an individual’s rights resulting from the actions of a foreign agency; and whether any public official in their country was involved with foreign agency activities that included deprivation of liberty or transport of any individual. In their responses, no government affirmed official involvement in the detention or transport of terrorist suspects.⁷⁷ However, Davis cited Poland, Italy, Bosnia, Macedonia, and Albania for their poor or inadequate responses, especially on the possible involvement of officials in secret detention centers or rendition flights.

Venice Commission Opinion on Legal Obligations. As noted earlier, the Venice Commission was asked to issue an opinion on the legality of secret detention centers and the legal obligations of Council of Europe member states regarding the transport of detainees by foreign agents through European territory. The Commission issued its opinion on March 17.⁷⁸

With respect to the possibility of the existence of “black sites” in Europe, the Venice Commission opined that secret arrests and detentions are “by definition” in

⁷⁶ Full text of the Davis report can be found at [<http://www.coe.int/T/E/Com/Files/Events/2006%2Dcia/>].

⁷⁷ Questions are paraphrased from the Davis report. Government responses to the questionnaire are posted on the Council of Europe website [<http://www.coe.int/T/E/Com/Files/Events/2006-cia/>].

⁷⁸ For full text of the Opinion, see [[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp)].

violation of the European Convention on Human Rights. As such, states that cooperated actively or passively in carrying out secret detentions would bear some responsibility for this violation. Moreover, states which remained ignorant of such activities were still obliged to investigate claims of illegal custody and take effective measures to safeguard against abductions or disappearances. It said that states must exercise effective oversight and control mechanisms over security and intelligence agencies.

With respect to rendition, the Commission did not recognize rendition as a legal way to transfer a prisoner to foreign authorities. It called for a prohibition on extradition, transfer, or transit through a Council of Europe country to a foreign country where there is a risk of torture or ill-treatment. It also said that Council of Europe states must secure respect for human rights obligations in cases of overflights of foreign aircraft.

Draft Report/Explanatory Memorandum. On June 12, Council of Europe investigation head Dick Marty released a new report on the allegations of secret detentions and unlawful transfers of detainees.⁷⁹ The report sharply criticized the United States for creating a global system Marty charged as incompatible with international law, as well as certain European states which had colluded with the United States. Marty said that elements of the “spider’s web” included a global network of secret detentions at CIA-run “black sites”; the CIA-run program of renditions; and the use of military aircraft and airbases to transport detainees. He acknowledged that the evidence to support some of his conclusions was circumstantial, but said that “a number of coherent and converging elements indicate that such secret detention centers did indeed exist in Europe.”

Marty’s report charged 14 European countries with either violations of individual rights or collusion involving secret detention or unlawful inter-state transfers. Sweden, Bosnia, the U.K., Italy, Germany, Macedonia, and Turkey were charged with the former; Poland, Romania, Germany, Turkey, Spain, Cyprus, Ireland, the U.K., Portugal, Greece, and Italy were charged with active or passive collusion. In particular, Poland and Romania were cited for likely harboring CIA detention centers.

European Parliament

The European Union has also initiated some actions in cooperation with the Council of Europe. The European Commission, the EU’s executive arm, announced that it would seek further information on alleged secret detention centers from EU member and prospective member states. The European Union Satellite Center (EUSC) and Eurocontrol (the EU’s air traffic control agency) have been solicited for information regarding flight information and satellite data of specific sites. In January 2006, the European Parliament (EP), the EU’s directly elected representative body, agreed to form a temporary committee to investigate the alleged illegal transfer of detainees, the alleged existence of secret detention facilities in EU member and

⁷⁹ For full text of the Marty report, see [assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm].

candidate countries, and possible unlawful action involved with these allegations. The “temporary committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” which is independent of the Council of Europe investigation, is composed of 46 Members (MEPs) and is led by Carlos Miguel Coelho of Portugal. It commenced work on January 18, 2006. The EP temporary committee has held several hearings and its members have traveled to several countries, including the United States.

Status. The EP committee issued a final draft report on November 24, 2006, (see below) and formally approved it in January 2007. The European Parliament as a whole is expected to debate the report in February 2007.

European Parliament Interim Report.⁸⁰ The EP temporary committee issued an “interim report” in June 2006. It charged that the CIA had been responsible for the “illegal seizure, removal, abduction, and detention of terrorist suspects” on the territory of EU member states.” It also charged that European governments — including Italy, Sweden, and Bosnia — at times condoned these activities.

European Parliament Draft Report.⁸¹ The temporary committee issued a final “draft report” in November 2006. Among other things, the report cited a dozen European countries, including Italy, the United Kingdom, Germany, and Sweden, for involvement in or knowledge of 1) the extraordinary rendition and illegal detention of individuals from their countries and/or 2) the stopovers on their territory of CIA-operated flights. The report claimed that CIA aircraft made 1,245 overflights in Europe. The report did not provide evidence to substantiate claims of the existence of secret detention facilities but implied their possible existence in Romania and in Poland. The report denounced the “very great reluctance” to cooperate with the committee of virtually all EU member governments as well as the Council of the EU. Individual European officials and other European institutions such as NATO also came under sharp criticism. Committee rapporteur MEP Claudio Fava said that many European governments were well aware of the CIA’s use of their countries and cooperated “actively or passively” in CIA activities.⁸²

⁸⁰ “Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” European Parliament Temporary Committee, June 15, 2006, available at [<http://www.europarl.europa.eu>].

⁸¹ “Draft report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” European Parliament Temporary Committee, November 24, 2006, available at [<http://www.europarl.europa.eu>].

⁸² “CIA rendition flights,” *Agence France Presse*, November 28, 2006.