



**ENABLING TORTURE:  
INTERNATIONAL LAW APPLICABLE TO  
STATE PARTICIPATION IN THE UNLAWFUL  
ACTIVITIES OF OTHER STATES**

**Briefing Paper**

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### **About the Center for Human Rights and Global Justice**

The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law (<http://www.chrgj.org>) focuses on issues related to “global justice,” and aims to advance human rights and respect for the rule of law through cutting-edge advocacy and scholarship. The CHRGJ promotes human rights research, education and training, and encourages interdisciplinary research on emerging issues in international human rights and humanitarian law. Philip Alston is the Center’s Faculty Chair; Smita Narula and Meg Satterthwaite are Faculty Co-Directors; and Jayne Huckerby is Associate Research Scholar.

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### **About this Briefing Paper**

This Briefing Paper is the most recent in a series of Briefing Papers that address human rights violations in the “War on Terror.” This Paper outlines the legal standards governing collaboration by States in the human rights violations of other States. Forthcoming Briefing Papers will address: the wider range of practices that may violate human rights law concerning enforced disappearances; international and regional law relevant to “disappearances”; and U.S. domestic law applicable to “disappearances.” This Briefing Paper is available at: [www.chrgj.org](http://www.chrgj.org).

For other CHRGJ papers on this subject, see:

- Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY & NYU School of Law, 2004).
- Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (New York: NYU School of Law, 2005).
- Center for Human Rights and Global Justice, *Torture by Proxy: International Law Applicable to “Extraordinary Renditions”*, Briefing Paper for U.K. All Party Parliamentary Group on Extraordinary Renditions (New York: NYU School of Law, 2005).
- Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the “War on Terror”* (New York: NYU School of Law, 2005).

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## **ENABLING TORTURE: INTERNATIONAL LAW APPLICABLE TO STATE PARTICIPATION IN THE UNLAWFUL ACTIVITIES OF OTHER STATES**

### Introduction

The full nature and extent of other States' involvement in U.S. actions in its "War on Terror" is the subject of continuing revelation and investigation, both in individual countries<sup>1</sup> and within regional frameworks, such as the European Union.<sup>2</sup> How this involvement violates a State's obligations under international human rights law depends on the facts that emerge through these and future inquiries. Evidence of involvement *per se* will not automatically be a breach of a State's obligations; some forms of involvement may properly be part of the State co-operation necessary to end terrorism. Involvement is prohibited when States seek assistance in using illegal means to combat terrorism.

This Briefing Paper sets out the scope of legal obligations of States concerning human rights violations perpetrated by the U.S. in its "War on Terror." This Briefing Paper does not analyze in detail how the practices of the U.S. violate international human rights norms. This is a topic that the Center for Human Rights and Global Justice has addressed elsewhere and will continue to address. Instead, this Briefing Paper looks at the obligations of States that are both independent of, and in addition to, those which bind the U.S. The Briefing Paper primarily deals with international human rights law<sup>3</sup> and does not address regional or domestic arrangements.<sup>4</sup>

What are the factual allegations of other States' involvement in U.S. activities in the "War on Terror"?

The broad factual allegations of involvement or assistance as they currently stand include the following:

- Allowing CIA flights to use a State's airspace and/or its airports, including for refueling and other stopover purposes for the extraordinary rendition of terrorism suspects. These allegations have arisen in respect of a number of European countries<sup>5</sup> (including Austria<sup>6</sup>; Denmark<sup>7</sup>; Finland<sup>8</sup>; France<sup>9</sup>; Germany<sup>10</sup>; Iceland<sup>11</sup>; Ireland<sup>12</sup>; Netherlands<sup>13</sup>; Portugal<sup>14</sup>; Spain<sup>15</sup>; Sweden<sup>16</sup>; and the U.K.<sup>17</sup>) and non-European countries, e.g. Canada;<sup>18</sup>
- Participating in the questioning of persons held by the U.S. in third countries in circumstances that may amount to torture or cruel, inhuman and degrading (CID) treatment;<sup>19</sup>
- Complicity in the apprehension of persons, including through provision of intelligence that leads to the arrest of a person or handing over of persons to U.S. authorities in circumstances where there is a likelihood of torture or CID treatment. Such allegations have arisen in relation to Germany<sup>20</sup> (in the case of Khaled El-Masri); Pakistan;<sup>21</sup> and the U.K.;<sup>22</sup>
- Hosting secret prison facilities run by or with the involvement of the U.S.<sup>23</sup> Places that have been identified as possible sites of such prisons include Bulgaria, Kosovo, Macedonia, Poland, Romania, Thailand, and Ukraine;<sup>24</sup> and

- Sending persons to countries where there are substantial grounds for believing that the person will be tortured e.g. such as through handing persons over to U.S. authorities to transfer persons to Egypt as in the case of Ahmed Hussein Mustafa Kamil Agiza in Sweden.<sup>25</sup>

When and where do a State's human rights obligations apply?

### ***Relationship between human rights and other international obligations***

A State must interpret its many international obligations in ways that are consistent with each other. In some cases though, precedence will be given to one type of international obligation over another. This is especially true when an international rule has gained *jus cogens* status.<sup>26</sup> In such circumstances, a State cannot derogate from that rule by arguing that other international obligations (including those in international treaties or even other customary international law which has not reached the status of a *jus cogens* rule) are conflicting or require different outcomes.<sup>27</sup> The prohibition against torture has been universally recognized as a customary international law norm and as a *jus cogens* norm applicable in times of war and peace, from which no derogation is permitted.<sup>28</sup> This means that all other international obligations of the State must be interpreted so as to be consistent with the prohibition on torture. This requirement has been recognized to a limited extent by the U.K. in its comments on the relationship between its human rights obligations and the *Convention on International Civil Aviation 1944* (also known as the *Chicago Convention*) (to be discussed below). For example, in response to a question concerning whether the *Chicago Convention* needs to be interpreted and applied consistently with human rights obligations and customary international law,<sup>29</sup> the Government replied that:

Her Majesty's Government abide by their obligations under international law and would not facilitate the transfer of an individual from or through the UK to another state where there were grounds to believe that the person would face a real risk of torture. The Government believe their application and interpretation of the Chicago convention is entirely compatible with their other international obligations.<sup>30</sup>

The U.K. also noted more recently on January 17, 2006 that:

The Government believe their application and interpretation of the Chicago convention is entirely compatible with their other international obligations. The convention is not used to shield from scrutiny acts that would be unlawful under the terms of other international conventions and, for example, does not prevent investigation of aircraft by the police, immigration or customs services, should this be considered necessary.<sup>31</sup>

Another key principle that emerges from the cited passages is that a State is bound by its *own* obligations under international law.<sup>32</sup> It is not bound by the meaning attributed to these obligations by another State.<sup>33</sup>

### ***Territorial and extraterritorial application of human rights obligations***

As a general matter, human rights treaties require the protection of individuals within the State party's "jurisdiction."<sup>34</sup> The scope of this jurisdiction, and therefore the reach of a State's human rights obligations, is set out in each treaty. Although these treaty formulations differ and are subject to some interpretation, each requires, at the very minimum, that a State must apply its human rights obligations within its sovereign territorial limits.<sup>35</sup> This is an important point to emphasize because a number of the current factual allegations of State involvement in U.S. activities arguably engage one of the most basic jurisdictional principles in international law: the obligation of the State to respect, protect and ensure human rights in its own territory.

To gauge the extent to which these obligations apply it is necessary to map out how concepts of territory and jurisdiction in human rights instruments relate to concepts of territory and jurisdiction as they are used in other areas of law concerning activities in a State's territory, such as international aviation law and law concerning foreign military bases. The next section of this Briefing Paper examines these concepts as they are used in international aviation law. This Briefing Paper closely examines this topic because Governments have been referring to aviation law when discussing their obligations in relation to flights containing terrorist suspects.<sup>36</sup> This Briefing Paper does not examine in detail the extent to which a State's human rights obligations apply to foreign military bases on its territory. This question is an important one; the factual allegations concerning U.S. use of other States' territory have included allegations that secret detention facilities may be on U.S. military bases in these countries<sup>37</sup> or that suspects may have been transported through U.S. military bases in foreign countries<sup>38</sup> on their way to detention or torture in third countries. While, it is beyond the scope of this Briefing Paper to address the question fully, several general principles can be established. First, it is likely that the territorial basis of jurisdiction means that even though a State (the receiving State) may have consented to another State (the sending State) having jurisdiction over certain crimes on the base (as is common in Status of Force agreements (SOFA)), the receiving State is still under an obligation to apply its human rights obligations.<sup>39</sup> In other words a State does not lose its obligation to ensure human rights in its territorial jurisdiction by granting the sending State the ability to exercise its own jurisdiction; instead this "jurisdiction is concurrent and may be invoked if the sending state does not exercise the jurisdiction given to it by the SOFA."<sup>40</sup> The requirement that a State apply its human rights obligations to visiting forces on its territory may mean that in certain circumstances a State will not be able to respect its agreement to give the visiting State primary or even exclusive jurisdiction over crimes on the base.<sup>41</sup> It would also be within the prerogative of the receiving State to "insist on an alteration to the status of forces agreement by a memorandum or otherwise" to ensure the end to a practice on its territory.<sup>42</sup> The question of the receiving State's jurisdiction over human rights violations on foreign military bases is without prejudice to the extent to which the sending State is also obliged to apply its human rights obligations to activities on the base.<sup>43</sup>

**International law:**

\* **Prohibits** use of a State's territory (including airports, airspace and places of detention thereon) to commit acts of torture, aiding and abetting in torture, conspiracy to torture, and to varying degrees, CID treatment;

\* **Prohibits** use of a State's territory (including airports, airspace and places of detention thereon) to transfer an individual to another State where that individual faces the risk of torture; and

\* **Prohibits** a State's officials from participating in questioning of individuals held in third countries in circumstances that amount to torture or CID treatment.

In addition to territorial jurisdiction, international law also recognizes that States will be required in certain circumstances to apply their human rights obligations extraterritorially. For example, under CAT, the requirement to criminalize acts of torture or complicity or participation in torture applies to acts by state actors (or non-state actors acting with the consent or acquiescence of a state actor) that take place in territory under a State's jurisdiction (interpreted to include territory over which the State has factual control), acts on board of ships or aircraft registered in the State, or acts by State actors (or non-state actors acting with the consent or acquiescence of a state actor) anywhere in the world.<sup>44</sup> The scope of applicability of ICCPR protections is similar to CAT, but has been interpreted more broadly to include state responsibility for violations of an individual's ICCPR protections (i) in the physical territory of the State or (ii) that may be imputed to the State if the individual was in the power or effective control of the State (even if outside its territory) or if the violations were committed by State actors, regardless of where they took place.<sup>45</sup> The requirement that a State observes its human rights obligations outside its territory means, for example, that a State's officials cannot participate in the questioning of persons held by the U.S. in third countries in circumstances that amount to a violation of the individual's human rights e.g. through the treatment to which they are subject or the conditions in which they are kept, including in *incommunicado* detention.

How is international aviation law relevant?

### **General**

It is a fundamental principle in international aviation law that a State enjoys “complete and exclusive” sovereignty in respect of the airspace over its territory.<sup>46</sup> This rule is embodied in international aviation law treaties<sup>47</sup> and has been said to have the status of a customary international law rule.<sup>48</sup> It is this principle of sovereignty that gives States the freedom to impose restrictions on the use of its airspace by foreign aircraft.<sup>49</sup>

The restrictions that a State imposes will not be the same for all foreign aircraft. For example, international aviation law draws a critical distinction between the rules that apply to state and civil aircraft.<sup>50</sup> This is particularly the case, for example, with respect to the rules that set out when interception of aircraft is permissible under international law.<sup>51</sup>

Much of the current debate concerning what a State can do to prevent use of its airspace or airports by other States to carry out unlawful acts has focused on the *Chicago Convention*.<sup>52</sup> The *Chicago Convention* only applies to civil aircraft (Article 3(a)), although it does contain two specific rules that pertain to state aircraft (Articles 3(c) and (d) to be discussed below). In the main part, the current discussion has not been about these two rules on state aircraft, but has instead tended to assume that “rendition” flights are undertaken by civil aircraft and that the key questions that need answering can be resolved through looking to the broader framework that the *Chicago Convention* provides. This section examines whether “rendition” flights should be considered to be state or civil aircraft and identifies the content of the rules that will be applicable depending on that classification.

### **The Chicago Convention: General**

International civil aviation is primarily governed by the *Chicago Convention*.<sup>53</sup> The Convention was signed on 7 December 1944 and entered into force on 4 April 1947.<sup>54</sup> It supersedes<sup>55</sup> the *Convention relating to the Regulation of Aerial Navigation* signed at Paris on October 13, 1919 (the Paris Convention), but reaffirms some of its key principles, such as the principle of sovereignty.<sup>56</sup> The *Chicago Convention* currently has 189<sup>57</sup> Contracting States, including all E.U. countries<sup>58</sup> and the United States.<sup>59</sup> There are 18 Annexes to the *Chicago Convention*.<sup>60</sup> These contain International Civil Aviation Organization (ICAO)<sup>61</sup> Standards and Recommended Practices on how States can implement the Convention.<sup>62</sup> One of the main ways in which States give effect to their obligations under the *Chicago Convention* is through the signing of bilateral agreements, which, *inter alia*, secure landing rights in cases where the Convention indicates that a State’s permission is needed before aircraft can land on its territory.<sup>63</sup>

There are two key things to note about the *Chicago Convention*. The first, as mentioned above, is that the *Chicago Convention* only applies to civil aircraft.<sup>64</sup> Article 3(a) imposes this limit in the following terms: “This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.” This does not mean that the Convention is completely silent on rules relating to state aircraft. Instead, the Convention specifically sets out two limits on state aircraft:<sup>65</sup>

- Article 3(c) clearly states that a State cannot either fly its state aircraft over, or land on, the territory of another State unless it has “authorization by special agreement or otherwise” and the flight and landing is in accordance with the terms of that authorization,<sup>66</sup> and
- Article 3(d) requires that State parties will have “due regard for the safety of navigation of civil aircraft” when issuing regulations for state aircraft.<sup>67</sup>

The second important thing about the *Chicago Convention* is that it embodies the principle of sovereignty referred to above. Article 1 of the Convention provides that “every State has complete and exclusive sovereignty over the airspace above its territory” and Article 2 clarifies that “territory” for these

purposes is “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State”.<sup>68</sup>

### ***Are planes used to transport terrorism suspects state or civil aircraft?***

There is no “universally accepted definition” of what constitutes civil or state aircraft.<sup>69</sup> The *Chicago Convention* is not as helpful on this point as might be hoped. Article 3(b) of the Convention states that aircraft “used in military, customs and police services shall be deemed to be state aircraft” but stops short of providing a detailed guide to how to generally classify aircraft as either civil or state.<sup>70</sup>

In lieu of this guidance, there appears to be a preference for an approach that focuses on the “function” or “use” of the aircraft in question.<sup>71</sup> Such an approach is based on the premise that an aircraft, irrespective of its markings, registration or ownership, can perform military (e.g. intelligence gathering) or civil (e.g. commercial carriage of passengers) purposes.<sup>72</sup> This is not to say that such factors as registration and ownership are irrelevant to determining the nature of an aircraft as civil or state; only that international law recognizes that such considerations are neither definitive nor exhaustive indicators of the aircraft’s status.<sup>73</sup> This makes sense when we consider that private ownership of aircraft may be used as a ruse to disguise an aircraft’s true state function. Indeed in the current circumstances, it is alleged<sup>74</sup> that aircraft used to transport terrorism suspects are owned by companies, such as Aero Contractors<sup>75</sup> or Bayard Foreign Marketing<sup>76</sup>, that are in fact CIA “front” companies.<sup>77</sup>

This attention to the activity of the aircraft is evident in the rationale advanced by the U.S. for its interception on October 10, 1985 of Egypt Air Flight MS 2843 in international airspace.<sup>78</sup> The aircraft was carrying the persons involved in the hijacking of the cruise ship *Achille Lauro* and was considered by the pilot to be a civil aircraft.<sup>79</sup> However, the U.S. argued that at the time of interception the aircraft was a state aircraft, noting that:

[I]t is our view that the aircraft was operating as a state aircraft at the time of the interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed military personnel on board, and the secrecy under which the mission was attempted - compel this conclusion.<sup>80</sup>

This statement illustrates that another relevant factor for determining an aircraft’s status is the secrecy of its activities. Secrecy is an inherent feature of the flights being conducted by the U.S.; private “front” companies are used to distance the aircraft from the U.S.<sup>81</sup> and the CIA is the agency used by the U.S. when it does not want an operation to have “‘U.S. government’ written all over it.”<sup>82</sup>

This example also shows that the question of which State bears the burden of classifying an aircraft as civil or State is not always straightforward. It has been stated that “[w]ithin the Chicago system, the State of registry of an airplane primarily controls the determination of its use.”<sup>83</sup> This makes sense because it is the State of registry that will have most control over the information pertaining to the aircraft. This classification is then recorded in the flight plan of the aircraft.<sup>84</sup> However, this discretion to determine the nature of aircraft is not completely unfettered. It must, for example, be in compliance with the terms of the *Chicago Convention*,<sup>85</sup> which would arguably not allow a State to disguise the true nature of aircraft in order to avoid the application of the Convention’s terms,<sup>86</sup> such as those requiring explicit authorization for overflight and landing of State aircraft (see below).<sup>87</sup> Nor is the classification fixed; it appears from the above example that even where an aircraft is considered to be civil (for example, by the pilot) another State may reclassify that aircraft as state aircraft.<sup>88</sup>

### ***What flights need prior permission to fly over or into a State’s territory?***

The *Chicago Convention* identifies when it is necessary to seek prior permission for flying over, or landing on, a State’s territory. In broad terms, there are two types of flights that need prior permission to operate over or into a country: state aircraft (Article 3(c))<sup>89</sup> and “scheduled air services” provided by civil aircraft (Article 6). “Non-scheduled” civil aircraft services do not require prior permission (Article 5).

### Prior permission and state aircraft

As stated above, state aircraft require “authorization by special agreement or otherwise” to fly over or land on another State’s territory. This permission may be subject to a standing agreement or it may need to be granted on a case-by-case basis.<sup>90</sup> In the context of Extraordinary Renditions, the U.K. position on the nature of permission needed has been clear: if the U.S. seeks to use the territory of the U.K. to “render” or transfer a detainee, it must make a specific request to that end.<sup>91</sup>

There are two other important things to remember here:

- when a State grants permission, either standing or on a case-by-case basis, to state aircraft to use its territory, it must do so in accordance with its other international obligations, including its human rights obligations.<sup>92</sup> It is the grantor State’s obligations that will be relevant here, not how similar obligations are interpreted by the requesting State.<sup>93</sup> If the request conflicts with a State’s international obligations it should be refused.<sup>94</sup> This much has been firmly stated by the U.K. Government in the following terms:

The UK policy on rendition of detainees to third countries is very clear. Where we are requested to assist another State and our assistance would be lawful, we will decide whether or not to assist taking into account all the circumstances. We would not assist in any case if to do so would put us in breach of UK law or our international obligations, including the UN Convention Against Torture. In particular, we would not facilitate the transfer of an individual from or through the UK to another State where there were grounds to believe that the person would face a real risk of torture. This is not affected by the position of other States on the Convention.<sup>95</sup>

- the overflight or landing of a state aircraft must be within the scope of the terms of that authorization (Article 3(c)). This means that if a State grants permission for state aircraft to access its territory for a particular purpose, the state aircraft cannot then proceed to use the territory for a different purpose. This is evident, for example, in the following discussion in the U.K. Parliament:

...the UK moves its RAF transport aircraft around the world. These are not the subject of detailed scrutiny by the local authorities concerned. Indeed, since I travel on RAF planes, I can confirm that when we are refuelling in Bari in Italy, which we sometimes do, the local authorities do not come on board because maintaining the integrity of the planes is very important. There are military policemen on the planes to ensure that. That practice applies, for example, for all our members of NATO. I think it is part of the arrangements of NATO. *That does not mean that there is carte blanche for a private plane hired in by a government that is a member of NATO to undertake activities which require the permission of the domestic government but to avoid that permission* (emphasis added).<sup>96</sup>

Given that a State cannot legally give permission to acts that would violate its international human rights obligations, the use of its territory for such purposes by state aircraft may never be authorized.

### Prior permission and civil aircraft – “scheduled” versus “non-scheduled” flights

Article 6 of the Convention provides that “No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.” The term “scheduled air service” is not defined in the Convention, however, the ICAO Council has defined a “scheduled international service” as being a “series of flights” that: pass through airspace over more than one State’s



territory; are performed for the transport of “passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public”; and are “operated so as to serve traffic between the same two or more points” either according to a “published timetable” or “with flights so frequent they constitute a recognizable systematic series.”<sup>97</sup> As with state aircraft, this permission is contingent; the scheduled air service must act in accordance with the terms of the authorization.

The only flights which on the face of the Convention do not require prior permission are “non-scheduled flight(s)” (Article 5). “Non-scheduled” flights in this sense often refer to those undertaken by charter aircraft.<sup>98</sup> When States speak about alleged “rendition” flights not requiring prior permission under the *Chicago Convention*, it is the rules on these civil “non-scheduled flights” to which they are most likely referring.<sup>99</sup> Under Article 5, there are three rights that these types of flights are accorded: the right to fly into a territory; the right to transit without stops across a territory; and the right to make non-traffic (e.g. refueling) stops on the territory.

However, these rights of a “non-scheduled” flight are not completely unfettered; they are subject to the sovereign right of the State flown over to require landing (see below)<sup>100</sup> and “to the observance of the terms of this Convention” (Article 5).<sup>101</sup> Such aircraft must also file a flight plan.<sup>102</sup> Indeed, in practice, a number of States have ensured that they have the possibility to restrict the flights of non-scheduled services, and usually have laws which allow them to require that such flights meet the State’s notice requirements prior to commencing service and to refuse entry or landing rights after being so informed.<sup>103</sup> Whether or not a particular State has such laws, and the content of its notice requirements, will need to be examined in each individual case.

### ***What other rights does a State have in respect of foreign aircraft in its territory?***

A State’s rights in respect of its airspace and airports are not limited to giving or refusing prior permission to foreign aircraft seeking to use such space. The principle that a State possesses sovereignty over its airspace means it has the right to do a number of additional things in respect of foreign aircraft, depending on whether that aircraft is civil or state.

In respect of state aircraft, under international law a State has the right to respond to the unauthorized use of its territory (e.g. unauthorized overflight). State responses to violations of their territory by foreign state aircraft have varied enormously, depending on factors such as the relationship between the two States.<sup>104</sup> Examples of actions taken include acquiescence; interception; escort from the territory; court action; diplomatic protest; forcing the landing of the aircraft; firing of a warning shot; and shoot down of aircraft.<sup>105</sup> The question of the nature and extent of permissible State response to violations of its territory is closely linked to the question of whether aircraft and its crew enjoy similar sovereign immunity (e.g. from search and inspection by foreign authorities) to that accorded to warships.<sup>106</sup> This question is an open one<sup>107</sup> and the answer will depend in part on the particular circumstances, including for example, the reasons for trespass<sup>108</sup> and the nature of acts alleged to have taken place on board the state aircraft.<sup>109</sup> However, at all times the State’s response must be in accordance with international law, including for example, those principles pertaining to use of force.

#### **The *Chicago Convention* gives States the right to:**

- \* **Authorize** which aircraft can fly over and into its territory;
- \* **Intercept** civil aircraft in limited circumstances;
- \* **Require landing or give other instructions** to suspect civil aircraft;
- \* **Search and inspect** civil aircraft on either landing or departure; and
- \* **Establish jurisdiction** over criminal offences committed on foreign civil aircraft in certain circumstances.

In respect of foreign civil aircraft, under the *Chicago Convention* a State has the right to:

- Engage in acts of interception or enforcement that “refrain from...the use of weapons against civil aviation” whilst in flight and do not endanger “the lives of persons on board and the safety of the aircraft” (Article 3bis (a)).<sup>110</sup>
- Require landing of, or give “any other instructions...”, to a civil aircraft where the aircraft is in the airspace above a State’s territory “without authority or if there are *reasonable grounds* to conclude that it is being used for any purpose *inconsistent with the aims of this Convention*” (Article 3 bis(b)) (emphasis added). The text of the Article makes it clear that this ability to require landing or give other instructions derives from the principle that a State has sovereignty over its airspace.<sup>111</sup> The range of activities over which a State can exercise such sovereignty is broad; the drafting history of this provision indicates that it was meant to cover the ability of the State to take action not only with respect to activities inconsistent with the “aims” of the Convention as set out in the Preamble, but also “any violations of State law and public order”, such as drug trafficking, “illegal transport of persons” and other “common crimes.”<sup>112</sup> It is also important to note that this entitlement of the State to issue an order or instruction is triggered when there are “reasonable grounds” to believe that an aircraft is suspect; the Convention does not require that a State have actual knowledge that the aircraft is being used unlawfully. Once the State gives such an order, Article 3bis (c) requires that the civil aircraft comply. The State of registry also has some obligations here, including the obligation to make compliance with the orders of the other State mandatory in its laws or regulations; to establish severe penalties for non-compliance; to submit cases of non-compliance to relevant authorities (Article 3bis(c)); and more generally to “take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State...for any purposes inconsistent with the aims of this Convention” (Article 3bis (d)). These obligations on the State of registry are designed to ensure that a civil aircraft cannot avoid (e.g. by refusing to land and then leaving the airspace) the requirement under international law that it comply with the rules of the sovereign State over which it flies.<sup>113</sup>
- Search, without unreasonable delay, aircraft on either landing or departure and to inspect certificates and required documentation (Article 16). Every aircraft that enters a State’s territory must land at a designated airport for “the purpose of customs and other examination” unless it is exempted from the requirement to land by special authorization or under the terms of the Convention (Article 10). In the context of “rendition flights” Spain has indicated that it will, if necessary, implement more thorough checks inside aircraft.<sup>114</sup>
- Establish jurisdiction over criminal offences committed on foreign aircraft in its territory in certain circumstances. It has been argued that “Under the Convention, all States possess full jurisdiction in the application of their respective laws to prevent or prohibit the use of civil aircraft for unlawful purposes.”<sup>115</sup> However, the *Chicago Convention* does not address all the complex questions concerning when and the exact means by which<sup>116</sup> States will exercise jurisdiction over crimes on board aircraft. In particular, it does not (and nor do any other international agreements concerning crimes on board aircraft)<sup>117</sup> address the question of which State (e.g. State of registry,<sup>118</sup> sovereign State, landing State or any other interested State) has the priority for exercising jurisdiction when more than one State is authorized or even required to do so (e.g. by international obligations, including human rights obligations or their domestic legislation<sup>119</sup>). This does not mean that the crime will go unaddressed, only that there is no established rule under international law on which State will assert jurisdiction. This question of who should have the priority to exercise jurisdiction when jurisdiction is concurrent or shared is also left open in human rights instruments, such as CAT (to be discussed below).<sup>120</sup>

The State also has “negative” obligations under the *Chicago Convention*, the most relevant one of which is the requirement in Article 4 (“Misuse of Civil Aviation”) that the State “agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.” In this context (as opposed to the context in which it is used in Article 3), the words “purpose inconsistent with the aims of this Convention” are taken to refer more generally to the prohibition on using civil aircraft to threaten “general security”.<sup>121</sup> It

has also been argued that Article 4 would prohibit a State using civil aircraft for criminal or other unlawful functions.<sup>122</sup>

In some cases, these actions described above may not only be the rights of the State (i.e. what a State is allowed to do) but rather what a State is compelled to do by virtue of its other international obligations. This next section discusses the content of international human rights obligations of a State, particularly with respect to the use of its territory to perpetuate human rights violations.

What are a State's primary human rights obligations?

### ***Prevent torture and CID treatment***

The prohibition against torture in international law requires that States do not just prohibit or punish torture, but also act preemptively to prevent its occurrence.<sup>123</sup> The obligation to prevent torture is specifically set out in Article 2(1) of CAT, which provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction" (emphasis added). It has also been read into the prohibition on torture and CID contained in Article 7 of the ICCPR. In General Comment 20, the Human Rights Committee stated that "it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to *prevent* and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction"<sup>124</sup> (emphasis added).

As well as having a duty to prevent acts of torture against persons within territory under its jurisdiction, a State also has a duty to "prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."<sup>125</sup> The content of this obligation will be dealt with next.

### ***Non-refoulement***

A State has an obligation to ensure that its territory is not used to send any person to a country where there are "substantial grounds" for believing, or a "real risk", that that person may be tortured.<sup>126</sup> International law prohibits the *refoulement*, or transfer, of an individual to another State where that individual faces the risk of torture, and in some cases, cruel, inhuman or degrading treatment. The principle of *non-refoulement* recognizes that a State will be responsible for acts within its territory or under its jurisdiction that either cause or may cause a person's human rights to be violated in another State.

This prohibition is explicitly set out in CAT Article 3(1) which states 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." In determining whether "substantial grounds" for the danger of torture exist, the State is to "take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (Article 3(2)). In commentary and decisions, the CAT Committee has made clear that under CAT, the prohibition against *refoulement* to torture requires both an objective assessment of the conditions in the State to which an individual may be transferred, and a subjective assessment of the danger particular to the individual.<sup>127</sup> CAT protections apply when these assessments lead to a substantial likelihood of a danger of torture that is greater than "mere suspicion," but the likelihood does not have to rise to the level of "high probability."<sup>128</sup>

While the CAT prohibition on *refoulement* does not apply to CID treatment, this protection is provided elsewhere, such as in the ICCPR and at the regional level (e.g. in the European Convention as interpreted by the European Court of Human Rights and the European Commission). The ICCPR does not itself contain a direct *non-refoulement* provision, however, the Human Rights Committee has interpreted Articles 2<sup>129</sup> and 7<sup>130</sup> of the ICCPR to prohibit the *refoulement* of individuals to States where they may be "at risk of" either torture or CID treatment (or both). In order for ICCPR protections to apply, the individual must face a "real risk"<sup>131</sup> of danger, which is a higher standard than the CAT "in danger of" threshold.<sup>132</sup>

## ***Criminalize, investigate and punish acts of torture and CID treatment***

### ▪ *Criminalize*

International human rights law requires that States make torture an offence under their national law. Under CAT, the relevant provision is Article 4. Article 4 sets out the obligation on the State to criminalize acts of torture, attempts to commit torture, or complicity or participation in torture.<sup>133</sup> This obligation encompasses the duty of the State to impose penalties that truly reflect the gravity of the crime of torture.<sup>134</sup> The implementation of Article 7 of the ICCPR also requires, at a minimum, making torture and CID treatment a crime.<sup>135</sup>

### ▪ *Investigate*

International law imposes a positive obligation on States to investigate violations of the prohibition on torture, participation in torture and complicity in torture in its territory or under its jurisdiction.<sup>136</sup> The duty to investigate is mentioned a number of times in CAT. A general duty to investigate is contained in Article 12, which requires a State to undertake a “prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” This investigation must be launched irrespective of the source of the suspicion that the act has occurred;<sup>137</sup> and it must be launched quickly to protect the victim and to enable evidence to be collected before it is no longer available (e.g. before physical signs of torture fade or disappear).<sup>138</sup> As is clear from the Article, the duty to investigate is triggered when there is “reasonable ground to believe” that torture has taken place. Some guidance as to when this threshold of suspicion will be met has been provided as follows:

The duty to investigate arises where a prima facie case exists that the Convention has been breached. Credible information suggesting that foreign nationals are being transported by officials of another State, via the United Kingdom, to detention facilities for interrogation under torture, would imply a breach of the Convention and must be investigated.<sup>139</sup>

Once a prima facie case is established, this investigation would necessarily entail: comparing flight plans of aircraft with dates, times and locations contained in the narratives of persons who are alleged to have been extraordinarily rendered and/or held in secret detention; investigating information identifying particular planes that have been linked to the transport of particular terrorism suspects; investigating whether aircraft that have entered, and continue to enter, the State’s territory are truly civil aircraft by looking further into the true ownership and function of the aircraft (starting, for example, by looking at companies identified as potential CIA front companies); and increasing searches of aircraft by relevant authorities.

Article 16 imposes on ratifying parties the same obligations with respect to investigation of allegations of CID treatment as the parties have with respect to investigation of torture allegations in territory under its jurisdiction.<sup>140</sup> CAT also sets out some duties of investigation that apply when a person who is alleged to have committed torture or is complicit in or has participated in torture is on a State’s territory. In this situation, the State is first required to examine available information to determine whether circumstances warrant taking the person into custody (Article 6(1)), and then, if the person is taken into custody, to make an immediate, preliminary inquiry into the facts of the case (Article 6(2)). A duty to investigate has also been articulated in relation to Article 15 of CAT<sup>141</sup> when allegations are made that a statement has been given as a result of torture.<sup>142</sup>

### **International law imposes a positive obligation on a State to:**

**\*Prevent** acts of torture and CID treatment;

**\*Ensure** its territory is not used for, and its officials are not complicit in, torture and CID and/or the transfer of an individual to another State where that individual faces the risk of torture;

**\*Investigate promptly and impartially** alleged violations of the prohibition on torture or CID treatment, participation in torture or CID treatment and complicity in torture or CID treatment, in its territory or under its jurisdiction; and

**\*Punish** perpetrators of torture or CID.

In addition to the CAT requirements, a duty to investigate allegations of torture has also been read into ICCPR's Article 2<sup>143</sup> and Article 4(2) of the Optional Protocol to the ICCPR.<sup>144</sup> This is to ensure the effective application of ICCPR Article 7's protection against torture, CID treatment, and *refoulement*.<sup>145</sup> A failure by the State to investigate allegations of breaches of these ICCPR protections could itself give rise to a separate breach of the ICCPR by the State.<sup>146</sup>

The duty to effectively investigate torture allegations is also both explicit<sup>147</sup> and implicit<sup>148</sup> in the victim's right to a remedy for human rights violations suffered; this right would be meaningless if it did not come with a corresponding obligation on States to investigate the violations for which remedy is sought.

- *Jurisdiction, prosecution and extradition*

International law also obliges States to ensure that perpetrators of human rights violations do not enjoy impunity.<sup>149</sup> CAT facilitates this by containing provisions on jurisdiction that, taken together, constitute a mandatory system of universal jurisdiction over criminal acts of torture and complicity in torture.<sup>150</sup> In order to realize their obligation to assert jurisdiction, a State must first investigate allegations of torture and CID treatment, and then, if there is a reasonable basis to believe the crimes occurred, proceed to prosecute and punish persons involved.

To this end, Article 5 of CAT requires that each State "take such measures as may be necessary to establish jurisdiction" over the offences of torture, aiding and abetting in torture, and conspiracy to torture set out in Article 4 of CAT where the offences: are committed in territory under the State's jurisdiction; occur on board of State-registered ships or aircraft; are committed by State nationals (or non-State actors acting with the consent or acquiescence of a State actor) anywhere; are perpetrated against a national of the State (Article 5(1) of CAT); or where the alleged offender is "present in any territory under its jurisdiction" and the State does not extradite the offender (Article 5(2)). Other Articles of CAT provide more detail of the process to be followed where the alleged offender is present on a State's territory. This process includes taking such a person into custody if the circumstances so warrant (Article 6(1)); making an immediate, preliminary inquiry into the facts of the case (Article 6(2)); and then deciding whether to extradite or prosecute in accordance with Articles 5(2), 7 and 8 of CAT. In these cases, the text of CAT does not require that there be an extradition request that is refused before the obligation to prosecute is triggered;<sup>151</sup> instead the Article ensures that the perpetrator will not escape prosecution by requiring that a State exercise jurisdiction over that person if they do not extradite him or her.<sup>152</sup> Finally, Article 5 reserves the right of States to use any domestic laws they may have which would enable them to establish jurisdiction over the crimes of torture, aiding and abetting torture, and conspiracy to torture (Article 5(3)).

The Human Right Committee has also stated that failure of the State to bring perpetrators to justice could amount to a breach of the ICCPR by that State.<sup>153</sup>

In addition to these primary obligations, when will a State be derivatively responsible for acts of another State?

### **General**

The International Law Commission's (ILC) *Articles on State Responsibility for Internationally Wrongful Acts* (ILC Articles)<sup>154</sup> establish the "basic rules of international law concerning the responsibility of states for their internationally wrongful acts."<sup>155</sup> The ILC Articles do not interpret the content of States' primary obligations, which are contained in treaties (e.g. CAT and ICCPR as discussed above) and customary law; rather, they "provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States."<sup>156</sup>

In addition to identifying when a State will be responsible for breaches of its own primary obligations, the ILC Articles set out ways in which a State might be held responsible (e.g. through aid or assistance) for the wrongful acts of another State.<sup>157</sup> What is crucial to remember here is that sometimes these two types of responsibility – i.e. *original* responsibility derived from a breach of a State's primary

obligations and *secondary or derivative responsibility* derived from participation in another State's breach of its primary obligations – may both be relevant to a particular set of circumstances. In this respect, the Commentaries to the ILC Articles state that:

Various specific *substantive* rules exist, *prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts*. Such provisions do not rely on any general principle of derived responsibility...(emphasis added).<sup>158</sup>

This section only focuses on what the ILC Draft Articles, in particular Articles 16 and 41, say about when this secondary or derivative responsibility arises.<sup>159</sup> It does not cover the question of when providing assistance or failing to prevent use of territory for wrongful acts also constitute breaches of a State's primary obligations under international law because this question is covered in the section above.

### ***Obligation to not knowingly aid or assist in internationally wrongful act(s) of another State(s)***

Under international law, a State is obliged to not knowingly aid or assist in the internationally wrongful act(s) of another State(s). Article 16 provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.<sup>160</sup>

This definition can be broken down as follows:

- **A State will be *internationally responsible for the acts of another State*:** “Internationally responsible” as used here means that the aiding or assisting State will be held responsible for its own actions, not for those of the assisted State.<sup>161</sup> The aiding or assisting State will only be held responsible to the extent of the aid or assistance given.<sup>162</sup>
- **The other State commits an act which is *internationally wrongful to both States***<sup>163</sup>: An internationally wrongful act is an action or omission that a) breaches a State's international legal obligations; and b) can be attributed to the State.<sup>164</sup> Extraordinary Renditions and Disappearances conducted by the U.S. are internationally wrongful acts on the part of the U.S. They violate international human rights law obligations that *inter alia* require State Parties to: prohibit torture, and to varying degrees, CID treatment; prohibit *refoulement*, or transfer, of an individual to another State where that individual faces the risk of torture; and prevent, criminalize, investigate and punish acts of torture, conspiracy in torture, and aiding and abetting in acts of torture.<sup>165</sup>

These are also acts which would also be internationally wrongful if committed by any other State, because, for example, of the *jus cogens* status of the prohibition on torture<sup>166</sup> and the widespread ratification of instruments prohibiting torture and CID treatment, including CAT and regional conventions, such as the European Convention.

- **Which the State *aids or assists*:** The wrongfulness arises when there is a causal link between the aid and assistance of a State and the commission of an internationally wrongful act by another State. This causal link must be “specific”<sup>167</sup> and there must be a “close connection”<sup>168</sup> between the wrongful act and the aid and assistance provided. However, the aid and assistance does not have to be essential to the wrongful act for the aiding or assisting State to incur responsibility.<sup>169</sup> It is sufficient if the aid and assistance “contributed significantly.”<sup>170</sup>

The type of aid or assistance provided – material, legal or political – is irrelevant here;<sup>171</sup> the key issue is whether that aid or assistance specifically facilitated the internationally wrongful act. This means that seemingly innocuous acts (e.g. allowing refueling at airports of aircraft of another State) can become wrongful under international law if those acts facilitate internationally wrongful acts such as Extraordinary Rendition or Disappearances (e.g. if it could be shown that a plane

carrying rendered persons would not be able to make it to a destination where the person may be subject to torture and/or held in secret detention unless it was able to refuel in a particular State). Indeed, it has been stated that providing “refueling facilities to aircraft otherwise out of their range of target” constitutes the type of “vital” assistance that Article 16 requires.<sup>172</sup> Further, the Commentary to an earlier version of Article 16 makes it clear that this causal link will also be made out where a State grants over flight or landing rights to another State for an unlawful military operation.<sup>173</sup>

Other potentially relevant examples of impermissible aid or assistance include: providing an “essential facility” for the commission of the wrongful act<sup>174</sup>; “facilitating the abduction of persons on foreign soil”<sup>175</sup>; “assisting in the destruction of property belonging to nationals of a third country”<sup>176</sup>; providing “material aid to a State that uses the aid to commit human rights violations”<sup>177</sup>; and “the act of a State in placing its own territory at the disposal of another State” (e.g. by providing or allowing a secret detention site to operate on its territory) in order to “facilitate” the commission of an unlawful act.<sup>178</sup>

- **With knowledge of the circumstances of the internationally wrongful act:** However, even where a causal link is shown, under Article 16, a State will only be responsible for its aid or assistance when it knows about the circumstances of the internationally wrongful act of the other State. In other words, the standard under international law is not one of strict liability.<sup>179</sup> A State is not automatically deemed to have knowledge of an act just because the act has occurred, even in cases where the act takes place on their territory.<sup>180</sup> It must instead be shown that a State is “...aware of the unlawful circumstances of the internationally wrongful act in question...”<sup>181</sup> At the same time, where unlawful acts do take place on a State’s territory, that State “...may be called upon to give an explanation”<sup>182</sup> and that State “...cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors.”<sup>183</sup>

**“Not knowing is not good enough regardless of whether ignorance is intentional or accidental.”**

Statement by Terry Davis,  
Secretary General, Council of  
Europe, 15 December 2005.

It is unclear whether, in addition to the knowledge requirement, a State must also *intend* to facilitate an internationally wrongful act before it can be held derivatively responsible for that act.<sup>184</sup> On the one hand, the plain text of Article 16 does not include an intent requirement; notably this requirement was in earlier versions of the Article<sup>185</sup> but subsequently removed.<sup>186</sup> In addition to this omission from the text, there are also sound reasons why an intent requirement should *not* be read into Article 16. These include, for example, the fact that the difficulty in establishing intent (i.e. a State will rarely make clear that it intends to facilitate violations of international law)<sup>187</sup> would mean that very few States would ever be held responsible for their aid or assistance.<sup>188</sup> On the other

hand, the Commentaries to the ILC Articles appear to add an intent requirement to Article 16.<sup>189</sup> In particular, with regard to the allegation that a State has aided or assisted a human rights violation, the Commentaries state that:

Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.<sup>190</sup>

This makes it clear that under the test of *secondary* State responsibility, the question of whether a State is responsible for complicity in the wrongful acts of Extraordinary Renditions and Disappearances requires a fact-intensive inquiry into exactly what it is that a State(s) is aware of with respect to the use of its territory for human rights violations. This inquiry will take place in the context of what has been described by the U.N. Committee Against Torture in *Agiza v. Sweden* as “...progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad...”<sup>191</sup>

### ***Obligation to co-operate and not to recognize or assist an unlawful situation***

In certain circumstances, the legal obligations of States with respect to the wrongful acts of other States will continue even after that wrongful act has been committed. For example, where the wrongful act is a serious breach of a peremptory norm under international law (Article 40), Articles 41(1) and (2)<sup>192</sup> of the ILC Articles require that:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

This section of the ILC Articles is based on the recognition that such breaches “can attract additional consequences, not only for the responsible State but for all other States.”<sup>193</sup> A “serious breach within the meaning of article 40” means a breach of a peremptory norm of general international law that involves a “gross or systematic failure” to meet the obligation that such a norm entails.<sup>194</sup>

The Commentaries to the ILC Articles specifically recognize that the prohibition on torture is one such peremptory norm.<sup>195</sup> The next question then is whether the practices of Extraordinary Rendition and Disappearances constitute a “serious breach” of the peremptory norm that prohibits torture. The Commentaries provide some general guidance on this point; defining a systematic violation as being one that is “carried out in an organized and deliberate way”<sup>196</sup> and a “gross” failure as encompassing “the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.”<sup>197</sup> In determining whether these practices constitute a “serious breach” additional relevant factors might include “the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims.”<sup>198</sup>

Under Article 41, the obligation of a State with respect to the “serious breach” of another State is twofold. First, to lawfully bring to an end that breach through institutionalized (e.g. through the U.N) or non-institutionalized co-operation,<sup>199</sup> irrespective of whether that State is individually affected by the breach.<sup>200</sup> Second, to neither recognize (either explicitly or implicitly<sup>201</sup>) the situation resulting from the breach as lawful nor to assist or aid the maintenance of that situation.<sup>202</sup>



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- <sup>1</sup> See e.g. *Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar* see <http://www.ararcommission.ca/eng/index.ca>; *Nordic states probe 'CIA flights'*, BBC NEWS, Nov. 18, 2005 available at <http://news.bbc.co.uk/1/hi/world/europe/4448792.stm> (last visited Feb. 22, 2006); *Spain probes 'CIA flights'*, BBC NEWS, Nov. 15, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4439036.stm> (last visited Feb. 22, 2006).
- <sup>2</sup> In the Council of Europe an investigation has been launched by Secretary General Terry Davis pursuant to Article 52 of the European Convention (see *Council of Europe, Reports of illegal detention and "rendition flights" in Council of Europe member states – the Secretary General activates the procedure under Article 52 of the European Convention on Human Rights*, Nov. 23, 2005, available at [http://www.cid.bg/en/readnews.php?id=6794&lang=en&t\\_style=tex&l\\_style=default](http://www.cid.bg/en/readnews.php?id=6794&lang=en&t_style=tex&l_style=default) (last visited Feb. 22, 2006) and an inquiry by Senator Dick Marty for the Parliamentary Assembly of the Council of Europe, in respect of which he has already issued some material (see Mr. Dick Marty, *Information Memorandum II: Alleged secret detentions in Council of Europe member states*, Parliamentary Assembly, Council of Europe, AS/Jur (2006) 02 rev, Jan. 22, 2006, available at [http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124\\_Jdoc032006\\_E.htm](http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm) (last visited Feb. 22, 2006) [hereinafter "*Information Memorandum II*"]. On January 12, 2006, the European Parliament also announced the establishment of a Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (see <http://www.europarl.eu.int/activities/expert/committees/presentation.do?committee=2073&language=EN>) (last visited Feb. 22, 2006).
- <sup>3</sup> This Briefing Paper primarily looks at the obligations contained in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter "CAT"], *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535. Also relevant to these discussions but less frequently invoked is the International Covenant on Civil and Political Rights [hereinafter "ICCPR"], G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, *entered into force* 23 March 1976, 999 U.N.T.S. 171. The Briefing Paper also refers to customary international law on human rights norms.
- <sup>4</sup> These regional human rights frameworks will also be an important measure of the scope of a State's obligation. In particular, those obligations that arise under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953, *as amended* by Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Oct. 24, 2004) [hereinafter "European Convention"] will be relevant given the number of factual allegations concerning involvement of European countries, see *supra* notes 5-25.
- <sup>5</sup> See generally Amnesty International, *Press Release: USA: 800 secret CIA flights into and out of Europe*, Dec. 5, 2005, available at <http://web.amnesty.org/library/Index/ENGAMR511982005>.
- <sup>6</sup> See e.g. William J. Kole, *Austria Joins Probe of Secret CIA Flights*, ASSOCIATED PRESS, Nov. 23, 2005.
- <sup>7</sup> See e.g. *CIA not to use Danish Airspace*, Copenhagen Post Online (English), Aug. 29, 2005, available at <http://www.cphpost.dk/get/90342.html> (last visited Feb. 22, 2006).
- <sup>8</sup> See e.g. *Finland asks CIA to explain mystery plane*, AGENCE FRANCE PRESSE (English), Nov. 24, 2005; *Finland disappointed with U.S. explanation of suspected CIA flight*, HELSINGIN SANOMAT (International Edition), Dec. 9, 2005, available at <http://www.hs.fi/english/article/Finland+disappointed+with+US+explanation+of+suspected+CIA+flight/1101981902658> (last visited Feb. 22, 2006).
- <sup>9</sup> See e.g. Stephen Grey & Luke Harding, *Twist to terror suspects row as logs show 80 CIA planes visited UK*, GUARDIAN (U.K.), Dec. 1, 2005; *France Stopovers for CIA Flights?*, CBS NEWS, Dec. 2, 2005, available at <http://www.cbsnews.com/stories/2005/12/02/terror/main1093672.shtml> (last visited Feb. 22, 2006).
- <sup>10</sup> See e.g. *CIA flights 'landed in Germany'*, BBC NEWS, Dec. 3, 2005 (citing information from *Der Spiegel*) available at <http://news.bbc.co.uk/1/hi/world/americas/4496322.stm> (last visited Feb. 22, 2006); Ian Fisher, *Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces*, N.Y. TIMES, Dec. 1, 2005; Grey & Harding, *supra* note 9.
- <sup>11</sup> See e.g. *Nordic states probe 'CIA flights'*, *supra* note 1.
- <sup>12</sup> See e.g. Fisher, *supra* note 10; Colin Murphy, *Investigations into CIA 'torture flights'*, VILLAGE, Nov. 24, 2005, available at <http://www.villagemagazine.ie/article.asp?sid=1&sud=41&aid=787> (last visited Feb. 22, 2006).
- <sup>13</sup> See e.g. *Netherlands Accessory to Secret CIA Flights*, SP INTERNATIONAL (ENGLISH), Feb. 15, 2006, available at <http://international.sp.nl/bericht/060215-netherlands-accessory-to-secret-cia-flights.html> (last visited Feb. 22, 2006).
- <sup>14</sup> See e.g. Fisher, *supra* note 10.
- <sup>15</sup> See e.g. *Spain quizzes US over CIA flights*, BBC NEWS, Nov. 17, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4444416.stm> (last visited Feb. 22, 2006).
- <sup>16</sup> See e.g. *Sweden begins "quick" CIA plane investigation*, LOCAL (Sweden's News in English), Nov. 17, 2005, available at <http://www.thelocal.se/article.php?ID=2511> (last visited Feb. 22, 2006).

<sup>17</sup> See e.g. Ian Cobain, Stephen Grey and Richard Norton-Taylor, *Destination Cairo: human rights fears over CIA flights*, GUARDIAN (UK), Sept. 12, 2005; Grey & Harding, *supra* note 9.

<sup>18</sup> See e.g. Tim Harper, *Ottawa okayed 'ghost flights': author*, TORONTO STAR, Jan. 16, 2006.

<sup>19</sup> See e.g. Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the "War on Terror"* [hereinafter "*Fate and Whereabouts Unknown*"] 4-5 (New York: NYU School of Law, 2005) (detailing the case of Abdullah Khadr); Clifford Krauss, *Canadian agencies linked to torture use abroad*, INT'L HERALD TRIB., Sept. 18, 2005.

<sup>20</sup> See e.g. *Germany denies 'CIA kidnap' role*, BBC NEWS, Dec. 14, 2005 available at <http://news.bbc.co.uk/1/hi/world/europe/4529612.stm> (last visited Feb. 22, 2006).

<sup>21</sup> See generally *Fate and Whereabouts Unknown*, *supra* note 19.

<sup>22</sup> See e.g. Richard Norton-Taylor, *Britain helped U.S. seize pair held in Guantánamo, says ex-minister*, GUARDIAN (UK), Dec. 19, 2005.

<sup>23</sup> See e.g. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *Wash. Post*, Nov. 2, 2005, at A1.

<sup>24</sup> See generally *Behind the News*, Al-Jazeera Satellite Channel Television, Nov. 5, 2005. Aired 18:32 GMT; Jason Burke, *Secret World of US Jails*, Guardian (UK), June 13, 2004; Fisher, *supra* note 10; Priest, *supra* note 23; Brian Ross and Richard Esposito, *Sources Tell ABC News Top Al-Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS, Dec. 5, 2005, available at <http://abcnews.go.com/WNT/print?id=1375123>; Marty, *Information Memorandum II*, *supra* note 2, at paras 3-6.

<sup>25</sup> See generally *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (finding Sweden in violation of its *non-refoulement* obligations under Article 3 of CAT).

<sup>26</sup> A *jus cogens* norm is defined in the Vienna Convention on the Law of Treaties as a rule that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, art. 32, 1155 U.N.T.S. 331, art. 53.

<sup>27</sup> See e.g. *Prosecutor v Furundzija* Case No. IT-95-17/1-T, Judgment para 153 (ICTY Trial Chamber December 10, 1998) (stating in relation to the prohibition on torture: "While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.")

<sup>28</sup> See e.g. *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 34 (Lord Bingham of Cornhill) (in which Lord Bingham of Cornhill stated "... the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture."); *Prosecutor v. Furundzija*, *supra* note 27 (recognizing prohibition against torture as *jus cogens* norm); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.) (same); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., §1, Reporters Note 3 (1987) at cmt. n, (the prohibitions against torture and CID treatment and punishment have the status of *jus cogens* norms). See also Human Rights Committee, General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) para. 10.

<sup>29</sup> The question was posed by Lord Lester of Herne Hill as follows: "Further to the statement by the Lord Davies of Oldham on 8 December (*Official Report*, col. GC 169), whether the Chicago convention needs to be interpreted and applied in a way which is compatible with the obligations imposed by the United Nations International Covenant on Civil and Political Rights, the Convention Against Torture, the European Convention on Human Rights and customary international law, so as to ensure that the states parties to the convention do not exercise the right to international air travel in a manner which facilitates acts of torture or inhuman or degrading treatment in breach of international human rights law. [HL2958]" UK House of Lords, *Hansard*, Dec. 20, 2005, Column WA251 available at [http://www.publications.parliament.uk/pa/ld200405/ldhansrd/pdvn/lds05/text/51220w03.htm#column\\_WA251](http://www.publications.parliament.uk/pa/ld200405/ldhansrd/pdvn/lds05/text/51220w03.htm#column_WA251).

<sup>30</sup> UK House of Lords, *supra* note 29.

<sup>31</sup> UK House of Lords, *Hansard*, Jan. 17, 2006, Column WA99 available at

<http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/60117w01.htm>

<sup>32</sup> James Crawford & Kylie Evans, Opinion for All Party Parliamentary Group on Extraordinary Rendition: *Extraordinary rendition of terrorist suspects through the United Kingdom*, Dec. 9, 2005, para. 13 available at [http://www.extraordinaryrendition.org/data/Rendition\\_Opinion\\_Prof\\_Crawford.doc](http://www.extraordinaryrendition.org/data/Rendition_Opinion_Prof_Crawford.doc)

<sup>33</sup> *Id.* at para. 13.

<sup>34</sup> See e.g. Theodor Meron, *The 1994 US Action in Haiti: Extraterritoriality of Human Rights Treaties* 89 AM. J. INT'L L. 78 ftote 19 (1995); PETER ROWE, *THE IMPACT OF HUMAN RIGHTS LAW ON THE ARMED FORCES* 122 (2006) (stating that the "reach of the relevant human rights treaties is based upon 'jurisdiction'").

<sup>35</sup> See e.g. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 59, 131 (1988) (noting in relation to the drafting Article 5 of CAT that there was “general agreement that territoriality should be a ground for jurisdiction” and that the phrase “territory under its jurisdiction” that is used in CAT was intended to extend jurisdiction to “territories under military occupation, to colonial territories and to any other territories over which a State has factual control”).

<sup>36</sup> See e.g. Embassy of France in the U.S., *Standpoint No. 151*, Dec. 2, 2005, available at <http://www.info-france-usa.org/news/standpoint/stand151.asp> (last visited Feb. 22, 2006); Miguel González, *El Gobierno Anuncia que Inspeccionará los Vuelos Sospechosos de la CIA*, *El País*, Nov. 25, 2005 available at [http://www.elpais.es/articulo/elpporesp/20051125elpepinac\\_14/Tes](http://www.elpais.es/articulo/elpporesp/20051125elpepinac_14/Tes).

<sup>37</sup> See e.g. Natalie Nougayrède, *Une prison secrète américaine a existé dans un camp de l'OTAN au Kosovo*, *LE MONDE*, Nov. 25, 2005, available at [http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type\\_item=ART\\_ARCH\\_30J&objet\\_id=924509](http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=924509) (last visited Feb. 22, 2006). These concerns have not been alleviated by the recent signing of an agreement between the U.S. and Romania to allow use of Romanian territory for U.S. military bases: see generally *Rice signs US-Romania bases deal*, *BBC NEWS*, Dec. 6, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4504682.stm> (last visited Feb. 22, 2006) (detailing the signing of an agreement for U.S. military bases in Romania).

<sup>38</sup> See e.g. allegations that Abu Omar was transported via the U.S. Ramstein Air Base in Germany Barbara McMahon, *CIA team wanted over Milan 'kidnap'*, *GUARDIAN (UK)*, June 25, 2005; Tracy Wilkinson, *Italy Seeks Former U.S. Diplomat in Kidnapping*, *L.A. TIMES*, Sept. 30, 2005; see generally *Arrest Warrant of July 20, 2005*, Tribunale Ordinario di Milano, Section XI Criminal Court as Review Judge, N° 1413/2005 RG TRD.

<sup>39</sup> THE HANDBOOK OF THE LAW OF VISITING FORCES 30 (Dieter Fleck, ed., 2001).

<sup>40</sup> *Id.* at 30. See generally ROWE, *supra* note 34, at 90-93.

<sup>41</sup> THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 39, at 30.

<sup>42</sup> See ROWE, *supra* note 34, at 92.

<sup>43</sup> *Id.* at 93.

<sup>44</sup> See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* 46 - 48 (New York: ABCNY & NYU School of Law, 2004) [hereinafter “*Torture by Proxy: International and Regional Law Applicable to “Extraordinary Renditions”*”].

<sup>45</sup> *Id.* at 56- 59.

<sup>46</sup> See e.g. DR. I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 12 (7<sup>th</sup> ed. 2001); Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT’L & COMP. L. 231, 237 - 238 (2004); Eric Donnelly, *The United States-China EP-3 Incident: Legality and Realpolitik*, 9 J. CONFLICT & SECURITY L. 25, 35 - 36 (2004). This principle is contained in Article 1 of the *Convention relating to the Regulation of Aerial Navigation* signed at Paris on October 13, 1919, which states that “[t]he High Contracting Parties recognise that every power has complete and exclusive sovereignty over the airspace above its territory”, and that “... the territory of a State shall be understood as including the national territory ... and the territorial waters adjacent” and is also set out in Article 1 of the *Chicago Convention* which provides that “every State has complete and exclusive sovereignty over the airspace above its territory.”

<sup>47</sup> *Id.*

<sup>48</sup> See e.g. Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT’L L. 542, 554 (1978).

<sup>49</sup> See e.g. DIEDERIKS-VERSCHOOR, *supra* note 46, at 13; Craig A. Morgan, *Legitimate Responses to Aerial Intrusion in Time of Peace*, 78 AM. SOC’Y OF INT’L L. PROC. 15, 16 - 17 (1984) (noting at 16 that “Apart altogether from the issue of whether an aircraft is in military service, actual or perceived, is the fact that the Chicago Convention makes it clear that operation of an aircraft of one state in the airspace of another state is a privilege and not a right...”).

<sup>50</sup> See generally Eric Edward Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. INT’L LEGAL STUD. 187 (1998).

<sup>51</sup> See generally *id.*; Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, J. OF AIR L. & COMM., 885 (2001); Major Darren C. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law*, 56 A.F. L. REV. 109 (2005).

<sup>52</sup> See *supra* note 36.

<sup>53</sup> See e.g. Huskisson, *supra* note 51, at 122. See further DIEDERIKS-VERSCHOOR, *supra* note 46, at 10 (discussing the agreements annexed to the *Chicago Convention*).

<sup>54</sup> See generally DIEDERIKS-VERSCHOOR, *supra* note 46, at 10.

<sup>55</sup> Article 80 states that “Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919 or the Convention on Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either. As between contracting States, this Convention supersedes the Conventions of Paris and Habana previously referred to.”

<sup>56</sup> See e.g. Dempsey, *Flights of Fancy and Fights of Fury*, *supra* note 46, at 237; Donnelly, *supra* note 46, at 26. See generally Diane Lourdes Dick, *The Case of the Little Yellow Cuban Biplane: Can Interest Analysis Reconcile Conflicting Provisions in Federal Statutes and International Treaties?* 57 FLA. L. REV. 91, 99 - 100 (2005) (for background on the Convention and its provisions).

<sup>57</sup> For status of *Chicago Convention* see: <http://www.icao.int/icao/en/leb/chicago.pdf> (last visited Feb. 22, 2006).

<sup>58</sup> *Id.*

<u>EU Country</u>	<u>Date of Ratification / Indicated Adherence (A)</u>	
Austria	27 August	1948 (A)
Belgium	5 May	1947
Cyprus	17 January	1961 (A)
Czech Republic	4 March	1993 (A)
Denmark	28 February	1947
Estonia	24 January	1992 (A)
Finland	30 March	1949 (A)
France	25 March	1947
Germany	9 May	1956 (A)
	*The German Democratic Republic, which adhered to the Convention on 2 April 1990, acceded to the Federal Republic of Germany on 3 October 1990.	
Greece	13 March	1947
Hungary	30 September	1969 (A)
Ireland	31 October	1946
Italy	31 October	1947 (A)
Latvia	13 July	1992 (A)
Lithuania	8 January	1992 (A)
Luxembourg	28 April	1948
Malta	5 January	1965 (A)
Poland	6 April	1945
Portugal	27 February	1947
Slovakia	15 March	1993 (A)
Slovenia	13 May	1992 (A)
Spain	5 March	1947
Sweden	7 November	1946
The Netherlands	26 March	1947
	*By a Note dated 9 January 1986 the Government of the Kingdom of Netherlands informed the Government of the United States of America that as of 1 January 1986 the Convention is applicable to the Netherlands Antilles (without Aruba) and to Aruba.	
United Kingdom	1 March	1947

<sup>59</sup> The U.S. ratified the *Convention* on 9 August 1946: *Id.*

<sup>60</sup> DIEDERIKS-VERSCHOOR, *supra* note 46, at 10.

<sup>61</sup> See Paul Stephen Dempsey, *Aviation Security: The Role Of Law In The War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 661 - 663 (2003) (outlining information regarding the ICAO which was established by the Chicago Convention and commenced its work in 1947).

<sup>62</sup> Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N. C. J. INT'L L. & COM. REG. 1, 5,16 (2004); Geiser, *supra* note 50, at 213; Huskisson, *supra* note 51, at 123-124.

<sup>63</sup> Dempsey, *Compliance and Enforcement in International Law*, *supra* note 62, at 19 (noting that bilateral agreements came into existence due to the failure of the Convention to set out rules concerning "economic regulatory issues"); Dempsey, *Flights of Fancy and Fights of Fury*, *supra* note 46, at 236 - 238.

<sup>64</sup> DIEDERIKS-VERSCHOOR, *supra* note 46, at 11.

<sup>65</sup> Huskisson, *supra* note 51, at 123.

<sup>66</sup> Article 3 (c) provides that "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."

<sup>67</sup> See generally Huskisson, *supra* note 51, at 123-125.

<sup>68</sup> See Meron, *Applicability of Multilateral Conventions to Occupied Territories*, *supra* note 48, fnote 49 (discussing the extent to which the concept of "territory" in the Convention encompasses territory over which the State exercises jurisdiction).

<sup>69</sup> DIEDERIKS-VERSCHOOR, *supra* note 46, at 34; Geiser, *supra* note 50, at 195 (noting that “The fact most controverted and difficult to establish after the military or civil status of the aircraft”). This may in part explain the reluctance of some States to comment on whether the rendition flights are civil versus state, *see e.g.* the failure of the U.K. Government to directly answer the parliamentary question of Lord Lester of Herne Hill on December 12, 2005 in the House of Lords, which was posed as follows: “further to the statement by the Lord Davies of Oldham on 8th December (HL Deb, cols. GC 168-9), whether foreign aircraft involved in acts of rendition by or on behalf of the intelligence, security or police services of the United States are considered to be state aircraft or civil aircraft for the purposes of the Chicago Convention; and, if the latter, what are their reasons; and [HL2981]...”: U.K. House of Lords, *Hansard*, Dec. 20, 2005, Column WA252 available at

<http://www.publications.parliament.uk/pa/ld200405/ldhansrd/pdvn/lds05/text/51220w03.htm>. The written answer to which Lord Lester of Herne Hill is referred does not address this question: *see* U.K. House of Commons, *Hansard*, Dec. 12, 2005, Column 1652W, available at

[http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/text/51212w20.htm#51212w20.html\\_sbhd4](http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/text/51212w20.htm#51212w20.html_sbhd4).

<sup>70</sup> *See generally* DIEDERIKS-VERSCHOOR, *supra* note 46, at 34 (noting that the exclusion of state aircraft from the Chicago Convention has led to a degree of uncertainty around the status of such aircraft). *See further* Bourbonniere & Haeck, *supra* note 51, at 897 (arguing for a “restrictive” interpretation of “state aircraft” that limits the term to aircraft used in “military, customs and police services”).

<sup>71</sup> DIEDERIKS-VERSCHOOR, *supra* note 46, at 34; Bourbonniere & Haeck, *supra* note 51, at 888 (noting that “The activity, purpose, or task being accomplished during the flight of an aircraft will determine the applicable norms. Thus, within the corpus of international public air law, the rights and duties, which affect the flight of an aircraft, are contingent upon its function”). *See further* Geiser, *supra* note 50, at 196 (noting that “Until the end of the 1930’s, the distinction between military and civil aircraft was tied to external markings and physical characteristics. By the eve of World War II, however, a functional distinction was gaining currency. A functional distinction begins with the understanding that a particular aircraft, irrespective of its external markings, can be used for a threatening military purpose such as intelligence gathering or a peaceful civil purpose such as carrying passengers. A functional distinction differentiates between military and civil aircraft based on the use to which the aircraft is put rather than on the aircraft’s markings and flight characteristics.”).

<sup>72</sup> Geiser, *supra* note 50, at 196.

<sup>73</sup> Bourbonniere & Haeck, *supra* note 51, at 888. Contrast with Embassy of France in the U.S., *supra* note 36 (“Q: The difference between private and government flights eludes me somewhat. The CIA is an agency of the American government, the State? A: Yes, but the distinction has to do with the nature of the aircraft, that is, according to the owner of the aircraft, whether the owner is private or government. That’s the Chicago Convention of 1944. When it’s a private aircraft, the procedure is to file a flight plan and when it’s a government aircraft belonging to a state, there’s a system of prior permission”).

<sup>74</sup> *See e.g.* U.K. House of Commons, *Uncorrected Transcript of Oral Evidence, Minutes of Evidence Taken Before Foreign Affairs Committee*, H.R. Annual Report 2005, Nov. 23, 2005, available at

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmcaff/uc574-ii/uc57402.htm> Q118 of Sir John Stanley.

<sup>75</sup> Scott Shane, Stephen Grey & Margot Williams, *CIA Expanding Terror Battle under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005 (stating that “while posing as a private charter outfit, Aero Contractors is in fact a major domestic hub of the CIA’s secret air service”).

<sup>76</sup> *Los Vuelos de la CIA también Realizaron Escalas en el Aeropuerto de Los Rodeos*, LA OPINIÓN DE TENERIFE, Aug. 4, 2005, available at

<http://www.la-opinion.com/secciones/noticia.jsp?pIdNoticia=30620&pIndiceNoticia=0&pIdSeccion=4>

<sup>77</sup> *See generally* Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1; Shane, Grey & Williams, *supra* note 75.

<sup>78</sup> *See* Michael J. Bazyler, *Capturing Terrorists in the “Wild Blue Yonder”*; *International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 690 - 694 (1986) (outlining factual background of the incident).

<sup>79</sup> Bourbonniere & Haeck, *supra* note 51, at 907.

<sup>80</sup> This position was set out in a letter from Government of the U.S. to International Federation of Air Line Pilots Associations (IFALPA) on 13 November 1985: *see* Bourbonniere & Haeck, *supra* note 51, at 908. *See further* Bazyler, *supra* note 78, at 701 (supporting this characterization and noting that the jet was “being used for private civil aviation but for a governmental purpose, to assist the escape of fugitives” thereby rendering the aircraft a state aircraft to which the *Chicago Convention* does not apply).

<sup>81</sup> Shane, Grey & Williams, *supra* note 75.

<sup>82</sup> *Id.* (citing a retired CIA officer).

<sup>83</sup> Bourbonniere & Haeck, *supra* note 51, at 970 (noting that the burden of proof shifts from the State controlling the aircraft to the attacking State under international humanitarian law).

<sup>84</sup> *See e.g.* U.K. House of Commons, *Hansard*, Dec. 20, 2005, Column 2911W, available at

[http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/text/51212w20.htm#51212w20.html\\_sbhd4](http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/text/51212w20.htm#51212w20.html_sbhd4) (noting that: “Under the Rules of the Air established in Annex 2 to the Convention, the commander of an aircraft must

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file a flight plan for all flights that will cross international borders, and for most other flights that are engaged in commercial operations. For flights operating in European controlled airspace, flight plans are filed with the Central Flow Management Unit (CFMU) at Eurocontrol, the European Organisation for the Safety of Air Navigation. On receipt of the flight plan, the CFMU perform a number of checks before distributing the information to the relevant air traffic control units along the projected route of the aircraft. Each of the air traffic units, for example National Air Traffic Services (NATS) in the UK, then utilises the information in order to provide air traffic services for the flight. The flight plan provides information on the aircraft's identity (whether it is civil or state) and equipment, the point and time of departure, the route and altitude to be flown, the destination and estimated time of arrival, and the alternate airport to be used should landing be impossible. The flight plan also specifies whether the flight will be carried out under visual or instrument flight rules").

<sup>85</sup> See e.g. Bourbonniere & Haeck, *supra* note 51, at 970 (noting that the characterization "must respect" Article 3(b)).

<sup>86</sup> See e.g. statement of Mr. Peter Rabbitte (Labour Party, Ireland) that "If state aircraft are being disguised for CIA purposes, it is in breach of the Chicago Convention. One the other hand, if they are orthodox civilian aircraft, we may inspect them", in *Extract from Leaders' Question Time to the Taoiseach* (Prime Minister), Jan. 25, 2006, available at [http://www.labour.ie/download/pdf/question\\_time\\_jan25\\_06.pdf](http://www.labour.ie/download/pdf/question_time_jan25_06.pdf).

<sup>87</sup> See e.g. Colin Brown, Nigel Morris & Stephen Castle, *Row Over CIA 'Torture' Flights Engulfs Blair*, THE INDEPENDENT (UK), Dec. 14, 2005 (noting the argument of Government critics that "CIA flights were using private jets to avoid international obligations under the Chicago Convention to ask for permission for the flights"). See also Shane, Grey & Williams, *supra* note 75.

<sup>88</sup> See further Bourbonniere & Haeck, *supra* note 51, at 908 (noting that the U.S. was "not the only country to accept the reclassification of the Egypt Air flight a state aircraft").

<sup>89</sup> See Bourbonniere & Haeck, *supra* note 51, at 954 (noting that the only exception to the requirement for authorization is the limited rights of passage given under Chapter VII of the U.N. Charter during U.N. military activities).

<sup>90</sup> See e.g. with respect to military or state aircraft landing at military airfields the U.K. position, which is that "In the case of military or State aircraft landing at military airfields, clearance is sought from the MOD. Certain countries have a block clearance on a yearly renewable basis in a quid pro quo agreement (US, Germany, Italy and many others). Otherwise all nations must formally request permission to land or transit." (Mike Gapes Esq. MP, Chairman Foreign Affairs Committee, House of Commons, *Uncorrected Evidence, Foreign Policy Aspects of the War Against Terrorism*, Nov. 22, 2005, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmaff/c573-ii/c573m02.htm>).

<sup>91</sup> See e.g. U.K. House of Lords *Hansard*, Jan. 20, 2006, Column WS42, available at <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60120-14.htm> (with The Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Lord Triesman) stating that "Since before September 2001 we have worked closely with the US to achieve our shared goal of fighting terrorism. As part of that close co-operation, we have made clear to the US authorities, including in recent months: that we expect them to seek permission to render detainees via UK territory and airspace (including Overseas Territories); that we will grant permission only if we are satisfied that the rendition would accord with UK law and our international obligations, and how we understand our obligations under the UN Convention Against Torture. We are also clear that the US would not render a detainee through UK territory or airspace (including Overseas Territories) without our permission. As noted above, the US has sought such permission in the past"); U.K. House of Commons, *Hansard*, Jan. 16, 2006, Column 969W – 970W, available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060116/text/60116w23.htm> (with Dr. Howells stating that "I refer the hon. Member to the reply to the Rt. hon. Member for North East Fife (Sir Menzies Campbell) on 12 December 2005 (Official Report, column 1652–1653 W) and to the Written Ministerial Statement my Rt. hon. Friend the Foreign Secretary gave on 10 January (Official Report, column 5WS). These demonstrate that the US Government has sought the UK Government's permission before using UK airports and airspace for the purpose of rendition. Since before 11 September 2001, we have worked closely with the US to achieve our shared goal of fighting terrorism. As part of that close co-operation, we have made clear to the US authorities, including in recent months: that we expect them to seek permission to render detainees via UK territory and airspace (including the Overseas Territories and Sovereign Bases); that we will grant permission only if we are satisfied that the rendition would accord with UK law and our international obligations, and how we understand our obligations under the UN Convention Against Torture. We are clear that the US would not render a detainee through the UK without our permission. It has sought such permission in the past: in some cases we have agreed, in others we have not, as my right hon. Friend the Foreign Secretary has made clear"); U.K. House of Commons, *Uncorrected Transcript of Oral Evidence, Minutes of Evidence Taken Before Foreign Affairs Committee*, Dec. 13, 2005, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmaff/uc768-i/uc76802.htm> (with Mr. Straw responding to a question from Richard Younger-Ross by noting that: "In any event, the permission is not contingent on the nature of the aeroplane, it is contingent on the nature of the activity being conducted either in the aeroplane or on the ground; so I do not think the fact that it was a private flight is relevant. I have no idea whether it was a private flight or a military flight or a CIA flight that was involved in the 1998 transfers which I authorised and it is not relevant. *The*

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question was the United States government understood that in using our airspace and our territory they needed our permission to effect a transfer, so they sought it") (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See also U.K. House of Commons, *Hansard*, Dec. 20, 2005, Column 2840W, available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051220/text/51220w50.htm> (with Dr. Howells noting that "The term "rendition" is currently being used to describe informal transfers of individuals in a wide range of circumstances. Whether any particular "rendition" is lawful depends on the facts of each individual case. Where we are requested to assist another State and our assistance would be lawful, we will decide whether or not to assist taking into account all the circumstances. We would not assist in any case if to do so would put us in breach of UK law or our international obligations, including under the United Nations (UN) Convention Against Torture. In particular, consistent with our obligations under the UN Convention Against Torture, we would not facilitate or permit the transfer of an individual from or through the UK to another State where there were substantial grounds to believe that the person would face a real risk of torture").

<sup>94</sup> *Id.* See also *supra* note 95.

<sup>95</sup> U.K. House of Commons, *supra* note 93.

<sup>96</sup> U.K. House of Commons, *supra* note 91.

<sup>97</sup> This definition was adopted 28 March, 1952 by the ICAO Council: ICAO Doc. 7278-C/841, 3: see further DIEDERIKS-VERSCHOOR, *supra* note 46, at 15.

<sup>98</sup> DIEDERIKS-VERSCHOOR, *supra* note 46, at 15-16.

<sup>99</sup> See e.g. U.K. House of Commons, *Hansard*, Dec. 14, 2005, Column 2027W available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051214/text/51214w18.htm>. (containing the written answer on the topic of "US-registered Planes" as follows: "The Chicago Convention on International Civil Aviation sets out the international rights and obligations of the airlines of contracting states, including when it is necessary to seek prior permission to operate flights over or into another state. This is implemented by Article 138 of the Air Navigation Order 2005. Permission from the Secretary of State for Transport is only required by foreign aircraft operating civil flights into the UK where they land and take on board or discharge passengers or cargo, and where valuable consideration is given or promised in respect of that carriage...).

<sup>100</sup> This is explicit in the terms of Article 5, see *supra* note 101. See also R.I.R. Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, 63 J. AIR. L. & COM. 289, 398 (1997) (noting that a State may require landing of non-scheduled flight).

<sup>101</sup> Article 5 provides in full that "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable." See further Morgan, *supra* note 49, at 16 (noting that the principle that operation of an aircraft is always subject to the control of the overflown State is confirmed in Article 5: "Article 5 of the convention, whilst permitting nonscheduled flights into or in transit nonstop across the territory of another state without the necessity of obtaining prior permission, recognized the right of the overflown state to require landing and the following of prescribed routes").

<sup>102</sup> See e.g. U.K. House of Commons, *supra* note 84.

<sup>103</sup> See Ruwantissa Abeyratne, *The Role of Civil Aviation in Securing Peace*, IN'L J. ON WORLD PEACE, 53, 72 -73 (2002) (noting that "Practically, Article 5 has been rendered nugatory in effect, since non-scheduled flights are usually required to inform States whose territories they fly over or land in, prior to the operation of the flights, and the grantor State has the right to refuse such requests"). See generally DIEDERIKS-VERSCHOOR, *supra* note 46, at 15.

<sup>104</sup> Donnelly, *supra* note 46, at 36.

<sup>105</sup> Bourbonniere & Haeck, *supra* note 51, at 946; Donnelly, *supra* note 46, at 36.

<sup>106</sup> Bourbonniere & Haeck, *supra* note 51, at 889-892.

<sup>107</sup> Donnelly, *supra* note 46, at 38 - 40.

<sup>108</sup> Bourbonniere & Haeck, *supra* note 51, at 947 - 948 (arguing that the action that a State may take will most likely be limited by the reasons for the trespass; for example, it may be that the State cannot take particular types of action against the state aircraft if it has entered the territory by reasons of error, distress, or *force majeure*).

<sup>109</sup> *Id.* at 891.

<sup>110</sup> See Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, *supra* note 100, at 400, 401 (noting at 401 that "...Article 3 bis does not exclude enforcement against foreign aircraft in flight, does not rule out the use of adequate and proportionate force, and does not rule out interception as such"). See

generally Huskisson, *supra* note 51, at 125-127 (outlining history of Article 3bis and arguments concerning its strengths and weaknesses).

<sup>111</sup> Article 3bis (b) provides that “The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft”).

<sup>112</sup> See Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, *supra* note 100, at 400. See also Geiser, *supra* note 50, at 215 (noting that debate on Article 3bis. focused on how the article would impact the ability of States to deal with aircraft being used to “transport of illicit drugs, contraband, gun running, illegal transport of persons and any other common crimes” and that Mexico, supported by all Latin American countries, wanted to ensure that States can “prevent, prosecute and punish any deliberate use of civil aircraft for unlawful purposes”).

<sup>113</sup> Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, *supra* note 100, at 402.

<sup>114</sup> See e.g. *Spain Clears U.S. of Blame in CIA Flight Probe*, REUTERS, Nov. 25, 2005.

<sup>115</sup> Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, *supra* note 100, at 399.

<sup>116</sup> *Id.* at 399 (noting further that “The practical problem...is not the applicability of particular laws; rather, the problem relates to the enforcement of such laws with respect to aircraft, particularly aircraft in flight”).

<sup>117</sup> These are *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970; and *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971. See generally DIEDERIKS-VERSCHOOR, *supra* note 46, at Chapter X.

<sup>118</sup> John T. Stewart Jr., *Obtaining Title and Financing Transport Category Aircraft – National and International Implications*, 50 J. AIR. L. & COM. 191, 197 - 200 (1985) (explaining the concept of aircraft registration and how registration establishes responsibilities for the State of registry).

<sup>119</sup> See e.g. Elizabeth Gaspar Brown, *Jurisdiction of the United States Courts over Crimes in Aircraft*, 15 STAN. L. REV. 45 (1962) (addressing the jurisdiction issues that arise by virtue of the inclusion of particular aircraft within the “special maritime and territorial jurisdiction of the United States”).

<sup>120</sup> This may in part derive from the fact that CAT’s provisions on jurisdiction were “inspired by” similar jurisdiction provisions such as those contained in the *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970; and *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971: see BURGERS & DANIELIUS, *supra* note 35, at 58.

<sup>121</sup> Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, *supra* note 100, at 397-398.

<sup>122</sup> Geiser, *supra* note 50, at 215. See also *id.* at 216 (noting that the Convention does not identify how States may redress violations of Article 4).

<sup>123</sup> *Prosecutor v Furundzija*, *supra* note 27, at para 147; *A (FC) and others v. Secretary of State for the Home Department*, *supra* note 28, at para 34 (Lord Bingham of Cornhill) (“... the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture.”).

<sup>124</sup> Human Rights Committee, General Comment 20, Article 7, UN Doc. A/47/40 (1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) [hereinafter “HRC General Comment 20”] para. 8.

<sup>125</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* A/59/324, Sept. 1, 2004, para 27.

<sup>126</sup> For detailed discussion of this obligation see *Torture by Proxy: International and Regional Law Applicable to “Extraordinary Renditions,” supra* note 44, at 36-44, 54-56.

<sup>127</sup> *Id.* at 38-40.

<sup>128</sup> *Id.* at 32.

<sup>129</sup> Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter “HRC General Comment 31”] para. 12.

<sup>130</sup> HRC General Comment 20, *supra* note 124, at para. 9.

<sup>131</sup> See e.g. *Kindler v. Canada*, Communication No. 470/1991, Human Rights Committee, UN Doc. CCPR/C/48/D/470/1991 (1993), para. 13.1 (“[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”); *Mrs. G.T. v. Australia*, Communication No. 706/1996, UN Doc. CCPR/C/61/D/706/1996 (1997), para. 8.4 (“A real risk is to be deduced from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases.”).



<sup>132</sup> This is based on an assessment of ICCPR Article 7 in light of European Court of Human Rights jurisprudence interpreting Article 3 of the European Convention given that the Human Rights Committee's terminology tracks that of the European Court of Human Rights; *see further Torture by Proxy: International and Regional Law Applicable to "Extraordinary Renditions"*, *supra* note 44, at 55-56.

<sup>133</sup> Article 4 provides that "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

<sup>134</sup> *See e.g. Mr. Kepa Urrea Guridi v Spain*, Communication No. 212/2002, Committee Against Torture, CAT/C/34/D/212/2002 (2005), para 6.7 ["With regard to the alleged violation of article 4, the Committee recalls its previous jurisprudence to the effect that one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished. The Committee also recalls that article 4 sets out a duty for States parties to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of those acts. The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment."]

<sup>135</sup> HRC General Comment 20, *supra* note 124, at para. 8.

<sup>136</sup> *See e.g. Crawford & Evans, supra* note 32, at para. 22; Redress, *Taking Complaints of Torture Seriously Rights of Victims and Responsibilities of Authorities*, Sept. 2004, available at <http://www.redress.org/publications/PoliceComplaints.pdf>; UN Commission on Human Rights, Resolution 2003/32, 57<sup>th</sup> session, at para. 8, U.N. Doc. E/CN.4/Res./2003/32 (2003) (stressing in particular that "...all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, notes in this respect the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Principles) annexed to Commission resolution 2000/43 and General Assembly resolution 55/89 as a useful tool in efforts to combat torture, ...;").

<sup>137</sup> *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, Committee Against Torture, CAT/C/20/D/59/1996 (1998), para. 8.2.

<sup>138</sup> *Id.* at para 8.2

<sup>139</sup> Crawford & Evans, *supra* note 32, at para. 22.

<sup>140</sup> CAT, *supra* note 3, article 16(1) provides:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

<sup>141</sup> Article 15 provides that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

<sup>142</sup> *See e.g. PE v France*, Communication No 193/2001, Committee Against Torture, CAT/C/29/D/193/2001 (2002), paras 5.3, 6.3; *GK v Switzerland*, Communication No 219/2002, Committee Against Torture, CAT/C/30/D/219/2002 (2003), para 6.10, cited in *A (FC) and others v. Secretary of State for the Home Department, supra* note 28, at para 36 (Lord Bingham of Cornhill) as support for the proposition that "A Committee against Torture was established under article 17 of the Torture Convention to monitor compliance by member states. The Committee has recognised a duty of states, if allegations of torture are made, to investigate them..."

<sup>143</sup> *See also Nqalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/41/40) (1986) para 10 (in which the Human Rights Committee found in the case of allegations of torture against Zaire, that Zaire was: "...under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that the authors have suffered, to grant them compensation, to conduct an inquiry into the circumstances of their ill-treatment, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.").

<sup>144</sup> *See Eduardo Bleier v. Uruguay*, Communication No. R.7/30, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982) para 13.3 (noting that "It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.").

<sup>145</sup> HRC General Comment 31, *supra* note 129, at paras. 15 and 18 (“Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7).”).

<sup>146</sup> *See id.* at para. 15 (“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities”).

<sup>147</sup> *See e.g.* Article 13 of CAT states that “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

<sup>148</sup> *See e.g.* jurisprudence of the European Court on Human Rights on this point, e.g. *Aksoy v. Turkey* Judgment of 18 December 1996, *Reports* 1996-VI, p. 2287, para. 98 (holding that the duty to proceed to a “thorough and effective investigation capable of leading to the identification and punishment of those responsible” whenever there is an arguable claim is implicit in the notion of an “effective remedy” under Article 13).

<sup>149</sup> BURGERS & DANIELIUS, *supra* note 35, at 58.

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Id.* at 60 (noting discussion of a proposed amendment to require that an extradition request be rejected before the obligation to prosecute and the objections of some States to this on the basis that it could create a “loophole” in CAT).

<sup>152</sup> *See generally id.* at 58 (noting generally the intention of States that the jurisdiction provisions in CAT ensure that it is “as difficult as possible for torturers to find a safe-haven in a foreign country.”); Cedric Ryngaert, *Universal Criminal Jurisdiction over Torture: a State of Affairs*, K.U. Leuven Faculty of Law Institute for International Law Working Paper No 66 (revised), Aug. 2005, available at <http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP66e.pdf>, 5.

<sup>153</sup> HRC General Comment 31, *supra* note 129, at para. 15.

<sup>154</sup> The ILC Articles were adopted by the International Law Commission on August 9, 2001 and commended to governments by a resolution of the General Assembly on December 12, 2001. For the text of the articles and their commentaries *see Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001) available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last visited Feb. 22, 2006) [hereinafter “ILC Articles and Commentaries”].

<sup>155</sup> *Id.* at 59.

<sup>156</sup> *Id.* at 61.

<sup>157</sup> *Id.* at 157 (noting that “the essential principle is that a State should not be able to do through another what it could not do itself.”).

<sup>158</sup> *Id.* at 156.

<sup>159</sup> For further information on principles governing the adjudication of State responsibility, *see further Torture by Proxy: International and Regional Law Applicable to “Extraordinary Renditions”*, *supra* note 44, at 100 - 102.

<sup>160</sup> ILC Articles and Commentaries, *supra* note 154, at 155.

<sup>161</sup> *Id.* at 159. *See also* Bernhard Graefrath, *Complicity in the law of international responsibility*, REVUE BELGE DE DROIT INTERNATIONAL 370, 377 (1996).

<sup>162</sup> ILC Articles and Commentaries, *supra* note 154, at 159.

<sup>163</sup> Article 16(b) makes it clear that the aiding or assisting State will only responsible for that internationally wrongful act if the act is a breach of an international obligation by which both States are bound: *see id.* at 157. Note that Article 16 does not require that the internationally wrongful act be committed against another State (e.g. such as a crime of aggression); the violation can be committed against “a particular group of States, a subject of international law other than a State, or the international community as a whole.” *See Report of the International Law Commission on the work of its Thirtieth session*, 8 May - 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, p105, Yearbook of the International Law Commission 1978 vol. II (2), available at [http://untreaty.un.org/ilc/documentation/english/A\\_33\\_10.pdf](http://untreaty.un.org/ilc/documentation/english/A_33_10.pdf) [hereinafter “Thirtieth Session ILC Report”].

<sup>164</sup> ILC Articles and Commentaries, *supra* note 154, at 68.

<sup>165</sup> *See generally Torture by Proxy: International and Regional Law Applicable to “Extraordinary Renditions”*, *supra* note 44.

<sup>166</sup> *See supra* note 26.

<sup>167</sup> ILC Articles and Commentaries, *supra* note 154, at 154.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 156.

<sup>170</sup> *Id.*

<sup>171</sup> Commentary on Article 27 (prior Article 16) Draft Articles adopted on First Reading by the Commission (1996) *Text of the draft articles provisionally adopted by the Commission on first reading* Yearbook of the International Law Commission 1978, Vol. II, Part 2, para 14 [hereinafter “Commentary on Article 27”].

<sup>172</sup> Special Rapporteur on State Responsibility, *Second report on State responsibility*, International Law Commission, 51<sup>st</sup> session, UN Doc. A/CN.4/498/Add.1 (1999) para.180, available at <http://icil.law.cam.ac.uk/ILCSR/498add1e.doc> (last visited Feb. 22, 2006) [hereinafter “Second report on State responsibility”].

<sup>173</sup> Commentary on Article 27, *supra* note 171, at 103.

<sup>174</sup> ILC Articles and Commentaries, *supra* note 154 at 155.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 159.

<sup>178</sup> *Id.* at 158.

<sup>179</sup> Second report on State responsibility, *supra* note 172, at para. 178 (noting “It is clear that to impose on the assisting State a standard of strict responsibility is too harsh”).

<sup>180</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 18 (Apr. 9) (Judgment - merits).

<sup>181</sup> ILC Articles and Commentaries, *supra* note 154, at 154.

<sup>182</sup> *Corfu Channel (U.K. v. Alb.)*, *supra* note 180, at 18.

<sup>183</sup> *Id.* The Court also noted that inferences of fact and circumstances can be made “...the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.”

<sup>184</sup> See Second report on State responsibility, *supra* note 172, at para. 178-179 for a detailed discussion on the question of intention or knowledge of wrongfulness.

<sup>185</sup> The precursor to Article 16, Article 27 provided that “Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.” The phrase “...for the commission of an internationally wrongful act” was designed to import a requirement of intent: see Thirtieth Session ILC Report, *supra* note 163, at 104 (recording that “...the wording adopted for the article lays stress on the intellectual element of intent, which must also be present before it can be concluded that the internationally wrongful act of participation that it is sought to define has been committed. As the article states, the aid or assistance in question must be rendered “for the commission of an internationally wrongful act”, i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use”).

<sup>186</sup> Kate Nahapetian *Confronting State Complicity in International Law*, 7 UCLA J. INT’L L. & FOREIGN AFF. 99, 126 (2002).

<sup>187</sup> *Id.* at 110.

<sup>188</sup> See e.g. International Law Commission, Fifty-Second Session ILC Report, *Topical Summary Prepared by the Secretariat: Report of the International Law Commission to the General Assembly*, Fifty-Second Session, U.N. GAOR 6th Comm., 55th Sess., U.N. Doc. A/CN.4/513 (2001) at 13 (noting that “While support was expressed for the general thrust of articles 16, 17 and 18, it was considered unnecessary that the State which assisted, directed or coerced another State should have done so with knowledge of the circumstances of the act in order to incur responsibility; it should be sufficient that the act in question would be internationally wrongful if committed by that State. It was also felt that knowledge of the circumstances was in that case implicit, and to create the express condition in the text set up two different but cumulative criteria that would make it harder to attribute responsibility”). See further Graefath, *supra* note 161, at 375; Nahapetian, *supra* note 186, at 111.

<sup>189</sup> See e.g. ILC Articles and Commentaries, *supra* note 154 at 156 (stating that “the aid or assistance must be given with a view to facilitating the commission of that act”), (“A State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct...”) (emphasis added).

<sup>190</sup> *Id.* at 189.

<sup>191</sup> *Agiza v Sweden*, *supra* note 25, at para. 13.5.

<sup>192</sup> Article 41 provides in full that “1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to

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the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law”: *see* ILC Articles and Commentaries, *supra* note 154, at 286.

<sup>193</sup> *Id.* at 281 – 282.

<sup>194</sup> Article 40 provides that “1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”: *see* ILC Articles and Commentaries, *supra* note 154, at 282.

<sup>195</sup> *Id.* at 284.

<sup>196</sup> *Id.* at 285.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 287.

<sup>200</sup> *Id.*

<sup>201</sup> ILC Articles and Commentaries note that the prohibition on recognition of an unlawful situation also includes acts which would “imply such recognition”: *id.*

<sup>202</sup> *Id.* at 287. The “elements” of this aid or assistance are to be understood through reference to Article 16. The ILC Articles and Commentaries indicate that “In particular, the concept of aid or assistance in article 16 presupposes that the State has knowledge of the circumstances of the internationally wrongful act. There is no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”: *id.* at 291.