

ADVISORY LETTER

**COUNTERTERRORISM IN A EUROPEAN AND
INTERNATIONAL PERSPECTIVE**
INTERIM REPORT ON THE PROHIBITION OF TORTURE

No. 11, December 2005

Members of the Advisory Council on International Affairs

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Introduction

On 15 July 2005 the government requested advice from the Advisory Council on International Affairs (AIV) on combating terrorism from a European and international perspective. The government asked the AIV to assess the fight against international terrorism since 11 September 2001 and to look ahead at the agenda for the coming years, as outlined in the High-Level Panel's report to the UN Secretary-General, focusing particularly on the ways in which international measures impact on the national approach and vice versa. The government also sought advice on how human rights and the rule of law can best be safeguarded in the struggle against terrorism, and was especially interested in whether the AIV finds there is justification for restricting human rights and international humanitarian law and, if so, to what degree and in what circumstances.

The AIV addressed itself to these questions in the autumn and set up a joint committee to prepare the advisory report. The Counterterrorism Committee comprises members of the AIV's four permanent committees (the Human Rights Committee (CMR), the Peace and Security Committee (CVV), the Development Cooperation Committee (COS) and the European Integration Committee (CEI)): Professor T.C. van Boven (CMR) (chair), Lt. Gen. G.J. Folmer (retd) (CVV) (vice-chair) and Professor P.R. Baehr (CMR), Professor M.G.W. den Boer (CEI), Dr P.P. Everts, Professor F.J.M. Feldbrugge (CVV), Professor B. de Gaay Fortman (COS), Ms B.T. van Ginkel (CVV) (corresponding member), R. Herrmann (CMR), F. Kuitenbrouwer (CMR), Lt. Gen. H.W.M. Satter (retd) (CVV), Professor B.A.G.M. Tromp (CVV) (temporary vice-chair), and Ms H.M. Verrijn Stuart (CMR). The civil service liaison officers were J.F. Gerzon, F.H. Olthof and A.P. van Wiggen (Political Affairs Department, Ministry of Foreign Affairs). The committee was supported by P.J.A.M. Peters (executive secretary) and H.J.W.B. Lathouwers (civil-service trainee) and Ms S.F. van den Driest (trainee).¹

Given the range of the request for advice and the complexity of the subject matter, the AIV soon concluded that it would not be possible to deliver an advisory report as quickly as the government wished. It then considered whether it would be advisable or possible to address one or more of the questions in an interim report, in advance of the full advisory report. As will become clear, the AIV decided to draft an interim report on the prohibition of torture and its enforcement, a subject which is currently giving rise to great international concern.

Focusing on the ban on torture

The government's questions assume that there is tension between the campaign against terrorism and respect for human rights.² Like the government, the AIV stresses

1 The committee drafting the advisory report interviewed a number of experts from foreign policy, domestic security and research circles, and non-governmental organisations.

2 At this point it is not necessary to go into the problems of defining terrorism; it is enough to describe it. The UN Secretary-General includes several elements of a definition in his report to the recent UN summit '(in addition to actions already proscribed by existing conventions) any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organisation to do or abstain from any act.' *In Larger Freedom: towards development, security and human rights for all*, report by the UN Secretary-General on the follow-up to the Millennium Summit (A/59/2005), 21 March 2005, para. 91.

the urgent need for an effective campaign against terrorism, since the lives and safety of potential victims are at stake. The rights and freedoms of actual and alleged perpetrators and others, and, more generally, the principle of the rule of law, are also matters of pressing concern. In the AIV's opinion, these tensions are reflected in developments relating to the ban on torture,³ which touches on one of the most fundamental of human rights: the inviolability of the human body and the human mind. The developments relating to the ban on torture offer a striking illustration of how internationally accepted norms can become circumscribed, given that until recently the consensus was that the ban was an absolute one. There are grounds for serious concern that the campaign against terrorism is weakening the absolute nature of the ban. An examination of this issue is in keeping with the Netherlands' consistent involvement in the realisation and implementation of the prohibition of torture.⁴ But there is more at stake than the prohibition itself. Circumscribing the ban on torture has set in motion a trend that is undermining the entire complex of interconnecting human rights norms. Furthermore, the practice of torture and the debate on circumscribing the ban undeniably have foreign policy implications, because they affect the image and the status of countries with which the Netherlands is closely allied, thus undermining their authority and involvement in international politics. These are the issues which convinced the AIV that it should give priority to this subject. The urgency of the problem is underlined by the practices and standards currently being employed in the fight against terrorism, which undermine the prohibition of torture in particular.

General framework

The AIV has no intention of separating the two main questions posed in the request for advice. The aims of safeguarding the principle of the rule of law and the rights and safety of individuals are inseparable. The AIV has a dual objective in issuing this interim report: to urge that the ban on torture be enforced and defended in full and, in more general terms, to call on those involved in the debate on counterterrorism to fulfil their international obligations in full in both foreign and domestic policy. The AIV also wishes to point out that the undermining of international norms can compromise the protection offered to individuals by the rule of law. Precisely because internationally accepted legal safeguards are worded in general terms, it is impossible to restrict their operation in a particular sector of government policy (i.e. counterterrorism) without compromising them in other sectors too (such as combating serious crime). In fact, the enforcement and promotion of a norm such as the ban on torture can be regarded as a litmus test to determine whether a state is governed by the rule of law.

3 The request for advice raises the ban on torture in question 10: "Intelligence gathering is an essential part of preventing terrorist acts. In that light, what is the AIV's opinion on how public authorities should handle information obtained from third parties when it is unclear how it was obtained, partly in view of the absolute ban on torture. I am also interested in the AIV's opinion on whether diplomatic guarantees concerning the proper treatment of persons to be extradited on suspicion of terrorism to countries where human rights violations occur are an acceptable means of safeguarding these persons' rights."

4 The Netherlands was among the initiators of the UN Declaration on Torture and played an active part in the drafting and adoption of the UN Convention against Torture and in its further development. The Netherlands was also involved in creating the mandate for the Special Rapporteur on torture appointed by the UN Commission on Human Rights and in formulating the UN's Principles of Medical Ethics (A/RES/37/194 of 18 December 1982). Over the years it has also made substantial contributions to the UN Voluntary Fund for Victims of Torture.

In taking action against terrorism, the authorities must do all in their power to ensure that there are no casualties and that society is not disrupted. In doing so, a state such as the Netherlands is defending the rule of law, which is an essential element of the protection afforded by the state to its citizens and to all within its jurisdiction. A state governed by the rule of law implements that protection with due respect for substantive and procedural norms. The protection of a democratic state governed by the rule of law requires an integrated approach, within which every element is equally entitled to protection. In a recent publication, for example, the General Intelligence and Security Service (AIVD) lists a number of the elements that are integral to the rule of law governing the relationship between the authorities and the public: the principle of *nulla poena sine lege*, the separation of powers, the decentralisation of power, fundamental rights, the state's monopoly on the use of force, transparency, restraint on the part of the authorities with regard to individuals' private lives, the right to vote and to stand for election, the freedom to acquire political power, fundamental political rights, democratic participation in and scrutiny of decision-making, public access to government information, respect for the rights of minorities and the rule of majority in political decision-making.⁵

When performing the state's tasks, a balance must be struck between different rights and between the rights of different persons. In striking this balance, the authorities are bound by international obligations, in particular relating to human rights, including the absolute prohibition of torture. These obligations vis-à-vis persons have both a national and an international dimension.

Counterterrorism efforts have been shown to negatively affect how detainees are treated and the protection of personal privacy. The AIV would point to the extension of existing powers of investigation and prosecution in a number of recent pieces of Dutch legislation, both passed and proposed.⁶ The application of the humanitarian laws of war has also been the subject of debate.⁷ Examples of rights that are being jeopardised can be found in the report drawn up by Robert K. Goldman for the UN Commission on Human Rights.⁸

5 *Van dawa tot jihad. De diverse dreigingen van de radicale islam tegen de democratische rechtsorde* (From dawa to jihad: the various threats posed by radical Islam to the democratic legal order), Ministry of the Interior and Kingdom Relations, The Hague, December 2004, p. 13.

6 The Bill on powers to compel the disclosure of information has been passed by the Senate and published in the Bulletin of Acts and Decrees (no. 390 of 2 August 2005). The Bill concerning protected witnesses has been passed by the House of Representatives (Parliamentary Papers, House of Representatives, 2005/06, 29.743). The Bill expanding the scope for investigating and prosecuting terrorist crimes has been introduced in the House of Representatives (Parliamentary Papers, House of Representatives, 2005/06, 30.164). The Bill on administrative measures in the interests of national security and the Bill concerning the criminalisation of the glorification of terrorist crimes and disqualification from the practice of certain professions were announced in the letter of 24 January 2005 to the House of Representatives from the Minister of the Interior and Kingdom Relations and the Minister of Justice (Parliamentary Papers, House of Representatives, 2004/05, 26.754, no. 5 (see http://www.nctb.nl/Images/KST83659_tcm111-85542.pdf).

7 Human rights dissolving at the borders? Counter-terrorism and EU criminal law, report by Amnesty International, Brussels, 31 May 2005.

8 Protection of human rights and fundamental freedoms while countering terrorism, UN document E/CN.4/2005/103, 7 February 2005, p. 6 ff.

The ban on torture

As observed above, there are grounds for serious concern that the counterterrorism campaign is undermining the core human rights values which include the prohibition of torture and the ban on cruel, inhuman or degrading treatment or punishment. This prohibition has long been held to be a prime example of a peremptory norm which must not be restricted or circumscribed in any way, even in times of armed conflict, public emergencies or other crisis situations. This is enshrined in numerous international human rights instruments and in international humanitarian law, and has been confirmed by the judgments of international courts. The European Court of Human Rights has held that a special stigma is attached to torture and that there is an increasing need to impose strict criteria in relation to the protection of human rights and fundamental freedoms.⁹ Until recently, there was consensus in national and international legal opinion regarding the absolute nature of the prohibition on torture. Torture nevertheless took – and takes – place frequently, but no regime, however despicable, ever argued openly that torture was permissible in certain circumstances. Every government felt compelled to deny or refute accusations that it systematically practised torture.

In recent years, particularly since the terrorist attacks of 11 September 2001, a definite – albeit not dominant – trend towards circumscribing the absolute nature of the ban on torture can be discerned in literature, policymaking and practice.¹⁰ This trend is reflected in recent reports of covert practices, such as secret detention centres and transfers ('extraordinary rendition') of suspects.¹¹ Practices of this kind create conditions in which fundamental human rights principles can be jeopardised.

Circumscribing the ban on torture: four issues

The ban on torture is being circumscribed in various ways that together form an interlocking pattern. The AIV would draw attention to four of these: (1) the redefinition and hence the narrowing of the term 'torture and cruel, inhuman and degrading treatment and punishment'; (2) keeping detainees incommunicado without charging them under criminal law; (3) the undermining of the principle of non-refoulement;

9 Etch, *Salmon v. France*, judgment of 28 July 1999, Reports of Judgements and Decisions, 1999-V, para. 96.

10 The German professor Winfried Brugger has argued in favour of taking a more flexible attitude to torture so as to keep it under control. See H. Bielefeldt, *Das Folterverbot im Rechtsstaat*, Deutsches Institut für Menschenrechte, policy paper no. 4, Berlin, 2004. Professor Alan Dershowitz says that exceptions to the ban may be made by law, provided it is laid down that in a specific case prior permission for the use of torture must be given by a court (cited in *Terrorism, counterterrorism and torture. International law in the fight against terrorism*, London, Redress, 2004, p. 26). See also the article by Conor Gearty in *Index on censorship*, 2005, no. 1, where he says that a number of intellectuals and human rights lawyers are supplying the arguments allowing the US Secretary of Defence to exploit the grey area between torture and legitimate pressure. On policy development see e.g. K.J. Greenberg & J.L. Dratel (ed.), *The Torture Papers; the road to Abu Ghraib*, Cambridge, Cambridge University Press 2005, especially the US policy memoranda reproduced there. See also I. Boerefijn, *Foltering is het probleem niet de oplossing* (Torture is the problem, not the solution) *NJCM Bulletin*, vol. 30, no. 3, 2005, p. 240 ff.

11 See e.g. *Washington Post*, 2 November 2005 (and *NRC Handelsblad*, 3 November 2005, *Opnieuw ophef over "spookgevangenen" van CIA* (Renewed controversy about CIA's hidden prisoners).

(4) the use of information that may have been obtained by torture or other forms of abuse. The AIV will discuss these four points and give its views on a number of points raised by the Minister in question 10 of the request for advice.

The scope of the ban

The ban on torture and other forms of cruel, inhuman or degrading treatment or punishment has a prominent place in the Universal Declaration of Human Rights (UDHR), which was a response to the mass torture and other atrocities of the Second World War. The ban is also enshrined, in the same language, in global and regional human rights conventions. The ban was further developed in the UN's Declaration on Torture (1975) and Convention against Torture (1984).¹² The definition of torture in article 1 of the Convention sets out four delimiting criteria: the severity of the suffering inflicted, the intention of the perpetrator, the identity of the perpetrator and the objective of the action. While it is not the purpose of this interim report to analyse these criteria, the AIV would point out that it has observed alarming developments which are chipping away at the nature and scope of the ban on torture as enshrined in treaty law. One example is the US government's legal policy documents concerning the interpretation of the ban under criminal law.¹³

Views expressed in those documents limit the definition of torture to physical coercion of such intensity that the pain and suffering inflicted causes physical harm serious enough to shut down organs of the body, damage bodily functions or even cause death. Yet those same documents state that even if a particular action (e.g. an inter-rogation method) exceeds the boundaries of what is permissible, it may still be justified as necessary and an act of self-defence within the context of waging an effective war against terrorism. Although these policy documents have drawn wide criticism and are not the last word on the matter within the US government, they nevertheless illustrate an outlook and a mentality that allow the assessment of what constitutes torture to depend on a perceived need – e.g. for extremely rigorous interrogation methods. The result is that the absolute ban on torture is being circumscribed.

These developments and the peremptory nature of the ban on torture are topics of political debate. The US Senate adopted Senator John McCain's proposal to state explicitly that military personnel may use only the interrogation techniques permitted by the US Army Field Manual and that the ban on torture and cruel and inhuman treatment also applies to foreign nationals detained by the US outside US territory. This is a clear condemnation by the Senate of the current Administration's attempt to interpret the ban as narrowly as possible.¹⁴ This recent and positive development cannot be separated from the vigilant reporting, within the United States and other

12 Supra, note 4.

13 Supra, note 10. See also the Report by the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly (doc. A/59/324, para 13 et seq.). See also Boerefijn, supra, note 10.

14 The Senate passed the amendment with 90 votes in favour and 9 opposed. Nevertheless, it met with resistance from the White House, which wanted exception clauses included for the CIA, etc. See *International Herald Tribune*, 11 October 2005; www.humanrightsfirst.org/us_law/etn/mccain/index.asp. See also footnote 27 below.

countries, by the media and by researchers and spokespersons of national and international NGOs.

The AIV would also note that, in accordance with the relevant conventions, cruel, inhuman and degrading treatment, of which torture is an extreme form, falls under the absolute ban. Over the years, international and regional human rights monitoring bodies have developed extensive case law holding that the absolute ban also covers certain extreme interrogation methods, often in combination, such as hooding, long-term sleep deprivation, death threats and other threats, violent shaking, use of cold water and cold air.¹⁵ The argument that certain behaviours do not have the intensity of torture, but are 'merely' cruel, inhuman and degrading, does not stand up. The absolute ban also applies to these types of behaviour and treatment.

Incommunicado detention

In their efforts to combat terrorism effectively, many countries have begun holding suspects incommunicado, with or without a basis in law. People are held by the police and security services for days, weeks, months or even indefinitely without reference to the courts, legal counsel or contact with their families or friends. Experience teaches that it is precisely in circumstances such as these that detainees are at risk of torture and cruel, inhuman and degrading treatment. The UN Commission on Human Rights has repeatedly stated that long-term incommunicado detention 'may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture'.¹⁶ The UN Human Rights Committee has taken the same position and regards the practice as a violation of article 7 of the International Covenant on Civil and Political Rights (ICCPR).¹⁷

The incommunicado detention of persons whose names and identities have been disclosed has raised questions about the prevention and curtailment of torture. Even more troubling is that detainees are being held in secret detention centres without their names and identities being disclosed. The International Red Cross is denied access to them and there is no inspection or judicial scrutiny to speak of. Their physical and mental integrity is in grave danger and there is a risk that these individuals will disappear for good.

Non-refoulement

The AIV also considered whether diplomatic guarantees concerning the proper treatment of persons to be extradited on suspicion of terrorism to countries where human rights violations, including torture, occur are an effective and thus acceptable means of safeguarding these persons' rights.¹⁸ This question arises repeatedly in the

¹⁵ See, for example, the conclusions dating from 1997 of the UN Committee against Torture cited in the aforementioned document A/59/324, para 17.

¹⁶ Most recently in Commission resolution 2005/39, April 2005, para 9.

¹⁷ See Boerefijn, *supra* note 10, p. 248.

¹⁸ See footnote 3 for the relevant question.

case law of the European Court of Human Rights¹⁹ and was recently the subject of a landmark decision by the UN Committee against Torture concerning an Egyptian citizen whom Sweden had extradited to Egypt, which gave guarantees but failed to comply with them.²⁰ The AIV also examined the positions taken on these matters by successive UN Special Rapporteurs on Torture and by UN Independent Expert Robert K. Goldman.²¹

The surrender of suspected terrorists to other countries for interrogation and possibly prosecution and trial has snowballed because of international cooperation on the fight against terrorism. In response, several UN Special Rapporteurs and the Council of Europe's Commissioner for Human Rights²² have delved deeply into this issue. In this respect, the AIV is referring only to the ordinary transfer of suspects and not to 'extraordinary rendition', i.e. capturing persons and transporting them to unknown destinations, without the involvement of the justice authorities or any court proceedings, and putting them at high risk of torture or inhuman treatment. Obviously, this practice, the extent of which cannot be known, is unacceptable, in any circumstances whatever.

Article 3 of the ECHR, as interpreted by the European Court of Human Rights, and article 3 of the UN Convention against Torture are of key significance with regard to the ordinary transfer of suspects. According to the latter article, no person may be expelled, returned or extradited to a State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. This principle of non-refoulement, laid down by treaty and also embedded in the case law of the European Court of Human Rights, ensues directly from the ban on torture and shares the same peremptory status. This was confirmed by the Human Rights Committee in its General Comment on article 7 of the ICCPR.²³

Diplomatic guarantees concerning the treatment of such persons by the country of destination should be tested for compatibility with the peremptory non-refoulement principle in order to assess their practicability and moral acceptability. In what cases and circumstances does the practice of furnishing diplomatic guarantees sustain this principle and when does it undermine it? In light of the numerous promises that have been broken, there is a body of authoritative opinion that categorically rejects the diplomatic guarantee system, because it is no more than a means of undermining or circumventing the non-refoulement principle.²⁴ Another point of view is that the guarantees should not be allowed to become a politically inspired substitute for the non-refoulement principle and should not be accepted from countries where torture is

19 See inter alia *Chahal v. UK*, ECHR judgment of 15 November 1996, Reports 1996-V.

20 *Agiza v. Sweden*, May 2005 (CAT/C/34/D/233/2003).

21 UN doc. E/CN.4/2005/103, para 52-61.

22 See Commissioner Alvaro Gil-Robles' report on his visit to Sweden, Comm. DH (2004) 13.

23 Human Rights Committee, General Comment, No. 20, point 9 (1992), www.ohchr.org/english/bodies.

24 Special Rapporteur Manfred Nowak's report to the UN General Assembly, doc. A/60/316, 2005, paras 40-52.

endemic and systematic and/or where the persons to be transferred are at risk of persecution on the grounds of their origin, race, religion, political convictions, sex or sexual orientation.²⁵ This would severely limit the cases in which diplomatic guarantees could be accepted. In those cases, the guarantees requested and furnished would have to meet several specific minimum conditions to protect the person in question: no incommunicado detention, immediate access to counsel, audiovisual registration of interrogations and the individuals present, independent forensic medical examination and regular monitoring by independent bodies, including interviews in circumstances in which detainees can speak freely.

The AIV endorses the latter view. It is nonetheless aware that to request guarantees under such conditions might be interpreted as a lack of trust in the State being asked to provide them. But the primary objective in requesting and accepting guarantees is to prevent and combat practices that are inconsistent with the ban on torture.

The use of information

With regard to the use of information that was extracted in a dubious fashion, possibly through torture or other forms of abuse, article 15 of the UN Convention against Torture provides that every contracting party is required to ensure that statements known to have been obtained by torture are inadmissible as evidence in court. This provision is a logical consequence of the absolute ban on torture. The issue is more complicated when, as the minister points out in his request for advice, the circumstances in which information was obtained from third parties are unclear. The AIV agrees that intelligence gathering is an essential part of preventing terrorist attacks. Nevertheless, it is of the opinion that there are ways of acquiring information that are not inconsistent with the absolute ban on torture.

Intelligence and security services obviously play a vital role in the battle against terrorism. There are two important elements: prevention, in the sense of detection and warning, and source protection with respect to information gathering. In this respect, the AIV has read the government's answers to parliament's questions about intelligence obtained by torture.²⁶ The AIV took special consideration of the fact that, as stated by the government, before cooperating with a foreign intelligence or security service, several matters are investigated, such as the democratic oversight of the service and its tasks, professionalism and reliability. The AIV also learned that the minister responsible for cooperation with foreign services is kept informed and, in cases involving cooperation with services that pose a risk, it is self-evident that the decision-making process is presented to the responsible minister. As the government stated in its answers to parliament, human rights are an essential consideration in making decisions about cooperation.

The AIV would point out that the above is related primarily to cooperation with foreign services and that in this respect human rights, of which the ban on torture is a core

25 Special Rapporteur Theo van Boven's report to the UN General Assembly, doc. A/59/324, 2004, paras 29-52, as cited by Goldman (E/CN.4/2005/103, para 56 et seq.).

26 Parliamentary questions submitted by Ms Van der Laan on 29 October 2004, and answers by the Minister of the Interior, also representing the Ministers of Justice, Foreign Affairs, Defence and Government Reform & Kingdom Relations, dated 25 January 2005.

element, is one of the essential criteria. However, it is impossible to rule out the possibility that information obtained by questionable means has come directly or indirectly from foreign services with which the Dutch intelligence services sustain some level of cooperation. The AIV maintains that the absolute ban on torture is a peremptory norm in all circumstances. In practice, it will be extremely rare for it to be established that information has been obtained by torture. The undisputed prohibition of the use of information obtained by torture as evidence in court would be complemented by a prohibition on attaching legal consequences for persons and organisations to such information.

This does not release the authorities from their obligation to evaluate intelligence and its sources and, if necessary, to take action, certainly when there is an unacceptable risk to society and the public. It goes without saying that other, verifiable and unimpeachable sources must be sought to confirm the information.

Practical arguments against torture

Following its description of the normative side of the ban on torture, the AIV would point out some of the practical negative consequences of torture. For instance, it increases the likelihood of retaliation and desensitisation. If torture is used by one country as a 'legitimate' means of interrogation, other parties could follow suit and it would be difficult to call them to account. Foreign policy is another issue. The ban on torture is being circumscribed in countries that are our allies. Their actions reflect on the West as a whole and colour the image it projects to many countries in the rest of the world. This in turn has consequences for Dutch foreign policy. Efforts to persuade the populations of other countries to embrace universal values, peaceful means of resolving conflicts and good relations with the Western world (including the Netherlands) are undermined by actions that are suggestive of opportunism and a failure to comply with international obligations.²⁷

The government's task

Article 90 of the Constitution prescribes that it is the government's task to promote the development of the international legal order. Consequently, great importance is attached to international obligations in both domestic and foreign policy. Indeed, language to that effect was used in the request for advice. For years the Netherlands has played a prominent role in shaping and embedding the ban on torture and, as a result, has a special responsibility to see that the ban is fully and universally enforced. This responsibility applies in particular with regard to countries that subscribe to the principles of the rule of law, pride themselves on their respect for and enforcement of the norms and values of human rights in a democratic society and, on that basis, have a special bond with the Netherlands.

In this light, the AIV advises the Dutch government to take a strong public stance: the ban on torture is absolute and may not be compromised in any situation whatsoever.

²⁷ This same practical argument is offered by Senator John McCain in defence of his amendment, which aims to establish the Army Field Manual as the uniform standard for interrogation techniques and to lay down in law that the ban on torture and cruel or inhuman treatment applies equally to foreign nationals in US custody outside US territory. See Senator McCain's press release of 5 October 2005, <http://mccain.senate.gov>.

This position, deriving from treaty-based norms currently in force, should be expressed in multilateral forums such as the UN and the EU and, as the occasion arises, in bilateral relations. In specific cases in which torture is being used or the integrity of the absolute ban is at risk, the Netherlands must hold firm, regardless of where events are taking place and who is involved. The authority of human rights principles depends on their universality, and this must be upheld at all times.

In this interim report, the AIV addressed four threats to the absolute ban on torture in the context of the war on terrorism: the redefinition and hence the narrowing of the term “torture and cruel, inhuman and degrading treatment and punishment”; keeping detainees incommunicado without charging them under criminal law; undermining the principle of non-refoulement; and the use of information that may have been obtained by torture or other forms of abuse. The AIV recommends that the Netherlands monitor developments in these four areas closely and critically and that it take the position advocated above. As an EU member state²⁸ and in its own right, the Netherlands must remain watchful for signs of erosion of binding international law norms intended to protect human rights, and should do everything in its power to prevent further erosion of this set of instruments.

28 See also: Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Affairs Council, Luxembourg, 9 April 2001.

Advisory Council on International Affairs (AIV)

Bernard Bot
Minister of Foreign Affairs
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Date 14 December 2005

Ref. AIV-219/05

Re: presentation of advisory letter

Dear Dr Bot,

I am pleased to present you with the advisory letter "Counterterrorism in a European and international perspective: interim report on the prohibition of torture". I am also sending copies to the Minister of Defence, the Minister for Development Cooperation and the Minister for European Affairs.

Yours sincerely,

(signed)

Frits Korthals Altes
Chair, AIV

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