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Written Opinion for the Public Hearing of the Bundestag Committee on Human Rights and Humanitarian Aid

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on the subject of

"Human Rights Protection and Combating Terrorism"

presented by

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A. Preliminary note

I would like to express my thanks for the invitation to take part in the public hearing on "Human Rights Protection and Combating Terrorism". Given my field of expertise, I shall confine myself to answering the legal issues raised, and in so doing I will highlight, in particular, aspects of international law.

B. List of questions

I. Strategies for combating terrorism

4.

a) How is the cooperation between the EU and the United States in combating terrorism to be assessed from a legal perspective if the latter regularly violates even "non-derogable" human rights?

From an (international) legal perspective, a distinction must first be drawn between cooperation between the *European Union* itself and the US on the one hand and *cooperation between individual EU member states* and the US on the other. It is only in the second situation that the question of direct international responsibility of individual member states (specifically Germany) arises.

If one assumes that the US violates human rights through its counter-terrorism measures, then if third-party states collaborate in this, the question of international responsibility through the provision of aid or assistance arises.

The difficulty posed by a third-party state aiding or assisting in internationally wrongful acts was clarified by the International Law Commission of the United Nations (ILC) in 2001 in its draft "Articles on State Responsibility", which can be regarded as a codification of the applicable customary international law. Article 16 reads:

"**Aid or assistance in the commission of an internationally wrongful act**

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."

As explained by the ILC in its commentary on the draft, this means that an international violation by an assisting state occurs only where the assisting state was aware of the circumstances constituting the international violation and where it provided its assistance with the objective of facilitating the conduct in question. The text of the ILC's Commentary reads:

> "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 (…)".[1]

The ILC further states in its commentary that, particularly in relation to human rights abuses, a careful examination should be undertaken in order to determine whether the state providing the aid was aware of the circumstances indicating such a violation and whether it intended to provide assistance for this purpose:

[1] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", UN-Doc. A/56/10, (2001) 2 *Yearbook of the International Law Commission* 2, p. 66 (Section 5); emphasis added

> "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."[2]

The assumption must, however, be that regularly occurring violations of applicable human rights standards on the part of the state with primary responsibility (or even a relevant policy of this state) will result in the conclusion that the assisting state at any rate knew the conduct in question was unlawful under international law.

Irrespective of the problematic issue of *assistance* in possible internationally wrongful conduct by the United States, cooperation with the US may, in addition, be regarded in an individual case as an independent, autonomous breach of the cooperating EU state's own obligations under international law, for instance (just to give one example) where an EU state, in breach of Article 3 of the European Convention on Human Rights (ECHR), extradites a person to the US if there is a sufficiently likely risk that the person concerned may experience treatment in contravention of Article 3 ECHR.

For more details see also 5c).

b) What action do you therefore recommend?

In order to avoid any international responsibility on the part of the assisting state in situations where there are "obvious" signs of human rights abuses by the state with primary responsibility, where applicable it would appear appropriate to refrain from cooperation or otherwise to ensure that no human rights abuses arise from the conduct of the assisting state.

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[2] *Ibid.* p. 67 (Section 9)

Assurances may be a suitable means to ensure this, if not necessarily quite sufficient.[3]

5.

a) How does the human rights protection of terrorist suspects differ in times of war and peace?

The term "terrorist suspect" is not a term of art in international law and accordingly is of little help in clarifying the issue as to what measures can be taken in individual cases against persons who (allegedly) pose a risk.

The situation is, rather, that in (international or non-international) armed conflicts, military action against enemy combatants (international armed conflicts) or against enemy fighters (non-international armed conflicts) and also against civilians taking direct part in hostilities is permissible in principle. Insofar as "terrorist suspects" fall within these categories of persons in a specific case, in principle they are a legitimate target of hostilities. If and insofar as they are *hors de combat*, however – through being wounded or taken prisoner, for example – they enjoy the relevant protection of international humanitarian law, including the guarantees warranted under the rule of law by both additional protocols to the Geneva Convention (and/or international customary law).

Outside of armed conflicts, "terrorist suspects" also enjoy the full scope of protection resulting from any applicable treaty-based and customary provisions for the protection of human rights.

b) To what extent can states legitimately restrict the rights of terrorist suspects?

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[3] European Court of Human Rights, *Chahal v. United Kingdom*, Grand Chamber Judgment of 15 November 1996, No. 22414/93, RJD 1996-V; *Saadi v. Italy*, Grand Chamber Judgment of 28 February 2008, No. 37201/06, RJD 2008; *Othman (Abu Qatada) v. United Kingdom*, Judgment of the Fourth Section of 17 January 2012, No. 8139/09, RJD 2012 with further references to earlier case law. See also German Federal Constitutional Court (BverfG), Decision of the 2nd Senate of 12 September 1995, BVerfGE 93; 248 and also Andreas Zimmermann, "Ausweisungsschutz" (Protection against Expulsion), in Rainer Grote/Thilo Marauhn (Publishers), *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechteschutz* (Tübingen: Mohr Siebeck, 2006), Chapter 27, para. 57 et seq.

Where international humanitarian law is applicable, please see my answer to 5a) above. See also the response to Question 6a) below.

Outside of armed conflicts, the rights of terrorist suspects may be restricted to the same extent as the rights of all other persons, i.e. in accordance with the relevant exceptions in the applicable human rights treaties, such as is to be found, for example, in the ECHR ("necessary in a democratic society").

For additional limitations see also c) immediately below.

c) What is the situation in particular in relation to non-derogable human rights, which cannot be restricted under any circumstances – e.g. the prohibition of torture?

All relevant universal and regional human rights treaties, including in particular the International Covenant on Civil and Political Rights (ICCPR) (Article 4(2) ICCPR) and the ECHR (Article 15 ECHR), contain specifications of human rights that remain non-derogable even in an emergency situation. This includes in particular the prohibition of torture – of particular importance in the present case – and the prohibition of cruel or degrading treatment, which is to be regarded, beyond the treaty-based provisions, as a mandatory and peremptory norm of international law ("*ius cogens*").

The European Court of Human Rights in particular considers that the prohibition contained in Article 3 ECHR implies absolute protection against any form of torture and against cruel or degrading punishment or treatment. Even the protection of the most important basic rights, namely the protection of life and health against terrorist acts, does not justify any infringement of the guaranteed protection.[4]

[4] See, for example, most recently ECHR, *Gäfgen v. Germany*, Grand Chamber Judgment of 1 June 2010, No. 22978/05, RJD 2010, Section 87

Accordingly, the protection resulting from Article 3 ECHR against measures terminating residence – unlike Article 33(2) of the Geneva Refugee Convention – contains no possibilities for restricting the rights of certain groups of people. In addition, Article 3 ECHR – unlike most of the other guarantees in the convention – is also not subject to any legal reservation whatsoever. Accordingly, no proportionality assessment takes place either. Furthermore, in relation to Article 3 ECHR – unlike with other rights in the convention – the member states also have no power of discretion ("margin of appreciation").

Recently, for example, in a case decided in 2012 concerning an extradition from the United Kingdom, the European Court of Human Rights again rejected arguments put forward by the British government and the British courts to the effect that at least in cases of expulsion, Article 3 ECHR should be restricted in certain cases.[5] This clearly applies all the more so in cases where the state party to the convention itself undertakes conduct contrary to Article 3 ECHR.

[5] European Court of Human Rights, *Harkins and Edwards v. United Kingdom*, Judgment of the Fourth Section of 17 January 2012, No. 9146/07, 32650/07; see also European Court of Human Rights, *Babar Ahmad et al. v. United Kingdom*, Judgment of the Fourth Section of 10 April 2012, No. 24027/07, etc.

II. Impact of the methods

6.

a) There is as yet no official government position in Germany regarding the legal consequences of cooperation in the US strategy of "targeted killings". The US government on the other hand has asserted time and again that "targeted killings" are lawful.

Formulation of the problem:

This paper offers an opinion on the key international law issues relating to the lawfulness of deploying unmanned combat drones.

In this respect, reference is made in the first place to the response to 5a) above.

It should also be noted that ethical and (dis)armament issues relating to the deployment of such weapon delivery systems are not addressed here.

In relation to the lawfulness under international law of the use of combat drones, a distinction must be made between several problem areas. On the one hand, if such targeted killings take place on the territory of another state, the rights of the territorial state may be violated. On the other hand, however, violation of the rights of the victim of that act must also be considered.

Possible violations of the sovereignty of the country of deployment:

Any use of military force in another state requires authority under international law. This may be gained through authorisation by the Security Council under Chapter VII of the UN Charter (example: the ISAF Mandate in Afghanistan), in an agreement with the territorial state (example: Mali) (without this having to take place publicly), or in the exercise of the right of self-defence under Article 51 of the UN Charter (possibly also against non-state attacks). Due to a lack of space, these very complex intergovernmental aspects will not be discussed in any further detail below.

Requirements of international humanitarian law:

However, the individual rights of the target persons may also be violated. Again, a distinction must be drawn between situations involving an armed conflict and situations below this threshold. According to consistent case law, particularly of the International Court of Justice, if there is an armed conflict, the rules of international humanitarian law take precedence over human rights protection requirements (under international peace law).

Under the rules of international humanitarian law, opposing combatants or opposing fighters, as well as civilians who take direct part in hostilities, are legitimate target of hostilities within an (international or non-international) armed conflict.

In terms of Article 43 (2) Additional Protocol I, enemy combatants (in international armed conflict) are all members of the opposing military forces (with the exception of medical personnel and chaplains).

In non-international armed conflict, members of non-state organised armed groups – i.e. insurgents and members of renegade state military forces – are legitimate targets of hostilities.

In both forms of conflict, civilians are also the legitimate target of hostilities if and as long as they take direct part in hostilities. The majority view is that they regain their protection status as soon as they cease participation in hostilities, although this view is disputed in particular by the United States and Israel.

In the (in my opinion correct) view of the ICRC,[6] which the German Federal Prosecutor's Office also approved in its decision to clear Colonel Klein,[7] in non-international armed conflicts persons who have a continuous combat function are not entitled to protection for as long as they assume this function even if at the time of the attack they themselves are not participating directly in hostilities.

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[6] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), p. 70 et seq.

[7] Federal Prosecutor's Office, Termination Decision of 16 April 2010, 3 BJs 6/10-4, available at: http://www.generalbundesanwalt.de/de/showpress.php?newsid=360, p. 48

The applicability of the rules of international humanitarian law outlined very briefly above is, however, restricted (and in this regard particularly in non-international armed conflict) to the temporal and spatial context of the conflict – correctly in my view. This means in the first place that there has to be "protracted armed violence" as defined in the Tadić case by the Yugoslav Tribunal[8] (and for the threshold for the scope of application of Additional Protocol II to the Geneva Conventions, the threshold laid down in Article 1 Additional Protocol II), as has also been recognised by the threshold clause contained in Article 8(2)(d) of the Rome Statute of the International Criminal Court,[9] in relation to which, in addition, the state using force – in the present case the United States – must also be a party to the conflict.

Correctly in my view, (but disputed particularly by the US), the territorial scope of application of the rules of international humanitarian law in non-international armed conflicts is restricted to the territory of relevant hostilities that have reached the aforementioned threshold, but in any event to the territory of the state in question (such as, for example, Afghanistan).

The fundamental legal position held by the US, on the other hand, is that due to the particular characteristics of the conflict with Al-Qaida, the applicability of the rules of international humanitarian law are not subject to geographic restrictions ("world-wide war on terror"). This circumvents the exceptional nature of the applicability of the rules of international humanitarian law.

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[8] ICC, *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Decision of the Appeal Chamber of 2 October 1995, IT-94-1, Section 70. Now also the legal opinion of the United States, Department of Justice White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force", available at: http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite, p. 4

[9] For more on this, see Andreas Zimmermann / Robin Geiß, "Article 8 War crimes, Section 2 (d)", in Otto Triffterer (Ed.), *Commentary of the Rome Statute of the International Criminal Court*, 3rd edition (in preparation)

At best it can be argued that a specific non-international armed conflict has a "spill-over effect" into the border regions of a neighbouring state and that therefore in relation to the military operations in North Pakistan against Afghan insurgents, for example the rules of international humanitarian law do apply, but that they do not, for example, in Yemen. This also seems to be confirmed by the recent practice of the Federal Prosecutor's Office. According, in any case, to press reports, it is currently investigating the killing of a German national in North Pakistan by a US drone strike. The investigators appear to be looking into possible violations of the German Code of Crimes against International Law. Since this can evidently *not* be considered as a crime against humanity, the jurisdiction of the Federal Prosecutor's Office under Section 142a (1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG) in conjunction with Section 120 (1) No. 8 of the Courts Constitution Act can therefore only apply on suspicion of the committal of a war crime pursuant to the Code of Crimes against International Law. This in turn implies that the Federal Prosecutor's Office seems to have assumed that at the time the killing occurred an international or non-international armed conflict was taking place in North Pakistan, too.

However, even if one assumes that a non-international, cross-border armed conflict, not restricted to Afghanistan, exists between the US and Al-Qaida, due to the amorphous and multi-faceted structure of the Islamist groups in question it cannot be assumed that all persons who are victims of a drone attack for which the US is responsible are members of the other party to the conflict, i.e. "Al-Qaida".

An additional aspect, assuming the application of international humanitarian law in a specific situation, concerns the question of the selectiveness of any specific killing. The study instigated by the ICRC into direct participation in hostilities (DPH Studies)[10] in particular argues in Part IX that the concept of "military necessity" implies that a targeted killing must always be a last resort. This must apply in particular in occupation situations. Thus in 2007 the Israeli Supreme Court held that:

> "(…) a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. (…) Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required (…) However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (…). Of course, given the circumstances of a certain case, that possibility might not exist."[11]

However, the ICRC study in question also states that:

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[10] Cf. *supra* footnote 6. [Translator's note: this excerpt is taken originally from the] German translation of Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* a synoptic comparison of the text in English and German, published by the Deutsches Rotes Kreuz e.V., (Sankt Augustin: Academia Verlag, 2012)

[11] Supreme Court of Israel, *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel et al.*, Judgment of 11 December 2005, HCJ 769/02, available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf, Section 40

> "operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive."[12]

The ICRC study further states that a targeted killing perpetrated without giving the adversary the opportunity to surrender defies the basic notions of humanity inherent in international humanitarian law only where

> "there is *manifestly* no necessity for the use of lethal force."[13]

Whether this is so in a specific case depends on the facts; in any event it seems clear that where territorial control is lacking, arrest (at least) is much less practicable than in, for example, an occupied territory or in a country like present-day Afghanistan.

The statements made by the ICRC in its DPH Study arguably concentrate on specific operational action but not on the choice of weapon systems or on the types of operation to be used. In other words, it should not be assumed, for instance, that the ICRC Study would regard the deployment of ground troops as compulsory if that was the only way to make an arrest (rather than a targeted killing of the adversary through an airborne delivery system) at all possible.

In any event, particularly in the context of international humanitarian law, the other requirements of international humanitarian law must always be observed too, as quite rightly stated, incidentally, by the United Nations Special Rapporteur on "extrajudicial killings"', Philip Alston:

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[12] Melzer, *supra* footnote 10, p. 102
[13] *Ibid.* (emphasis added)

> "(…) a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL [international humanitarian law]."[14]

In particular, in no event may targeted attacks be conducted against civilians (unless they are taking direct part in hostilities, as stated above). In addition, it must be ensured that disproportionate collateral damage to the civilian population or civilian buildings is avoided. Furthermore, sufficient care must be taken prior to an attack to ensure that the attack satisfies these requirements.

Human rights requirements:

As mentioned, beyond the scope of application of international humanitarian law the question of a violation of human rights requirements applies. A distinction must be made here between treaty-based provisions and provisions of customary law.

As regards the United States, the primary consideration is the question of a violation of the International Covenant on Civil and Political Rights (ICCPR) and the right enshrined therein that "no one shall be arbitrarily deprived of his life". However, this firstly requires the (possible) validity of the covenant abroad, i.e. outside national territory. Allow me to refer in this respect to what I said before this committee on 17 December 2008 on the subject of "extraterritorial state obligations".[15]

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[14] HRC, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Addendum, Study on targeted killings", UN Doc. A/HRC/14/24/Add.6, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf

[15] Andreas Zimmermann / Sara Jötten, "Extraterritoriale Staatenpflichten und internationale Friedensmissionen" (2010) MRM 1, p. 5 et seq.

That statement can be summarised thus: regardless of the rather cryptic wording of Article 2(1) of the ICCPR, the ICCPR can apply extraterritorially. This summary corresponds, incidentally, with the legal opinion of the German government as expressed to the UN Human Rights Council (UNHRC). It does, however, require that the persons concerned are subject to the jurisdiction of the attacking state at the time of the attack. Cf. in this regard Article 2(1) ICCPR:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant".

It is, however, questionable whether persons who are attacked from the air by drones are thereby subject to the jurisdiction of the attacking Sstate. In its Decision of 12 December 2001 in the Banković case,[16] which concerned the air strike by NATO member states on a Serbian radio station in Belgrade during the Kosovo War, the European Court of Human Rights (Grand Chamber) categorically rejected this, following the legal opinion of the respondent governments, including the German government, in respect of the parallel provision in Article 1 ECHR ("The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention.").

In the meantime, however, the court seems to have opened up another extraterritorial application of the ECHR. Thus, particularly in the judgments relating to British operations in Iraq in the cases of Al-Skeini and Al-Jedda, both of which did involve ground troops, the Court of Justice confirmed for the first time that a substantive application of the ECHR restricted to only some ECHR rights (as would be typical for mere "overflight cases"") is also possible. On the other hand, however, the court has (not yet at any rate) called the statements in the Banković judgment into question.

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[16] ECHR, *Banković et al. v. Belgium et al.*, Decision of the Grand Chamber of 12 December 2001, No. 52207/99, RJD 2001-XII

As regards the ICCPR, the Human Rights Council has not yet expressed a clear position on the question of the application of the convention in a Banković scenario. In its General Comment No. 31 from 2004 it merely stated that the persons concerned must be subject to the power or effective control of a state party in order for the convention's guarantees to apply:

> "This means that a State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party".[17]

It can probably be rightly assumed that in the context of a teleological interpretation of the convention (and of the ECHR), the ICCPR can, in principle, apply in a Banković scenario, albeit in a substantively limited manner.

Therefore, if the United States pledged to uphold the ICCPR in its drone operations, including when these take place in peacetime outside US territory, it is nevertheless unlikely that the strict requirements for the lawfulness of interference in the right to life could actually be met.

Similar considerations probably apply *mutatis mutandis* in respect of the corresponding norms of international customary law.

b) How should the political and legal cooperation of the Federal Republic of Germany with (friendly) states that commit human rights violations in the fight against terrorism be viewed?

aa) CIA rendition flights

[17] HRC, "General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, Section 10 (emphasis added)

Reference is made in the first place to the statements made above in relation to Question 4a). In terms of this, on the one hand the Federal Republic of Germany can (only) be accused of an internationally wrongful act in connection with "CIA rendition flights" if German agencies have rendered aid or assistance within the meaning of Article 16 of the ILC Articles on State Responsibility.

On the other hand, a violation by Germany itself, in particular of Article 3 ECHR, is possible. The judgment of the Grand Chamber of the European Court of Human Rights in the case of El-Masri v. The Former Yugoslav Republic of Macedonia is of decisive importance in this respect. The Court held that a contracting state is responsible for how "rendition flights" are conducted if the contracting state was aware of these and if the relevant acts were carried out in the presence of officials of the contracting state:

> "The Court must first assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities."[18]

[18] European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber Judgment of 13 December 2012, No. 39639/09, Section 206

However, these renditions themselves also constitute a violation of Article 3 ECHR if there has been no formal extradition request and if the country of destination (here Afghanistan) was known to the contracting state and if there were reasonable grounds for believing that the person or persons involved would be subjected to treatment prohibited under Article 3 ECHR in the country of destination and if the contracting state did not seek any assurances that could have averted such acts.[19]

In addition, in situations where a person is initially detained with the knowledge and approval of a contracting state on its territory in order to be then transferred by way of "rendition" to a third country where he or she will be held without guarantees under the rule of law, as a general rule this constitutes a violation of Article 5 ECHR.[20]

bb) Use of statements obtained under torture

Pursuant to Article 15 of the UN Convention Against Torture "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."

In relation to the prohibition of torture contained in Article 7 of the International Covenant on Civil and Political Rights, General Comment No. 20 of the Human Rights Council similarly states:

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[21]

The European Court of Human Rights also shares this view, as demonstrated recently in its decision of 25 September 2012 in the case of El-Haski v. Belgium:

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[19] *Ibid.* Sections 216-219

[20] For more on this *ibid.* Sections 236-241

[21] HRC, "General Comment No. 20: Replaces General Comment No. 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): CCPR General Comment No. 20", 3 March 1992, UN Doc.

> "Thus, the use in a prosecution of statements obtained by means of a violation of Article 3 – be that violation characterised as torture or as cruel or degrading treatment – automatically removes equity from the proceedings as a whole and violates Article 6 (Gäfgen v. Germany [GC], No. 22978/05, Sections 166-167 and 173, ECHR 2010). The same applies to the use of material evidence gathered as a direct consequence of acts of torture (ibid.)."[22]

At the same time, the committee set up by the UN Convention Against Torture considers that it is not necessary for the state perpetrating the torture and the forum state to be identical.[23] The European Court of Human Rights emphasises that the use of coerced statements in criminal proceedings against third parties (i.e. not against the tortured person himself or herself) is also inadmissible:

> "The Court judges that these principles hold not only when the victim of treatment contrary to Article 3 is the accused him or herself, but also in the case of a third party. It points out in this regard that it has already had occasion to state in the ruling on Othman (Abu Qatada) v. United Kingdom (No. 8139/09, Sections 263 and 267, 17 January 2012), in the specific case of a flagrant denial of justice, that the use in a trial of evidence obtained by torture constitutes such a denial even if the person from whom the evidence has been obtained by this means is a person other than the accused."[24]

HRI/GEN/1/Rev.6 at 151 (2003), Section 12

[22] HRC, El Haski v. Belgium, judgment of the 2nd Senate of 25 September 2012, No. 649/08, Section 85

[23] See on this, for example, Committee Against Torture "Conclusions and Recommendations of the CAT on the UK's fourth periodic report", 10 December 2004, UN Doc. CAT/C/CR/33/3, Section 4(a)(i)

[24] European Court of Human Rights, *Haski v. Belgium, supra* footnote 22, Section 85

This judgment of the European Court of Human Rights of 25 September 2012 in the case of El Haski v. Belgium is also of importance insofar as it clarifies that establishing that a *real risk* exists that statements were obtained under torture is sufficient for excluding evidence, unless the forum state itself has already investigated the issue:

> "If the legal system of the third country in question offers no real guarantees of an independent, impartial and serious examination of the allegations of torture or of cruel or degrading treatment, it is necessary and sufficient for the person concerned to invoke the exclusionary rule under Article 6 Section 1 of the Convention to demonstrate that there is a 'real risk' that the statement at issue was thus obtained. It would be unfair to place a greater burden of proof on him or her."[25]

In light of the foregoing it seems clear that statements obtained using torture are inadmissible.

These international law requirements are taken into account domestically in Germany in Section 136a(3), second sentence of the Code of Criminal Procedure (*Strafprozeßordnung* – StPO), which provides that "statements that were obtained in breach of this prohibition [contained in Section 136a(1)] shall not be used, even if the accused consents to their use."

[25] *Ibid.*, Section 88

This, however, raises the problem of a "long-range effect" (*Fernwirkung*), that is, the question of whether (e.g. physical) evidence (such as the body of a victim) that is found as a consequence of the forced confession can actually be used. The European Court of Human Rights expressed its view on this point in the case of Gäfgen v. Germany. Since the court assumed that in principle the use in criminal proceedings of information directly obtained under torture constitutes a violation of the ECHR, the Court adopted a differentiated position in relation to the question of a "long-range effect" relating to the prohibition of the use of such evidence, since, according to the court, a long-range effect only applies if it is proved that the breach of the prohibition of torture had a causal impact on the offender's conviction or sentence:

> "The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. *However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.*"[26]

This is specifically not the case if, as in the Gäfgen case, the person concerned makes a second confession after being appropriately advised that an original, forced confession cannot be used as evidence.

cc) Targeted killings by combat drones

Reference is made in this respect to the responses to Question 6a) and Question 4a).

c) Do states that participate indirectly in such "targeted killings" through reconnaissance and the supply of information have the same responsibility as the states actually executing them? What is the legal basis for your opinion (international law, criminal law, constitutional law)?

With respect to questions of *state* responsibility, which the question evidently pertains to ("Do states […] have the same responsibility"), reference is made in the first place to the responses to Question 6a) and to Question 4a).

If, as evidenced by the additional question, an opinion is to be given beyond this also in relation to the question of possible individual responsibility under criminal law of German nationals, an in-depth analysis would be required in the first place to determine whether German courts have jurisdiction at all if mere acts of assistance are involved, the (main) perpetrator is a foreigner and the crime was committed abroad, and if (due to the absence of an armed conflict) the German courts also do not have jurisdiction under Section 1 of the Code of Crimes against International Law. In addition, there would also have to be requisite intent to act as an accessory (*Gehilfenvorsatz*), pursuant to Section 27 (1) of the Criminal Code.

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[26] European Court of Human Rights, *Gäfgen .v Germany, supra,* footnote 4, Section 178

7. What prospects are there for a binding international ban on the practice of "targeted killings"; what role can the UN and the ICRC play?

As is well known, UN special rapporteurs have repeatedly addressed this problematic issue. About a year ago, Ben Emmerson, the present UN Special Rapporteur on Counter-Terrorism and Human Rights, announced a major investigation into the issue of the deployment of combat drones.

In its assessment of the State Party Report by the United States due in 2013, the Human Rights Council is also likely to express its views both in its discussions with the US delegation and in its Concluding Observations on the question of the deployment of such weapon delivery systems.

For its part, the ICRC has already made its position clear in relation to the issue in its DPH Study mentioned above; to this extent further initiatives are not anticipated in the near future.

It is unlikely that in the foreseeable future there will be any specific regulation governing the deployment of such systems that is treaty-based and therefore binding under international law.

8.

a) "Terrorist lists" are problematic from a human rights perspective. Because the lists are kept secret, those affected cannot exercise their right to defence and a fair trial. Is there an alternative? For example, doing away with the lists altogether, or introducing strictly defined criteria or publicly accessible lists?

b) Does the procedure by which the UN Sanctions Committee places people and organisations on the terrorist list comply with rule of law criteria, and what opportunities do people and organisations on the list presently have to be removed and compensated?

The Security Council's original practice of listing and de-listing individual people and groups as part of its sanctions regime has – justifiably – provoked considerable criticism. As is well known, the case law of the Court of Justice of the European Union (CJEU), particularly in the Kadi case, has contributed significantly to providing for a minimum level of checks and procedures to ensure that the rule of law is respected.

This applies in particular in the meantime to the sanctions regime against the Taliban and Al-Qaida, as currently provided for in Security Council Resolution 2083 (2012) of 17 December 2012, which now (after an initial Focal Point was set up back in 2006 that affected persons could turn to) at least provides a considerably greater degree of transparency and ensures the right to information of the affected party.

In this regard, the key role of the ombudsperson pursuant to Annex II of the resolution should be especially emphasised. The ombudsperson may now submit de-listing recommendations of his or her own to the Sanctions Committee, which become effective after 60 days unless the Sanctions Committee decides unanimously to maintain the listing or a member of the Security Council is prepared to pay the political price of getting the Security Council as a whole to address the question; the Security Council would then have to decide on a possible de-listing under the procedure pursuant to Article 27 of the UN Charter.

It would be a welcome development if this procedure were to be extended to all sanctions regimes providing for individual sanctions and if, in addition, it were possible for humanitarian exceptions to be implemented by the ombudsman in a similar procedure.

On the basis of the previous legal position, in 20 cases persons or organisations have already been removed from the sanctions list on the recommendation of the ombudsperson; in two cases the application for de-listing was rejected.[27]

[27] For details see the overview at http://www.un.org/en/sc/ombudsperson/status.shtml

III. International law aspects and strategies for the future

10. A sustained move away from state-sponsored terrorism towards autonomous and transnational terrorism has been evident lately. Has this change resulted in further developments in international law and in international humanitarian law, and what is your assessment of these developments?

As already mentioned, the United States in particular argues that against the background of the fight against non-state perpetrators of violence, a "blurring" has taken place (or has to take place) in relation to the applicability of international humanitarian law. In addition, the group of potential adversaries who may be lawfully attacked is broadening. I should also point out that military force may be lawfully used by an international partner only if the territorial state is not in a position to fight the perpetrators of violence effectively itself.

If we look at the overall picture, we see that there is a very wide-ranging use of powers to act under international law and that this is largely independent of the respective administration.

In such situations, the rules of international humanitarian law are understood by the United States to be merely broadly worded principles from which, so the argument goes, effective benchmarks can scarcely be derived.

This has as yet, however, remained a rather isolated opinion. With the exception of individual cases (for example, as regards the fundamental classification of non-state attacks as "armed attacks" within the meaning of Article 51 of the UN Charter), they have found little positive resonance.

This stance must also be countered on substance. In particular, the fundamental character of international humanitarian law as a mere emergency law is called into question; instead it becomes the norm and is intended to largely displace the regulations and principles of international peace law precisely in order to sideline thorny human rights situations. But it is peace that should be the norm or, to use the words of a former Federal President, the challenge.

Regardless of the fact that these legal views advanced by the US are as yet shared by few, if any, of its major European partners (or other countries), it is, however, striking that open opposition (if indeed there is any) is, at best, isolated. Particularly in a situation where the establishment (or even prior existence) of certain customary law norms is being claimed, such a silence assumes a definite international law significance – certainly when this occurs in a united fashion and over an extended period. Against this background, in my opinion a firm view should be taken on these issues *publicly*, such as in the forums of the United Nations, or in legally relevant documents substantiating the *opinio juris* of the Federal Republic of Germany, such as in the Central Service Regulations of the Armed Forces on international humanitarian law.

Similar considerations apply *mutatis mutandis* in respect of the question of the classification of captured individuals who were/are categorised neither as civilians nor as prisoners of war but as "illegal combatants". This issue has, however, declined in significance since the Obama administration came to power. This points, in my view, towards a much clearer stance against this practice, particularly by the EU member states.

Potsdam, 11 February 2013

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