



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : General Secretariat of the Council
to : Delegations

Subject : Report on the meeting of the Temporary committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, held in Brussels on 2 and 3 October 2006

The meeting was chaired by **Mr Coelho** (PPE-DE, PT), followed by **Baroness Ludford** (ALDE, UK).

I. Exchange of views on the outcome of the mission of a delegation to Berlin

Mr Coelho was pleased with the outcome of the mission of a delegation to Berlin. The delegation had met its counterparts in the committee of the Bundestag investigating the allegations concerning the CIA renditions and detention centres (the Bundestag Committee). It had also met Mr Steinmeier, German federal minister for foreign affairs, who had said that he would prefer to appear before the Bundestag Committee, before coming to the European Parliament's Committee. The Bundestag Committee would not be able to hold a hearing with Mr Steinmeier at an earlier stage than planned in its working programme, but its members considered that it was for Mr Steinmeier to decide the timing of his appearance before the European Parliament's Committee. The Bundestag Committee was happy to share its documents with the European Parliament's Committee, but the documents would have to remain confidential.

Members stressed the importance of national committees of inquiry and underlined that the European Parliament's Committee should not replace those committees. Several members raised the issue of the time constraint on the European Parliament's Committee. The matter of Mr Steinmeier's appearance before the European Parliament's Committee was discussed, and the Chair suggested pursuing further contacts with the Bundestag Committee and with the German government, with a view to holding an exchange of views with Mr Steinmeier specifically about the El Masri case, once the inquiry of the Bundestag Committee regarding that case had been concluded. Furthermore, officials in the chancellery with responsibility for the intelligence and security services would be invited.

II. Exchange of views with Mr Aguado, Director General of Eurocontrol

Mr Aguado gave an introductory statement in which he described the organisation, function and role of Eurocontrol. For the purposes of the matter under investigation by the Committee, the Central Route Charges Office (CRCO) and the Central Flow Management Unit (CFMU) were the most important units. The CRCO billed and collected en-route charges on behalf of Eurocontrol Member States. In order to bill a user, it must obtain the information about what services the user had enjoyed. The CFMU had an overview of available capacity and matched supply and demand. To carry out this task, the CFMU would obtain information about departure and destination points by users.

Asked by several Members about what information regarding departure and destination points Eurocontrol had, and to what extent the Member States of the organisation had access to that information, **Mr Aguado** gave some clarifications. All flights must file a flight plan, identifying the immediate point of departure and the immediate point of destination. Some users voluntarily gave additional information covering the whole itinerary of the flight, indicating previous and future departure or destination points, but it was only the information concerning the immediate departure and destination points that was compulsory. Member States would automatically receive the information which was of concern to them, but the rest of the itinerary was not communicated automatically. Thus, if a plane came from Afghanistan to Germany and continued to Italy, the Italian authorities would only receive information about the Germany-Italy route.

However, since the Member States of Eurocontrol were owners of the information held by Eurocontrol, they could request and obtain all the information Eurocontrol had about a particular flight. Eurocontrol did not have information about the itinerary before or after a flight entered or left European territory, except for the immediate departure or destination point outside of Europe, unless users had given such information voluntarily. Thus, Member States had to obtain such information from other agencies. Eurocontrol kept the data concerning the flight plans for five years and the data concerning billing and charges for four years.

Members were also concerned about the existence of flights outside the surveillance of Eurocontrol. **Mr Aguado** confirmed that there were indeed flights which were not under an obligation to communicate their routes to Eurocontrol or omitted to do so. Among those were flights that come under the so-called Visual Flight Rules (VFR flights). These were mainly private planes/hobby planes and occasionally some commercial flights. Furthermore, military flights went under the rules of Operational Air Traffic (OAT). With regard to such flights, the military authorities of each state had the responsibility to make sure that the routes were safe and to separate their aircraft from other aircrafts. There was no pan-European approach to military flight. Eurocontrol did not have any flight plans for VFR flights or OAT flights. Furthermore, in some cases, on the periphery of European airspace, flights could come from neighbouring continents without flight plans. In those cases the pilot should communicate his/her intended destination point to the national air traffic authority. It was possible that in a small number of cases (estimated by Mr Aguado at less than 1%), the information was not reported to Eurocontrol. Finally, if an aircraft used an airport which was formally no longer in use, Eurocontrol would not have the flight plan of that aircraft since Eurocontrol would not accept a flight which departed from a non-recognised airport. Such a flight would have to rely on means of control other than Eurocontrol's services.

Mr Fava (PSE, IT) wondered how it could be possible that a plane could land at one airport one day, and then leave from another airport the next, without any stopover having been registered in between. **Mr Aguado** explained that this could be due to the pilot changing his/her route after having communicated the intended destination, or that the flight moved via VFR between the communicated destination and the uncommunicated departure point.

III. Exchange of views with Mr Scheinin, UN Special Rapporteur for promotion and protection of Human Rights while countering terrorism

In his introductory remarks, **Mr Scheinin** gave a presentation of his office and its functions. He expressed his concern about Article 12 of the Agreement on extradition between the European Union and the United States of America of 2003.¹ Under that Article, a Member State may authorise transportation through its territory of a person surrendered to the United States of America by a third State, or by the United States of America to a third State. Authorisation is not required when air transportation is used and no landing is scheduled on the territory of the transit State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to procedures set out in the Article. Mr Scheinin told the Committee that he had been in contact with the EU Coordinator for the fight against terrorism, Mr De Vries, regarding the question of the applicability of Article 12. Mr de Vries considered that Article 12 can never be used as a legal basis to grant authorisation for transiting a person who has been the subject of a so-called extraordinary rendition by a third state. It can only be used in a context where a third state has granted an extradition to the US government and it does not oblige Member States (or the US) to authorise transit over their territory. Also, EU Member States would have to respect the ECHR, including its Article 3 banning extradition or transfer where there would be a risk of torture. Mr Scheinin shared this interpretation, but underlined that the text of Article 12 in the EU-US agreement referred to “a person”, without specifying whether or not there had been an extradition decision, and wanted the European Parliament to call for some clarification of the scope of the Article in question. As regards the use of evidence obtained under torture, Mr Scheinin referred to Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which stated 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”. Mr Scheinin considered that this Article could be seen as having on the one hand a narrow scope and on the other a wide one. It was narrow in the sense that it only covered torture, and not other cruel, inhuman or degrading treatment, but wide in the sense that it was not just applicable to the accused, but to any person in a proceeding, and thus also covered witnesses.

¹ OJ L 181, 19.07.2003, p. 27.

Provisions in other international instruments had a more narrow scope in the sense that they only related to information obtained by the accused, but a wider scope in the sense that they covered evidence obtained not only through torture, but any form of compulsion.

Asked by Members about the legality of using information obtained through torture for purposes other than as evidence in judicial proceedings, for example with the aim of preventing terrorist attacks, Mr Scheinin said that the situation was ambiguous and that there was a certain “flexibility” with regard to using such information in intelligence operations. In fact, there was no strict prohibition on using information obtained under torture in cases other than those mentioned in Article 15 CAT. He considered that it was very unlikely that the word “proceedings” in Article 15 CAT could be interpreted in the sense that it would cover measures to prevent terrorist attacks. Stressing that torture could in no way be legitimised, he considered that it was in the nature of intelligence services that there were no clear rules about how to obtain information.

Mr Fava wondered about a case of nine UK residents who were detained in Guantánamo Bay, whom the US had offered to hand over to the UK, but regarding whom the UK had refused to admit responsibility. **Mr Scheinin** said that the question of responsibility of the UK would depend on whether the UK had been complicit in the event of taking the persons into detention, whether there existed any ties related to the protection of private or family life, or whether any matter of humanitarian protection was at stake. **Mr Kreissl-Dörfler** (PSE, DE) said that, as in the case of Mr Kurnaz, the release of the UK residents had been conditional upon the UK giving the US certain guarantees concerning the surveillance of these persons, which were difficult to provide, and which meant that the release would not really be a release.

Asked by **Mr De Rossa** (PSE, IE) about his opinion about other parts of the US-EU extradition agreement than Article 12, **Mr Scheinin** said that he was not really concerned about any other part of it, but that some concerns had been raised by the EU Network of Experts on Fundamental Rights regarding the description of capital punishment, which could be seen as rather vague. However, he did not see any real risk in the application of the agreement in this regard. He called for national parliaments to make declarations on the context in which to use Article 12. Furthermore, a memorandum of understanding between the US and the EU regarding that Article would be appropriate, and should state that the Article would only be applicable if there was a formal decision of extradition.

Asked about the definition of torture, **Mr Scheinin** underlined that not only torture, but also other cruel, inhuman or degrading treatment or punishment was forbidden in international law. Any borderline case, which might not be defined as torture, would in any case fall under the definition of other cruel, inhuman or degrading treatment or punishment. Mr Scheinin also emphasised that psychological torture could be more difficult to define than physical torture.

Ms in't Veld (ALDE, NL) was very critical of the reaction of the foreign ministers of EU Member States to Mr Bush's statement on 6 September and of the lack of a Council statement on this. She was very concerned about the statement by Mr Bush that the US would continue having secret detention centres and use them if it considered it necessary. **Mr Scheinin** agreed that the situation regarding the existence of secret detention centres was very problematic. UN bodies had explicitly disagreed with the position of the US, and stressed that under human rights law, detention of the type in question, as well as cruel, inhuman or degrading treatment or punishment, was forbidden.

To questions from **Mr Romeva i Rueda** (Verts/ALE, ES) regarding the responsibility of States which had been aware of the matters at stake, **Mr Scheinin** answered that just knowing in the sense of passively receiving information about the transit of prisoners could hardly be seen as involvement in human rights violations. However, maybe it could be expected that the States in question should protest about such transit. Passivity in the sense of tacit approval was more than simple knowledge of the matter and could lead to State responsibility.

Answering a question from **Ms Brepoels** (PPE-DE, BE), **Mr Scheinin** said that it would be useful, in order to prevent human rights violations in the fight against terrorism, to have a clear definition of terrorism. He considered that terrorism could be defined as actions where morally inexcusable means were used to reach an end that might or might not be legitimate.

IV. Administrative information

A delegation of the Committee will visit Poland from 8 to 10 November 2006.

Next meeting will be held on 9 October 2006 in Brussels at 15:00.

For further information: Ms Cavallin (phone: 8134)