



OIFIG AN AIRE GNÓTHAÍ EACHTRACHA
(OFFICE OF THE MINISTER FOR FOREIGN AFFAIRS)

BAILE ÁTHA CLIATH 2
(DUBLIN 2)

25 July 2006

Dr. Maurice Manning
President
Irish Human Rights Commission
4th Floor, Jervis House
Jervis Street
Dublin 1

Dear Dr Manning,

Thank you again for your further thoughts on the subject of extraordinary rendition, contained in your letter of 24 May. As my Private Secretary stated in his initial reply to you of 6 June, I greatly value our dialogue on the fundamentally important issues with which your correspondence has been concerned.

I must, however, strongly disagree with the suggestion made in Part (1) of your letter—*Evidence of extraordinary rendition*—that I consider the matter of so-called extraordinary rendition to be largely an “academic matter”. On the contrary, it is a matter which exercises the Government greatly. We have gone to great lengths not only to voice our complete opposition to the practice, but also to raise our concerns at the very highest levels of the US government. In this respect, I have been active at the General Affairs and External Relations Council of EU Foreign Ministers, and also in my bilateral dealings with the US authorities. As a result, Ireland is in the unique position in Europe, to the best of my knowledge, of having explicit, categorical, bilateral assurances in this matter, confirmed at the level of the US Secretary of State, Condoleezza Rice.

I would reiterate the fact that there is no evidence, nor even any concrete and specific allegation, that prisoners have been brought through Ireland as part of an

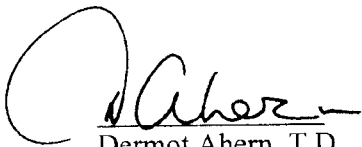
extraordinary rendition operation. Let me be clear: I am not denying that the practice exists elsewhere. That much is clear from public statements by US officials. However, the Government have received explicit assurances from the US authorities that Irish territory is not, and has not been, used for this purpose.

I look forward, in the coming months, to the publication of the recommendations of the Secretary General of the Council of Europe, Mr Terry Davis. I would reiterate the Government's intention to consider carefully with partners any specific and workable recommendations that may be made by the Council of Europe in this area. I would anticipate that when such recommendations emerge they will require coordinated action at a European level if they are to be implemented in an effective manner.

I am attaching a note responding in some detail to the legal issues raised in your letter. Let me say that I have found our exchanges to be most valuable. They have helped to clarify the underlying concerns that exist in Ireland on this matter—concerns I have then been able to raise in my bilateral dealings with the US Government, and among EU partners. They have also, I hope, enabled me to clarify for you the Government's position on this complex matter.

I would suggest that if there are any further points you might wish to raise these could be considered between officials.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D. Ahern', with a large, stylized initial 'D' on the left.

Dermot Ahern, T.D.
Minister for Foreign Affairs

**Comments on the document enclosed with the letter dated 24 May 2006 to the
Minister for Foreign Affairs from the President of the
Irish Human Rights Commission**

Positive Obligations

In Part (2) of the document, (“Article 3 of the European Convention on Human Rights: The Positive obligation to Prevent Torture”), the Commission takes issue with the Minister’s reference, in describing the scope of a State’s positive obligation to prevent torture under Article 3 of the Convention, to the judgment of the European Court of Human Rights in the case of *Osman v UK*¹. The Commission points out that this case dealt with Article 2 of the Convention (on the right to life) and not Article 3, and state that the Minister’s reference to it ‘could be quite misleading in this context’. The Minister wishes to make clear that he never intended to suggest that the *Osman* case concerned Article 3 of the Convention. The Minister’s letter of 4 April, written as it was to a Commission of human rights experts, simply referred to that case as generally indicative of the scope of a State’s positive obligation under Article 3, having regard to the well established link between the two Articles in the Court’s jurisprudence. In fact, the relevance of the *Osman* standard to a State’s positive obligation to prevent torture is confirmed by the Court’s judgment in *E. and Others v UK*².

With regard to the Commission’s comments on a State’s obligation under Article 3 to conduct an effective, official investigation where an arguable claim is raised that ill-treatment is being committed by third parties within Irish jurisdiction, the Minister would point out that all credible complaints of illegal activity connected to so-called extraordinary rendition have been investigated by An Garda Síochána. To date, owing to a lack of evidence that any unlawful activity had occurred, no further action has been found to have been warranted. In this context, the Minister wishes to remind the Commission that the Government have consistently made clear that any person with specific evidence of illegal activity should present this to An Garda Síochána.

¹ *Osman v The United Kingdom*, Judgment of the European court of Human Rights, 28 October 1998

² *E. and Others v The United Kingdom*, Judgment of the European Court of Human Rights, 26 November 2002

Diplomatic Assurances

Turning to the Commission's comments in Part (2) of its letter dealing with diplomatic assurances, the assertion is repeated that the State is not permitted to rely upon these in order to fulfil its positive obligation to prevent use of Irish airports to facilitate so-called extraordinary rendition. In stating this, the Commission refers to comments on diplomatic assurances in the decisions of the European Court of Human Rights in the cases of *Soering v UK*³ and *Chahal v UK*⁴ and the decision of the UN Committee Against Torture in the case of *Ahmed Agiza v Sweden*⁵.

The Minister wishes to point out that the three cases cited did not deal, as the Commission suggests, with the general duty of States to prevent torture, but with the specific obligation of States with regard to non-refoulement. In these cases, both the nature of the diplomatic assurance given and, more particularly, the legal obligation of the relevant States in deciding whether to rely on these assurances differed significantly from those which apply in the current situation.

As the Commission will be aware, a State's obligation of non-refoulement is an explicit requirement of Article 3 of the Convention Against Torture in respect of torture and such a requirement may be implied in respect of other forms of ill-treatment falling within the scope of that Convention. It is also an inherent requirement under Article 3 of the ECHR. The essential elements for the obligation to arise, present in all three cases cited by the Commission, is that a State is contemplating the return, through its own action (by mechanisms such as extradition, deportation or expulsion), of a specific individual to another State where there is a substantial risk that he or she might be tortured or ill-treated⁶. The diplomatic assurances considered by States in such situations (again, including all three cases cited) are concerned with how the individual will be treated by or in the potential receiving State. In these situations, international tribunals have considered the weight

³ *Soering v the United Kingdom*, Judgment of the European Court of Human Rights, 7 July 1989

⁴ *Chahal v the United Kingdom*, Judgment of the European Court of Human Rights, 15 November 1996

⁵ *Agiza v. Sweden*, UN Committee Against Torture, Communication No. 233/2003 (Decision of 20 May 2005)

⁶ These specific requirements for such an obligation to arise are evident in your own general point made on page 6 of your letter: '**prisoners** must not be **deported** or **handed over** in circumstances where there is a substantial risk that they might be tortured or ill-treated' (emphasis added).

to be attached by potential sending States to such diplomatic assurances, having regard to their clear legal obligation to determine, on the basis of *all* relevant considerations, whether there are grounds for believing that the individual would be in danger of being subjected to torture or other prohibited ill-treatment.

In the current situation, the above elements are not present. The Government are not contemplating whether to return a particular individual to another State, and are not therefore engaged in an assessment of the risk that that person may be subjected to torture if returned to another State. The matter on which the Government need to satisfy themselves is simply whether a category of persons, alleged without evidence by some commentators to be present on Irish territory, are actually so present. The diplomatic assurances received from the US and accepted by the Government in this context are specific, factual and relate to the very existence of such persons.

It is perhaps worth illustrating this point by a detailed reference to the facts of the *Ahmed Agiza* case. This case was not referred to in the Minister's letter of 4 April precisely because the facts on which it is based are simply absent in the current situation. In the *Agiza* case, the complainant was undoubtedly present in Sweden, and had applied to the Swedish authorities for asylum there. The authorities decided to reject his application, ordered his deportation and subsequently handed him over to foreign agents. In arriving at their decision to deport the applicant, the authorities sought to satisfy themselves that he would not face torture in Egypt, and in this regard appear to have relied upon the assurances of the Egyptian authorities that he would be treated in accordance with international law upon his return to Egypt⁷. The question faced by the Committee Against Torture was whether Sweden's act of handing the complainant over to foreign authorities violated Article 3 of the UN Convention Against Torture. It was in this context that Sweden's reliance on diplomatic assurances was considered by the Committee. No analogous facts are present in the current situation.

The fact that a State's obligation in respect of non-refoulement does not arise in the abstract, but requires the existence of an actual person is evident in the *Agiza* decision

⁷ see paragraph 4.12 of the decision

itself. In paragraph 13.3 of the decision, the Committee states the need to consider whether the complainant was ‘*personally* at risk of being subjected to torture in the country to which he was returned’ (emphasis added). In the same paragraph it considers that the assessment of the *personal* risk to a complainant is a separate matter to the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the relevant country. This is further indication of the fact that States’ very specific obligations in respect of non-refoulement cannot be applied to the present situation.

In this context, it is worth noting that in their joint statement on extraordinary rendition of 27 June 2006, Amnesty International, Human Rights Watch, the International Commission of Jurists and the Association for the Prevention of Torture all confine their criticism to “diplomatic assurances **against torture or inhuman or degrading treatment.**” There is no suggestion that diplomatic assurances, as a class, cannot be relied upon.

To complete the Minister’s response to the Commission on this matter, the content of the diplomatic assurances received from the US will be briefly addressed. Diplomatic assurances, by their nature, can often involve uncertainties as to the meaning of the language used, or the practical ability of States to guarantee the treatment promised. The assurances obtained from the US in the context of extraordinary rendition are that prisoners have not been and will not be transported through Irish territory without the Government’s consent.

As such they are simple, factual and categorical. They state unambiguously a factual situation, over which (contrary to the Commission’s suggestion) the Minister is confident the US Government have complete control.