

**European Parliament, Subcommittee on Human Rights**

**Public Hearing on  
Secret rendition and detention practices -  
How to protect Human Rights while countering terrorism?**

12 April 2012, 09.15 – 11.15

*Suggested talking points*

**Mr. Juan E. Méndez,  
United Nations Special Rapporteur on torture and other cruel, inhuman or degrading  
treatment or punishment**

- I warmly welcome the initiative of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament and all gathered in Brussels to follow up on the 27 March hearing into steps taken by European States at the national level towards accountability and implementation of the Parliament's resolutions. It is my pleasure to participate in this important follow-up hearing and I thank the organisers for making my intervention possible *via* this video message.
- The practice of “extraordinary rendition” and of “proxy detention”, involves the transfer of a detainee from one State to another outside the realm of any international or domestic legal procedure. It has been extensively covered in several studies launched by international and regional human rights mechanisms mainly in the context of human rights while countering terrorism; combating torture and other cruel, inhuman or degrading treatment or punishment; arbitrary detention; and enforced or involuntary disappearances. Various United Nations bodies have in the past heavily criticized the policy of extraordinary rendition, identifying it as a clear and serious violation of international law. There is an extensive international legal framework applicable to secret detention in the context of countering terrorism in the post 9/11 period which addresses State responsibility on the basis of each country's of involvement and complicity with such a practice.
- The United Nations joint study (A/HRC/13/42) on global practices in relation to secret detention in the context of countering terrorism, presented at the 14<sup>th</sup> session of the Human Rights Council in June 2010, by the mandates of four different Special Procedures concluded that the practice of secret detention in connection with counter-terrorism policies has been widespread and was reinvigorated by the so-called war on terror. The report also stated that intelligence agencies operated in a legal vacuum with no law, or no publicly available law, governing their actions. In such situations, oversight and accountability mechanisms are either absent or severely restricted, with limited powers and hence ineffective.

- The experts of the study concluded that in almost no recent cases have there been any judicial investigations into allegations of secret detention, and practically no one has been brought to justice. Many victims have almost never received any form of reparation, rehabilitation or compensation.
- The experts called upon States to establish independent institutions promptly to investigate any allegations of secret detention and extraordinary rendition and hold perpetrators responsible; to make the status of all pending investigations into allegations of ill-treatment and torture of detainees public; to ensure judicial oversight over the transfers, provide victims of secret detention with judicial remedies and afford victims the right to adequate, effective and prompt reparation. I support these latter recommendations of the Joint study and call on States who have yet to provide a reply on measures taken to investigate allegations contained in the joint study to do so and to implement the recommendations. As of 4 April, we regrettably have received only 9 replies, three of which originate from a European Union Member State. I would like to take this occasion to encourage the six other members of the European Union that we had addressed to provide us with a reply.
- I am engaged with the United States Government on a variety of issues related to this hearing, including a request to visit Guantanamo, results of investigations into allegations of torture committed by United States agents, use of black sites and complicity in extraordinary renditions. My conversations with the United States Governments on this and other issues are still in confidential stages but I can assert that they are conducted in a spirit of cooperation.
- The attempts by the European Parliament to hold European officials accountable for any complicity in secret rendition, detention and interrogation programs are unfortunately moving slowly.
- In most states where Parliamentary Commissions or inter-ministerial working groups have been established to investigate alleged cases of rendition alongside with immediate judicial investigations launched into alleged extrajudicial renditions, the outcomes could neither confirm nor deny the existence of those allegations.
- This leads me up to the next point of my intervention - *accountability for torture cases linked to rendition and detention practices*.
- One means to enhance accountability and combat impunity would be to strengthen legislation on *ex officio* investigations, as required by article 12 of the Convention against Torture. As victims are often unaware of existing complaints mechanisms, they lack confidence that their complaints will be effectively addressed or they are afraid to file them for fear of repercussions by the authorities. In this regard, one should underline that the lack of any impartial investigation into allegations of torture and ill-treatment and the resulting impunity of the perpetrators amount to a separate violation of articles 12 and 13 of the Convention against Torture.

- Authorities in several countries have hampered investigations and prosecutions by the excessive application of the State secrets doctrine and have blocked redress suits by victims of rendition. The burden of proof lies on the State asserting national security interests to demonstrate the proportionality of any restriction. Moreover, any procedural rule that restricts the right to remedy must pursue a legitimate aim, be proportionate to that aim, and employ the least restrictive means possible.
- The State secret's privilege can never be invoked in order to block an entire case/remedy as a kind of blanket prohibition nor should it ever be used to hide a human rights violation.
- My latest report to the Human Rights Council (A/HRC/19/61) focused on the commissions of inquiry as a strong yet flexible tool, to assist States in fulfilling the legal obligations to investigate and prosecute torture and other forms of ill-treatment, and to provide effective remedies to victims of past violations, including reparation for harm suffered and prevention of their reoccurrence.
- Several contemporary nationally established commissions of inquiry have arisen out of issues of complicity in torture in the aftermath of the terrorist attacks of 11 September 2001. Two such commissions of inquiry are the United Kingdom's Detainee Inquiry, commonly known as the Gibson Inquiry, and the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to victim Maher Arar.
- I am aware of a recent Polish media report that prosecutors have charged the former head of Poland's intelligence service for helping set up CIA prisons for al Qaeda suspects in Poland at the height of the US-led "war on terror". It is my understanding that this information has not been confirmed.
- As for *the recommendations on future policy, including co-operation with countries suspected of torture and the practice of accepting "diplomatic assurances"*, I would like to stress that the practice of "proxy detention" by a State in circumstances where there is a risk of torture in the hands of the receiving State could amount to a violation of the State's obligation under customary international law on *non-refoulement* - that is, the obligation not to transfer a person to another State where there are substantial grounds to believe that the person would be in danger of being subjected to torture. In this respect, like my predecessors, I am convinced that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment. States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.
- Furthermore, it is of deep concern that States regularly receive and rely on information – either as intelligence or evidence for proceedings – whose sources present a real risk of having been acquired as a result of torture and ill-treatment from third party States. Receiving or relying on information, from third parties, which may be compromised by the use of torture does not only implicitly validate

the use of torture and ill-treatment as an acceptable tool to gain information, but creates a market for information acquired through torture, which ultimately undermines the goal of preventing and eradicating torture.

- It is therefore my considered opinion that, in order for the “exclusionary rule” stipulated in article 15 of CAT, to work as a preventative measure and create a disincentive for would-be abusers to deploy ill-treatment as a tool for extracting confessions or corroborating information, States should seriously consider extending the applicability of article 15 to cover intelligence and executive decisions.
- Finally, the issues we discuss are not only academic or legal. They go to the very core of human dignity and the quest for justice. They relate to who we are as human beings respect for our fellow beings. We cannot negate horrible, unjustifiable crimes committed by others especially of terrorist nature. However, neither can we cast aside the impressive international human rights framework that we have created in the search of all human rights for all while understanding the imperative for the rule of law and combating impunity.