

OPINION n° 3-2006 :
THE HUMAN RIGHTS RESPONSIBILITIES OF THE EU MEMBER STATES IN
THE CONTEXT OF THE C.I.A. ACTIVITIES IN EUROPE
(‘EXTRAORDINARY RENDITIONS’)

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The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document .

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyses (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Edita Ziobiene (Lithuanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

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The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyses (Luxemburg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.

The documents of the Network may be consulted on :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

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I. Introduction

By a letter dated April 7th, 2006, the European Commission (DG Justice, Freedom and Security) requested from the EU Network of Independent Experts on Fundamental Rights an opinion on the question of the alleged CIA activities in Europe (extraordinary renditions) within the Framework of the NATO or the bilateral SOFA ('status of forces') agreements (ref. DG JLS/C3/AG/bh/ D(2006) 4783). This in turn followed a request to the vice-president of the European Commission, Mr Frattini, from the Chairman of the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (TDIP Temporary Committee), Mr Carlos Coelho, dated March 29th, 2006 (ref. D(2006)1731).

It will be recalled that, following reports by *The Washington Post* that the CIA had been holding and interrogating al Qaeda captives at secret facilities in Eastern Europe, part of a global covert prison system established after the 11 September 2001, attacks, and allegations by Human Rights Watch that CIA airplanes had been traveling from Afghanistan in 2003 and 2004 to airfields in Poland and Romania, a number of initiatives have been taken, both within the Council of Europe and within the European Union. On 2 November 2005, the President of the Parliamentary Assembly of the Council of Europe, Mr van der Linden, asked the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to look into these allegations. The chair of the Committee on Legal Affairs and Human Rights, Mr Dick Marty, was appointed as rapporteur. The Committee recalled the Resolution 1433(2005) of the Parliamentary Assembly on the legality of the detention of persons by the United States in Guantanamo Bay, in which it called upon the Member States to 'ensure that their territory and facilities [were] not used in connection with practices of secret detention or rendition in possible violation of international human rights law' (para. 10, vii).

By a letter of 15 December 2005, Mr Dick Marty, chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, requested an opinion of the European Commission for Democracy through Law (the Venice Commission), which the Venice Commission delivered on 18 March 2006.¹ The Venice Commission was asked to provide an 'assessment of the legality of secret detention centres in the light of the Council of Europe member States' international law obligations, in particular the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture', and identify in particular, the extent to which a State may be 'responsible if – actively or passively – it permits illegal detention or abduction by a third State or an agent thereof'. It also was asked 'what are the legal obligations of Council of Europe member States, under human rights and general international law, regarding the transport of detainees by other States through their territory, including the airspace', and what the relationship is 'between such obligations and possible countervailing obligations which derive from other treaties, including treaties concluded with non-member States'.

Acting under Article 52 of the European Convention on Human Rights, the Secretary General of the Council of Europe requested the Governments of the High Contracting Parties to the Convention to furnish, by 21 February 2006, an explanation of the manner in which their internal law ensures the effective implementation of the provisions of the Convention and its additional Protocols, as interpreted by the European Court of Human Rights, regarding the following specific issues: explanation of the manner in which their internal law ensures that acts by officials of foreign agencies within their jurisdiction are subject to adequate controls; explanation of the manner in which their internal law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within their jurisdiction, whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Party or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty; explanation of the manner in which their internal law provides an adequate response to any alleged

¹ Opinion no. 363 / 2005, of the Venice Commission, on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transport of prisoners, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), CDL-AD(2006)009.

infringements of Convention rights of individuals within their jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, the Member States of the Council of Europe were requested to explain how effective investigations that are prompt, independent and capable of leading to the identification and sanctioning of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims, were provided for. In the context of the foregoing explanations, an explanation was requested as to whether, in the period running from 1 January 2002 (or from the moment of entry in force of the Convention if that occurred on a later date) until the present, any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission - in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency. Information is to be provided on whether any official investigation is under way and/or on any completed investigation. All the Member States of the Council of Europe had responded to this inquiry within the deadline or within days following the deadline. The results were presented on March 1st, 2006.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs, has also been acting on this issue. On 15 December 2005 the European Parliament decided to set up a temporary committee to investigate the alleged illegal transfer of detainees and the suspected existence of secret CIA detention facilities in the European Union and in candidate countries (hereafter referred to as 'TDIP Temporary Committee'). After the formal decision was adopted on 12 January 2006 to set up such committee, the European Parliament, on 18 January 2006, approved the mandate and membership suggested by the Conference of Presidents of the Political Groups for its temporary 46-member committee, which is to investigate the allegations of CIA prisons in Europe where persons suspected of terrorism have allegedly been detained and tortured.

It is in this context that the Network of independent experts on fundamental rights has been requested to focus on the examination of two questions. The first question relates to the alleged CIA activities in Europe within the framework of the NATO or the bilateral SOFA ('status of forces') agreements. The TDIP Temporary Committee asks if the existing multilateral (NATO) or bilateral (SOFA) agreements to which the EU Member States are parties could have been applied in a way that has legitimated or tolerated the alleged abuses which are the subject of the work of the TDIP Temporary Committee. The second question relates to the implementation by the EU Member States of the prohibition of torture under international law and the control mechanisms which are established to ensure the application of this international norm.

This opinion therefore has a limited scope. It seeks to answer the two questions identified by the TDIP Temporary Committee of the European Parliament, without examining the broader context in which the opinion is requested from the Network of independent experts on fundamental rights. Moreover, this opinion will build on preexisting inquiries, and has made full use of the information available from those inquiries. In particular, the second part of the opinion (II.), which addresses the first question submitted by the TDIP Temporary Committee, relies both on the independent findings of the Network of independent experts, and on the opinion delivered by the Venice Commission, which has been referred to above. The third part of the opinion (III.), which addresses the second question submitted by the TDIP Temporary Committee, is based on a variety of sources, including in particular the individual contributions of the independent experts of the Network, the reports of the EU Member States to the Committee against torture created under the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, and the answers of the EU Member States, provided as Member States of the Council of Europe, to the inquiry of the Secretary General of the Council of Europe acting under Article 52 of the European Convention on Human Rights. A final paragraph (IV.) contains a limited set of conclusions and recommendations.

Mr Martin Scheinin, a member of the Network of independent experts, also UN Special Rapporteur on human rights and counterterrorism, has prepared the draft of part II of the opinion with his team, on the basis of the Opinion no. 363/2005 of the Venice Commission and on all the information the

Network has received on this issue. Mr Manfred Nowak, a member of the Network of independent experts, also UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has prepared the initial draft of this part of the opinion, with the assistance of his team. On the basis of the reports prepared by Messrs Scheinin and Nowak, the coordinator of the Network, Mr. Olivier De Schutter, prepared the final text of this opinion, which was sent to all experts of the network for comments, corrections or additions before being finalized.

II. The alleged CIA activities in Europe (extraordinary renditions) within the Framework of the NATO or the bilateral SOFA ('status of forces') agreements

1. Introduction

The purpose of this part of the opinion is to evaluate the NATO or the bilateral SOFA ('status of forces') agreements through the prism of fundamental and human rights. The focus is on 'extraordinary renditions' within the framework of these agreements. By 'rendition' is meant a situation in which one State obtains custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. By "extraordinary rendition" is meant any occasion on which there is little or no doubt that the obtaining of custody over a person is, for one reason or another, not in accordance with the existing legal procedures applying in the State where the person was situated at the time.²

Extraordinary rendition is thus a general term referring to any particular "rendition" which is not, for one reason or another, in accordance with the law. In practice, extraordinary renditions may involve multiple layers of human rights violations. Firstly, victims of rendition may be arrested and detained illegally; others may be abducted; yet others may be denied access to any legal process, including the ability to challenge the decision to transfer them because of the risk of torture. In addition, there may be a link between renditions and enforced disappearances. A person who has been illegally detained in one country and illegally transported to another may subsequently "disappear". Finally, a victim of rendition may be subjected to torture and other ill-treatment.

The Network underlines that the present opinion does not aim to establish, nor does it have the ambition to assess the facts in relation to the existence of secret detention facilities in Europe or about the transport of detainees by the CIA through the territory (including the airspace) of certain European States.

The Network also recalls that it bases all its reports and opinions, including the present opinion, on the Charter of Fundamental Rights of the European Union. Article 51 of the Charter of Fundamental Rights limits the scope of application of the Charter to the institutions of the Union and to the Member States only in their implementation of Union law. However, the Charter constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the understanding of Article 6(1) EU, to which Article 7 EU refers. In conformity with its mandate, the Network considers the Charter as the most authoritative embodiment of these common values, on which its evaluation therefore may be based.

The Charter, as an instrument for the protection of human rights, should be interpreted and applied in accordance with the general principles of the international law of human rights. It has been the

² According to the Venice Commission, the term "extraordinary rendition" is used in public debate "when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time." Opinion no. 363 / 2005, paragraph 31. Amnesty International uses the term "rendition" to describe "the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process." See Report 51/051/2006, 5 April 2006, [USA: Below the radar: Secret flights to torture and 'disappearance'](#) (05/04/06).

consistent practice of the Network to read the Charter in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation and the Council of Europe, including the findings of bodies set up within the framework of these instruments.

In accordance with this practice, the Network has relied essentially adopting this opinion, on the opinion no. 363/2005 of the Venice Commission of 17 March 2006 which provides an in-depth analysis of the matter through the prism of European and international human rights law, as well as international law in general. The present opinion by the Network does not seek to be exhaustive on the domains covered by the opinion of the Venice Commission. On the contrary, the Network has decided to underscore particular topics, which are felt to be of particular importance in the evaluation of the NATO or the bilateral SOFA ('status of forces') agreements through the prism of fundamental and human rights law. Moreover, even on the issues covered, the present opinion does not repeat all the findings and descriptions found in the opinion of the Venice Commission, where they are detailed.

Section 2 describes the legal framework under the NATO or the Bilateral SOFA ('status of forces') Agreements. Section 3 addresses the question how the human rights obligations of the EU Member States limit and shape the application of the NATO and the Bilateral SOFA agreements, in particular with reference to the alleged CIA activities (extraordinary renditions). Section 4 concludes that the requirements of fundamental and human rights, as derived from the EU Charter of Fundamental Rights and the international law of human rights, should be taken into account in the application of the NATO and the Bilateral SOFA agreements as these requirements limit the nature and scope of Member State obligations which may derive from the NATO or the bilateral SOFA ('status of forces') agreements. The obligations arising out of these treaties should not be seen as preventing Member States from complying with their human rights obligations. On the contrary, the Network emphasizes that these treaties must be interpreted and applied in a manner consistent with the Member States' human rights obligations under international law, and with their status as Member States of the Union bound to comply with certain common values referred to in Article 6(1) EU. Indeed, an implied condition of any agreement is that, in carrying it out, the Member States will act in conformity with international law, in particular human rights law.

2. The Essentials of the NATO or the Bilateral the 'Status-of-forces agreements' (SOFAs)

a) General Remarks

The lawfulness of the presence of the armed forces of one State on the territory of another State in peacetime is contingent on the consent of the host State. The consent of the host State is normally expressed in a two-stage procedure as follows: first, the initial decision to admit the forces takes the form of a bilateral or multilateral treaty, often defence agreements ; second, the receiving State makes a concrete decision in which the use of facilities on its soil is granted. This second decision is usually made through a further agreement between the two States concerned.

The 'Status-of-forces agreements' (SOFAs) between the host State and a State stationing military forces in the host State define the legal status of the sending State's personnel and property in the territory of the host State. They form an integral part of the overall military bases agreements that allow the military forces of the sending State to operate within the host State

SOFAs are usually bilateral. Bilateral SOFAs usually form an integral part of the overall military bases agreements that allow the sending State's military forces to operate within the host State. In addition, there exists a multilateral SOFA between NATO members, the NATO Status of Forces Agreement (SOFA) of 19 June 1951 (Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces).³

³ See <http://www.nato.int/docu/basicxt/b510619a.htm>, 13 April 2006.

The United States has concluded some 90 SOFAs. The EU Member States are party to a SOFA with the United States *either* on the basis of their membership in NATO⁴, *or* as States participating in Partnership for Peace (PfP)⁵. The ‘Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces’ and the Additional Protocol thereto, both done at Brussels on 19 June 1995, make applicable to the Contracting States the NATO Status of Forces Agreement, including the so-called Paris Protocol (the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, done at Paris, August 28, 1952). These agreements have been complemented by the Further Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces, done at Brussels, 19 December 1997.

b) The scope and essential content of SOFAs

SOFAs between the host State and a State stationing military forces in the host State define the legal status of the sending State’s military and civilian personnel, including their dependents, when such personnel are present in any such territory in connection with their official duties or, in the case of dependents, the official duties of their spouse or parent. SOFAs also define the legal status of the sending State’s property in the territory of the host State. As already noted, they usually form an integral part of the overall military bases agreements that allow the sending State’s military forces to operate within the host State.

In more detail, SOFAs regulate immigration requirements, documentation, the use of uniform, possession of arms, as well as a general requirement for those employed by the sending Contracting Party to comply with the laws of the receiving State. Typically, SOFAs guarantee a privileged position to the sending State’s military and civilian personnel, including their dependents, insofar as entry formalities are concerned. Accordingly, foreign armed forces whose admission has been consented to by the receiving State are not, as a rule, subject to the normal immigration controls and entry formalities applicable to foreign nationals. For instance, Article III.1 of the NATO-SOFA agreement provides that “members of a force shall be exempted from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State. They shall also be exempt from the regulations of the receiving State on the registration and control of aliens”. However, this waiver of entry procedures is counterbalanced by the requirement under Article III.2 that members of the force must present on demand identification, whether on entry or at any time thereafter, and an individual or collective movement order certifying the status of the individual as a member of a force. The receiving State enjoys discretion whether to require a movement order to be countersigned by its authorised representatives. Exemption from entry formalities is also made conditional on compliance with the formalities established by the receiving State relating to the entry and departure of a force or the members thereof.

It is common for SOFAs to authorize the sending State to have access to its forces and to the ports or airfields which it has been accorded in the host State. This authorisation is essential, as in relation to public vessels and aircraft there is no right of access under customary international law. It is, however, often the practice in bilateral treaties for entry to the ports of the receiving State to be subject to “appropriate notification under normal conditions” made to the authorities of the latter. Even more importantly, the sending State does not benefit from an unrestricted freedom of movement within, and overflight of, the receiving State, unless such rights are expressly granted in a base agreement. Finally, as this opinion will emphasize below, the national and international law that is applicable to military

⁴ The following 19 EU Member States are parties to the NATO : Belgium, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and United Kingdom.

⁵ The formal basis for the Partnership for Peace is the Framework Document (done at Brussels, on 10 January 1994), which sets out specific undertakings for each Partner country. The following EU Member States feature as Partnership for Peace (PfP) countries: Austria, Finland, Ireland and Sweden

bases cannot, and does not claim to, diminish the obligations and responsibilities of the EU Member States under Union law and human rights treaties.

The rules on jurisdiction are stipulated in Art. VII of the NATO SOFA. The distribution of jurisdiction between the sending State and the receiving State is typically as follows: When only the sending State's law is violated, the sending State has the power to exercise sole criminal jurisdiction. When only the receiving State's law is violated, the receiving State has the power to exercise sole criminal jurisdiction. When a crime violated the laws of both countries, there is concurrent criminal jurisdiction: the receiving State maintains primary jurisdiction except for offences committed solely against the property or security or member of the sending State force, or for offences arising out of any act or omission done by the sending State service member in the performance of official duty. In all other cases, the receiving State has the primary right to exercise jurisdiction. In cases of concurrent jurisdiction, the receiving State may relinquish jurisdiction through waiver requests from the sending State.

As a result of the regime thus established, the military authorities of the sending State as a rule shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction on the basis of the law of the sending State. As a rule, too, the receiving State cannot search foreign military bases on its territory unless this is allowed under the relevant treaties or unless the host State is authorised by the sending State to do so. This may constitute an obstacle to the effective exercise by the receiving State of its jurisdiction, in particular in order to enforce its domestic law where offences against that law are committed on such military bases.

The rules recalled above however do not result in a situation where an EU Member State is unable to ensure that there does not exist extraordinary rendition or associated practice, such as enforced disappearance, torture or other ill-treatment and incommunicado and secret detention in military bases within the framework of SOFAs. Such a conclusion would be entirely inappropriate, due to two distinct, yet inter-related reasons.

First, the receiving State does not abandon its sovereignty altogether when it consents to the presence of foreign armed forces on its territory. While it admits the enjoyment of the privilege of use of its territory accorded to the sending State, it nonetheless retains the right to regulate this privilege within the framework of applicable treaties and agreements. Therefore, the sending State acquires various powers pertaining to the operation of its defence forces on a territory that remains subject to the sovereignty of the host State. The sending State may lawfully claim in or over the territory of the receiving State, only those rights and powers that are connected directly with the establishment and operation of, and access to, the sites at which the foreign forces and installations are located. The principle of sovereignty of the territorial State dictates that any further rights and powers can derive only from an express grant by the receiving State. In particular, the extent of the right for the receiving State to search a foreign military base on its territory depends on the concrete terms of the defence agreement or of the "Status-of-forces agreement" (SOFA).

Second, SOFAs may not, nor do they claim to, diminish the obligations and responsibilities of the EU Member States under human rights treaties. The EU Member States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and SOFAs, where these are applicable, in a manner compatible with their human rights obligations. Moreover, EU Member States remain accountable under the European Convention on Human Rights and other human rights treaties binding upon them even if extraordinary rendition or associated practices are effected by foreign authorities in the exercise of their (alleged) jurisdiction under the terms of an applicable SOFA.

The following section elaborates further on these observations.

3. Human Rights Obligations of the EU Member States within the framework of SOFAs

a) *The applicability of the international law of human rights to SOFAs*

EU Member States are committed to respecting fundamental rights, as defined by a number of international treaties, both at the universal level (including the 1966 International Covenant on Civil and Political Rights (“ICCPR”), and the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and at the European level, in particular the 1950 European Convention on Human Rights, but also the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

With respect to the matters which form the object of the present opinion, the human rights which are at issue are primarily the right to liberty and security of the person and the ban on torture and other inhuman or degrading treatment or punishment. The opinion by the Venice Commission discusses these rights in detail and obviates the necessity of recapitulation.⁶

The basic argument that human rights law should be respected within the framework of SOFAs is based on the following well-established considerations in human rights law and public international law in general. The Network would recall, in terms which closely follow the opinion by the Venice Commission, the following principles on State responsibility and human rights law.

1. In accordance with general principles of international law, any good faith application of a human rights instrument entails a general obligation to prevent violations thereof. Reasonable and appropriate measures must be taken to avoid breaches of human rights. Hence, if there is a real risk that the adoption and subsequent implementation of a certain treaty would lead to violations of human rights, then effective respect for human rights requires the elimination of such a danger.
2. Where contracting parties fail to take human rights properly into account, or where a treaty leads to infringements of human rights whether or not such violations could be anticipated when the treaty was concluded, the parties concerned can be held responsible for such violations: the obligation to secure the enjoyment of human rights and fundamental freedoms continues to exist after the conclusion of a treaty with third parties. This is in conformity with the rule expressed in Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969, entitled ‘Application of successive treaties relating to the same subject-matter’ (see, specifically, Article 30 § 4, b)).⁷ The European Court of Human Rights has ruled that Article 1 ECHR, which requires the States Parties to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, “makes no distinction as to the type of rule or measure concerned”. The Court has also insisted that Article 1 ECHR “does not exclude any part of the member States’ ‘jurisdiction’ from scrutiny under the Convention. It is, therefore, with respect to their ‘jurisdiction’ as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention”. This necessarily entails that a State party to the Convention is also bound by its provisions when it is exercising its ‘jurisdiction’ under a certain treaty – and irrespective of whether the other State involved is party to the Convention. Where certain States parties to the European Convention on Human Rights have agreed to create between themselves an international organisation in particular, the Court has emphasized that the Convention ‘does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer’.⁸ A State Party to the European Convention on Human Rights is

⁶ See Opinion no. 363/2005 of the Venice Commission, paragraphs 49-61.

⁷ As explained by Special Rapporteur Fitzmaurice : “Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting” (G. Fitzmaurice, Third Report, *ILC Yearbook* (1958), vol. II, p. 43).

⁸ Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32.

therefore considered by the European Court of Human Rights to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.⁹

3. The duty of the States Parties to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention also includes positive obligations to protect individuals against infringements of their rights by third parties, be they private individuals or organs of third States operating within the jurisdiction of the State party concerned.¹⁰ The European Court of Human Rights has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security. Such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.
4. These considerations are even more compelling in situations involving a serious risk that a person would be subjected to the death penalty, torture or inhuman or degrading treatment or punishment. The European Court of Human Rights has stated on many occasions, even in the most difficult circumstances, such as the fight against terrorism and organised crime, that the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the ECHR and of Protocols Nos. 1 and 4, Article 3 makes no provision for limitations and no derogation from it is permissible under Article 15 § 2, not even in the event of a public emergency threatening the life of the nation. In this context, it is also worth underlining that Council of Europe Member States are under an obligation to prevent prisoners' exposure to the risk of torture: the violation does not depend on whether the prisoner is eventually subjected to torture. The assessment of the reality of the risk must be carried out on a case-by-case basis and very rigorously.

b) Member States' human rights obligations in respect of extraordinary renditions within the Framework of the NATO or the bilateral SOFA ('status of forces') agreements

General remarks

Member States may face practical difficulties in securing the effective enjoyment of human rights in military bases for foreign forces on their territory. Without prejudice to the wider question of how such difficulties can affect the scope of a Member State's obligations to secure human rights, the Network emphasizes that the case-law of the European Court of Human Rights makes it clear that the State has a duty to secure the most elementary rights at issue (right to security of person; freedom from torture and from inhuman or degrading treatments and right to life), regardless of acquiescence or connivance.

In its concluding observations, the Venice Commission noted that the obligations arising out of such multilateral and bilateral treaties as SOFAs do not prevent States from complying with their human rights obligations. These treaties must be interpreted and applied in a manner consistent with the Parties' human rights obligations.

The Venice Commission emphasized that an implied condition of any agreement is that, in carrying it out, the States will act in conformity with international law, in particular human rights law. The Venice Commission also felt that there is room to interpret and apply the different applicable treaties in a manner that is compatible with the principle of respect for fundamental rights. It insisted that this is an obligation for all Council of Europe member States. To highlight this point, the Venice Commission made a reference to the search of a state airplane which has presented itself as a civil aircraft. The Commission noted that such a search is allowed under the Chicago Convention and must be effected whenever there are reasonable grounds to suspect that the plane may be used to commit

⁹ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

¹⁰ See, inter alia, Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia* (Appl. N° 48787/99), judgment of 8 July 2004, para. 330-331.

human rights breaches. The Commission also noted that the relevant inter-state practice must be changed and adapted to this obligation, without however frustrating the legitimate aims pursued by the treaties in question. Diplomatic measures may also need to be taken. Finally, the Commission observed that to the extent that this due interpretation and application of the existing treaties in the light of human rights obligations is not possible, Council of Europe member States must take all the necessary measures to renegotiate and amend the treaty provisions to this effect.

While sharing these observations by the Venice Commission, the Network would recall the limited value which, in its view, may be afforded to diplomatic assurances provided by the State with whom the receiving State is bound by a 'status of forces' agreement or by a treaty containing clauses of a similar nature. This question is examined hereunder in greater detail.

The Network also notes that it is important to keep close track of how the Member States of the European Union will observe their human rights obligations within the framework of SOFAs.

Specific issues

In its opinion, the Venice Commission highlighted the following issues of particular concern: arrest and secret detention, inter-state transfers of prisoners and overflight. Regarding these issues, the Venice Commission reached the following conclusions which deserve to be quoted here in their entirety.

As regards arrest and secret detention, the Venice Commission reached the following conclusions:

- a) Any form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe member State concerned may remain accountable under the European obligations, such as they ensue from Article 3.
- b) Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the latter must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.
- c) The Council of Europe member State's responsibility is engaged also in the case where its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention without government knowledge, acting *ultra vires*. The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability for all form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.
- d) If a State is informed or has reasonable suspicions that any persons are held incommunicado at foreign military bases on its territory, its responsibility under the European Convention on Human Rights is engaged, unless it takes all measures which are within its power in order for this irregular situation to end.
- e) Council of Europe member States which have ratified the European Convention for the Prevention of Torture must inform the European Committee for the Prevention of Torture of any detention facility on their territory and must allow it to access such facilities. Insofar as

international humanitarian law may be applicable, States must grant the International Committee of the Red Cross permission to visit these facilities.

As regards inter-state transfers of prisoners, the Venice Commission reached the following conclusions:

f) There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected.

g) Diplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories.

h) The prohibition to transfer to a country where there exists a risk of torture or ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

As regards overflight, the Venice Commission reached the following conclusions:

i) If a Council of Europe member State has serious reasons to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3 of the European Convention on Human Rights, it must take all the necessary measures in order to prevent this from taking place.

j) If the state airplane in question has presented itself as a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, the territorial State must require landing and must search it. In addition, it must protest through appropriate diplomatic channels.

k) If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefore, the duty to submit to searches; if the overflight permission derives from a bilateral treaty or a Status of Forces Agreement or a military base agreement, the terms of such a treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.

l) In granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

m) With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

n) As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners or to grant unconditional overflight rights, for the purposes of combating terrorism. The Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (*jus cogens*), it does not give rise to an internationally wrongful act, and the prohibition of torture is a peremptory norm. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations.

The Network concurs in these conclusions by the Venice Commission insofar as issues of arrest and secret detention, inter-state transfers of prisoners and overflight may take place within the framework of SOFAs. In particular, the Network emphasises that the Member States of the European Union are not obliged to allow extraordinary renditions under SOFAs. The Network thus strongly warns against the tendency of thinking that the obligations arising out of these treaties would somehow prevent Member States from complying with their human rights obligations. The case is totally the opposite: these treaties must always be interpreted and applied in a manner consistent with the Member States' human rights obligations. In particular, the Member States are under the absolute duty to secure the most elementary rights at issue, i.e. the right to liberty and security of the person, freedom from torture and other inhuman treatment, and the right to life.

Although the Venice Commission does not exclude the use of diplomatic assurances, it has emphasized that 'when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories'. In a different context, the Network has underscored (in its Conclusions relating to the year 2005 (Concl. 2005, pp. 157-161); see also Concl. 2005, p. 81) that 'diplomatic assurances' cannot be a substitute for a verification, on a case-to-case basis, that a person facing the threat of removal (for instance in cases of extradition, expulsion or after being denied asylum, but also in situations where a person is under the jurisdiction of the host State and faces the threat of being removed from the territory by agents of a foreign State) will not be subjected to a real risk of torture, to other forms of inhuman or degrading treatment or punishment or to the death penalty, and that the security of that person will not be threatened. This position, which has been clearly expressed by the Special Rapporteur on Torture of the United Nations Commission on Human Rights to the General Assembly, is shared by international jurisdictions and the human rights treaties bodies. The Network relied in particular on the position adopted on 20 May 2005 by the UN Committee against Torture (CAT)¹¹. The Network also recalls the statement made by the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, in July 2004, according to which: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains"¹². As the Special Rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak¹³ took the view that States 'cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a

¹¹ UN Doc. CAT/C/34/D/233/2003, 20 May 2005, p. 34. The *Agiza* case in which this position was adopted is referred to hereunder in broader detail.

¹² Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document CommDH(2004)13, 8 July 2004, para. 9.

¹³ Manfred Nowak is also the expert for Austria of the EU Network of Independent Experts on Fundamental Rights and the main author of part III of this opinion.

person would be in danger of being subjected to torture or ill-treatment upon return'¹⁴. The Network of Independent Experts considers that, in the view of the status of the international norm prohibiting torture and of the absolute and unconditional character of this prohibition, this is the only acceptable position under international law.

III. The Protection from Torture and other Forms of Cruel, Inhuman or Degrading Treatment in E.U. Member States

1. Introduction

The second part of the opinion deals with the question on how protection from torture and other cruel, inhuman or degrading treatment is ensured in the E.U. Member States. The context in which an answer to this question is requested from the Network should be recalled.

On 15 February 2006, five special procedures of the United Nations Human Rights Commission published a joint report on the situation of detainees at Guantanamo Bay,¹⁵ in which they conclude, *inter alia*, that international human rights law is applicable in Guantanamo Bay, that the continuing detention of all persons held there amounts to arbitrary detention in violation of article 9 ICCPR, that the US Government violates the right to a fair trial before an independent tribunal as provided for by article 14 ICCPR, and that the detention facilities at Guantanamo Bay should therefore be closed without further delay by either releasing the detainees or charging them before an independent court for crimes which they allegedly committed. In the joint report, the five experts also express their 'utmost concern' about the 'attempts by the United States Administration to redefine torture in the framework of the struggle against terrorism in order to allow certain interrogation techniques that would not be permitted under the internationally accepted definition of torture'. These independent experts added that 'the confusion with regard to authorized and unauthorized interrogation techniques over the last years is particularly alarming. The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of article 7 of ICCPR and article 16 of the convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention. Furthermore, the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees under article 10(1) ICCPR to be treated with humanity and with respect for the inherent dignity of the human person. The excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces and force-feeding of detainees on hunger strike must be assessed as amounting to torture as defined in article 1 of the Convention against Torture'. The experts also noted that 'force-feeding of competent detainees violates the right to health as well as the ethical duties of any health professionals who may be involved'.¹⁶

It follows that the EU Member States are under an obligation to prohibit the removal from persons under their jurisdiction to Guantanamo Bay, or to any other location where such persons risk being subjected to torture or to forms of treatment which are considered cruel, inhuman or degrading under international law.¹⁷ Article 19(2) of the EU Charter of Fundamental Rights states that 'No one may be

¹⁴ UN doc. A/60/316, 30 August 2005, at para. 51-52.

¹⁵ The UN Report on the „Situation of detainees at Guantanamo Bay“ was submitted jointly by the Chairperson of the Working Group on Arbitrary Detention and the Special Rapporteurs on the independence of judges and lawyers, on torture, on freedom of religion and on the right to health: See UN Doc. E/CN.4/2006/120 of 5 February 2006.

¹⁶ Ibid, paras. 83 to 88 and 94.

¹⁷ The Network has also emphasized in its Conclusions relating to the year 2005 (pp. 143-144) that there exists an absolute prohibition on returning a person to a State where he or she risks being sentenced to death. This prohibition can be inferred from the undertaking of the Member States of the European Union with regard to Article 6 of the International Covenant on Civil and Political Rights, as interpreted by the United Nations Human Rights Committee (Human Rights Committee, *Judge v. Canada*, communication n° 829/1998, final views of 20 October 2003, ONU doc. CCPR/C/78/D/829/1998 (2003)). The Member States of the European Union have all ratified Protocols Nos. 6 and 13 to the European Convention on Human Rights. Consequently, they are States that have abolished the death penalty within the meaning of Article 6(2) of the

removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. This provision restates Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It should be read also in accordance with the requirements formulated by Article 7 of the International Covenant on Civil and Political Rights (1966), by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984) (CAT) and by Article 33 of the Convention relating to the Status of Refugees (1951). These provisions impose an absolute prohibition on removing a person to a territory where that person runs a real risk of being subjected to forms of treatment which amount to torture or to cruel, inhuman or degrading treatment or punishment.

The European Parliament should clearly reiterate its support for this fundamental guarantee provided under the international law of human rights. In the case of *Ramzy v. the Netherlands* (Appl. N° 25424/05), currently pending before the European Court of Human Rights, the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, who have been given leave to intervene in support of the Dutch government's position, are taking the view that suspected terrorists might be expelled in conditions which, if the persons concerned did not represent such a serious threat to the community of the expelling State, would be in violation of Article 3 ECHR. While these governments do not challenge the absolute nature of the prohibition in Article 3 against a Contracting State itself subjecting an individual to Article 3 ill-treatment, they insist however that, 'the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism'; that 'it is necessary and appropriate for all the circumstances of a particular case to be taken into account in deciding whether or not a removal in the situation set out above is, or is not, compatible with the Convention - national security considerations cannot simply be dismissed as irrelevant in this context'.¹⁸ These governments are asking the European Court of Human Rights to overrule the *Chahal v. the United Kingdom* judgment it delivered on 15 November 1996, where the Court clearly identified an *absolute* prohibition to expel, extradite, or return a person to a State where he or she would be facing a serious risk of torture or of treatment or punishment contrary to Article 3 ECHR, explicitly dismissing as without relevance the seriousness of the offences committed by that individual or the threat that person would represent for the national security of the expelling State. In its conclusions and recommendations relating to the year 2005, the Network expresses its deep concern about this attempt to move the clock of human rights backwards.

The question addressed to the Network of Independent Experts concerns the legal and practical measures which the EU Member States have adopted in order to ensure that they comply with their obligation, clearly stipulated under international law, to protect persons under their jurisdiction from being removed to locations where they run a real risk of being tortured or subjected to cruel, inhuman or degrading treatments and punishments.

In order to gather accurate information in this regard the Network undertook a survey of the 25 E.U. Member States. For each State, the experts sought to answer the following questions :

- 1) Is torture a crime under the domestic law in your country as required by Art. 4 CAT? Please provide the relevant text including the penalty.
- 2) How has the principle of non-refoulement in relation to torture (Art. 3 CAT) been implemented in domestic law? Please provide the relevant texts in all laws relating to expulsion/extradition/deportation/transit and transfer of sentenced persons.

International Covenant on Civil and Political Rights. Moreover, the European Court of Human Rights has also considered that 'it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by [a decision to return a person] in circumstances where the [returnee] has suffered or risks suffering a flagrant denial of justice in the requesting country' (Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 32 (citing the judgment of the Court in *Soering v. the United Kingdom* of 7 July 1989, p. 45, § 113, and, *mutatis mutandis*, the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 34, § 110; Eur. Ct. HR (GC), *Mamatkulov and Askaraov v. Turkey* (Appl. n° 46827/99 and 46951/99) judgment of 4 February 2005, § 88).

¹⁸ Observations of the governments of Lithuania, Portugal, Slovakia and the United Kingdom, presented to the European Court of Human Rights in the case of *Ramzy v. the Netherlands*, 21 November 2005.

- 3) Does your domestic law provide for any independent national mechanisms to visit places of detention as foreseen in the Optional Protocol to the UN Convention Against Torture?
- 4) Are there any places of detention in your country where the CPT and/or national monitoring bodies entrusted to carry out visits to places of detention have no access? In particular, are there any military bases of the United States/NATO where people might be detained without any possibility of domestic bodies to monitor possible torture practices?
- 5) Are there any domestic investigations carried out in relation to CIA rendition flights? If so, can you provide us with the results of these investigations?
- 6) Does your domestic law provide for the possibility of searching civil or State aircrafts landing on your territory (e.g. for the purpose of re-fuelling) in case of suspicion that these aircrafts carry detainees and/or that these persons might be subjected to torture, cruel, inhuman or degrading treatment? Does your domestic law provide for any possibility to prevent these aircrafts to continue transporting detainees to countries where there exists a substantial risk of being subjected to torture?
- 7) Do you know of any cases after 11 September 2001 in which the authorities of your country have actively participated in CIA rendition flights?
- 8) Do you know of any cases after 11 September 2001 in which the authorities of your country have taken action to prevent CIA rendition flights and/or to protect CIA detainees against torture, cruel, inhuman or degrading treatment, including the principle of non-refoulement?

Questions 1 to 3 concern the legal framework within the Member States in respect to the protection from torture and cruel, inhuman or degrading treatment and punishments, the legal protection against *refoulement*, i.e. provisions that guarantee that no individual is sent to a country where he or she might face a substantial risk of being tortured, and the existence of national mechanisms authorised to inspect places of detention within the Member States. This legal framework is addressed in section 2 of this part of the opinion.

Question 4 asks whether factually there are places, such as foreign military bases, within the EU Member States where the CPT and/or national monitoring mechanisms have no access. The first part of the opinion has focused on the legal background. Section 3 in this part of the opinion examines the practical question of whether the EU Member States have adopted all the necessary measures which ensure an adequate protection of all persons under their jurisdiction from the risk of being detained and removed in conditions which would violated the norms of international law which Article 19(2) of the EU Charter of Fundamental Rights recapitulates.

Finally, questions 5 to 8 are particularly concerned with CIA rendition or “extraordinary rendition” flights within the airspace of the Member States of the European Union and on its airfields. This question is addressed in Section 4 of this part of the opinion.

The answers of the independent experts to the questions cited above form the basis of this part of the opinion. They were completed by other sources of information, such as the respective State reports to the UN Committee Against Torture and the CAT Committee’s concluding observations and recommendations, the Report of the Council of Europe Secretary General following the use of his powers under Article 52 ECHR as referred to above and the national contributions to this report, results of investigations or opinions by specifically established mechanisms of the Council of Europe as well as the European Parliament, reports from non-governmental organisations and media sources.

2. The legal framework applicable to torture and the protection from *refoulement*

a) Torture as a crime under domestic law

Article 4 CAT obliges the States parties to make torture a crime under domestic law, which should be made punishable with adequate sanctions.

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

The definition of torture under domestic law should reflect the definition given in Article 1 CAT, according to which torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. Those issuing an order to carry out torture are guilty of complicity or participation in the sense of article 4(1). Attempted torture should also be made punishable.

With regard to Article 4(2), while the Committee Against Torture as a whole did not comment on the appropriate level of sentences for torture, based on individual opinions of members, it is possible to conclude that the range within which such sentences for the offence of torture should fall would be somewhere between 6 and 20 years of imprisonment.¹⁹

The analysis of the replies given by the independent experts shows that the E.U. Member States are far from conforming to their obligations under Article 4 CAT. Member States fall largely into two main categories: States whose criminal laws explicitly make torture a crime and States who do not. In the former category one can make a division between States, where the definition satisfies the criteria set out by CAT (or is even broader) and where the sanctions correlate to the severe nature of the crime and States where this is not the case.

Category 1. Those States whose criminal laws explicitly make torture a crime include Belgium, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Luxembourg, Malta, the Netherlands, Portugal, the Slovak Republic, Spain and the United Kingdom.

However, within this category, in order for these States to comply with the requirements of Article 4(1) CAT, there must be a definition of torture in national legislation which complies with the criteria set out in Article 1 CAT and “adequate sanctions” as laid down in Article 4(2). It is unfortunate to note that, based on the responses of the independent experts and on the findings of the Committee Against Torture in the State reporting procedure, it would appear that some of those Member States whose criminal laws do explicitly make torture a crime, have either failed to incorporate a definition of torture altogether, do not adequately incorporate or at least not with the requisite amount of clarity, the definition of torture in their national legislation. This makes it also difficult to establish whether or not the penalties provided for are appropriate in the given circumstances.

For instance, while explicitly criminalising acts of torture, the **Netherlands** has failed to adopt a definition of torture.²⁰ In relation to **Estonia**, the Committee Against Torture pointed out that the definition of torture contained in Article 122 of the Penal Code as “continuous physical abuse or abuse which causes great pain” did not make adequately plain that *mental* suffering was also encompassed within the definition and therefore did not comply fully with Article 1 of the Convention. The Committee noted that, according to the delegation, Article 122 protects physical as well as mental health, but it was of the opinion that the wording of the article might lead to restrictive interpretations as well as confusion.²¹ It recommended that the State party incorporate into the Penal Code a definition of the crime of torture that fully and clearly responded to Article 1 of the Convention.²² While welcoming the possible direct applicability, under the Estonian Constitution, of the definition of

¹⁹ See references in C. Ingelse, *The UN Committee Against Torture: An Assessment*, Chapter 11, § 3.1.2.

²⁰ A/55/44, paras.181-188.

²¹ CAT/C/CR/29/5, §C5(b). 23rd December 2002.

²² CAT/C/CR/29/5, §D6(a).

torture set out in Article 1 of the Convention,²³ the Committee expressed concern that Article 1 of the Convention has not yet been directly applied by magistrates, and that the direct application of international human rights treaties, although possible in theory, is not widely practised in the courts.²⁴ The CAT pointed out in April 2006, that the **French** Criminal Code does not contain a definition of torture that is in conformity with Article 1 of the Convention, “an omission that can lead to confusion and adversely affect the collection of relevant data”. It recommended that “a distinction be drawn between acts of torture committed by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity, and acts of violence in the broad sense committed by non-State actors”.²⁵

Category 2: Those States whose criminal laws do not explicitly make torture a crime include Austria, Denmark, Finland, Hungary, Latvia, Lithuania, Poland, Slovenia, and Sweden

All States of the second category prefer to rely on traditional offence definitions, such as assault, ill-treatment or abuse of power provision in their criminal codes.

Defining and criminalising torture is important for a number of reasons which have been stressed by the Committee Against Torture in the State reporting procedure. Firstly, in explicitly making torture a specific offence as opposed to the traditional offence definitions, such as ill-treatment or abuse of power, with more severe penalties for public officials, a State party reinforces the moral abhorrence of the use of torture and acknowledges it as a threat to the very foundation of democracy.²⁶ At the same time such incorporation makes it easier to collect statistical data on the incidence of torture within each country and to compare implementation and practices across countries.²⁷ After ratification of the CAT many States continue to be opposed to changing their criminal codes. Taking **Austria** as an example, during the consideration of the Austrian report in 2005, Austria had argued that the existing provisions of the Penal Code were effective in preventing torture and that to introduce a special provision including the definition from the Convention in Austrian legislation would lead to duplication.²⁸ Another reason given by Austria for not having incorporated in its domestic legislation a definition of torture in line with that of the Convention was that it considered that its compliance with various national and international provisions afforded a higher degree of protection.²⁹ Mr. El Masry, Country Rapporteur drew attention to the fact that the present legal system in Austria recognised three different definitions of torture, which caused confusion and led to problems in data collection noting that a lack of conformity in the definition of torture could undermine efforts to eliminate that practice.³⁰ The Chairperson added that the purpose and circumstances of torture had an impact not only on the type of penalty imposed, but also on the application of universal jurisdiction. The latter was not compulsory but could be lawful in certain situations and the Committee attached great importance to information on State practice in that connection with a view to combating impunity for international crimes.³¹ **Denmark** is of the opinion that this was “legally unnecessary and only had symbolic value” preferring that torture be covered by provisions on violence and threats. In **Finland** torture is indirectly made a crime in domestic law under the provisions in the Penal Code related to assault and grave assault. The Committee reiterated its recommendation in 2006 that Finland enact specific legislation criminalizing torture in all its forms, as defined in Article 1 CAT.³² In **Hungary** torture is also only indirectly covered by a set of rules regarding coercion, violation of personal freedom, kidnapping, malfeasance in office, abuse of authority, mistreatment in official proceedings, unlawful detention, and crimes against the person and sexual morality. **Latvia** only mentions torture as an aggravating factor to other crimes such as intentional serious bodily injury and intentional moderate bodily injury. In **Lithuania** torture falls under the provision in the Criminal Code on “injury, torture or

²³ UN Doc. CAT/C/CR/29/5, B 4 (c).

²⁴ UN Doc. CAT/C/CR/29/5, C 5 (a).

²⁵ UN Doc. CAT/C/FRA/CO/3.

²⁶ UN Doc. CAT/C/SR.415.

²⁷ UN Doc. CAT/C/SR.534, §19.

²⁸ UN Doc. CAT/C/SR.679, §7.

²⁹ UN Doc. CAT/C/SR.679, §55.

³⁰ Mr. El Masry, Country Rapporteur, UN Doc. CAT/C/SR.679, §20.

³¹ UN Doc. CAT/C/SR.679, §50.

³² UN Doc. CAT/C/SR/34/FIN.

other cruel, inhuman or degrading treatment of persons protected under international humanitarian law” and “serious health impairment”. Although the Criminal Code of **Slovenia** refers to torture, it is not made a crime and remains undefined.³³ Finally, torture in **Sweden** is encompassed under the crime of assault. In 2002 the Committee recommended that Sweden incorporate in its domestic law the definition of torture set out in Article 1 of the Convention, and should characterise acts of torture and cruel, inhuman and degrading treatment as specific crimes, punishable by appropriate sanctions.³⁴

Finally, turning to Article 4(2) and the question of adequate sanctions, bearing in mind the individual opinions of the Committee against Torture in its state reporting procedure, the Network would conclude a sentence of 2 years such as the case in **Austria** for maltreatment of a prisoner by a law enforcement agent would be too lenient whereas, a sentence of life imprisonment as provided for in, for instance, **Greece, Ireland, Luxembourg, the Netherlands** and the **United Kingdom**, would be too serious.³⁵

b) The principle of non-refoulement under domestic law

According to Article 3(1) CAT “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” According to Article 3(2), “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Specific provisions must exist in domestic law preventing expulsion, return (refoulement) and extradition to a country where there is a danger of torture being inflicted.³⁶ If there is no specific provision in domestic law then Article 3 must be directly applicable if the Convention is to be complied with.³⁷ Legal measures should also be taken to implement Article 3(2) which requires that the competent authorities take into account relevant considerations, including the existence in the State concerned of a consistent pattern of gross violations of human rights.³⁸

The EU Member States’ domestic systems in general contain various provisions regarding **expulsion** (a legal sanction against non-citizens), **extradition**, (on request of another State that wishes to exercise its jurisdiction over the person concerned), **deportation** (of aliens whose asylum claims were not successful), **return** (of an alien at the border of a State), and **transit** or **transfer** of indicted persons by foreign authorities.

Refoulement of asylum-seekers whose claim to asylum has been rejected.

Generally, it must be noted that the majority of EU Member States foresee non-refoulement provisions in their laws on asylum and the treatment of aliens that comply with the UN Convention relating to the Status of Refugees of 1951 (Refugee Convention). According to this convention no person shall be deported or returned to a country where he or she has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

³³ UN Doc. CAT/C/CR/30/4

³⁴ UN Doc. CAT/C/CR/28/6

³⁵ UN Doc. CAT/C/SR.234, §41, 51 and 76.

³⁶ UN Docs. CAT/C/SR.26, §34; CAT/C/SR.34, §24; CAT/C/SR.34, §37; CAT/C/SR.34, §72; CAT/C/SR.52, §19; CAT/C/SR.59, §24; CAT/C/SR.61, §74; CAT/C/SR.77, §35; CAT/C/SR.79, §40; CAT/C/SR.90, Add.1, §44; CAT/C/SR.91, §54; CAT/C/SR.92, §51; CAT/C/SR.93, §26; CAT/C/SR.98, §44; CAT/C/SR.158, §66; CAT/C/SR.195, §9; CAT/C/SR.164, §53; CAT/C/SR.166, §39; CAT/C/SR.169, §71

³⁷ UN Docs. CAT/C/SR.26, §23; CAT/C/SR.26, §29; CAT/C/SR.65, §19. CAT/C/SR.89, §58; CAT/C/SR.92, §51; CAT/C/SR.93, §45; CAT/C/SR.108, §30; CAT/C/SR.145, §30; CAT/C/SR.168, §48

³⁸ UN Doc. CAT/C/SR.93, §37

Other forms of removal

Article 3 CAT is much wider than the provisions contained in the Refugee Convention, which only apply to asylum seekers and refugees.³⁹ A person could very well not be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and still be at risk of torture.⁴⁰ The Committee has confirmed on a number of occasions, the absolute nature of Article 3⁴¹. Article 3 should be applicable to all aliens not only to refugees⁴² but also to others without such status⁴³ and including those who have not requested asylum⁴⁴. Common criminals cannot be excluded from the application of Article 3⁴⁵ nor can those persons considered to be “threats to national security”⁴⁶. Because of these differences the Network would like to reiterate that it is not sufficient for EU Member States to refer to general non-refoulement clauses under refugee and asylum laws in order to comply with Article 3 CAT.

A number of States claim that an explicit provision regarding the prohibition of expulsion/extradition/deportation in the case where the person concerned faces a serious risk of being tortured is not necessary as their laws generally oblige all public officials to act in accordance with their Constitutions, which often foresee a prohibition of torture, and international agreements, like the ECHR, the CAT, and the ICCPR. For example, in **Austria** the ECHR has the status of constitutional law and is directly applicable to any act of a public official. Also in **Belgium**, judges must apply Article 3 ECHR when deciding on expulsion or extradition and Article 3 CAT is applicable in cases where the authorities wish to return a foreigner at the border. According to the **Greek** Constitution, Article 3 CAT is directly applicable in cases of expulsion/extradition/deportation/transfer. Apart from this general constitutional rule the only explicit norm in Greek laws relates to the judicial expulsion of minors, according to which the deciding tribunal must take into consideration the serious risk to life, physical integrity or personal or sexual liberty of the minor in the country of return.⁴⁷ Regarding deportation, the **Maltese** Immigration Act refers to Malta’s international obligations in cases of deportation. All other forms of return are governed by the direct applicability of the ECHR. No specific reference to the principle of non-refoulement in the sense of Article 3 CAT can be found in **Portuguese** laws. However, the Portuguese authorities are expressly obliged to apply international human rights treaties when cooperating with other States in criminal matters, like in extradition procedures.⁴⁸ The **Slovenian** Constitution establishes that extradition of aliens shall only be permitted in accordance with international treaties.

While general provisions linking the legality of any public act to the application of international obligations are desirable, the Network is of the opinion that such general clauses alone do not seem to be sufficient to guarantee a high degree of protection against torture in the receiving countries. They should be reinforced by specific provisions, not only at the constitutional level, in order to raise the awareness of the public authorities who have to implement expulsion/extradition/deportation decisions. Indeed, this is linked in a way to the positive obligation under Article 3 CAT to ensure that public officials have been made aware of their obligations and received special training or instructions on their Article 3 related obligations⁴⁹; border police in particular should be trained in order to recognise torture victims and to ensure that bona fide victims are not sent back.⁵⁰ Immigration officials

³⁹ UN Docs. CAT/C/SR.13, §27; CAT/C/SR.12, §27; CAT/C/SR.52, §6; CAT/C/SR.65, §60; CAT/C/SR.79, §10

⁴⁰ UN Docs. CAT/C/SR.65, §60; CAT/C/SR.91, § 54.

⁴¹ UN Doc. CAT/C/SR.77, § 26.

⁴² UN Doc. CAT/C/SR.28, § 77.

⁴³ UN Doc. CAT/C/SR.63, § 37.

⁴⁴ UN Doc. CAT/C/SR.52, § 62.

⁴⁵ UN Doc. CAT/C/SR.32, § 15.

⁴⁶ UN Docs. CAT/C/SR.12, § 21; CAT/C/SR.126, § 51.

⁴⁷ Article 74 of the Greek Criminal Code.

⁴⁸ Law 144/99, of 31 August, on International Cooperation on Criminal Matters.

⁴⁹ CAT/C/SR.195, §9

⁵⁰ CAT/C/SR.12, §37; CAT/C/SR.10, §24; CAT/C/SR.13, §25; CAT/C/SR.126, §37; CAT/C/SR.197, §23;

carrying out refugee status reviews should also receive training on their obligations under the Convention.⁵¹

Expulsion for reasons of public order. Some countries foresee a clear prohibition of expulsion as a criminal sanction against non-citizens in cases where the person concerned faces a valid threat that he or she will be subjected to torture. These countries include the **Czech Republic, Germany, Ireland** and **Lithuania**. In certain countries, such a prohibition is only made explicit with regard to certain categories of persons, such as persons who were granted subsidiary or temporary protection under refugee law (**Cyprus**) or persons who have obtained the status of refugee (**Hungary**).

Extradition. Extradition, i.e. the handing over of a person on request of another State that wishes to exercise its jurisdiction over this person or for execution of a court sentence, is explicitly prohibited in **Ireland** if there are substantial grounds for believing that the extradited person is in danger of being subjected to torture. The same is true in **Lithuania** and **Luxembourg**. Other countries have specific provisions regarding the inadmissibility of extradition of asylum seekers, refugees or persons under temporary protection, like **Cyprus, Hungary** and **Latvia**. **Estonian, Germany**, and **Polish** laws also provide for specific provisions that an extradition request is inadmissible if this cooperation is “in contradiction with general principles of the law, like the main international obligations” (Estonia), or the outcome of such cooperation is “patently incompatible with the law” (Germany), or if it would “contravene the law” (Poland).

The prohibition on extraditing persons to countries where they face the death penalty and corresponding domestic provisions are often quoted by Member States.⁵² For example, in the absence of written guarantees, the laws of **Austria, Belgium, Denmark, Estonia, Finland, Hungary, Portugal**, the **Slovak Republic** and the **United Kingdom** provide for a prohibition of extradition in cases where the person would face the death penalty in the requesting State. At the same time, some States have legislation prohibiting extradition if there is a real risk that the person concerned will be subjected to a flagrant breach of the right to a fair trial as guaranteed by Article 6 ECHR (e.g. the **Netherlands**). While welcome, standing alone, such provisions can not be deemed sufficient to cover a Member State’s obligations under Article 3 CAT.

A problematic issue in regard to extradition is if it is left to the discretion of a governmental Minister to decide whether an extradition shall be permitted or not, like in the case of the **Slovak Republic**. Even though it can be argued that the respective Minister is also bound by international human rights treaties in his decision the Committee Against Torture has noted that under the CAT, States parties are not allowed any discretion in regard to Article 3 CAT.⁵³

Deportation of foreigners without legal status in E.U. Member States is mainly governed by principles of the Refugee Convention. Nevertheless, a number of E.U. Member States make the risk of torture in the country of origin an explicit reason for inadmissibility of deportation, like the **Czech Republic, Finland, Germany, Hungary, Ireland, Poland** and **Sweden**. In addition to the prohibition of deportation, some States consider the risk of torture a reason for granting subsidiary or temporary protection, “alternative status”, or providing the aliens in question with a residence permit, like **Cyprus, Denmark, Latvia**, and the **Netherlands**.

The **Czech** Law amending the Aliens/Asylum Act provides that a person can be deported regardless of the risk of torture if he or she is a danger to security or has been convicted for a serious crime. The Network reiterates in that respect the absolute nature of Article 3, which has been recalled in the introductory section of this part of the opinion.⁵⁴ Common criminals cannot be excluded from the application of Article 3⁵⁵ nor can those persons considered to be “threats to national security”.⁵⁶

⁵¹ CAT/C/SR.91, §22

⁵² See Eur. Ct. HR, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A, n° 161.

⁵³ UN Doc. CAT/C/SR.91, § 17.

⁵⁴ See also UN Doc. CAT/C/SR.77, §26

⁵⁵ UN Doc. CAT/C/SR.32, §15

Transit or transfer of persons. Finally, the provisions regulating transit or transfer of persons in the E.U. Member States seldom take into account a risk of torture when providing permission to transit or transfer. Only the general rule of direct application of international treaties apply in a number of States (see above), or there is a general prohibition of cooperation in criminal matters if it contravenes domestic laws and principles (**Estonia, Germany, Poland**). In the **Slovak Republic** bilateral agreements with Poland, Hungary, Slovenia and Austria contain specific clauses on this matter. In **Spain**, the transit of a sentenced person can only be effected in a manner which “respects the dignity and rights of the individuals”⁵⁷.

c) National monitoring mechanisms

The Optional Protocol to the United Nations Convention Against Torture (OPCAT)⁵⁸ foresees the establishment of a system of regular visits by independent international and national bodies to places of detention in order to prevent torture and other forms of ill-treatment. All States parties have an obligation to create or, if it already exists, to maintain such a national system within one year after the entry into force of the OPCAT or, once it is in force⁵⁹, one year after the ratification or accession. The OPCAT sets out specific guarantees and safeguards which must be respected by States parties in order to guarantee the effective and independent functioning of these bodies and to ensure that they will be free from undue interference. For instance, States must make available the necessary resources. States are left free to establish the form that these mechanisms will take whilst at the same time paying due regard to the Paris Principles.⁶⁰

Denmark, Malta, Poland, Spain, Sweden and the **United Kingdom** have ratified OPCAT. The following EU Member States have neither signed, nor ratified OPCAT: **Germany**,⁶¹ **Greece, Hungary, Ireland, Latvia, Lithuania, the Slovak Republic** and **Slovenia**. Other EU Member States have signed but not ratified OPCAT: **Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Italy, Luxembourg, the Netherlands** and **Portugal**.

The EU member States can be divided into three categories:

- Firstly, those Member States who explicitly provide for national monitoring mechanisms in their domestic laws and who already have functioning national mechanisms which largely comply with the requirements of OPCAT. These countries include; The **Czech Republic, Denmark, Finland, Latvia, the Netherlands, Poland, Portugal, Slovenia, Sweden** and the **United Kingdom**. This opinion cannot be taken as a definitive judgement on compliance or non compliance with OPCAT however as concerns have been expressed regarding, for instance, the possible limited human resources available to certain national mechanisms (e.g. **Czech Republic, Poland, Slovenia**).
- Secondly, those EU Member States which do have national monitoring mechanisms but where these mechanisms do not largely comply with the provisions of OPCAT for one or more than one of the following reasons; there is no explicit provision establishing the monitoring mechanism in domestic law; the monitoring mechanism is not functionally independent; it cannot visit all places of detention; it is only reactive in nature. These countries include the following; **Austria, Belgium, Cyprus, Estonia, France, Greece, Ireland, Lithuania, Malta** and the **Slovak Republic**.

⁵⁶ UN Doc. CAT/C/SR.12, §21; CAT/C/SR.126, §51.

⁵⁷ Article 18 of the Law 1/1979 of 26 September.

⁵⁸ The Optional Protocol was adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

⁵⁹ OPCAT currently has 18 ratifications. It will enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

⁶⁰ See Part IV OPCAT on national preventive mechanisms <http://www.ohchr.org/english/law/cat-one.htm>. See also, the Principles relating to the Status of National Institutions (Paris Principles) <http://www.ohchr.org/english/law/parisprinciples.htm>.

⁶¹ On 26 April 2006, the federal government of Germany expressed its intention to sign OPCAT. The ratification is intended for 2007.

- Thirdly, those Member States which do not have such monitoring mechanisms. These countries include; **Germany, Hungary, Luxembourg and Spain**. It should be noted that Germany and Spain are currently in the process of setting up such a national body.

3. Access of the CPT and national monitoring bodies to places of detention

Based on the information which the Network has received, the following EU Member States do not have US/NATO military bases on their territory and there have been no instances in which the CPT or a national monitoring body⁶² has asked for, but been refused access to, any places of detention: **Austria, Cyprus (government controlled area), Czech Republic, Estonia, Finland, France, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovak Republic, Slovenia, Sweden.**

As far as the Network is aware, in the following countries, which do have US/NATO military bases on their territory, neither the CPT nor the national monitoring bodies have had access to these facilities; **Belgium, Denmark⁶³, Germany⁶⁴, Greece, Hungary, the Netherlands, Spain⁶⁵, and the United Kingdom.⁶⁶**

In the cases of the above countries, to the knowledge of the Network, there have been no instances where the CPT or, where applicable, the national monitoring body has been refused access to any other place of detention. In the absence of any information to the contrary, the Network can therefore presume that the CPT has never asked for access to US/ NATO military bases in EU Member States.

⁶² Where one exists, see preceding section, c).

⁶³ The only United States military base within the Danish Kingdom is the Thule Air base in Greenland. The main basis for the American presence in Greenland today is the 1951 Agreement on the Defense of Greenland. It follows from the amended Agreement that the provisions on jurisdiction of the NATO Status of Forces Agreement (NATO SOFA) apply. According to the 1951 Agreement “The Government of the United States of America shall have the right to exercise exclusive jurisdiction over those defense areas in Greenland”, the CPT and/or national monitoring bodies will therefore not be able to access the Thule Air Base, since the areas are not within Danish jurisdiction. The provisions of the NATO Status of Forces Agreement are not seen to alter this point of departure.

⁶⁴ In premises made available by the Federal Republic of Germany to the armed forces of foreign states signatory to the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO Status of Forces Agreement) of 19 June 1951 and to the Agreement to Supplement the Agreement between the Parties of the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Supplementary Agreement to the NATO Status of Forces Agreement) of 3 August 1959 for their executive use, the military police of the force have in principle the right to exercise police powers (Article VII, paragraph 10 (a), NATO Status of Forces Agreement). However, without prejudice to the above-mentioned provisions, the German police are entitled to exercise their authority within such accommodation to the extent that the public order and safety of the Federal Republic of Germany are jeopardized or violated (Article 28 of the Supplementary Agreement to the NATO Status of Forces Agreement).

⁶⁵ There are four NATO military bases in Spain: Rota (Cádiz), Morón (Sevilla), Cartagena (Murcia) et Torrejón de Ardoz (Madrid). Other military bodies are connected with NATO operations.

⁶⁶ The following bases/facilities/ United States bases are publicly acknowledged to exist in the United Kingdom: Beck Row Family Hsg, Yildenhall, US Air Force; Eriswell Family Hsg Annex, Eriswell, US Air Force; Ipswich Storage Site, Ipswich, US Air Force; JMF St Mawgan, St Mawgan, US Navy; Lynn Wood Family Hsg, Thetford, US Air Force; NAVACT London UK, London, US Navy; Newmarket Fam Hsg Anx No 3, Newmarket, US Air Force ; RAF Alconbury, Alconbury, US Air Force; RAF Barford St John Transmitter Annex, Barford St John, US Air Force ; RAF Bicester, Bicester, US Air Force; RAF Chelveston Fam Hsg Anx, Rushden, US Air Force; RAF Croughton, Croughton, US Air Force; RAF Digby, Lincolnshire*; RAF Fairford, Fairford, US Air Force ;RAF Feltwell, Feltwell, US Air Force; RAF Fylingdales*; RAF Hythe, US Army; RAF Lakenheath, Lakenheath, US Air Force RAF Leuchars, Scotland*; RAF Mildenhall, Mildenhall, US Air Force; RAF Mildenhall Storage Annex, Mildenhall, US Air Force; RAF Mildenhall Waste Annex, Mildenhall, US Air Force RAF Molesworth, Thrapston, US Air Force; RAF Molesworth Storage Anx No 12, Molesworth, US Air Force; RAF Oakhanger*; RAF Shepherds Grove Family Hsg Annex, Stanton, US Air Force ; RAF Upwood, Upwood, US Air Force; RAF Welford A m m o S t o r A r e a , N e w b u r y , U S A i r F o r c e . In addition it is claimed at http://www.kelebekler.com/occ/bas_gb.htm that there are some 31 installations for which no further details are available – although it does not list those marked* – and the United States has two bases in British Indian Ocean Territory: Diego Garcia, Diego Garcia, US Navy; Diego Garcia, Diego Garcia, US Air Force and one at RAF Ascension Island, Ascension Island in the Atlantic Ocean.

4. “Extraordinary Renditions”

The following paragraphs are concerned with the practice of CIA rendition flights and their legal as well as factual impact on Member States of the European Union. The main focus is put on what became known as “extraordinary renditions”, i.e. transfers of detainees which are not in accordance with the law.⁶⁷ “Extraordinary renditions” infringe on various national and international laws, like the Convention on International and Civil Aviation of 7 December 1944 (Chicago Convention) and other bilateral aviation agreements, the principle of sovereignty and domestic laws regulating the legality of activities of foreign agents on the host State’s territory, and, most importantly, a number of human rights provisions, including the right to personal liberty, freedom of movement and the prohibition of arbitrary expulsion, the right to a fair trial and, finally, the right not to be subjected to torture or other forms of cruel, inhuman or degrading treatment or to be brought to a country where there are substantial grounds for believing that the personal risk to be tortured is high (principle of non-refoulement).⁶⁸

The concept of “extraordinary rendition” is not new⁶⁹ and was practiced already before 11 September 2001. After the attacks, media reports of such flights increased in the course of the “war on terror” and occasionally certain EU Member States were mentioned in the context of rendition flights.⁷⁰ In early 2005, the media and NGOs started to point out that the problem of “extraordinary rendition” was not only an issue that concerned the United States of America but that European States played a role in at least condoning this illegal practice by giving permission to the use of their airspace and airports.⁷¹ As has been recalled in the introduction to this opinion, after reports emerged about United States’ secret places of detention within Europe⁷², the Council of Europe and the European Union reacted by setting up investigative mechanisms in order to clarify the involvement of European States and to reiterate their legal obligations in this respect. In addition to detailed media reports⁷³ and well-researched contributions from non-governmental organisations⁷⁴, official reports and opinions were prepared by the Council of Europe’s Committee on Legal Affairs and Human Rights⁷⁵, the Council of Europe’s Secretary-General⁷⁶, the Venice Commission⁷⁷, and the European Parliament’s Temporary Committee on the alleged use of European countries by the CIA⁷⁸.

⁶⁷ For the definition of “extraordinary rendition” see the introductory section to part II of this opinion.

⁶⁸ Some scholars see the decisive difference between “ordinary” and “extraordinary” rendition precisely in the fact that suspected terrorists are being transferred to locations where they may be tortured in order to obtain information from them. See Association of the Bar of the City of New York, Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”*, 2004, available at: www.abcny.org, www.nyuhr.org (Torture by Proxy).

⁶⁹ See Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year after Rasul v. Bush*, NYU School of Law, New York, 2005, pp. 19 ff. (Beyond Guantánamo).

⁷⁰ See for example the case of *Mohammed Al-Zery and Ahmed Agiza v. Sweden*, Decision of the UN Committee against Torture of 20 May 2005, or the case of Abu Omar, who was kidnapped by the CIA in Milan, Italy, and deported to Egypt.

⁷¹ See for example Stephen Grey and Andrew Buncombe, *Britain Accused Over CIA’s Secret Torture Flights*, *The Independent*, 10 February 2005.

⁷² Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *Washington Post*, 2 November 2005.

⁷³ See for example *The Guardian*, *CIA Rendition Flights*, available at www.guardian.co.uk/usa/rendition.

⁷⁴ See for example *Beyond Guantánamo*, cited above; Amnesty International, *United States of America. Below the radar: Secret flights to torture and ‘disappearance’*, AI Index: AMR 51/051/2006 of 5 April 2006 (Below the radar), Human Rights Watch, *Statement on U.S. Secret Detention Facilities in Europe*, 7 November 2005, available at <http://hrw.org/english/docs/2005/11/07/usintl1995.htm>.

⁷⁵ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged secret detentions in Council of Europe member states*, Information Memorandum II by Rapporteur Dick Marty, 22 January 2006 (Information Memorandum II).

⁷⁶ Council of Europe, Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, 28 February 2006 (Article 52 ECHR Report).

⁷⁷ Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion no. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 17 March 2006.

⁷⁸ European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, *Draft Interim Report by Rapporteur Giovanni Claudio Fava*, 24 April 2006 (Fava Report).

These reports make two issues regarding rendition flights perfectly clear. Firstly, there is proof that “extraordinary rendition” flights have taken place and that the CIA used an estimated 1,000 times European airspace and on various occasions European airports with aircraft declared to be civilian flights in violation of the Chicago Convention since 2001.⁷⁹ According to Mr. Dick Marty, “rendition affecting Europe seems to have concerned more than a hundred persons in recent years. Hundreds of CIA-chartered flights have passed through numerous European countries.”⁸⁰

Secondly, as the Council of Europe Secretary-General has pointed out, “virtually none of our Member States have proper legislative and administrative measures to effectively protect individuals against violations of human rights committed by agents of friendly foreign security services operating on their territory”⁸¹.

Whereas the preceding sections in this part of the opinion were mainly concerned with the domestic legal framework of the EU Member States regarding torture and non-refoulement as well as the existence of national mechanisms for the prevention of torture, this section specifically deals with CIA rendition flights, the legal provisions governing such flights and investigations or other forms of action taken by the E.U. Member States in connection with allegations of “extraordinary rendition”.

a) National investigations into CIA rendition flights

Investigations into alleged violations of various international and domestic norms have been conducted on different levels. In a broader understanding of the term “investigation” the Network also takes into account requests for clarification through diplomatic channels as well as parliamentary hearings on this issue within the Member States.

In December 2005, the UK Presidency on behalf of the European Union officially requested clarifications from the United States Government. Additionally, a number of governments of the EU Member States have entered into bilateral communications with the respective US embassies in their country. Such consultations were initiated by **Austria, Finland, Germany, Ireland, Malta, Netherlands, Portugal** and **Spain**. In response, United States Secretary of State, Ms Condoleezza Rice, on her visit to Europe assured the Governments that the United States of America did adhere to international as well as national laws in the “war on terror”, and in particular to the obligation not to torture.⁸² A vast majority of Member States regarded these assurances given by the United States sufficient and did not conduct any other forms of investigations. For example, the Government of **Ireland** “are satisfied that they are entitled under the Convention [the European Convention on Human Rights] to rely on clear and explicit factual assurances given by the Government of a friendly state, on a matter which is within the direct control of that Government”⁸³.

Other forms of investigation have been carried out for instance in **Luxembourg**, where the Ministry of Foreign Affairs together with the Ministry of Transport are investigating two landings of two suspect aircraft in November 2005 and January 2006. However, the Network did not receive further information on these investigations. Also **Malta** indicated that the Ministry of Foreign Affairs was conducting investigations but no details of the results were conveyed to the Network. In addition, a Maltese MEP raised a Parliamentary Question before the European Parliament in relation to CIA rendition flights. Again, consequences or results of this inquiry remain unknown. Moreover, the **Dutch** Parliament has posed questions to members of the Government in this regard. The **Portuguese**

⁷⁹ Dan Bilefsky, EU inquiry links 1,000 flights to CIA, International Herald Tribune, 27 April 2006. Fava Report, cited above, para. 14.

⁸⁰ Information Memorandum II, cited above, para. 66.

⁸¹ Notes for the press conference given by Terry Davies, Secretary-General of the Council of Europe, on 12 April 2006, available at: www.coe.int/T/E/Com/Files/PA-Sessions/April-2006/20060412_Speaking-notes_sg.asp.

⁸² In the course of time the United States Government repeatedly made statements to this effect. See also second periodic report to the UN Committee Against Torture by the United States of America, UN Doc. CAT/C/48/Add.3/Rev.1 of 13 January 2006, Paras. 4-7.

⁸³ Article 52 ECHR Report, referred to above, Appendix, Reply of the Government of Ireland.

Government has contacted the national technical services and after receiving all the relevant documentation concluded that there was no evidence that any aircraft of the type prescribed by the press, which would violate national and/or international law, used Portuguese airspace.

In the more narrow understanding of the term “investigations”, i.e. criminal investigations, the Network comes to the conclusion that in the majority of EU Member States no official criminal investigations into the issue of alleged illegal CIA flights have been initiated. These countries include: **Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece⁸⁴, Ireland, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovak Republic and Slovenia**. In a number of cases the Governments and/or public prosecutors found that there was not enough evidence to officially launch investigations or that, according to the Governments, no allegations had been made in this regard or that they were not aware of such illegal practices.

Such statements are completely contradictory to the existence of vast and well-founded information regarding allegations of “extraordinary rendition” flights in Europe. Or, as the European Parliament’s Temporary Committee Rapporteur, Giovanni Claudio Fava, put it in his Draft Interim Report, “The European Parliament considers it implausible, on the basis of the testimonies and documents received to date, that certain European governments were not aware of the extraordinary rendition activities taking place on their territory and in their airspace or airports” (para. 8).

The latest report of Amnesty International on “extraordinary rendition” alone names 15 out of the 25 EU Member States in a comprehensive list of countries where CIA flights had landed in the past years.⁸⁵ Additionally, national NGOs and media consistently report on the use of the national airspace and airports by undeclared CIA flights, as for example in **Denmark**, where the Danish branch of Amnesty International has reported on twelve such incidents.

A small number of EU Member States have carried out further investigations, like **Austria** in the case of one overflight, **Hungary** in the case of two landings of one aircraft, and **Sweden**, where the Government has instructed the relevant departments and civil aviation authority to look into flights to and from Swedish airports by US registered aircraft since January 2002.

In the case of the **United Kingdom**, the Greater Manchester Police Chief only recently confirmed that he will investigate “extraordinary rendition” flights. These investigations, however, will only cover the territories of England and Wales, but not Scotland, where Amnesty International has spotted a substantive number of landings.

So far, only **Germany, Italy, and Spain** have initiated official criminal investigations into specific cases, which will be summarised briefly. In **Germany**, the public prosecution office in Zweibrücken and the Munich I public prosecution office have each launched an investigation on suspicion of unlawful deprivation of liberty. The first case concerns the alleged abduction of Abu Omar, an Egyptian citizen, by CIA agents in Milan, Italy and is investigated by the German authorities because of allegations that his “extraordinary rendition” flight to Egypt, where he has been allegedly tortured, stopped over at the United States military airbase in Ramstein, Germany. In the second case, the alleged abduction of the German citizen Khaled El Masri in Macedonia, no allegations of involvement of an EU Member State were made. In both cases findings are not yet available. The case investigated by the **Italian** authorities also concerns the alleged kidnapping of Abu Omar by 13 CIA agents in Milan. In **Spain**, investigations were or still are undertaken regarding various landings of aircraft supposedly chartered by the CIA on airports in Palma de Mallorca, Ibiza and the Canary Islands.

Despite the fact that “extraordinary rendition” flights violate numerous international and national laws and that the alleged acts of abducting suspected terrorists, depriving them of their liberty without

⁸⁴ Although it must be noted that Greek authorities were investigating into an alleged abduction of seven Greek men by British security forces. See BBC News, Greece to probe abduction claims, 13 December 2005, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4526502.stm>.

⁸⁵ Below the radar, referred to above. The report names **Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Spain** and the **United Kingdom**.

judicial control and, most of all, transporting them to countries where there are substantial grounds to believe that they will be tortured, constitute, directly or indirectly⁸⁶, criminal acts in all Member States of the European Union, and although a substantial number of these States seem to be affected by allegations of CIA rendition flights, the number of criminal investigations is very low. If anything at all, States rather take recourse to inquiries through diplomatic channels and seem to find the assurances given sufficient.

It should be emphasized however that States are under an obligation to promptly and effectively investigate alleged violations of laws, and generally to take appropriate steps to ensure respect for human rights within their jurisdiction. This implies in the present context that the EU Member States are now more than ever under an obligation to be more vigilant regarding future use of their airspace and airports by US private flight, in particular if the companies and aircraft numbers are on one of the published “black lists”, but also to carry out investigations into alleged incidents of past “extraordinary renditions” in their airspace and on their territory.

With regard to proper investigations into past incidents, the Network holds the opinion that at least in those EU Member States that have been named in recent reports it is important to initiate independent investigations into all landings of US registered aircraft since 2001 in order to verify the accuracy of the NGO and media reports, as is currently done in **Sweden**.

b) Legal means to search aircraft

All 25 EU Member States are States parties to the Chicago Convention of 1944, which regulates civil aviation. A number of provisions of this convention are relevant in the context of this opinion, in particular Article 1 (every State has exclusive and complete sovereignty over the airspace above its territory), Article 3 (b) (no State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation) and Article 3bis (b) (the contracting States recognise that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the convention). These provisions have been relied on extensively in the discussion of the alleged misuse of civil aviation by the CIA transporting detainees either to the United States or to third countries.

This section deals specifically with the legal means of the EU Member States to search civil aircraft⁸⁷ once it is landed and prevent it from continuing transport if detainees are found on board who face a substantial risk of being tortured in the countries of destination or whose human rights risk otherwise being violated. In this respect, Article 16 of the Chicago Convention is of particular interest as it states that “the appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing and departure”. This provision does not elaborate specific reasons for such a search and leaves it to the States parties to regulate the details of this right. And indeed, a number of EU Member States have based national legislation on this provision. However, as shown by the Network’s survey, States that do make use of the right to search are doing so mainly for reasons of customs, public order and security.

For instance, **Finland**’s Frontier Guard Act provides border guards with the authority to stop and search vehicles entering the territory. Its Aviation Act foresees a possibility to prohibit the departure of an aircraft for reasons of public order and safety. According to the Civil Aviation Code of **France**, the Minister responsible for civil aviation or any person authorised by the Minister can carry out inspections of all aircraft landed on airfields located on French territory in order to ensure that they conform to security and safety standards. The Aviation Code of **Greece** foresees the possibility of provisionally preventing an aircraft from continuing its journey by ministerial order in case of

⁸⁶ See above questions 1 and 2.

⁸⁷ State aircraft is generally exempted from searches due to immunity provisions. However, State aircraft is subject to specific authorisation and it is a prerogative of State sovereignty to grant such authorisation.

violation of said code ; the code, however, deals mainly with security and customs and does not contain a specific provision in regard to torture or other human rights violations committed on board. The Regulations of the Organisation of the Airspace of **Lithuania** provides that the Minister of Defence can authorise the search of an aircraft if there is suspicion that it carries illegal cargo. Also the **Maltese** Airports and Civil Aviation (Security) Act provides for searches for security reasons. In **Portugal**, the National Institute of Civil Aviation can immobilise an aircraft if security questions are at stake. The more detailed provision of the **Slovakian** Civil Aviation Act grants the airport operator, who is responsible for safety and public order, the right to request explanations related to safety of life and health of persons, search any place, identify persons and arrest persons if necessary. Searches of vehicles for customs reasons are also foreseen in the State Border Supervision Act of **Slovenia**.

According to the Network's survey, a substantial number of EU Member States apply as a general rule the right and obligation of the authorities to search any premises where there is suspicion that a crime is being committed or was committed. Most of these provisions foresee that a police or security officer can enter and search the premises if there is imminent danger and the matter bears no delay. Otherwise, judges have the authority to issue a search warrant. Although, as noted above, not all EU Member States have made torture a crime under their domestic criminal laws and the CAT does not oblige the States to criminalise a violation of the principle of non-refoulement in relation to torture but rather to establish legal safeguards against the transfer of a person to a country where he or she faces torture, illegal deprivation of liberty is a crime in every Member State, and unauthorised activities by foreign State agents are prohibited in all States. Moreover, under Article 5 of the European Convention on Human Rights, the States parties to that instrument are under a positive obligation to protect the liberty of all persons under their jurisdiction. The European Court of Human Rights has recently noted that

Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Articles 2, 3 and 8 of the Convention. It would, moreover, leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *Ila cu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-352 and 464, ECHR 2004-VII).⁸⁸

EU Member States that fall in the category of States authorising the respective authorities to search any premises, including landed aircraft, if there is suspicion or evidence that an illegal act under their respective criminal laws is or was committed, include: **Austria**, **Belgium**, **Denmark**, **Cyprus** (if the crime in question is punishable with more than two years imprisonment), **Netherlands** (the Royal Constabulary may inspect any aircraft that landed on Dutch territory if there is suspicion of a criminal act), the **Slovak Republic** (the Act on Police Corps empowers police officers to prevent the departure of any means of transport and carry out an examination if there is suspicion that a crime was committed; according to the Code of Criminal Procedure, a prosecutor can order the inspection of "other areas", i.e. places not for accommodation, and a police officer can enter any place if the entry is necessary in order to protect life and health, or rights and freedoms of persons), **Slovenia** and **Spain**. Within the same category falls the current opinion of the **United Kingdom** House of Lords, according to which : "If the aircraft is on the ground, the control authorities – the police, customs and immigration – already have a variety of powers to enter, take evidence and make arrests. For civil aircraft, the police could board an aircraft in the UK if they had reasonable suspicion that certain crimes were being committed within UK jurisdiction under UK law."⁸⁹

⁸⁸ Eur. Ct. HR (3d sect.), *Storck v. Germany* (Appl. N° 61603/00), judgment of 16 June 2005 (final on 16 September 2005), § 102.

⁸⁹ Statement by Lord Davies of Oldham (Deputy Chief Whip in the House of Lords), House of Lords, 28 March 2006.

This latter position reflects the general attitude adopted within the EU Member States. However, there are obvious practical difficulties with the implementation of such general provisions. As illustrated by the non-existence of such interventions or searches,⁹⁰ the authorities responsible have so far not seen the need to search United States civil aircraft with a view to crimes possibly committed on board. It remains to be seen whether these general rules for searches of premises will be applied more vigorously in the future, now that more and more evidence of criminal acts possibly committed on US civil aircraft comes to light and the authorities cannot simply refer to a lack of suspicion any longer. This is particularly true in case one of the airplanes known to be chartered by the CIA through private front companies landed on the national territory of an EU Member State. To rely on other services, like customs and air safety authorities, to notify the police in case they by chance encounter a suspicious situation during their routine inspections, as is the practice for instance in the **Netherlands**, is simply not enough.

Some EU Member States provide for more specific regulations in this regard. In **Belgium**, the law on air navigation foresees that the Executive could take any measure necessary to ensure compliance with obligations resulting from international treaties with regard to aircraft, its crew and its route. However, so far no such measures have been taken in regard to compliance with the CAT. **Hungary's** laws provide for the possibility of searching foreign aircraft only in case of suspicion that a crime is under commission or has been committed on the aircraft and that this illegal act is a crime under universal jurisdiction, which would be the case with the crime of torture but not with illegal deprivation of liberty. According to the Aviation Law Act of **Poland**, the responsible State organs may call on a civil aircraft to change its course, land or perform other orders (including searches) if there are justified concerns that the aircraft is being used for illegal activities.

The Network's survey revealed that in fact only in **Ireland** Section 2 of the Criminal Justice (United Nations Convention Against Torture) Act implies the power to search aircraft suspected of being used to facilitate torture of individuals. Again, this is not an explicit provision regarding the matter. However, the Irish Minister of Foreign Affairs has indicated that this power exists and that it would be exercised if sufficient evidence was presented to the appropriate authorities.⁹¹

Although many of the domestic provisions listed above can be interpreted in a manner that includes searches for persons illegally deprived of their liberty, ill-treated on board of an aircraft or brought to countries where they face torture, no explicit provision in this regard exists throughout the European Union. Due to the relative novelty of this issue, it is not surprising that countries do not foresee such specific provisions. However, if national authorities are hesitant to make use of their powers implied in general provisions, either a specific change of legislation should be considered or the Governments should issue a clear policy that requires the respective authorities to firmly comply with the principle of legality also in regard to civil aviation.

In the opinion of the Network it is inadequate to state that so far no need has arisen to investigate into past landings or to routinely search U.S. civil aircraft at present and in the future because of a lack of suspicion while at the same time issuing blanket permissions to these aircraft without closely looking at the flight route or specifications of the aircraft, information that has to be provided also by civil aircraft in accordance with International Civil Aviation Organization (ICAO) rules. If an airplane with a registration number listed on the "black list" of aircraft, operated by a company known to be a front company for the CIA, with route Guantánamo Bay via, for example, Shannon, Ireland or Ramstein, Germany to Mitiga, Libya asks overflight clearance or landing permission for technical maintenance, then this should be enough suspicious information to justify a search of the aircraft.

However, such extreme cases cannot be considered the norm. Therefore, and in the light of current developments, the Network recommends that EU Member States should start to think about introducing a system of routine searches of civil aircraft by the responsible authorities in order to check compliance with international aviation regulations, like the Chicago Convention, issues of

⁹⁰ The opinion returns to the question hereunder.

⁹¹ Irish Times, 24 December 2005, p. 11.

sovereignty as well as compliance with international and national human rights standards. Routine searches relating to customs regulations as well as security checks are already for a long time standard procedures and rigid searches for smuggled drugs, weapons or other goods are constantly on the agenda within the EU Member States. Now it is time to make routine searches relating to alleged severe human rights violations also a standard procedure in accordance with the States' positive obligations to protect human rights under their jurisdiction.

There is the possibility that in many cases the national authorities will not find a detainee on board, who is illegally detained and/or brought to a country where he/she faces a risk of being tortured. Also, it might turn out that the aircraft is indeed only used for a civil flight according to its declaration and in accordance with international law. However, the United States of America have repeatedly assured the international community that they did not violate national or international legal obligations in the "war on terror" and that they have nothing to hide. Therefore, there is no reason to believe that a routine search of aircraft should result in any kind of diplomatic or political consequences.

c) Involvement of national authorities

The independent experts were asked whether they had knowledge of any cases after 11 September 2001 in which the authorities of their country have actively participated in CIA rendition flights. The information received on this question coincides to a large part with the official replies by the Member States to the Council of Europe's Secretary-General acting under his powers of Article 52 ECHR. In the cases of **Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, Netherlands, Portugal, Slovenia** and the **United Kingdom** the official statements by the Governments read that no public official or any other person acting in an official capacity has been involved in any manner – whether by action or omission – in rendition flights or that the Government had no knowledge of such an involvement. Neither is the Network aware of any information to the contrary.

However, as for example the Government of the **United Kingdom** has pointed out, under the current arrangements United States aircraft does not need clearance to use UK military airfields and no passenger lists have to be provided.⁹² Therefore, the Government is not necessarily in a position to know whether their authorities are – unknowingly – involved in illegal activities such as "extraordinary rendition" flights. This might also be the case in other E.U. Member States.

Although the Government of **Ireland** in its reply to the request of the Council of Europe Secretary-General has answered the question regarding any kind of involvement by Irish public officials clearly in the negative, the Network would point out that the Government has shown itself to be cognisant of the fact that six aircraft, believed to have been chartered by the CIA, landed and took off on 43 separate occasions from Shannon Airport since 11 September 2001⁹³.

Regarding **Italy**, the Government has stated that Italian authorities were certainly not involved in what they call "flying prisons" and denied governmental knowledge previous to the abduction of Abu Omar in Milan by CIA agents. However, the Council of Europe's Rapporteur Dick Marty asked whether it was "conceivable or possible that an operation of that kind, with deployment of resources on that scale in a friendly country that was an ally, was carried out without the national authorities being informed."⁹⁴

Even though **Lithuania** has omitted to answer the respective question by the Council of Europe Secretary-General, the Network has received information that the Government has noted that the Ministry of Justice has neither received any request from the competent United States institutions to transport an arrested or sentenced person via the territory nor do they have information about the

⁹² Evidence of Harriet Harman (Minister of State, Department of Constitutional Affairs) to the parliamentary Joint Committee on Human Rights on UK compliance with the UN Convention Against Torture, 6 March 2006.

⁹³ Irish Times, 14 December 2005, p. 6.

⁹⁴ Information Memorandum II, referred to above, para. 46.

transportation by air without scheduled landings. The Government has underlined that it has no information about any landing on its territory of an aircraft with a prisoner on board.

Poland appears not to have answered the Council of Europe request in a satisfying manner. In particular, the Secretary-General criticised in his report that the Government has elided his question regarding transport of detainees through Polish territory. However, the Network has no additional information on any kind of involvement of Polish public officials.

The same criticism applies to the **Slovak Republic**, where the Government has given no reply regarding transport and has in general been unclear in its response regarding the involvement of Slovakian authorities in cases of illegal deprivation of liberty. At this stage, the Network is not aware of any publicly available information according to which there might have been any cases in which the State authorities of the Slovak Republic were involved in illegal transports of detainees in cooperation with the CIA. However, the Network observes that a possible collaboration of Slovakian authorities with the CIA in rendition flights has neither been confirmed nor explicitly disproved by representatives of the competent State authorities.

Despite numerous allegations in **Spanish** domestic media regarding the landings of CIA rendition flights on airports of Palma de Mallorca, Barcelona, and the Canary Islands, and the fact that the Procurator of the Balearics lightened the controls of US aircraft shortly before the war in Afghanistan and declared that the passengers of these aircraft were to be considered diplomatic personnel, the Spanish Government insists that there has been no involvement whatsoever by Spanish officials in CIA rendition flight. A journalist of the newspaper “Diario de Mallorca”, who published a report on more than 100 CIA aircraft landings on Spanish territory, stated in a public hearing before the European Parliament that in his opinion it was impossible that the Spanish authorities did not have any notice of this vast amount of air traffic. The governmental reply to the Article 52 ECHR investigation by the Council of Europe only referred to ongoing criminal investigations in this regard.

Finally, the Network notes that **Sweden** replied to the Council of Europe Secretary-General that, according to his question, *since 1 January 2002* there had been no involvement of Swedish public authorities in “unacknowledged deprivation of liberty [...] of any individual by or at the instigation of a foreign agency”. However, in December 2001, two Egyptian men, Mohammed Al-Zery and Ahmed Agiza, had been arrested by Swedish police officers and handed over to the Egyptian authorities. The men were transported to Egypt, where they were subjected to torture. Following a communication filed before the Committee Against Torture, Sweden was found to have violated Article 3 of the CAT⁹⁵. It will be noted that the Swedish Government had based its decision to proceed with the expulsion in December 2001 on a so-called ‘diplomatic assurances’ of fair treatment from the Egyptian authorities upon the return of Messrs Al-Zery and Agiza. The Committee nevertheless came to the conclusion that Sweden had violated Article 3 of the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. In the view of CAT, the applicant had credibly alleged that he would be under a risk of torture after his forcible return to Egypt. The Committee stressed that assurances of the kind that has been given to the Swedish authorities could not protect Agiza from the risk of torture he faced upon return: “the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk”⁹⁶. The Committee against Torture also pointed out that it “should have been known, to the State party’s authorities at the time of the complainant’s removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons”. Finally, the Committee made the observation that the applicant’s retrial in an Egyptian military tribunal in April 2004 was deemed unfair by the Swedish authorities themselves.

⁹⁵ Case of *Mohammed Al-Zery and Ahmed Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 20 May 2005.

⁹⁶ UN Doc. CAT/C/34/D/233/2003, 20 May 2005, p. 34.

d) Domestic action taken to prevent CIA rendition flights

The independent experts were asked whether they knew of any cases after 11 September 2001 in which the authorities of their country have taken action to prevent CIA rendition flights and/or to protect CIA detainees against torture, cruel, inhuman or degrading treatment, including the principle of non-refoulement. The answers indicate that no such action was ever taken within any of the EU Member States, or that information of such action was unavailable. The same conclusions may be drawn from the replies of the EU Member States to the inquiry of the Council of Europe Secretary-General under the powers attributed to him by Article 52 ECHR. No indication can be found that any of the States has taken action in this regard, either by ordering or forcing an aircraft to land or by preventing it from carrying on after a stopover. Only in the case of **Spain** does there exist a report that the airport's technical services employees had routinely carried out maintenance tasks on US civil aircraft during which they had entered the planes. Reportedly, they had found nothing suspicious on board of the aircraft.⁹⁷ However, these routine inspections were conducted for technical security reasons and not in relation to any allegations of torture, ill-treatment or illegal deprivation of liberty of a person on board.

Regrettably, it seems highly unlikely that EU Member States will start to order US civil aircraft to land in order to be searched or prevent them from departure. However, such implications should be no excuse for the Member States to look away, condone illegal activities or even actively participate in them. On the contrary, in the light of all the information revealed by different sources and detailed lists of aircraft, which have been used in the past to transport persons suspected of terrorism, Member States cannot simply refer to the lack of sufficient evidence in order to get active.

A first step would be not to grant blanket or automatic overflight clearances to US aircraft declared as private flights. Meanwhile, political pressure should be applied on the United States not to circumvent the Chicago Convention by allowing State agencies like the CIA to charter private aircraft.⁹⁸ To the knowledge of the Network, no explanation has been provided by the United States so far, why the CIA has resorted to the use of private aircraft in circumvention of international aviation laws. This question should be posed to the US Government, regardless of whether detainees have been illegally transported or not. The adherence to human rights obligations should be the main focus of EU Member States dealing with this issue. But additionally, it is also in the interest of the Member States to ensure that other States parties to the Chicago Convention do apply its provisions and thereby respect States' sovereignty. If political and diplomatic means turn out to be insufficient to put an end to the misuse of civil aviation regulations States should have the legal means (as well as the political will) to resort to routine searches of US aircraft.

In this context the Network recommends the holding of a high level conference between the United States, the European Union and its Member States in order to clarify the matter.

Additionally, the Network recommends that the Union should give a clear sign to accession States that participation in illegal activities like "extraordinary rendition" flights and detention on secret places will not be tolerated.

IV. Conclusions and Recommendations

- The European Parliament should clearly reaffirm its commitment to uphold the absolute character of the prohibition to expel, extradite, or return a person to a territory where that person runs a real risk of being subjected to torture or to cruel, inhuman or degrading

⁹⁷ Article 52 ECHR Report, referred to above, Appendix, Reply of the Government of Spain, pp. 15-16.

⁹⁸ The exercise of diplomatic and political pressure may constitute one means through which a State party to the European Convention on Human Rights may fulfil its positive obligation to protect the rights and freedoms the Convention recognizes. See Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at §§ 330-331 (referring to the positive obligation under Article 1 of the Convention of the defending State to "take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention").

treatment, or of being sentenced to the death penalty or to a trial in flagrant violation of the requirements of a fair trial. It should also express its position that the EU Member 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.

- In accordance with their obligation under Article 4 CAT, all Member States of the European Union should make torture a crime under domestic law and provide for adequate sanctions. The provisions should contain a definition of torture that reflects the definition of Article 1 CAT.
- The principle according to which no individual should be subjected to a risk of torture or of cruel, inhuman or degrading treatment or punishment should be implemented in domestic laws through specific provisions within all laws governing expulsion, extradition, deportation, return, transfer or transit of persons by all Member States of the European Union.
- All Member States of the European Union should sign and ratify the Optional Protocol to the Convention against Torture (OPCAT) and accordingly establish independent national mechanisms to monitor places of detention. Due regard to the “Paris Principles” should be taken in the establishment of such mechanisms, in particular as regards their independency and legal status.
- The CPT and national monitoring bodies should be granted access to any place of detention within the Member States of the European Union, including foreign military bases.
- Effective and independent investigations into past incidents of CIA rendition flights over the territory of the Member States of the European Union or landings of such aircraft on airfields of Member States should be promptly carried out. In particular those Member States that have been named in recent reports should initiate independent investigations into all landings of United States aircraft since 2001.
- Introduction of specific legislation with regard to searches of civil aircraft in case of suspicion of human rights violations committed on board should be considered in all Member States of the European Union. A system of routine searches of United States civil aircraft in this respect would be desirable.
- No blanket or automatic overflight or landing clearances should be granted to United States civil or State aircraft.
- The European Union and its Member States should request assurances from the United States that United States public officials will not abuse international civil aviation regulations and will respect the principle of sovereignty. Where in the past such incidents have taken place, the European Union should request an explanation from the United States Government.
- A clear signal should be given to European Union accession States that participation in illegal activities like “extraordinary rendition” flights and detention on secret places will not be tolerated by the European Union.