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'Extraordinary Rendition' A Review of Ireland's Human Rights Obligations

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The Irish Human Rights Commission (IHRC) was established, under statute, in 2001 to promote and protect human rights in Ireland. The human rights which the IHRC is mandated to promote and protect are the rights, liberties and freedoms guaranteed under the Irish Constitution and under the international agreements, treaties and conventions to which Ireland is a party.

'Extraordinary Rendition'
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Contents

The statutory functions of the Irish Human Rights Commission (IHRC) include the functions of reviewing the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and making recommendations in relation to the measures that the IHRC considers should be taken to strengthen, protect and uphold human rights in the State.

In December 2005, amid growing concerns both here and abroad about 'extraordinary rendition' flights landing in the State, the IHRC exercised these statutory powers and made a recommendation to the Irish Government that it seek agreement from the US authorities to inspect suspect aircraft. The Government's response stated that it had sought and received assurances from the US Government on the issue and felt it was appropriate to rely on such assurances.

Since that time the IHRC has continued to review and monitor the situation. In July 2007 it met with the Department of Foreign Affairs. The IHRC acknowledges the Department's engagement with it on this important matter. Given the importance of the issues involved, i.e. arbitrary detention and/or torture or inhuman or degrading treatment or punishment, the IHRC decided to conduct a substantive review of the matter in late 2007 with the assistance of Eilis Brennan BL. The results of that review are set forth in this report.

The report includes important recommendations to Government which should be implemented urgently in order to ensure that the State is not in violation of its international human rights obligations.

Executive Summary

The term 'extraordinary rendition' is used to describe the forcible kidnapping of an individual by the agents of a State and the transfer of that person to a secret prison in another State where s/he can be tortured or subjected to inhuman or degrading treatment or punishment, without recourse to the courts, to lawyers or to any of the mechanisms set up to protect the human rights of an individual. 'Extraordinary rendition' may lead to 'enforced disappearances' whereby an individual is not heard of again. It is a practice designed to circumvent and set at naught the human rights principles and practices that have developed over decades to protect the rights of those under investigation or in detention.

It is now known that the practice of 'extraordinary rendition' has taken place with the active involvement of some European States and the acquiescence of others. It is also known that US Central Intelligence Agency (CIA) aircraft involved in 'extraordinary rendition' have landed and refuelled at Shannon Airport, Ireland. To the IHRC's knowledge such aircraft have not been subject to any searches or inspections on Irish soil.

Since 2005 the IHRC has exercised its statutory powers and repeatedly called for a system of inspection of foreign aircraft to be put in place in order to ensure that Ireland is never, even unwittingly, a party or an accessory to the heinous practice of torture or inhuman or degrading treatment or punishment. In response, the Irish Government has asserted that it has received assurances from the US administration that prisoners have not been and will not be transported illegally through Irish territory. The Irish Government's view is that there is no necessity for a system of aircraft inspections to be put in place as the political assurances it has received are sufficient to meet its human rights obligations.

The Government also appears to have put the onus of producing evidence regarding suspect aircraft on to the private citizen. It has requested that if any private citizen has evidence that aircraft have been used for 'extraordinary rendition', such information should be given to An Garda Síochána for investigation.

Despite extensive dialogue on the issue, this remains the Government's position. The IHRC fundamentally disagrees with the Government on this matter.

The IHRC is of the view that in its approach to 'extraordinary rendition', the Irish State is not complying with its human rights obligations to prevent torture or inhuman

or degrading treatment or punishment. Its reliance on the assurances of the US Government is not enough. In order to ensure full compliance with its human rights obligations, the Irish State should put in place a reliable and independently verifiable system of inspection so that no prisoner is ever transported through this country except in accordance with proper legal formalities and the highest observance of human rights standards. In the absence of such a system of inspection, it is impossible for any ordinary citizen to gain evidence regarding such activity or to ascertain with any level of confidence whether such illegal activity is taking place in the State.

The IHRC believes that the recommendations set out in this report must be implemented so that the Irish State is fully in compliance with its obligations in accordance with the letter and the spirit of our own Constitution and the international human rights conventions to which the State is a party. These conventions include the UN Convention Against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The IHRC recommendations are also in accordance with the findings and resolutions adopted by both the European Parliament and the Parliamentary Assembly of the Council of Europe.

In a Resolution in February 2007 the European Parliament specifically deplored the stopovers in Ireland made by aircraft that are known to have been used by the CIA in 'extraordinary rendition' activities. It also recommended a ban on CIA aircraft landing in Ireland unless a regime of inspection was in place.

The investigation commissioned by the Council of Europe's Parliamentary Assembly concluded that a number of countries, including Ireland, could be held responsible for 'collusion' in the process of 'extraordinary rendition' by virtue of being 'stopovers' for flights involving the unlawful transfer of detainees. In a Resolution in June 2006, the Parliamentary Assembly called on Member States to 'take effective measures to prevent renditions and rendition flights through the Member State's territory and airspace'.

In addition, the Secretary General of the Council of Europe invoked a seldom-used procedure under Article 52 of the European Convention on Human Rights. His investigation concluded that while stronger international controls were required to check whether transiting aircraft are being used for illegal purposes, even within the current legal framework, States should equip themselves with stronger control tools. He also concluded that mere assurances by foreign States that their agents abroad comply with international and national law are not enough, but that formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

A legal Opinion commissioned by the Council of Europe, known as the Venice Commission Opinion, concluded that Member States should refuse to allow transit of certain prisoners in circumstances where there is a risk that they will be exposed to torture or ill treatment. It states that where a State has serious reasons to believe that the mission of an aircraft crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment, then in such circumstances that State must take all possible measures in order to prevent the commission of human rights violations in its territory, including its airspace. This Opinion was compiled with the assistance of a number of human rights experts throughout Europe.

Jurisprudence on cases concerning 'extraordinary rendition' by both the UN Committee Against Torture and the UN Human Rights Committee have made clear that a State cannot shelter behind assurances it has received from another State in order to fulfil its obligation to prevent torture or inhuman or degrading treatment or punishment and that States are required to take 'steps of due diligence' to avoid a threat to an individual.

The IHRC is of the view that the important recommendations contained in this report should be implemented urgently in order to ensure that the State is not in violation of its international human rights obligations. The inspection regime recommended by the IHRC would show this State's willingness to comply with the recommendations of the Council of Europe and the European Parliament on the practice of 'extraordinary rendition'.

Given that the Programme for Government, agreed between Fianna Fáil, the Green Party and the Progressive Democrats, contains a commitment that Ireland will be a model UN State, this system of inspection would send a clear signal to the international community that Ireland is taking effective steps to ensure that human rights are being observed. It would also show the Government's willingness to fulfil its commitment in the Programme to ensure that all relevant legal instruments are used so that the practice of 'extraordinary rendition' does not occur in any form in this State.

Summary of Recommendations

General

- The State should introduce an effective inspection regime as a matter of urgency.

- Aircraft from any State in relation to which suspicion exists should be subject to the inspection regime.

- Ireland should continue to oppose the practice of 'extraordinary rendition' and linked practices, in appropriate fora.

- The State should implement the recommendations of the Marty Reports, the Council of Europe Inquiry Report and the European Parliament's Temporary Committee on the issue of 'extraordinary rendition'.

- The State should continue to press for revisions of international aviation agreements where this is required in order to detect and prevent 'extraordinary rendition' flights.

- The commitments in the Programme for Government should be clearly implemented, particularly in relation to the role of An Garda Síochána.

- The State, having signed the Optional Protocol to the UNCAT, should ratify the Protocol without delay and introduce an effective national preventive mechanism as required thereunder.

Specific

- The inspection regime referred to should have effective monitoring and inspection components. It should be properly resourced and be overseen by an independent body (possibly a national preventive mechanism).

- To facilitate proper inspection of relevant aircraft, detailed information about the purpose of the flight, its destination and the names of passengers on board should be required by the aviation authorities and received in advance of any such aircraft landing. The provision of relevant details should be a condition for entry to the State.

- Consideration should be given to establishing a Garda sub-station at Shannon Airport, which would obviate the need for citizens alleging the entry of suspected aircraft having to make a complaint in Shannon Town. In any event, any complaint to a member of An Garda Síochána concerning an aircraft possibly engaged in an 'extraordinary rendition' flight should be investigated immediately, including inspection of the aircraft by the member or members concerned.

- Where necessary, legislation should be introduced to ensure that no aircraft may leave the State where an allegation has been made that it is involved in an 'extraordinary rendition' flight until such time as an inspection of the aircraft occurs.

The term 'extraordinary rendition' is a violation of language. It is a euphemism, a deliberately opaque phrase to describe the forcible kidnapping of an individual by the agents of a State and the transfer of that person to a secret prison in another State where s/he can be tortured or subjected to inhuman or degrading treatment or punishment, and be interrogated and detained indefinitely without recourse to the courts, to lawyers or to any of the mechanisms set up to protect the human rights of an individual. 'Extraordinary rendition' may lead to 'enforced disappearances' whereby an individual is not heard of again. It is a practice designed to circumvent and set at naught the human rights principles and practices that have developed over decades to protect the rights of those under investigation or in detention.

It is now known that the practice of 'extraordinary rendition' has taken place with the active involvement of some European States and the acquiescence of others. It is also known that US Central Intelligence Agency (CIA) aircraft involved in 'extraordinary rendition' have landed and refuelled at Shannon Airport, Ireland. To the IHRC's knowledge such aircraft have not been subject to any searches or inspections on Irish soil. In a Resolution in February 2007, the European Parliament specifically deplored the stopovers in Ireland made by aircraft that are known to have been used by the CIA in 'extraordinary rendition' activities.

Since 2005 the IHRC has repeatedly called for a system of inspection of foreign aircraft to be put in place in order to ensure that Ireland is never, even unwittingly, a party or an accessory to the heinous practice of torture or inhuman or degrading treatment or punishment. In response, the Irish Government has asserted that it has received assurances from the US administration that prisoners have not been and will not be transported through Irish territory. The Irish Government's view is that there is no necessity for a system of aircraft inspections to be put in place as the political assurances it has received are sufficient to meet its human rights obligations.

The Government also appears to have put the onus of producing evidence regarding suspect aircraft on to the Irish people. It has requested that if any private citizen has evidence that aircraft have been used for 'extraordinary rendition', such information should be given to An Garda Síochána for investigation.

The specific functions of the IHRC are to keep under review the adequacy and effectiveness of law and practice in the State relating to human rights and to make recommendations to Government in relation to measures that can be taken to strengthen and protect human rights in the State.[1] By 'human rights' is meant those rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution and any agreement, treaty or convention to which the State is a party.[2]

The IHRC is of the view that in its approach to 'extraordinary rendition' the Irish State is not complying with its human rights obligations to prevent torture or inhuman or degrading treatment or punishment. Its reliance on the assurances of the US Government is not enough. In order to ensure full compliance with its human rights obligations, the Irish State should put in place a reliable and independently verifiable system of inspection so that no prisoner is ever transported through this country except in accordance with proper legal formalities and the highest observance of human rights standards.

Given that the Programme for Government, agreed between Fianna Fáil, the Green Party and the Progressive Democrats,[3] contains a commitment that Ireland will be a model UN State, this system of inspection would send a clear signal to the international community that Ireland is taking effective steps to ensure that human rights are being observed. It would also show the Government's willingness to fulfil its commitment in the Programme to ensure that all relevant legal instruments are used so that the practice of 'extraordinary rendition' is not facilitated by any means in this State.

1 See legislation establishing the IHRC: Human Rights Commission Act, 2000, Section 8.
2 See Section 2 of the Human Rights Commission Act, 2000.
3 An Agreed Programme for Government, June 2007. See Appendix VI.

Background to 'Extraordinary Rendition'

(i) The Allegations Emerge

In 2005 a number of reports began to surface that some European countries were hosting secret detention centres that were being run by the CIA for the purpose of detaining and interrogating terrorist suspects.[4] In these reports it was alleged that detainees were being subjected to so-called 'enhanced interrogation techniques', another crude euphemism for the practice of torture or inhuman or degrading treatment or punishment.[5] In Ireland, from late 2003 concerns were raised that prisoners might be transported through Shannon on US aircraft to the Guantanamo Bay detention centre in Cuba.

In 2005 allegations were made that CIA aircraft engaged in 'extraordinary rendition' were stopping over in Shannon to refuel. This led to a number of public representatives tabling questions on the matter in the Oireachtas. A group that monitors the use of Shannon by US aircraft made a detailed submission to the Oireachtas Joint Committee on Foreign Affairs in December 2005 and further submissions by letter to the Minister for Justice, Equality and Law Reform in January 2006.[6]

(ii) Action taken by the IHRC

Amid growing concerns about 'extraordinary rendition', both here and abroad, the IHRC exercised its statutory powers in December 2005 to review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and made a recommendation to the Irish Government that it should inspect suspect aircraft. The Government responded by letter in April 2006 stating it had sought and received assurances on a number of occasions from the US Government on the issue and felt it was appropriate to rely on such assurances. Despite repeated subsequent requests from the IHRC and an ongoing dialogue with the Department of

4 Human Rights Watch statements: 'US Secret Detention Facilities in Europe', 7 November 2005; 'CIA Whitewashing Torture', 21 November 2005; 'List of "Ghost Prisoners" Possibly in CIA Custody', 30 November 2005. Also reports aired in the *Washington Post* and on the US *ABC television* channel: See discussion of these reports in paras 7 to 9 of first report of the Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe Member States*, dated 12 June 2006 (first Marty Report), Parliamentary Assembly Doc. 10957.

5 See first Marty Report, para 7.

6 Submissions of the Shannon Peace Activist Group.

Foreign Affairs, this essentially remains the position of the Irish Government as is set forth further below.

(iii) Action taken by International Bodies

A number of eminent international bodies have commissioned their own investigations into 'extraordinary rendition' and have concluded that many European States, including Ireland, are not complying with their international human rights obligations to do everything possible to halt the kidnapping of individuals who are subsequently at risk of torture or inhuman or degrading treatment or punishment.

Towards the end of 2005 the main European human rights watchdog, the Parliamentary Assembly of the Council of Europe,[7] commissioned an investigation to be carried out by Rapporteur Dick Marty. Given the seriousness of the allegations, the Secretary General of the Council of Europe, Mr Terry Davis, also invoked a seldom-used procedure under Article 52 of the European Convention on Human Rights (ECHR) and formally requested information from all Council of Europe Member States as to whether any public officials had been involved in 'extraordinary rendition'.

Mr Marty delivered two comprehensive reports, in June 2006 and in June 2007. The second of these (referred to hereafter as the second Marty Report)[8] concludes that there is now no doubt that 'extraordinary rendition' took place and that a number of secret detention centres run by the CIA existed in Europe from 2003 to 2005, in particular in Poland and Romania.[9] The report states that these centres were run as part of a special CIA programme established by the US in the aftermath of the September 11, 2001 bombing of the World Trade Center. The report contends that the programme's purpose was to kill, capture and/or detain terrorist suspects.[10] The first Marty Report had already concluded that detailed flight logs clearly indicated that aircraft involved in 'extraordinary rendition' had stopped over at Shannon.[11] The report called on Member States to take measures to ensure that 'extraordinary rendition' flights did not take place through their territory.[12]

Additionally, the European Parliament set up a Temporary Committee (in January 2006) to investigate whether European Union (EU) Member States were involved in the systematic human rights abuses that were being alleged. It published two reports – one in June 2006 and a final report in January 2007. Its final report is deeply critical of the manner in which European States have participated, either passively or actively, in the practice of 'extraordinary rendition'. It specifically criticised the stopovers in Ireland of aircraft that had been involved in 'extraordinary rendition' and praised the stance of the IHRC on the issue.[13] It recommended a ban on CIA aircraft landing in Ireland unless a regime of inspection was in place.[14]

7 Founded in 1949, the Council of Europe has 47 member countries, including Ireland, and seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other conventions on the protection of individuals.

8 The second Marty Report, commissioned by the Parliamentary Assembly of the Council of Europe: *Secret detentions and illegal transfers of detainees involving Council of Europe Member States; second report*, 7 June 2007.

9 See Introductory Remarks - an overview, second Marty Report.

10 See para 7 of the second Marty Report.

11 See Flight log attached as appendices to the first Marty Report.

12 See first Marty Report, Section 11.

13 European Parliament, Final Report, *The alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200 (INI)) para 122.

14 *Ibid*, at para 125. See Appendix V for the Minister for Foreign Affairs' criticism of the European Parliament Report 2007.

Meanwhile Sweden, Germany, Italy and Canada have conducted national probes into specific instances of alleged abductions from their territory or involving their own nationals (see below).

In September 2006 US President George W. Bush finally acknowledged that the practice of 'extraordinary rendition' did exist when he referred somewhat opaquely to the existence of a covert programme implemented by the CIA to arrest, detain and interrogate overseas terrorist suspects.[15]

(iv) 'Extraordinary Rendition' Aircraft and Shannon

The most recent report on specific aircraft believed to have been used for 'extraordinary rendition' flights was that published by Amnesty International on 5 April 2006.[16] It identified a number of US companies used to charter or operate aircraft involved in 'extraordinary rendition' activities and it examined in detail flights undertaken by four aircraft between 2001 and 2005. Each of these aircraft had been involved in at least one well-known 'extraordinary rendition' operation. Amnesty International calculated that between them, the four aircraft had landed in Ireland 79 times, mostly at Shannon, but also once or twice in Dublin.

While it is clear that not all CIA flights participate in 'extraordinary rendition',[17] a few of these were linked closely in time to known 'extraordinary rendition' flights. In a written reply to the Dáil on 4 April 2006, the then Minister for Transport confirmed 48 landings by three of these aircraft (one had changed its registration details during the period).[18] Details of the aircraft identified by Amnesty International and the number of recorded Irish landings are given at Appendix I to this report. In addition to these aircraft, a number of other suspected CIA aircraft were included on a list circulated by Senator Dick Marty to Member States of the Council of Europe in December 2005, as part of his investigation. This list is set out at Appendix II.

(v) The UN Report on Guantanamo Bay

In February 2006 a report compiled by five Special Rapporteurs for the UN Commission on Human Rights called for the detention centre in Guantanamo Bay to be shut down immediately and concluded that many of the practices at the camp amounted to torture.[19] Led by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the report also noted: '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

15 The White House, Office of the Press Secretary, 'Remarks by the President on the Global War on Terror (War against terrorism is a struggle for freedom and liberty, Bush says)', speech delivered in East Room of the White House, 6 September 2006; referred to in para 22 of the second Marty Report.

16 *Below the Radar: Secret Flights to Torture and Disappearance*, Amnesty International, published 5 April 2006.

17 The first Marty Report, 2006, page 15, para 49, where it is remarked that 'Indeed, it is evident that not all flights of CIA aircraft participate in "renditions"' and '… Intelligence flights are a manifestation of the co-operation that happened amongst us. They carry analysts to talk with one another, they carry evidence that has been collected …' This is repeated by the Department of Foreign Affairs in their response to the IHRC, 13 November 2007; see Appendix V.

18 Dáil debates, 4 April 2006, Written replies to Questions 363 and 364.

19 Commission on Human Rights. Report of five UN Special Rapporteurs, *Situation of Detainees at Guantanamo Bay*, 15 February 2006; see para 87. The Commission on Human Rights has been replaced by the Human Rights Council, comprising 54 States.

would not be permitted under the internationally accepted definition of torture are *of the utmost concern*'.[20]

It concluded that the practice of 'extraordinary rendition' was a violation of the UN Convention Against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR), both of which prohibit torture or inhuman or degrading treatment or punishment.[21] It added that the excessive violence used against many of the prisoners during transportation to Guantanamo in itself amounted to torture.[22]

(vi) Two Case Studies: Khaled El-Masri and Maher Arar

The horror of 'extraordinary rendition' is apparent in the following two case histories of individuals who became victims of illegal kidnapping and secret detention.

The first case history is described in the first Marty Report (June 2006). The following narrative of events is taken from the report. According to the report, in December 2003 Kuwaiti-born German national Khaled El-Masri boarded a bus from his hometown of Neu Ulm in Germany to travel to Skopje, Macedonia.[23] It is stated that he was detained at the Serbian-Macedonian border and held and interrogated for approximately three weeks. During this time he was denied any contact with the German embassy, an attorney or his family. He was told that if he confessed to Al-Qaeda membership he would be returned to Germany.

After 23 days of detention he was blindfolded and brought to an airport where, according to the report, he was beaten and stripped naked. It is stated that a hard object was forced into his anus. When the blindfold was removed, he saw seven or eight men, hooded and dressed in black. He was placed in a diaper and sweatsuit, blindfolded, shackled and then chained spreadeagled to the floor of an aircraft. He was injected with drugs and flown to Baghdad, then on to Kabul in Afghanistan.

According to the report, Mr El-Masri was held for over four months where he was repeatedly interrogated and refused access to a representative of the German government. Finally, in May 2004 he was flown back to central Europe and released near a checkpoint on the Albanian border. The detention was apparently a mistake.[24] Mr El-Masri has been unable to find employment in the past three years.[25] His lawyer states that he is in constant need of post-trauma care. In May 2007 he was placed in a psychiatric hospital.

It is now accepted that Mr El-Masri has never been charged in relation to any terrorist activities.[26] The aircraft involved in his abduction had stopped in Shannon some days before his 'extraordinary rendition'.[27]

20 At para 86 (italics added).
21 At paras 89 and 90.
22 At para 88.
23 Details of this abduction and many others are set out in the first Marty Report in Section 3. See also 'Extraordinary Rendition; A Human Rights Analysis' by David Weisbrodt and Amy Bergquist, *Harvard Human Rights Journal*, Vol. 19, p. 123 (2006).
24 See para 276 of the second Marty Report.
25 See para 296 of the second Marty Report.
26 See para 132 of the first Marty Report.
27 The flight logs for this aircraft are detailed in the first Marty Report.

The second case was investigated by a Canadian Royal Commission of Inquiry and the following narrative is taken from its report.[28] Maher Arar, a Canadian citizen of Syrian origin, was arrested at JFK airport in New York while on a stopover on return from holiday in September 2002. He was interrogated for 12 days by American officials and then chained and shackled on an aircraft and flown to Syria. There he was held for one year, tortured, abused and forced to make a false confession. He was kept in a cell seven feet high, six feet long and three feet wide. A small gap in the ceiling allowed cats to urinate into the cell. Mr Arar stuffed shoes under the door to his cell to prevent rats from entering. He saw almost no sunlight and described the cell as a 'grave' and a 'slow death'.

Maher Arar was finally released in October 2003. He returned to Canada, suffering from post-traumatic stress. He also suffered devastating economic loss, and had gone from being an engineer and a comfortable member of the middle class to having to rely on social assistance to help feed and house his family.

The Commission of Inquiry concluded that there was no evidence to implicate Mr Arar in terrorist activities.[29] The investigation also concluded that Mr Arar had been subjected to torture in Syria and that the psychological impact of that torture had been devastating. It is alleged that the aircraft that brought Mr Arar to Syria had on other occasions stopped over at Shannon.[30] There is, however, no evidence that Mr Arar was transferred through Ireland.

As to the effects of the torture on Mr Arar, the Inquiry's Fact Finder described it thus:

> **'[His] psychological state was seriously damaged and he remains fragile. His relationships with members of his immediate family have been significantly impaired. Economically, the family has been devastated.'[31]**

28 This case is extensively detailed in the *Report from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, *www.ararcommission.ca*.

29 See footnote 28.

30 See European Parliament resolution on 'The alleged use of European countries by CIA for the transportation and illegal detention of prisoners', adopted 14 February 2007, at para 123.

31 *Report from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, by Professor Stephen J. Toope, Fact Finder, 14 October 2005, Conclusion and Summary of Findings.

Dialogue between the IHRC and the Government

(i) Recommendation made by the Irish Human Rights Commission

On 21 December 2005, against a background of allegations that US aircraft landing at Shannon had been involved in 'extraordinary rendition' activities, the IHRC exercised its powers under the Human Rights Commission Act, 2000.[32] It reviewed the relevant law and practice on the issue and made a recommendation to the Government accordingly. In its recommendation, sent to the Taoiseach, the IHRC noted Ireland's obligations to ensure that no person is sent to a jurisdiction where s/he risks being subjected to torture or inhuman or degrading treatment or punishment and called on the Government to inspect suspect aircraft that land at any Irish airport. Following this recommendation, the Council of Europe's then Commissioner for Human Rights, Mr Alvaro Gil-Robles, wrote to the IHRC indicating his concern about the issue of 'extraordinary rendition' and welcoming the IHRC's proposal regarding the inspection of aircraft.

(ii) Response from the Government

The Government responded in April 2006 (by letter from the Minister for Foreign Affairs). The Government took the position that it has received explicit assurances from the US authorities that 'no persons have been transported illegally through Irish territory and that no person would be so transported'. It then reiterated its position that any person with evidence of illegal 'extraordinary rendition' activities involving Shannon should present the evidence to An Garda Síochána to investigate such claim.

The letter made it clear that the Irish authorities do not require the consent of the US authorities before inspecting the type of civil aircraft that have been the subject of 'extraordinary rendition' allegations. However, the Government stated that it has no intention of implementing a system of inspection of aircraft. Instead, its position was that Ireland has complied with its obligations under both the European Convention on Human Rights (ECHR) and the UNCAT by seeking and receiving these factual assurances from the US Government.

(iii) A Fundamental Difference of View

On 24 May 2006 the IHRC sent a detailed response to the Government setting out why it disagreed with its position. The letter set out the credible reports that CIA aircraft that had been identified as being involved in 'extraordinary rendition' activities

32 Section 8(a) and 8(d) of the legislation.

had repeatedly landed at Shannon. It also pointed out that it is extremely difficult for private citizens to obtain concrete evidence of aircraft involved in 'extraordinary rendition' activities without having the authority or power to inspect the aircraft in question. The IHRC then set out the reasons why the Irish Government should not rely on diplomatic assurances in this context. To buttress its position, the IHRC cited the similar stance taken by Council of Europe Secretary General Terry Davis, by the UN High Commissioner for Human Rights and by the Temporary Committee of the European Parliament contained in its Interim Report dated 15 June 2006.[33]

Detailed as appendices to its letter, the IHRC proposed a system of inspection of a number of specific aircraft and of additional aircraft that seek to use Irish airports and are owned or operated by any of the companies named in a recent Amnesty International report as being linked to the CIA.[34]

The IHRC also issued a press release in June 2006, following the publication of the first Marty Report, stating that this report gave credence to the concerns raised by the IHRC and calling again for an effective regime of monitoring and inspection.

A response from the Minister for Foreign Affairs to the IHRC was received in July 2006. The Minister reiterated that 'there is no evidence, nor even any concrete and specific allegation, that prisoners have been brought through Ireland as part of an "extraordinary rendition" operation'. He did not address the evidence that aircraft involved in 'extraordinary rendition' activities appear to have stopped and refuelled at Shannon. The Minister stated that he looked forward to the publication of the recommendations of the Secretary General of the Council of Europe, Mr Terry Davis, and that the Government would consider carefully with partners any 'specific and workable recommendations that may be made by the Council of Europe in this area'.[35] He concluded: 'I would anticipate that when such recommendations emerge they will require coordinated action at a European level if they are to be implemented in an effective manner.'

Attached to the Minister's letter was a legal critique essentially arguing that previous international case-law on the value of diplomatic assurances does not apply in the current context of the US assurances to Ireland. In the view of the IHRC, this critique does not go far enough to address any of the substantive or factual concerns raised by it in its previous correspondence.

In July 2006 the IHRC wrote again, in a letter that crossed with the above communication from the Minister, asking for full details of the assurances that had been given by the US and whether there are any remedies provided for a breach of such assurances. The letter also requested a meeting with the Government to discuss the matter.

33 The investigations by the European Parliament are fully discussed below in Chapter 4 under the heading 'The European Parliament'.

34 The system of inspection proposed is set out below in Chapter 6, Conclusions and Recommendations.

35 The Secretary General of the Council of Europe has since made recommendations, detailed below in Chapter 4.

This meeting took place on 11 July 2007.[36] The Department outlined the steps the State had taken since 2003 to combat the practice of 'extraordinary rendition', citing numerous representations to the US authorities and work undertaken at the European Union level as part of its dialogue with the US authorities.[37]

Both the IHRC and the Department agreed that the State abhors the practice of 'extraordinary rendition' and would not allow 'extraordinary rendition' flights into the State. The Department also indicated that the State would sign and ratify the Optional Protocol to the UNCAT (the Optional Protocol provides for a national preventive mechanism to routinely inspect all places of detention in the State).[38]

However, there were still fundamental differences over whether the diplomatic assurances received by Ireland are sufficient to satisfy Ireland's human rights obligations. The Department reiterated its view that Ireland had received assurances from the highest levels in the US. It argued that these assurances were significant, given that they had not been similarly extended to other European States. On this basis, it held firm in its view that there is no necessity for an effective regime of monitoring and inspection. The IHRC asked the Department to reconsider releasing the diplomatic assurances received and to reconsider introducing an effective monitoring and inspection regime. The Department, for its part, agreed to consider both requests. The two sides agreed to continue dialogue on the issue.

In a follow-up letter the Department agreed to the IHRC request that it give sight of the diplomatic assurances received. It enclosed a summary of the assurances that had been given to Ireland by the US. According to this letter, these assurances have been given by the US Embassy in Dublin to the Department of Foreign Affairs, by the US authorities in Washington to the Irish Embassy, and by US Secretary of State Condoleeza Rice to Foreign Affairs Minister Dermot Ahern. In addition, the IHRC was informed that similar assurances were given by US President George W. Bush to Taoiseach Bertie Ahern. A copy of the diplomatic assurances provided to the Government are set out in Appendix III.

Subsequently, the Department of Foreign Affairs stressed that the Minister was the first European Union Minister to raise the issue of 'extraordinary rendition' bilaterally with the US.[39]

From the record provided to the IHRC, it is clear that the Department actively engaged with the US authorities from late 2003 and that in October 2004 the US authorities 'provided firm assurances to the effect that Irish airports had not been used for the transit of prisoners to or from the detention centre at Guantanamo and Irish airports would not be used for this purpose without the permission of the Irish Government'.

36 There was some delay in setting up this meeting due to the fact that there was a delay in appointing a new Commission in late 2006. Thereafter, a scheduled meeting had to be cancelled due to unavailability of delegates.

37 See Appendix III. For the full correspondence between the IHRC and the Government, see Appendix IV.

38 The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment, New York, 18 December 2002 (General Assembly Resolution A/RES/57/199, 9 January 2003).

39 See Appendix V, response of the Department of Foreign Affairs to the IHRC, 13 November 2007.

It also appears that the most substantive discussion took place on 29 September 2005 between the US Embassy and the Department against the backdrop of increased public concern about 'extraordinary rendition' flights. The Department recalled the answer of the Minister for Foreign Affairs to a Parliamentary Question, as follows:

> **The Government have on several occasions made clear to the US authorities that it would be illegal to transit prisoners for rendition purposes through Irish territory without the express permission of the Irish authorities, acting in accordance with Irish and international law. The US authorities have confirmed that they have not done so, and do not do so, and that they would not do so without seeking the permission of the Irish authorities. No request for such authorisation has been received from the US authorities.**[40]

The record outlines the assertion by the US Embassy that this accurately represented the US position and that the assurances had followed 'interagency consultation at the highest level and that great care had been taken to ensure that Irish concerns were fully understood and respected'.

The Government is satisfied that the assurances received by it are to the effect that no person, however he or she may be classified, would ever be subject to 'extraordinary rendition' through Irish territory without the permission of the Irish authorities. As confirmed in the accompanying letter to the assurances, the Government is satisfied with these assurances under international law. The IHRC, on the other side, is convinced that these assurances do not suffice.

The IHRC also raised the question with the Department as to whether the assurances relating to 'prisoners' was as understood by both the Irish Government and the IHRC (i.e. to include 'detainees'), or whether the term 'prisoners' may not be more narrowly defined or understood by the US authorities. The Department responded that the term referred to all detainees. However, the IHRC considers that there must be some doubt as to this proposition given that, for example, detainees in Guantanamo detention centre have been previously defined by the US authorities, not as 'prisoners' or 'prisoners of war', but rather as 'enemy combatants'.[41]

As a result, there remains a fundamental difference of opinion on the acceptability of continued reliance by the Government on diplomatic assurances and on whether an inspection regime is necessary. The IHRC is firmly of the view that the human rights obligations imposed on Ireland through International treaties to which it is a party and by the Irish Constitution require that such a regime be established as a matter of urgency. The Commission thus decided to proceed on this matter by conducting a detailed substantive review of Ireland's human rights obligations in regard to the practice of 'extraordinary rendition', and its conclusions and recommendations are set out further in this report.

40 See Appendix III.

41 See Appendix III. The exchange occurred at the meeting between the Department and the IHRC on 11 July 2007. In the US Supreme Court Judgment of *Hamdan v. Rumsfeld, Secretary of Defence et al* (29 June 2006), the Government filed a motion to dismiss the writ of *certiorari*, arguing that the newly enacted Detainee Treatment Act (DTA), 2005 did not allow the Court jurisdiction if the person is an 'enemy combatant' (see subsection (e) of para. 1005 of the DTA). The motion was denied.

A copy of this report in draft form was forwarded to the Department of Foreign Affairs before publication. The response and comments from the Department were received by the IHRC in a letter dated 13 November 2007. These comments have been in the main incorporated into the body of this report. The complete letter has been attached to Appendix V of this report. The Government's commitments on the issue of 'extraordinary rendition' which it refers to in its response is set out, in relevant extract, in Appendix VI of this report.

Human Rights Obligations of the Irish State

(i) Human Rights Treaties and the Constitution

Ireland is a signatory to the UN Convention Against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). All of these legal instruments place on Ireland an absolute obligation to prevent torture or inhuman or degrading treatment or punishment. They also impose obligations on this State to respect the security and liberty of the person so that individuals are not subject to the arbitrary and secret detentions carried out through the practice of 'extraordinary rendition'. The ECHR has recently been incorporated into the domestic law of Ireland[42] and specifically requires each organ of State to carry out its duties in a manner compatible with the Convention.[43] In addition, the Irish Constitution protects the right of each individual to bodily integrity and to freedom from arbitrary detention.

The relevant human rights obligations are analysed below. This analysis focuses mainly on the duty to prevent torture or inhuman or degrading treatment or punishment. However, since 'extraordinary rendition' involves detention at a secret location where recourse to the courts or a lawyer is impossible, it is trite law to state that any acquiescence by Ireland in the practice of 'extraordinary rendition' also involves breaches of an individual's right to liberty and the right not to be detained other than in accordance with law and fair procedures.

(ii) Human Rights Issues Involved

- *Article 3 UNCAT:* prohibition against expulsion or refoulement to a jurisdiction where there is a danger of torture;
- *Article 16 UNCAT:* prohibition against acts of cruel, inhuman or degrading treatment or punishment committed with the acquiescence of a public official;
- *Article 3 ECHR:* absolute prohibition of torture or inhuman or degrading treatment or punishment;
- *Article 5 ECHR:* right to liberty and security of the person;

42 The European Convention on Human Rights Act, 2003.
43 Section 3.

– *Article 7 ICCPR:* absolute prohibition of torture or cruel, inhuman or degrading treatment or punishment;

– *Article 9 ICCPR:* right to liberty and security of the person;

– *Article 40.3.1 of the Irish Constitution:* right to bodily integrity;

– *Article 40.4.1 of the Irish Constitution:* right to liberty.

As highlighted above, Article 3 of the UNCAT provides that 'no State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture'. Article 7 of the ICCPR provides that 'no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 3 of the ECHR contains a similar provision, which absolutely forbids torture or inhuman or degrading treatment or punishment and when read in conjunction with Article 15(2) of the same Convention provides there shall be no circumstances, including war or public emergency, which can be invoked as a justification for torture or cruel, inhuman or degrading treatment or punishment.[44]

Although it is possible to argue on technical grounds that the language in Article 3 of the UNCAT – 'expel, return or extradite' – does not encompass the mere transit through the State of a prisoner, such a restrictive interpretation would not appear to be within the spirit of the Convention. Article 16 of the UNCAT also forbids acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed with the acquiescence or consent of a public official, or any other person acting in an official capacity.

(iii) Political Assurances not Enough

Case-law under the UNCAT makes it clear that a State cannot shelter behind assurances it has received from another State in order to fulfil its obligation to prevent torture or cruel, inhuman or degrading treatment or punishment. This principle is clear from the case of *Agiza v. Sweden*,[45] where the complainant was seized by Swedish authorities and handed over to US security personnel, who in turn transported him to Egypt where he was tortured. In this case, the UN Committee Against Torture (the relevant treaty monitoring body) considered that assurances to Sweden given by the Egyptian Government that he would not be tortured, given before the deportation of Mr Agiza to Egypt, were not sufficient to meet Sweden's obligations under the UNCAT. In coming to this view, the Committee noted that Sweden would, or should, have known that Egypt resorted to the widespread use of torture and stressed that there was no mechanism for the enforcement of the assurances given by Egypt.

The Committee also noted that, according to the investigations of the Swedish Parliamentary Ombudsman, prior to leaving Sweden Mr Agiza had been hooded, shackled and strapped to mattresses in an aircraft by the US agents, while the attending Swedish police, who handed Mr Agiza over, did nothing.[46] The Committee considered that he had been 'subjected on [Sweden's] territory to treatment in breach of, at least, article 16 of the UNCAT by foreign agents but with the acquiescence

44 See also Article 1(2) of UNCAT which provides: 'This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.'

45 20 May 2005. Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003(2005).

46 See para 12.9.

of [Sweden's] police'.[47] This finding preceded the UN report on Guantanamo Bay, which concluded that the excessive force used during the transportation of prisoners 'must be assessed as amounting to torture as defined by Article 1 of the Convention Against Torture [UNCAT]'.[48] Article 16 of the UNCAT also refers to a number of separate obligations under Articles 10, 11, 12 and 13 to prevent torture or other acts of cruel, inhuman or degrading treatment or punishment and to investigate allegations of torture or other acts of cruel, inhuman or degrading treatment or punishment.[49]

A similar conclusion was reached in the case of *Alzery v. Sweden*,[50] which was decided by the UN Human Rights Committee under the provisions of the ICCPR. In this case, the Swedish authorities handed an Egyptian national over to foreign agents at Bromma airport outside Stockholm for transportation to Cairo. His clothes were cut off him at the airport where he was drugged per rectum and placed in diapers.[51] He was blindfolded and chained to the aircraft in an awkward and painful position. In Egypt he was tortured. Following *Agiza*, the Human Rights Committee held that Sweden could not rely on assurances where there was no mechanism for ensuring their enforcement. The Committee also held that the treatment meted out to Mr Alzery at Bromma airport was in itself a breach of the obligation to prevent torture or cruel, inhuman or degrading treatment or punishment since a State is responsible for the acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of that State.[52]

The first Marty Report[53] provides a substantial level of detail about the typical manner in which detainees are prepared for 'extraordinary rendition' flights. His description tallies with the ordeal of Mr Alzery. Detainees have described having their clothes cut off, being subjected to an extensive and invasive body search, being forced to wear a nappy, being hooded, shackled, drugged and strapped to a mattress or floor in an uncomfortable position, with no knowledge of their fate or destination. This treatment alone, which continues throughout the transit, would appear to clearly fall within the definition of inhuman and degrading treatment.

As stated, Article 3 of the ECHR contains an absolute prohibition on torture or inhuman or degrading treatment or punishment. No derogations or exceptions are permissible to this prohibition. Not only have Member States the obligation not to

47 See para 13.4; the Committee continued: 'It follows that the State Party's expulsion of the complainant was in breach of article 3 of the Convention.'

48 See para 88. See earlier discussion of the UN report in Chapter 1 of this report.

49 For example, under Article 10(1) UNCAT, the State 'shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment'.
Article 12 UNCAT provides that 'Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'. Article 13 meanwhile provides that 'Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.

50 Human Rights Committee. Decision of 25 October 2006. Communication No. 1416/2005 communicated 29 July 2005.

51 See para 3.11.

52 See para 11.5.

53 At para 2.7.1: 'CIA methodology: how a detainee is treated during a rendition.'

torture or to inflict inhuman or degrading treatment or punishment, they also have a duty to prevent torture or inhuman or degrading treatment or punishment.[54] In addition, States have the obligation to investigate[55] as soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman and/or degrading treatment or punishment has taken place.

Under the ECHR a State may be held responsible for a violation of Article 3 if its decision to transfer that person to another country has created a real risk of torture or inhuman or degrading treatment or punishment in the State to which the prisoner is transferred.[56] In the case of *Chahal v. The United Kingdom*,[57] the European Court of Human Rights specifically ruled that diplomatic assurances are an inadequate guarantee in relation to the proposed return of individuals to countries where torture is 'endemic' or 'where the violations of human rights by certain members of the security forces in Punjab and elsewhere in India, is a recalcitrant and enduring problem'.

Under the ICCPR, in *Ahani v. Canada*,[58] the Human Rights Committee emphasised that 'the right to be free from torture requires … that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties'.[59]

A summary of the jurisprudence under international treaties is provided in a recent report by the UN Special Rapporteur on Torture and Other, Cruel, Inhuman and Degrading Treatment or Punishment (Professor Manfred Nowak), published in August 2005.[60] Professor Nowak concluded:

> **It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment; such assurances are sought usually from States where the practice is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. 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.**

His views echo those of the then Council of Europe High Commissioner for Human Rights (Mr Alvaro Gil-Robles) in July 2004:

54 ECHR, *Z and others v. UK*, judgment 10 May 2001; *A v. UK*, judgment 23 September 1998.
55 ECHR, *Caloc v. France*, judgment 20 July 2000.
56 ECHR *Soering v. UK*, judgment 7 July 1989; *Chahal v. UK*, judgment 15 November 1996.
57 See footnote 56.
58 United Nations, Human Rights Committee, 80th Session, Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002.
59 At para 10.7.
60 A/60/316 (30 August 2005), para 51.

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 on torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.[61]

There is a fundamental difference of opinion between the IHRC and the Government as to whether Ireland can rely solely on the diplomatic assurances given by the US Government on 'extraordinary rendition' to meet its international obligations to prevent torture or inhuman or degrading treatment or punishment. The Government position, which is fully set out in the letters to the IHRC, stresses that the assurances from the US authorities are not assurances that torture or inhuman or degrading treatment or punishment will not take place, as was the case in many legal decisions, but are factual assurances that no prisoners are being 'rendered' through Ireland. The Government is of the view that as a result of this distinction, the case-law on diplomatic assurances as described in this chapter does not apply to factual assurances given by the US on this issue.

Clearly, this distinction can be made. However, in the view of the IHRC, the principles expressed in the case-law and by experts regarding diplomatic assurances would apply equally to factual assurances, given that such assurances are not legally binding and that there is no mechanism for their enforcement.

(iv) The Irish Constitution and 'Extraordinary Rendition'

In addition to international treaties binding on the State, the Irish Constitution also provides protection to individuals from torture or inhuman or degrading treatment. The right to bodily integrity, which is one of the un-enumerated rights enshrined under Article 40.3.1 of the Constitution, includes a more general right not to have one's health endangered by actions of the State.[62] This right clearly includes a right to freedom from torture or inhuman or degrading treatment.[63] There is some debate as to whether the un-enumerated rights protected in the Constitution apply to non-citizens. However, in cases involving gross human rights violations, non-nationals would be entitled to constitutional protection on Irish soil.[64]

The Irish courts have accepted that in the context of the right to liberty enshrined under Article 40.4.1, the courts will refuse to extradite an individual where there is a real risk that his or her fundamental rights would be breached.[65] This principle is in line with the European Convention jurisprudence described above. In *Finucane v. Mahon*,[66] the Supreme Court held that the applicant had shown there was a probable risk of ill-treatment were he to be returned to the Maze prison in Northern Ireland. Because of this, the Court held that it was required to order the release of the applicant to ensure that his constitutional rights were not violated.

61 CommDH(2004) 13, 8 July 2004, para 9.
62 See J.M. Kelly, *The Irish Constitution*, Para 7.3.72 7.3.76. *State(C) v. Frawley* [1976] IR 365, *State (McDonagh) v. Frawley* [1978] IR 131, *State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82.
63 *State (C) v. Frawley*, per Finlay P. [1976] IR 365 at 374.
64 See discussion in J.M. Kelly, *The Irish Constitution*, paras 7.1.3 1 7.1.44.
65 See J.M. Kelly, *The Irish Constitution*, paras 7.4.304 7.4.309.
66 [1990] 1 IR 165, [1990] ILRM 505.

(v) The Venice Commission Opinion

There is no case-law that deals specifically with the issue of 'extraordinary rendition' in the circumstances that are most likely to arise in the Irish context, i.e. no case-law on a situation where an individual is 'rendered' through a State in circumstances where the State knowingly allows the aircraft to land but does not have actual notice (though it may have some form of constructive notice) of the existence of the prisoner on the flight. (Obviously, if the transit State knows an 'extraordinary rendition' prisoner is on board, it is clear that it has a positive duty to prevent such transit.) There is also no specific case-law on circumstances where aircraft involved in such activities are allowed passage and facilities through the airports of friendly States en route to, or returning from, 'extraordinary rendition' activities.

However, a legal Opinion commissioned by the Council of Europe, known as the Venice Commission Opinion,[67] referred to above, specifically addresses the obligations of Member States of the Council of Europe under the ECHR and other treaties in instances where the State's involvement in 'extraordinary rendition' activities includes the use of its airspace and/or airports. This Opinion was compiled with the assistance of a number of human rights experts throughout Europe.

The Venice Commission Opinion concluded that Council of Europe Member States are under an obligation to prevent a prisoner's *exposure to risk of* torture or inhuman or degrading treatment and that the assessment of the reality of the risk must be carried out very rigorously.[68]

According to the Venice Commission Opinion, the requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe Member States. It concludes that Member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk.[69] The situation may arise where a State has serious reasons to believe that the mission of an aircraft crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.[70] In such situations, it concludes, the responsibility of Member States under the ECHR is engaged if they do not take preventive measures within their powers, and such States must take all possible measures in order to prevent the commission of human rights violations in its territory, including its airspace.[71]

This means that if the particular aircraft is a civil aircraft the territorial State may require landing and may search it. In addition, it may protest through appropriate diplomatic channels.[72] In granting foreign State aircraft (as opposed to civil aircraft) authorisation for overflight, Council of Europe Member States 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 aircraft carrying prisoners.[73]

67 'European Commission for Democracy Through Law (Venice Commission) Opinion on the international obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transfer of Prisoners', adopted by the Venice Commission at its 66th plenary session (Venice 17-18 March 2006).
68 Paras 139 and 140 (italics added).
69 Para 143.
70 Para 144.
71 Para 145.
72 Para 148.
73 Para 151.

If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers are at risk of being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses.[74]

Requests for overflight clearance should provide sufficient information to allow effective monitoring (for example the identity and status 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 aircraft must be exercised.[75]

Although the Opinion does not specifically address the question of diplomatic assurances in the context of 'extraordinary rendition', it does make the point that in the context of diplomatic assurances that relate to the interstate transit of prisoners, such 'assurances must be legally binding on the issuing State and must be unequivocal in terms; where there is substantial evidence that a country practises 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.'[76]

(vi) Powers to Inspect Foreign Aircraft

The Venice Commission Opinion sets out some detail regarding the provisions of international aviation conventions in this context, in particular the Chicago Convention[77] and the Tokyo Convention,[78] to both of which Ireland is a party.

The Opinion concludes that *civil aircraft*[79] (generally understood to be the aircraft alleged to be involved in 'extraordinary rendition' activities) that are not engaged in scheduled international air services of a State that is party to the Chicago Convention are entitled to make flights into or in-transit non-stop across the territory of another State party and to make stops for non-traffic purposes, without the necessity of obtaining prior permission and subject to the right of the State flown over to require landing. The authorities of each State party have the right to search such aircraft on landing or departure.[80] *State aircraft*, on the other hand, do not have the same overflight rights and are not permitted to fly over or land in foreign sovereign territory without the specific authorisation of that State.[81] However, such authorisation could be conditioned on agreeing to an inspection regime. The commission of offences when an aircraft is in flight is governed by the Tokyo Convention.[82]

74 Para 151.
75 Para 151.
76 Conclusions at p. 30, para 159 (g).
77 Convention on International Civil Aviation, signed in Chicago, 7 December 1944.
78 Convention on Offences and certain other Acts Committed on Board Aircraft, signed Tokyo, 14 September 1963.
79 Emphasis added.
80 See para 92 of the Venice Commission Opinion.
81 See para 93 of the Venice Commission Opinion.
82 See para 100 and 101 of the Venice Commission Opinion. A host State may not interfere with an aircraft in flight to exercise jurisdiction over an offence committed on board unless the offence has effect in the territory of the host State, has been committed against a national or permanent resident of the State, or is against the security of the State, is a breach of regulations regarding the flight of aircraft in the State, or the exercise of jurisdiction is necessary to ensure the observance of any obligation of the host State under a multilateral international agreement.

In its Article 52 response to the Council of Europe Inquiry (see Appendix IV),[83] the Irish Government has taken the view that the Irish Air Navigation and Transport Acts of 1988 and 1998 provide that in a case where it is suspected that a crime is being committed on board a civil aircraft, an authorised officer, including a member of An Garda Síochána, may arrest without warrant any person who assaults, or whom the Garda reasonably suspects to have assaulted, another person. The response also points out that the 1998 Act permits an authorised officer to enter an aircraft in an Irish airport when such is necessary for the exercise of any power under the 1998 Act or the 1988 Act. The Government takes the view that these powers would apply to civil aircraft used by foreign officials, which land on Irish territory.[84] It also takes the view that in order to inspect civilian CIA aircraft, it does not have to secure the consent of the US Government.[85]

(vii) Legal Conclusions

From the analysis set out above, the IHRC concludes that Ireland's international human rights obligations, as set out in the relevant international treaties and our own Constitution, require that the State takes effective measures to ensure that its airspace or territory is not being used to facilitate the practice of torture or inhuman or degrading treatment or punishment. Given the credible allegations that CIA aircraft involved in 'extraordinary rendition' have on a number of occasions stopped at Shannon, the need for a system of investigation or monitoring has been triggered.

The reliance on US political assurances is not enough, particularly given that the US has made no secret of its use of 'enhanced interrogation techniques' and that it has acknowledged the existence of the 'extraordinary rendition' programme. Reliance on such assurances will not relieve Ireland of legal liability if an individual is 'rendered' through Irish territory. The IHRC concludes that an effective system of inspection is required as a matter of urgency. There is no legal barrier to requiring foreign suspect aircraft to submit to such a regime and the Irish Government has acknowledged that this is the case.

83 See Chapter 1, heading (iii) 'Action taken by International Bodies'.

84 See Appendix IV, 'Article 52 Request in respect of unacknowledged Deprivation of Liberty Reply of the Government of Ireland', p. 7, para 3(a)(2).

85 See Chapter 3 and reference to letter of 4 April 2006 from Minister for Foreign Affairs Dermot Ahern to the IHRC.

European and International Investigations of 'Extraordinary Rendition'

As stated earlier, a number of reports commissioned by eminent international bodies have condemned 'extraordinary rendition' and made recommendations so that the practice can be halted. The findings of these bodies are described in this chapter. It is the IHRC's view that the system of inspection proposed in this report is in line with the recommendations made by the Council of Europe and the European Parliament to their Member States.

(i) The Council of Europe Parliamentary Assembly and the Marty Reports

As stated above, the Parliamentary Assembly of the Council of Europe commissioned an investigation of the practice of 'extraordinary rendition', culminating in the first and second Marty Reports.[86] Following the publication of the first Marty Report in June 2006, a resolution, adopted by the Parliamentary Assembly on 27 June 2006,[87] stated that the United States has woven a 'clandestine "spider's web" of disappearances, secret detentions, and unlawful inter-State transfers, often encompassing countries notorious for their use of torture'. This 'web', it was stated, has been spun out 'with the collaboration or tolerance of many countries, including several Council of Europe Member States' and has 'spawned a system that is utterly incompatible with the fundamental principles of the Council of Europe'.

In its resolution, the Parliamentary Assembly identified instances in which Council of Europe Member States have colluded with the US, 'wilfully or at least recklessly in violation of their international human rights obligations'. These examples specifically included making available civilian airports or military airfields as 'staging points' for 'extraordinary rendition' operations, whereby an aircraft prepares for or takes off on its operation from such a point. Another example is making such airports available as 'stopover points' for 'extraordinary rendition' operations, whereby an aircraft lands briefly at such a point on the outward or homeward flight, for example to refuel. The first Marty Report concluded[88] that a number of countries, including Ireland, could be held responsible for 'collusion' involving secret detention and unlawful inter-State transfers by virtue of being 'stopovers' for flights involving the unlawful transfer of detainees.

86 See footnotes 4 and 8.
87 Resolution 1507, 2006.
88 Page 60 at para 289.

Included at appendices to the first Marty Report are the flight logs of aircraft associated with the 'extraordinary rendition' of specific prisoners investigated and detailed in the report. According to Appendix 1, Plane N313P, which was involved in the successive 'extraordinary renditions' of Binyam Mohammed Al Habashi and Khaled El-Masri in January 2004, stopped at Shannon en route to carry out the illegal transport of Al Habashi from Rabat to Kabul and, some days later, El-Masri from Skopje to Baghdad and on to Kabul. Appendix 4 states that Plane N85VM stopped in Shannon one day after carrying out the 'extraordinary rendition' of Abu Omar (abducted on the streets of Milan) to Cairo from military airbases in Italy and Germany in February 2003. Appendix 7 states that Plane N379P stopped at Shannon after it carried out the illegal rendition of Binyam Mohammed Al Habashi from Islamabad to Rabat in July 2002.

In its resolution, referred to above, the Parliamentary Assembly calls on Member States of the Council of Europe to 'ensure that unlawful inter-State transfer of detainees will not be permitted and take effective measures to prevent renditions and rendition flights through the Member State's territory and airspace'.[89]

It also calls on Member States to 'ensure that independent, impartial and effective investigations are carried out into any serious allegation that the territory, including airports or airspace, has been used in the context of rendition or secret detention. Such investigation should investigate thoroughly any action taken by State or foreign agents linked to rendition and laws or practices which may facilitate it. The scope and findings of the investigation should be made public'.

(ii) The Council of Europe and Article 52

In December 2005 the Secretary General of the Council of Europe, Mr Terry Davis, invoked the seldom-used procedure under Article 52 of the ECHR and formally requested information from all Council of Europe Member States as to whether any public officials had been involved in any way 'whether by action or omission' in the detention or transport of any of the detainees and whether any official investigation has been held into this matter.

In its reply[90] to this request for information, the Irish Government stated that, in 2004, it 'sought and received assurances from the US government that prisoners had not been, nor would they be, transferred through Irish territory without the express permission of the Irish authorities'. It also stated that 'in conformity with the relevant domestic and international law, permission would not be granted for the transit of an aircraft participating in an "extraordinary rendition" operation or for any other unlawful act'. The Irish Government stated that these assurances had been reiterated at a number of meetings in 2005 and 2006 and that they had also been confirmed at a meeting between Minister for Foreign Affairs Dermot Ahern and US Secretary of State Condoleeza Rice on 1 December 2005.

The Government stressed that it is 'satisfied that they are entitled under the ECHR to rely on clear and explicit factual assurances given by the Government of a friendly State, on a matter that is within the direct control of that Government'.

89 'Alleged detention and unlawful inter-State transfer of detainees involving Council of Europe Member States', Resolution 1507, para 19.1. Council of Europe, Assembly debate 27 June 2006 (17th sitting).

90 'Article 52 request in respect of Unacknowledged Deprivation of Liberty. Reply of the Government of Ireland' (The Article 52 response) (undated). See Appendix IV.

By way of conclusion to its Article 52 response, the Government stated that 'A thorough examination of practice throughout the State in response to the Secretary General's request has revealed no indication of the occurrence either of unacknowledged deprivation of liberty or the transportation of any individual while so deprived of his liberty'.

The Government also stated that any person with specific evidence regarding 'extraordinary rendition' operations should present this to An Garda Síochána and added that any 'credible complaint of criminal activity' made to the Gardaí would result in a full investigation being conducted, which could include an inspection of the aircraft in question.[91] According to the Government, at that time three complaints had been made of such activity. In two of the cases, papers were forwarded to the Director of Public Prosecutions (DPP), but in neither instance was any further action warranted, due to a lack of evidence. It now appears that six such files have been forwarded to the DPP, according to information supplied by Foreign Affairs officials.[92]

In the Secretary General's report drawn up as part of the Article 52 inquiry and delivered on 28 February 2006,[93] the following points emerged:

- The rules governing activities of secret services appear inadequate in many States; better controls are necessary, in particular as regards activities of foreign secret services on their territory.

- The current international regulations for air traffic do not give adequate safeguards against abuse. There is a need for States to be given the possibility to check whether transiting aircraft are being used for illegal purposes. But even within the current legal framework, States should equip themselves with stronger control tools.

- Mere assurances by foreign States that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

(iii) The European Parliament

A Temporary Committee of the European Parliament carried out an investigation, and Members of the IHRC as well as the Irish Minister for Foreign Affairs appeared to testify at the hearings on the issue.[94] The Committee issued an interim report, dated 15 June 2006,[95] which essentially endorsed the findings of the first Marty Report. It also, *inter alia*, found that it is implausible that 'many hundreds of flights through the airspace of several Member States … could have taken place without the knowledge of either the security services or the intelligence services and without senior officials

91 See p. 19 of Article 52 response. See Appendix IV. The Government referenced the Minister for Justice, Equality and Law Reform informing the Dáil in these terms in November 2004.

92 The Department of Foreign Affairs provided this figure to the IHRC during their meeting of 11 July 2007. The Minister for Foreign Affairs gave an account of the cases in his evidence to the European Parliament Temporary Committee on 30 November 2006 (p14-16), attached at Appendix V.

93 Secretary General's Report under Article 52 of the European Convention on Human Rights on the question of Secret Detention and Transport of Detainees suspected of Terrorist Acts, notably by or at the instigation of foreign agencies. SG/Inf 5 (2006).

94 Temporary Committee of the European Parliament on the alleged use of European countries by the CIA for the Transport and illegal detention of prisoners, 28 November 2006.

95 *Interim Report on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners* (2006/2027(INI)) A6-9999/2006.

from those services being at least questioned on the link between these flights and the practice of "extraordinary rendition"'.[96]

Its final report was published on 30 January 2007[97] and contained a number of hard-hitting findings about the involvement of EU Members States in 'extraordinary rendition'. In adopting the report, the European Parliament passed a resolution[98] regretting that 'European countries have been relinquishing control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for "extraordinary rendition"'.[99] The resolution contained a specific section relating to Ireland and expressed serious concern about the '147 stopovers made by CIA-operated aircraft at Irish airports that on many occasions came from or were bound for countries linked with "extraordinary rendition" circuits'.[100]

It also deplored the 'stopovers in Ireland of aircraft which have been shown to have been used by the CIA, on other occasions, for the "extraordinary rendition" of Bisher Al-Rawi, Jamil El Banna, Abou Elkassim Britel, Khaled El-Masri, Benyam Mohamed Al Habashi, Abu Omar and Maher Arar and for the expulsion of Ahmed Agiza and Mohammed Alzery'.[101] The resolution endorsed the view of the IHRC that acceptance by the Irish Government of diplomatic assurances does not fulfil Ireland's human rights obligations.[102] In the absence of random searches, it suggested that a 'ban should be imposed on all CIA-operated aircraft landing in Ireland'.[103]

In responding to the report, the Minister for Foreign Affairs, Dermot Ahern TD, stated that the fact that Ireland alone was the subject of such a call demonstrated a lack of balance and a degree of political partisanship. Earlier, when addressing the Temporary Committee, the Minister had questioned the methodology by which the figure of 147 suspect flights had been calculated, pointing out that these aircrafts were chartered to different users on an ongoing basis and that there are many legitimate purposes for which the US authorities might wish to charter an aircraft.

(iv) Investigations in Sweden, Germany, Italy and Canada

A number of investigations have been carried out in European countries and in Canada into the issue of 'extraordinary rendition'. In Canada, the Arar Commission,[104] which was established to probe the involvement of Canadian officials into the illegal 'rendition' of Maher Arar, delivered a conclusive report categorically stating that the allegations against him were groundless and that his claim for compensation should be seriously considered by the Canadian authorities. In January 2007 Mr Arar finally received $Can 11.5 (approx. €7.5 million) in compensation and a formal public apology from the Canadian Prime Minister.[105]

96 At para 14.
97 European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, FINAL A6-0020/2007.
98 Motion for a European Parliament resolution on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (2006/2200 (INI)), adopted 14 February 2007; 382 votes in favour, 256 against and 74 abstentions.
99 At para 43.
100 At para 123. For the Minister's response see footnote 14.
101 At para 123.
102 At para 122.
103 At para 125.
104 See footnote 28.
105 See footnote 281 to the second Marty Report.

The Deputy Public Prosecutor in Milan, Italy, is carrying out an investigation into the illegal abduction and 'extraordinary rendition' from Italy to Egypt of the Egyptian national Abu Omar. In Germany the Munich Public Prosecution Office and a German parliamentary committee of inquiry are carrying out an investigation into the alleged abduction and detention of the German citizen Khaled El-Masri. An investigation has been carried out in Sweden into the illegal abduction and 'extraordinary rendition' to Egypt of Mohammed Alzery and Ahmed Agiza.[106]

106 Parliamentary Ombudsman, *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens*, registration No. 2169 2004 (22 May 2005). Swedish Parliament, *The Swedish Government's handling of matters relating to expulsion to Egypt*, Scrutiny Report 2005/06-Ku2 www.riksdagen.se

Need for an Effective Inspection Regime

The key question that arises in the Irish context is whether the consistent allegations about the use of Shannon and the evidence regarding CIA aircraft have triggered the need for an effective investigation by the Irish authorities. Are there, in the words of the Venice Commission Opinion, 'reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated'?

The Irish Government has accepted the assurances of the US Government that no prisoners have been transported through Irish airports. Despite the evidence that CIA aircraft involved in 'extraordinary rendition' have stopped at Shannon, it is not prepared to investigate further or to put in place a regime of inspection. Rather, it has placed the onus on the private citizen to come up with credible evidence of 'extraordinary rendition' activities even though the private individual has no ability or authority to access those parts of airports through which suspected flights pass.

In this context, the State could certainly be perceived to be turning a blind eye to any possibility of its airspace being used for 'extraordinary rendition', given that flight logs clearly show CIA aircraft involved have passed through Shannon and given the conclusions of both the Council of Europe and the European Parliament in its reports and resolutions on the issue. Yet, no CIA aircraft appears ever to have been searched at Shannon. According to the Department for Foreign Affairs, six investigative files have been forwarded to the DPP containing allegations about aircraft landing in Ireland.[107] According to testimony given by the Minister for Foreign Affairs, Dermot Ahern TD, to the European Parliament Temporary Committee, these allegations were investigated but ultimately no action was taken because of a lack of concrete evidence of illegal activity.[108]

Unfortunately, this underlines the key problem in assembling such evidence. In the absence of a system of inspection, it is impossible for any ordinary person to ascertain who is on board and what activities are being carried out in aircraft parked on a runway, en route to an unknown destination. In the view of the IHRC, in putting the onus of assembling such evidence on the ordinary citizen, the Irish Government is failing to do all in its power to ensure that its airspace and airports are not used to facilitate the practice of 'extraordinary rendition'.

107 The Department of Foreign Affairs gave this information to the IHRC in their meeting on 11 July 2007. See Appendix III.

108 See Appendix V (pp 14-16) Extract of the Minister for Foreign Affairs giving evidence to the European Parliament Temporary Committee, 30 November 2005.

The European Parliament, the Parliamentary Assembly of the Council of Europe and the Secretary General of the Council of Europe have each called on all Member States to do more to ensure that they are not parties to the practice of 'extraordinary rendition'.[109]

To summarise, the European Parliament has been unequivocal in relation to Ireland's obligations to respect human rights. It has recommended that, in the absence of a system of inspection, all CIA flights should be banned from stopping at Irish airports.

The Parliamentary Assembly of the Council of Europe has recommended that each Member State takes effective measures to prevent 'extraordinary rendition' flights through the Member State's territory and airspace. It has also called on each Member State to ensure that independent and effective investigations are carried out into any serious allegation that the territory, including airports or airspace, has been used in the context of 'extraordinary rendition'.

Finally, the Council of Europe Secretary General has recommended that States should equip themselves with stronger tools to check whether transiting aircraft are being used for illegal purposes. He has also firmly stated that mere assurances by foreign States that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect human rights.

The Department of Foreign Affairs points out[110] that it is international aviation practice under the Chicago Convention, that private civil aircraft engaged in technical stops in transit through third countries are merely required to give air traffic authorities, with very limited notice, their call signs and immediately previous and next stops. With a view to addressing more effectively a range of challenges, including terrorism, the Department of Foreign Affairs indicated that the Minister has called for a review of the Convention to require provision of additional information, and this matter is being proposed with international partners, particularly within the European Union Council framework. The Department has stated that this is also in line with its commitments in the Programme for Government.

The call for a coordinated approach is welcomed by the IHRC but it is felt this does not go far enough. It is important that the Irish State examines its human rights obligations on an individual basis and that it acts now to ensure that its territory is not or could not be used for illegal activities. Ireland should and can take the lead in showing its complete abhorrence of the practice of 'extraordinary rendition'. The IHRC also notes that as pointed out in the Venice Commission Opinion,[111] the authorities of each State party have the right, without unreasonable delay, to search civil aircraft of the other State party on landing or departure, and to inspect the certificates and other documents prescribed by the Chicago Convention (Article 16). Thus, the searching of civil aircraft is permitted under the Chicago Convention.[112]

109 The recommendations of each of these bodies is described in detail in Chapter 4 of this Report.
110 See letter from the Department for Foreign Affairs to the IHRC dated 13 November 2007, attached at Appendix V.
111 Para 92.
112 See also Appendix IV, 'Article 52 Request in respect of unacknowledged Deprivation of Liberty Reply of the Government of Ireland', pp 12-13, on the State's ability to search civil aircraft where a crime is suspected.

If it does emerge at a later date that prisoners have been transported through Shannon for the purposes of 'extraordinary rendition', it will be difficult for the Government to justify its reliance on the assurances of the US Government. As pointed out by the IHRC in its letter to the Government on 24 May 2006, it is not clear that the US authorities are in day-to-day control of all 'extraordinary rendition' operations carried out by the CIA and, further, given the analysis of the conditions for detainees in Guantanamo Bay by the UN Special Rapporteurs, there must be questions about how effective assurances against 'extraordinary rendition' can be.[113]

In his speech to the Dáil on 13 June 2006 the Minister for Foreign Affairs did not deny that CIA aircraft stopped and were refuelled at Shannon. He merely made the point that 'given that at most the allegations are that such aircraft passed empty through Ireland, it is impossible to see how even if such aircraft were to be identified and searched the outcome of such searches would shed any particular light on the matter'.

He stressed the Government's policy of continuing engagement with the US authorities and said that Ireland is one of only three countries in Europe that has obtained clear and factual assurances that 'extraordinary rendition' is not taking place through Ireland. He also stated that 'these assurances were issued having been confirmed by all of the agencies who might be involved in such operations'.[114]

The Minister reiterated the Government position, fully set out in the letters to the IHRC, that the assurances from the US authorities are not assurances that torture will not take place, as was the case in many of the legal decisions on the issue,[115] but are factual assurances that no prisoners are being 'rendered' through Ireland. In the view of the IHRC, the Government has not addressed the issue of how the State appears to be indirectly facilitating 'extraordinary rendition' by allowing suspicious aircraft to land and refuel at an Irish airport.

It would seem clear that Ireland is not doing all within its power to ensure that its airports are not involved in 'extraordinary rendition'. The Government does not believe that more is required of it beyond securing and relying upon the factual assurances of the US Government. It has not taken any steps to verify such assurances and it appears that it has not inspected any aircraft. It is difficult to see how the IHRC can take any other view than that the Government is not actively complying with its human rights obligations to ensure that its territory is not used to aid and abet the practice of 'extraordinary rendition' for torture or inhuman or degrading treatment or punishment.

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113 Furthermore, it is not clear that the US can be relied upon to fully respect its international obligations regarding the sovereignty of other nation States in other transit situations not involving 'extraordinary rendition'. On 11 June 2006 a civilian aircraft landed at Shannon carrying a US marine who had been convicted of a breach of the US military code. The transfer of such a prisoner through Ireland to the US to carry out his sentence required the consent of the Minister for Justice, Equality and Law Reform, but such consent had not been sought. The Minister for Foreign Affairs told the Dáil that the US authorities had explained the failure to get consent as a mistake. The local military authorities simply placed the prisoner on the earliest convenient flight and were unaware that the consent of the Irish authorities was necessary; see speech of Minister for Foreign Affairs delivered to the Dáil on 13 June 2006.

114 The Minister stated: 'It is worth highlighting that the US Government has declined to issue similar blanket assurances to most other Member States. We are one of only three countries in this position in Europe. These assurances were issued having been confirmed by all the agencies who might be involved in such operations'.

115 The cases referred to in the Department of Foreign Affairs' response of 25 July 2006 were *Soering v. UK*, ECHR, 7 July 1989, *Chahal v. UK*, 15 November 1996 and *Ahmed Agiza v. Sweden*, UN Committee Against Torture, Communication No. 233/2003 (Decision of 20 May 2005).

If a prisoner can establish that s/he was 'rendered' through Ireland by the US authorities to another State where s/he was tortured or suffered inhuman or degrading treatment or punishment, there is a strong probability that Ireland would be held to be in breach of its human rights obligations in this regard.

The IHRC recommends that the Government establish as a matter of urgency a system of inspection so that it can clearly show the international community that it will not tolerate its airspace or airports being involved in this practice. It must also demonstrate that it will not rely solely on political assurances, particularly from an administration that is known to be involved in the illegal practice of 'extraordinary rendition' and is known to condone so-called 'enhanced interrogation techniques', now accepted to be a form of torture. In this context, it should be noted that UN Rapporteur Martin Scheinin has emphasised that many of the interrogation techniques in which 'the CIA has indeed been involved and continues to be involved', in his assessment, 'involve conduct that amounts to a breach of the non-derogable right to be free from torture and any form of inhuman or degrading treatment'.[116]

An inspection regime would show this State's willingness to comply with the recommendations of the Council of Europe and the European Parliament on the practice of 'extraordinary rendition'. It is no longer enough for our State to assert that there is no concrete evidence that an 'extraordinary rendition' prisoner has been transported through this country. In view of the clear evidence that Shannon has been used by CIA aircraft involved in 'extraordinary rendition', this State must actively take steps to ensure that such aircraft do not carry prisoners en route to torture or inhuman or degrading treatment or punishment. The State must require detailed information about the purpose of the flight, the destination and the names of passengers on each flight (i.e. the flight manifest). It must also establish a system of spot checks so that the information given to the State can be verified. Without such a system, Ireland is open to the charge of only paying lip service to its legal and moral obligations in relation to human rights. The Government is not fulfilling its commitment as set out in its Programme for Government to be a model UN State.

The Government is of the view that an inspection regime is not necessary or justified by a reasonable assessment of the facts and probabilities of the situation and that it is not aware of such a regime in operation elsewhere. Its position is that there is no good reason to believe that an inspection regime, as proposed, would have detected, or would in future detect, illegal activity connected with 'extraordinary rendition'. It also states that call signs can be easily changed, or that new aircraft, not only existing aircraft, may just as easily be used, and that aircraft may be leased from different companies. Under this reasoning, it suggests that any hypothetical person or agency seeking in future to carry out 'extraordinary rendition' activities would take care to avoid patterns that have been identified as suspicious.

Of course the IHRC accepts that many ploys can be adopted to ensure the suspect aircraft are not obvious or susceptible to detection. That is why the IHRC suggests that the Irish authorities monitor closely the movements of any aircraft that may be linked to the CIA or other suspicious aircraft and that it takes pro-active steps to ensure that the list is fluid and can be added to as suspicious activities emerge.

116 See Martin Scheinin, UN Special Rapporteur, On The Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Press conference discussing Preliminary Findings on Visit to the United States, 16 25 May 2007; in the second Marty Report, p. 69 at footnote 305.

The IHRC does not accept that just because persons or agencies will seek to evade inspection, that this is a valid reason for refusing to institute an inspection regime.[117]

117 See footnote 16. The Amnesty International report also acknowledges the difficulty of evasion; however, it also recommends that States put in place an inspection regime.

Conclusions and Recommendations

The IHRC is strongly of the view that the only form of diplomatic assurances that could meet our constitutional and international human rights obligations would be ones that were fully legally enforceable and were accompanied by an effective regime of monitoring and inspection of aircraft suspected of involvement in the 'extraordinary rendition' of prisoners. Given the finding of the UN Special Rapporteurs that the treatment of many of the prisoners being transported to the Guantanamo Bay detention centre in Cuba in itself amounted to torture, this requirement of inspection and monitoring should also apply to the transfer of prisoners through Ireland to that detention centre.[118]

The transfer of prisoners in the course of 'extraordinary rendition' activities, either to secret prisons or to Guantanamo Bay, and the inhuman treatment to which such prisoners are subject in the course of the transfer, are all prohibited acts under international law, and they should not be permitted on Irish territory. If there is a risk of this occurring through the landing of CIA-chartered aircraft at Irish airports, Ireland has an obligation to prevent it, and in our view, that obligation requires more that *just* seeking and accepting assurances.

The obligation requires at a minimum the securing of legally enforceable guarantees that would ensure the immediate release, return and compensation of anyone found to have been transported through Irish territory to any destination where s/he would be placed at risk of torture, inhuman or degrading treatment or punishment. It also requires the putting in place of an effective regime for the monitoring and inspection of aircraft suspected of involvement in the practice of 'extraordinary rendition'. An effective inspection regime would entail requiring full details about the flight itinerary, the purpose of the flight and the name and status of all passengers. It would also include the right to board any aircraft to ensure it is being used in accordance with the stated purpose.

It is the view of the IHRC that Ireland's human rights obligations are activated where US aircraft landing at Irish airports are not actually carrying prisoners but are on their way to collect prisoners for 'extraordinary rendition' to Guantanamo Bay or to third countries, where they run the risk of being tortured or subjected to inhuman or degrading treatment or punishment. The same applies if such aircraft are landing in Ireland when returning after 'rendering' such prisoners.

118 See above Chapter 1, heading (v) 'The UN Report on Guantanamo Bay'.

The Government's reply to the Secretary General of the Council of Europe accepts that aiding or abetting the unlawful detention or ill-treatment of any person is a criminal offence. In that context, we suggest that refuelling an aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for 'extraordinary rendition' or on return from such a mission, would constitute aiding and abetting the practice of torture or inhuman or degrading treatment or punishment, if it occurred.

Once again, the only effective way of ensuring we are not complicit in this regard is through establishing a system of inspection. To facilitate proper inspection of relevant aircraft, detailed information about the purpose of the flight, its destination, the name and status of each passenger, and each passenger's final destination should be required by the aviation authorities and received in advance of any aircraft landing. The provision of detailed information should be a condition for entry to the State. The inspection regime should be applied to any of the aircraft listed at Appendix I of this report if they land at Irish airports, and also to those included on the list circulated to national delegations to the Council of Europe by Senator Dick Marty as part of his investigation (see Appendix II).

We further suggest that the Irish authorities monitor closely the movements of any aircraft not on Senator Marty's list but which are either owned or operated by any of the companies named in the recent Amnesty International Report as linked to the CIA, and which seek to use Irish airports, or any other suspected aircraft in relation to which reasonable suspicion exists or a complaint has been made to An Garda Síochána.[119] In this way, the proposed regime of inspection and examination of flight documents may also apply to such aircraft.

Our fundamental concern in this matter is to try and prevent any person from being subjected to torture or inhuman or degrading treatment or punishment. A secondary concern is that Ireland should observe our international human rights obligations. We wish to prevent a situation where a prisoner is secretly and illegally transported through Ireland to any other country where s/he faces the risk of torture or inhuman or degrading treatment or punishment or other serious human rights violations in circumstances where the Irish authorities made no inquiry about the nature or purpose of the flight in question and did not inspect the aircraft.

The establishment of a monitoring and inspection regime as a matter of urgency will fulfil Ireland's human rights obligations. It will also go some way towards fulfilling Ireland's moral duty to take a stand against any form of torture or inhuman or degrading treatment or punishment, wherever practised. It will send a signal to the wider international community that the human right to be protected from torture or inhuman or degrading treatment or punishment cannot be diluted or weakened – it must be nurtured and protected and can never be subjected to the desire for good relations between States.

119 As noted in the Department's response to the IHRC of 13 November 2007, 'the exercise by the Garda of their powers of investigation in no way requires the consent of the US authorities'. See Appendix V.

Summary of Recommendations

General

- The State should introduce an effective inspection regime as a matter of urgency.

- Aircraft from any State in relation to which suspicion exists should be subject to the inspection regime.

- Ireland should continue to oppose the practice of 'extraordinary rendition' and linked practices in appropriate fora.

- The State should implement the recommendations of the Marty Reports, the Council of Europe Inquiry Report and the European Parliament's Temporary Committee on the issue of 'extraordinary rendition'.

- The State should continue to press for revisions of international aviation agreements where this is required in order to detect and prevent 'extraordinary rendition' flights.

- The commitments in the Programme for Government should be clearly implemented, particularly in relation to the role of An Garda Síochána.

- The State, having signed the Optional Protocol to the UNCAT, should ratify the Protocol without delay and introduce an effective national preventive mechanism as required thereunder.

Specific

- The inspection regime referred to should have effective monitoring and inspection components. It should be properly resourced and be overseen by an independent body (possibly a national preventive mechanism[120]).

- To facilitate proper inspection of relevant aircraft, detailed information about the purpose of the flight, its destination and the names of passengers on board should be required by the aviation authorities and received in advance of any such aircraft landing. The provision of relevant details should be a condition for entry to the State.

- Consideration should be given to establishing a Garda sub-station at Shannon Airport, which would obviate the need for citizens alleging the entry of suspected aircraft having to make a complaint in Shannon Town. In any event, any complaint to a member of An Garda Síochána concerning an aircraft possibly engaged in an 'extraordinary rendition' flight should be investigated immediately, including inspection of the aircraft by the member or members concerned.

- Where necessary, legislation should be introduced to ensure that no aircraft may leave the State where an allegation has been made that it is involved in an 'extraordinary rendition' flight until such time as an inspection of the aircraft occurs.

120 This mechanism is to be established on ratification of the Optional Protocol to the UNCAT. The IHRC has previously called on the Government to ratify that instrument and the Government has signed the Protocol and declared its intention of ratifying it.

Appendices

Aircraft identified by Amnesty International

APPENDIX I

Aircraft identified by Amnesty International as involved in specific CIA "rendition" operations

N313P A Boeing 737-7ET aircraft registered by Stevens Express Leasing Inc., then by Premier Executive Transport Services. Later re-registered as **N4476S** by Keeler and Tate Management. This plane took a German citizen called Khaled al-Masri, who was kidnapped in Macedonia, to Afghanistan in January 2004. It appears to have stopped off at Shannon en route to Macedonia. Amnesty has recorded that it landed at Shannon 23 times and at Dublin twice between 2002 and 2005. Minister for Transport Martin Cullen TD said in a written answer in the Dail recently that it had landed 14 times at Shannon.

N379P A Gulfstream V executive jet owned by Premier Executive Transport Services and later re-registered as **N8068V** and then **N44982**. This plane was nicknamed the "Guantanamo Bay Express" because of the frequency of its trips there. It was used to take Ahmed Agiza from Sweden to Egypt. Amnesty has recorded that it landed at Shannon 22 times. Minister Martin Cullen said it had landed 12 times at Shannon under the registration number **N379P** and three times as **N8068V**.

N829MG A Gulfstream III owned by Mark J. Gordon Aviation and then by S & K Aviation LLC, which re-registered it as **259SK**. This plane took Maher Amar, who had joint Canadian/Syrian citizenship from New York to Jordan in 2002, from where he was transferred to Syria where he was tortured. It has also made a lot of trips to Guantanamo Bay. Amnesty has recorded it as landing twice at Shannon. Minister Cullen gave no figures for it.

N85VM A Gulfstream IV owned by Assembly Point Aviation Inc. and operated by Richmor Aviation. Re-registered as **N227SV**. This plane was involved in transporting an Egyptian cleric called Abu Omar to Egypt after he had been kidnapped by CIA personnel in Italy in February 2003. It flew to Shannon afterwards. Amnesty has recorded it as landing 30 times at Shannon and once in Dublin. Minister Martin Cullen said it had landed 19 times at Shannon.

Aircraft identified by the Council of Europe

APPENDIX II

List of Suspected CIA Aircraft

Shortened version of list attached to letter sent by Senator Dick Marty to heads of national delegations to Parliamentary Assembly of the Council of Europe on 19th December 2005

N85VM (re-registered as N227SV) Gulfstream IV, owned by Assembly Point Aviation and operated by Richmor Aviation;

N508H Gulfstream G-1159/A, owned by Crystal Jet Aviation Inc. and operated by Richmor Aviation;

N368CE Boeing 737, owned by Wells Fargo Northwest and operated by Richmor Aviation/Premier Aircraft Management;

N4042J Beech B-200, owned and operated by Stevens Express Leasing Inc.;

N173S Beech B-350, owned and operated by Stevens Express Leasing Inc.;

N4009L Beech B-350, owned and operated by Stevens Express Leasing Inc.;

N845S Douglas DC3, owned and operated by Stevens Express Leasing Inc.;

N1016M Cessna C-208, owned and operated by Crowell Aviation Technologies Inc.;

N157A Beech King Air B-200C, owned by Aviation Specialities and operated by Stevens Express Leasing Inc.;

N312ME Beech King Air B-200C, owned and operated by Aviation Specialities;

N58AS Beech King Air B-200C, owned and operated by Aviation Specialities;

N6161O DeHavilland DHC-6, owned and operated by Aviation Specialities;

N299AL (?)Raytheon B-200, owned and operated by Aviation Specialities;

N4456A Raytheon B-200C, owned and operated by Aviation specialities;

N4489A Raytheon B-200C, owned and operated by Aviation Specialities;

N5139A Raytheon B-200C, owned and operated by Aviation Specialities;

N5155A Raytheon B-200C, owned and operated by Aviation specialities;

N8068V (formerly N379P, re-registered as N44982) Gulfstream G-V, owned by Bayard Foreign Marketing and operated by Premier Executive Transport Services Inc.;

N313P (re-registered as N4476S) Boeing 737, owned by Keeler & Tate Management Inc, and operated by Premier Executive Transport services Inc.;

N1018H Cessna TR182, owned by Tepper Aviation Inc. and operated by Devon Holding and Leasing Inc.;

N168D Casa 235, owned and operated by Devon Holding and Leasing Inc;

N196D Casa 235, owned and operated by Devon Holding and Leasing Inc.;

N187D Casa 235, owned and operated by Devon Holding and Leasing Inc.;

N219D Casa 235, owned and operated by Devon Holding and Leasing Inc.;

N120JM Fairchild SA-227AT, owned and operated by Path Corporation;

N221SG Lear Jet 35A, owned and operated by Path Corporation;

N212CP Cessna 208B, owned and operated by Path Corporation;

N505LL DeHavilland DHC-8, owned and operated by Path Corporation;

N8183J Lockheed L-328G, owned by Rapid Air Trans Inc. and operated by Tepper Aviation;

N2189M Lockheed L-328G, owned by Rapid Air Trans Inc. and operated by Tepper Aviation;

N4557C Lockheed L-328G, owned by Rapid Air Trans Inc. and operated by Tepper Aviation;

N837DR Bell 407, owned and operated by Eastern Shore Holdings Inc.;

N219MG Bell 412, owned and operated by Eastern Shore Holdings Inc.;

N719GB Bell 412, owned and operated by Eastern Shore Holdings Inc.;

N486AE Super Puma AS322L1, owned and operated by Eastern Shore Holdings Inc.;

N588AE Super Puma AS322L1, owned and operated by Eastern Shore Holdings Inc.;

N8062Z VS M1-8-MTV-1, owned and operated by Eastern Shore Holdings Inc.;

N40414 VS M1-8-MTV-1, owned and operated by Eastern Shore Holdings Inc.;

N88ZL Boeing 707-330B, owned and operated by Lowa Ltd/Principal Air Services

Diplomatic Assurances provided to the Government

Summary Note for the information of the Irish Commission on Human Rights

1. During the period from late 2003 to September 2004, in discussions with the Department of Foreign Affairs, the US Embassy in Dublin consistently confirmed that there was no information to suggest that there were any cases of prisoners being transported through Shannon Airport to Guantanamo Bay.

2. In October 2004, following approaches from the Embassy of Ireland in Washington on the instruction of the Minister for Foreign Affairs to the US State Department, and on the basis of extensive interagency consultations on the US side, the US authorities provided firm assurances to the effect that Irish airports had not been used for the transit of prisoners to or from the detention centre at Guantanamo and Irish airports would not be used for this purpose without the permission of the Irish Government.

3. In late November 2004 a meeting was held with the US Embassy at the Department of Foreign Affairs at which there was a further full discussion of allegations that US aircraft involved in the illegal transfer of prisoners had transited Shannon Airport. The Irish side made clear that any such transits would be a matter of the utmost gravity.

4. On 29 September 2005, at a further meeting with the US Embassy in the Department of Foreign Affairs, the Irish side laid emphasis on the continuing public concern on the extraordinary rendition issue, as reflected in the large number of Parliamentary Questions regarding allegations of the illegal transit of prisoners through Irish airports on US aircraft. The Irish side recalled that the Minister for Foreign Affairs had, in reply to Parliamentary Questions in recent months, spelt out the US assurances in the following terms (which were read carefully and in full to the US side):

   > *"The Government have on several occasions made clear to the US authorities that it would be illegal to transit prisoners for rendition purposes through Irish territory without the express permission of the Irish authorities, acting in accordance with Irish and international law. The US authorities have confirmed that they have not done so, and do not do so, and that they would not do so without seeking the permission of the Irish authorities. No request for such authorisation has been received from the US authorities."*

5. In response, the US Embassy, following on from their previous assurances, confirmed that what had been read to them accurately represented the US position. The US side emphasised that the previous US assurances were given following interagency consultation at the highest level and that great care had been taken to ensure that Irish concerns were fully understood and respected.

6. On 1 December 2005, at a meeting between the Minister for Foreign Affairs, Mr. Dermot Ahern TD, and the US Secretary of State, Dr. Condoleezza Rice,

in Washington DC, the Secretary of State confirmed the assurances that had previously been received from the US authorities at high official level. The Taoiseach was similarly reassured when he raised the issue with President Bush at meetings in the White House on 17 March 2006 and 16 March 2007.

7. Since then, the issue has continued to be the subject of discussion between the Irish and US authorities at various levels, particularly at regular meetings in the Department of Foreign Affairs with the US Embassy, and the same categorical assurances have continued to be received from the US side.

8. On 1 November 2006, the Minister for Foreign Affairs reiterated the Government's position on extraordinary rendition to the new US Ambassador, H.E. Thomas C. Foley.

Department of Foreign Affairs
July 2007

Correspondence between the IHRC and the Government

IHRC

IRISH HUMAN RIGHTS COMMISSION

23 November 2007

Mr Rory Montgomery
Assistant Secretary General
Political Director
Department of Foreign Affairs
Iveagh House
80 St. Stephen's Green
Dublin 2

Re: IHRC Review on "extraordinary rendition"

Dear Rory,

I refer to the above matter and wish to acknowledge with thanks your detailed letter of response of 13 November 2007 to the Commission's draft review report on the issue of "extraordinary rendition".

The Commission is obliged to the Department for carefully considering the draft report and for providing detailed comments thereon. We are particularly grateful to you for reverting to us within the timeframe requested.

Clearly the Department and the Commission are both totally opposed to the practice of "extraordinary rendition" as confirmed in our correspondence and in our meeting in July this year. However, there remain significant areas of disagreement between us on the State's human rights obligations in relation to "extraordinary rendition", for example, on the value that can be placed on diplomatic assurances sought and received by the State.

Notwithstanding this, in order to allay any concerns that the Government's position is not adequately reflected in our report, we have made changes to the report by incorporating a number of your comments into the text. Further, we will append your letter and annex to the report, as is the case with our correspondence to date. We will also append the relevant extracts from the Programme for Government to the report insofar as you also refer to it.

Finally, the Commission once again welcomes its ongoing dialogue with the Department on the issue and we trust that the recommendations in the final review report will be considered and implemented across Government. We will of course inform you of the publication date in due course.

With kind regards.

Yours sincerely,

Des Hogan
Acting Chief Executive

Irish Human Rights Commission
An Coimisiún Um Chearta Duine

Address
4th Floor, Jervis House, Jervis Street, Dublin 1, Ireland

AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS
BAILE ÁTHA CLIATH 2
DUBLIN 2

Mr. Des Hogan
Acting Chief Executive
Irish Human Rights Commission
4th Floor Jervis House
Jervis Street
Dublin 1

13 November 2007

Dear Des,

On behalf of the Minister for Foreign Affairs, Mr Dermot Ahern TD, I would like to thank you for sharing with the Department on a confidential basis the draft of the Irish Human Rights Commission's Review of Ireland's Human Rights Obligations in the area of Extraordinary Rendition.

We welcome the extensive dialogue which has taken place between us on the issue of extraordinary rendition. This dialogue has confirmed that both the Government and the Commission are totally opposed to the practice of extraordinary rendition. I would also note that you have not disputed our view that none of the investigations into the matter have revealed any evidence, or even a specific allegation, that any person has on any occasion been subject to extraordinary rendition through Ireland. I recall that the President of the Commission acknowledged this in his evidence to the Temporary Committee of the European Parliament.

We have emphasised to you on a number of occasions that freedom from torture and inhuman or degrading treatment or punishment is among the personal freedoms protected by the Constitution of Ireland. Torture and inhuman or degrading treatment and punishment are contrary to global and regional international human rights norms. Furthermore, the detention of any person by a foreign state on Irish territory without the statutory consent of the Government would constitute not only a breach of Irish law and international human rights instruments but also of one of the basic principles of public international law.

Following our meeting on 11 July, I provided the Commission with a summary note of the assurances which have been received from the US Government and I am grateful that this is acknowledged in the draft Review. It is, however, clear that there continues to be a significant degree of difference between us on the Government's position that it is entitled to rely on these assurances. It is also the case that Government and the

Commission differ on the scope of the Government's positive obligations in relation to the prevention of torture and other ill-treatment by other States and on the introduction of a specific inspection regime for private civil aircraft landing at Irish airports.

I regret to say that we do not believe that the body of the draft Review adequately reflects the position of the Government as expressed in our extensive dialogue on these key issues. Nor does the draft Review, in our view, fairly reflect the extensive action taken by Minister Ahern to express at the international level Ireland's total opposition to extraordinary rendition.

The body of the draft Review also fails to give a full account of the specific commitments in the Programme for Government on Extraordinary Rendition providing for measures to be taken by the Departments of Justice, Equality and Law Reform and Transport.

In addition to these substantive points, which I address in more detail below, I have to say that we are concerned at the tone of much of the drafting, which could be described as simplistic, pejorative and unfair. For example, it is hardly appropriate, and certainly not accurate, for a statutory body such as the Commission to describe the acceptance of diplomatic assurances from the US Government on the question of extraordinary rendition in terms which suggest that the Government of Ireland *"has adopted a stance of deference"*. Likewise, we also strongly reject the use of language such as *"turning a blind eye"*, *"not doing all within its power"* *"shows a marked unwillingness"*, *"shelter behind"*, *"baldly assert"* and *"lip service"*.

I have set out in an annex to this letter specific issues of drafting, presentation and fact with which we would take issue. It has been necessary to repeat similar points on a number of occasions between the letter and the annex, reflecting the structure of the Commission's own draft.

Diplomatic Assurances

The position of the Government on its entitlement, in accordance with normal practice in international relations, to rely on the diplomatic assurances received from the US Government has been fully set in out in Minister Ahern's letters dated 4 April and 25 July 2006 to the President of the Commission.

At our meeting on 11 July 2007 I advised the Commissioners that these assurances were the result of inter-agency consultation in the US, apply to all US personnel whether in civil or state aircraft and to all detained persons and not merely "prisoners" in some technical sense of the word.

It is our view that the Commission's interpretation of the law relating to diplomatic assurances is overly broad in that it seeks to extract from the jurisprudence general principles that are not established in law. In so doing, the Commission overlooks significant legal and factual distinctions between the situations covered in the jurisprudence and what is at issue here.

As we have previously stated, the case law of the European Court of Human Rights and UN Committee Against Torture on diplomatic assurances is limited to: (i) assurances given in the context of the extradition/expulsion of a particular person from the territory of the state being offered the assurance; (ii) matters over which the state offering the assurance does not exercise full control; and (iii) relating to mixed issues of law and fact.

These elements are not present in the current situation. First and foremost, it must be recalled that for a foreign state to detain a person in Irish territory without the State's consent would be a clear breach of international law. Any suggestion that an additional legal assurance is required would undermine the basic principle of international law that a state is sovereign in its own territory. Rather, the Government must satisfy themselves whether a category of person is present on Irish territory. The assurances received from the US in this regard are specific, factual and relate to the very existence of such persons. The assurances are unqualified and state unambiguously a factual situation, over which the Government are confident that the US Government have complete control. These assurances were made at the highest level and were the subject of consultation. I would again add that similar assurances have not been made generally available to other European States.

I would recall that, at our meeting, the Commission accepted that it had adopted the broadest possible interpretation of the relevant law and acknowledged that there is no international jurisprudence relating to comparable facts. The extent to which the law relating to diplomatic assurances is varied and contested is not reflected in the draft Review.

While the draft Review briefly acknowledges that a distinction can be made between different categories of diplomatic assurances (pg.35) it also makes clear (pg. 14) that the Commission takes a different view from the Government. Given these continuing differences, we would suggest that the draft Review would more accurately reflect the substance of our dialogue if it included more extensive references in Chapters 2 and 3 to the Government's analysis, and if it underscored the Commission's own acceptance, as conveyed at our meeting, that the jurisprudence on the matter is far from clear.

The nature of the positive obligation to prevent torture and other ill-treatment

The draft Review argues that "if a prisoner can establish that s/he was 'rendered' through Ireland by the US authorities to another State where s/he was tortured or suffered inhuman or degrading treatment, there is a strong probability that Ireland would be held to be in breach of its human rights obligations in this regard". This is, of course, an entirely hypothetical situation. It is in any case our view that, since any such determination would depend on the particular facts, it is not possible to make such an assertion. It cannot be claimed that, regardless of the particular circumstances, the mere fact that a person was "rendered" through Ireland by another state probably amounts to a breach, by Ireland, of its international law obligations. We note that the Commission's treatment of the Venice Commission's opinion fails to include the important qualification that a state must take all measures to prevent a person being "rendered" through its territory if it has "serious reasons

(our emphasis) to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment".

Throughout our dialogue, we have expressed the view that there are limits on the scope of positive obligations under international law to prevent the commission of wrongful acts by other states. In particular, it has been noted that the case law of the European Court of Human Rights accepts that positive obligations are not unlimited and that not every risk can entail a requirement to take operational measures to prevent that risk from materialising. The draft Review fails to detail the Government's views on this matter, or to acknowledge that international law in this regard is highly complex and unsettled. The report is also particularly unclear in its treatment of the Government's positive obligations in the case where an empty aircraft might travel through Irish territory either prior to or after an "extraordinary rendition".

We feel that the points above and the Government's position as detailed by the Minister in his letters to the Commission and elaborated at our meeting in July should also be more fully reflected in Chapter 3 and elsewhere as appropriate in the draft Report.

Inspections/Monitoring Regime

The draft Review indicates that the Commission is maintaining its position that a specific inspection and monitoring régime should be introduced for certain aircraft alleged to have been involved at some point in extraordinary rendition. It also proposes that "any complaint to a member of the Garda Síochána concerning an aircraft possibly engaged in an 'extraordinary rendition' flight should be investigated immediately, including inspection of the aircraft by the member or members concerned".

We do not believe that the introduction of such a régime is necessary, likely to be useful, or justified by any reasonable assessment of the facts and probabilities of the situation as they are known to us. Nor are we aware of any such régime in operation elsewhere.

I would recall a number of points made at our meeting in July, and previously by the Minister.

As indicated earlier, the extensive investigations conducted by the European Parliament's Temporary Committee and by Senator Marty for the Council of Europe have revealed no evidence, or even a specific allegation, that any person has on any occasion been subject to extraordinary rendition through Ireland.

The overall impression given by the draft Review that there are or have been numerous flights through Ireland involved in extraordinary rendition activity fails to acknowledge, particularly in the many references to "CIA planes involved in extraordinary rendition" (beginning on page 4) that the civil aircraft which it is proposed to search under this regime are in fact chartered to different users on an ongoing basis – as, for example, was confirmed in a recent instance drawn to our attention. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an

aircraft. The misleading impression is conveyed that every time such aircraft may have landed in or transited through Ireland they were: (i) chartered by the CIA and (ii) involved in a rendition "circuit".

In particular, as Minister Ahern commented in his reaction to the European Parliament Resolution on Extraordinary Rendition on 14 February 2007, the alleged figure of 147 supposedly suspicious flights through Irish airports, repeated in the draft Review (p31), is grossly inflated. The actual number of aircraft ever identified as transiting Ireland in any relatively close time proximity to an alleged extraordinary rendition operation elsewhere is no more than four, over a period of a number of years, most recently in 2004 – in a context where, as noted before the European Parliament Temporary Committee by Mr Victor Aguado, Director General of Eurocontrol, some 36,000 flight plans are filed daily. Up to 1,750 movements of private aircraft through Irish airports may take place each month.

At our meeting in July, we pointed out that what would have been involved in the four possible instances would presumably have been an empty plane travelling through an Irish airport some days either before or after a rendition flight, and that there was no reason to believe that an inspection would have revealed any incriminating evidence.

I would also recall that the subsequent identification by investigators of certain aircraft or flight movements as suspicious was based on an extensive retrospective analysis of a mass of information assembled a considerable time after the event.

The draft Review does not acknowledge, as does Amnesty International, that call signs can be easily changed, or that new planes, not on existing lists, may just as easily be used, and that aircraft may be leased from different companies. One has to assume that any hypothetical person or agency seeking in future to carry out extraordinary renditions would take care to avoid patterns of activity which had been identified as suspicious.

It is international aviation practice, under the Chicago Convention, that private civil aircraft engaged in technical stops in transit through third countries are merely required to give, with very limited notice, their call signs and immediately previous and next stops. The Minister for Foreign Affairs has called for a review of the Convention to require the provision of additional information, and this matter is being pursued with international partners, in line with the commitments in the Programme for Government and, indeed, with the earlier call of the Secretary General of the Council of Europe for changes in the regulation of international aviation. We note that the Commission's draft report does not address general international practice in the matter, or comment on the efforts of the Government in this regard. Nor does it indicate whether in its view such changes would be of value. The Minister has repeatedly pointed out the need for a co-ordinated international approach.

Given all these factors, the insinuation on page 38 of the draft Report that the Government has permitted "re-fuelling aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for

"extraordinary rendition" or on return from such a mission" is quite unfair and based not on any fact but on pure speculation.

I would reiterate, therefore, our position that there is no good reason to believe that an inspection regime such as proposed would have detected, or would in future detect, illegal activity connected with extraordinary rendition. There are serious questions over the effectiveness, practicality, proportionality and reasonableness of any inspection régime, whether random or in relation to an identified list of suspect aircraft, and we believe that this needs to be taken account of in the draft Report, including in its assessment of the Government's positive obligations in this matter.

Having said this, however, I also have to add that the Government's position on the inspection of aircraft is seriously misrepresented on pages 4 and 33 of the draft Review. It is not the case that aircraft which may have been chartered by the CIA "...are not inspected or subject to any investigation on Irish soil" or that the "...Government's view is that there is no necessity for plane inspections" or that the Government "despite the evidence that CIA aircraft involved in 'extraordinary rendition' have stopped at Shannon, (it) is not prepared to investigate further.". On the contrary, as indeed you acknowledge elsewhere, the Government has repeatedly made clear that the Garda Síochána have full authority to search civil aircraft in any circumstances where they have reasonable grounds for suspecting illegal activity such as extraordinary rendition and to make any necessary investigations. The investigative powers of the Garda must, of course, and as the Commission would no doubt expect, be exercised in accordance with the Constitution and relevant legislation and on the basis of reasonable suspicion.

The references to the role of the Shannon Peace Activist Group on pages 6 and 35 of the draft Review would appear to raise certain questions. The Commission would appear uncritically to have given particular weight to the representations of a small group. Is the Commission suggesting that agencies other than the Garda should be permitted to search civil aircraft at Shannon Airport? The references to monitoring and photographing aircraft may also need to be clarified to make clear that the Commission recognises the appropriate role of the Garda in law enforcement and the need to ensure the security of airports.

Action taken by the Minister for Foreign Affairs, Mr. Dermot Ahern TD

The unfortunate tone of the draft Review in relation to the Government's active opposition to extraordinary rendition is epitomized by the assertion on page 3 and repeated on page 7 that "The Government's response (to the Commission's Resolution of December 2005) stated that it had received assurances from the US Government on the issue and was content (our emphasis) to rely on such assurances". Indeed, the overall impression given by the draft Review is that the Government, apart from seeking and accepting diplomatic assurances from the US Government, has been inactive on the issue of extraordinary rendition.

This depiction is very far from the reality. Far from "choosing to turn a blind eye" adopting a "stance of deference" or "paying lip-service", the Taoiseach and Minister Ahern have proactively engaged on a sustained basis with the US Government on the issue of extraordinary rendition over recent years. The Minister's concern about extraordinary rendition is reflected in the fact that he was the first EU Minister to raise the issue bilaterally with the US authorities and to obtain a uniquely clear and categorical assurance from them that no extraordinary rendition had taken place through Ireland. He has raised extraordinary rendition directly with the US Secretary of State Condoleezza Rice, as has the Taoiseach with President Bush. Minister Ahern was the first Minister to raise the issue in the EU Council of Ministers with the result that the issue was subsequently taken up by the President of the Council on behalf of the EU with the US authorities.

In the Council of Europe, Ireland's February 2006 response to the Secretary General's Article 52 questionnaire was one of only nine Member State replies judged not to require further inquiry.

The Minister was also only one of only two EU Foreign Ministers to meet with the European Parliament's Temporary Committee on Extraordinary Rendition - others declined to do so - where he was the first political figure to call for a review of the Chicago Convention governing international civil aviation in the context of the concerns surrounding extraordinary rendition. On the Minister's instructions the possibility of reviewing the Chicago Convention has also been raised within the EU Council framework earlier this year. In the ICAO context we are continuing to consult with international partners.

In short, the Government's engagement with the issue has been sustained and intense.

In the domestic context, the Minister and his Government colleagues have fully engaged on the issue of extraordinary rendition in both Houses of the Oireachtas in response to numerous Parliamentary Questions and specific motions. He has on many occasions fully explained the basis of the Government's total opposition to the practice of extraordinary rendition and of the assurances which he has obtained from the US authorities in relation to Ireland.

We would suggest that Chapters 2 and 3 of the draft Review should be re-drafted appropriately to reflect fairly the action taken in a range of fora on the issue of extraordinary rendition by the Taoiseach and Minister Ahern.

Conclusion

It will be clear from the above that the Government firmly rejects the view of the Commission as expressed on page 5 of the draft Review "…that in its approach to 'extraordinary rendition', the Irish State [sic] is not complying with its legal obligations to prevent torture or inhuman or degrading treatment or punishment". The protection and promotion of universal human rights, including the right to be protected from torture or inhuman or degrading treatment, is a core principle of Irish foreign

policy and not in any sense "subjected to the desire for good relations between States" (p 39). We feel that the Commission's analysis and recommendations clearly fail to give due weight to the legal arguments advanced by us, and distort or misunderstand the range of practical issues involved.

Finally, I would like, however, to thank you once again for sharing the draft Review with us. I have sought to indicate the broad lines of our concern regarding the draft Review, and have listed specific issues in the annex to this letter. If you have any queries in relation to these concerns, I would be happy to discuss them with you. We look forward, in any case, to considering the final version of the Review when it is published in December.

With best wishes,

Yours sincerely,

Mary Rondeegard

pp Rory Montgomery
Political Director

Annex: Specific Issues of Drafting, Presentation and Fact

Page 4, paras 2 & 3: It is not the case that aircraft which may have been chartered by the CIA *"...are not inspected or subject to any investigation on Irish soil"* or that the "*...Government's view is that there is no necessity for plane inspections*". The Government has repeatedly made clear that the Garda Síochána have full authority to search civil aircraft in any circumstances where they have reasonable grounds for suspecting illegal activity such as extraordinary rendition and to make any necessary investigations. The investigative powers of the Garda must, of course, and as the Commission would no doubt expect, be exercised in accordance with the Constitution and relevant legislation and on the basis of reasonable suspicion. It is also incorrect to say that "*the Government appears to have put the onus of investigating allegations regarding suspect aircraft on to the Irish people*." This is the responsibility of the Garda. Naturally, the Government invites all those with any evidence of criminal activity to present it to the Garda.

Page 5, para 1: The Government reject, for the reasons set out at length in this and previous communications with the Commission, the assertion that "*...that in its approach to 'extraordinary rendition', the Irish State [*sic] *is not complying with its legal obligations to prevent torture or inhuman or degrading treatment or punishment*"

Page 6, para 1: The Commission would appear uncritically to have given particular weight to the representations of a small group. To repeat the claim that "*the Irish Government has taken steps to ensure that foreign aircraft are not searched by any other persons"* suggests, wrongly, that persons other than the Garda would have such a right.

Page 6, para 2: The treatment of the gap between the Government's receipt of the Commission's first statement and its response (effectively three months, allowing for the Christmas break, some of which was taken up with preparing the Government's response to the Council of Europe) is rather different from the handling of the Commission's own delay in renewing dialogue with the Government on the issue after July 2006.

Page 7, para 1: This completely inadequate summary of the Government's position is surely unnecessary at this point, as the issues should be addressed more comprehensively in the body of the report.

Page 8, para 2 (see also page 31, para 2): In relation to the European Parliament Temporary Committee's call for a ban on "CIA flights" transiting Ireland, the Minister for Foreign Affairs pointed out, in responding to the report, that the fact that Ireland alone was the subject of such a call demonstrated a lack of balance and political partisanship.

Page 8, para 5: This and other references implying that there have been numerous flights through Ireland by "CIA aircraft" involved in extraordinary rendition activity fail to acknowledge that the civil aircraft involved are in fact chartered to different users on an ongoing basis. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an aircraft. Indeed, it might be recalled that in his Report of June 2006 Senator Marty remarked that "it is evident that not all flights of CIA aircraft participate in "renditions"", and said that "intelligence flights are a manifestation of the co-operation that happens amongst us. They carry analysts to talk with one another, they carry evidence that has been collected..."

The misleading impression is conveyed that every time such aircraft may have landed in or transited through Ireland they were: (i) chartered by the CIA and (ii) involved in a rendition "circuit".

Page 11, para. 2: The case of Maher Arar is undoubtedly shocking. The draft report acknowledges that "*there is, however, no evidence that Mr Arar was transferred through Ireland.*" It is also the case that it has never been claimed that he was.

Page 13 para.4/page 14 para. 2: The reference to a "*brief response*" from the Minister on 25 July 2006 is hardly appropriate given that it was a two page covering letter with an additional four pages of commentary in response to the Commission's letter of 24 May 2006 (the latter, however, is described on the same page in the draft Review as a "detailed response" to the Minister's earlier letter). The claim that this "*does not really address any of the substantive or factual concerns*" is quite unreasonable, given that the Department advanced a serious and substantive set of legal arguments with which the Commission may disagree but which it has not rebutted.

Page 16 para 2: The Government are satisfied that the assurances received from the US authorities are to the effect that no person, however he or she may be classified, would ever be subject to extraordinary rendition through Irish territory without the permission of the Irish authorities.

Pages 18-22: The Commission's treatment of the issue of diplomatic assurances, as indicated in detail in the body of our letter, overlooks significant legal and factual distinctions between the situations covered in the jurisprudence cited by it and what is at issue here. The quotations from Professor Nowak and Mr Gil-Robles, for example, clearly relate to a situation in which the return of a specific individual to a particular state has been sought. The extent to which the law relating to diplomatic assurances is varied and contested is not reflected in the draft Review.

Page 22, paras 2 and 3: The Commission might recognise, in its treatment of the Constitutional situation, that the powers of the Garda in searching and investigating suspected criminal activity are also subject to constitutional constraints.

Page 22, para 4: The implication that the Government may "*knowingly*" have allowed aircraft carrying prisoners to land is untrue and inappropriate. We likewise reject the implication of the term "*collusion*" later in the same paragraph.

Page 23, para 4: We note that the Commission's treatment of the Venice Commission's opinion fails to include the important qualification that a state must take all measures to prevent a person being "rendered" through its territory if it has "serious reasons (our emphasis) to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment".

Page 24, para 4: The reference to the Venice Commission's handling of diplomatic assurances clearly relates to the extradition of prisoners and as such is irrelevant.

Page 28, para 1: On the publication of the first Marty report, the Minister made clear the inappropriateness of the term "*collusion*", implying as it does a level of active knowledge of or assistance to alleged criminal activity.

Page 29, para 5: In giving evidence to the European Parliament Temporary Committee, the Minister for Foreign Affairs gave an account of the cases involved [*extracts from official transcript attached at page 14].*

Page 30, para 2: We note that in his presentation to the Temporary Committee the President of the Commission acknowledged the absence of any evidence that any act of extraordinary rendition had taken place through Ireland.

Page 31, para 1: In addressing the Temporary Committee, the Minister seriously questioned the methodology by which the figure of 147 allegedly suspect flights had been arrived at. As indicated earlier, this fails to acknowledge that the civil aircraft involved are in fact chartered to different users on an ongoing basis. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an aircraft.

Page 31, para 2.: (see also page 8, para 2): In relation to the European Parliament Temporary Committee's call for a ban on "CIA flights" transiting Ireland, the Minister for Foreign Affairs pointed out, in responding to the report, that the fact that Ireland alone was the subject of such a call demonstrated a lack of balance and political partisanship.

Page 33, para 2: The phrase "*a stance of deference to the US Government"* is unfair and inappropriate and utterly fails to acknowledge either the Government's position on the concrete and unequivocal assurances it has received or the consistency with which it has pursuing the issue of extraordinary rendition bilaterally with the US Government, in the Council of Europe, in the EU framework, and with ICAO partners. Likewise, as indicated earlier, the responsibility of the Gardaí in regard to the prevention and detection of criminal activity should be acknowledged.

Page 33, para 3: Again, the claim that the "*State can certainly be accused of turning a blind eye*" is unfair and quite inappropriate. As indicated above, in relation to page 29 para 5, the Minister for Foreign Affairs gave to the European Parliament an account of the six cases investigated by the Gardaí.

Page 34, para 3: To posit a situation where it might "*emerge at a later date that prisoners have been transported through Shannon for the purposes of extraordinary rendition"* is entirely hypothetical and speculative.

Page 34, footnote 105: In addressing the incident of a US marine conveyed through Shannon in the Dáil on 13 June 2006, the Minister for Foreign Affairs made clear that "This was in no way an act or an attempted act of extraordinary rendition or related to such an act. Indeed, the Attorney General has confirmed that, quite unlike extraordinary rendition, which is illegal in all circumstances, there is nothing substantively unlawful about such a transfer, provided that Ministerial consent has been obtained. The prisoner was not a suspected terrorist from a third country but a US marine duly found guilty under the US military code of a minor offence."

Page 35, para 4: Given the extensive exchanges between us, and the Government's active involvement in the issue as documented on many occasions, we fail to understand the assertion that "*the Government has not substantively addressed the issue of how the State appears to be assisting "extraordinary rendition" activities"*

Page 35, para 5: The claims that the Government is "*not doing all within its power*" and "*shows a marked unwillingness*" are unfair and inappropriate. Again, the reference to the Shannon Peace Activist Group might appear to give uncritical weight to the claims of a small group.

Page 36, para 1: As indicated in our letter, the claim that "*if a prisoner can establish that s/he was 'rendered' through Ireland by the US authorities to another State where s/he was tortured or suffered inhuman or degrading treatment, there is a strong probability that Ireland would be held to be in breach of its human rights obligations in this regard*". is based on an entirely hypothetical situation. It is in any case our view that, since any such determination would depend on the particular facts, it is not possible to make such an assertion.

Page 36, para 2: Ireland has repeatedly made clear to the international community its abhorrence of the practice of extraordinary rendition. Indeed we have, as indicated earlier, taken a lead in raising the issue. We would also note that our practice in regard to the passage of state and civil aircraft through our territory is entirely in line with international norms.

Page 36, paras 2 and 3: Terms such as "*shelter behind*", "*baldly assert*" and "*lip service*" are, once again, quite unfair and inappropriate to a report of this kind.

Page 36, para 3 (see also page 37, para 3, and page 38, para 3): In regard to the proposal by the Commission for the provision of additional information in regard to certain flights linked to an inspection régime, the overall approach of the Government in relation to the practicality and necessity of such a régime is set out in our letter. However, in addition, and as acknowledged by the Commission itself in its account of the Venice Commission's analysis (page 25) it is international aviation practice, under the Chicago Convention, that private civil aircraft engaged in technical stops in transit through third countries are not required to seek permission to make such stops, but are merely required to give the air traffic authorities, with very limited notice, their call signs and immediately previous and next stops. With a view to addressing more effectively a range of challenges, including terrorism, the Minister for Foreign Affairs has called for a review of the Convention to require the provision of additional information, and this matter is being pursued with international partners, in line with the commitments in the Programme for Government and, indeed, with the earlier call of the Secretary General of the Council of Europe for changes in the regulation of international aviation. We note again that the Commission's draft report does not address general international practice in the matter, nor does it comment on the efforts of the Government in this regard.

Page 37, para 1: The assurances secured by the Government embrace the possible transfer of prisoners to Guantanamo. No requests have ever been made in this regard.

Page 38, para 2: The insinuation that the Government has permitted "*re-fuelling aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for "extraordinary rendition" or on return from such a mission*" is quite unfair, inappropriate and based not on any fact but on pure speculation.

Page 38, para 4: The exercise by the Garda of their powers of investigation and search of private civil aircraft in no way requires the consent of the US authorities.

Page 38, paras 4 and 5: The practical issues involved in any inspection régime are highlighted by the proposal that this should be concerned with planes listed in previous reports, which mostly cover activities now some years ago. This does not acknowledge, as has Amnesty International, that call signs can be easily changed, or that new planes, not on existing lists, may just as easily be used, and that aircraft may be leased from different companies. One has to assume that any hypothetical person or agency seeking in future to carry out extraordinary renditions would take care to avoid patterns of activity which had been identified as suspicious.

Page 39, para 2: We entirely reject as quite unfair and inappropriate the implication that Ireland is not fulfilling *"its moral duty to take a stand against any form of torture or inhuman or degrading treatment."* We likewise reject the suggestion that it is "*subjected to the desire for good relations between states.*"

Re: Page 29, para 5:

Extract from Minister's speech and from subsequent exchanges at the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, 30 November 2006

Extract from speech by the Minister for Foreign Affairs, Mr. Dermot Ahern T.D.

"……..Our response in that case clearly sets out the legal position in Ireland as regards the illegal deprivation of liberty and the role of our police and other authorities in preventing such deprivation and investigation of relevant allegations. The Government and our police authorities took very seriously indeed any allegations that aircraft chartered by the CIA engaged in illegal activity in Ireland. An Garda Síochána, the Irish police service, has investigated six complaints from members of the public related to extraordinary rendition. In keeping with standard practice, it has passed papers on two separate occasions to the office of the Director of Public Prosecutions. In Ireland, the Director of Public Prosecutions is the authority responsible for deciding, independently of the government and the police service, whether to charge people with criminal offences, for conducting prosecutions and what the charges should be. However, in neither of the investigations carried out by the DPP was any further action found to be warranted owing to a complete lack of evidence that any unlawful activity has occurred…..

The Gardaí, of course, remain very ready to investigate any allegations of illegal activity where there are grounds to suspect that such activity has occurred, and they have all the necessary powers so to do……

Extracts from responses by Minister Ahern to subsequent questions from Members of the European Parliament on investigations

In response to Rapporteur Fava, Minister Ahern replied :

….The Garda Síochána has investigated a number of allegations involving some of the planes that you refer to. In relation to one of them – I am not sure if it is involved in your own examination – an allegation was made in May 2006 by an anti-war campaigner that a plane with the index number N444CX landed in Shannon. The allegation was made that it was involved in illegal activities. It was established by the Garda Síochána that the aircraft was privately owned and operated in the course of a corporate business flight.

Another allegation was made in relation to the use of an unmarked white aircraft observed at Shannon in November 2005. The allegation was that it was carrying munitions of war. That was investigated and it was found to have been used on that occasion to transport racehorses from Shannon to Dubai. So again, on any occasion that we have got firm allegations in relation to any of these issues, we have investigated them to the best of our ability. Again, not one shred of evidence has been produced.

In response to Ana Maria Gomes, Minister Ahern replied :

As I said earlier, they have investigated quite a number of complaints from individuals, mainly people who are anti-war campaigners, but not all, indeed, some members of our

parliament have made complaints, but in no instance has anyone produced any information. I can give you the list of investigations and some details of the investigations, without giving the names involved.

In response to Prionsias De Rossa, Minister Ahern replied:
... Again, if you want I can list all of the allegations that have been made by people, some in relation to some of the planes that are referred to in your report and indeed in other investigations. Four active anti-war people made an allegation in relation to a Gulfstream jet – number N379P – claiming that it had been used to transport prisoners to places of torture and that it had transited through Shannon on several occasions. Inquiries were conducted into this complaint by the Garda Síochána; all four complainants were interviewed; the investigation concluded that the complainants were basing their assertions wholly on the contents of a Swedish television documentary. A file was submitted to the Director of Public Prosecutions, but there was no evidence to support the charge of torture.

Again, in December 2004, an allegation was made by letter that the same Gulfstream jet, number N379P, was used to fly terrorist suspects and that it transited through Ireland. The gentleman who made the allegation was contacted and he acknowledged to the investigators that his complaint was based almost entirely on media reports. He produced no further evidence when asked. A file was forwarded to the Director of Public Prosecutions; a prosecution was not warranted on the basis of no evidence. On 24 November 2005, an anti-war campaigner who is well known – even to this committee – alleged that an unmarked white aircraft carrying war munitions landed at Shannon Airport – not really an extraordinary rendition. The complaint was investigated and it was found, as I said earlier, that the plane was used on that particular occasion to transport racehorses from Shannon to Dubai. I think that is one of the planes that is complained about.

A Senator contacted the Garda in November 2005 and said, in his words, that there was a prima facie case that a crime had been committed by Gulfstream jet N379P at Shannon Airport, and that a number of citizens had made complaints of a detailed nature to the police authorities in Limerick to no avail. The Garda Commissioner was asked to investigate the matter fully. He appointed a detective superintendent from Garda headquarters. He was appointed to interview the Senator and afforded him the opportunity to produce evidence. On 26 January 2006, the Detective Superintendent met the Senator. He asked the Senator to produce evidence. When pressed to provide the prima facie evidence, he was unable to do so and appeared to be relying on opensource information and reports from other jurisdictions in respect of the activities of certain aircraft, but not anywhere in the Irish Republic. He declined to make a statement He was contacted again in March and indicated he had nothing further to add. Again the Garda could not pursue those activities.

On 22 February 2006, a deputy in the Dáil produced copies of documents gathered by staff in his office as to possible breaches of international and domestic law allegedly occurring on CIA planes. A detective superintendent was appointed to contact this deputy. There was a meeting, and the Deputy informed the Detective Superintendent appointed that he had no specific evidence in support of these allegations.

On 9 May 2006, another anti-war campaigner alleged that the plane referred to

earlier, N44CX, landed at Shannon Airport. It was found that this plane was privately owned and was operating in the context of a corporate business flight.

In May 2006, again, one of the previous complainants made an allegation that the Garda Síochána was involved in criminal negligence. A detective superintendent was appointed to investigate. The process of taking a statement from this particular gentleman was slow and indeed continues to be slow. So that is a clear indication, I think, of the intensity with which the Gardaí have acted, particularly in recent times.

Going back to some of the questions in relation to the ability of our Gardaí to investigate, they have to do so on some suspicion. They cannot just walk in on private property – which these planes are – and demand to see, unless and until they have those suspicions, because it would not stand up in court if they were to do that. They are very careful, as you know, in entering private property, unless and until they have a clear suspicion. And indeed the Venice Commission itself has said that it believes that searches would only be required in the event of serious concern in relation to torture. The Garda inquiries which have come up with nothing, despite the exhortations of members of the Government to the general public to produce evidence and all of the anecdotal evidence that is available.

IHRC

IRISH HUMAN RIGHTS COMMISSION

26 October 2007

Private and Confidential *BY COURIER*

Mr Rory Montgomery
Assistant Secretary General
Political Director
Department of Foreign Affairs
Iveagh House
80 St. Stephen's Green
Dublin 2

Re: IHRC Review on "extraordinary rendition"

Dear Mr Montgomery,

I am writing to you further to the Commission review on the issue of "extraordinary rendition" which was announced at our Annual Report launch on 11 September last and our telephone conversation of today also refers.

The Commission has now completed its review which it intends to publish and launch in early December. We will of course provide you with proper notice once a date has been agreed.

In light of the ongoing co-operation and dialogue with the Department, we are sending you the review herewith in the event that you wish to make any comments on same before it goes to print. We cannot commit to including any comments made by the Department in the final version, however, where possible we will take any such comments into account.

There is of course no onus on the Department making comments on the review. If you do wish to make comment we would be grateful to receive same **by 5 p.m. on Tuesday 13th November 2007** in order to meet our publication schedule.

As the draft document is confidential at this stage, please note that it should not be disclosed outside the Department unless otherwise authorised by the Commission further to section 9(14) of the Human Rights Commission Act 2000.

Yours sincerely,

Des Hogan
Acting Chief Executive

Irish Human Rights Commission
An Coimisiún Um Chearta Duine

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AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS
BAILE ÁTHA CLIATH 2
DUBLIN 2

Dr Maurice Manning
President
Irish Human Rights Commission
Jervis House
Jervis Street
Dublin 1

27 July 2007

Dear Maurice,

It was a pleasure to meet you and your colleagues earlier this month for what I believe was a constructive and fruitful exchange of views, building on the Commission's correspondence with the Minister for Foreign Affairs, Mr. Dermot Ahern TD, on the question of extraordinary rendition. I am grateful to you for your letter of 23 July in which you indicate that your assessment of the meeting was similar.

The meeting was, of course, an opportunity to confirm once again the unequivocal opposition of both the Government and the Commission to the practice of extraordinary rendition and our shared determination to ensure that such activity does not occur in Ireland at any time. It was particularly useful to have the opportunity to discuss the relevant provisions in the new Programme for Government. I have reported to the Minister on the substance of our exchanges and he is fully supportive of the intention to maintain the dialogue between the Department and the Commission in the future. However, for the record I would underline that our position on the necessity for and practicability of an inspection régime remains as set out clearly at the meeting.

You will also recall that in response to the Commission's request at our meeting that the Department make public the assurances received from the United States, we noted that these assurances are fully reflected in the record of Dáil Éireann and Seanad Éireann in debates and in response to numerous Parliamentary Questions in recent years and, as such, are already in the public domain.

I also advised the Commission that the categorical and unqualified assurances received have been conveyed to us orally over recent years by US Government representatives at various levels and on the basis of extensive inter-agency consultation in the US system. As previously indicated in the correspondence between the Minister and the Commission, the Government is fully satisfied of the validity of these assurances under international law and of its entitlement to rely on them in accordance with normal practice in international relations.

Against this background, I undertook to consider providing the Commission with a summary note setting out how the question of extraordinary rendition has been discussed with the US authorities, and the assurances given by the latter on this matter. I now attach a note for this purpose for the information of the Commission. I would emphasise that this note is not intended to be exhaustive or to include all contacts with the US authorities, but I believe it sets out the main points.

I look forward to future dialogue and co-operation with the Commission both on the question of extraordinary rendition and on other human rights issues of mutual concern.

Yours sincerely,

Rory Montgomery
Political Director

Summary Note for the information of the Irish Commission on Human Rights

1. During the period from late 2003 to September 2004, in discussions with the Department of Foreign Affairs, the US Embassy in Dublin consistently confirmed that there was no information to suggest that there were any cases of prisoners being transported through Shannon Airport to Guantanamo Bay.

2. In October 2004, following approaches from the Embassy of Ireland in Washington on the instruction of the Minister for Foreign Affairs to the US State Department, and on the basis of extensive interagency consultations on the US side, the US authorities provided firm assurances to the effect that Irish airports had not been used for the transit of prisoners to or from the detention centre at Guantanamo and Irish airports would not be used for this purpose without the permission of the Irish Government.

3. In late November 2004 a meeting was held with the US Embassy at the Department of Foreign Affairs at which there was a further full discussion of allegations that US aircraft involved in the illegal transfer of prisoners had transited Shannon Airport. The Irish side made clear that any such transits would be a matter of the utmost gravity.

4. On 29 September 2005, at a further meeting with the US Embassy in the Department of Foreign Affairs, the Irish side laid emphasis on the continuing public concern on the extraordinary rendition issue, as reflected in the large number of Parliamentary Questions regarding allegations of the illegal transit of prisoners through Irish airports on US aircraft. The Irish side recalled that the Minister for Foreign Affairs had, in reply to Parliamentary Questions in recent months, spelt out the US assurances in the following terms (which were read carefully and in full to the US side):

   > *"The Government have on several occasions made clear to the US authorities that it would be illegal to transit prisoners for rendition purposes through Irish territory without the express permission of the Irish authorities, acting in accordance with Irish and international law. The US authorities have confirmed that they have not done so, and do not do so, and that they would not do so without seeking the permission of the Irish authorities. No request for such authorisation has been received from the US authorities."*

5. In response, the US Embassy, following on from their previous assurances, confirmed that what had been read to them accurately represented the US position. The US side emphasised that the previous US assurances were given following interagency consultation at the highest level and that great care had been taken to ensure that Irish concerns were fully understood and respected.

6. On 1 December 2005, at a meeting between the Minister for Foreign Affairs, Mr. Dermot Ahern TD, and the US Secretary of State, Dr. Condoleezza Rice,

in Washington DC, the Secretary of State confirmed the assurances that had previously been received from the US authorities at high official level. The Taoiseach was similarly reassured when he raised the issue with President Bush at meetings in the White House on 17 March 2006 and 16 March 2007.

7. Since then, the issue has continued to be the subject of discussion between the Irish and US authorities at various levels, particularly at regular meetings in the Department of Foreign Affairs with the US Embassy, and the same categorical assurances have continued to be received from the US side.

8. On 1 November 2006, the Minister for Foreign Affairs reiterated the Government's position on extraordinary rendition to the new US Ambassador, H.E. Thomas C. Foley.

Department of Foreign Affairs
July 2007

IHRC
IRISH HUMAN RIGHTS COMMISSION

Dr. Maurice Manning
President

23 July 2007

Mr Rory Montgomery
Assistant Secretary General
Political Director
Department of Foreign Affairs
Iveagh House
80 St. Stephen's Green
Dublin 2

Re: Our recent meeting on "extraordinary rendition"

Dear Rory,

I am writing to you to thank you and your colleagues for taking the time to meet with the Commission on the issue of "extraordinary rendition" on 11 July last. I felt the meeting was a positive and constructive one in which both sides agreed to agree and agreed to differ on different points.

Thank you for agreeing to revisit the two main issues of difference between the Commission and the Department, namely whether the assurances received by the US government can be made public and whether an effective inspection and enforcement regime can be introduced in a way which would satisfy public and human rights concerns and be seen to meet the commitments in the Programme for Government.

We appreciate the fact that sensitivities are involved and welcome again the fact that the Irish Government is opposed to the practice of "extraordinary rendition" and continues to oppose this practice wherever it occurs. I hope that we can continue our dialogue on this matter over the coming months. For our part, we will continue to review the law and practice in the area and work with our European partners to this end.

I look forward to hearing from you in relation to the two matters outlined above at your convenience.

With best wishes.

Yours sincerely,

Maurice

Maurice Manning
President

Irish Human Rights Commission
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OIFIG AN AIRE GNÓTHAÍ EACHTRACHA
(OFFICE OF THE MINISTER FOR FOREIGN AFFAIRS)

BAILE ÁTHA CLIATH 2
(DUBLIN 2)

25 July 2006

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

Dear Dr Manning,

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

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

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

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

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

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

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

Yours sincerely,

Dermot Ahern, T.D.
Minister for Foreign Affairs

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

Positive Obligations

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

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

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[1] Osman v The United Kingdom, Judgment of the European court of Human Rights, 28 October 1998
[2] E. and Others v The United Kingdom, Judgment of the European Court of Human Rights, 26 November 2002

Diplomatic Assurances

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

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

As the Commission will be aware, a State's obligation of non-refoulement is an explicit requirement of Article 3 of the Convention Against Torture in respect of torture and such a requirement may be implied in respect of other forms of ill-treatment falling within the scope of that Convention. It is also an inherent requirement under Article 3 of the ECHR. The essential elements for the obligation to arise, present in all three cases cited by the Commission, is that a State is contemplating the return, through its own action (by mechanisms such as extradition, deportation or expulsion), of a specific individual to another State where there is a substantial risk that he or she might be tortured or ill-treated[6]. The diplomatic assurances considered by States in such situations (again, including all three cases cited) are concerned with how the individual will be treated by or in the potential receiving State. In these situations, international tribunals have considered the weight

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

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

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

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

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

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

It is perhaps worth illustrating this point by a detailed reference to the facts of the *Ahmed Agiza* case. This case was not referred to in the Minister's letter of 4 April precisely because the facts on which it is based are simply absent in the current situation. In the *Agiza* case, the complainant was undoubtedly present in Sweden, and had applied to the Swedish authorities for asylum there. The authorities decided to reject his application, ordered his deportation and subsequently handed him over to foreign agents. In arriving at their decision to deport the applicant, the authorities sought to satisfy themselves that he would not face torture in Egypt, and in this regard appear to have relied upon the assurances of the Egyptian authorities that he would be treated in accordance with international law upon his return to Egypt[7]. The question faced by the Committee Against Torture was whether Sweden's act of handing the complainant over to foreign authorities violated Article 3 of the UN Convention Against Torture. It was in this context that Sweden's reliance on diplomatic assurances was considered by the Committee. No analogous facts are present in the current situation.

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

[7] see paragraph 4.12 of the decision

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

In this context, it is worth nothing that in their joint statement on extraordinary rendition of 27 June 2006, Amnesty International, Human Rights Watch, the International Commission of Jurists and the Association for the Prevention of Torture all confine their criticism to "diplomatic assurances **against torture or inhuman or degrading treatment.**" There is no suggestion that diplomatic assurances, as a class, cannot be relied upon.

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

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

IHRC
IRISH HUMAN RIGHTS COMMISSION

Dr. Maurice Manning
President

24th May 2006

Mr Dermot Ahern TD
Minister for Foreign Affairs
Iveagh House
St Stephen's Green
Dublin 2

Dear Minister,

Thank you for your letter of 4th April 2006 in response to the Commission's letter of 21st December 2005 to An Taoiseach. The Commission welcomes your detailed response as it is anxious to engage in a dialogue with Government on what it regards as a fundamentally important issue in relation to the protection of human rights.

Regrettably, however, for reasons set out in the enclosed document, we cannot agree with your conclusion that the Government has discharged "its obligations under both the European Convention on Human Rights and the Convention Against Torture".

We are replying in some detail in order to explain why we see this as a matter of such urgency and importance and why we believe that Ireland's human rights obligations require further action by the Government. In this connection we welcome the remarks by An Taoiseach in Washington on St. Patrick's Day when he acknowledged the concern in Ireland about CIA "rendition" flights and called for greater transparency on this issue.

With best wishes,

Yours sincerely,

Maurice Manning
President

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IHRC

IRISH HUMAN RIGHTS COMMISSION
AN COIMISIÚN UM CHEARTA DUINE

Irish Human Rights Commission

Response to Minister for Foreign Affairs in relation to the transfer of persons to locations where they may be subjected to torture, inhuman and degrading treatment

Background:

In our Resolution, enclosed with our letter of 21st December 2005, we set out the basis for the Commission's intervention in this matter, namely our mandate under Sections 8(a) and 8(d) of the Human Rights Commission Act, 2000, "to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights", and to make recommendations to Government about measures "to strengthen, protect and uphold human rights in the State".

We also referred to the prohibition of torture, inhuman or degrading treatment which is implicit in the Constitution and is made explicit by Article 3 of the European Convention on Human Rights and by Articles 1 and 2 of the UN Convention Against Torture. The same Convention also outlaws the expulsion or return (*refoulement*) of persons to jurisdictions where there are substantial grounds for believing that they might be in danger of being subjected to torture.

For the sake of completeness, we should also refer here to Article 16.1 of the Convention Against Torture, which states:

> "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity..."

In that context we expressed our concern at repeated and credible reports that US aircraft were being used to secretly transport prisoners to destinations where they were at risk of torture, inhuman or degrading treatment, a practice commonly described as "rendition", and that a number of the aircraft concerned had landed frequently at Irish airports, in particular at Shannon airport.

This gave rise to fears that the US aircraft landing here could be involved in the "rendition" of prisoners and that by facilitating these aircraft, we could be in breach of our obligations under the Constitution and international human rights conventions to prevent torture or inhuman or degrading treatment. With a view to ensuring that we would not be in breach of our obligations, we called upon the Government to seek the agreement of the US authorities to the inspection of aircraft suspected of involvement in this practice on their landing at any Irish airport.

In connection with this point, your letter appears to assume that we suggested seeking the agreement of the US authorities to inspection of these aircraft because we thought it was legally necessary to do so. That was not the case. We believed that the Irish authorities had and have power to inspect these aircraft. However, we suggested this as a non-confrontational way of resolving the matter, on the basis that if the aircraft concerned were not in fact involved in "rendition" – as the US authorities claimed – then they would be happy to cooperate with such a request from a friendly government whose airports were affording them facilities. If the US authorities refused to cooperate, then the Government could consider other ways of proceeding.

Developments since our Initial Letter: Subsequent Reports by the Council of Europe and Others:

After we wrote to the Government on this issue in December 2005, the Council of Europe's then Commissioner for Human Rights, Mr. Alvaro Gil Robles, wrote to the Commission indicating his concern about the issue of "rendition" and welcoming our proposal for dealing with it. He said:

> "States have a responsibility to ensure that their territory and facilities are not used for illicit purposes, especially not human rights violations and, even more particularly, for violations of Article 3 of the ECHR. In so far as so-called extraordinary rendition flights are concerned, States must be in a position, where there is doubt, to establish who is on board planes transiting via their airports, whether they are travelling freely or are detained, and if the latter, under whose authority they are being transported and for what purpose. The IHRC's proposal that the Irish Government seek the agreement of the US authorities to inspect aircraft would certainly facilitate this".[1][2]

Since our letter of 21st December 2005, there have been a number of other developments which serve to underline the importance of this issue:

First, the Secretary General of the Council of Europe, Mr Terry Davis, has published a report on a questionnaire on the subject of "rendition" which he sent to all member states of the Council of Europe, using a very rarely invoked article of the European Convention on Human Rights (Article 52).[2]

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[1] IHRC Press Release, 6th January 2006.

[2] Secretary General's Report under Article 52 of the European Convention on Human Rights on the question of Secret Detention and Transport of Detainees suspected of Terrorist Acts, notably by or at the instigation of foreign agencies. SG/Inf (2006) 5.

Secondly, the Government has, as mentioned in your letter, published its detailed Reply to the questions posed by Secretary General Davis.[3]

Thirdly, the European Commission on Democracy through Law, the "Venice Commission", has published an opinion on "The international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners".[4]

Fourthly, Amnesty International has published a report entitled: "Below the Radar: Secret flights to torture and disappearance".[5]

Fifthly, a Temporary Committee of the European Parliament, investigating "the alleged use of European countries by the CIA for the transport and illegal detention of prisoners" has issued an interim report on its inquiries.[6]

We should say at this point that we welcome the clear statement in the Government's Reply to the Secretary General of the Council of Europe that it is completely opposed to torture, ill-treatment or unacknowledged deprivation of liberty, all of which are prohibited by Irish law, and that prisoners can only be transported through Irish territory for the purposes of legally sanctioned extradition or transfer of sentenced prisoners, and then only with the consent of the Minister for Justice, Equality and Law Reform.

We also welcome the confirmation that members of An Garda Siochana may at any time require the owner or operator of a civil aircraft landing at an Irish airport to produce documentation concerning the purpose of the flight and details of any passengers or materials being transported, and that Gardai may enter and inspect the aircraft under Section 49 of the Air Navigation and Transport Act, 1998.

However, drawing on the reports mentioned above, we make the following points:

(1) Evidence of Extraordinary Rendition

The Commission is concerned at the suggestion in your letter that the issue of "rendition" is largely an academic matter. In particular, your comments that: "The recent allegations of extraordinary rendition ... involve unsubstantiated claims that unidentified persons might be, or might have been, illegally transported through Irish territory en route to unspecified destinations".

The analysis of several eminent bodies is to the contrary. The report by the Temporary Committee of the European Parliament drew upon data supplied by

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[3] Article 52 Request in respect of Unacknowledged Deprivation of Liberty. Reply of the Government of Ireland.

[4] Venice Commission: Opinion on the International Legal Obligations of Council of Europe member states in respect of Secret Detention Facilities and Inter-State Transport of Prisoners. Opinion No. 363/2005; CDL-AD (2006) 009, 17th March 2006.

[5] Amnesty International: United States of America – Below the Radar: Secret flights to torture and 'disappearance', 5th April 2006.

[6] European Parliament 2006/2027(INI)

Eurocontrol, the EU's air safety agency, that indicated there may have been as many as 1,000 unacknowledged CIA flights through or over Europe during the last five years.[7] A number of the aircraft involved have been identified as having taken part in well-documented and notorious cases of "rendition" and the same planes have landed repeatedly at European airports on their way to or from the US detention camp at Guantanamo Bay in Cuba or locations in Egypt, Algeria, Pakistan and Afghanistan

Several reputable international human rights organisations, notably Human Rights Watch and Amnesty International, have compiled lists of civilian aircraft used in known "rendition" cases. A number of these planes have been officially investigated in European countries, and/or are known to have flown frequently to Guantanamo Bay or to Afghanistan or Middle Eastern countries where supposed terrorist suspects are known to have been tortured or ill-treated. These organisations have also compiled lists of companies by which the aircraft in question are owned or operated, and which have links with the CIA.

Senator Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, who is conducting an investigation into "rendition" flights, has found these lists reliable enough to use them as part of his inquiry and to seek information from member states of the Council of Europe, including Ireland, as to their movements.[8]

The most recent report on aircraft believed to have been used for "rendition" flights was that published by Amnesty International on 5th April 2006. It identified a number of US companies used to charter or operate aircraft involved in "renditions" and it examined in detail flights undertaken by four aircraft between 2001 and 2005. Each of these aircraft had been involved in at least one well-known "rendition" operation. Amnesty calculated that, between, them the four planes had landed in Ireland 79 times, mostly at Shannon but once or twice at Dublin as well. A few of these landings were closely linked in time to known "rendition" flights.

In a written reply in the Dail on 4th April 2006, Minister for Transport Martin Cullen TD confirmed 48 landings by three of these aircraft (one had changed its registration details during the period).[9] Information given in the British House of Commons also confirmed a number of landings by these aircraft at Irish airports.[10] (Details of the planes identified by Amnesty and the number of recorded Irish landings are given in Appendix I).

The involvement of the four planes cited by Amnesty in four high profile "rendition" cases was also confirmed in the report of the Temporary Committee of the European Parliament published on 24th April 2006. In addition to these planes, a substantial number of other suspected CIA aircraft were included in the list circulated by Senator

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[7] Herald Online: EU lawmakers allege numerous CIA flights, Jan Sliva (AP), 27th April 2006.
[8] Parliamentary Assembly of Council of Europe, Committee on Legal Affairs and Human Rights: "Alleged Secret Detentions in Council of Europe member states – Information Memorandum II", Appendix II; AS/Jur (2006) 03. 22nd January 2006.
[9] Dail Debates, 4th April 2006, Written Replies to Questions 363 and 364.
[10] Adam Ingram MP, Minister of State for the Armed Forces, to Menzies Campbell MP, quoted in Press Release by Michael Moore MP, Liberal Democrat Shadow Foreign Secretary, 7th March 2006 www.michaelmoore.org.uk

Marty and referred to above. (This list is given at Appendix II). A number of these planes have also probably landed at Shannon or other Irish airports and information about them should be available from the Irish airport authorities.

In our view, the frequency of landings at Irish airports by aircraft known to have been used for "rendition" operations and the likelihood that there may have been many other landings by planes on Senator Marty's list, must give rise to very serious concerns that at least some of those flights may have been carrying prisoners, or have been on their way to collect prisoners, or have been returning after delivering prisoners.

"Rendition" is, of its nature, a secretive business and is carried out in a manner intended to conceal its existence, e.g. by using civilian aircraft crewed by unidentified and sometimes masked personnel to transport prisoners. This was documented in the case of ***Ahmed Agiza***, who was transported from Sweden to Egypt by US special forces in December 2001. Mr ***Agiza's*** case later led to a finding against Sweden by the UN Committee Against Torture.[11]

In your letter, you say that the Government has called on anyone who has knowledge of wrongdoing in relation to suspected CIA flights to inform the Gardai. However, given the nature of the exercise as it has been documented to date, private citizens are very unlikely to have access to specific evidence, which could only be definitively obtained by inspecting the aircraft in question and examining their documentation and flight records.

As outlined below, given the gravity of the matters at stake and the absolute nature of the prohibition on torture and ill-treatment of prisoners, we believe that this situation imposes a real obligation on the Irish authorities to take pro-active steps to ensure that our airports are not used to facilitate in any way "rendition" or transfer of prisoners to locations where they might be ill-treated.

(2) Article 3 of the European Convention on Human Rights: The Positive obligation to Prevent Torture

As regards the positive obligation on all states that have ratified the European Convention on Human Rights to prevent torture, we note your comments regarding the judgment of the European Court of Human Rights in the case of ***Osman v UK.***[12] That case, however, dealt with Article 2 of the European Convention on Human Rights, dealing with the right to life, as opposed to Article 3, prohibiting torture. Hence, the quotations to which you refer are not applicable and could be quite misleading in this context, drawn up as they were in the context of a very tightly constructed test set forth by the Court regarding liability for alleged threats to life.

On the other hand, your letter does not refer at all to the point which we made in our letter of 21st December regarding the positive, procedural obligation that Article 3 inevitably imposes on Contracting States to conduct an effective, official investigation

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[11] UN Committee Against Torture: Communication No. 233/2003 – *Ahmed /Agiza v. Sweden,* CAT/c/34/D/233/2003; 24th M<ay 2005.

[12] *Osman v. UK*, Judgment of the European Court of Human Rights, 28th October 1998.

where an individual raises an arguable claim that s/he has been seriously ill-treated by the police or other agents of the State unlawfully and in breach of Article 3.[13]

This principle necessarily requires that the State must conduct such an investigation where an arguable claim is raised that ill-treatment is being committed by third parties (including agents of a foreign state) within the jurisdiction of the receiving state. This conclusion is buttressed by the fact that Article 3 is one of the only articles of the European Convention on Human Rights which admits of no exceptions. The European Court has specifically pointed out that torture, inhuman or degrading treatment is never excusable, under any circumstances, including for the purposes of interrogating terrorist suspects.

It follows from the Court's previous rulings on this point that such a duty must apply where credible evidence exists in the public domain of a risk of torture or ill-treatment, or rendition to face such treatment, in violation of Article 3.

Diplomatic Assurances:

Your letter argues that the Government has fulfilled its obligations in relation to CIA flights and "rendition" by obtaining assurances from the US authorities that no-one has been or will be transported illegally through Irish territory.

In our letter to An Taoiseach we said that reliance on diplomatic assurances was not sufficient to fulfil our positive obligation to prevent the use of Irish airports to facilitate "rendition" with its accompanying risk of torture and ill-treatment. We supported this by referring to the decisions of the European Court of Human Rights in the leading cases of ***Soering v. the UK***[14] and ***Chahal v. the UK***[15] and the decision of the UN Committee Against Torture in the case of ***Ahmed Agiza v. Sweden***.

Your letter seeks to distinguish the assurances given to the Irish Government by the US authorities from the assurances rejected as inadequate by the European Court of Human Rights in the ***Soering*** and ***Chahal*** cases. The distinction is on two grounds, namely that (a) those cases concerned known, specific individuals, and (b) the assuring states in those cases (India and the US) did not have sufficient control over the surrounding circumstances to enable them to make good their assurances. In the context of rendition, you point out that the assurances given to the Government by the US authorities are in relation to "unsubstantiated claims [about] unidentified persons", and you argue that the US authorities have full control over whether any prisoners are transported via Ireland by their personnel.

We cannot accept this analysis. Firstly, as a general point, the cases in question established the general principles that prisoners must not be deported or handed over in circumstances where there is a substantial risk that they might be tortured or ill-treated, and that diplomatic assurances which cannot be legally enforced do not suffice to meet a state's obligations in this regard. Those principles were not dependent on the precise facts of the two cases and certainly the differences to which

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[13] *Assenov v, Bulgaria*, Judgment of the European Court of Human Rights, 28th October 1998.
[14] *Soering v. the UK*, Judgment of the European /Court of Human Rights, 7th July 1989.
[15] *Chahal v. the UK*. Judgment of the European Court of Human Rights. 15th November 1996.

you have referred are not so radical as to make the principles inapplicable to the context at hand.

Moreover, the specific reasons given for drawing a distinction between these cases and the "rendition" *issue* are unconvincing. First, it would appear that assurances would be more reliable in relation to known, identifiable individuals than in relation to unknown and therefore untraceable individuals. Moreover, the allegations about "rendition" all concern the use of unacknowledged civilian aircraft operated by the CIA or similar special forces units, and involve unidentified personnel. It is not clear that the US administration is in day to day control of all such operations and therefore in a position to give cast iron guarantees about their conduct. Indeed, even where regular US forces are concerned, the widespread ill-treatment of prisoners carried out at Abu Ghraib Prison in Iraq must raise questions about how effective such assurances could be.

In this connection, your letter did not refer to the case of ***Agiza v. Sweden***, to which we had also referred. The ***Agiza*** case is particularly relevant to the issue of "rendition". In that case, the UN Committee Against Torture held that assurances given to Sweden by the Egyptian government before the deportation of Mr Agiza to Egypt were not sufficient to meet Sweden's obligations under the Convention Against Torture. The Committee laid particular stress on the lack of an adequate mechanism to enforce the assurances.

In the ***Agiza*** case, the complainant and another man were actually flown to Egypt by unidentified and masked US personnel in a civilian aircraft which has made a number of landings at Shannon. Prior to leaving Sweden, the prisoners were hooded, shackled and strapped to mattresses in the plane by the US personnel and the Committee Against Torture held that Mr. Agiza had been "subjected on the State party's [Sweden's] territory to treatment in breach of, at least, Article 16 of the Convention [Against Torture] by foreign agents but with the acquiescence of the State party's police".

Expert Opinion:

We are fortified in our views regarding the duty on the state to investigate allegations about "rendition", and the inadequacy of relying on diplomatic assurances, by the conclusions drawn by expert bodies and individuals who have investigated this matter.

The Council of Europe Secretary General, Mr Terry Davis, reported on 28th February last on the responses to his questionnaire addressed to the member states. He stressed that not only does the European Convention on Human Rights impose an obligation on member states not to participate in breaches of human rights, but "respect for the Convention imposes positive obligations to ensure respect for the guaranteed rights and freedoms, including preventative measures. In other words the Convention may also be invoked through an omission to act. Not knowing is not good enough".

Mr Davis said that the existing procedures in relation to civil aircraft were ineffective in obtaining enough information to monitor whether they were breaching the

Convention and he urged all European governments to strengthen their "control tools" as much as possible. In that connection he seemed surprised that in Ireland, "States applying for overflight permissions are not systematically requested to provide passenger lists or information about cargo, even though this would be possible".

And finally, he said: "Mere assurances by foreign states that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights".

In its Legal Opinion of 17-18 March 2006, the Venice Commission stressed that Council of Europe member states were under an obligation not only to prevent prisoners being tortured, but to prevent their "exposure to the risk of torture", whether such torture eventually occurred or not. The Commission emphasised that this obligation applied to the transit of prisoners by another state as well as to direct deportation or *refoulement* by the member state in question: "[T]hey must therefore refuse to allow transit of prisoners in circumstances where there is such a risk".

The Venice Commission did not entirely rule out reliance on assurances given by another state, but said:

> "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 these categories."

The UN High Commissioner for Human Rights, Ms Louise Arbour, at a meeting with our Commission on 7th April 2006 also indicated her concern about the issue of "rendition" and suggested that diplomatic assurances should not be accepted from any country that has not ratified the Optional Protocol to the UN Convention Against Torture, which requires states to allow the Subcommittee on Prevention of the UN Committee Against Torture to visit prisons and places of detention to guard against ill-treatment of detainees. The US has not ratified the Optional Protocol.[16]

In summary, The European Court of Human Rights, the UN Committee Against Torture, the Venice Commission, the UN High Commissioner for Human Rights, the Council of Europe's Commissioner for Human Rights, and the Secretary General of the Council of Europe have all made clear that diplomatic assurances which are not legally enforceable and where there is no effective mechanism in place to monitor them, are not adequate to fulfil states' obligations under the European Convention on Human Rights and the UN Convention Against Torture.

This view was also supported by the Interim Report of the Temporary Committee of the European Parliament set up to investigate CIA "rendition" flights. It proposed

[16] Ireland has not ratified the Optional Protocol either, but we have ratified the European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment, which provides for periodic monitoring and visits to places of detention by the European Committee for the Prevention of Torture.

that the European Parliament should declare inadequate "the practices of certain governments that try to limit their responsibilities by asking for diplomatic assurances, a method that has proved ineffective and which does not provide for the level of protection required by the European Convention on Human Rights".

Conclusion – The Need for Further Steps to Ensure Compliance with our International Legal Obligations:

The Commission is strongly of the view that the only form of diplomatic assurances that could meet our constitutional and international human rights obligations would be ones which were fully legally enforceable and were accompanied by an effective regime of monitoring and inspection of aircraft suspected of involvement in "rendition" of prisoners.

This requirement also applies to the transfer of prisoners to the US detention camp at Guantanamo Bay in Cuba, where a group of five UN Special Rapporteurs, headed by Manfred Nowak, the Special Rapporteur on Torture, recently came to the firm and well reasoned conclusion that the interrogation techniques authorised by the US Department of Defense were in breach of Article 16 of the Convention Against Torture and in severe cases would amount to actual torture. They added that the violence used against many of the prisoners transported to Guantanamo also amounted to torture.[17]

In these circumstances, transfer of prisoners to Guantanamo Bay and the conditions to which such prisoners are subjected in the course of transfer or "rendition" would all constitute prohibited acts, which should not be permitted on Irish territory. If there is a substantial risk of this occurring through the landing of CIA-chartered civil aircraft at Irish airports, Ireland has an obligation to prevent it, and in our view that obligation requires more than *just* seeking and accepting assurances.

This obligation requires at a minimum the securing of legally enforceable guarantees that would ensure the immediate release, return and compensation of anyone found to have been transported through Irish territory to any destination where s/he would be placed at risk of torture, inhuman or degrading treatment, and the putting into place of an effective regime for the monitoring and inspection of aircraft suspected of involvement in the practice of "rendition".

It is also our view that Ireland's legal and human rights obligations are engaged where US aircraft landing at Irish airports are not actually carrying prisoners but are on their way to collect prisoners for "rendition" to Guantanamo Bay or to third countries where they run the risk of being tortured or subjected to inhuman or degrading treatment, or where they are returning after "rendering" such prisoners.

The Government's Reply to the Secretary General of the Council of Europe confirmed that aiding or abetting unlawful detention or ill-treatment also constitute offences. In that context we suggest that re-fuelling aircraft clearly fitted out to

[17] UN Economic and Social Council, Commission on Human Rights: "Situation of Detainees at Guantanamo Bay". Report by UN Special Rapporteurs, E/CN.4/2006/120, paragraphs 87 & 88; 15th February 2006.

transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for "rendition" or have just "rendered" them, constitutes aiding and abetting prohibited conduct.

Once again, the only effective way of ensuring that we do not become complicit in despatching people to be tortured or ill-treated is through establishing an effective regime of monitoring and inspection.

We reiterate our suggestion that this should be done by agreement with the US authorities if possible. However, in default of agreement, we suggest that a regime of monitoring and inspection be insisted upon in any event. This regime should be applied to any of aircraft listed in Appendix One if they land at Irish airports, and also to those included on the list circulated to national delegations to the Council of Europe by Senator Dick Marty as part of his investigation.

We further suggest that the Irish authorities monitor closely the movements of any aircraft not on Senator Marty's list, but which are owned or operated by any of the companies named in the recent Amnesty Report as linked to the CIA, and which seek to use Irish airports, so that, if necessary, the proposed regime of inspection and examination of flight documents may apply to them as well.

Our fundamental concern in this matter is to try to prevent any person from being subjected to torture or inhuman or degrading treatment. A secondary concern is that Ireland should observe our international human rights obligations and that in any future investigation of "rendition" flights, it may not emerge that any prisoner was secretly and illegally transported via an Irish airport to a destination where s/he was tortured or ill-treated and that the Irish authorities made no inquiry about the nature or purpose of the flight in question and did not seek to inspect the aircraft.

Finally, we note that these suggestions are consistent with the comments made by An Taoiseach in Washington on St. Patrick's Day when he acknowledged that there was "concern [in Ireland] about extraordinary renditions and about CIA flights" and called for greater transparency on this issue.

The Commission welcomes the Taoiseach's call for greater transparency and urges the Government to promptly implement a process of monitoring and inspection of suspect aircraft in order to meet our human rights obligations.

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

BAILE ÁTHA CLIATH 2
(DUBLIN 2)

4 April 2006

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

Dear Dr Manning

I refer to your letter to the Taoiseach of 21 December 2005, and the Irish Human Rights Commission's *Resolution in relation to claims of US aircraft carrying detainees*, ("the Resolution"), and would wish to reply.

I should like, in the first place, to attach a copy of the Government's submission in response to the Article 52 questionnaire from the Secretary-General of the Council of Europe, which deals with many of the issues raised in the Commission's Resolution, and in particular the question of the right to search. The submission makes clear that, contrary to the apparent assumption of the Commission, the consent of the US Government would not be required to engage in searches of civil aircraft of the type which have been the subject of allegations.

I wish also to address more fully the issue of the assurances the Government has received from the US Authorities on extraordinary rendition. In the Resolution, it is claimed that it is impermissible for the Government to rely on these assurances. The assurances, it will be recalled, are that prisoners have not been transferred through Irish airports, nor would they be, without our permission.

It is the Government's view that this claim of impermissibility is based on a misunderstanding and misinterpretation of the relevant international case-law. This does not in fact deal with assurances generally but rather, and explicitly, with assurances given in the context of the extradition or expulsion of a particular individual from a Contracting State to another State.

Article 3 of the European Convention on Human Rights

Article 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This prohibition is absolute. The European Court of Human Rights ("the Court") has ruled that the Article prohibits a Contracting State from extraditing or deporting a person from its territory in circumstances where it knows that there are substantial grounds

for believing that that person faces a real risk of being subjected to torture in the requesting country.

The Court has considered the application of the above principle in cases where the requesting State has given assurances ("diplomatic assurances") to the effect that the requested person would not be subjected to torture or inhuman or degrading treatment or punishment. It has ruled that the existence of such a diplomatic assurance does not automatically relieve a Contracting State of its obligations under Article 3.

For example, in *Soering v UK* [1], the Court held that a US District Attorney's undertaking that he would urge a Virginian court not to impose the death penalty on the requested person was deemed an insufficient guarantee against the death penalty being imposed, given the limits of his authority over the judicial process.

Further, in *Chahal v UK*[2] , the Court examined the Indian Government's assurance to the UK Government that the applicant, if deported to India, would be safe there. It found that, while the assurance was made in good faith, it was not credible in light of the well documented unrest being experienced in the relevant province at that time.

The cases in which the Court has examined diplomatic assurances, therefore, have involved concrete situations in which a known individual is being deported to a particular State, and assurances are given relating to matters over which the State does not exercise full control.

Assurances on Extraordinary Rendition

The recent allegations of extraordinary rendition, on the other hand, involve unsubstantiated claims that unidentified persons might be, or might have been, illegally transported through Irish territory en route to unspecified destinations. The assurances given by the US Authorities are factual, are unqualified by any reference to the purpose or nature of any hypothetical transfer, and are to the effect that no persons have been so transported through Irish territory. This is clearly a matter entirely within the control of the US Authorities. As such, these assurances are clearly of an entirely different nature to those considered by the European Court of Human Rights.

Even if the Court's case-law outlined above were to be used as a guideline for reliance on diplomatic assurances more generally, it must be pointed out that (contrary to some suggestions) the Court has not ruled that such assurances should be disregarded. While the Court has previously held that a particular assurance was insufficient (*Soering*), or that the relevant State would not be in a position to honour its assurance (*Chahal*), it has never held that a factual assertion by a State on a matter directly within its full control cannot be relied upon.

It is highly relevant in this context to note that the Court has stated its respect for the comity of nations, and has also held that the Convention must be interpreted in harmony with other rules of international law of which it forms part.

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[1] Soering v the United Kingdom, Judgment of the European Court of Human Rights , 7 July 1989.
[2] Chahal v the United Kingdom, Judgment of the European Court of Human Rights , 15 November 1996

There is, therefore, no authority to suggest that Ireland is obliged under the Convention to disregard an explicit assurance from the US Government. Any Irish Government would be loath to do so.

The State's positive obligation to prevent torture

It is appropriate also to refer to the positive obligation on all Contracting Parties to prevent violations of Article 3 of the European Convention. In considering the nature of this obligation, the Court has held that a State's positive obligation is not unlimited and that not every claimed risk "can entail a Convention requirement to take operational measures to prevent that risk from materialising". It has also ruled that the obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the relevant Authorities (*Osman v UK*[3]).

I would reiterate that the Government has responded to the allegations of extraordinary rendition by seeking and obtaining the explicit assurance of the US Authorities that no persons have been transported illegally through Irish territory and that no person would be so transported. The Government has also called upon persons with any evidence of wrongdoing to present this to the Gardaí, who have the powers needed to investigate any such claim.

Accordingly, the Government remains satisfied that it has discharged its obligations under both the European Convention on Human Rights and the Convention Against Torture.

I hope this clarifies the situation.

Yours sincerely

Dermot Ahern, TD
Minister for Foreign Affairs

[3] Osman v the United Kingdom, Judgment of the European Court of Human Rights, 28 October 1998

Article 52 Request

in respect of

Unacknowledged Deprivation of Liberty

Reply of the Government of Ireland

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I. Introduction

On 21 November 2005 the Secretary General of the Council of Europe, Mr Terry Davis, wrote to the Governments of all of the Member States of the Council of Europe. Exercising his powers under Article 52 of the European Convention on Human Rights, the Secretary General sought from each State an explanation of "the manner in which its internal law ensures the effective implementation" of certain provisions of the Convention. This document forms the response of the Government of Ireland to that request.

As the recital to the Secretary General's request indicates, it is circulated against a background of:

> *"recent reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been apprehended and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive cooperation of High Contracting Parties to the Convention or by High Contracting Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged."*

The Secretary General's request may be divided into two parts. The first part asks for an explanation of the adequacy of domestic law relating to unacknowledged deprivation of liberty and the activity of foreign agencies. The second part asks whether any public official, or "person acting in an official capacity", has been involved in any unacknowledged deprivation of liberty during the period since 1 January 2002. The Government's response to the Secretary General takes its structure from his request. The conclusion records the absolute prohibition under Irish law of the unacknowledged deprivation of liberty, and confirms that the practice within the State fully conforms to this.

A. Controls on officials of foreign agencies

The Secretary General asks for an explanation of

"The manner in which [Irish] law ensures that acts by officials of foreign agencies within [its] jurisdiction are subject to adequate controls."

The actions of all persons present in the territory of Ireland are governed by Irish law, including that relating to the deprivation of liberty described in Section II.C.

Consistent with Ireland's international legal obligations, Irish law confers specified privileges and immunities upon certain representatives of other states and international organisations, which could present a procedural bar to the enforcement of Irish law against such persons. The situations in which such diplomatic and state immunity may be enjoyed by a foreign official in Ireland are set out below.

1. Diplomatic Immunity

Diplomatic immunity applies in Ireland to

- the categories of person specified by the Vienna Convention on Diplomatic Relations of 1961, and the Vienna Convention on Consular Relations of 1963;
- any additional categories created or persons specified under the Diplomatic Relations and Diplomatic Immunity Act 1967; and
- any additional categories created or persons specified by international agreement and implemented by other primary domestic legislation.

The categories of person specified by the Vienna Convention on Diplomatic Relations of 1961, and the Vienna Convention on Consular Relations of 1963.

The provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are given effect in Irish law through the Diplomatic Relations and Immunities Acts 1967 and 1976. As a result, diplomatic and consular agents enjoy under Irish law immunity in respect of search, arrest and immunity from Irish criminal jurisdiction. It should be pointed out that, as provided by the two Conventions, such persons are under a duty to respect Irish law and regulations and, in addition, their immunity may be waived by the sending State.

The two Conventions do not include, as a category, officials of an agency of a foreign State travelling or present in the State on the business of their agency or otherwise.

Pursuant to an international agreement between Ireland and the United States of America,[1] US citizens who are permanent employees of the US Government assigned to 'preinspection' duties in Ireland are notified to the Department of Foreign Affairs as a diplomat (in the case of the head of the facility) or technical and administrative staff (in the case of other staff) and, as such, enjoy the relevant privileges and immunities under the 1967-76 Acts in respect of acts performed in the exercise of their duties under the 1986 agreement.

Any additional categories created or persons specified under the Diplomatic Relations and Immunities Acts 1967 and 1976

The Diplomatic Relations and Immunities Acts 1967-1976 also give effect in Irish law to international agreements conferring privileges and immunities upon certain

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[1] Agreement between Ireland and the United States of America on Preinspection, Dublin 25 June 1986, Irish Treaty Series, No 2 of 1986

international organisations (i.e. the United Nations and specialised agencies of the United Nations, the Council of Europe, the Organisation for Economic Co-Operation and Development, and the Customs Co-Operation Council). These agreements provide for the immunities of these organisations, their officials and representatives of their Member States. The agreements all contain provisions relating to the abuse of privileges and immunity by individuals, and allow for the waiver of immunities by the relevant international organisation or Member State.

Part VIII of the Diplomatic Relations and Immunities Acts 1967-1976 allows the Government, by Order, to confer on a designated international organisation or body of which the State is or intends to become a member, and its officials, "inviolability and exemptions, facilities and immunities, privileges and rights" (Section 40); to confer immunities and privileges on international judicial bodies or semi-judicial bodies established under an agreement to which the State or Government is, or intends to become, a party (Section 43); and to confer immunities and privileges on international organisations and bodies, in accordance with international agreements to which the State or Government is, or intends to become, a party (Section 42A).

Any additional categories created or persons specified by international agreement and implemented by other primary domestic legislation.

In addition to the above, privileges and immunities have been conferred on various bodies by virtue of primary legislation, or Orders made pursuant to such primary legislation.[2]

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[2] Chemical Weapons Act 1997, Section 5 (members of an inspection team of the Organisation for the Prohibition of Chemical Weapons); Decommissioning Act 1997, Section 3 (Independent International Commission on Decommissioning, its property members and staff); Europol Act 1997, Section 2,(Europol and the members of its organs); Criminal Justice (United Nations Convention Against Torture) Act 2000, Section 11,(members of the UN Committee against Torture); Containment of

2. State immunity

Consistent with Ireland's obligations under customary international law, a serving Head of State or Minister for Foreign Affairs of a foreign state enjoys immunity while on Irish territory.

As stated above, Irish law on immunity reflects customary international law on this matter, and must be interpreted in light of developments in that law.

3. Foreign Aircraft

It is appropriate, having regard to other areas of Irish law referred to in this Questionnaire, to outline the controls which exist in respect of the acts of officials of foreign agencies who transit Irish territory by aircraft. The law applicable to both civil and state aircraft is explained below.

a) Civilian aircraft

(1) Aircraft in flight

Ireland's competence to exercise jurisdiction in cases of criminal offences committed on board foreign civilian aircraft is governed, as regards aircraft in flight, by the Tokyo Convention 1963[3] . Article 4 of the Convention allows Ireland to exercise criminal jurisdiction *inter alia* in respect of such offences committed on Irish territory.

Nuclear Weapons Act 2003, Section 5, (international IAEA Inspector); Independent Monitoring Commission Act 2003, Section 5, (members and staff of the Independent Monitoring Commission)

[3] The Convention on Offences and Certain Other Acts committed on board Aircraft, Tokyo, on 14th September 1963. The Convention was adopted into Irish law by the Air Navigation and Transport Act, 1973.

(2) Aircraft not in flight

Where an aircraft is not in flight, the Tokyo Convention places no restriction on Ireland either investigating, or claiming jurisdiction to prosecute, in respect of a criminal offence appearing to have been committed on board an aircraft registered to another State. Civil aircraft used by foreign officials which land on Irish territory are not entitled to any state immunity. Hence, the powers of search outlined in Section II.C would apply to these aircraft.

b) Foreign State aircraft.

It is a requirement of Irish law that prior permission must be sought for a foreign military aircraft to land in Irish territory. In such circumstances, the foreign military aircraft enjoy immunity from search by Irish officials unless permission is conditional upon the waiver of this immunity. In addition, persons on board such an aircraft, who commit an offence while they remain on board, also enjoy immunity. Non-military state aircraft must also, in accordance with international law, seek permission to overfly or land in Irish territory if immunities are to apply.

If a person, who is believed to have committed an offence in Ireland, leaves the aircraft he or she can be arrested, charged and prosecuted, including for a crime committed against an Irish person on the aircraft, or an international crime wherever committed.

B. Safeguards to prevent unacknowledged deprivation of liberty

The Secretary General secondly asks for an explanation of

> *"The manner in which [Irish] law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within [the State's] jurisdiction, whether such deprivation of liberty is linked to an action or omission directly attributable to the [State] or whether [the State] 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."

Article 40.4.1 of the Constitution of Ireland provides that "No person shall be deprived of his personal liberty save in accordance with law".

The purpose of this Section is to explain that (i) under Irish law the deprivation of a person's liberty can only take place in defined circumstances, and that there is no concept in Irish law of a detention which is simultaneously both lawful and secret; and (ii) that Irish law provides numerous mechanisms to prevent an unlawful deprivation of liberty.

1. Lawful deprivation of liberty by Irish officials:

In addition to the power of An Garda Síochána (the Irish police service) to deprive a person of his or her liberty (which is highly regulated by law), a number of other authorities are empowered to do so in defined circumstances.[4] It will be noted that, in

[4] These circumstances are similar to those set out in Article 5.1 of the Convention- e.g. Section 12 of the Child Care Act 1991 permits a member of the Garda Síochána to remove the child to safety when he or she has reasonable grounds for believing that the health and welfare of a child is at serious and immediate risk; a health board can apply to a higher Court for an Order of Detention (in a unit with educational and therapeutic services) in respect of a non-offending child in need of special care and protection, which is granted under the Court' inherent jurisdiction; Section 38(1) of the Health Act 1947, allows a chief medical officer may order the detention and isolation of a person who is a probable source of infection with an infectious disease (specified by regulation). A person so detained has a right to appeal against that detention to the Minister for Health, and must be informed of this right; under the Trial of Lunatics Act 1883, a defendant in criminal proceedings who has been found guilty but insane must be detained in the Central Mental Hospital until such time as the executive has decided that he or she has recovered- the Courts have held that such detention is permitted only so long as it is necessary to achieve the objectives of the legislation; the Mental Treatment Act 1945 permits

all of these situations, the deprivation of liberty is regulated by law and subject to judicial control.

2. Lawful deprivation of liberty by foreign agents in Ireland:

There are only two circumstances in which Irish law permits the authorities of another State to detain a prisoner on Irish territory:

- **Extradition**: The Extradition Act 1965, in Section 40 (1), permits the transit through Irish territory of a person being conveyed from one country to another pursuant to an agreement in the nature of an extradition agreement. In such a case, the transit must be consented to by the Minster for Justice, Equality and Law Reform and is subject to the relevant extradition provisions and any condition the Minister thinks proper.

  The Ireland-US extradition agreement of 2001 additionally permits detention of prisoners by officials of the United States as they pass through Ireland. The agreement at Article XV requires the consent of the State for each such transit.

- **Transfer of a sentenced prisoner:** The Minister for Justice, Equality and Law Reform may also consent to the transfer of a sentenced prisoner through Irish territory pursuant to the Convention on the Transfer of Sentenced Persons 1983, when he or she is satisfied that Article 16 of that Convention is applicable.

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the detention, in specified circumstances, of mentally ill patients in mental hospitals. The Act makes provision for complaints of unlawful detention to be investigated by mental heath authorities. The Courts are empowered to release a patient who has recovered or who was otherwise unlawfully detained.

It is not lawful for the Minister or the State to consent to the transit of a prisoner through Irish territory other than in the two circumstances outlined above.

It is important to note that the exercise by any Minister of his or her powers and discretions must be done in a constitutional manner and, under the European Convention on Human Rights Act 2003, in a manner compatible with the European Convention on Human Rights. No Minister can lawfully consent to the transit through Irish territory of a prisoner where he or she knows, or has substantial grounds for believing, that there is a real risk of that prisoner being tortured or subjected to inhuman or degrading treatment or punishment.

3. Unlawful deprivation of liberty

All detention, whether secret or otherwise, which does not have the positive authorisation of law in the State, constitutes the criminal offence of false imprisonment.

Section 15 of the Non-Fatal Offences against the Person Act 1997 provides that a person who intentionally or recklessly takes or detains, or causes to be taken or detained, or otherwise restricts the personal liberty of another without that other's consent, shall be guilty of the offence of false imprisonment. For the purposes of the Section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under the legal compulsion to consent. The offence of false imprisonment is punishable on summary conviction by a fine not exceeding €1,904.61 or to imprisonment for a term not exceeding 12 months or both and, on conviction on indictment, by imprisonment for life.

A person who aids, abets, counsels or procures the commission of the above offence is liable to be indicted, tried and punished as a principal offender (Section 22 of the Petty Sessions (Ireland) Act 1851; Section 7 of the Criminal Law Act 1997).

It is relevant to note that Section 2 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 provides that it is an offence for a public official (or a person acting at the instigation of, or with the consent or acquiescence of a public official), whatever his or her nationality, to carry out an act of torture, whether within or outside the State. Section 3 of the Act provides that it is an offence to attempt to commit or to conspire to commit the offence of torture.

As stated above, there is no such concept in Irish law as detention which is simultaneously both lawful and secret.

4. Prevention of unlawful deprivation of liberty

An Garda Síochána are under a common law duty to detect and prevent crime. To assist the Gardaí in the performance of this duty, a number of common law and statutory powers of entry, search and seizure are available.

The Irish Courts have recognised the entitlement of a Garda to enter a premises or dwelling in order to protect the constitutional rights of an individual (a term taken to mean all persons, regardless of nationality).

In addition, the Irish Air Navigation and Transport Acts of 1988 and 1998[5] provide (in Section 33 of the 1988 Act) that, in a case where it is suspected that a crime is being committed on a civil aircraft, an authorised officer (which includes a member of An Garda Síochána) may, in the interest of the proper operation or the security or safety of an aerodrome, or the security or safety of persons, aircraft or other property thereon, arrest without warrant any person who assaults, or whom he or she reasonably suspects to have assaulted, another person.

Section 49 of the 1998 Act provides a power for an authorised officer to enter an aircraft in an Irish airport when he or she considers it necessary for the purpose of

[5] Air Navigation and Transport Act 1988; Air Navigation and Transport (Amendment) Act 1998

exercising any power conferred upon him or her by, or under, this Act, or the Act of 1988. Subsection (3) provides that the authorised officer may, at any time, require the operator or registered owner of the aircraft to produce for inspection by him or her such documents, relating to the aircraft or passengers or goods on board the aircraft, as he or she may require; or inspect the aircraft for the purpose of ensuring compliance with the relevant legislation.

Habeas corpus applications

The availability of the habeas corpus application, the procedure for which is set out in Article 40.4.2 of the Constitution of Ireland, provides a mechanism by which all forms of unlawful detention can be judicially challenged.

Where a person is being unlawfully detained, he/she or a person acting on his/her behalf may apply to the High Court alleging that he/she is being unlawfully detained. The High Court must then enquire into this complaint, and may order the person, in whose custody he/she is detained, to produce the "body" of that detained person before the High Court and to certify the grounds of the detention.

Having considered the reasons justifying the detention, the Court must order the release of the detained person, unless it is satisfied that the detention is lawful.

This remedy is supported by the unenumerated Constitutional right to communicate with the court for the purpose of making this application.

C. Adequate response to alleged infringements

The third part of the Secretary General's requests asks about

> *"the manner in which [Irish] law provides an adequate response to any alleged infringements of Convention rights of individuals within [its] jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, explanation of the availability of 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;"

The previous Section outlines the measures which can be taken under Irish law to prevent the unlawful deprivation of a person's liberty. The following explains the remedies open to a victim arising from a situation in which he or she has been unlawfully deprived of his or her liberty.

In a situation where the unacknowledged deprivation of an individual's liberty had taken place, a crime under Irish law would have been committed (see above). In such a case, the Gardaí are empowered and obliged to investigate the crime, and in doing so would have at their disposal the powers of search outlined above.

In addition to a possible criminal action, the victim could pursue civil damages through a number of legal means:

The Constitution of Ireland provides a number of personal rights to be enjoyed by citizens (a term taken to mean all persons, regardless of nationality). These rights are enforceable by the Courts, which can award damages for breach of constitutional rights.

The tort of unlawful imprisonment, defined similarly to the criminal offence, also gives a right of action for damages. Insofar as a situation of false imprisonment is likely also to involve an assault, an action for damages for assault would also be open to a victim.

In the case where a criminal conviction has been obtained against the perpetrators, the victim can also seek compensation from the Criminal Injuries Compensation Tribunal.

III. The question of unacknowledged deprivation of liberty

The Secretary General finally requests

> *"an explanation... as to whether, in the period running from 1 January 2002... 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".*

The request refers to the possibility of the involvement in unacknowledged deprivation of liberty of any public official or person acting in an official capacity either by action or by omission. The issues raised in responding are different, so, for the sake of clarity, the reply addresses the two questions separately.

A. Involvement by action

The question of the possible involvement of any public official or person acting in an official capacity has necessarily been the subject of close interdepartmental coordination, involving the Departments of Foreign Affairs; Justice, Equality and Law Reform; Defence; Transport; Education and Science; and Health and Children. The Revenue Commissioners were also included in order to confirm that Customs facilities had not been used for this purpose.

Officers from the Department of Foreign Affairs met on several occasions in order to formulate a process which would answer the Secretary General's questions in the most comprehensive manner. In December 2005, the Secretary General of the Department of Foreign Affairs wrote to his colleagues in all relevant Departments,

attaching the Article 52 request, explaining its context and requesting their cooperation in preparing a comprehensive reply. Relevant Departments were identified as all of those in control of detention facilities, as well as the Department of Transport. The Department of Foreign Affairs chaired an interdepartmental coordination meeting for representatives of these Departments on 12 January in order to explain the context of the Secretary General's request, and to reinforce the commitment to ensuring a comprehensive reply by the due date. At this meeting, the Department of Foreign Affairs provided information in response to Departments' specific questions on the Article 52 process.

Following this meeting, internal investigations were set in train within the Departments concerned in order to prepare categorical replies to the Secretary General's questions. These investigations involved consultation within the responsible Departments, and with the Irish Prison Service, Prison Governors, the Inspector of Prisons and Places of Detention, the Chairpersons of all the Prison Visiting Committees, the Chief of Staff of the Defence Forces, the Army Director of Legal Services, the Army Director of Intelligence, An Garda Síochána and the Directors or Deputy Directors of the State's five industrial and reformatory schools.

1. Detention facilities in Ireland

The Departmental investigations included an examination of the possibility that unacknowledged deprivation of liberty might have occurred in any of the State's detention facilities. These facilities include prisons, Garda stations, psychiatric institutions and children's detention facilities. The Revenue Commissioners and the Department of Transport reported that, while customs officers and airport police officers have rights of arrest and detention, in practice their rights of detention are exercised by An Garda Síochána.

2. Format of enquiry

Departments contacted the bodies responsible, under their auspices, for running detention facilities, to explain the concept of unacknowledged deprivation of liberty.

These bodies were then asked to investigate the possibility that unacknowledged deprivation of liberty might have occurred in those facilities over the period of the request.

To ensure completion, oversight bodies — e.g. the Chairpersons of the Prison Visiting Committees and the Inspector of Prisons and Places of Detention — were also consulted as to whether they had received complaints about any unacknowledged deprivation of liberty.

3. Results of investigation into possibility of involvement by action

These investigations have confirmed that no unacknowledged deprivation of liberty has occurred in any of the State's detention facilities as the result of an act of a public official or other person acting in an official capacity. Similarly, these investigations have revealed no instance of unacknowledged deprivation of liberty to have occurred in any of the State's detention facilities as the result of an omission of a public official or other person acting in an official capacity.

B. Involvement by omission

The Government are fully aware of their obligations to prevent involvement by omission in the unacknowledged deprivation of liberty, and to fulfil all of their positive obligations in respect of this matter. As far as the Secretary General's request is concerned, the issue arises largely in the context of the "transport of any individual while so deprived of their liberty", which has become known as extraordinary rendition.

1. US Assurances

When the Government became aware in 2004 of allegations regarding extraordinary rendition, urgent contact was made with the United States authorities, through both the US Embassy in Dublin and the Irish Embassy in Washington, to ensure that the Irish position was fully understood and respected. The Government sought and

received assurances that prisoners had not been, nor would they be, transferred through Irish territory without the express permission of the Irish authorities. It was made clear that, in conformity with the relevant domestic and international law, permission would not be granted for the transit of an aircraft participating in an extraordinary rendition operation or for any other unlawful act. The US authorities' assurances were subsequently reiterated in a number of meetings throughout 2005, and they were confirmed at a bilateral meeting in Washington D.C. between the Minister for Foreign Affairs, Dermot Ahern, T.D., and the US Secretary of State, Condoleezza Rice, on 1 December 2005. They have been repeated at several meetings in 2006.

The Government accept these assurances, which are of a particular clarity and completeness. They are factual and in no way qualified by any reference to the circumstances in which, or the purpose for which, any hypothetical prisoner might be transported.

The Government have carefully considered the value of these assurances having regard to their obligations (including their positive obligations) under the Convention. This has included an examination of the European Court of Human Rights' consideration of a Contracting Party's entitlement to rely on "diplomatic assurances" made to it by a third state, in the quite different context of extradition or expulsion of known individuals to that state.

The Government are satisfied that they are entitled under the Convention 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.

2. Involvement of An Garda Síochána

Notwithstanding the US assurances, the Government have repeatedly made clear that any person with specific evidence that persons are being transported through Ireland in so-called extraordinary rendition operations should present this to An Garda

Síochána. The vast majority of allegations surrounding extraordinary rendition flights in Europe refer to civil aircraft. As set out in Section II above, such aircraft are liable to search and inspection according to the provisions of Irish law. The Minister for Justice, Equality and Law Reform informed the Dáil (Parliament) as early as November 2004 that, in the case of a credible complaint of criminal activity being made to An Garda Síochána, a full investigation would be conducted, which could include an inspection of the aircraft in question.

Three complaints have been made. In two instances, in accordance with standard procedures in cases of allegations of serious offences, papers were forwarded to the Office of the Director of Public Prosecutions. In neither instance was any further action found to be warranted, owing to a lack of evidence that any unlawful activity had occurred. The Director of Public Prosecutions is the authority responsible for deciding — independent of the Government or the Gardaí — whether to charge people with criminal offences and what the charges should be.

3. Conclusion on Positive Obligations

The above confirms that Ireland and its officials have fulfilled all of their positive obligations in respect of preventing unacknowledged deprivation of liberty, particularly with respect to any possible "transport of individuals while... deprived of their liberty". There is therefore no question of any public official or person acting in an official capacity being involved in such activity by omission.

C. Overall Results of investigation

In light of the foregoing, and after the thorough investigation outlined above, the Government are in a position emphatically to answer in the negative the Secretary General's question as to:

> *"whether, in the period running from 1 January 2002... 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."

IV. Official investigations

With regard to the Secretary General's request for information on whether any official investigation is underway or has been completed, the Government are satisfied that, apart from the investigation undertaken in order to provide as comprehensive a reply as possible to the Secretary General's request, no official investigation is required.

V. Conclusion

In no circumstances would the unacknowledged deprivation of liberty be legal in Ireland. In this respect, all of Ireland's obligations in respect of the European Convention on Human Rights are fulfilled.

On 10 November 2005 the Minister for Foreign Affairs, Dermot Ahern, T.D. made clear the Government's "very deep concern" over allegations of the possible existence of secret prisons, and on 14 December 2005, he recorded the Government's "complete opposition to the practice of so-called extraordinary rendition". A thorough examination of practice throughout the State in response to the Secretary General's request has revealed no indication of the occurrence either of unacknowledged deprivation of liberty, or the transportation of any individual while so deprived of his liberty. This is entirely in keeping with the Government's stated position on the matter.

The practices described in the Secretary General's request would plainly be in breach of international law, Irish law, and of the principles upon which the Council of Europe is founded, namely the maintenance and realisation of human rights and fundamental

freedoms. They are practices to which the Government of Ireland are completely opposed.

VI. Annex I: Secretary General's Request

Council of Europe
The Secretary General

Strasbourg, 21 November 2005

Dear Minister,

I refer to Article 52 of the European Convention on Human Rights which states that "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

I hereby avail myself of the powers conferred on me by this provision and ask your Government to furnish the explanations requested in the appended question.

I should appreciate receiving these explanations before 21 February 2006.

Yours sincerely,

Terry Davis

Mr Dermot Ahern
Minister for Foreign Affairs of Ireland

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Request for an explanation in accordance with Article 52 of the European Convention on Human Rights

The Secretary General of the Council of Europe,

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention") and its Protocols;

Having regard also to the case law of the European Court of Human Rights which has given concrete expression to the rights and freedoms guaranteed thereunder and which has affirmed that the law and practice of the High Contracting Parties must comply with the provisions of the Convention and its additional Protocols;

Noting that there have been recent reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been apprehended and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive cooperation of High Contracting Parties to the Convention or by High Contracting Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged;

Bearing in mind the fundamental importance of the safeguards contained in the Convention against arbitrary deprivation of liberty both in their own right and for the protection of the right to life and for upholding the absolute prohibition of torture or inhuman or degrading treatment or punishment;

Considering that, under Article 1 of the Convention, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms guaranteed therein and that the participation, acquiescence or connivance of the authorities of a Contracting State in the acts of the agents of another State affecting Convention rights may engage the Contracting State's responsibility under the Convention and that such responsibility may also be engaged where that State's agents are acting *ultra vires* or contrary to instructions;

Considering also that unacknowledged deprivation of liberty raises serious questions concerning the effective implementation of, and compliance with, the Convention, notably its Articles 2, 3, 5, 6, 8, 13 and Article 2 of Protocol No. 4 to the Convention;

Acting on the basis of the powers conferred on him by virtue of Article 52 of the European Convention of Human Rights:

1. Requests the Governments of the High Contracting Parties to furnish 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 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, explanation of the availability of 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;

   In the context of the foregoing explanations, an explanation is 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;

2. Requests that these explanations be provided by 21 February 2006.

IHRC
IRISH HUMAN RIGHTS COMMISSION

Dr. Maurice Manning
President

21 December 2005

An Taoiseach
Department of An Taoiseach
Government Buildings
Upper Merrion Street
Dublin 2

Dear Taoiseach,

The Irish Human Rights Commission at its plenary meeting last week discussed the reports that US aircraft landing at Shannon airport may be involved in the transport of persons to secret locations where they may be at risk of being subjected to torture, cruel or inhuman treatment and is seriously concerned about the implications of these reports.

It is the view of the Commission that in light of Ireland's international legal obligation to ensure that no one is sent to a jurisdiction where they may run this risk we call on the Government to seek agreement from the US authorities to inspect the aircraft in question on landing at Shannon or any other Irish airport.

The reasons for the Commission's concerns are detailed in the accompanying document.

With best wishes.

Yours sincerely,

Maurice Manning

Encl.

Irish Human Rights Commission
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IHRC

IRISH HUMAN RIGHTS COMMISSION

Irish Human Rights Commission

Resolution in relation to claims of US aircraft carrying detainees

The Irish Human Rights Commission is seriously concerned about reports that US aircraft landing at Shannon airport may be involved in the transport of persons to secret locations where they may be at risk of being subjected to torture, cruel or inhuman treatment.

In view of Ireland's international legal obligation to ensure that no one is sent to a jurisdiction where they may run this risk we call on the Government to seek agreement from the US authorities to inspect the aircraft in question on landing at Shannon or any other Irish airport.

Reasons for the Resolution:

Human Rights Commission Act.
Section 8 (a) of the Act establishing the Commission states that one of its functions is "to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights". Section 8 (d) authorises the Commission to make recommendations to the Government about measures "to strengthen, protect and uphold human rights in the State".

United Nations Convention Against Torture.
Article 1 of the United Nations Convention against Torture, to which Ireland is a party, defines torture as

> 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 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture, cruel, inhuman or degrading treatment is also prohibited by the provisions of the Constitution and the carrying out of an act of torture "whether within or outside the State" is specifically prohibited by Section 2 of the Criminal Justice (United Nations Convention Against

Torture) Act, 2000. Attempting or conspiring to commit an act of torture within or outside the State, is also an offence under Section 3 of the same Act.

Article 3 of the United Nations Convention against Torture prohibits the expulsion or return ('refoulement') of a person to a jurisdiction where there are substantial grounds for believing that the person would be in danger of being subjected to torture. A summary of the jurisprudence in this regard is usefully provided in a recent report by the UN Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment in August 2005 (Professor Manfred Nowak).[1] A reading of the relevant case-law strongly suggests that diplomatic assurances that individuals will not be subjected to such treatment are not, in themselves, sufficient to fulfil a state's obligations to guard against torture or ill-treatment. The relevant treaty monitoring body – the UN Committee against Torture – has made it plain that Article 3 of the Convention against Torture is absolute. Furthermore, the Committee has found that "the procurement of diplomatic assurances, which moreover provided no mechanism for their enforcement, did not suffice to protect against [a] manifest risk" [*Agiza v Sweden* [2005][2].

In 2004 the Committee against Torture closely scrutinised the reported reliance by the United Kingdom on diplomatic assurances from other countries and it:

> ...requested that within one year, the United Kingdom provide it with details of how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases[3].

The UN Special Rapporteur concluded in his August 2005 Report (para 51):

> It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. 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.

European Convention on Human Rights:

Article 3 of the *European Convention On Human Rights* (1950) to which Ireland is also party (and which is incorporated into domestic law by the *European Convention on Human Rights Act* 2003) provides that states shall secure to "everyone within [their] jurisdiction" the right to be free from torture, inhuman or degrading treatment or punishment.

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[1] A/60/316 (30 August, 2005).
[2] Id. at para 44.
[3] Id at para 40.

The European Court of Human Rights has previously ruled that the obligation in Article 3 also protects against *refoulement* of an individual to a state where there is are substantial grounds for believing that the person faces a real risk of ill-treatment in violation of Article 3.[4] It has also ruled that states parties to the Convention are under a procedural obligation in respect of Article 3 to conduct an effective, official investigation where an individual raises an arguable claim that he or she has been seriously ill-treated by the police or other agents of the State unlawfully and in breach of Article 3.[5]

In the case of *Chahal v the United Kingdom,*[6] the European Court of Human Rights specifically ruled that diplomatic assurances are an inadequate guarantee in relation to the proposed return of individuals to countries where torture is "endemic" or a "recalcitrant and enduring problem."

In July 2004 the Council of Europe High Commissioner for Human Rights (Mr. Alvaro Gil-Robles) stated:

> 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 on torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains[7].

Analysis of the Irish Human Rights Commission:

In the Commission's view, the State must conduct an official investigation where an arguable claim is raised that a breach of Article 3 of the European Convention is being committed by third parties (including agents of a foreign state) within the jurisdiction of the receiving state. Moreover, the principle of 'non-refoulement' inevitably requires that such an investigation must also take place where the state's territory is being used to facilitate the transportation of any person to places where there is a real risk of ill-treatment in violation of Article 3. This conclusion is buttressed by the fact that Article 3 is one of the only articles of the European Convention on Human Rights which admits of no exceptions. The Court has specifically pointed out that torture, inhuman or degrading treatment is never excusable, under any circumstances, including for the purposes of interrogating terrorist suspects.[8]

Credible international human rights NGOs such as Human Rights Watch and Amnesty International have reported that particular US-owned aircraft have been used for the transport or "rendition" of detainees to secret detention facilities or to third countries and that some of the detainees concerned may have been tortured or subjected to severe ill-treatment.[9] It has also been reported that some of the aircraft suspected of involvement in the transport of these detainees have been recorded as stopping at Shannon airport.

The Rapporteur of the Parliamentary Assembly of the Council of Europe, Mr Dick Marty, who is investigating allegations about the transport of detainees to secret detention centres in Council of Europe member states, stated on 13th December last that "the information gathered to date

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[4] *Cruz Varas v* Sweden, Judgment of the European Court of Human Rights, 20 March 1991.
[5] *Assenov v Bulgaria*, Judgment of the European Court of Human Rights, 28 October 1998.
[6] Judgment of the European Court of Human Rights, 15 November 1996.
[7] CommDH(2004) 13, 8 July, 2004, para 9.
[8] *Tomasi v France,* Judgment of the European Court of Human Rights, 27 August 1992.

reinforced the credibility of the allegations concerning the transfer and temporary detention of individuals, without any judicial involvement in European countries".[10]

The Secretary General of the Council of Europe, Mr Terry Davis, has taken these reports so seriously that he has formally requested information from all members of the Council of Europe as to whether any public officials have been involved in any way, "whether by action or omission" in the detention or transport of any of the detainees and whether any official investigation has been held into this matter.[11] In a statement on 15th December last, he said that:

> "... respect for the [European] Convention imposes a positive obligation. In other words, the Convention may also be violated through an omission to act. Not knowing is not good enough regardless of whether ignorance is intentional or accidental.
>
> ... the obligation of our member states to ensure respect for the rights protected by the Convention is linked to the exercise of their effective jurisdiction, which includes the airports on their territory and the airspace above it...."[12]

The Irish Government has a clear obligation both under the Convention against Torture, the ECHR and under domestic law to prevent any actions on our soil which could in any way facilitate torture or ill-treatment even in another country. Thus far, the Government has said that it has received assurances from the US authorities that they are not using planes which are landing at Shannon in connection with the transport of detainees to locations where they may be tortured or ill-treated. In the Commission's view, and in light of Ireland's international legal obligations in this field, reliance on diplomatic assurances is not sufficient to protect against the risk of torture and other forms of ill-treatment.

In the Commission's view, given the fact that the obligation on the state to protect against all forms of torture, inhuman and degrading treatment is an absolute one, and given the gravity of the allegations that have been made to date and which are under active investigation by the Council of Europe, it is not sufficient for the Government to rely on such assurances.

Accordingly, the Commission calls on the Government to seek the agreement of the US authorities to the inspection of aircraft suspected of involvement in this traffic.

[9] Human Rights Watch statements on "Us Secret Detention Facilities in Europe", 7 November 2005; "CIA Whitewashing Torture", 21 November 2005; "List of 'Ghost Prisoners' Possibly in CIA Custody", 30 November 2005.

[10] Council of Europe Press Release 690a(2005) "Alleged existence of secret detention centres in Council of Europe member states: statement by Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights".

[11] Council of Europe Press Release 636a(2005) "Reports of illegal detention and 'rendition flights' in Council of Europe m,ember states – the Secretary General activates the procedure under Article 52 of the European Convention on Human Rights"

[12] Council of Europe Press Release 703a(2005) "Secretary General sets the parameters of the Council of Europe inquiry into alleged CIA activities in Europe"

Response of the Department of Foreign Affairs to the draft IHRC Review

AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS
BAILE ÁTHA CLIATH 2
DUBLIN 2

Mr. Des Hogan
Acting Chief Executive
Irish Human Rights Commission
4th Floor Jervis House
Jervis Street
Dublin 1

14 NOV 2007

13 November 2007

Dear Des,

On behalf of the Minister for Foreign Affairs, Mr Dermot Ahern TD, I would like to thank you for sharing with the Department on a confidential basis the draft of the Irish Human Rights Commission's Review of Ireland's Human Rights Obligations in the area of Extraordinary Rendition.

We welcome the extensive dialogue which has taken place between us on the issue of extraordinary rendition. This dialogue has confirmed that both the Government and the Commission are totally opposed to the practice of extraordinary rendition. I would also note that you have not disputed our view that none of the investigations into the matter hav revealed any evidence, or even a specific allegation, that any person has on any occasion been subject to extraordinary rendition through Ireland. I recall that the President of the Commission acknowledged this in his evidence to the Temporary Committee of the European Parliament.

We have emphasised to you on a number of occasions that freedom from torture and inhuman or degrading treatment or punishment is among the personal freedoms protected by the Constitution of Ireland. Torture and inhuman or degrading treatment and punishment are contrary to global and regional international human rights norms. Furthermore, the detention of any person by a foreign state on Irish territory without the statutory consent of the Government would constitute not only a breach of Irish law and international human rights instruments but also of one of the basic principles of public international law.

Following our meeting on 11 July, I provided the Commission with a summary note of the assurances which have been received from the US Government and I am grateful that this is acknowledged in the draft Review. It is, however, clear that there continues to be a significant degree of difference between us on the Government's position that it is entitled to rely on these assurances. It is also the case that Government and the

Commission differ on the scope of the Government's positive obligations in relation to the prevention of torture and other ill-treatment by other States and on the introduction of a specific inspection regime for private civil aircraft landing at Irish airports.

I regret to say that we do not believe that the body of the draft Review adequately reflects the position of the Government as expressed in our extensive dialogue on these key issues. Nor does the draft Review, in our view, fairly reflect the extensive action taken by Minister Ahern to express at the international level Ireland's total opposition to extraordinary rendition.

The body of the draft Review also fails to give a full account of the specific commitments in the Programme for Government on Extraordinary Rendition providing for measures to be taken by the Departments of Justice, Equality and Law Reform and Transport.

In addition to these substantive points, which I address in more detail below, I have to say that we are concerned at the tone of much of the drafting, which could be described as simplistic, pejorative and unfair. For example, it is hardly appropriate, and certainly not accurate, for a statutory body such as the Commission to describe the acceptance of diplomatic assurances from the US Government on the question of extraordinary rendition in terms which suggest that the Government of Ireland *"has adopted a stance of deference"*. Likewise, we also strongly reject the use of language such as *"turning a blind eye"*, "*not doing all within its power*" "*shows a marked unwillingness*", "*shelter behind*", "*baldly assert*" and "*lip service*".

I have set out in an annex to this letter specific issues of drafting, presentation and fact with which we would take issue. It has been necessary to repeat similar points on a number of occasions between the letter and the annex, reflecting the structure of the Commission's own draft.

Diplomatic Assurances

The position of the Government on its entitlement, in accordance with normal practice in international relations, to rely on the diplomatic assurances received from the US Government has been fully set in out in Minister Ahern's letters dated 4 April and 25 July 2006 to the President of the Commission.

At our meeting on 11 July 2007 I advised the Commissioners that these assurances were the result of inter-agency consultation in the US, apply to all US personnel whether in civil or state aircraft and to all detained persons and not merely "prisoners" in some technical sense of the word.

It is our view that the Commission's interpretation of the law relating to diplomatic assurances is overly broad in that it seeks to extract from the jurisprudence general principles that are not established in law. In so doing, the Commission overlooks significant legal and factual distinctions between the situations covered in the jurisprudence and what is at issue here.

As we have previously stated, the case law of the European Court of Human Rights and UN Committee Against Torture on diplomatic assurances is limited to: (i) assurances given in the context of the extradition/expulsion of a particular person from the territory of the state being offered the assurance; (ii) matters over which the state offering the assurance does not exercise full control; and (iii) relating to mixed issues of law and fact.

These elements are not present in the current situation. First and foremost, it must be recalled that for a foreign state to detain a person in Irish territory without the State's consent would be a clear breach of international law. Any suggestion that an additional legal assurance is required would undermine the basic principle of international law that a state is sovereign in its own territory. Rather, the Government must satisfy themselves whether a category of person is present on Irish territory. The assurances received from the US in this regard are specific, factual and relate to the very existence of such persons. The assurances are unqualified and state unambiguously a factual situation, over which the Government are confident that the US Government have complete control. These assurances were made at the highest level and were the subject of consultation. I would again add that similar assurances have not been made generally available to other European States.

I would recall that, at our meeting, the Commission accepted that it had adopted the broadest possible interpretation of the relevant law and acknowledged that there is no international jurisprudence relating to comparable facts. The extent to which the law relating to diplomatic assurances is varied and contested is not reflected in the draft Review.

While the draft Review briefly acknowledges that a distinction can be made between different categories of diplomatic assurances (pg.35) it also makes clear (pg. 14) that the Commission takes a different view from the Government. Given these continuing differences, we would suggest that the draft Review would more accurately reflect the substance of our dialogue if it included more extensive references in Chapters 2 and 3 to the Government's analysis, and if it underscored the Commission's own acceptance, as conveyed at our meeting, that the jurisprudence on the matter is far from clear.

The nature of the positive obligation to prevent torture and other ill-treatment

The draft Review argues that "if a prisoner can establish that s/he was 'rendered' through Ireland by the US authorities to another State where s/he was tortured or suffered inhuman or degrading treatment, there is a strong probability that Ireland would be held to be in breach of its human rights obligations in this regard". This is, of course, an entirely hypothetical situation. It is in any case our view that, since any such determination would depend on the particular facts, it is not possible to make such an assertion. It cannot be claimed that, regardless of the particular circumstances, the mere fact that a person was "rendered" through Ireland by another state probably amounts to a breach, by Ireland, of its international law obligations. We note that the Commission's treatment of the Venice Commission's opinion fails to include the important qualification that a state must take all measures to prevent a person being "rendered" through its territory if it has "serious reasons

(our emphasis) to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment".

Throughout our dialogue, we have expressed the view that there are limits on the scope of positive obligations under international law to prevent the commission of wrongful acts by other states. In particular, it has been noted that the case law of the European Court of Human Rights accepts that positive obligations are not unlimited and that not every risk can entail a requirement to take operational measures to prevent that risk from materialising. The draft Review fails to detail the Government's views on this matter, or to acknowledge that international law in this regard is highly complex and unsettled. The report is also particularly unclear in its treatment of the Government's positive obligations in the case where an empty aircraft might travel through Irish territory either prior to or after an "extraordinary rendition".

We feel that the points above and the Government's position as detailed by the Minister in his letters to the Commission and elaborated at our meeting in July should also be more fully reflected in Chapter 3 and elsewhere as appropriate in the draft Report.

Inspections/Monitoring Regime

The draft Review indicates that the Commission is maintaining its position that a specific inspection and monitoring régime should be introduced for certain aircraft alleged to have been involved at some point in extraordinary rendition. It also proposes that "any complaint to a member of the Garda Síochána concerning an aircraft possibly engaged in an 'extraordinary rendition' flight should be investigated immediately, including inspection of the aircraft by the member or members concerned".

We do not believe that the introduction of such a régime is necessary, likely to be useful, or justified by any reasonable assessment of the facts and probabilities of the situation as they are known to us. Nor are we aware of any such régime in operation elsewhere.

I would recall a number of points made at our meeting in July, and previously by the Minister.

As indicated earlier, the extensive investigations conducted by the European Parliament's Temporary Committee and by Senator Marty for the Council of Europe have revealed no evidence, or even a specific allegation, that any person has on any occasion been subject to extraordinary rendition through Ireland.

The overall impression given by the draft Review that there are or have been numerous flights through Ireland involved in extraordinary rendition activity fails to acknowledge, particularly in the many references to "CIA planes involved in extraordinary rendition" (beginning on page 4) that the civil aircraft which it is proposed to search under this regime are in fact chartered to different users on an ongoing basis – as, for example, was confirmed in a recent instance drawn to our attention. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an

aircraft. The misleading impression is conveyed that every time such aircraft may have landed in or transited through Ireland they were: (i) chartered by the CIA and (ii) involved in a rendition "circuit".

In particular, as Minister Ahern commented in his reaction to the European Parliament Resolution on Extraordinary Rendition on 14 February 2007, the alleged figure of 147 supposedly suspicious flights through Irish airports, repeated in the draft Review (p31), is grossly inflated. The actual number of aircraft ever identified as transiting Ireland in any relatively close time proximity to an alleged extraordinary rendition operation elsewhere is no more than four, over a period of a number of years, most recently in 2004 – in a context where, as noted before the European Parliament Temporary Committee by Mr Victor Aguado, Director General of Eurocontrol, some 36,000 flight plans are filed daily. Up to 1,750 movements of private aircraft through Irish airports may take place each month.

At our meeting in July, we pointed out that what would have been involved in the four possible instances would presumably have been an empty plane travelling through an Irish airport some days either before or after a rendition flight, and that there was no reason to believe that an inspection would have revealed any incriminating evidence.

I would also recall that the subsequent identification by investigators of certain aircraft or flight movements as suspicious was based on an extensive retrospective analysis of a mass of information assembled a considerable time after the event.

The draft Review does not acknowledge, as does Amnesty International, that call signs can be easily changed, or that new planes, not on existing lists, may just as easily be used, and that aircraft may be leased from different companies. One has to assume that any hypothetical person or agency seeking in future to carry out extraordinary renditions would take care to avoid patterns of activity which had been identified as suspicious.

It is international aviation practice, under the Chicago Convention, that private civil aircraft engaged in technical stops in transit through third countries are merely required to give, with very limited notice, their call signs and immediately previous and next stops. The Minister for Foreign Affairs has called for a review of the Convention to require the provision of additional information, and this matter is being pursued with international partners, in line with the commitments in the Programme for Government and, indeed, with the earlier call of the Secretary General of the Council of Europe for changes in the regulation of international aviation. We note that the Commission's draft report does not address general international practice in the matter, or comment on the efforts of the Government in this regard. Nor does it indicate whether in its view such changes would be of value. The Minister has repeatedly pointed out the need for a co-ordinated international approach.

Given all these factors, the insinuation on page 38 of the draft Report that the Government has permitted "re-fuelling aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for

"extraordinary rendition" or on return from such a mission" is quite unfair and based not on any fact but on pure speculation.

I would reiterate, therefore, our position that there is no good reason to believe that an inspection regime such as proposed would have detected, or would in future detect, illegal activity connected with extraordinary rendition. There are serious questions over the effectiveness, practicality, proportionality and reasonableness of any inspection régime, whether random or in relation to an identified list of suspect aircraft, and we believe that this needs to be taken account of in the draft Report, including in its assessment of the Government's positive obligations in this matter.

Having said this, however, I also have to add that the Government's position on the inspection of aircraft is seriously misrepresented on pages 4 and 33 of the draft Review. It is not the case that aircraft which may have been chartered by the CIA "…are not inspected or subject to any investigation on Irish soil" or that the "…Government's view is that there is no necessity for plane inspections" or that the Government "despite the evidence that CIA aircraft involved in 'extraordinary rendition' have stopped at Shannon, (it) is not prepared to investigate further.". On the contrary, as indeed you acknowledge elsewhere, the Government has repeatedly made clear that the Garda Síochána have full authority to search civil aircraft in any circumstances where they have reasonable grounds for suspecting illegal activity such as extraordinary rendition and to make any necessary investigations. The investigative powers of the Garda must, of course, and as the Commission would no doubt expect, be exercised in accordance with the Constitution and relevant legislation and on the basis of reasonable suspicion.

The references to the role of the Shannon Peace Activist Group on pages 6 and 35 of the draft Review would appear to raise certain questions. The Commission would appear uncritically to have given particular weight to the representations of a small group. Is the Commission suggesting that agencies other than the Garda should be permitted to search civil aircraft at Shannon Airport? The references to monitoring and photographing aircraft may also need to be clarified to make clear that the Commission recognises the appropriate role of the Garda in law enforcement and the need to ensure the security of airports.

Action taken by the Minister for Foreign Affairs, Mr. Dermot Ahern TD

The unfortunate tone of the draft Review in relation to the Government's active opposition to extraordinary rendition is epitomized by the assertion on page 3 and repeated on page 7 that "The Government's response (to the Commission's Resolution of December 2005) stated that it had received assurances from the US Government on the issue and was content (our emphasis) to rely on such assurances". Indeed, the overall impression given by the draft Review is that the Government, apart from seeking and accepting diplomatic assurances from the US Government, has been inactive on the issue of extraordinary rendition.

This depiction is very far from the reality. Far from "choosing to turn a blind eye" adopting a "stance of deference" or "paying lip-service", the Taoiseach and Minister Ahern have proactively engaged on a sustained basis with the US Government on the issue of extraordinary rendition over recent years. The Minister's concern about extraordinary rendition is reflected in the fact that he was the first EU Minister to raise the issue bilaterally with the US authorities and to obtain a uniquely clear and categorical assurance from them that no extraordinary rendition had taken place through Ireland. He has raised extraordinary rendition directly with the US Secretary of State Condoleezza Rice, as has the Taoiseach with President Bush. Minister Ahern was the first Minister to raise the issue in the EU Council of Ministers with the result that the issue was subsequently taken up by the President of the Council on behalf of the EU with the US authorities.

In the Council of Europe, Ireland's February 2006 response to the Secretary General's Article 52 questionnaire was one of only nine Member State replies judged not to require further inquiry.

The Minister was also only one of only two EU Foreign Ministers to meet with the European Parliament's Temporary Committee on Extraordinary Rendition - others declined to do so - where he was the first political figure to call for a review of the Chicago Convention governing international civil aviation in the context of the concerns surrounding extraordinary rendition. On the Minister's instructions the possibility of reviewing the Chicago Convention has also been raised within the EU Council framework earlier this year. In the ICAO context we are continuing to consult with international partners.

In short, the Government's engagement with the issue has been sustained and intense.

In the domestic context, the Minister and his Government colleagues have fully engaged on the issue of extraordinary rendition in both Houses of the Oireachtas in response to numerous Parliamentary Questions and specific motions. He has on many occasions fully explained the basis of the Government's total opposition to the practice of extraordinary rendition and of the assurances which he has obtained from the US authorities in relation to Ireland.

We would suggest that Chapters 2 and 3 of the draft Review should be re-drafted appropriately to reflect fairly the action taken in a range of fora on the issue of extraordinary rendition by the Taoiseach and Minister Ahern.

Conclusion

It will be clear from the above that the Government firmly rejects the view of the Commission as expressed on page 5 of the draft Review "...that in its approach to 'extraordinary rendition', the Irish State [sic] is not complying with its legal obligations to prevent torture or inhuman or degrading treatment or punishment". The protection and promotion of universal human rights, including the right to be protected from torture or inhuman or degrading treatment, is a core principle of Irish foreign

policy and not in any sense "subjected to the desire for good relations between States" (p 39). We feel that the Commission's analysis and recommendations clearly fail to give due weight to the legal arguments advanced by us, and distort or misunderstand the range of practical issues involved.

Finally, I would like, however, to thank you once again for sharing the draft Review with us. I have sought to indicate the broad lines of our concern regarding the draft Review, and have listed specific issues in the annex to this letter. If you have any queries in relation to these concerns, I would be happy to discuss them with you. We look forward, in any case, to considering the final version of the Review when it is published in December.

With best wishes,

Yours sincerely,

Mary Rowledge

pp Rory Montgomery
Political Director

Annex: Specific Issues of Drafting, Presentation and Fact

Page 4, paras 2 & 3: It is not the case that aircraft which may have been chartered by the CIA *"...are not inspected or subject to any investigation on Irish soil"* or that the "*...Government's view is that there is no necessity for plane inspections*". The Government has repeatedly made clear that the Garda Síochána have full authority to search civil aircraft in any circumstances where they have reasonable grounds for suspecting illegal activity such as extraordinary rendition and to make any necessary investigations. The investigative powers of the Garda must, of course, and as the Commission would no doubt expect, be exercised in accordance with the Constitution and relevant legislation and on the basis of reasonable suspicion. It is also incorrect to say that "*the Government appears to have put the onus of investigating allegations regarding suspect aircraft on to the Irish people*." This is the responsibility of the Garda. Naturally, the Government invites all those with any evidence of criminal activity to present it to the Garda.

Page 5, para 1: The Government reject, for the reasons set out at length in this and previous communications with the Commission, the assertion that "*...that in its approach to 'extraordinary rendition', the Irish State [*sic] *is not complying with its legal obligations to prevent torture or inhuman or degrading treatment or punishment*"

Page 6, para 1: The Commission would appear uncritically to have given particular weight to the representations of a small group. To repeat the claim that "*the Irish Government has taken steps to ensure that foreign aircraft are not searched by any other persons"* suggests, wrongly, that persons other than the Garda would have such a right.

Page 6, para 2: The treatment of the gap between the Government's receipt of the Commission's first statement and its response (effectively three months, allowing for the Christmas break, some of which was taken up with preparing the Government's response to the Council of Europe) is rather different from the handling of the Commission's own delay in renewing dialogue with the Government on the issue after July 2006.

Page 7, para 1: This completely inadequate summary of the Government's position is surely unnecessary at this point, as the issues should be addressed more comprehensively in the body of the report.

Page 8, para 2 (see also page 31, para 2): In relation to the European Parliament Temporary Committee's call for a ban on "CIA flights" transiting Ireland, the Minister for Foreign Affairs pointed out, in responding to the report, that the fact that Ireland alone was the subject of such a call demonstrated a lack of balance and political partisanship.

Page 8, para 5: This and other references implying that there have been numerous flights through Ireland by "CIA aircraft" involved in extraordinary rendition activity fail to acknowledge that the civil aircraft involved are in fact chartered to different users on an ongoing basis. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an aircraft. Indeed, it might be recalled that in his Report of June 2006 Senator Marty remarked that "it is evident that not all flights of CIA aircraft participate in "renditions"", and said that "intelligence flights are a manifestation of the co-operation that happens amongst us. They carry analysts to talk with one another, they carry evidence that has been collected…"

The misleading impression is conveyed that every time such aircraft may have landed in or transited through Ireland they were: (i) chartered by the CIA and (ii) involved in a rendition "circuit".

Page 11, para. 2: The case of Maher Arar is undoubtedly shocking. The draft report acknowledges that "*there is, however, no evidence that Mr Arar was transferred through Ireland.*" It is also the case that it has never been claimed that he was.

Page 13 para.4/page 14 para. 2: The reference to a "*brief response*" from the Minister on 25 July 2006 is hardly appropriate given that it was a two page covering letter with an additional four pages of commentary in response to the Commission's letter of 24 May 2006 (the latter, however, is described on the same page in the draft Review as a "detailed response" to the Minister's earlier letter). The claim that this "*does not really address any of the substantive or factual concerns*" is quite unreasonable, given that the Department advanced a serious and substantive set of legal arguments with which the Commission may disagree but which it has not rebutted.

Page 16 para 2: The Government are satisfied that the assurances received from the US authorities are to the effect that no person, however he or she may be classified, would ever be subject to extraordinary rendition through Irish territory without the permission of the Irish authorities.

Pages 18-22: The Commission's treatment of the issue of diplomatic assurances, as indicated in detail in the body of our letter, overlooks significant legal and factual distinctions between the situations covered in the jurisprudence cited by it and what is at issue here. The quotations from Professor Nowak and Mr Gil-Robles, for example, clearly relate to a situation in which the return of a specific individual to a particular state has been sought. The extent to which the law relating to diplomatic assurances is varied and contested is not reflected in the draft Review.

Page 22, paras 2 and 3: The Commission might recognise, in its treatment of the Constitutional situation, that the powers of the Garda in searching and investigating suspected criminal activity are also subject to constitutional constraints.

Page 22, para 4: The implication that the Government may "*knowingly*" have allowed aircraft carrying prisoners to land is untrue and inappropriate. We likewise reject the implication of the term "*collusion*" later in the same paragraph.

Page 23, para 4: We note that the Commission's treatment of the Venice Commission's opinion fails to include the important qualification that a state must take all measures to prevent a person being "rendered" through its territory if it has "serious reasons (our emphasis) to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment".

Page 24, para 4: The reference to the Venice Commission's handling of diplomatic assurances clearly relates to the extradition of prisoners and as such is irrelevant.

Page 28, para 1: On the publication of the first Marty report, the Minister made clear the inappropriateness of the term "*collusion*", implying as it does a level of active knowledge of or assistance to alleged criminal activity.

Page 29, para 5: In giving evidence to the European Parliament Temporary Committee, the Minister for Foreign Affairs gave an account of the cases involved [*extracts from official transcript attached at page 14].*

Page 30, para 2: We note that in his presentation to the Temporary Committee the President of the Commission acknowledged the absence of any evidence that any act of extraordinary rendition had taken place through Ireland.

Page 31, para 1: In addressing the Temporary Committee, the Minister seriously questioned the methodology by which the figure of 147 allegedly suspect flights had been arrived at. As indicated earlier, this fails to acknowledge that the civil aircraft involved are in fact chartered to different users on an ongoing basis. Nor does it recognise that there are many entirely legitimate purposes for which the US authorities might wish to charter an aircraft.

Page 31, para 2.: (see also page 8, para 2): In relation to the European Parliament Temporary Committee's call for a ban on "CIA flights" transiting Ireland, the Minister for Foreign Affairs pointed out, in responding to the report, that the fact that Ireland alone was the subject of such a call demonstrated a lack of balance and political partisanship.

Page 33, para 2: The phrase "*a stance of deference to the US Government"* is unfair and inappropriate and utterly fails to acknowledge either the Government's position on the concrete and unequivocal assurances it has received or the consistency with which it has pursuing the issue of extraordinary rendition bilaterally with the US Government, in the Council of Europe, in the EU framework, and with ICAO partners. Likewise, as indicated earlier, the responsibility of the Gardaí in regard to the prevention and detection of criminal activity should be acknowledged.

Page 33, para 3: Again, the claim that the "*State can certainly be accused of turning a blind eye*" is unfair and quite inappropriate. As indicated above, in relation to page 29 para 5, the Minister for Foreign Affairs gave to the European Parliament an account of the six cases investigated by the Gardaí.

Page 34, para 3: To posit a situation where it might "*emerge at a later date that prisoners have been transported through Shannon for the purposes of extraordinary rendition"* is entirely hypothetical and speculative.

Page 34, footnote 105: In addressing the incident of a US marine conveyed through Shannon in the Dáil on 13 June 2006, the Minister for Foreign Affairs made clear that "This was in no way an act or an attempted act of extraordinary rendition or related to such an act. Indeed, the Attorney General has confirmed that, quite unlike extraordinary rendition, which is illegal in all circumstances, there is nothing substantively unlawful about such a transfer, provided that Ministerial consent has been obtained. The prisoner was not a suspected terrorist from a third country but a US marine duly found guilty under the US military code of a minor offence."

Page 35, para 4: Given the extensive exchanges between us, and the Government's active involvement in the issue as documented on many occasions, we fail to understand the assertion that "*the Government has not substantively addressed the issue of how the State appears to be assisting "extraordinary rendition" activities"*

Page 35, para 5: The claims that the Government is "*not doing all within its power*" and "*shows a marked unwillingness*" are unfair and inappropriate. Again, the reference to the Shannon Peace Activist Group might appear to give uncritical weight to the claims of a small group.

Page 36, para 1: As indicated in our letter, the claim that "*if a prisoner can establish that s/he was 'rendered' through Ireland by the US authorities to another State where s/he was tortured or suffered inhuman or degrading treatment, there is a strong probability that Ireland would be held to be in breach of its human rights obligations in this regard*". is based on an entirely hypothetical situation. It is in any case our view that, since any such determination would depend on the particular facts, it is not possible to make such an assertion.

Page 36, para 2: Ireland has repeatedly made clear to the international community its abhorrence of the practice of extraordinary rendition. Indeed we have, as indicated earlier, taken a lead in raising the issue. We would also note that our practice in regard to the passage of state and civil aircraft through our territory is entirely in line with international norms.

Page 36, paras 2 and 3: Terms such as "*shelter behind*", "*baldly assert*" and "*lip service*" are, once again, quite unfair and inappropriate to a report of this kind.

Page 36, para 3 (see also page 37, para 3, and page 38, para 3): In regard to the proposal by the Commission for the provision of additional information in regard to certain flights linked to an inspection régime, the overall approach of the Government in relation to the practicality and necessity of such a régime is set out in our letter. However, in addition, and as acknowledged by the Commission itself in its account of the Venice Commission's analysis (page 25) it is international aviation practice, under the Chicago Convention, that private civil aircraft engaged in technical stops in transit through third countries are not required to seek permission to make such stops, but are merely required to give the air traffic authorities, with very limited notice, their call signs and immediately previous and next stops. With a view to addressing more effectively a range of challenges, including terrorism, the Minister for Foreign Affairs has called for a review of the Convention to require the provision of additional information, and this matter is being pursued with international partners, in line with the commitments in the Programme for Government and, indeed, with the earlier call of the Secretary General of the Council of Europe for changes in the regulation of international aviation. We note again that the Commission's draft report does not address general international practice in the matter, nor does it comment on the efforts of the Government in this regard.

Page 37, para 1: The assurances secured by the Government embrace the possible transfer of prisoners to Guantanamo. No requests have ever been made in this regard.

Page 38, para 2: The insinuation that the Government has permitted "*re-fuelling aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for "extraordinary rendition" or on return from such a mission*" is quite unfair, inappropriate and based not on any fact but on pure speculation.

Page 38, para 4: The exercise by the Garda of their powers of investigation and search of private civil aircraft in no way requires the consent of the US authorities.

Page 38, paras 4 and 5: The practical issues involved in any inspection régime are highlighted by the proposal that this should be concerned with planes listed in previous reports, which mostly cover activities now some years ago. This does not acknowledge, as has Amnesty International, that call signs can be easily changed, or that new planes, not on existing lists, may just as easily be used, and that aircraft may be leased from different companies. One has to assume that any hypothetical person or agency seeking in future to carry out extraordinary renditions would take care to avoid patterns of activity which had been identified as suspicious.

Page 39, para 2: We entirely reject as quite unfair and inappropriate the implication that Ireland is not fulfilling *"its moral duty to take a stand against any form of torture or inhuman or degrading treatment."* We likewise reject the suggestion that it is "*subjected to the desire for good relations between states.*"

Re: Page 29, para 5:

Extract from Minister's speech and from subsequent exchanges at the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, 30 November 2006

Extract from speech by the Minister for Foreign Affairs, Mr. Dermot Ahern T.D.

"……..Our response in that case clearly sets out the legal position in Ireland as regards the illegal deprivation of liberty and the role of our police and other authorities in preventing such deprivation and investigation of relevant allegations. The Government and our police authorities took very seriously indeed any allegations that aircraft chartered by the CIA engaged in illegal activity in Ireland. An Garda Síochána, the Irish police service, has investigated six complaints from members of the public related to extraordinary rendition. In keeping with standard practice, it has passed papers on two separate occasions to the office of the Director of Public Prosecutions. In Ireland, the Director of Public Prosecutions is the authority responsible for deciding, independently of the government and the police service, whether to charge people with criminal offences, for conducting prosecutions and what the charges should be. However, in neither of the investigations carried out by the DPP was any further action found to be warranted owing to a complete lack of evidence that any unlawful activity has occurred…..

The Gardaí, of course, remain very ready to investigate any allegations of illegal activity where there are grounds to suspect that such activity has occurred, and they have all the necessary powers so to do……

Extracts from responses by Minister Ahern to subsequent questions from Members of the European Parliament on investigations

In response to Rapporteur Fava, Minister Ahern replied :

….The Garda Síochána has investigated a number of allegations involving some of the planes that you refer to. In relation to one of them – I am not sure if it is involved in your own examination – an allegation was made in May 2006 by an anti-war campaigner that a plane with the index number N444CX landed in Shannon. The allegation was made that it was involved in illegal activities. It was established by the Garda Síochána that the aircraft was privately owned and operated in the course of a corporate business flight.

Another allegation was made in relation to the use of an unmarked white aircraft observed at Shannon in November 2005. The allegation was that it was carrying munitions of war. That was investigated and it was found to have been used on that occasion to transport racehorses from Shannon to Dubai. So again, on any occasion that we have got firm allegations in relation to any of these issues, we have investigated them to the best of our ability. Again, not one shred of evidence has been produced.

In response to Ana Maria Gomes, Minister Ahern replied :

As I said earlier, they have investigated quite a number of complaints from individuals, mainly people who are anti-war campaigners, but not all, indeed, some members of our

parliament have made complaints, but in no instance has anyone produced any information. I can give you the list of investigations and some details of the investigations, without giving the names involved.

In response to Prionsias De Rossa, Minister Ahern replied:
... Again, if you want I can list all of the allegations that have been made by people, some in relation to some of the planes that are referred to in your report and indeed in other investigations. Four active anti-war people made an allegation in relation to a Gulfstream jet – number N379P – claiming that it had been used to transport prisoners to places of torture and that it had transited through Shannon on several occasions. Inquiries were conducted into this complaint by the Garda Síochána; all four complainants were interviewed; the investigation concluded that the complainants were basing their assertions wholly on the contents of a Swedish television documentary. A file was submitted to the Director of Public Prosecutions, but there was no evidence to support the charge of torture.

Again, in December 2004, an allegation was made by letter that the same Gulfstream jet, number N379P, was used to fly terrorist suspects and that it transited through Ireland. The gentleman who made the allegation was contacted and he acknowledged to the investigators that his complaint was based almost entirely on media reports. He produced no further evidence when asked. A file was forwarded to the Director of Public Prosecutions; a prosecution was not warranted on the basis of no evidence. On 24 November 2005, an anti-war campaigner who is well known – even to this committee – alleged that an unmarked white aircraft carrying war munitions landed at Shannon Airport – not really an extraordinary rendition. The complaint was investigated and it was found, as I said earlier, that the plane was used on that particular occasion to transport racehorses from Shannon to Dubai. I think that is one of the planes that is complained about.

A Senator contacted the Garda in November 2005 and said, in his words, that there was a prima facie case that a crime had been committed by Gulfstream jet N379P at Shannon Airport, and that a number of citizens had made complaints of a detailed nature to the police authorities in Limerick to no avail. The Garda Commissioner was asked to investigate the matter fully. He appointed a detective superintendent from Garda headquarters. He was appointed to interview the Senator and afforded him the opportunity to produce evidence. On 26 January 2006, the Detective Superintendent met the Senator. He asked the Senator to produce evidence. When pressed to provide the prima facie evidence, he was unable to do so and appeared to be relying on opensource information and reports from other jurisdictions in respect of the activities of certain aircraft, but not anywhere in the Irish Republic. He declined to make a statement He was contacted again in March and indicated he had nothing further to add. Again the Garda could not pursue those activities.

On 22 February 2006, a deputy in the Dáil produced copies of documents gathered by staff in his office as to possible breaches of international and domestic law allegedly occurring on CIA planes. A detective superintendent was appointed to contact this deputy. There was a meeting, and the Deputy informed the Detective Superintendent appointed that he had no specific evidence in support of these allegations.

On 9 May 2006, another anti-war campaigner alleged that the plane referred to

earlier, N44CX, landed at Shannon Airport. It was found that this plane was privately owned and was operating in the context of a corporate business flight.

In May 2006, again, one of the previous complainants made an allegation that the Garda Síochána was involved in criminal negligence. A detective superintendent was appointed to investigate. The process of taking a statement from this particular gentleman was slow and indeed continues to be slow. So that is a clear indication, I think, of the intensity with which the Gardaí have acted, particularly in recent times.

Going back to some of the questions in relation to the ability of our Gardaí to investigate, they have to do so on some suspicion. They cannot just walk in on private property – which these planes are – and demand to see, unless and until they have those suspicions, because it would not stand up in court if they were to do that. They are very careful, as you know, in entering private property, unless and until they have a clear suspicion. And indeed the Venice Commission itself has said that it believes that searches would only be required in the event of serious concern in relation to torture. The Garda inquiries which have come up with nothing, despite the exhortations of members of the Government to the general public to produce evidence and all of the anecdotal evidence that is available.

Extract from the Programme for Government 2007-2012

Darfur
We will use all avenues, bilaterally, through the EU and through the UN, to focus urgent international attention on the crisis in Darfur and to seek agreement for a lasting, peaceful solution to the crisis.

Middle East
With the EU and the broader international community, we will press for dialogue, reconciliation and negotiations leading to a two-State solution.

Extraordinary Rendition
The Irish Government is completely opposed to the practice of extraordinary rendition.

1. The Government will prioritise effective enforcement of a) Criminal Justice (United Nations Convention Against Torture) Act, 2000 b) The Geneva Conventions Acts 1962-1998

To that end the Government will encourage and support An Garda Siochana in the investigation and enforcement of these Statutes. It will do so by making resources available for specialized training in the provisions of those Statutes to members of An Garda Siochána and by other means as may be required by An Garda Siochana in order to ensure effective protection for the dignity of all persons within or passing through the State.

We will ensure that all relevant legal instruments are used so that the practice of extraordinary rendition does not occur in this State in any form.

2. Ireland will seek EU and international support to address deficiencies in aspects of the regulation of civil aviation under the Chicago Convention.

Disarmament and the Arms Trade
We will:

- Continue to press for nuclear disarmament and nuclear non-proliferation.
- Support a binding and comprehensive global treaty on the trade of arms, covering all weapons and ammunition, and a binding, strengthened EU code of conduct for arms exports.
- Strengthen controls on military exports and to regulate arms-brokering activities in Ireland through the enactment of the Control of Exports Bill.

Irish Abroad
For every £1 spent on the Irish Abroad in 1997, we spend €19 today. In the coming five years we will:

- Increase funding for emigrant welfare to €34 million per annum.
- Maintain the momentum in the campaign for the undocumented Irish. We will use every opportunity to lobby on behalf of the undocumented Irish.
- Resist all attempts to downgrade the Irish Abroad Unit to unanswerable Agency Status and resist all efforts to divert funds presently allocated to emigrant welfare to the administration of such an Agency.

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