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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES IN RESPECT OF SECRET DETENTION FACILITIES AND INTER-STATE TRANSPORT OF DETAINEES

On the basis of comments by

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INTRODUCTION

A. The procedure

1. By a letter of 15 December 2005, Mr Dick Marty, chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Commission in respect of the following inter-related matters:

a) An assessment of the legality of secret detention centres in the light of the Council of Europe member States' international law obligations, in particular the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture. In particular, to what extent is a State responsible if – actively or passively – it permits illegal detention or abduction by a third State or an agent thereof?

b) What are the legal obligations of Council of Europe member States, under human rights and general international law, regarding the transport of detainees by other States through their territory, including the airspace ? What is the relationship between such obligations and possible countervailing obligations which derive from other treaties, including treaties concluded with non-member States ?

2. A working group was set up, which was composed of the following members: Mr Iain Cameron, Mr Pieter van Dijk, Mr Olivier Dutheillet de Lamothe, Mr Jan Helgesen, Mr Giorgio Malinverni and Mr Georg Nolte. It was assisted by Ms Simona Granata-Menghini, Head of the Constitutional Co-operation Division.

3. Two working meetings were held in Paris, on 13 January and on 27 and 28 February 2006.

[4. The Working Group sought the assistance of the NATO Legal Advisor, Mr de Vidts, and requested information and clarifications in relation to certain matters of international law.

5. The Working Group further sought the assistance of the International Civil Aviation Organization (ICAO), requesting from the Legal Bureau information about the interpretation of certain provisions of the Chicago Convention on International Civil Aviation].

6. The present study was discussed within the Sub-Commissions on International Law and on Democratic Institutions in the course of a joint meeting on 16 March 2006, and was subsequently adopted by the Commission at its … Plenary Session (Venice, 2006).

B. The scope of this study

7. The present study does not aim, nor does it have the ambition to assess the facts in relation to the current allegations about the existence of secret detention facilities in Europe or about the transport of detainees by the CIA through the territory (including the airspace) of certain European States. This is not the task of the Venice Commission. It is instead the object of the report that is in the process of being prepared by the PACE Legal Affairs Committee, and of the inquiry of the Secretary General of the Council of Europe under Article 52 of the ECHR (See the Secretary General's report under Article 52 ECHR on the question of secret detention and

transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006)5).

8. This report does not aim at identifying the pertinent internal law and practice of the Council of Europe member-States either: this as well has been the object of the inquiry of the Secretary General.

9. The aim of this report is to provide a reply to the questions put by PACE Legal Affairs Committee, and thus to identify the obligations of Council of Europe member States under public international law in general and under human rights law in particular, in respect of the irregular transport, extradition, deportation or detention of prisoners. In order to be able to do so, the Commission deems that it is necessary to outline at the outset the basic rules under international law, human rights law, humanitarian law and air law (Section I) in respect of detention and inter-State transport of detainees. The Commission will subsequently proceed with the identification of the specific obligations of Council of Europe member States in these areas (Section II), and will then answer the questions put by PACE (Conclusions).

SECTION ONE: THE LEGAL REGIME

A. General principles

a. Inter-State transfers of prisoners from the perspective of international law

10. Under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of convicts for the purposes of serving their sentence in another country.

11. Deportation is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial. A person against whom a deportation decision has been taken by an administrative authority must have the possibility of applying to a competent authority[1], preferably a court[2]. Expulsion is only possible on the specific grounds indicated by the pertinent national law.

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[1] Article 1, Protocol 7 to the ECHR (Procedural safeguards relating to expulsion of aliens) provides:

"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a to submit reasons against his expulsion, b to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." Similarly, Article 13 of the International Covenant on Civil and Political Rights provides:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[2] European Court of Human Rights, Klass and others v. Federal Republic of Germany of 24 October 1979, § 55.

12. Extradition is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence.

13. Extradition is a process to which both international and national law apply. While extradition treaties may provide for the transfer of criminal suspects or convicts between States, domestic law determines under what conditions and according to which procedure the person concerned is to be surrendered in accordance with such treaties. Extradition legislation varies significantly among the different European countries, notably as concerns the incorporation of treaties into national law, procedural guarantees, especially the respective role of the executive and the judiciary in the extradition process, and the proof (and assurances) required for extradition.

14. In Council of Europe member States, extradition laws must take into consideration, or be interpreted in conformity with constitutional provisions guaranteeing human rights and international human rights treaties and humanitarian law.

15. The 1957 European Convention on Extradition[3] requires, like most bilateral extradition treaties nowadays, respect for the principles of *ne bis in idem* and speciality. It also forbids extradition to a country where the death penalty would be carried out. The same is true if the extraditing State has "substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons". In addition, the *nulla poena* principle has to be respected.[4]

16. The 1977 European Convention on the Suppression of Terrorism[5] was adopted with a view to eliminating or restricting the possibility for the requested State of invoking the political nature of an offence in order to oppose an extradition request in respect of terrorist acts. Under this Convention, for extradition purposes, certain specified offences shall never be regarded as "political" (Article 1) and other specified offences may not be regarded as such (Article 2), notwithstanding their political content or motivation. There is no obligation, and even a prohibition to extradite, however, if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that the position of the person whose extradition is requested may be prejudiced for any of these reasons.

17. Transit is an act whereby State B provides facilities for State A to send a prisoner (p) through its territory.

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[3] ETS no. 24. The European Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States simplifies and speeds up the procedure of extradition between EU member States, by requiring each national judicial authority (the executing judicial authority) to recognise, ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). As of 1 July 2004, it has replaced for the EU member States the 1957 European Extradition Convention and the 1978 European Convention on the suppression of terrorism as regards extradition; the agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests; the 1995 Convention on the simplified extradition procedure ; the 1996 Convention on extradition and the relevant provisions of the Schengen agreement.

[4] Article 7 ECHR.

[5] ETS no. 90.

18. Transit is regulated by bilateral and multilateral treaties, *inter alia* Article 21 of the European Convention on Extradition, which provides:

> 1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.
>
> 2. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.
>
> 3. Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.
>
> 4. If air transport is used, the following provisions shall apply:
> a when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;
> b when it is intended to land, the requesting Party shall submit a formal request for transit.
>
> 5. A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.
>
> 6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.

19. Although the wording of Article 21 § 1 a) indicates that States need to “notify” a transit flight, State practice on this matter may vary, and indeed some States do not appear to require notification of transit of a prisoner by air over their territory, when no landing is planned[6].

20. European Council Directive no. 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air[7], underlines that “member States are to implement this Directive with due respect for human rights and fundamental freedoms” and that “in accordance with the applicable international obligations, transit by air should be neither requested nor granted if in the third country of destination or of transit the third-country national

[6] The Explanatory report on the European Convention on Extradition underlines that different approaches were taken by the different States as to whether the transport of a person on board of a ship or aircraft of the nationality of a country other than the requesting or requested Parties was to be considered as transit through the territory of that country. This question was left to be settled in practice (see Explanatory Report on Article 21, at http:/conventions.Council of Europe.int/treaty/en/reports/htlm/024.htm).

[7] OJL, 321,6.12.2003, p. 26.

faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty would be at risk by reason of his/her race, religion, nationality, membership of a particular social group or political conviction". Pursuant to Article 4 of the Directive,

> "1. The request for escorted or unescorted transit by air and the associated assistance measures under Article 5(1) shall be made in writing by the requesting Member State. It shall reach the requested Member State as early as possible, and in any case no later than two days before the transit. This time limit may be waived in particularly urgent and duly justified cases.
>
> 2. The requested Member State shall inform the requesting Member State forthwith of its decision within two days. This time limit may be extended in duly justified cases by a maximum of 48 hours. Transit by air shall not be started without the approval of the requested Member State.
>
> Where no reply is provided by the requested Member State within the deadline referred to in the first subparagraph, the transit operations may be started by means of a notification by the requesting Member State.
>
> Member States may provide on the basis of bilateral or multilateral agreements or arrangements that the transit operations may be started by means of a notification by the requesting Member State."

21. Under this Directive, with respect to any request for transit, the requesting member State must provide the requested member State with information about the third-country national to whom the transit request relates, flight details and further information about the health State of the person and possible public order concerns.

22. The text of an Agreement on Extradition between the European Union and the USA was finalised in 2003; however, this agreement has, so far, not entered into force in respect of any EU member-State[8]. It provides that a EU member State may authorise transportation through its territory of a person surrendered to the US by a third State, or by the US to a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief description of the facts of the case. Authorization is not required when air transportation is used and no landing is scheduled on the territory of the transit State (which does not change the obligations of member States of the Council of Europe under human rights treaties, see below, para. 147) ; if an unscheduled landing occurs, the State on whose territory the landing takes place may require a request for transit.

23. States may enter into agreements concerning the transfer of convicts for the purpose of serving their sentence in their country of origin. Such procedures are not relevant for this opinion.

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[8] The possible specific human rights obligations for Council of Europe member States in respect of extradition treaties, including this agreement, will be dealt with below (see paras. ..)

b. Unlawful/Irregular inter-State transfers of prisoners

24. A transfer is unlawful or irregular when the government of State B transfers a person (p) from State B to the custody of State A, against p's consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving).

25. The kidnapping of a person by agents of State A on the territory of State B and his or her removal to State A or to a third State is a violation of State B's territorial sovereignty and therefore an internationally wrongful act which engages the international responsibility of State A[9].

26. Under general international law (see para. 37 below), State A has to make "full reparation for the injury caused by the internationally wrongful act" at the request of the injured State, which, in this case, would include the return of the person in question. The rights of the person in question vis-à-vis State A depend upon the latter's law, on the applicable human rights obligations, and on whether or not the State applied the rule of *male captus, bene detentus.*

27. Irregular transfers may take place with the acquiescence of the territorial State. This type of situation raises a human rights issue. For a *Rechtsstaat*, it will also raise the issues of governmental responsibility for acts of its organs and services and of parliamentary control over government.

28. Another form of irregular transfer happens where some section of the public authorities in State B (police, security forces etc.) transfers p from State B but not in accordance with a procedure set out in law, or even contrary to domestic law. This, in turn, may take the form of official participation in the transfer (arresting and handing over), or facilitating a kidnapping (actively, or passively – not preventing a kidnapping which it was known would occur). The security/police action may occur with or without government knowledge.

29. If there is no basis for an active measure (arrest, handing over etc) under national law, then there will be a breach of national law on arrest, and consequently also a breach of Article 5 ECHR. This situation also raises the issue of governmental control over the security/police services, and parliamentary control over the government (see below, §§ 37-42).

30. As regard the terminology used to refer to irregular transfer and detention of detainees, the Venice Commission notes that the public debate frequently uses the term "rendition". This is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. "Rendition" is thus a general term referring more to the result – obtaining of custody over a suspected offender – rather than the means. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of State organs), it may still be unlawful under the national law of the other State(s). Moreover, a "rendition" may be contrary to customary international law (in

9 See also Stocké v. Germany, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167.

particular the principle of non-intervention) and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.

31. The term "extraordinary rendition" appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time.

c. International co-operation in the fight against terrorism

32. General international law allows States to cooperate in the transport of detainees, provided that such transport is carried out in full respect of human rights and other international legal obligations of the State concerned. Numerous international treaties confirm this rule.

33. As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that terrorist crimes be prevented and that persons who are suspected of having committed a very serious crime and are suspected to have acted from abroad or who have fled abroad should be brought to justice. Conversely, the establishment of safe havens for persons who are preparing terrorist crimes or who are suspected of having committed a serious crime would not only result in danger for the State harbouring the protected person but also tend to undermine the foundations of extradition[10].

34. The ECHR does not, in principle, prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing suspects of serious crimes to justice, provided that it does not interfere with any of the rights or freedoms recognised in the ECHR[11].

35. The Council of Europe has produced several international instruments and recommendations relating to the fight against terrorism, including three international treaties dealing with suppression of terrorism[12], prevention of terrorism[13] and money laundering and terrorist financing[14], and three recommendations of the Committee of Ministers to member States relating to special investigation techniques; protection of witnesses and collaborators of justice; and questions of identity documents which arise in connection with terrorism[15].

36. An additional set of standards aimed specifically at safeguarding human rights and fundamental freedoms has been produced after 2001, namely the Guidelines on Human Rights and the Fight Against Terrorism (2002), the additional Guidelines on the Protection of Victims

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[10] European Court of Human Rights, Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, p. 35, § 89

[11] European Court of Human Rights, Stocké v. Germany, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 169

[12] European Convention on the Suppression of Terrorism, ETS 90

[13] European Convention on the Prevention of Terrorism, ETS No. 196

[14] European Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, ETS No. 198

[15] Recommendation Rec(2005)10 of the Committee of Ministers to member States on "special investigation techniques" in relation to serious crimes including acts of terrorism; Recommendation REC(2005)09 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice; Recommendation Rec(2005)07 of the Committee of Ministers to member States on identity and travel documents and the fight against terrorism.

of Terrorist Acts (2005), a Declaration on Freedom of expression and information in the media in the context of the fight against terrorism (2005) and a Policy Recommendation on Combating Racism While Fighting Terrorism (2004).

d. Some observations of State responsibility

37. When a State commits, through its agents acting in their official capacity, an internationally wrongful act, it incurs responsibility and "is under an obligation to make full reparation for the injury caused by the internationally wrongful act" at the request of the injured State (see Article 31 para. 1 of the ILC Articles on State Responsibility).

38. With respect to the imputability of an international wrong, the question arises of whether and to what extent a State incurs responsibility when its agents have *ultra vires* consented expressly or impliedly by rendering assistance, to acts of a foreign State invading its territorial sovereignty (see above, paras. 27 and 29).

39. Ultra vires acts usually bind the State for the purposes of State responsibility (Article 7, ILC Articles on State Responsibility).

40. Consent to carry out activities which otherwise would be internationally wrongful renders them lawful, unless these activities are contrary to jus cogens (see para. 42 below). However, consent to an interference with sovereignty must be validly given (Article 20, ILC Articles on State Responsibility). In this context, Article 46 of the Vienna Convention of the Law of Treaties is pertinent. It provides that:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

41. In the opinion of the Commission, if a public authority of a State would give a permission to the representative of another State to arrest and/or transfer a person against his will from the territory of that State and it is clear that this would be outside of the ordinary (judicial, administrative) procedures for such arrest/transfer, such permission would be a manifest violation of a rule of internal law of fundamental importance in any State under the rule of law. Such a permission could therefore not be invoked by the other State as a valid consent.

42. Even where such permission does not result in the conclusion of or accession to a treaty, the Law of Treaties insofar reflects the general principle of good faith.[16] This principle is "one of the most basic principles governing the creation and performance of legal obligations"[17]. The giving of a permission is comparable to the conclusion of a treaty insofar as the validity of consent is concerned. In any case, the validity of any consent as a circumstance precluding

[16] See *Müller/Kolb*, Article 2(2), MN. 16, in: Simma (ed.), The Charter of the United Nations – A Commentary, Oxford, 2nd ed. 2002).

[17] *Border and Transborder Armed Actions, Nicaragua v. Honduras, Jurisdiction of the Court and Admissibility of the Application, ICJ Rep. 1988, 69, 105, para. 105.*

wrongfulness in international law is limited by the rule enunciated in Article 26 of the ILC Articles on State Responsibility:

> "Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

43. A norm is of peremptory character when it "is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" (Article 53 of the Vienna Convention of the Law of Treaties). These norms include the prohibitions of genocide, aggression, crimes against humanity, slavery, piracy, torture and the basic rights of the human person.[18]

44. In order to be considered wrongful, an act must be inconsistent with an international obligation of the State which commits it. For Council of Europe member States, in the present context, the obligation in question stems directly from the ECHR, namely from the obligation not to expose anyone to the risk of treatment contrary to Article 3, the obligation to prevent any detention in breach of Article 5 and the obligation to investigate into any substantiated claim that an individual has been taken into unacknowledged custody. These obligations may be breached by a State also by merely but knowingly letting its territory be used by a third State in order to commit a breach of international law.

45. For a State knowingly to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned. Under general international law (see Article 16 ILC Articles on State Responsibility) "a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

46. The consequences of irregular transfers and secret detentions from the viewpoint of human rights law for Council of Europe member States will be examined below.

B. Human rights law

a. The rights at issue

47. Council of Europe member States are committed to respecting fundamental rights, as defined by a number of international treaties, both at the universal level (including the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and at the European level, *in primis* the ECHR, but also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

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[18] See ICTY, Prosecutor v. Furundzija, International Legal Materials 38 (1999) 317, at p. 349; further references in: Andreas Paulus, Jus Cogens in a Time of Hegemony and Fragmentation, Nordic Journal of International Law 74 (2005) 297-334 (at p. 306).

48. With respect to the matters which form the object of the present opinion, the fundamental rights which are at issue are primarily the right to liberty and security of person and the ban on torture and other inhuman or degrading treatments or punishments.

i) Liberty and security of person

49. Article 5 ECHR protects the right to liberty and security of person. Although this right is not absolute, a person may only be detained on the basis of and according to procedures set out the law, and the law in question must be consistent with recognized European standards, that is *inter alia* with the (other) provisions of the ECHR. In addition, paragraph 4 of Article 5 provides for all forms of deprivation of liberty allowed under that article, that the detainee "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (*habeas corpus*).

50. Detention must be lawful and in accordance with a procedure prescribed by law: in the European Court of Human Rights' view, the requirement of lawfulness means that both domestic law and the ECHR must be respected. The possible reasons for detention are exhaustively enumerated in Article 5 (1) ECHR. Paragraph 1 (c) of Article 5 permits "the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so", while paragraph (f) of Article 5 permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right.

51. As regards extradition arrangements between States, when one is a party to the ECHR and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or give rise to an issue under Article 5. However, for the member States of the Council of Europe the provisions of the extradition treaty or the practice of cooperation cannot justify any deviation of their obligations under the ECHR; for those States the decisive factor is whether the extradition is according to domestic law and respects the State's obligations under the ECHR.

52. The ECHR contains no provisions concerning the exact circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the suspect's arrest is an arrest warrant issued by the authorities of the suspect's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the ECHR[19]. This being said, it has also to be stressed that several rights and freedoms protected by the ECHR, may be relevant in the case of extradition and will have to be respected, the most important being Articles 2 and 3, and in particular circumstances Articles 5 and 6.

53. Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective

[19] European Court of Human Rights, Ocalan v. Turkey judgment [GC] of 12 May 2005.

investigation into a substantiated claim that a person has been taken into custody and has not been seen since[20].

ii) Torture, inhuman and degrading treatment

54. Torture is prohibited by Article 3 ECHR, Article 7 ICCPR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the UN Convention against Torture. It is defined 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 is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[21]

55. The crucial distinction between torture, "inhuman treatment" and "degrading treatment" lies in the degree of suffering caused.

56. Inhuman treatment is such treatment which causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. Unlike torture, inhuman treatment does not need to be intended to cause suffering [reference]. In its judgment in Ireland v. United Kingdom.[22] the European Court of Human Rights held that the so-called "five techniques" were inhumane treatment. This decision has sometimes been misunderstood to mean that the same or similar techniques would not amount to torture. However, in the Selmouni case the Court later clarified that, since the Convention is a "living instrument which must be interpreted in the light of present-day conditions", acts which were classified in the past as "inhuman and degrading treatment" could be classified as torture in future.[23] It Stated that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[24]

57. "Degrading treatment" is treatment which grossly humiliates or debases a person before others or drives him to act against his will or conscience. Although causing less suffering than torture or inhuman treatment, it must attain a minimum level [reference]. It too does not need to be intended to cause suffering.

58. The prohibition of torture and inhuman or degrading treatment or punishment enshrines one of the most fundamental values of democratic societies. As the European Court of Human Rights has Stated on many occasions, even in the most difficult circumstances, such as the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and

[20] European Court of Human Rights, Kurt v. Turkey judgment of 25 May 1988, § 124

[21] Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[22] European Court of Human Rights, Ireland v.UK judgment of 18. January 1978), § 167.

[23] European Court of Human Rights Selmouni v. France judgment of 29 July 1999, § 101.

[24] European Court of Human Rights, Selmouni v. France judgment, § 101.

inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the ECHR and of Protocols Nos. 1 and 4, Article 3 makes no provision for limitations and no derogation from it is permissible under Article 15 § 2, not even in the event of a public emergency threatening the life of the nation.

59. Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly States that "No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

60. The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") which, "by means of visits, examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Pursuant to Article 2 of this Convention, CPT can visit any place on the territory of member States where a person is deprived of their liberty (i.e. including military bases, non-official detention centres such as the offices of the intelligence service or a particular police department - drugs, anti-terrorism - if CPT believes that persons are being held/interviewed in these offices).

61. Member States of the ECHR not only have the obligation not to torture but also the duty to prevent torture.[25] In addition they have an obligation of investigation. Under this obligation Member States must assure an efficient, effective and impartial investigation.[26] As soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman or degrading treatment has been committed, a duty to investigate arises whether and in which circumstances torture has been committed.

b. <u>Scope of the duty of Council of Europe member States to secure human rights</u>

62. Under Article 1 of the ECHR, "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention"[27]. According to the European Court of Human Rights, the notion of "jurisdiction" is primarily territorial. It does, however, exceptionally extend to certain other cases, such as acts of public authority performed abroad by diplomatic or consular representatives of the State, or by an occupying force; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there.

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[25] European Court of Human Rights, Z v. United Kingdom judgment of 10 May 2001; A. v. the United Kingdom judgment of 23 September 1998, § 22.

[26] European Court of Human Rights, Caloc v. France judgment of 20 July 2000.

[27] Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly States that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

63. There is a presumption that jurisdiction is exercised by the State throughout its territory. States may also be held accountable for human rights violations occurring outside their territory in certain situations[28].

64. As regards the arrest of an individual on the territory of a State by foreign authorities, the (co-)responsibility of the former State does not depend on whether the arrest amounts to a violation of the law of the host State – a question which only falls to be examined by the European Court of Human Rights if the host State is a party to the ECHR. In order to exclude the (co-)responsibility of the host State, proof is required, possibly in the form of concordant inferences, that the authorities of the State to which the arrested person has been transferred have acted extra-territorially and without the consent of the former State, and consequently in a manner that is inconsistent with the sovereignty of that State, thus contrary to international law[29].

65. Article 2 of the International Covenant on Civil and Political Rights provides that a State Party undertakes to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

66. The term "jurisdiction" under the ICCPR is comparable to the same term under the ECHR. It is also not limited to territorial jurisdiction. The HRC has held, for example, that communications by persons who were kidnapped by agents in a neighbouring States are admissible, reasoning that States Parties are responsible for the actions of their agents on foreign territory[30]. The HRC also clarified in its General Comment no. 31 that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[31]

67. The duty of State parties under Article 1 ECHR to "secure" to everyone within their jurisdiction "the rights and freedoms … of this Convention" is not limited to the duty of state organs not to violate these rights themselves. This duty also includes positive obligations to protect individuals against infringements of their rights by third parties, be they private individuals or organs of third state operating within the jurisdiction of the state party concerned. The European Court of Human Rights has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security. Such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

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[28] See European Court of Human Rights, Issa v. Turkey judgment of 6 November 2004, §§ 71-74; International Court of Justice, Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004, § 109. See also the views adopted by the Human Rights Committee on 29 July 1981 in the cases of Lopez Burgos v. Uruguay and Celiberti de Casariego v. Uruguay, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively. See Inter-American Commission on Human Rights, Coard v. US, Case 10.951, Report No. 109/99, 29 September 1999, § 37, and Alejandre Cuba, Case 11.589, Report No. 86/99 29 September 1999, § 23.

[29] See Öcalan v. Turkey judgment [GC] of 12 May 2005.

[30] Lopez Burgos, No 52/ 1979, § 12.3; Celiberti, No 56/1979, § 103.3; Persons who have fled abroad are not prevented by Art 2 (1) from submitting an individual communication, No 25/1978, § 7.2; No. 74/1980, § 4.1; No. 110/1981, § 6; States parties are responsible for violations of the Covenant by foreign diplomatic representatives, No 31/1978; No 57/1979; Nr 77/1980, No 106/1981; No 108/1981; No. 125/1982

[31] HRC General Comment 31, § 10.

c. Limitations on the competence to transfer prisoners imposed by human rights obligations

68. The international condemnation of torture has a clear impact on extradition and deportation. Article 3 of the UN Convention against Torture prevents States Parties from "expelling, returning ("refouler") or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"[32].

69. The ECHR does not guarantee a right not to be extradited or deported. Nor is there a right to political asylum. Extradition and deportation are not per se in breach of Article 3 of the ECHR. Nonetheless, extradition or deportation may run counter to provisions of the ECHR. According to the *Soering* doctrine of the European Court of Human Rights, a State may be held responsible for a violation of Articles 2 and 3, in flagrant cases also of possible violations of Articles 5 and 6 ECHR, if its decision, permission or other action has created a real risk of a violation of these rights by the State to which the prisoner is to be transferred.[33] It is of no relevance in such case whether the State on whose territory the violation will or could ultimately take place is also bound by the ECHR[34].

70. Under what circumstances a State may be deemed to have known about a "real risk of a violation" is to be determined in each separate case. Indeed, the establishment of the responsibility of a State in respect of an extradition or deportation inevitably involves an assessment of conditions in the requesting or receiving country against the standards of Article 3 ECHR. Nonetheless, the responsibility of the requesting or receiving country, whether under general international law, under the ECHR or otherwise, is not decisive for the liability of the extraditing State under the ECHR. Such liability may have been incurred by the latter member State by reason of its having taken action which has as a direct consequence the exposure of an individual to ill-treatment prohibited by Article 3 ECHR[35].

71. In the Agiza case, the UN Committee against Torture found a violation of article 3, as Sweden, at the time of the complainant's removal to Egypt, knew or should have known that Egypt resorted to consistent and widespread use of torture against detainees, and therefore that the complainant was at a real risk of torture. In the opinion of the Committee, the procurement of diplomatic assurances, which, moreover, had no effective mechanism for enforcement, did not suffice to protect against this risk[36].

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[32] See Also Article 33 (Prohibition of expulsion or return ("refoulement")) of the 1951 UN Convention relating to the Status of Refugees. In 1990, the United Nations General Assembly sought to ensure that human rights would receive full respect in the extradition process when it gave approval to the UN Model Treaty on Extradition which excludes extradition not only if there are substantial grounds for believing that the person will be prosecuted or punished in the requesting State on account of his race, religion, nationality, ethnic origin, political opinion, sex or status, or subjected to torture or cruel inhuman or degrading treatment or punishment, but also "if that person has not received or would not receive the minimum guarantees in criminal proceedings as contained in the international covenant on civil and political rights".

[33] European Court of Human Rights, Soering v. the United Kingdom judgment of 7 July 1989; Chahal v. United Kingdom judgment, of 15 November 1996, § 80.

[34] Soering judgment, § 86.

[35] Soering judgment, §§ 89-91.

[36] Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Decision CAT/C/34/D/233/2003, 24 May 2005.

72. In the Mamatkulov case, the European Court of Human Rights accepted that assurances leading to extradition/deportation can take away the real risk of torture, even when the follow-up procedures were not extensive[37]. However, the assessment of diplomatic assurances in the case should not be overestimated. The Court merely took "formal cognizance of the diplomatic notes from the Uzbek authorities that have been produced by the Turkish Government"[38]. Moreover, there was no substantiated evidence in the individual case that the people in question had in fact been tortured. Finally, according to the European Court of Human Rights, the existence of the risk must be assessed "primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion."[39]

d. Derogations

73. Under Article 15 ECHR, a Contracting State may derogate from certain of its obligations under the ECHR "in time of war or other public emergency threatening the life of the nation. Among these "derogable" obligations are also those laid down in Articles 5 and 6; but not those laid down in Articles 2 and 3 ECHR[40]. However, a State may apply Article 15 only if and to the extent that a war or other public emergency threatening the life of the nation presents itself in that very same State, and the derogating measures are "strictly required by the exigencies of the situation" and "are not inconsistent with its other obligations under international law". When such a situation pertains, it is imperative for the State in question to make a formal derogation under Article 15 ECHR[41]. Moreover, in case of such derogation, the third paragraph of Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore.

74. Article 4(1) of the ICCPR is expressed in terms very similar to those of article 15(1)[42].

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[37] European Court of Human Rights, Mamatkulov and Abdurasulovic v. Turkey judgment of 6 February, 2003, confirmed by Grand Chamber on 4 February 2005.

[38] European Court of Human Rights, Mamatkulov judgment, § 78

[39] European Court of Human Rights, Cruz Varas and others v. Sweden judgment of 20 March 1991, § 75, Mamatkulov and Abdurasulovic v. Turkey (Chamber) judgment, § 68; Vilvarajah and others v. UK judgment of 30 October 1991, § 107.

[40] See e.g. European Court of Human Rights, Aksoy v. Turkey judgment of 18 December 1996, § 62.

[41] See European Court of Human Rights, Isayeva v. Russian Federation judgment of 24 February 2005, § 191; ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of 9 July 2004, para. 127 ("The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory").

[42] Article 4(1) ICCPR has led to the formulation by the United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the so-called Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984). In paras 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said: "39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the

75. In its Resolution 1271, adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that: "In their fight against terrorism, Council of Europe members should not provide for any derogations to the ECHR." It also called on all member States (para 12) to "refrain from using Article 15 to limit the rights and liberties guaranteed under its Article 5."

76. In its 2002 Guidelines on human rights and the fight against terrorism, the Committee of Ministers of the Council of Europe reiterated that member States "may never, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law."[43]

77. In its General Comment no 29/2001 on Article 4 of the ICCPR, the UN Human Rights Committee observed (in para 3) that "On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."

78. In the era of "global terrorism" it has been put to debate whether fundamental human rights as they are discussed in this opinion or the extent of possible derogations from them should be reinterpreted. Recent decisions by several domestic courts in Europe and beyond, however, have confirmed that the existing rights and standards are, in principle, appropriate for the current situation of the fight against global terror.[44] It is also the Commission's opinion that no such reinterpretation is necessary or warranted.

C. International Humanitarian law

79. At present, International Humanitarian Law has only limited relevance for the question of the law applicable to extraordinary transfers of prisoners and secret detention on the territory of member States of the Council of Europe. International Humanitarian Law applies during "armed conflict" and it distinguishes between international and non-international armed conflicts. "Armed conflict" in the sense of International Humanitarian Law refers to protracted armed violence between States or between governmental authorities and/or organised armed groups within a State.[45] "State practice indicates that banditry, criminal activity, riots, sporadic

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rights recognised in the Covenant. 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4".

[43] Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, article XV.

[44] House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals), [2005] UKHL 71; House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56; Bundesverfassungsgericht, Aviation Security Act, 1 BvR 357/05; Israeli Supreme Court, Public Committee Against Torture in Israel v. The State of Israel et al., Case HCJ 5100/94; Israeli Supreme Court, The Center for the Defense of the Individual v. The Commander of IDF Forces in the West Bank, Case HCJ 3278/02; Israeli Supreme Court, Marab v. The Commander of IDF Forces in the West Bank, Case HCJ 3239/02; see also US Supreme Court, Rasul v. Bush, Case No. 03-334, 542 US 466 (2004) 321 F.3d 1134.

[45] See Prosecutor v. Tadic (1996) 105 ILR 419, 488.

outbreaks of violence and acts of terrorism do not amount to an armed conflict."[46] This means, for example, that the organised hostilities in Afghanistan before and after 2001 have been an "armed conflict" which was at first a non-international armed conflict, and later became an international armed conflict after the involvement of US troops. On the other hand, sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an "armed conflict" in the sense that they trigger the applicability of International Humanitarian Law.

80. The Venice Commission considers that counter-terrorist measures which are part of what has sometimes been called "war on terror" are not part of an "armed conflict" in the sense of making the regime of International Humanitarian Law applicable to them. It considers that further reflection is necessary to consider whether any additional instrument may be needed in the future to meet or anticipate the novel threats to international peace and security[47]

81. International Humanitarian Law thus only applies to such transports of prisoners through the territory and/or airspace of the member States of the Council of Europe if as such prisoners have been arrested/captured in the context of an "armed conflict" as explained above. This would be the case, for example, if a prisoner was captured in an area of Afghanistan in which organized fighting takes place at the time of the arrest. In this case his or her transfer or detention would be covered by International Humanitarian Law irrespective of where he or she is transferred to or detained in Europe. If, on the other hand, persons are transported or detained who have been arrested in the territory of a State where no armed conflict takes place, or in an area in which no armed conflict takes place, International Humanitarian Law does not apply. In such cases human rights law fully applies.

82. Even in those limited cases in which International Humanitarian Law applies (in the context of extraordinary transport of prisoners) this body of law does not apply exclusively. As a general rule, Human rights law applies at all times, whether in times of peace or concurrently in situations of armed conflict, to all persons subject to a State's authority and control ("jurisdiction"). However, once an armed conflict has begun, human rights law is normally partly superseded by International Humanitarian Law, which contains rules specifically regulating the behaviour of parties to an armed conflict. For example, human rights law do not specifically take account of the regime of belligerent occupation. This means that the rules of the Hague Regulations and the Fourth Geneva Convention largely serve as *lex specialis*. However, as the Commission has previously pointed out[48], human rights law's non-derogable rules and those rules which have not been derogated from in accordance with the derogation mechanism provided for under the relevant treaty instrument are also applicable in situations of armed conflict.

83. Under the Geneva Conventions, persons who are arrested by a power in the course of an international armed conflict are protected either as prisoners of war (hereinafter "POW") (Article 4 GCIII) or as other "protected persons" (all persons, in particular civilians, who are not

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[46] The Manual of the Law of Armed Conflict, UK Ministry of Defence, Oxford (OUP) 2004, no. 3.5.1(at p. 31).

[47] See Venice Commission's opinion on possible need to further develop the Geneva Convention, CDL-AD(2003)018, § 87.

[48] Opinion on the possible need for further development of the Geneva Conventions, CDL-AD (2003)018, § 56.

nationals of the detaining Power or are not protected by other Conventions, Article 4 GCIV). The plain wording of Article 4 (1) and (4) GC IV makes it clear that there should be no category of persons that would remain unprotected. As the Commission has pointed out before, even those persons who do not fulfil the nationality requirements of Article 4 GC IV are protected by customary international humanitarian law, as it has been given expression in Article 75 of the First Additional Protocol of 1977 to the Geneva Conventions .

84. Persons who are suspected to be members of an international terrorist network, such as Al-Qaeda, and who have been arrested in connection with an armed conflict, will fall either into the category of other "protected persons" or into the category of POWs.

85. As far as the Fourth Geneva Convention, the First Additional Protocol and customary international humanitarian law apply, all protected persons, including terrorist suspects, must be treated according to the rules laid down in Articles 27-78 GCIV and the minimum requirements of Article 75 of the First Additional Protocol. This has been confirmed in recent years by national courts.[49]

86. In the case that suspected members of international terrorist networks qualify as POWs, their transfer would be regulated by the Third Geneva Convention (see in particular Articles 12 and 46- 48).

D. General principles of civil aviation

87. International air law has a codified framework in the Convention on International Civil Aviation (commonly referred to as the "Chicago Convention"), signed in Chicago on 7 December 1944.

88. The Chicago Convention sets out in Article 1 the principle that every State has complete and exclusive sovereignty over the airspace above its territory, that is to say above the land areas and territorial waters adjacent thereto.

89. Article 4 of the Chicago Convention provides that: "Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention".

90. The Chicago Convention sets out the regime for civil aircraft and civil aviation. According to Article 3 (a), such regime does not apply to State aircraft.

91. Under the Convention, aircraft "used in military, customs and police services" are deemed to be state aircraft (Article 3(b)). This presumption, however, is not irrefutable[50]. Moreover,

[49] See Supreme Court of Israel, HCJ 7015/02, Ajuri v. The Commander of the IDF Forces in the West Bank, in: Judgments of the Supreme Court of Israel – Fighting Terrorism within the Law, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm, at pp. 144-178.

[50] In Germany, for example, these flights are referred to as "civil State flights" (zivile Staatsflüge) and are regarded as civil flights. In its Study on "Civil/State aircraft", the Secretariat of the ICAO Council Stated that "the predominant view is that all such other aircraft [performing State services other than military, police and customs] would in fact be considered as falling within the scope of the Convention". In the study, it is recalled that under the Paris Convention of 1919 all State aircraft other than military, customs and police aircraft were treated as private aircraft and subjected to all the provisions of the Paris Convention (see Doc. C-WP/9835 of 22/09/1993, Secretariat Study on "Civil/State aircraft" presented by the Secretary General at the ICAO Council 140th Session, § 5.2).

aircraft engaged in other state activities such as coast guard and search and rescue could also be state aircraft.

92. It has generally been admitted[51] that, in case of doubt, the status of an airplane as "civil aircraft" or "state aircraft" will be determined by the function it actually performs at a given time[52]. As a general rule, aircraft are recognised as "state aircraft" when they are under the control of the State and used exclusively by the State for state purposes. Accordingly, the same airplane can accordingly be considered to be "civil aircraft" and "state aircraft" on different occasions.

93. Civil aircraft that is not engaged in scheduled international air services of a State party to the Chicago Convention[53] 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, without unreasonable delay, to search 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).

94. State aircraft do not enjoy the overflight rights of civil aircraft. According to Article 3 (c), state aircraft are not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned, and in harmony with the terms of such authorisation. Such authorisation must be given by special agreement "or otherwise"; the practice of States indicates that the preferred form is a bilateral or multilateral agreement between the States concerned, valid for a given period of time, one year for example, or general permissions, or "ad hoc" permissions properly obtained through the diplomatic channels. In the latter case, the diplomatic notes are to be submitted to the competent authorities - to the Ministry of Foreign Affairs, for example - prior to the operation of the flight and usually contain *inter alia* the name of the foreign air operator, the type of aircraft and its registration and identification, the proposed flight routing (including last point of departure outside the sate, the first point of entry, the date and time of arrival, the place of embarkation or disembarkation abroad of passengers or freight), the purpose of the flight (number of passengers and their names).

95. If "state aircraft" enter the foreign sovereign air space without a proper authorisation, they may be :

- intercepted for purposes of identification;
- directed to leave the violated air space;

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[51] See e.g. Pellet, Dailler, Droit International Public, LGDJ, 7è edition, 2002, pp. 1244-1245; Combacau (J.), Sur (S), Droit international Public, Montchristien, 5è édition, 2001, p. 473; "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http:// www.mindef.gov.sg/dmg/ls/Il399.doc; Diederiks-Verschoor, Introduction to air law, Kluwer, pp. 30 and following.

[52] In the case of a civil aircraft (B-737, MisrAir flight 2843 from Cairo to Tunis) carrying, on the basis of charter by the Government, suspected terrorists out of the country under Military Police escort and intercepted and forced to land in Italy by the US, the US Government, in a letter to the International Federation of Air Line Pilots Association, Stated: "It is our view that the aircraft was operating as a State aircraft at the time of interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted - compel this conclusion". This case, quoted in ICAO document LC/29-WP/2-1, pp. 11-12, was cited by Professor Milde, see above, footnote 50. See also A. Cassese, Terrorism, Politics and Law, the Achille Lauro case, Polity Press, p. 39.

[53] Status of ratifications of the Chicago Convention available at: http://www.icao.int/ICDB/HTML/English/Representative%20Bodies/Council/Working%20Papers%20by%20Session/163/c.163.wp.11641.en/C.163.WP.11641.ATT.EN.HTM

- directed to land for the purpose of further investigation/prosecution;
- forced to land for further investigation/prosecution.

96. Under customary international law[54], state aircraft enjoy immunity from foreign jurisdiction in respect of search and inspection. Accordingly, they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities, without the captain's consent. However, because state aircraft need authorisation to enter another State's airspace pursuant to Article 3 (c) of the Chicago Convention, the extent of their immunity is conditioned on such an authorisation pursuant to Article 3 (c) of the Chicago Convention[55].

97. A mere operational air traffic control (ATC) clearance for the flight is not sufficient to satisfy the requirement for permission under Article 3 (c)[56], unless this corresponds to an accepted practice.

98. Article 3bis para. b) of the Chicago Convention provides that:

> [E]very State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article[57]. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

99. The flag State of the violating aircraft is internationally responsible for the infraction; the consequences of such responsibility would impact on the overall relations of the States concerned and can range from the duty to apologise, a promise to penalise the individuals responsible, a promise not to repeat the infraction and so on, to more severe sanctions.

100. Pursuant to Article 54 of the Chicago Convention, any action which may be considered as an infraction, breach, violation or infringement of the Convention is potentially subject to ICAO Council action under Article 54 (j) or (k). For example, a contracting State which by its action contravenes the principle in Article 1 that every State has complete and exclusive sovereignty over the airspace above its territory, could be considered committing an infraction of the Convention. A similar conclusion could be drawn in respect of a State which by its action

[54] The United Nations Convention on Jurisdictional Immunities of States and their Property, signed on 1 March 2004, provides in its Article 3 § 3 that "The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by the State".

[55] See Pellet, Dailler, Droit International Public, op. cit., p. 1252 ; A. Cassese, Terrorism, Politics and Law, op. cit., p. 39.

[56] See "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http:// www.mindef.gov.sg/dmg/ls/Il399.doc.

[57] Para. a) of Article 3bis of the Chicago Convention provides that " The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

disregards the scope of "territory" given in Article 2; or whose State aircraft fly over the territory of another State without prior permission (Article 3 (c)); or whose regulations for State aircraft do not show "due regard for the safety of navigation of civil aircraft" (Article 3 (d)); or which uses weapons against civil aircraft in flight contrary to Article 3 *bis*; or which uses civil aviation for any purpose inconsistent with the aims of the Chicago Convention (Article 4). Infractions may be brought before the Council by a Contracting State or a group of Contracting States.

101. As long as an airplane is in the air and not on the ground, persons on board are subject to the concurrent jurisdiction of both the national State of the airplane and the territorial State[58]. In this context, it should be noted that Article 4 of the Convention on Offences and Certain other Acts Committed on Board Aircraft[59] , to which practically all Council of Europe member States are party, provides that:

> "A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:
> (a) the offence has effect on the territory of such State;
> (b) the offence has been committed by or against a national or permanent resident of such State;
> (c) the offence is against the security of such State;
> (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
> (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement."

102. This provision does not waive jurisdiction entirely. In the first place, serious offences of abduction, torture etc. certainly have "effect" on the territorial state. Where the conditions of a prisoner on a plane do not in themselves constitute inhuman or degrading treatment, all acts involved in transferring by air a prisoner to a place where he or she runs a real risk of being tortured may not necessarily be criminal offences in the territorial state. This will depend upon how the relevant offences and inchoate offences (preparation, conspiracy etc.) are formulated in the law in the territorial state (e.g. whether the acts in question constitute a continuing offence of abduction) and that state's rules on extraterritorial crime, in particular, whether the deliberate handing over of a person to extraterritorial torture is an offence. It should be stressed however that the obligations of a Council of Europe member state to ensure protection of human rights (see above, paras. 62-67, and below para. 147) are not limited simply to enforcing its criminal law. Thus, it is not decisive that, in a particular case, a territorial state may not, in fact, make all acts involved in transfer punishable, or exercise jurisdiction over these. In addition, according to subparagraph (e) of Article 4 of the Tokyo Convention, the limitation of the exercise of the right of the territorial state to interfere with an aircraft in flight does not apply when "the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a

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[58] For Germany see Schönke/Schröder, Strafgesetzbuch, 26th ed. 2001, Vor §§ 3-7, para. 30, and § 153 c Strafprozessordnung (Law on Criminal Procedure), according to which the Public Prosecutor *may* abstain from prosecuting a crime which has been committed by a foreigner in a foreign aircraft; this provision presupposes that full jurisdiction over foreign aircraft in flight exists and only gives the Prosecutor a discretionary power not to exercise this jurisdiction, see Meyer-Goßner, Strafprozessordnung, 48th ed. 2005. See also, e.g. Males (French Cour de Cassation, 29 June 1972, 27 June 1973, 73 ILR 698), Public Prosecutor v. Janos V. Austrian Supreme Court 17 May 1972, 71 ILR 229, Air India v. Wiggens, UK House of Lords, 3 July 1980, 77 ILR 276), US v. Georgescu, 723 F. Supp. 912 (1989).

[59] Tokyo, 14 September 1963, UNTS 704.

multilateral international agreement", such as the European Convention of Human Rights. Therefore, if the positive obligations arising under the ECHR require a member State of the Council of Europe to investigate possible violations of human rights committed in an aircraft in flight through its airspace, this member State is not barred by the Tokyo Convention to interfere with this aircraft in flight.

103. The question arises in this context of what would be the status of an airplane registered in the flag State as civil aircraft but carrying out "State functions" (such as special missions for the transport of prisoners) which entered the airspace of another State without seeking a specific authorisation or without following the applicable procedures for State aircraft.

104. In the opinion of the Venice Commission, state aircraft can only claim immunity inasmuch as they make their state function known to the territorial State through the appropriate channels. If the public purpose was not declared in order to circumvent the requirement of obtaining the necessary permission(s), then the State will be estopped from claiming State aircraft status[60] and the airplane will be deemed to be civil and thus falling within the scope of application of the Chicago Convention, including its Article 16 providing for the territorial State's right to search and inspection. The territorial State could therefore request the airplane to land and could proceed to search and inspection and take the necessary measures to put an end to possible violations it might identify. In addition, the flag State would face international responsibility for the breach of Article 4 of the Chicago Convention and of customary international law.

105. The relations between air law and human rights law will be analysed below (see paras 145-155).

E. Military bases

106. The lawfulness of the presence of the armed forces of one State on the territory of another State in peacetime is contingent on the consent of the host State. The initial decision to admit the force may take the form of a bilateral or multilateral treaty, often defence agreements. There follows a decision by the receiving State granting the use of facilities on its soil, which is normally done through a further agreement.

107. A State does not abandon its sovereignty when it consents to the presence of foreign armed forces on its territory, it. It guarantees the enjoyment of the privilege of user of its territory accorded to the sending State; it retains however the right to regulate this privilege within the framework of the applicable treaties and agreements. It follows that the sending State acquires various powers pertaining to the operation of its defence forces on a territory that remains subject to the sovereignty of the host State. The sending State may lawfully claim in or over the territory of the receiving State, only those rights and powers that are connected directly with the establishment and operation of, and access to, the sites at which the foreign forces and installations are located. The principle of sovereignty dictates that any further rights and powers can derive only from an express grant by the receiving States. In particular, the extent of the right for the receiving State to search a foreign military base on its territory depends on the terms of the defence agreement or SOFA[61].

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[60] ICJ judgment on the North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Reports 4 at 42

[61] For example, the agreement of 26 July 1962 between Italy and the Supreme Commander of the NATO on the specific conditions of settling and operation on the Italian territory of the present or future international military

108. "Status-of-forces agreements" (SOFAs) between the host State and a State stationing military forces in the host State define the legal status of the sending State's personnel and property in the territory of the host State. They are usually an integral part of the overall military bases agreements that allow the sending State's military forces to operate within the host State[62].

109. Foreign armed forces whose admission has been consented to by the receiving State are, as a rule, not subject to the normal immigration controls and entry formalities applicable to foreign nationals. The NATO-SOFA agreement provides that "members of a force shall be exempted from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State. They shall also be exempt from the regulations of the receiving State on the registration and control of aliens"[63]. This waiver of entry procedures is counter-balanced by the requirement for members of the force, to present on demand, whether on entry or at any time thereafter, identification and an individual or collective movement order certifying the status of the individual as a member of a force[64]. The receiving State has a discretion whether to require a movement order to be countersigned by its authorised representatives. Exemption from entry formalities is made conditional on compliance with the formalities established by the receiving State relating to the entry and departure of a force or the members thereof.

110. The sending State must have access to the base and, where it has more than one base on the territory of the same State, it must be allowed movement between them. To deny access would amount to a derogation from the grant made by the host State. It is therefore common for military base agreements to authorise the sending State to have access to its forces and to the ports or airfields which it has been accorded in the host State. This authorisation is essential, as in relation to public vessels and aircraft there is no right of access under customary international law. It is, however, often the practice in bilateral treaties for entry to the ports of the receiving State to be subject to "appropriate notification under normal conditions" made to the authorities of the latter[65].

111. The sending State does not benefit from an unrestricted freedom of movement within, and overflight of, the receiving State, unless such rights are expressly granted in a base agreement. In any case, the national and international law that is applicable to military bases cannot, and does

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General Quarters provides at Article 4 that the Italian Government accepts that the moveable and immoveable property of the General Quarters is immune from search.

[62] SOFAs are normally bilateral; there exists in addition a multilateral SOFA with NATO members, the NATO Status of Forces Agreement (SOFA) of 19 June 1951 (Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, http://www.nato.int/docu/basictxt/b510619a.htm). Pursuant to Article VII of the NATO SOFA, when only the sending State's law is violated, the sending State has the power to exercise sole criminal jurisdiction. When only the receiving State's law is violated, the receiving State has the power to exercise sole criminal jurisdiction. When a crime violated the laws of both countries, there is concurrent criminal jurisdiction: the receiving State maintains primary jurisdiction except for offences committed solely against the property or security or member of the sending State force, or for offences arising out of any act or omission done by the sending State service member in the performance of official duty. In all other cases, the receiving State has the primary right to exercise jurisdiction. In cases of concurrent jurisdiction, the receiving State may relinquish jurisdiction through waiver requests from the sending State.

[63] Article III.1

[64] Article III.2

[65] This is usual, for instance, in US treaty practice. See John Woodcliffe, "The peacetime use of foreign military installations under modern international law", Martinus Nijhoff, 1992, p. 144.

not claim to, diminish the obligations and responsibilities of the member States of the Council of Europe under human rights treaties.

F. Article V of the NATO treaty

112. Article 5 is the core clause of the Washington Treaty, NATO's founding charter. It States that an armed attack against one Ally shall be considered an attack against them all. In response to an invocation of Article 5, each Ally determines, in consultation with other Allies, how it can best contribute to any action deemed necessary to restore and maintain the security of the North Atlantic area, including by the use of armed force.

113. Article 5 was first invoked on 12 September 2001 immediately following the 11 September terrorist attacks against the United States. The invocation was initially provisional, pending determination that the attacks were directed from abroad. This was confirmed on 2 October 2001, after US officials presented findings on investigations into the attacks to the North Atlantic Council, concluding that the Al-Qaeda terrorist network was responsible.

114. On 4 October 2001, the Allies agreed on a series of measures to assist the US-led campaign against Al-Qaeda and related terrorism. These include enhanced intelligence sharing and cooperation, blanket over-flight clearances in accordance with the necessary air traffic arrangements and national procedures, and access to ports and airfields for US and other Allied craft for operations against terrorism.

115. In application of this agreement, certain NATO member-States granted US (and NATO member States') aircraft either blanket over-flight clearances for certain time-periods, or overflight rights upon request[66].

116. Article 5 of the North Atlantic Treaty does not contain an obligation for member States of the Council of Europe to allow rendition to or to grant blanket overflight rights, for the purposes of fighting against terrorism. That treaty provision at most contains an obligation to take measures, including cooperation and consent, into consideration; but leaves any decision as to concrete measures to the appreciation of the State concerned of the necessity of such measures in order to restore and maintain security. In addition, neither Article 5 of the North Atlantic Treaty nor any Agreements in execution thereof can, or claim to, diminish the obligations and responsibilities of member States of the Council of Europe under human rights treaties.

SECTION II – THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES

A. Council of Europe members' obligations in respect of arrests by foreign authorities on their territory

117. A State party to the ECHR is presumed to exercise its jurisdiction over its whole territory. Any arrest of a person by foreign authorities on the territory of a Council of Europe member State without the agreement of this member State is a violation of its sovereignty and therefore contrary to international law. In addition, the European Commission of Human Rights has Stated that "an arrest made by the authorities of one State on the territory of another State,

66 See US Department of Defense, Fact Sheet of 7 June 2002, International contributions to the War against terrorism, at http://www.defenselink.mil/news/Jun2002/d20020607contributions.pdf.

without the prior consent of the State concerned, does not only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 § 1"[67].

118. The European Court of Human Rights has clearly expressed how the responsibility of a Council of Europe member State is engaged in relation to the arrest of an individual on its territory by foreign authorities: irrespective of whether the arrest amounts to a violation of the law of the State in which the suspect has been arrested, the responsibility of the host State is engaged unless it can be proved that the authorities of the State to which the applicant has been transferred have acted extra-territorially and without consent, and consequently in a manner that is inconsistent with the sovereignty of the host State.

119. Any form of involvement of the Council of Europe member State or receipt of information prior to the arrest taking place entails responsibility under Articles 1 and 5 ECHR (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place, unless the arrest is effected by the foreign authorities in the exercise of their jurisdiction under the terms of an applicable SOFA (see footnote 62 above).

120. The responsibility of the Council of Europe member States in engaged also in the case that some section of its public authorities (police, security forces etc.) has co-operated with the foreign authorities or has not prevented an arrest *without government knowledge*. This situation raises the question of governmental control over the security/police services, and possibly, if the applicable national law so foresees, of parliamentary control over the government.

121. Different European States exercise different systems for political insight into, and control over, the operations of the security and intelligence services, depending upon constitutional structure, historical factors etc. Different mechanisms exist for ensuring that particularly sensitive operations are subject to approval and/or adequate control. Meaningful government accountability to the legislature is obviously conditioned upon meaningful governmental control over the security and intelligence services[68]. Where the law provides for governmental control, but this control does not exist in practice, the security and intelligence services risk becoming a "State within a State". Where, on the other hand, the law provides for a degree of distance between government ministers and officials and the day-to-day operations of the security and intelligence services, but government ministers in fact exercise influence or even control over these operations, then the phenomenon of "deniability" can arise. In such a case, the exercise of power is concealed, and there is no proper accountability. The Statute of the Council of Europe and the ECHR require respect for the rule of law which in turn requires accountability for *all* exercises of public power. Independently of how a State chooses to regulate political control over security and intelligence agencies, in any case effective compensatory oversight and control mechanisms must exist to avoid these two problems.[69]

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[67] Opinion of the Commission, 12 October 1989, Stocké v.Germany, § 167

[68] Internal Security Services In Europe, Report adopted by the Venice Commission at its 34th Plenary meeting, 7 March 1998CDL-INF(1998)006e)

[69] European Court of Human Rights, Klass and others v. Federal Republic of Germany judgment of 6 September 1978, § 75 in connection with § 71; Leander v. Sweden judgment of 26 March 1987, § 84.

B. Council of Europe's members obligations in respect of alleged secret detention facilities

122. For a State to provide facilities to another State to conduct voluntary interviews with suspects on its territory is, in principle, not in violation of international law. On the contrary, it is a feature of most modern Mutual Assistance Treaties. It depends upon the territorial States' constitutional and administrative rules on the exercise of public power whether this can go so far as involuntary interrogation. Some States will not allow any but their own officials to exercise public power on their territory. Others make exceptions by treaty rules[70].

123. The territorial State retains its full jurisdiction within the meaning of Article 1 ECHR over any place on its territory where such interviews take place, including any ad hoc detention facilities: : that State is therefore responsible for any infringement of the ECHR in relation to any suspect treated in violation of Articles 3 and 5, e.g. any prisoners who may be held incommunicado there. The modalities of the interrogation and detention, and of treatment given, need to comply with the standards of the ECHR.

124. It is appropriate to clarify what is the meaning of "secret" detention facility. Indeed, the term "secret" can be interpreted as meaning unknown to the prisoner himself and as unknown to the authorities .

125. The problematic aspect of the secrecy of detention lies in the first place in the impact which such secrecy has on the prisoner's defence rights under Articles 5[71] and 6 ECHR. In addition, prolonged secret detention may impinge on Article 3[72] and on other aspects of Article 6 ECHR.

126. *Incommunicado* detention, that is detention without the possibility of contacting one's lawyer and of applying to a court, is clearly not "in accordance with a procedure prescribed by law" of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review. For the detainee, it is not possible to exercise his entitlement to habeas corpus guaranteed by Article 5, paragraph 4. The unlike possibility that such a detention is "in accordance with a procedure prescribed by law" under the law of the foreign State by whose authorities the detention was ordered and executed, is irrelevant for the issue of the responsibility under the ECHR of the State on whose territory it takes place.

127. If and in so far as *incommunicado* detention takes place, is made possible or is continued on the territory of a member State of the Council of Europe, in view of its secret character that detention is by definition in violation of the ECHR and the applicable domestic law of that State.

128. Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the ECHR. The European Court of Human Rights has ruled that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals

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[70] The Schengen treaty, for example.

[71] European Court of Human Rights, Kurt v. Turkey judgment of 25 May 1998, § 124.

[72] Inter-American Court of Human Rights, Velasquez Rodrigues case, 29 July 1988, § 187 and Suarez Rosero case, 12 November 1997, §§ 90-91. UN Human Rights Committee, Polay Campos v. Peru, Communication 577/1994, 6 November 1997, §§ 8.4, 8.6 and 8.7. See also European Court of Human Rights, Ocalan v. Turkey judgment of 12 March 1993, §§ 31-232.

within its jurisdiction may engage the State's responsibility under the Convention"[73]. This is even more true in respect of acts of agents of foreign States.

129. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the territorial State must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into an arguable claim that a person has been taken into unacknowledged custody.

130. The possible obligation by a Council of Europe member State under bilateral or multilateral treaties to co-operate in prosecution measures does not affect or diminish this State's obligation not to allow or contribute to secret detention on its territory.

131. As the European Court of Human Rights has pointed out[74], the opinion of the State under whose authority the detention is decided and executed concerning the issue of whether the detention is in violation of fundamental rights is not conclusive for the question of whether cooperation engages responsibility of a member State of the Council of Europe under the ECHR; only the relevant provisions of the ECHR, as interpreted by the European Court of Human Rights, are decisive. This means, for instance, that the opinion which has been put forward by voices in connection with the US Government according to which "cruel and unusual punishment", if applied outside US territory, does not violate the US Constitution, is of no relevance whatsoever for the question of responsibility of member States under the ECHR. It also means that the individual opinion of individual Governments, or of certain public persons, about possible limits to the absolute character of the scope of the prohibition of torture are not relevant either. In addition to the interpretation given by the European Court of Human Rights concerning the absolute character of the prohibition of torture, Article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly states that there is no room whatsoever and under any circumstances to justify torture

132. If a State is informed or has reasonable grounds to suspect that any prisoners are held incommunicado at foreign military bases on its territory, despite its limited jurisdiction over foreign military bases, its responsibility under the ECHR might still be engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

133. As a rule, a State cannot search foreign military bases on its territory unless this is allowed under the relevant treaties or unless the host State is authorised by the sending State to do so. However, the right to detain non-military personnel does not fall under the ordinary rights and powers that are connected directly with the establishment and operation of the sites at which the foreign forces and installations are located (see para. 107 above), unless the site falls under the jurisdiction of the sending State under the applicable SOFA, such as the NATO-SOFA (see footnote above).

134. The host State is therefore entitled and even obliged to prevent, and react to such abuse of its territory. It could exercise its powers in respect of registration and control of aliens, and demand identification and movement orders of those present on the military base in question. Access to such military bases, assuming that it had been freely granted under the military base

73 European Court of Human Rights, Ilascu and others v. Moldova and Russia judgment of 8 July 2004, § 318.

74 European Court of Human Rights, Chahal v. United Kingdom judgment of 15 November 1996.,

agreement, would require notification under normal conditions. In addition, appropriate diplomatic channels can be used in order to protest against such practice.

135. The case might arise that some section of the public authorities of the Council of Europe member State (police, security forces etc.) is informed and tolerates, or fails to prevent or even co-operates in the execution of secret detentions without government knowledge. While this situation raises the already mentioned constitutional issue of government control over security forces, the State remains responsible under the ECHR.

136. States which have ratified the ECPT have the obligation to co-operate with the CPT and to provide it with a list of all the detention centres which are present on their territory. CPT must have access to all and any of these detention centres. Failure by a State to inform CPT of any detention facility can be seen as a lack of co-operation within the meaning of Article 3 ECPT[75], which, if not clarified appropriately, can result in procedures towards a public Statement under Art 10(2)[76].

137. As concerns international humanitarian law, the Geneva Conventions (Articles 126 or GCIII and 143 GCIV) grant the International Committee of the Red Cross "permission to go to all places where prisoners of war or protected persons may be, particularly to places of internment, imprisonment and labour", and "access to all premises occupied by" them, including "the places of departure, passage and arrival of prisoners who are being transferred". Responsibility could arise in this respect too.

C. Council of Europe member States' obligations in respect of inter-State transfers of prisoners

138. There are only four legal ways of transferring a prisoner to foreign authorities: deportation, extradition, transit and transfers of convicts for the purpose of their serving the sentence in their country of origin.

139. Extradition and deportation proceedings must be specified by the applicable law, and the prisoners must be given access to the competent authorities. In addition, extradition and deportation proceedings cannot be carried out where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR and of the UN Convention against Torture in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.

140. In this context, it is worth underlining that Council of Europe member States are under an obligation to prevent prisoners' *exposure to the risk* of torture: the violation does not depend on whether the prisoner is eventually subjected to torture.

141. The assessment of the reality of the risk must be carried out very rigorously. The risk assessment will depend upon the circumstances, meaning both the rights which risk being

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[75] Article 3 ECPT provides: "In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co operate with each other."

[76] Article 10 § 2 ECPT provides: "If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two thirds of its members to make a public Statement on the matter."

violated and the situation in the receiving State. The diplomatic assurances which are usually provided by the requesting State in order to exclude human rights breaches in its territory after the extradition or deportation is carried out may be acceptable for risks of application of the death penalty[77] or for fair trial violations, because such risks can be monitored satisfactorily. On the other hand, as regards the risk of torture, monitoring is impracticable in most conceivable cases, especially bearing in mind the fact that, even after conviction in a criminal case, a State may want to torture a prisoner for information. At the same time, it is impracticable to have a "life-long" responsibility for people who are sent away.

142. This situation raises the question of the value of diplomatic assurances[78]. In the Venice Commission's view, the acceptance of such assurances is in principle the expression of the necessary good faith and mutual trust between friendly States, although the terms of the diplomatic assurances need to be unequivocal [(for instance, a reference to "torture" or to "inhuman or degrading treatment" should be interpreted within the meaning given to these terms by the CAT, the HR Committee and the ECtHR)] and need to reflect the scope of the obligation by which the State which issues them is legally bound.

143. However, this general mutual trust must not prevail over the accurate examination of each specific situation, particularly if there are precedents or even patterns of violation of previously accepted assurances. For example, an important difference between the situation in the Mamatkulov case (see para. 72 above) and later ones is that recent experience has shown that the risk of torture seems to be greater than what expected before, despite assurances. In the Commission's view, under these circumstances the room for accepting guarantees against torture is reduced significantly. Where there is substantial evidence that a country practices torture in respect of certain categories of prisoners, guarantees may not satisfactorily reduce this risk in cases of requests for extradition of prisoners belonging to those categories.

144. The Commission underlines in addition that the terms of the diplomatic assurances need to be unequivocal; for instance, a reference to "torture" or to "inhuman or degrading treatment" should be interpreted within the meaning given to these terms by the CAT, the HR Committee and the European Court of Human Rights. In addition, it should be made clear that assurances are to be legally bindings on the promising State.

145. The requirement of non 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 : member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

146. The situation may arise that a Council of Europe member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.

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[77] And is indeed required: see European Court of Human Rights, Nivette v. France judgment of 3 July 2001, in which the European Court of Human Rights found that extradition to a State imposing the death sentence violated Protocol 6.

[78] The Council of Europe Steering Committee on Human Rights (CDDH) has set up a Group of Specialists with the task of "reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures; and consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals".

147. If such airplane does not require landing, as long as the plane is in the air, all persons on board are subject to the jurisdiction of both the flag State and the territorial State. In the Commission's view, Council of Europe member States' responsibility under the ECHR would be engaged if they do not take the preventive measures which are within their powers. In addition, their responsibility for aiding another State to commit an unlawful act would be at issue. It follows, in the Commission's view, that the territorial State is entitled to, and must take all possible measures in order to prevent the commission of human rights violations in its territory, including in its air space .

148. There are obviously practical difficulties involved in securing the effective enjoyment of Convention rights in aircraft transiting a Council of Europe member State's airspace or military base for foreign forces on its territory. Without prejudice to the wider question of how such difficulties can affect the scope of a State's obligations to secure generally the rights under the Convention, the case-law of the European Court of Human Rights makes it clear that the State's duty to secure the most elementary rights at issue in the present case (right to security of person; freedom from torture and right to life) continues to apply, particularly in case of acquiescence or connivance[79].

149. The territorial State has different course of action in respect of the suspect airplane, depending on its status.

150. If the state airplane in question has presented itself as if it were a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, it is in breach of Article 4 of the Chicago Convention : the territorial State may and must therefore require landing. The airplane having failed to declare its State functions, it will not be entitled to claim State aircraft status and subsequently not be entitled to immunity : the territorial State will therefore be entitled and will have to search the plane pursuant to Article 16 of the Chicago Convention and take all necessary measures to secure human rights. In addition, it will be entitled to protest through appropriate diplomatic channels.

151. If the plane has presented itself as a State plane and has obtained overflight permission without however disclosing its mission, the territorial State could contend that the flag State has violated its international treaty obligations. The flag State could thus face international responsibility. The airplane however will, in principle, be entitled to immunity according to general international law and to the applicable treaties: the territorial State will therefore be unable to search the plane, unless the captain consents.

152. However, the territorial State may refuse further overflight clearances in favour of the flag State or impose, as a condition therefore, a duty to submit to searches. If the overflight permission derives from a bilateral treaty or a SOFA or a military base agreement, the terms of such treaty might be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights, or their abuse might be advanced. In this respect, the Venice Commission recalls that the legal framework concerning foreign military bases on the territory of Council of Europe member States must enable the latter to exercise sufficient powers to fulfil their human rights obligations.

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[79] See European Court of Human Rights, Ilascu and others v. Moldova and the Russian Federation, judgment of 8 July 2004, § 318, Riera Blume and others v. Spain judgment of 14 October 1999 (final 14/01/2000) §§ 34-35; Gongadze v. Ukraine, judgment of 8 November 205, § 165.

153. While mutual trust and economic and military co-operation amongst friendly States need to be encouraged, in the presence of serious indications of risks of ill-treatment of prisoners, Council of Europe member States must require additional guarantees of respect of human rights in relation to overflight and transit. In that situation, it might become necessary to insert new clauses, including search as a condition for diplomatic clearances in favour of State planes carrying prisoners on special missions. Consent for overflight permission by state aircraft could generally be made conditional upon guarantees concerning respect for the fundamental rights of those passengers in respect of whom there is reason for doubt (express human rights clauses). Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation must provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

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

155. As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow so-called "renditions" to or to grant blanket/unconditioned overflight rights, for the purposes of fighting terrorism. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty [and by the agreement of 4 October 2001] and from military base agreements and SOFAs, where these are applicable, in a manner compatible with their human rights obligations. As regards notably the NATO treaty, the Commission stresses that this principle is expressed in Article 7 according to which "[t]his Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter [of the United Nations] of the Parties which are members of the United Nations." Even if it can be argued that NATO member states have undertaken rendition/unconditional overflight obligations, the Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm, it does not give rise to an internationally wrongful act. As underlined above (para. 43), the prohibition of torture is a peremptory norm (jus cogens).

CONCLUSIONS

156. Council of Europe member States are under an international legal obligation to fight terrorism, but in doing so they must safeguard human rights.

157. Council of Europe member States are under an international legal obligation to secure that everyone within their jurisdiction will enjoy internationally agreed fundamental rights, including and notably that they will not be unlawfully deprived of their personal freedom and will not be subjected to torture and inhuman and degrading treatment, including in breach of the non-refoulement principle. This obligation may also be breached by acquiescence or connivance in the conduct of foreign agencies. There exists notably a duty to investigate into substantiated claims of breaches of fundamental rights by foreign agents, particularly in case of allegations of torture or unacknowledged detention.

158. Council of Europe member States are bound by numerous multilateral and bilateral treaties in different fields, such as collective self-defence, international civil aviation, military bases. The obligations arising out of these treaties do not prevent States from complying with their human rights obligations. These treaties must to be interpreted and applied in a manner consistent with the parties' human rights obligations. Indeed, an implied condition of any agreement is that in carrying it out the States will act in conformity with international law, in particular human rights law.

159. The Venice Commission considers that there is room to interpret and apply the different applicable treaties in a manner that is compatible with the fundamental principle of respect for fundamental rights. Council of Europe member States must do so. For example, the search of a State airplane abusing the status of civil aircraft is allowed under the Chicago Convention and must be effected whenever there are reasonable grounds to suspect that the plane is used to commit human rights breaches. The relevant inter-State practice must be changed and adapted to this obligation, without however be made to frustrate the legitimate aims pursued by the treaties in question. Diplomatic measures may also need to be taken.

160. To the extent that this due interpretation and application of the existing treaties in the light of human rights obligations is not possible, Council of Europe member States must take all the necessary measures to renegotiate and amend these treaties.

161. In reply to the questions put by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission has reached the conclusions listed below.

<u>As regards arrest and secret detention</u>

a) Any form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents taking place entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is effected by the foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement, the Council of Europe member State concerned may remain accountable under the European Convention on Human Rights, as it is obliged to give priority to its *jus cogens* obligations, such as they ensue from Article 3.

b) Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the latter must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.

c) The Council of Europe member State's responsibility is engaged also in the case that its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention *without government knowledge*, acting *ultra vires.* The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability

for *all* form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective compensatory oversight and control mechanisms must exist.

d) If a State is informed or has reasonable doubts to suspect that any prisoners are held *incommunicado* at foreign military bases on its territory, its responsibility under the European Convention on Human Rights is engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

e) Council of Europe member States which have ratified the European Convention for the Prevention of Torture must inform the European Committee for the Prevention of Torture of any detention facility on their territory and must allow it to access such facilities. Insofar as international humanitarian law is applicable, States must grant the International Committee of the Red Cross permission to visit these facilities.

As regards inter-state transit of detainees

f) There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of convicts for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be given access to the competent authorities. The principle of non-refoulement must be respected.

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

h) The principle of non-refoulement also applies in respect of the transit of prisoners through the territory of Council of Europe member States : they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

As regards overflight

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

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

k) If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefor, the duty to submit to searches;

if the overflight permission derives from a bilateral treaty or a Status of Forces Agreements or a military base agreement, the terms of such treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.

l) In general, Council of Europe member States may have to consider whether it is necessary to insert new clauses, including search as a condition for diplomatic clearances in favour of State planes carrying prisoners on special missions. Consent for overflight permission by state aircraft could generally be made conditional upon guarantees concerning respect for the fundamental rights of those passengers in respect of whom there is reason for doubt (express human rights clauses). Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

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

n) As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow "renditions" to or to grant blanket/unconditioned overflight rights, for the purposes of fighting against terrorism. The Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (*jus cogens*), it does not give rise to an internationally wrongful act, and the prohibition of torture is a peremptory norm. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty [and by the agreement of 4 October 2001] and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations.