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SG/Inf (2006) 5 28 February 2006

Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights, in the light of reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been arrested and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive co-operation of States Parties to the Convention or by States Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged

This report may also be referred to as (short title):

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.

EXECUTIVE SUMMARY

This summary is not authoritative and only serves to give a short overview of the main points of the official report. It does not form part of the official report itself.

This report contains the results of an analysis of the replies received from 45 of the 46 States Parties to the ECHR in response to the Secretary General's inquiry of 21 November 2005.

The Article 52 inquiry was launched against the background of reports alleging involvement by States Parties in unlawful deprivation of liberty of terrorist suspects and their transport in or through their territory by or at the instigation of foreign agencies (“secret detention”, “extraordinary rendition”).

States were asked to explain how their internal law ensured the effective implementation of the ECHR on four issues:

1. adequate controls over acts by foreign agents in their jurisdiction;
2. adequate safeguards to prevent, as regards any person in their jurisdiction, unacknowledged deprivation of liberty, including transport, with or without the involvement of foreign agents;
3. adequate responses (including effective investigations) to any alleged infringements of ECHR rights, notably in the context of deprivation of liberty, resulting from conduct of foreign agents;
4. whether since 1 January 2002 any public official has been involved, by action or omission, in such deprivation of liberty or transport of detainees; whether any official investigation is under way or has been completed.

On the basis of an analysis of the replies to **Questions 1, 2 and 3**, the first conclusion is that all forms of deprivation of liberty outside the regular legal framework need to be defined as criminal offences in all States Parties and be effectively enforced. Offences should include aiding and assisting in such illegal acts, as well as acts of omission (being aware but not reporting), and strong criminal sanctions should be provided for intelligence staff or other public officials involved in such cases.

However, the most significant problems and loopholes revealed by the replies concern the ability of competent authorities to detect any such illegal activities and take resolute action against them. Four main areas are identified where further measures should be taken at national, European and international levels:

- the rules governing activities of secret services appear inadequate in many States; better controls are necessary, in particular as regards activities of foreign secret services on their territory;
- the current international regulations for air traffic do not give adequate safeguards against abuse. There is a need for States to be given the possibility to check whether transiting aircraft are being used for illegal purposes. But even within the current legal framework, States should equip themselves with stronger control tools;
- international rules on State immunity often prevent States from effectively prosecuting foreign officials who commit crimes on their territory. Immunity must not lead to impunity where serious human rights violations are at stake. Work should start at European and international levels to establish clear human rights exceptions to traditional rules on immunity;
- mere assurances by foreign States that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

It gives rise to serious concern that some States Parties have not replied or not replied completely to **Question 4**. This is particularly worrying as regards States which have been cited by the Parliamentary Assembly

rapporteur, Mr Dick Marty, in his memorandum of January 2006: Bosnia and Herzegovina, Italy, Poland and “the former Yugoslav republic of Macedonia”.

* * *

Not all replies provide sufficient explanations on all four questions. For other replies, clarifications are necessary on specific points. Follow-up letters will be sent to the States concerned.

On the more general problems identified in this report, the Secretary General will in due course present proposals for Council of Europe action to the Committee of Ministers.

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I. Introduction

1. Article 52 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention on Human Rights", "ECHR", or "the Convention") provides:

"On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

2. Until November 2005, this provision had been applied seven times (in 1964, 1970, 1975, 1983, 1988, 1999 and in 2002). The first five times, this provision was applied in respect of all States Parties to the ECHR. On the sixth and seventh occasions, it was applied in respect of a single State Party (Russian Federation in 1999 and Moldova in 2002).

3. On 21 November 2005, I availed myself of the powers conferred on me by Article 52 and addressed a letter to the Ministers of Foreign Affairs of all States Parties, requesting the Governments to furnish explanations on certain questions by 21 February 2006. The letter of 21 November is appended to this report (Appendix I). The same letter was sent to the Minister of Foreign Affairs of Monaco on 14 December 2005, following the entry into force of the Convention as regards this State on 30 November 2005.

4. By noon on 22 February, the replies of 41 States Parties had been received. The rest was received by 24 February. This report is based on 45 of the 46 replies received (as regards Albania, see paragraph 17 below).

5. The replies as received from the States Parties are contained in a separate Addendum to this report which will be shortly made available in electronic form on the Council of Europe website.

6. Several States (notably Croatia, the Czech Republic, Finland, Hungary, Norway, Poland, Portugal, Romania, Switzerland) have expressly indicated in their replies that they welcome this inquiry under Article 52 of the Convention or stated the importance they attach to it or more generally to the efforts of the Council of Europe to ensure that the fight against terrorism is conducted with full respect for human rights. Although some criticism was expressed in two replies (Bulgaria and Spain) as regards the appropriateness of the fourth question in my request, the governments concerned did provide information on that point.

7. The structure of the present report is as follows: Section II recalls the background to my request for explanations, Section III describes the scope of my request and assesses whether States Parties have complied with their obligations under Article 52 of the Convention, Section IV gives the main results from the analysis of the explanations received, and Section V sets out my overall conclusions at this stage.

II. Background to the present request for explanations under Article 52 of the Convention

8. I decided to resort to my powers under Article 52 in the light of reports¹ suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been arrested and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies with the active or passive cooperation of States Parties to the Convention or by States Parties themselves on their own initiative without such deprivation of liberty having been acknowledged. This specific context of my inquiry under Article 52 was clearly indicated in the text of the request.

9. The purpose of my inquiry was to verify the manner in which the member States of the Council of Europe, all of which are Parties to the European Convention on Human Rights, ensure the effective implementation of and compliance with the provisions of the Convention in the specific context described in the previous paragraph. As was pointed out in my request, the safeguards contained in the Convention against arbitrary deprivation of liberty (in particular in Article 5) are of fundamental importance both in their own right and for the protection of other essential rights of the human being, notably the right to life (Article 2 of the Convention) and the absolute prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the Convention). The fundamental rights and freedoms enshrined in the Convention include positive obligations for the States Parties, meaning that governments are required to take action through protective

measures to prevent violations from taking place and, where such violations have taken place, to conduct prompt and effective investigations capable of leading to the identification and punishment of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims. In my request, I recalled that unacknowledged deprivation of liberty raised serious questions concerning the effective implementation of and compliance with the Convention as regards the above-mentioned provisions as well as Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the Convention as well as Article 2 of Protocol No. 4 to the Convention (freedom of movement).

10. The human rights obligations under the Convention also apply in the current context of the fight against terrorism. Both the Parliamentary Assembly and the Committee of Ministers have repeatedly made clear that this position is not only indisputable from a legal point of view but also constitutes a moral and political necessity. The Council of Europe Guidelines on Human Rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002, are an authoritative expression of this position. In the Preamble of this text, the Committee of Ministers recalls that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law. I myself have on numerous occasions made public statements to remind States of this necessity.

III. Assessment under Article 52 of the Convention: scope of the request and of the replies received

1. Obligations of States Parties receiving a request under Article 52

11. On the basis of an analysis of Article 52 and of the past practice in this field in 2000, some general comments can be made concerning the nature and the scope of the obligations incumbent on the States Parties under this provision.⁶

12. The State has the obligation to provide truthful explanations. It appears clearly from the wording of Article 52 that this obligation is unconditional. The scope of the obligation is defined by Article 52 itself. The State must furnish the requested explanations about “the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention”. The State has an obligation of result to provide explanations about the effective implementation of the Convention in its internal law: the State cannot, therefore, confine itself to providing explanations of a formal nature. On the contrary, bearing in mind also the obligation to execute treaty obligations in good faith (Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969), a State has the obligation to furnish precise and adequate explanations which make it possible to verify whether the Convention is actually implemented in its internal law. This necessarily implies that the State must furnish information of a sufficiently detailed nature about the national law and the practice of the national authorities, in particular the judicial authorities, and about their conformity with the Convention as interpreted in the case-law of the European Court of Human Rights (hereinafter “the Court”). The case-law has given a concrete expression to the rights and freedoms laid down in the Convention and has specified the conditions for an effective application of the rights guaranteed by the Convention: as the European Court of Human Rights has stated: “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (*Airey judgment* of 9 October 1979, Series A, No. 32, paragraph 24).

13. It goes without saying that under Article 52 States Parties are also bound to provide the explanations requested by the time-limit indicated in the request, provided that the time given is not unreasonably short in relation to the scope of the explanations sought.

2. Scope of the request

14. The request of 21 November 2005 (see Appendix I for the full text) contained a set of four specific questions on the manner in which the internal law of States

Parties ensures the effective implementation of the provisions of the Convention and its additional Protocols, as interpreted by the European Court of Human Rights:

– How their internal law ensures that acts by officials of foreign agencies within their jurisdiction are subject to adequate controls;

– How their internal law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within their jurisdiction, whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Party or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty;

– How their internal law provides an adequate response to any alleged infringements of Convention rights of individuals within their jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, how their internal law ensures the availability of effective investigations which are prompt, independent and capable of leading to the identification and punishment of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims;

– In the context of the foregoing explanations, whether, in the period running from 1 January 2002 (or from the moment of entry in force of the Convention if it occurred on a later date) until the present, any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission – in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency. Information was also to be provided on whether any official investigation was under way and/or on any completed investigation.

15. The request referred in a general way to the domestic implementation of the provisions of the Convention and its additional Protocols, as interpreted by the European Court of Human Rights, but also pointed to a number of provisions which are particularly relevant to the issue of unacknowledged deprivation of liberty (namely Articles 2, 3, 5, 6, 8, 13 of the Convention and Article 2 of Protocol No. 4 to the Convention).

3. The replies received and their scope

Late replies

16. By the expiry of the time-limit on 21 February 2006, no replies had been received from **Belgium, Bosnia and Herzegovina, Georgia, Italy and San Marino**, but these States Parties rapidly rectified this situation of non-compliance by replying within one to three days after the deadline. By 24 February 2006, replies from all 46 States Parties had been received.

Vague and/or very general reply not addressing any of the four questions

17. The reply received from **Albania** was of a very general nature and did not really answer any of the four questions. On 22 February 2006, I therefore addressed a letter to the Albanian authorities asking for detailed answers to the four questions to be submitted without delay. I have not yet received a response. The initial reply received from this country has not been taken into account in this report.

Incomplete replies or replies lacking precision or detail

18. The explanations provided by the States Parties vary widely in scope and depth. Many replies do not address some of the questions in a sufficiently detailed manner or leave some important aspects of these questions unanswered. Further explanations from these States will therefore be necessary to supplement the replies furnished (see Appendix II, and section IV, 2.4 below).

Full replies

19. Some State Parties have given replies which cover the main aspects of the questions raised in the Secretary General's request (see Appendix II, and section IV, 2.4 below). However, in respect of some of these replies, clarifications or information on specific points may nonetheless be necessary.

IV. Analysis

1. Introduction

20. My assessment of the explanations given by our member States is based on three important considerations. First, the effective enjoyment of human rights guaranteed by the Convention must be guaranteed by law. Every Party to the Convention must have appropriate laws and regulations designed to provide effective safeguards and deterrence against abuse. Second, respect for the Convention imposes positive obligations to ensure respect for the guaranteed rights and freedoms, including preventive measures. In other words, the Convention may also be violated through an omission to act. Not knowing is not good enough. Third, the obligation of our member States to ensure respect for the rights protected by the Convention is linked to the exercise of their effective jurisdiction, which includes the airports on their territory and the airspace above it.

21. My inquiry under Article 52 was motivated by two main concerns, namely the possible existence of secret detention centres in States Parties and the involvement of officials of States Parties in the unacknowledged detention of individuals and their rendition by aircraft using airspace and airport facilities in States Parties.

22. "Rendition" or "extraordinary rendition" are not legally defined terms. They are normally understood to mean the apprehension and subsequent transfer of a person from one jurisdiction to another, outside the framework of legally defined procedures such as extradition, deportation, or transfer of sentenced persons and possibly with the risk of being subjected to torture or inhuman and degrading treatment. Such renditions involve multiple human rights

violations, including transfer in breach of the principle of *non-refoulement*, as well as arbitrary arrest and *incommunicado* detention. The victim is placed in a situation of complete defencelessness with no judicial control or oversight by the European Committee for the Prevention of Torture (CPT) leaving the door open for the use of torture and other forms of ill-treatment. According to the Court, the unacknowledged detention of an individual is a complete negation of the Convention's guarantees against arbitrary deprivation of liberty and a most grave violation of Article 5 (right to liberty and security).³ The arbitrary arrest, detention and transfer of an individual would also affect the rights under Articles 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 2 of Protocol No. 4 (freedom of movement), as well as, depending on the circumstances, Article 2 (right to life) and Article 3 (prohibition of torture).⁴

23. The activities of foreign agencies cannot be attributed directly to States Parties. Their responsibility may nevertheless be engaged on account of either their duty to refrain from aid or assistance in the commission of wrongful conduct, acquiescence and connivance in such conduct, or, more generally, their positive obligations under the Convention.⁵ In accordance with the generally recognised rules on State responsibility, States may be held responsible of aiding or assisting another State in the commission of an internationally wrongful act.⁶ There can be little doubt that aid and assistance by agents of a State Party in the commission of human rights abuses by agents of another State acting within the former's jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State Party's responsibility under the Convention. Of course, any such vicarious responsibility presupposes that the authorities of States Parties had knowledge of the said activities.

24. In this context, it should be noted that there have been consistent press reports about prisoner transfers by the CIA since at least March 2005.⁷ Human Rights Watch published a well-documented briefing paper on "ghost detainees" in October 2004.⁸ In April 2005, the Parliamentary Assembly adopted Resolution 1433 (2005) on the lawfulness of detentions by the United States in Guantánamo Bay in which it called on member States to ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law.

25. Even *ultra vires* action by national authorities or individual conduct by members of national security services not covered by superior orders would engage a State Party's responsibility. Under the Convention a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected.⁹

26. Where a State had no knowledge of illegal activities, it may still incur responsibility under the Convention on account of its failure to protect individuals or where subsequent information comes to light to investigate violations. In addition to their duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, States are required to take appropriate steps to ensure respect for those rights and freedoms within their territory. The Court found that such positive obligations remain even where the exercise of the authority of the State is limited in part of its territory, which means that it has a duty to take all the appropriate measures which are within its power.¹⁰ For positive obligations to arise in the context of human rights abuses by private persons, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid this risk.¹¹

27. It can be argued that at least the same standards should be applied as regards human rights abuses by foreign officials acting on the territory of a State Party. Under international law, as several States Parties indicate in their explanations, a State may not exercise authority on the territory of another State without the latter's consent. Unless duly authorised, such extra-territorial exercise of authority would amount to a violation of the sovereignty of the host State and would therefore be contrary to international law. This violation of international law is a relevant factor to be taken into account in the context of the Convention, for example when judging the lawfulness of a deprivation of liberty under Article 5.¹² Under Article 1 of the Convention, every State Party has a general duty to protect all individuals under its jurisdiction, regardless of nationality or status as a legal resident, from unlawful interferences with their rights and freedoms under the Convention. In certain circumstances, in particular if there are reasonable grounds to believe that there is a danger that foreign agents will abuse their powers, obligations to seek information from the responsible government may arise in order to secure to everyone the rights and freedoms guaranteed under the Convention. At least following consistent reports in the media about suspicious activities within their jurisdictions, States Parties cannot turn a blind eye and ignore the potential threat to terrorism suspects.

28. As regards the alleged secret places of detention, State responsibility under the Convention would follow directly from territorial sovereignty. States Parties are under an obligation to ensure that their territory is not used for activities which are incompatible with the guarantees of the Convention. Setting up secret detention facilities necessarily requires some form of authorisation, permission or, at least, acquiescence by the authorities of the territorial State. Even if the foreign agencies had not provided full information on their activities initially, the territorial State would be under an obligation to ensure, with all the legal and diplomatic means available

to it, that activities by foreign agencies on its soil comply with the Convention.¹³

29. It would appear that positive obligations, to some degree at least, are capable of extending to military bases, although these are only to a very limited extent under the jurisdiction of the receiving State. The use of such bases for activities of foreign intelligence agencies in violation of internationally recognised human rights standards would not be covered by the applicable NATO or other multilateral or bilateral agreements. Since the receiving State's initial consent under these agreements would not cover such activities, they would simply constitute an unlawful exercise of jurisdiction by the sending State. Under the principles of State responsibility, the receiving State would therefore be entitled to request the immediate cessation of such activities, reparation for any damages and guarantees against non-repetition.

30. Finally, States Parties are under an obligation to conduct prompt and effective investigations into any arguable claim that a person has been taken into custody by foreign agencies operating in its territory and has not been seen since.¹⁴ The Court (and other relevant human rights bodies of the Council of Europe and the United Nations) have identified a number of procedural and substantial requirements for investigations which must be capable of leading to the identification and punishment of those responsible for any illegal acts. Key principles include, *inter alia*:

- carrying out investigations which are prompt, effective and not merely perfunctory and which take into consideration not only the actions of State agents but also the surrounding circumstances;
- ensuring the independence and impartiality of investigators from those State agents allegedly involved in the cases of killings or serious abuses under investigation;
- protecting witnesses from threats and intimidation;
- ensuring where possible that investigations are open to the general public or subject to public scrutiny;
- minimising the use of certain measures designed to protect the identity of members of the security forces (such as testimony from behind screens, no badge numbers on uniforms and the wearing of balaclavas);
- applying an appropriate burden of proof (e.g. where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and deaths occurring during that detention);
- ensuring independent judicial review in cases where it is decided not to initiate criminal prosecution, or providing other guarantees;
- where wrongdoings are found, imposing adequate criminal or disciplinary sanctions which have a dissuasive effect and meet the requirement of proportionality and which cannot be converted, e.g. into fines, or suspended.

2. Replies to the four questions

31. The replies to the four questions are analysed in sub-sections 2.1. - 2.4. below. The focus of this analysis is on thematic issues arising from each question and the replies thereto, with some noteworthy (non-exhaustive) examples being drawn from individual replies by States Parties.

2.1. Question 1 – Adequate controls over acts of officials of foreign agencies within the State's jurisdiction

i) Police and judicial cooperation in criminal matters

32. A number of replies provide relatively detailed information about existing procedures on police and judicial co-operation in criminal matters between States. Within the framework of EU law, bilateral or multilateral agreements, some countries allow the presence of foreign liaison or police officers on their territory. They are usually acting under the control of national police authorities and are not entitled to take decisions on deprivation of liberty. The Irish-US extradition agreement of 2001 exceptionally permits the detention of prisoners by officials of the US as they pass through **Ireland**. However, any such transit requires the explicit consent of Ireland.

33. Foreign investigating officers are sometimes allowed to operate on the territory of another State in the specific context of cross-border pursuits. All those activities are carried out within a specific regulatory framework of existing arrangements of police and judicial co-operation. According to the information provided, the existing controls appear to be adequate. There are no indications of particular problems of compatibility with the Convention.

34. In the **Netherlands**, foreign liaison officers are instructed by the National Police Services Agency regarding the provisions of Dutch law relevant to their work, including the Convention, as well as the consequences that non-compliance could have. Regulations on operations of foreign police liaison officers also exist in **Belgium**.

ii) Security Services

35. Only a few replies contain precise information about the activities of foreign intelligence services and control mechanisms. Officers of foreign security services are usually present for purposes of co-operation with the host country. It is normally required that their activities must be compatible with international law and the national legal order. **Hungary** clearly indicates that nothing authorises the national security services to enter into any type of co-operation with foreign secret services that would transgress the constitutional limitations, including the respect for fundamental human rights, imposed upon their activities.

36. According to the explanations provided, foreign agents are not allowed to take any coercive measures such as arrest or detention. Covert intelligence gathering

operations usually require a special authorisation by the competent national authorities. **Italy** indicates that there is no official agreement according to which a foreign intelligence agency would be obliged to communicate the presence in Italy of their staff or accredit such staff. **Switzerland** refers to accreditation and mentions that such staff is informed upon arrival of the legal rules governing their activities. **Lithuania** indicates that information must be made available about the activities of foreign special services on the national territory.

37. Some of the States which have given more precise information on this subject indicate that activities of foreign agents are subject to control by a national authority, usually the national security service or a branch of it. However, only a few States give more detailed explanations about the nature and scope of such control. In **Hungary**, the 1995 Act on the National Security Services creates a comprehensive legal framework for democratic civilian control, including Parliamentary oversight, over the activities of security services, both national and foreign. The competent authorities are instructed by law to detect any endeavours and activities of foreign secret services interfering with or threatening the sovereignty or the political, economic, or other important interests of **Hungary**. **Germany** indicates that cooperation with foreign agencies is closely monitored by the Federal Office for the Protection of the Constitution. The **Russian Federation** indicates that its Federal Security Service is entrusted with monitoring the activities of foreign special services. The **Czech Republic** and the **Netherlands** indicate that cooperation of domestic intelligence services with foreign counterparts is subject to special provisions.

38. The **Czech Republic**, **Iceland** and, to some extent **Slovakia**¹⁵, state that there are no regulations dealing specifically with control over the activities of foreign secret services. Most other replies do not say so explicitly, but this may well be a common situation in many member States. This absence of a regulatory framework stands in sharp contrast to the rather detailed regulations that exist regarding the activities of foreign police officers on their territory (see under i) above).

39. **Austria, Belgium, the Czech Republic, Estonia, Hungary, the Netherlands, Poland and Switzerland** mention the existence of Parliamentary oversight over the activities of intelligence services. Where it exists, such oversight appears to be restricted to the activities of national secret services. Usually there are special procedures to guarantee the confidentiality of classified information. In **Hungary**, the National Assembly exercises parliamentary control of the national security services through its National Security Committee. This Committee may conduct inquiries about complaints implying the illegal activities of national security services, in the course of which it may have access to relevant documents kept in the registry of the national security services and may hear staff members of the security services. Further to its investigation, it may call upon the competent Minister to take necessary measures. The complainant is informed about the findings of the Committee.

40. In addition to parliamentary oversight, **Lithuania** and **Sweden** refer to complaints procedures involving the national ombudspersons, who are competent to investigate any abuse of official authority or violation of human rights by the public authorities. It is not clear whether the competence of ombudspersons in these and other States extends to the secret services. The **Netherlands** have created a supervisory commission for the intelligence and security services. This commission is charged with monitoring the lawfulness of the security services' activities and with informing the relevant ministers about its findings. It has access to all the information processed by the security services. Reports of the commission are sent to the parliament, which deals with the secret parts of these reports confidentially. In **Belgium**, a similar body exists which also handles complaints from private individuals or public officials. In the latter case, anonymity of the official can be guaranteed.

41. With a few exceptions, the information about existing controls over the activities of secret services reveals a lack of democratic oversight, which has already been deplored by the Parliamentary Assembly.¹⁶ The functioning of these services should be based on clear and appropriate legislation providing for adequate safeguards against abuse, parliamentary oversight and, where human rights are affected, judicial control. Their activities should be clearly separated from the activities of police and other law enforcement authorities. As the explanations of some States Parties show, ways and means can be found to strike a balance between accountability and the necessary confidentiality of classified information. While stronger supervision over the activities of national secret services is necessary, this is even more the case in respect of foreign secret services.

iii) Military personnel

42. A number of States Parties indicate the presence of foreign military personnel on the basis of NATO, bilateral or multilateral agreements. Under the agreements, military forces of the sending State are obliged to respect the law of the receiving State. Authorities of the sending State usually exercise exclusive jurisdiction over persons subject to its military law. The explanations given omit any indication of whether, in addition to the (military)

authorities of the sending State, authorities of the receiving State exercise any control or supervision over their activities.

iv) Flights allegedly used for rendition purposes

43. I regret that some replies did not contain information about the specific issue of flights allegedly used for rendition purposes. This is all the more regrettable as well-documented allegations about such flights were among the reasons which prompted me to use my powers under Article 52 (see paragraphs 8 and 21 above). All those explanations which contain information on this subject draw a distinction between State (military and non-military) and civil aircraft.

44. The Convention on International and Civil Aviation of 7 December 1944 (“Chicago Convention”), which has been ratified by 189 States worldwide provides the legal framework for international air traffic in Europe. Under the Convention, all civil aircraft of a State Party, including unscheduled flights, have a right to make flights into or transit non-stop across the territory of another Party, including the right to land for technical purposes such as refuelling or maintenance. Unlike State aircraft, civil aircraft do not enjoy immunity from search or seizure.¹⁷ Indeed, controls on landed aircraft are routinely carried out. The purpose of such controls appears to be mainly to check compliance with customs and security regulations.

45. In the absence of any general or permanent clearances for specific types of aircraft (see paragraph 55 below), authorisation for overflight by State aircraft is obtained on a case-by-case basis through the competent military or civil authorities. Under Irish law, both military and non-military State aircraft must seek permission to overfly or land in Irish territory if immunities are to apply. It is usually required that the application for permission contains a statement of the purpose of the flight, the aircraft used, its route and final destination. However, States applying for overflight permissions are not systematically requested to provide passenger lists or information about cargo, even though this would be possible.

46. Some States mention flights used to repatriate illegal aliens. Such flights would qualify as State flights, and their transit through the airspace of another country would therefore require a special permission, unless general permissions have been granted unilaterally or on the basis of bilateral or multilateral arrangements.

47. **Austria** indicates that it has established penalties if flights by State aircraft are not declared as such, but are operated as civil aircraft according to the ICAO rules.

48. In addition, air traffic control clearance is required for all flights. In accordance with ICAO regulations, such clearance is given on the basis of the aircraft’s flight plan, which contains general information on the aircraft, its route and the number of persons on board. It is not necessary to indicate the cargo or to provide a list of passengers. The type of flight is indicated according to standardised categories (scheduled air service, non-scheduled air transport operations, general aviation, military or other).

49. **Finland** indicates that its aviation authorities are merely informed of the registration number and destination of every aircraft entering Finnish airspace. **Norway** declares that in cases where civil aircraft must apply for permission (e.g. where they take on new passengers during an intermediate landing), the application procedures are routine and not detailed enough to reveal cargo or passengers being carried in violation of Norwegian legislation. According to the explanations provided by **Iceland**, customs aviation authorities can request information from all aircraft concerning the passengers they are carrying.

50. Granting overflight clearances or rights for State aircraft is a sovereign prerogative of each State. Permission may be granted subject to a waiver of immunity (**Ireland**) or under other conditions, such as to ensure compliance with internationally recognised human rights standards on board (**Norway**). However, it seems from the explanations received that most States have so far not felt the necessity to resort to such restrictions.

51. Some member States indicate that measures available for the control of aircraft which merely transit their airspace are limited (for instance **Austria, Finland, Ireland, Norway**). If there are serious grounds to believe that criminal offences are committed on board transiting aircraft, the competent authorities may order an aircraft to land. The Chicago Convention recognises the right to require the landing of an aircraft if there are reasonable grounds to conclude that it is being used for purposes inconsistent with this Convention.¹⁸ This remains however a rather theoretical possibility since these authorities usually do not have any detailed information about the purpose of the flight or the passengers on board.

52. **Iceland** declares that its legislation could in practice provide for the possibility to establish a systematic supervision to collect information on the passengers in all aircraft landing in Icelandic airports. However, according to the explanations provided, the need to do so has not been felt as yet. Indeed, no State appears to have established any kind of procedure in order to assess whether civil aircraft are used for purposes that would be incompatible with internationally recognised human rights standards.

53. **Luxembourg** mentions that, since 7 February 2006, air traffic control services are required to inform the competent minister immediately in case a flight plan is received concerning an aircraft mentioned on the list provided by the Parliamentary Assembly. As necessary, an inspection will be carried out on the aircraft.

54. **The explanations provided on the specific point of controls over aircraft allegedly used for rendition purposes show that existing procedures do not provide adequate safeguards against abuse. The existing standardised procedures in the case of civil aircraft and the immunity in the case of State aircraft**

mean that it is virtually impossible for States to assess with certainty whether aircraft transiting through their airspace or even using their airport facilities are used for purposes incompatible with the European Convention on Human Rights and other internationally recognised human rights standards.

55. It is disconcerting to note that no explanations were given about “blanket” or “automatic” overflight clearances or rights upon request granted by States either unilaterally or under bilateral or multilateral agreements, including within the framework of the EU or NATO. Such information is, at least partially, in the public domain.¹⁹ For the purposes of my inquiry it would be important to know the precise nature and scope of such arrangements and whether they contain adequate safeguards against abuse.

2.2. Question 2 – Adequate safeguards to prevent unacknowledged deprivation of liberty

56. The inviolability of personal liberty is guaranteed in many national constitutions. Unacknowledged deprivation of liberty would constitute a crime everywhere in Europe. All member States have legislation establishing unlawful detention, false imprisonment or kidnapping as criminal offences. Most States also indicate expressly that such acts also constitute offences when committed by public officials. In some countries this would even constitute a qualified form of the normal offence. According to the explanations given by most of the States, whoever aids or assists in such deprivation of liberty would likewise be punishable. The surrender of a person to a foreign power has only exceptionally been established as a separate, specific offence (e.g. in **Austria**). **Andorra** qualifies the unacknowledged deprivation of liberty and transfer to another State as a “crime against humanity”. In several countries, the secret transportation of unlawfully detained persons would probably qualify as an abduction.

57. The existing criminal sanctions appear to be applicable to the agents of foreign States in the same manner as to nationals, subject to privileges and immunities which the former may enjoy under international law (see paragraphs 68-69 and 71 below).

58. In **France**, a public official who abstains from ending or from obtaining from the relevant authority the end of an illegal detention of which he or she has become aware is liable to a sanction of three years imprisonment and a fine of 45 000 euros. There is even a sanction if the public agent abstains from acting when he or she was not aware of the illegality of the deprivation of freedom in cases where such illegality was alleged and proved afterwards. In **Belgium** and **Hungary**, public officials who, in their functions, become aware of a crime or offence must immediately inform the prosecutor of the tribunal where the crime or offence was committed. A similar duty exists in **Italy** with special procedures to be followed by intelligence officers. In **Belgium** and **Luxembourg**, there exists a general duty for anyone to report an irregular detention to the authorities. **Switzerland** generally states that such crimes may also be committed by omission.

59. **Ireland** declares that it is not lawful for the Minister of State to consent to the transit of a prisoner through Irish territory other than in the framework of the Extradition Act 1965 or of the Council of Europe Convention on Transfer of Sentenced Persons 1983. The Irish government clearly stated that, in order to stay in conformity with the European Convention on Human Rights Act 2003, no minister can lawfully consent to the transit through Irish territory of a prisoner where he or she knows, or has substantial grounds for believing that there is a real risk of the prisoner being tortured or subjected to inhuman or degrading treatment or punishment.

60. **Hungary** indicates that coercive measures are strictly regulated and preclude the possibility of any foreign authority depriving any individual of his or her liberty on the territory of the Republic of Hungary, as well as any authorities of the Republic of Hungary aiding or assisting the agents of another state in such illegal conduct. According to **Slovakia**, any transport through its territory for the purposes of criminal prosecution or execution of judgments would require a permission by the Ministry of Justice. **Switzerland** indicates that transit by air via Switzerland of persons unlawfully deprived of their liberty would be considered as a violation of Swiss sovereignty and contrary to Swiss as well as International law. The Federal Council confirmed this position in a Parliamentary inquiry.

61. Some States recall the importance of monitoring by the European Committee for the Prevention of Torture (CPT) and comparable national bodies and the safeguards which they offer against unacknowledged deprivations of liberty. In addition, some countries refer to the existence of custody records as another safeguard.

62. The existence of a legislative framework designed to provide effective deterrence against human rights violations is not sufficient in itself. The competent police and judicial authorities must also be entitled to exercise their powers and jurisdiction over those who are responsible. The absence of criminal jurisdiction or the rules on State immunity may constitute obstacles to the effective exercise of supervisory and enforcement powers.

63. In this context, I regret that many explanations do not provide clear answers to such vital questions as to whether and to what extent national authorities may exercise jurisdiction over foreign military personnel or transiting aircraft.

64. Under the applicable bilateral and multilateral status of forces agreements, authorities of the sending State usually exercise exclusive jurisdiction over persons subject to its military law. The criminal or civil courts of the receiving State are thus in principle prevented from exercising jurisdiction. The question of whether and to what extent the courts of the receiving State may exercise concurrent jurisdiction is only exceptionally addressed. **Germany** declares that its police may only exercise authority to the extent that the public order and safety of the Federal Republic are jeopardised or violated. **Romania** indicates that waivers of jurisdiction by the receiving State under the Status of Forces Agreements (SOFA) are subject to recall when the Romanian authorities consider that the case is “of particular importance”.

65. Under international law, States are not prevented from exercising their criminal jurisdiction over foreign aircraft. Under Article 4 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft of 14 September 1963 (“Tokyo Convention”),²⁰ a State which is not the State of registration may interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board in the following exceptional 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 maneuver 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.

66. A number of States mention expressly that they exercise jurisdiction over foreign civil and commercial aircraft. French courts are competent for foreign aircraft when they land in **France** after the crime, when the offence has been committed on board during the flight, when the offender or the victim is of French nationality or when the aircraft (excluding staff) was rented by a person residing in France. The **United Kingdom** indicates that Scottish criminal courts have jurisdiction, at common law, over aircraft within or flying over Scotland.

67. **Norway** declares that its authorities would be obliged to prevent any acts which would constitute human rights violations. **Iceland** indicates that if an inspection of aircraft is performed and grounds are established that a criminal act has been committed on board, the police would have full authority to initiate an investigation.

68. Several States declare that principles of immunity recognised under public international law would be an obstacle to law enforcement measures by their authorities. The explanations refer in particular to the Vienna Conventions on Diplomatic and Consular Relations. According to **Spain**, these treaties would apply to foreign agents

only if they are duly accredited as diplomatic or consular agents. Since foreign agents act in official capacity, their action might benefit from immunity *ratione materiae*. This immunity is based on the idea that the individual official is not to be held individually responsible for acts which, in effect, are those of the State. It operates as jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign State through proceedings against the official who carried out the act. The explanations also acknowledge that State aircraft used for official purposes would be subject to the rules on State immunity and thus beyond the reach of criminal jurisdiction of the authorities of the State of transit.

69. Immunity is, however, not absolute. The **United Kingdom** declares that insofar as any official of a foreign agency may be entitled to immunity from legal process, a waiver of immunity can be sought, and if the required co-operation is not forthcoming, the official may be required to leave the UK. **Azerbaijan** and **Latvia** refer more generally to the settlement of questions of criminal liability by diplomatic means. According to the explanation provided by **Norway**, certain serious violations of international law obligations, such as gross human rights violations, may be exempt from immunity. If Norway were to receive clear indications that persons on board a State aircraft could be subject to gross human rights violations, the Norwegian authorities would have to contact the authorities responsible for the aircraft to obtain assurances that such actions will not take place. If such assurances are not provided, there might be consequences for the immunity of the aircraft in question. There could also conceivably be cases where such assurances are not, for various reasons, considered sufficient.

70. **From the explanations provided, it appears that the existing legislative framework in the member States offers, by and large, important safeguards for the protection of the right to liberty and security against interferences by national authorities. However, the existing rules on jurisdiction and State immunity seem to create obstacles for effective law enforcement regarding actions by foreign agents.** It could be argued that the States Parties to the Convention are under an obligation to establish criminal jurisdiction to the extent that this is required to punish offences which constitute serious human rights violations, even if such "violations" are committed by agents of a State not bound by the European Convention on Human Rights. The European Court of Human Rights has found in several cases that the Convention requires efficient criminal-law provisions in order to prevent and sanction serious human rights abuses, such as rape, sexual assault, or domestic slavery.²¹ The Court has also, albeit in the context of civil claims, underlined the importance of access to court. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 paragraph 1, namely that civil claims must be capable of being submitted to a judge for adjudication, if States could remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons.²²

71. **There appears to be a need to establish more precisely the scope and conditions of human rights exceptions to State immunity. So far, an exception has been established only for acts of torture, due to the *ius cogens* nature of the prohibition, which was recognised by international and national courts, in particular the International Criminal Tribunal for the former Yugoslavia,²³ the European Court of Human Rights²⁴ and the British House of Lords.²⁵ The same rationale should be applied to other serious human rights violations, such as enforced disappearances. Under the Statute of the International Criminal Court, the systematic practice of enforced disappearances qualifies as a crime against humanity.²⁶ The issue of human rights exceptions to State immunity could be an area for standard-setting by the Council of Europe.**

2.3. Question 3 – Adequate provisions to deal with alleged infringements of Convention rights

72. The explanations provided describe in some detail the various procedures to ensure an adequate response to any real or potential infringements of the rights and freedoms guaranteed by the Convention. These procedures are not all necessarily of a judicial character. Ombudspersons or similar institutions, to which various member States refer, play an important role in this context.

73. From the explanations given, all the police and criminal authorities have an obligation to investigate any suspected cases of unacknowledged deprivations of liberty of which they become aware. In many States Parties, the authorities have a duty to prosecute in such cases, subject to some usually narrowly defined exceptions. In States where this is not the case, the discretion of prosecuting authorities appears to be limited, and victims are usually granted a right of appeal.

74. There are of course important differences between national systems regarding the organisation and functioning of their police and judicial systems. However, on the whole, the judicial systems of our member States appear to make provision for an independent and impartial official investigation procedure which is in principle capable of satisfying certain minimum standards as to effectiveness established by the Convention. Subject to the rules of jurisdiction and immunity highlighted above, the existing procedures should ensure that criminal penalties are applied to all those who commit or participate in the commission of criminal offences, irrespective of nationality or status.

75. **Switzerland** declares that any victim of a criminal offence committed in this country, irrespective of nationality, is entitled to request assistance from a counselling centre (*centre de consultation*), protection and defence during possible criminal proceedings and, depending on the circumstances, obtain compensation and moral damages. To benefit from this assistance, the perpetrator need not be known. **Sweden** indicates that agents of another State can be held liable under general principles of international law and ordered to pay compensation.

76. **National law in our member States generally provides for the payment of adequate compensation for any personal injury or loss or damage caused directly or indirectly by acts which constitute the offence. Many countries have adopted special legislation concerning unlawful deprivation of liberty. Compensation claims may be brought in either civil or criminal proceedings.**

77. **I regret that many replies do not explain in more detail the conditions under which compensation is provided. Taking into account the background of my inquiry, it would have been useful to indicate whether the existing procedures would also be open to aliens who are not legal residents in the country concerned, but are merely in transit against their will, and whether compensation can be awarded in the event that agents of another State are liable for the damages caused.**

2.4. Question 4 – Any involvement of public officials / any official investigations

i) How have States Parties replied?

78. The fourth question raised in my request consisted of two parts. An indication of how States Parties have replied to them is given below under a) and b) respectively (for further details, see Appendix III).

a) Have any public officials been involved in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty?

79. The question as put in the request was whether, in the period running from 1 January 2002 (or from the entry into force of the Convention if that occurred on a later date) until the present, any public official or other person acting in an official capacity had been involved in any manner – whether by action or omission – in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may

have occurred by or at the instigation of any foreign agency.

80. Most States Parties give a clear and complete reply to the question as formulated:

Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Moldova, Netherlands, Portugal, Romania, [the Russian Federation – see paragraph 82 below] San Marino, Sweden, Turkey, United Kingdom.

*All these replies state that there has been **no involvement** of the kind mentioned in question 4, at least not to the knowledge of the authorities.*

81. Some States Parties give an incomplete reply:

- Some States give a qualified or partial reply, a reply to a question narrower than the one put, or only an indirect reply:

Andorra (no explicit reply on transport), **Croatia** (no explicit reply on transport), **Estonia** (reply limited to the conduct of law enforcement agencies), **Italy** (partial reply limited to involvement of national officials in "flying prisons"), **Norway** (no direct reply but information on investigations into suspect flights through diplomatic channels), **Poland** (the reply on secret detentions does not cover the full period mentioned in the request; no reply on transport), **Serbia and Montenegro** (reply limited to participation in arrest under influence of foreign agencies; no reply as regards transport), **Slovakia** (no reply as regards transport; reply not totally clear regarding deprivation of liberty), **Spain** (no direct reply, but completed and ongoing criminal investigations), **Switzerland** (no direct reply, but completed and ongoing criminal investigations).

*To the extent that a reply is given and within those limits, most of these replies indicate that there has been **no involvement**, at least not to the knowledge of the authorities. Three States Parties did not give a direct reply (**Norway, Spain, Switzerland**). However, this may be explained by the fact that, according to the information they provided, certain investigations are under way (**Spain, Switzerland**) or appear to be continuing (**Norway**).*

- Some replies are (apparently) based on information held by only some authorities:

Andorra (to the extent that a reply has been given, this appears to be based on information of the judicial authorities only), **Austria** (reports from the public prosecutors only), **Greece** (police activities only), **Latvia** (on the basis of information held by the Ministry of Foreign Affairs only), **Monaco** (Directorate of Judicial Services only), **Serbia and Montenegro** (to the extent that a reply has been given, this is based on information held by the Ministry of Justice of Montenegro only), **Slovenia** (police information only), **Ukraine** (information from the Ministry of Justice only).

*These replies all state that there has been **no involvement**, at least not to the knowledge of those authorities which are mentioned in the reply.*

82. One State Party gives a reply which is not fully clear:

Russian Federation (the reply should probably be interpreted as stating that according to the information available to the competent authorities, there has been **no involvement** of the kind mentioned in question 4. However, confirmation that this reading is correct would be useful).

83. Some States Parties have not replied at all:

Bosnia and Herzegovina, Georgia, Lithuania, "the former Yugoslav Republic of Macedonia".

b) Are there any official investigations²⁷ completed or under way?

84. Some States indicate that official investigations of various kinds:

- are under way:

Germany (criminal investigations in two cases), **Greece** (criminal case concerning alleged abduction), **Romania** (parliamentary investigation), **Spain** (criminal investigations in two cases), **Switzerland** (criminal investigation), **United Kingdom** (complaint transmitted to the police);

- have been completed:

Austria (one particular investigation into a specific flight), **Belgium** (inquiries by the authorities, but the matter is kept under review), **Cyprus** (on unacknowledged detentions, inquiry launched by the authorities following Art. 52 request), the **Czech Republic** (inquiry following the Art. 52 request), **Denmark** (reference to information which has been provided to parliament), **Finland** (Government internal inquiries), **Hungary** (Government internal inquiry), **Ireland** (Government internal inquiry, preliminary criminal investigations into suspect flights), **Luxembourg** (investigations into suspect flights as listed by the Parliamentary Assembly), **Malta** (Government internal investigations following Art. 52 request), the **Netherlands** (Government replies to questions put by parliament on suspect flights), **Norway** (investigations into secret flights through diplomatic channels; not fully clear whether these have been completed), **Poland** (investigations regarding secret detention centres), **Portugal** (Government internal inquiry), **Romania** (governmental investigations), **Slovakia** (consultation within the Government), **Spain** (criminal

investigation), **Sweden** (searches of records of suspect flights by airport and civil aviation authorities), **Switzerland** (parliamentary investigation, Federal Office of Civil Aviation investigation).

85. Some States indicate that no official investigations are under way or completed:

Andorra, Armenia, Bulgaria, Estonia, Iceland, Latvia, Moldova, San Marino, Slovenia (as regards police investigations only), **Ukraine**.

86. Some States provide no reply to this question:

Azerbaijan, France, Georgia, Italy, Liechtenstein, Lithuania, Monaco, Russian Federation, Serbia and Montenegro, "the former Yugoslav Republic of Macedonia", Turkey.

a. One State gives a very incomplete reply to this question:

Bosnia and Herzegovina (mere reference to an information request made to various authorities).

ii) Comments

87. The answers received call for an explanation and some comments.

88. In my request I used the term "official investigations" in a broad sense, encompassing not only criminal investigations into specific cases but also inquiries by other national authorities (e.g. Government, Parliament) irrespective of whether they are of a general nature or dealing with specific cases, and of whether they are internal or public. When analysing the replies, I have therefore also taken into account inquiries made within the Government in order to respond to my request under Article 52. However, the results of my analysis of the replies on this point should be read with caution, since in some replies the notion of "official investigations" seems to have been interpreted in a narrow way, as denoting criminal investigations only (i.e. excluding governmental, parliamentary or other inquiries). The wording of the request may not have been sufficiently precise on this point.

89. I am concerned that some States Parties have not replied at all to the question or have given an incomplete reply. This is all the more unacceptable in that, apart from the fact that all States Parties have the obligation under Article 52 to give precise and truthful explanations (see paragraph 12 above), the subject of the fourth question continues to give rise to considerable public debate in the member States and beyond. It is definitely in the public interest that full clarification is obtained in response to the allegations which have been made about involvement of member States of the Council of Europe in secret detention centres and "extraordinary rendition" flights. It cannot be said that the States Parties which have not given a clear and full reply have necessarily acted in bad faith but, at the very least, they have not given sufficient attention to this element of the Article 52 request.

Comparison of replies with the Marty Memorandum

90. This state of affairs is particularly serious as regards those States which have been cited in the allegations referred to in the Information memorandum presented by Mr Dick Marty in January and have nevertheless failed to provide a full and clear reply. **Poland** only provides a very incomplete reply which cannot be considered as an adequate response or sufficient to put an end to the controversy. **"the former Yugoslav Republic of Macedonia"** does not give any reply at all to the questions about involvement and official investigations. **Bosnia and Herzegovina** does not give a reply about involvement and has only provided a very incomplete reply to the question about official investigations. In the latter country, there is however a well-documented case of abduction of six persons, notwithstanding a ruling by the Federal Supreme Court ordering their release.

91. Giving only a partial reply to the question about involvement and not replying at all to the question about official investigations, **Italy** has failed to provide information about the well-known ongoing criminal investigation into the alleged abduction of Abu Omar by CIA agents in Italy, in contrast to **Germany** and **Switzerland** which provide information about ongoing investigations by their own authorities.

92. The replies of two other countries (**Bulgaria, Ukraine**) mentioned in the Marty Memorandum indicate that no official investigations have been undertaken. However, it may be that these countries have understood the term "official investigation" as referring only to criminal investigations. It would also be important to receive information from these countries about whether investigations of another kind (e.g. governmental or parliamentary inquiries) are under way or have been completed. The same point also applies to **Greece**, notably as regards any inquiries into the alleged existence of a secret prison at Souda naval base in Crete (see the Marty Information Memorandum, AS/Jur(2006) 03 rev).

Cooperation between States in investigations under way

93. Finally, as regards official investigations, it is clear that the member States of the Council of Europe should make every effort to assist each other in their endeavours to bring factual information to light. The replies to question 4 provide some examples of such cooperation in the context of ongoing investigations. However, according to the reply given by **Germany**, **"the former Yugoslav Republic of Macedonia"** has yet to respond to the request made in 2005 by the Federal Government of Germany for legal assistance in the context of a criminal investigation by the Munich 1 public prosecution office into a kidnapping case.

V. Conclusions

94. I am grateful to the Governments of the States Parties for providing me with explanations further to my request. The fact that all Council of Europe member States have done so is a clear sign of their commitment to the European Convention on Human Rights and to the Council of Europe.

95. The analysis of the explanations received has reinforced my conviction that it was both necessary and appropriate to use Article 52 in order to seek explanations of the manner in which the internal laws of States Parties ensure the effective implementation of certain Convention rights and freedoms in the light of allegations about secret detentions and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies.

96. The explanations received vary widely in scope and depth. Some replies provide comprehensive information. Others do not address some of the questions in a sufficiently detailed manner or leave some important aspects of these questions unanswered. I shall therefore seek further explanations from these States.

97. There are some basic preliminary conditions to be met as a first step in order to avoid the risk of involvement in activities contrary to the European Convention on Human Rights.

98. All States Parties must ensure that there is adequate criminal law protection. All forms of unacknowledged deprivation of liberty, including aiding and abetting such acts, should be defined as criminal offences under national law. We need adequate sanctions which are commensurate with the gravity of the acts or omissions. It should not be lawful for anybody to be aware of illegal deprivations of liberty and fail to take appropriate action, such as reporting the crime or putting an end to it. It would be appropriate to establish enhanced criminal responsibility for public officials involved in such acts or omissions, including agents of the intelligence services.

99. Detainees should only be held in officially recognised places of detention. As the European Committee for the Prevention of Torture (CPT) has repeatedly stated, no safeguard is more important than the requirement that a person's deprivation of liberty be formally recorded without delay. Records should include data about time of arrival, transfers and names of officers responsible for such transfers.

100. Such traditional basic safeguards are essential, but they are not enough to avoid the risk of member States of the Council of Europe becoming involved in illegal activities such as secret detentions and transfers. Measures must also be taken to ensure that the authorities are effectively capable of detecting any such activities and taking resolute action against them. It is here that the explanations received point to the most significant problems and loopholes in the laws and practice of our member States.

101. On the basis of my analysis of the explanations received, I should like to highlight four areas which require attention both at domestic level and in the framework of the Council of Europe and other international fora:

- i) **The existing legislative and administrative framework for the activities of secret services appears to be inadequate in many of our member States. While there are some mechanisms in place in a number of countries regarding the activities of national secret services, the activities of foreign secret services appear to be insufficiently controlled. We need an appropriate regulatory framework providing for effective safeguards against abuse, democratic oversight by national Parliaments and judicial control in cases of alleged human rights violations. As the explanations of some States Parties show, ways and means can be found to preserve the necessary confidentiality of classified information whilst ensuring adequate controls.**
- ii) **The current international legal framework for air traffic does not seem to provide adequate safeguards against abuse and needs to be rethought. Governments are clearly having problems in exercising meaningful control because the existing standardised procedures in the case of civil aircraft make it difficult for the competent authorities to ascertain whether aircraft transiting through their airspace, whether they land or not, are used for purposes incompatible with internationally recognised human rights standards. At the same time, every State should now enhance their control tools to the maximum extent possible under the current framework.**
- iii) **The relationship between State immunity and human rights should be reconsidered. Torturers and perpetrators of other serious human rights violations such as illegal detentions and enforced disappearances must not be able to hide behind the veil of immunity. International law should not regard it as being contrary to the dignity or sovereign equality of nations to respond to claims against them or their agents. We need to establish clear exceptions to State immunity in cases of serious human rights abuses. This work should be done through co-operation between governments at European level.**
- iv) **Mere assurances that the activities of foreign agents comply with international and national law are not enough. We need effective guarantees and mechanisms to enforce, if necessary, the rights and freedoms enshrined in the Convention. Such guarantees should be set out in international or bilateral agreements and in domestic law.**

102. The governments of States Parties have a duty to investigate the allegations about the involvement of member States of the Council of Europe in secret detention centres and "extraordinary rendition" flights. Under the Convention, every State Party must ensure that its territory is not used for abducting or transferring any person to a country where there is a real risk that he or she may be subjected to torture or inhuman or degrading treatment.

103. As regards the situation of specific countries, it gives rise to serious concern that some States Parties have not replied at all to the question about the possible involvement of their public officials or have given an incomplete reply. This is particularly worrying as regards those States which have been cited in the allegations referred to in the Information memorandum presented by Parliamentary Assembly Rapporteur Mr Dick Marty in January 2006.

104. As regards the next steps to be taken, I shall

– make this report public;

- make public on the Council of Europe website all the replies received from the States Parties;
- where appropriate, send individual follow-up letters under Article 52 to States Parties to seek further explanations or clarifications regarding the information already provided;
- in due course make proposals to the Committee of Ministers for Council of Europe action addressing the more general problems at European level.

105. I am confident that member States will continue to comply with their obligations under Article 52 and provide me, where necessary, with further explanations and information. I shall report again in the light of further replies to be received.

* * *

Appendix I – Letter of 21 November 2005 from the Secretary General to the Ministers of Foreign Affairs of all member States

Strasbourg, 21 November 2005

Dear Minister,

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

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

I should appreciate receiving these explanations before 21 February 2006.

Yours sincerely,

Terry Davis

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

The Secretary General of the Council of Europe,

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

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

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

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

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

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

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

1. Requests the Governments of the High Contracting Parties to furnish an explanation of the manner in which their internal law ensures the effective implementation of the provisions of the Convention and its additional Protocols, as interpreted by the European Court of Human Rights, regarding the following specific issues:

- Explanation of the manner in which their internal law ensures that acts by officials of foreign agencies

within their jurisdiction are subject to adequate controls;

- Explanation of the manner in which their internal law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within their jurisdiction, whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Party or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty;

- Explanation of the manner in which their internal law provides an adequate response to any alleged infringements of Convention rights of individuals within their jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, explanation of the availability of effective investigations that are prompt, independent and capable of leading to the identification and sanctioning of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims;

In the context of the foregoing explanations, an explanation is requested as to whether, in the period running from 1 January 2002 (or from the moment of entry in force of the Convention if that occurred on a later date) until the present, any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission – in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency. Information is to be provided on whether any official investigation is under way and/or on any completed investigation;

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

Appendix II – Responses given by States Parties to questions 1 to 3: indicative list of questions to be (further) addressed.²⁸

State Party	Questions in respect of which further explanations will be requested
Albania	All four questions (letter already sent on 22/2/2006)
Andorra	Question 1.
Armenia	Question 1.
Austria	None.
Azerbaijan	Question 1.
Belgium	None.
Bosnia and Herzegovina	Questions 1, 2 and 3.
Bulgaria	Question 1.
Croatia	Question 1.
Cyprus	Question 1.
Czech Republic	None.
Denmark	Question 1.
Estonia	Question 1.
Finland	Question 3.
France	Question 1.
Georgia	Questions 1 and 2.
Germany	None.
Greece	Questions 1 and 2.
Hungary	None.
Iceland	None.
Ireland	None.
Italy	Questions 1 and 2.
Latvia	Question 1.
Liechtenstein	Question 1.
Lithuania	Question 1.
Luxembourg	Question 1.

Malta	Questions 1 and 2.
Moldova	Question 1.
Monaco	Question 1.
Netherlands	None.
Norway	None.
Poland	None.
Portugal	Question 1.
Romania	Question 1.
Russia	None.
San Marino	Question 1.
Serbia and Montenegro	Question 1.
Slovakia	Question 1.
Slovenia	Questions 1, 2 and 3.
Spain	Question 1.
Sweden	Question 1.
Switzerland	None.
"The former Yugoslav Republic of Macedonia"	Question 1.
Turkey	Questions 1, 2 and 3.
Ukraine	Questions 1, 2 and 3.
United Kingdom	None.

Appendix III – Table containing summaries of the replies given to question 4 of the request²⁹

- Whether, since 1 January 2002 (or since the date of entry into force of the Convention if it occurred later) any public official has been involved in any manner – by action or omission – in the unacknowledged deprivation of liberty of any individual or transport of any individual so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency.

- Information on any official investigation under way or completed.

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation?	By whom	Subject of investigation	Underway	Completed	Results
Albania									
Andorra	1/1/2002	NO	NO REPLY	NO					
Armenia	26/4/200	NO	NO	NO					

a	2								
Austria	1/1/2002	NO	NO	YES 1. General: official request for clarification by Austrian officials to US authorities through the US embassy in Vienna	1. "Austrian officials"	1. Allegations of deprivation of liberty and transport of individuals	1. No information	1. No information	1. No information
				2. Illegal Transport: particular investigation	2. No information			1. 2. YES 2.	2.No substantial information that the flight in question was actually used to illegally transfer terrorist suspects through Austria

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Azerbaijan	15/4/2002	NO	NO	NO REPLY					
Belgium	1/1/2002	NO	NO	YES	"Belgian authorities" It is also stated that the Permanent	Questions as put by the Secretary General		YES	No public official or other person acting in an official capacity was involved

					<i>Control Committee on Police Services</i> was not informed of complaints or denunciations of allegations mentioned in the request of the Council of Europe				
Bosnia & Herzegovina	12/7/2002	NO REPLY	NO REPLY	YES [mere reference to a request for information addressed to several authorities]	Ministry of Justice	Information on secret detentions and actions by officials of foreign agencies	No information	No information	No information
Bulgaria	1/1/2002	NO	NO	NO					
Croatia	1/1/2002	NO	NO REPLY	NO					
Cyprus	1/1/2002	NO	NO	YES	Inquiry with all police departments / districts / services [by Ministry of Foreign Affairs?]	Unacknowledged deprivation of liberty in the period from 1/1/2002		YES	No case of unacknowledged deprivation of liberty has been ascertained (whether by the Republic, or by any foreign agency)

Count	Applica	Public official(s)	Official investigation
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Country	Available starting date for period under review (1/1/2002 or later date)	Involved?		Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
		Deprivation of liberty	Transport of any individual deprived of their liberty						
Czech Republic	1/1/2002	NO	NO	YES Information was obtained from the "competent Czech authorities"	Unclear which authority sought that information	Whether any public officials or other persons acting in an official capacity have been involved in the unacknowledged deprivation of liberty or transport of individuals so deprived of liberty, including such acts occurring at the instigation of agents of another State		YES	No knowledge of any facts indicating such involvement
Denmark	1/1/2002	NO	NO	YES [mere reference to relevant information already provided to Parliament]					
Estonia	1/1/2002	NO	NO	NO					
Finland	1/1/2002	NO	NO	YES	1. Government	1. One specific flight that landed in		1. YES	1. The US Embassy informed

						Helsinki on 16/5/2003, information asked from the Embassy of the United States.			the Government that the aircraft only carried cargo meant for the US embassy
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Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Finland cont.					2. Government, inter-departmental	2. Whether suspected terrorists had been placed in Finnish prisons or transported on the order of the Prison Service in Finland.		2. YES	2. No, this was not the case and there is no reason to believe that any public official or other person acting in an official capacity nor officials of foreign agencies in Finland have been involved in the unacknowledged deprivation of liberty of any individual.
France	1/1/2002	NO	NO	NO REPLY					
Georgia	1/1/2002	NO REPLY	NO REPLY	NO REPLY					

Germany	1/1/2002	NO	NO	YES [two investigations on suspicion of unlawful deprivation of liberty in Germany have been launched]	Public prosecution offices Zweibrücken and Munich I	1. Alleged kidnapping of an Egyptian citizen in Italy who has allegedly been taken to Egypt via the US military airbase in Ramstein	1. YES		
						2. Alleged kidnapping of a German citizen of Lebanese origin allegedly taken by the US authorities from "the former Yugoslav Republic of Macedonia" to Afghanistan	2. YES		

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Underway	Completed	Results
Greece	1/1/2002	NO (prior to the case)	NO (prior to the case)	YES	Public Prosecutor's	Alleged abduction	YES (Public Prosecution)		

		currently being investigated)	currently being investigated)		Office at the Athens Court of First Instance (following a complaint by the President of the association "Pakistani Community of Greece – the Unity")		or at the Supreme Court of Justice ordered the urgent examination of the case)		
Hungary	1/1/2002	NO	NO	YES	Official written enquiry by Ministry of Foreign Affairs to all relevant Government authorities	Questions as put by the Secretary General		YES	No involvement ; No knowledge of any secret detention or rendition activities by any foreign authority on the territory or in the airspace of Hungary.
Iceland	1/1/2002	NO	NO	NO					
Ireland	1/1/2002	NO	NO	YES	1. The Government	1. Questions as put by the Secretary General		1. YES	1. No indication found of unacknowledged deprivation of liberty or transportation of any individual so deprived of their liberty. No active or passive involvement of any

									official.
					2. Director of Public Prosecution	2. Investigation in respect of 2 out of 3 complaints made to the Police on allegations relating to CIA flights transporting kidnapped terrorism suspects through Shannon Airport.		2. YES	2. Files on two of the complaints were considered serious enough to be sent to the Director of Public Prosecution but no action was taken because of a lack of evidence of any unlawful activity.

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Italy	1/1/2002	NO REPLY	NO	NO REPLY					
Latvia	1/1/2002	NO	NO	NO					
Liechtenstein	1/1/2002	NO	NO	NO REPLY					
Lithuania	1/1/2002	NO REPLY	NO REPLY	NO REPLY					
Luxembourg	1/1/2002	NO	NO	YES	Competent authorities (unspecified)	Overflight or landing of "suspect flights" as listed by		YES	Two aircrafts mentioned on the Parliamentary

						the Parliamentary Assembly			<p>Assembly's list of 41 "suspect aircraft" landed in Luxembourg:</p> <ul style="list-style-type: none"> - on 16/11/2005, a Beech 200 with identification number N312ME landed from Corfu at 09.42 and departed to Dublin at 11.05. - on 31/01/2006, a Boeing 737-300 with identification number N368CE landed from Frankfurt at 11.44 and departed to Frankfurt at 16.15. <p>In both cases, no passenger left or entered the aircraft.</p>
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Country	Applicable starting date for period under	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any	Official investigation?	By whom	Subject of investigation	Under way	Completed	Results

	review (1/1/2002 or later date		individual deprived of their liberty	(yes/no/no reply)		<i>tion</i>			
Luxembourg cont.									Since 7/2/2006, Luxembourg airport authorities are required to inform immediately the competent Minister in case a flight plan indicates a planned landing of one of the aircrafts mentioned on the Parliamentary Assembly list. As necessary, competent authorities will inspect the aircraft.
Malta	01/01/2002	NO	NO	YES	Competent authorities (unspecified)	Questions as put by the Secretary General		YES	No public official or other person acting in an official capacity has been involved by action or omission.
Moldova	1/1/2002	NO	NO	NO					
Monaco	30/11/2	NO	NO	NO					

	005			REPLY					
Netherlands	1/1/2002	NO	NO	YES [replies were given to questions from the Parliament]	Parliamentary questions to the Minister of Foreign Affairs and the Deputy Minister of Transport	Flights that landed on Dutch territory of which press reports indicated that it were 'CIA-flights'		YES	Details on the respective flights were provided. In one case, the name of the company that owned the plane was provided. There was no information linking these flights to the CIA and no concrete suspicion of a criminal offence

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Norway	1/1/2002	NO REPLY	NO REPLY [but information about investigations]	YES	Ministry of Foreign Affairs, Ministry of Transport and Communications	Information sought from the US authorities about 2 specific cases of intermediate landings		YES (?)	Assurances given by the US Embassy: the United States abide by Norwegian laws, respect Norwegian territorial sovereignty

						in Norway			and will not use Norwegian airports without prior consultation with the Norwegian authorities.
Poland	1/1/2002	NO	NO REPLY	YES	Competent authorities (unspecified)	Existence of secret prisons or prisoners suspected of terrorism detained on the Polish territory in violation of the Polish laws and international conventions		YES	There are no such secret prisons in Poland and there are no prisoners so detained (Declaration of 10/11/2005)
Portugal	1/1/2002	NO	NO	YES	1. Government gathered information through the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Ministry of Finance, the Ministry of National Defence, the Ministry of Justice and the Ministry of Public Works, Transport and	1. Questions as put by the Secretary General		1. YES	1. No evidence for any involvement of Portuguese authorities or officials in unacknowledged deprivations of liberty or transport. No evidence that any aircraft used for rendition purposes used Portuguese

					Communication				airspace. US assurances that the sovereignty of the Portuguese State, any bilateral agreements or international law were not violated.
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Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Underway	Completed	Results
Portugal cont.					2. Ministry of Home Affairs and Ministry of Justice	2. Secret detention centres		2. YES	2. The Ministry of Justice certified that no secret detention centres exist and guarantees that no person arrested in circumstances of the type described by the media has been admitted to any Portuguese prison.
Romania	1/1/2002	NO	NO	YES	1. Official investigations:	1. unacknowledged		1. YES	1. Confirmation that no

					Several governmental authorities	deprivation and illegal transport			unacknowledged deprivation of liberty or illegal transport took place on Romanian territory
					2. Parliamentary investigation: Investigation Committee set up by the Romanian Senate	2. Allegations concerning the existence of CIA detention centres on Romanian territory / flights chartered by CIA, which might have transported persons accused of terrorist acts	2. YES (Preliminary report expected by 15/2/2006)		
Russian Federation	1/1/2002	NO [reply unclear]	NO [reply unclear]	NO REPLY					
San Marino	1/1/2002	NO	NO	NO					
Serbia & Montenegro	3/3/2004	NO	NO REPLY	NO REPLY					

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Slova	1/1/200	NO	NO	YES	Minister	Existence of		YES	No

kia	2		REPLY		of Foreign Affairs, in contact with Minister of Justice, Minister of Defence and Minister of Interior, in order to prepare the reply to the Article 52 request	cases unacknowledged deprivation of liberty			evidence for any cases of unacknowledged deprivation of liberty.
Slovenia	1/1/2002	NO	NO	NO					
Spain	01/01/2002	NO REPLY	NO REPLY [but information provided about investigations]	YES	1. Public prosecutor's office of Baleares (<i>Fiscalía de Baleares</i>) acting on a complaint by a member of Parliament (there had previously been an investigation by the competent police authorities [<i>Direcció n</i>	1. US airplanes transiting through the Baleares in 2005		1. YES	1. Public prosecutor at the <i>Tribunal Superior de las Islas Baleares</i> discontinued proceedings because of lack of evidence for the commission of an offence.

					General de la Guardia Civil)				
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Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Underway	Completed	Results
Spain cont.					2. Tribunal of first instance of Mallorca (<i>juzgado nº 7</i>) acting on a complaint by a group of lawyers from the Balears' bar	2. US airplanes transiting through the Balears in 2005	2. YES (In November 2005) (the judge decided to transfer the case to the <i>Audiencia Nacional</i> for reasons of competence, a decision that was contested by the prosecutor)		
					3. General Prosecutor of the State (<i>Fiscal General del Estado</i>)	3. US airplanes transiting through the Canary Islands in 2005 (this enquiry concerns three types of flights: repatriati	3. YES (in November 2005)		

						on of illegal aliens to Nigeria and Liberia, military and civil flights)			
Sweden	1/1/2002	NO	NO	YES	LFV Group (Swedish Airports and Air Navigation Services) and the Swedish Civil Aviation Authority	Investigation concerned flights made by aircraft registered in the US to and from Swedish airports			Reports state that it cannot be concluded that any of the more than 19,000 flights registered between 1/1/2002 and 17/11/2005 have been commissioned by the CIA

Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Switzerland	1/1/2002	NO REPLY (but see official investigation columns and information is provided about the Padilla case:	NO REPLY (but see official investigation columns).	YES 1. Criminal procedure initiated.	1. Federal Public Prosecutor's Office (<i>Ministère public de la Confédération</i>)	1. Alleged acts unlawfully executed by a foreign State (transfer via Switzerland of persons unlawfully deprived of their	1. YES		

		allegations about unlawful acts by Swiss agents are wholly unfounded)				liberty would be contrary to the Criminal Code): Abu Omar case (alleged abduction by US agents from Italy and transfer via Swiss airspace to Germany)		
			2. Parliamentary investigation.	2. <i>Délégation des commissions de gestion</i> (responsible for controlling activities relating to State security and intelligence)	2. Establish the information available to the federal authorities and steps made in relation to aircraft used for the transportation of unlawfully detained terrorist suspects via Switzerland and whether intelligence authorities were aware of the CIA activities.		2. YES (on 31/1/2006)	2. The Swiss authorities have no evidence that the Swiss airspace or airports have been used by the CIA for illegal purposes. The only case of doubt is being investigated (see above). The Swiss authorities have acted correctly by making clear to the US authorities that

									they would not condone extraordinary renditions. As regards the intercepted Egyptian fax implying that there would be secret detention places in Europe, the Swiss authorities consider that it provides no evidence of the existence of these detention centres.
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Country	Applicable starting date for period under review (1/1/2002 or later date)	Public official(s) involved?		Official investigation					
		Deprivation of liberty	Transport of any individual deprived of their liberty	Official investigation? (yes/no/no reply)	By whom	Subject of investigation	Under way	Completed	Results
Switzerland and cont.					3. OFAC (Federal Office for Civil Aviation)	3. Identify movement of suspect aircraft mentioned in the media		3. YES	3. Between December 2001 and December 2005, four suspect

						and by NGOs			airplanes landed and 74 (as at 5/1/2006) flew over Swiss territory. All official aircraft had the necessar y authorisat ion. Private aircraft do not need such authorisat ion. None of these aircraft had directly arrived or flown from Guantána mo Bay. It could not be establish ed whether they carried out connectio n flights to or from Guantána mo.
“the former Yugosla v Republi c of Macedo nia”	1/1/200 2	NO REPLY	NO REPLY	NO REPLY					
Turkey	1/1/200 2	NO	NO	NO REPLY					
Ukraine	1/1/200 2	NO	NO	NO					

United Kingdom	1/1/2002	NO	NO	YES	1. Allegations by the UK NGO Liberty and others have been passed to the police	1. Use of UK airspace for transfer of detainees to locations where they may be subjected to ill-treatment	1. YES		
					2. Searches by officials of the Foreign and Commonwealth Office of records of rendition flights (records back to 5/1997)	2. Rendition by the US through UK territory or airspace			

Appendix IV – Extracts from the Information Memorandum II of the Parliamentary Assembly Committee on Legal Affairs and Human Rights (Mr Dick Marty, rapporteur), and additional information regarding “the former Yugoslav Republic of Macedonia”

Extracts from the Information Memorandum II of the Parliamentary Assembly Committee on Legal Affairs and Human Rights, Mr Dick Marty (rapporteur)³⁰ (see paragraphs 90-92 above):

“A. Introduction

[...]

3. I am particularly struck by the fact that it is in the United States that the discussions first really took off. Following an article in The Washington Post and a report by Human Rights Watch (HRW) published in early November, the international media have reported allegations that the CIA is or was running a system of secret prisons, including prisons in certain “central and east European democracies”. Numerous aircraft chartered by the CIA allegedly flew over, to and from European territory (benefiting, therefore, from airport facilities in Council of Europe member states) in order to transport suspects, completely illegally, to these secret centres.

4. Whereas The Washington Post did not mention any countries by name (further to an agreement entered into with the United States Government, which, to my mind, suggests that the reports are true), HRW expressly mentioned Poland and Romania. The press reports also quote denials by officials from Poland³¹ and Romania, but also Latvia, the Czech Republic, Georgia, Armenia and Bulgaria.

5. Since then, recent further information has extended the list of countries allegedly concerned by the existence of secret detention centres. According to a fax from the Egyptian Ministry of European Affairs to the Egyptian Embassy in London, intercepted by the Swiss intelligence services, such centres existed in Romania, Bulgaria, Macedonia, Kosovo and Ukraine.

6. On 5 December 2005 ABC reported, in turn, the existence of secret prisons in Poland and Romania that had apparently been closed following The Washington Post's revelations. According to ABC, eleven suspects detained in these centres were then transferred to CIA facilities in North Africa. They were allegedly submitted to the harshest interrogation techniques (so-called "enhanced interrogation techniques"). I would point out that the ABC article confirming the use of secret detention camps in Poland and Romania by the CIA was available on the Internet for only a very short time before being withdrawn. This strikes me as a telling indication of the pressure put on the media in this affair (in this particular case, the pressure was apparently brought to bear direct by the CIA)."

[...]

C. Criminal investigations and other reactions

a. Council of Europe member countries

i. Overview

25. In two countries (Italy and Germany) judicial investigations have begun into "abduction" of persons subsequently transported to Guantánamo, Afghanistan and other detention centres by means of aircraft belonging to entities with hidden direct or indirect links to the CIA. The Italian prosecution service has even issued arrest warrants against CIA agents after the violent abduction of a Muslim, Abu Omar, in a Milan street in February 2003. The German judicial authorities are taking part in the investigation and have themselves begun investigating the case of a German citizen of Lebanese origin, Khaled al Masri. After being arrested by mistake in Macedonia he was reportedly taken to Kabul for interrogation.

[...]

26. The Polish Government ordered an enquiry into the alleged existence in Poland of secret CIA detention centres. The findings were to have been made known in December, but so far none have been published (although a parliamentary committee had been informed of these findings). On 21 December 2005, I wrote to the head of the Polish delegation to the Parliamentary Assembly, Mr Iwinski, asking him to let me have the findings as soon as possible.

[...]

32. With regard to Bosnia and Herzegovina, their American lawyer³² has sent me a detailed account of the case of six Bosnians abducted by American agents on Bosnian soil and taken to Guantánamo Bay, despite a Bosnia and Herzegovina Federal Supreme Court judgment ordering their release after police investigation had failed to uncover the slightest evidence against them. I shall be following developments in the case as part of my further investigations.

[...]

ii. The more detailed cases of Italy and Switzerland

- Italy

41. At midday on 17 June 2003 an Egyptian citizen, Hassam Osama Mustafa Nasr, known as Abu Omar, was abducted in the middle of Milan. Thanks to an outstanding and tenacious investigation by the Milan judiciary and the DIGOS police services, Abu Omar's is undoubtedly the best known and best documented case of "extraordinary rendition".

42. Via the military airbases at Aviano (Italy) and Ramstein (Germany) Abu Omar was flown to Egypt, where he was tortured before being released and re-arrested. To my knowledge no proceedings were brought against Omar in Egypt.

43. The Italian judicial investigation established, beyond all reasonable doubt, that the operation was carried out by the CIA (which has not issued any denials). The Italian investigators likewise established that the presumed leader of the abduction operation – who had worked as the American consul in Milan – was in Egypt for two weeks immediately after Omar was handed over to the Egyptian authorities. It may safely be inferred that he took part, in one way or another, in Omar's interrogation.

44. The proceedings instituted in Milan are concerned with 25 American agents, against 22 of whom the Italian authorities have issued arrest warrants.

45. Abu Omar was a political refugee. Suspected of Islamic militancy, he had been under surveillance by the Milan police and judicial authorities. As a result of the

surveillance operation, the Italian police were probably on the point of uncovering an activist network operating in northern Italy. Abu Omar's abduction, as the Milan judicial authorities expressly point out, sabotaged the Italian surveillance operation and thereby dealt a blow to antiterrorist action.

46. Is it conceivable or possible that an operation of that kind, with deployment of resources on that scale in a friendly country that was an ally (being a member of the coalition in Iraq), was carried out without the national authorities – or at least Italian opposite numbers – being informed? The Italian Government has denied having been informed. The presence on Italian territory of at least 25 foreign agents who abducted someone who had been granted political asylum and was already under police surveillance might have been expected, if not to create a diplomatic incident, then at least to trigger a sharp response from the national authorities. As far as I know, there was no such response. A further interesting point is that the Italian justice minister has so far not forwarded to the American authorities the Milan judicial authorities' requests for assistance and extradition.

47. Abu Omar's abduction is a perfect illustration of "extraordinary rendition". It is a clear indication that the method exists, together with complex logistic support in various parts of Europe and considerable deployment of personnel. It also plants doubts and raises the question of involvement of national authorities at one or other level.

[...]"

* * *

Additional information which has been widely reported:

"the former Yugoslav Republic of Macedonia"

According to information publicly available regarding the case of Mr Khaled el-Masri (see paragraph 25 in the extracts of the Marty Information Memorandum above), the reason for his arrest at a border checkpoint on 31 December 2003 would have been due to his name being on an Interpol terror watch list, which in fact concerned another person. It is reported that senior officials of "the former Yugoslav Republic of Macedonia" and the United States have stated that after his arrest Mr Khaled el-Masri was held in a hotel in "the former Yugoslav Republic of Macedonia" for several weeks, where he was questioned by the CIA. The authorities of "the former Yugoslav Republic of Macedonia" have publicly denied that Mr Khaled el-Masri had been held illegally. Mr Khaled el-Masri has alleged that by January 2004 he was transported to Afghanistan where he says he was held and beaten during the next five months.

* * *

Note ¹ See the references in the Information Memorandum II on Alleged secret detentions in Council of Europe member States, presented by rapporteur Mr Dick Marty to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, doc. AS/Jur (2006) 03 rev of 22 January 2006.

Note ² The following observations are drawn from a report prepared in 2000 by three eminent experts in international human rights law (Messrs. Tamas Ban, Frédéric Sudre and Pieter van Dijk). See their Consolidated report containing an analysis of the correspondence between the Secretary General of the Council of Europe and the Russian Federation under Article 52 of the European Convention on Human Rights, SG/Inf(2000)24 of 26 June 2000, paragraph 6.

Note ³ *Kurt v. Turkey*, judgment of 25 May 1998, §§ 123-124.

Note ⁴ It may also be noted that on the basis of the information available to him, the UN Special Rapporteur on torture has taken the view that the United States practice of "extraordinary rendition" constitutes a violation of Article 3 of the UN Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture). See UN Human Rights Rapporteurs' report on the situation of detainees at Guantánamo Bay, UN Doc. Future E/CN.4/2006/120 of 15 February 2006, § 55.

Note ⁵ See, *mutatis mutandis*, *Ilascu and Others v. Moldova and the Russian Federation*, judgment of 8 July 2004, § 322.

Note ⁶ See Article 16 of the draft Convention on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.

Note ⁷ See *Controversy Continues Regarding Detainees Held by the CIA, Renditions to Other Countries*, 99 American Journal of International Law 706 (2005) with references to press reports in the US.

Note ⁸ "The United States' 'Disappeared' – The CIA's Long-Term 'Ghost Detainees'", Human Rights Watch Briefing Paper, October 2004, available at < <http://www.hrw.org/backgrounder/usa/us1004/>>.

Note ⁹ *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64, § 159; see also Article 7 of the International Law Commission's Draft Articles on the responsibility of States for internationally wrongful acts, p. 104.

Note ¹⁰ *Ilascu and Others v. Moldova and the Russian Federation*, judgment of 8 July 2004, § 331.

Note ¹¹ *Gongadze v. Ukraine*, judgment of 8 November 2005, § 165; *Kiliç v. Turkey* (no. 22492/93), judgment of 28 March 2000, §§ 62-63, ECHR 2000 III.

Note ¹² *Öcalan v. Turkey*, judgment of 12 May 2005, §§ 83-90; *Stocké v. Germany*, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167.

Note ¹³ See, *mutatis mutandis*, *Ilascu*, § 333.

Note ¹⁴ See *Kurt v. Turkey*, judgment of 25 May 1998, § 124.

Note ¹⁵ **Slovakia indicates more generally that officials of foreign agencies have no particular status in the Slovak Republic.**

Note ¹⁶ **Recommendation 1713 (2005) Democratic oversight over the security sector in member States.**

Note ¹⁷ See Article 16 of the Chicago Convention.

Note ¹⁸ Article 3bis § b.

Note ¹⁹ See 'NATO Transformed', 2004 at <http://www.nato.int/docu/nato-trans/html_en/nato_trans01.html> and the US Department of Defense, Fact Sheet of 7 June 2002, 'International contributions to the War against terrorism, at <<http://canberra.usembassy.gov/hyper/2002/0628/epf504.htm>>.

Note

Note ²⁰ The Convention states in article 1 § 4 that it 'shall not apply to aircraft used in military, customs or police service'.

Note ²¹ See *X and Y v. the Netherlands*, judgment of 26 March 1985; *M.C. v. Bulgaria*, judgment of 4 December 2003; *Siliadin v. France*, judgment of 26 July 2005.

²² *Al-Adsani v. the United Kingdom*; judgment of 21 November 2001, §47; *McElhinney v. Ireland*, judgment of 21 November 2001, §24; *Fogarty v. United Kingdom*, judgment of 21 November 2001, §25.

Note ²³ ***Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998.**

Note ²⁴ ***Al-Adsani v. the United Kingdom*, judgment of 21 November 2001, § 61.**

Note ²⁵ ***R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197-199; *A and Others v Secretary of State for the Home Department* [2005] UKHL 71 of 8 December 2005.**

²⁶ **Article 7 § 2 (1) reads as follows:**

“Article 7 - Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ...

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(i) Enforced disappearance of persons;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.

Note ²⁷ See the remark in paragraph 88 below.

Note ²⁸ See paragraphs 32-77 of the report. This appendix only consists of a formal and indicative overview, in light of Article 52 requirements. For each country those questions are indicated on which further explanations are necessary.

Note Note that while in some cases no questions have been indicated as needing further explanations, some clarifications or information on specific aspects of the three questions may nonetheless be necessary.

Note For a substantive analysis of the replies received in the light of the rights and freedoms guaranteed by the ECHR, see Section IV of the report.

Note ²⁹ This Appendix must be read in conjunction with the text of Section IV concerning the fourth question.

Note See the Addendum to this Report for the full text of the replies given (to be published on the Council of Europe website: <http://www.coe.int>).

Note ³⁰ 22 January 2006, AS/Jur (2006) 03 rev.

Note ³¹ “ A denial that was firmly reiterated by President Aleksander Kwasniewski on 7 December 2005.”

Note ³² “ Stephen H. Oleskey, of the law company WilmerHale.”

Other documents

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