IRISH HUMAN RIGHTS COMMISSION
AN COIMISIÚN UM CHEARTA DUINE

Submission to the European Parliament's *Temporary Committee on Rendition*

28th November 2006

Suzanne Egan on behalf of the Irish Human Rights Commission

Mr. Chairman, Ladies and Gentlemen. I would also like to begin by stating that it is a great honour to address this Committee and I hope that our submission will be of assistance to you in your extremely important work. As Dr. Manning has already indicated, my role here will be to inform you of the nature of our legal advice to the Irish government regarding the possible use of Shannon Airport by the CIA for the purposes of rendition. I shall briefly outline the reasons why the Commission chose to exercise its powers in relation to this issue; the content of our legal advice to government; and the responses thus far received. I understand that you already have copies of the Commission's submissions to government so I will just concentrate on the main points.

The Commission first exercised its statutory powers in relation to this issue on 21st December 2005. Concern over the possible use of Shannon Airport by the CIA for the purposes of "extraordinary rendition" had been raised in the Irish media and in other quarters for some time. Amnesty International had reported on the 5th of December 2005 that six planes used by the CIA for renditions had made 800 flights in and out of European airspace, which included 50 landings at Shanonn airport. The issue had at that stage also been raised in the Irish Parliament, where parliamentary questions had been put to the Irish Foreign Minister, Mr. Ahern, about the matter.[1] The Commission was also aware of international investigations taking place at a broader level regarding rendition by the CIA of detainees to secret detention facilities in Europe and beyond - in particular, the investigations being conducted at that time by Senator Dick Marty and the inquiry being conducted by the Secretary General of the Council of Europe, Mr. Terry Davis, pursuant to Article 52 of the *European Convention on Human Rights*.

[1] PQs asked on 8th December 2005 and again on 14th December 2005.

Based on these facts, the Commission decided to exercise its statutory powers under section 8(a) of the Human Rights Commission Act *"to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights"* and section 8(d) of the Act which authorises the Commission to make recommendations to government *"to strengthen, protect and uphold human rights in the State"*. Accordingly, on the 21st of December 2005, we advised the government that it should seek the agreement of the US authorities to inspect aircraft suspected of involvement in rendition. This advice was based on our analysis of the State's obligations under the Constitution and international human rights law regarding the right to be free from torture, inhuman or degrading treatment or punishment. The specific detail of our advice is in the Resolution which we released publicly on the 23rd of December 2005 which I believe has been circulated to this Committee. Suffice to say, the primary focus of the Commission at that stage was on the preventative aspect of the guarantee against torture, inhuman or degrading treatment enshrined in the United Nations Convention against Torture and also implicit in Article 3 of the ECHR. Based in particular on the case law of the European Court of Human Rights, the Irish Commission took the view that the State should conduct an official investigation where an arguable claim is raised that a breach of Article 3 of the Convention is being committed by third parties (which in our view includes agents of a foreign state) within the jurisdiction of the state. The principle of *non-refoulement* inevitably requires that such an investigation also takes places where the state's territory is being used to facilitate the transportation of any person to a places where there is a risk of ill-treatment in violation of Article 3. In that resolution, we also indicated our view that diplomatic assurances were not in themselves sufficient to fulfil a state's obligations to guard against torture or ill-treatment. This view was based, in particular, on the decision of the Committee Against Torture in the case of *Agiza v Sweden*, the decision of the European Court of Human Rights in *Chahal v United Kingdom* and the views of the UN *Special Rapporteur on Torture* in his August 2005 report to the UN Commission on Human Rights. I should also point out that we were aware at that stage that legally, the Irish authorities had the right to search all civil aircraft which were the subject of these allegations. However, we believed that our proposal to seek permission constituted a non-confrontational method of resolving the matter.

On the 5th of April, 2006, we received a reply from the Minister for Foreign Affairs regarding this advice. His letter indicated that the government had rejected the Commission's advice regarding the impermissibility of diplomatic assurances in the particular context at hand. In its view, international case law regarding assurances had only arisen in the context of extradition and expulsion of particular, named individuals from a Contracting State to another State, whereas allegations regarding extraordinary rendition, on the other hand, and I quote "involve *unsubstantiated claims that unidentified persons might be, or might have been illegally transported through Irish territory en route to unspecified destinations"*. In the government's view, the assurances which it had received from the US authorities are "*factual, are unqualified and are to the effect that no prisoners have or will be transferred through Irish airports without the government's permission.* I think it is fair to say that the government's response did not deal substantially with the main thrust of our legal advice to it to the effect that it was obliged to investigate the allegations of rendition. It was implicit in the reply that the government did not deem any such investigation to be necessary, given its satisfaction with the diplomatic assurances received.

On 24th May 2006, we then issued a response to the Minister for Foreign Affairs. This is a very detailed response which again I believe members of the Committee have before you. In it, we outlined the many developments that had occurred since our initial advice to government in December 2005. These included, of course, the draft interim report which had been issued by this Committee; the section 52 report of the Secretary General of the Council of Europe; the Advice of the Venice Commission; the report published by Amnesty International on 5th April 2006 – in which landings at Shannon were specifically mentioned again. On 4th April 2006, the Irish Minister for Transport had confirmed in Parliament that three planes cited in the Amnesty Report as being linked to rendition operations had landed 48 times at Shannon airport. The carrying out of rendition operations involving those planes were also cited in the draft interim report of this Committee published on 24th April 2006.[2] Senator Dick Marty had also at that stage circulated a list of suspicious planes which he was using as part of his inquiry.

In the view of the Irish Human Rights Commission, the frequency of landings at Irish airports by aircraft known to be used for "rendition" operations gave rise to very serious concerns that at least some of those flights may have been facilitated by the use of Shannon airport. On the strength of these concerns, we reiterated our strong advice to government regarding the duty to investigate the allegations. We rejected the government's assertion of its absolute right to rely on diplomatic assurances from the US government that prisoners are not being transported through the airport without its permission, relying again, in particular on the decision of the Committee Against Torture in the case of *Agiza v Sweden*. We were also fortified in our views by the Report of Mr. Terry Davis in which he stated generally that existing procedures in relation to civil aircraft were ineffective in Member States in obtaining enough information to monitor whether they were breaching the Convention. Mr Davis in that report drew attention to the fact that in Ireland "States applying for over flight permissions are not systematically requested to provide passenger lists or information about cargo, even though this would be possible". Mr Davis also asserted in that report that:

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

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[2] Specifically, Plane **N379P** (later re-registered as **N8068V** and then **N44982**) – owned by Premier Executive Transport services – nicknamed the Guantanamo Express and used to take Ahmed Agiza from Sweden to Egypt. Cullen said it landed at Shannon 12 times.

N313P A Boeing 737-7T aircraft registered by Stevens Express Leasing Inc and then by Premier Executive Transport Services and later re-registered by Keeler and Tate Management. It took Khaled-El-Masri to Afghanistan in January 2004. Amnesty recorded it as stopping in Shannon 23 times and Dublin twice. Minister Cullen stated that it had landed at Shannon 14 times.

N85VM – re-registered as **N227SV** – owned by Assembly Point Aviation Inc – used in the transportation of Abu Omar to Egypt. Minister Martin said it landed at Shannon 19 times – Amnesty 30 times and once in Dublin.

We also referred to the advice of this Committee in its interim report that governments should not try to limit their responsibilities by reliance on diplomatic assurances. Accordingly, we advised government that the only form of diplomatic assurances that would meet our constitutional and international obligations would be ones that were fully legally enforceable and which were accompanied by an effective regime of monitoring and inspection of aircraft suspected of involvement in rendition operations.

We also stated our view that Ireland's international obligations are engaged whenever US aircraft landing at Shannon are not actually carrying prisoners but are on their way to collect prisoners for the purposes of rendition to torture in third countries or Guantanamo Bay, or where they are returning after such rendition. While we have not seen the precise content of the assurances provided to the US government to the Irish government, it does not appear from information thus far given by the government regarding those assurances that they cover these aspects of a flight-path involving rendition where an Irish airport is potentially involved.

In conclusion, then, the Commission urged the government to implement a regime of monitoring and inspection of aircraft – in the first place with the agreement of the US authorities, or in default of agreement, on demand.

The Commission did receive a substantive response from the Minister for Foreign Affairs to this advice on 25th July 2006 in which he welcomed the dialogue with the Commission on this subject. However, on the legal issues, the Minister does not believe that any further action is required of the government in regard to the obligation to investigate activities. The Minister states that all credible complaints have been investigated by the police force and has repeated to us the government's position that persons with specific evidence of illegal activity should present it to the police. (On this point, the Commission had previously indicated the extreme unlikelihood of private citizens having access to such evidence given the secretive nature of the activity in question). On diplomatic assurances, the Minister's response again seeks to distinguish all previous case law on this issue on the basis that it only relates to cases involving the obligation of *non-refoulement* where the respondent state is *directly* responsible for the return of the person in question to a receiving state. Therefore, the government appears to be of the view that the case law on diplomatic assurances is simply inapplicable to transit states which *may* directly or indirectly be assisting in the rendition of a person by a third state.

I should mention at this point that by the time this detailed legal response was received at the Commission's offices, the term of office of the Commissioners who had given the original advice had expired. A new Commission was recently appointed on 1st October, but it has not at this stage had an opportunity to formulate a response to this position. It may be that the new Commission, and indeed this Committee, may seek to challenge the Minister's view that the obligation of *non-refoulement* does not apply in this context, particularly in the light of the Venice Commission's very clear legal advice that:

"The prohibition to transfer to a country where there exists a risk of torture or ill-treatment also applies in respect of the transit of prisoners through the territory of

Council of Europe States; they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk".

The Commission's clear view to date has been that the case law on diplomatic assurances must, by extension, apply to a transit state like Ireland and does not simply apply to the rendering state.

I trust that this information will be of assistance to the Committee in your work.

The following points were made by Dr Maurice Manning during the course of questions from MEP's.

The advice of the Irish Human Rights Commission to government has been consistent on this issue since December 2005 when evidence first emerged into the public domain that Shannon Airport may have been used to facilitate rendition operations by the CIA.

That advice has essentially been two fold:

First, that under our domestic and international human rights obligations, the State has a duty to inspect flights suspected of involvement in rendition operations.

And secondly that diplomatic assurances are not in themselves sufficient to fulfil a state's obligations to guard against torture or ill-treatment.

The Commission has based its advice to government on the previously documented concerns about stopovers at Shannon Airport by numerous organisations including the Council of Europe and Amnesty International.

Suspicious activity regarding planes known to have been involved in rendition operations and which have used Shannon Airport in the past is now well documented.

Whether the figure of 147 stopovers is being cited or 48 – is not material. The human rights obligations are the same.

We told the Committee that we did not have a "smoking gun" as a means of explaining to it that we were not there to give evidence about stopovers but rather to give our legal analysis of the human rights obligations on the State in regard to this issue.