

COMMENT ON THE AGREEMENT BETWEEN THE EU AND KENYA ON THE TRANSFER OF PERSONS SUSPECTED OF PIRACY TO KENYA.

In this comment, the Meijers Committee wishes to express its concerns regarding the agreement between the EU and Kenya on the transfer of persons suspected of piracy to Kenya. With a view to the widespread use of torture and ill-treatment in prisons in Kenya reported by various authoritative international sources, the Meijers Committee recommends the Dutch government not to transfer persons suspected of piracy to Kenya, but to find alternative locations to bring them to trial.

On 19 December 2008, the Dutch government decided to participate in the EU operation NAVFOR-Atalanta, the EU military operation to deter and prevent acts of piracy off the Somali coast. With a view to prosecution of persons suspected of having committed acts of piracy and detained by EUNAVFOR, the Council of the European Union approved on 26 February 2009 the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of piracy (Council Decision 2009/293/CFSP). Such an agreement has not (yet) been concluded in the context of the operation *Allied Protector* led by NATO.

The Dutch public prosecutor [*Openbaar Ministerie*] has decided to prosecute five piracy suspects in the Netherlands who assaulted a merchant vessel flying a Dutch flag and were apprehended by the Danish navy in January this year. After having apprehended nine persons suspected of piracy in April this year, the Dutch navy decided to immediately release the persons, who were brought to the shores of Somalia and put into custody by the authorities of Somalia. To the knowledge of the Meijers Committee, no situations have yet occurred whereby Dutch maritime or law enforcement officials have embarked upon the transfer of persons suspected of piracy to Kenya.

1. Risk of ill-treatment of transferred piracy suspects in Kenya

While acknowledging the growing threat posed by piracy and the need to prosecute persons engaged in acts of piracy, the Meijers Committee is concerned about the prospect of the transfer of persons arrested and detained by Dutch maritime forces to the authorities of Kenya. Although the government of Kenya has accepted the terms set out by the EU on the conditions of treatment, prosecution and trial of transferred persons, the Meijers Committee has serious doubts about the capability in practice of the Kenyan authorities to guarantee compliance with those conditions.

Recent country reports on the human rights situation in Kenya indicate that grave deficiencies exist with regard to the quality of the criminal justice system and prison and detention center conditions. According to the US State Department's 2008 Human Rights Report on Kenya, there is a "visible lack of independence of the judiciary" and prison and detention center conditions are described as "harsh and life threatening".¹ The report mentions that torture in prisons is "commonplace and inflicted openly"; that authorities "did not take action against those accused of torture"; and that hundreds of prisoners "die annually from infectious diseases spread by overcrowding, unhygienic conditions and inadequate medical treatment". These findings are confirmed by various other sources, including the United Nations Committee Against Torture, the United Nations Human Rights Committee and the African Union Peer Review Mechanism.² In its concluding

¹ US Department of State, 2008 Human Rights Report: Kenya, February 25, 2009.

² Concluding observations of the Committee against Torture on Kenya, CAT/C/KEN/CO/1, 19 January 2009, esp. paras 9, 10, 12, 13, 14, 15; Concluding observations of the Human Rights Committee on Kenya, CCPR/CO/83/KEN, 29 April

observations on Kenya released in January this year, the United Nations Committee Against Torture noted “with deep concern the numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody” and the “dire conditions of detention in Kenyan prisons”. It transpires from these reports, in short, that there are systematic failures in the Kenyan criminal justice system, that prison conditions are very poor, and that torture and ill-treatment in prisons is widespread. An excerpt of the US State Department country report is annexed to this letter.

The circumstances regarding detention conditions in particular, raise serious issues under Article 3 of the European Convention on Human Rights, laying down the prohibition of torture and inhuman and degrading treatment. The European Court of Human Rights has fairly recently, on the basis of similar country information regarding detention conditions in Turkmenistan and Tunisia, prohibited the extradition of criminal suspects to these countries, because the criminal suspects would counter a serious risk of being subjected to torture or inhuman treatment while in prison.³ The Court concluded that, despite the procurement of various assurances by the authorities of Turkmenistan and Tunisia, given the lack of an effective system of torture prevention and the reported numerous and regular cases of torture and ill-treatment meted out to persons in detention, “it would be difficult to see whether such assurances would have been respected” and that the applicants extradition to Turkmenistan and Tunisia would therefore be in violation of Article 3 of the Convention. It is standing case-law of the Court that diplomatic assurances are “not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention”.⁴ Accordingly, no reliance should be placed on diplomatic assurances unless the absence of a risk of ill-treatment is firmly established.⁵ For similar reasons, and given the systematic and indiscriminate practices of ill-treatment mentioned in the various reports on Kenya, the Meijers Committee considers it unlikely that the assurances requested from Kenya remove the risk of ill-treatment of piracy suspects who will be transferred to Kenya. Accordingly, should Dutch naval or law enforcement officials decide upon the transfer of piracy suspects to Kenya, the Netherlands government may well act in violation of Article 3 ECHR.

2. Safeguards regarding arrest, detention and extradition of persons suspected of piracy

The Meijers Committee wishes to underline that the Dutch government is bound to respect the safeguards of the European Convention on Human Rights and other international human rights treaties, also when participating in naval operations coordinated by the EU or NATO off the coast of Somalia. The European Court of Human Rights has considered the European Convention on Human Rights to apply to interceptions and arrests taking place at the high seas.⁶ This means not only that persons suspected of piracy whose

2005, esp. paras 8-9, 13, 16, 19; African Union Peer Review Mechanism, Country Review Report of the Republic of Kenya, May 2006.

³ ECtHR 23 October 2008, Soldatenko v Ukraine, no. 2440/07, paras 72-75. Also see ECtHR, Saadi v Italy, 28 February 2008, no. 37201/06, paras 143 and 146; ECtHR 24 February 2009, Ben Khemais v Italy, no. 246/07.

⁴ ECtHR 28 February 2008, Saadi v Italy, no. 37201/06, paras. 147-148; ECtHR 19 June 2008, Ryabikin v Russia, no. 8320/04, par. 119.

⁵ ECtHR 24 February 2009, Ben Khemais v Italy, no. 246/07, par. 61.

⁶ See, in particular, ECtHR 10 July 2008, Medvedyev and Others v. France, no. 3394/03, concerning the apprehension on the high seas by the French Navy of a ship and its crew suspected of international trafficking in drugs, where a violation of Article 5 (1) ECHR was found. Also see ECtHR 12 January 1999, Rigopoulos v Spain, no. 37388/97 and ECtHR 11 January 2001 Xhavarra v Italy, no. 39473/98. A similar stance is taken by the UN Human Rights Committee and the UN Committee Against Torture, see Committee against Torture, P.K. et al v Spain, 21 November 2008, no. 323/2007 (*Marine I case*), par 8.2; and, in the context of extraterritorial military operations, including NATO missions, Human Rights Committee, Concluding Observations on Belgium, 12 August 2004, UN doc. CCPR/CO/81/BEL, par 6.

transfer to Kenya or other third states is ordered must be granted an effective judicial remedy in accordance with Article 13 ECHR should they wish to resist the transfer, but that they should also enjoy the full range of safeguards regarding arrest, detention and extradition procedures in accordance with Articles 5 (right to liberty) and 6 ECHR (right to a fair trial). This includes the rights of being brought promptly before a judge and to take proceedings by which the lawfulness of the detention is decided speedily by a court.

The Meijers Committee notes that the government has confirmed the Dutch Act on Extradition [*Uitleveringswet*] to be applicable to piracy suspects having been arrested on board Dutch vessels and that instructions for the handling of prisoners have been given to law enforcement personnel [*Koninklijke marechaussee*] and an assistant-district attorney [*hulpofficier van justitie*] who are on board the Dutch vessels.⁷ The Meijers Committee has not been able to verify whether these instructions are fully in compliance with applicable Dutch criminal law provisions and relevant guarantees under Article 5 ECHR. In this context, the Meijers Committee considers insufficient the statement of the Minister of Defence that the handling of prisoners on board the vessels is a matter of the Public Prosecutor [*Openbaar Ministerie*] to decide upon.⁸ Dutch naval officers and law enforcement officials on board the ships should under all circumstances operate under clear guidelines guaranteeing, in law and practice, the safeguards of persons being placed under arrest.

3. Alternative solutions for the prosecution of piracy offenders

In view of the above, the Meijers Committee has serious doubts about the conformity with international legal standards of the legal framework which is currently in place regarding the treatment of persons suspected of piracy who are arrested by Dutch personnel participating in the international military operations. Whilst the Committee would advise against the transfer of persons to Kenya, it recognises the imperatives of the effort to combat piracy and to bring to trial persons suspected of having committed acts of piracy. In this regard, international maritime law recognises the dangers posed by piracy and provides ample opportunities for the apprehension and prosecution of persons engaged in acts of piracy. The Dutch government has acknowledged that domestic Dutch law has implemented the relevant provisions of international law in that respect and that it provides for the establishment by Dutch courts of criminal jurisdiction over acts of piracy regardless of whether Dutch interests are involved. Similarly, on the international plane, discussions are currently underway regarding possible international solutions of a more long-term and durable nature, including the possibility of the setting up of an international criminal tribunal specifically competent to prosecute and bring to trial those responsible for piracy.

The Committee does not wish to underestimate the various practical obstacles and objections which exist with regard to both the solution of prosecuting piracy suspects on the territory of the Netherlands and that of the setting up of an international tribunal – of which the latter will in any regard not be realised in the near future. Nonetheless, there are unmistakably legal alternatives for the prosecution of offenders other than to transfer them to Kenya or another country where they risk being treated contrary to international human rights. An alternative solution may also lie in the transfer of piracy offenders to another country than the Netherlands which is demonstrably capable of guaranteeing international human rights and which would agree to their prosecution. Neither would the Meijers Committee rule out the possibility of prosecuting piracy offenders in countries in the region (including Kenya or Somalia), provided detention and prosecution is carried out under the strict supervision and control of the European Union or other international fora. The Meijers Committee will not delve further into the merits of the various alternatives at this point. But it would

⁷ Kamerstukken II 2008/09, 29521 nr. 99, p. 5.

⁸ Kamerstukken II 2008/09, 28676 nr. 82, p. 15; Kamerstukken II 2008/09, 29521 nr. 90, pp. 6-7.

consider it highly opportune for the Dutch government to explore the various alternatives on their legal and practical feasibilities and to contribute to international solutions in this respect.

As a final note, the Meijers Committee wishes to set out that it deplores the fact that the Council of the European Union has chosen to seek an agreement with Kenya under which it is assumed to be possible to transfer piracy suspects to Kenya in accordance with international human rights standards. The Parliamentary Assembly of the Council of Europe, the European Committee for the Prevention of Torture, the European Commissioner for Human Rights and others have all expressed concerns about states having recourse to “diplomatic assurances” in the context of the extradition or expulsion of persons to countries known to engage in the systematic practice of torture and inhuman treatment.⁹ Pledges from such countries must be treated with the utmost restraint and have more often than not proven to be ineffective in well-documented cases.

In view of the above, the Meijers Committee:

- **strongly recommends that future suspects of piracy who are arrested by Dutch personnel in the course of military operations off the Somali coast, are not transferred to Kenya or other third countries where they run a real risk of being ill-treated;**
- **urges the Dutch government to ensure that all arrested suspects of piracy are treated in accordance with the relevant safeguards relating to arrest, detention and extradition procedures, including a right to oppose the extradition before a judge;**
- **invites the Dutch government to contribute to an international solution regarding the detention and prosecution of piracy suspects in the course of international military operations. Such a solution must pay due respect for relevant international law on human rights, in order to guarantee in particular that suspects of piracy will receive a fair trial, are not detained arbitrarily and shall not be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment;**
- **recommends that so long as such an international solution does not exist, persons suspected of having committed acts of piracy arrested and detained with a view to prosecution on board Dutch vessels taking part in the military operations led by the EU and NATO, are brought to the Netherlands or to another country which is demonstrably capable of guaranteeing international human rights and has agreed to their prosecution;**
- **calls upon the Dutch government not to participate in the conclusion of agreements by the European Union or NATO, in which reliance is placed on guarantees with respect to the treatment of transferred persons, with countries which have shown not to be able to comply with such guarantees.**

⁹ Parliamentary Assembly of the Council of Europe, Resolution 1433 (2005), par. 8x; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 15th General Report on the CPT's activities, CPT/Inf (2005) 17, paras 38-42; Commissioner for Human Rights of the Council of Europe, CommDH(2008)23, paras 92-94.

Annex

Excerpt of US Department of State, 2008 Human Rights Report: Kenya.

“Prison and Detention Center Conditions

Prison and detention center conditions continued to be harsh and life threatening. Most prisons, particularly men's prisons, continued to be severely overcrowded in part due to a backlog of cases in the judicial system. In May the director of health services for prison services stated that the country's 90 prisons held 48,000 prisoners while they were designed to hold only 12,000 persons. According to an OFFLACK study released in 2007, Meru Prison held three times more inmates than its intended capacity and had only nine toilets for 1,405 prisoners, forcing many to use as toilets the same buckets they also used for bathing. In Kamiti Maximum Security Prison, approximately 700 inmates shared a cell block designed for 300. During the April security operation in Mount Elgon, IMLU noted that Bungoma Prison held over 900 prisoners in a facility with a 480-person capacity.

In 2007 the Parliamentary Committee on Health visited Embu Prison and expressed concern about health conditions in prisons.

Prisoners generally received three meals per day, but portions were inadequate, and they were sometimes given half rations as punishment. Water shortages continued to be a problem.

Civil society organizations began visiting prisons in 2003, and these visits continued to reveal harsh conditions as well as allegations by prisoners of inhumane treatment, including torture. Such treatment, perpetrated by police, prison guards, and inmates, at times resulted in death. For example, in November wardens in Kamiti Prison scalded prisoners with hot water and beat them during an operation to interdict contraband items. One person died and 20 were hospitalized. Three wardens were suspended. At year's end a police investigation of the incident was ongoing.

In February 2007 the Legal Resource Foundation released a report which stated that torture in prisons was commonplace and inflicted openly. Of 948 prisoners from 29 prisons interviewed, 83 percent claimed they were beaten and 59 percent witnessed wardens mistreating other prisoners. Police did not appear to target any particular ethnic, religious, or social group for torture. Authorities did not take action against those accused of torture.

Prison personnel stated that the rape of male and female inmates, primarily by fellow inmates, continued. Media reports indicated that it was also common for prison officials to rape female inmates.

Hundreds of prisoners died annually from infectious diseases spread by overcrowding, unhygienic conditions, and inadequate medical treatment. In July a Ministry of Home Affairs report on prison conditions concluded that 46 inmates died monthly because of congestion, unhygienic conditions, and poor health care.

Prisoners were sometimes kept in solitary confinement far longer than the legal maximum of 90 days. Prisoners and detainees sometimes were denied the right to contact relatives or lawyers. Family members who wanted to visit prisoners faced numerous bureaucratic and physical obstacles, each often requiring a bribe to overcome. In 2006 then-Vice President Moody Awori, who was responsible for the prison system in his capacity as minister for home affairs, acknowledged that bribery occurred throughout the country's jails and prisons.”