exact whereabouts or wellbeing. The uncertainty that defines rendition and secret detention is torturous, both for those detained and those for whom they are "disappeared"[89].

90. Yet the ordeal continues long after a detainee is located, or even released and able to return home. Victims have described to us how they suffer from flashbacks and panic attacks, an inability to lead normal relationships and a permanent fear of death. Families have been torn apart. On a personal level, deep psychological scars persist; and on a daily basis, stigma and suspicion seem to haunt anybody branded as "suspect" in the "war on terror". In short, links with normal society appear practically impossible to restore.

91. I salute the remarkable courage and resilience of those who have been held in secret detention and subsequently released, like Khaled El-Masri and Maher Arar. Both these men have spoken eloquently to us about what moves them to recount their experiences despite the obvious pain and trauma of doing so. From these words we must draw our own resolve to uncover the secret abuses of the spider's web and ensure that they never again be allowed to occur. From Mr El-Masri, "all I want is to know the truth about what happened to me and to have the American Government apologise for what it did"[90]; from Mr Arar, "the main purpose of talking about my torture is to prevent the same treatment from ever happening to another human being"[91].

3. Specific examples of documented renditions

3.1. Khaled El-Masri

92. We spoke for many hours with Khaled El-Masri, who also testified publicly before the Temporary Committee of the European Parliament, and we find credible his account of detention in Macedonia and Afghanistan for nearly five months.

3.1.1. The individual account of Mr El-Masri

93. A summary of the unprecedented suffering endured by Mr El-Masri reads as follows:

94. [A]ccording to the statement of facts presented to the US District Court[92], Khaled El-Masri, a German citizen of Lebanese descent, travelled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia, in the final days of 2003. After passing through several international border crossings without incident, Mr El-Masri was detained at the Serbian-Macedonian border because of alleged irregularities with his passport. He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. Subsequent to his release in May, 2004, Mr El-Masri was able to identify the hotel from website photographs as the Skopski Merak, and to identify photos of the room where he was held and of a waiter who served him food. Over the course of three weeks, Mr El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists, and was denied any contact with the German Embassy, an attorney, or his family. He was told that if he confessed to Al-Qaeda membership, he would be returned to Germany. On the thirteenth day of confinement, Mr El-Masri commenced a hunger strike, which continued until his departure from Macedonia. After 23 days of detention, Mr El-Masri was videotaped, blindfolded, and transported by vehicle to an airport.

95. There, he was beaten, stripped naked, and thrown to the ground. A hard object was forced into his anus. When his blindfold was removed, he saw seven or eight men, dressed in black and hooded. He was placed in a diaper and sweatsuit, blindfolded, shackled, and hurried to a plane, where he was chained spreadeagled to the floor. He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan, an itinerary that is confirmed by public flight records. At some point prior to his departure, an exit stamp was placed in his passport, confirming that he left Macedonia on January 23, 2004.

96. Upon arrival in Kabul, Mr El-Masri was kicked and beaten and left in a filthy cell. There he would be detained for more than four months. He was interrogated several times in Arabic about his alleged ties to 9/11 conspirators Muhammed Atta and Ramzi Bin Al-Shibh and to other alleged extremists based in

[89] See Louise Arbour, United Nations High Commissioner for Human Rights, *Human Rights: A casualty of the war on terror?*; interview for UN World Chronicle No. 996, 7 December 2005 (transcript provided by UN Television, on file with the rapporteur): "Secret detention under these extreme conditions is an unacceptable treatment, both of the person detained and I would certainly suggest of members of their families [for whom], for all purposes, these people have disappeared."

[90] Khaled El-Masri made this statement to me during our meeting in Strasbourg in April 2006.

[91] Maher Arar made this statement to my representative during their meeting in Brussels in March 2006.

[92] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71.

Germany. American officials participated in his interrogations. All of his requests to meet with a representative of the German government were refused.

97. In March, Mr El-Masri and several other inmates commenced a hunger strike. After nearly four weeks without food, Mr El-Masri was brought to meet with two American officials. One of the Americans confirmed Mr El-Masri's innocence, but insisted that only officials in Washington, D.C. could authorize his release. Subsequent media reports confirm that senior officials in Washington, including the CIA Director Tenet, were informed long before Mr El-Masri's release that the United States had detained an innocent man. Mr El-Masri continued his hunger strike. On the evening of April 10, Mr El-Masri was dragged from his room by hooded men and force-fed through a nasal tube.

98. At around this time, Mr El-Masri felt what he believed to be a minor earthquake. Geological records confirm that in February and April, there were two minor earthquakes in the vicinity of Kabul.

99. On May 16, Mr El-Masri was visited by a uniformed German speaker who identified himself as "Sam". "Sam" refused to say whether he had been sent by the German government, or whether the government knew about Mr El-Masri's whereabouts. Subsequent to his release, Mr El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer.

100. On May 28, 2004, Mr El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe other than Germany. He was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. He was given his belongings and told to walk down a path without turning back. Soon thereafter, he was confronted by armed men who told him he was in Albania and transported him to Mother Theresa Airport in Tirana. There, he was accompanied through customs and immigration controls and placed on a flight to Frankfurt.

101. Upon his return to Germany, Mr El-Masri contacted an attorney and related his story. The attorney promptly reported Mr El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. Pursuant to their investigation, German prosecutors obtained and tested a sample of Mr El-Masri's hair, which proved consistent with his account of detention in a South-Asian country and deprivation of food for an extended period. That investigation, as well as a German parliamentary investigation of Mr El-Masri's allegations, is ongoing.

3.1.2. Elements of corroboration for Mr El-Masri's account

102. Mr El-Masri's account is borne out by numerous items of evidence, some of which cannot yet be made public because they have been declared secret[93], or because they are covered by the confidentiality of the investigation underway in the office of the Munich prosecuting authorities following Mr El-Masri's complaint of abduction.

103. The items already in the public domain are cited in the afore-mentioned memorandum[94] submitted to the Virginia court in which Mr El-Masri lodged his complaint:

- Passport stamps confirming Mr El-Masri's entry to and exit from Macedonia, as well as exit from Albania, on the dates in question;
- Scientific testing of Mr El-Masri's hair follicles, conducted pursuant to a German criminal investigation, that is consistent with Mr El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period of time;
- Other physical evidence, including Mr El-Masri's passport, the two t-shirts he was given by his American captors on departing from Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr El-Masri possessed during his ordeal, all of which have been turned over to German prosecutors;
- Aviation logs confirming that a Boeing business jet owned and operated by defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004; landed at the Skopje airport at 8:51 p.m. that evening; and left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital;

[93] The information in question appears in the report of the German Federal Government to the parliamentary committee monitoring the secret services (PKG) ; I was able to obtain from the chairman of that committee a "public" version of the report, which contains no particulars of individual cases. A version classified "confidential - for official use only" was handed to me by a journalist. This information enabled me to form a judgment as to the credibility of Mr El-Masri's account, but I have chosen to preserve the confidentiality of that report although, to be frank, I believe that the public should have access to this kind of information. To my knowledge, there is an even fuller version classified "secret", which I declined to obtain out of respect for German parliamentary procedure.

[94] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71.

- Witness accounts from other passengers on the bus from Germany to Macedonia, which confirm Mr El-Masri's account of his detention at the border;
- Photographs of the hotel in Skopje where Mr El-Masri was detained for 23 days, from which Mr El-Masri has identified both his actual room and a staff member who served him food;
- Geological records that confirm Mr El-Masri's recollection of minor earthquakes during his detention in Afghanistan;
- Evidence of the identity of "Sam," whom Mr El-Masri has positively identified from photographs and a police line-up, and who media reports confirm is a German intelligence officer with links to foreign intelligence services;
- Sketches that Mr El-Masri drew of the layout of the Afghan prison, which were immediately recognizable to another rendition victim who was detained by the U.S. in Afghanistan;
- Photographs taken immediately upon Mr El-Masri's return to Germany that are consistent with his account of weight loss and unkempt grooming.

Numerous government inquiries, including the German prosecutors' investigation, a German parliamentary investigation, and various intergovernmental human rights inquiries, are almost certain to produce additional corroborating evidence.

3.1.3. The role of "the former Yugoslav Republic of Macedonia"

104. The role of "the former Yugoslav Republic of Macedonia" in the rendition of Khaled El-Masri has yet to be fully understood. The information collected on site by a member of my team appears to show a certain ambiguity in the Macedonian position. In effect, the Government of Macedonia has adopted an "official line" of complete negation, repeated in a rigid and stereotyped fashion.

105. I am indebted to the delegation from the European Parliament for arranging and administering an excellent programme of meetings with the highest-level representatives of the Macedonian Government and Parliament[95]. I share many of the reflections of my colleagues from the European Parliament in their review of these meetings, not least the sense of discomfort that in many areas the Macedonian authorities fell short of genuine transparency[96].

3.1.3.1. The position of the authorities

106. The "official line" of the Macedonian Government was first contained in a letter from the Minister of Interior, Ljubomir Mihajlovski, to the Ambassador of the European Commission, Erwan Fouere, dated 27 December 2005. In its simplest form, it essentially contains four items of information '*according to police records*": first, Mr El-Masri arrived by bus at the Macedonian border crossing of Tabanovce at 4 pm on 31 December 2003; second, he was interviewed by "*authorised police officials*" who suspected "*possession of a falsified travel document*"; third, approximately five hours later, Mr El-Masri "*was allowed entrance*" into Macedonia, apparently freely; and fourth, on 23 January 2004, he left Macedonia over the border crossing of Blace into Kosovo.

107. Mr Mihajlovski restated exactly the same Government position in response to a parliamentary question in the Sobranie on 26 January 2006[97]. He cited "*official evidence of the Ministry of Interior*" and went on to describe the allegations as "*speculative and unfounded*".

108. The President of the Republic, Branko Crvenkovski, set out a firm stance in the very first meeting with the European Parliament delegation, providing a strong disincentive to any official who may have wished to break ranks by expressing an independent viewpoint: "*Up to this moment, I would like to assure you that I have not come across any reason not to believe the official position of our Ministry of Interior. I have no additional comments or facts, from any side, to convince me that what has been established in the official report of our Ministry is not the truth.*"

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[95] The programme of meetings took place between 27 and 29 April 2006.

[96] President Branko Crvnekovski said in his opening remarks on 27 April 2006: *"Macedonia is completely determined and open for co-operation with you. What I want to repeat is that we're completely prepared to establish the truth... Our joint task is to find out the truth and not to respond to the current public opinion or the positions of the media"*; Siljan Avramovski, the former Head of the UBK, Macedonia's counter-intelligence service stated on 28 April: *"We will provide maximum transparency and openness in our discussions"*. These were fairly typical of the sentiments expressed by all the officials who met with the delegation.

[97] Mr Slobodan Casule, a prominent opposition politician who met with the European delegation on 27 April 2006, posed the question. He said he sought clarification about the El-Masri case because he believes that '*such issues should be opened and closed within the Parliament*'.

109. On Friday 28 April the official position was presented in far greater detail during a meeting with Siljan Avramovski, who was Head of the UBK[98], Macedonia's main intelligence service, at the time of the El-Masri case. Avramovski stated that the UBK's "Department for Control and Professional Standards" had undertaken an investigation into the case and traced official records of all Mr El-Masri's contact with the Macedonian authorities. The further details as presented by Mr Avramovski[99] are summarized as follows:

> Mr El-Masri arrived on the Macedonian border on 31 December 2003, New Year's Eve. The Ministry of Interior had intensified security for the festive period and was operating a higher state of alert around the possible criminal activity. In line with these more intense activities, bus passengers were being subjected to a thorough security check, including an examination of their identity documents.
>
> Upon examining Mr El-Masri's passport, the Macedonian border police developed certain suspicions and decided to "*detain him*". In order not to make the other passengers wait at the border, the bus was at this point allowed to continue its journey.
>
> The objective of holding Mr El-Masri was to conduct an interview with him, which (according to Avramovski) was carried out in accordance with all applicable European standards. Members of the UBK, the security and counter-intelligence service, are present at all border points in Macedonia as part of what is described as "Integrated Border Management and Security". UBK officials participated in the interview of Mr El-Masri.
>
> The officials enquired into Mr El-Masri's reasons for travelling into the country, where he intended to stay and whether he was carrying sufficient amounts of money. Avramovski explained: "I think these were all standard questions that are asked in the context of such a routine procedure – I don't think I need to go into further details".
>
> At the same time, Macedonian officials undertook a preliminary visual examination of Mr El-Masri's travel documents. They suspected that the passport might be faked or forged – noting in particular that Mr El-Masri was born in Kuwait, yet claimed to possess German citizenship.
>
> A further passport check was carried out against an Interpol database. The border point at Tabanovce is not linked to Interpol's network, so the information had to be transmitted to Skopje, from where an electronic request was made to the central Interpol database in Lyon. A UBK official in the Analytical Department apparently made this request using an electronic code, so the Macedonian authorities can produce no record of it. Mr El-Masri was made to wait on the border point while the Interpol search was carried out.
>
> When it was established that there existed no Interpol warrant against Mr El-Masri and no further grounds on which to hold him[100], he was released. He then left the border point at Tabanovce, although Macedonian officials were not able to describe how. Asked directly about this point in a separate meeting, the Minister of Interior, Mr Mihajlovski said: "*we're not able to tell you exactly what happened to him after he was released because it is not in our interest; after the person leaves the border crossing, we're not in a position to know how he traveled further*"[101].
>
> The Ministry of Interior subsequently established, according to Avramovski, that Mr El-Masri had stayed at a hotel in Skopje called the "Skopski Merak". Mr El-Masri is said to have checked in on the evening of 31 December 2003 and registered in the Guest Book. He stayed for 23 nights, including daily breakfast, and checked out on 23 January 2004.
>
> The Ministry then conducted a further check on all border crossings and discovered that on the same day, 23 January 2004, in the evening, Mr El-Masri left the territory of Macedonia over the border crossing at Blace, into the territory of Kosovo. When asked whether Mr El-Masri had received a stamp to indicate his departure by this means, Avramovski answered: "*Normally there should be a*

[98] Uprava za Bezbednosti i Kontrarazuznavanje, or the Security and Counter-Intelligence Service.
[99] Meeting with Siljan Avramovski, now Deputy Director of UBK in the Ministry of Interior, 28 April 2006, transcript on file with the Rapporteur.
[100] Avramovski stated that Macedonian border police decided for themselves that Mr El-Masri's passport was genuine, after an unspecified process or length of examination "*At our border points, expert members of the border police are qualified to assess whether a passport is counterfeit or not. When they decided that it was genuine, they took no further action. They did not inform the German Embassy; they didn't feel the need to request any documents against which to compare the passport.*"
[101] Meeting with Ljubomir Mihajlovski, Minister of Interior, 28 April 2006, transcript on file with the Rapporteur.

stamp on the passport as you cross the border out of Macedonia, but I can't be sure. UNMIK is also present on the Kosovo border and is in charge of the protocol on that side... My UBK colleague has just informed me that he has crossed the border at Blace twice in recent times and didn't receive a stamp on either occasion."

Avramovski concluded his summary with the words: "*This is the truth of the case that has been exploited by the media – the so-called El-Masri case.*"

110. In a separate meeting directly following Avramovski's briefing, Minister Mihajlovski retained the position and added very few further details. Both officials were keen to talk about the case as if it were a routine matter, one which only came to their attention when it was reported in the local and international press. They referred repeatedly to the media "prejudice" and "pressure" against Macedonia. Mihajlovski even implied that there was a conspiracy theory at play, designed to discredit the country: "*Who is really behind all of this? This case is making so much damage to the country. If you can get a reason why it is happening, please send us a message; tell us.*"

111. It seems clear that the Macedonian public has reacted negatively to the El-Masri affair. Most Macedonians feel aggrieved that their country has been given such a bad press and is associated with what is often portrayed as a manipulative operation. Many regard the international media interest as a thinly veiled attempt to discredit Macedonia's prospects for European integration. In reality, it seems that the Macedonian Government is itself responsible for this situation. More transparency, and a greater degree of preparedness genuinely to seek the truth, rather than locking themselves into a pre-established, dogmatic scheme, would have certainly avoided much criticism and suspicion.

3.1.3.2. Further elements

112. The Government's official line is based on what Mr Avramovski called "*a reconstruction after the fact, based on information we established through documents and discussions*" with, *inter alia*, "*employees of the hotel*". There is no doubt in my mind that the Ministry of Interior has put together a very thorough reconstruction of the case; just not an accurate one. Equally I accept that the Ministry has undertaken "*discussions*" with witnesses, including hotel employees; but I regard these as efforts to harmonise the official line, not to establish the truth.

113. One could, with sufficient application, begin to tease out discrepancies in the official line. For example, the Ministry of Interior stated that "*the hotel owner should have the record of Mr El-Masri's bill*", while the hotel owner responded to several inquiries, by telephone and in person, by saying that the record had been handed over to the Ministry of Interior.

114. Contacts we were able to make with sources close to the administration and to the intelligence services have enabled us to obtain much more credible information, in order to better understand what really happened. We can consequently present a more coherent analysis of this case. For obvious reasons, the sources contacted locally wish to stay anonymous, at least for the time being.

115. The Government's public portrayal seems at first glance perfectly plausible. However, it ceases to be credible when it asserts that El-Masri was allowed to proceed freely from Tabanovce on the evening of 31 December 2003. In reality, that evening signalled the beginning of his five-month ordeal in secret detention ordered by the CIA.

116. What is not said in the official version is the fact that the Macedonian UBK routinely consults with the CIA on such matters (which, on a certain level, is quite comprehensible and logical). According to confidential information we received (of which we know the source), a full description of Mr El-Masri was transmitted to the CIA via its Bureau Chief in Skopje for an analysis similar to the one Avramovski says was undertaken by Interpol: did the person in question have contact with terrorist movements, in particular with Al Qaida? Based on the intelligence material about Khaled El-Masri in its possession – the content of which is not known to us – the CIA answered in the affirmative. The UBK, as the local partner organisation, was requested to assist in securing and detaining Mr El-Masri until he could be handed over to the CIA for transfer.

117. The UBK has an excellent reputation for its professionalism. It is well practiced in the conduct of clandestine surveillance and detention operations, having exploited its own network of "secret apartments"

for decades[102]. Information obtained from our internal sources indicates that the UBK is equally skilled in working on behalf of the CIA. – we even learned of one previous collaborative operation between these services in the past, targeted at apprehending suspected Islamic terrorists. In the El-Masri case, according to our understanding, this co-operation was particularly efficient and the Macedonian services fulfilled the expectations of the CIA.

118. The choice of the Skopski Merak hotel as a detention site warrants comment. The Macedonian authorities have categorically denied that this hotel could have served as a place for detention, considering such a possibility as downright ridiculous. Avramovski said he could "*absolutely*" rule out the prospect of Mr El-Masri's being held there:

> "*Look, I can state this very specifically and decisively. The 31 December is New Year's Eve – that period is a holiday, there are always a lot of guests, many of them tourists, in the hotel to celebrate the New Year. There is not even a theoretical possibility [laughing] that a person could be detained in an open hotel, where there's a constant flow of people coming and going. There were many guests there at the time, including foreign nationals – it's a well-known, open hotel with a fine reputation in this city!*"

In fact, a busy place with this hotel's features lends itself very well to a clandestine operation, given that a top-floor room facing away from the street was used.

119. Whilst the operation was driven and directed by CIA agents, the Americans kept a very low profile throughout the operation in Macedonia. The CIA transmitted to UBK the questions to ask the suspect, without ever taking part in any interrogation.

120. Several of our interviewees told us – with varying degrees of knowledge – that German intelligence was informed of the fact that Mr El-Masri was in Macedonian custody in the days immediately following the arrest, but not about the operational details. Intelligence material from Germany was added to the dossier from which questions were later asked, both in Macedonia and in Afghanistan, by interrogators of various nationalities.

121. According to our insider sources in the intelligence community, whom we consider serious and well-informed, approximately 20 officials were involved overall on the Macedonian side, including "four or five" politically responsible persons in Government. Three teams of three agents rotated in the task of guarding and surveillance. Technicians and analysts helped to compile the record of the operation, which was a running log rather than a cumulative written report. An operational commander and a deputy marshalled the Macedonian agents and took responsibility for reporting to their liaisons in the CIA.

122. The period for which the Macedonians held Mr El-Masri in advance of his rendition – 23 days – was abnormally long for any operation involving the CIA. Partner agencies and CIA officials alike prefer to keep the time between the initial arrest and the transfer to a CIA detention centre as short as possible[103].

123. The delay in this case appears to have been caused by logistical reasons, in particular related to the availability of an aircraft. A flight on an unusual route, from Skopje into the Middle East, had to be incorporated into an existing schedule for that month, which, as established above in the description of the newly-discovered rendition circuit, included other detainee transfers.

124. According to further eye-witness accounts from persons in the civil aviation sector, who described the presence and movements of the suspect rendition plane at Skopje airport that evening, the aircraft thought to have taken Mr El-Masri on board did not follow regular procedures. The manner in which the plane registered with ground staff and paid its "route charge" fees was highly unusual – as the Ministry of Interior himself confirmed, no passengers even left the plane to enter the terminal building and thus cross officially onto Macedonian territory. Instead the plane taxied into position at the far end of the runway, more than a kilometer from the terminal. A detail of armed Macedonian security police formed a lookout nearby,

[102] The Macedonian Helsinki Committee for Human Rights has researched questions of secret detention and produced a variety of credible reports (copies of which are on file with the Rapporteur). In many cases, people are held in secret apartments to get them "out of the system" for an indefinite period of time, for the UBK to interrogate them and elicit confessions. Further still, in the notorious "Rastanski Lozja" case of March 2002, Macedonian police were said to have shot dead "seven members of a terrorist group" in what seemed like an act of summary execution. The Helsinki Committee wrote in its Annual Report of 2002: "the largest number of human rights violations was perpetrated by officers of the special units at the Ministry of Interior".

[103] See, for example, Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview carried out by the Rapporteur's representative, *supra* note 19.

under strict instructions to face away from the plane itself. Asked whether such a measure was conventional for foreign aircraft, Minister of Interior Mihajlovski answered:

> *"No, no. Not at all. The plane is not Macedonian territory; if Spain sends us a plane, it's the territory of Spain. If there's a bomb on board we must come inside; but otherwise it's like a ship, a diplomatic territory".*

125. All these factual elements indicate that the CIA carried out a "rendition" of Khaled El-Masri. The plane in question had finished transferring another detainee just two days earlier and the plane was still on the same "rendition circuit". The plane and its crew had spent the interim period at Palma de Mallorca, a popular CIA staging point. The physical and moral degradation to which Mr El-Masri was subjected before being forced aboard the plane in Macedonia corresponds with the CIA's systematic "rendition methodology" described earlier in this report. The destination of the flight carrying Mr El-Masri, Kabul, forms a hub of CIA secret detentions in our graphic representation of the "spider's web".

126. All the indications are that the Macedonian authorities have decided to deny their part in the abduction of El-Masri, admitting only what has already been clearly proven and trying to conceal the rest. It is regrettable that the will is lacking to perform a true inquiry and that Parliament has not shown the initiative to take up the issue (as the German *Bundestag* has done in the same case). To this must be added the further accusations of the Macedonian Helsinki Committee for Human Rights. According to reports produced by this NGO, suspects were and still are interrogated and sometimes imprisoned and ill-treated for several days, outside the normal arrest and custody system[104], specifically in the "apartments" that had been widely used by the previous regime.

127. It is worth repeating that the analysis of all facts concerning this case points in favour of the credibility of El-Masri. Everything points in the direction that he was the victim of abduction and ill-treatment amounting to torture within the meaning of the term established by the case-law of the United Nations Committee against Torture. In addition, numerous indications support the conclusion that German services participated in a manner that still remains to be precisely established (not excluding the fact that the same services were in the end instrumental in El-Masri's release; the latter told me that he considered "Sam" as his guardian angel, a kind of "life insurance')[105].

128. The detailed information with which El-Masri was confronted during his interrogations in Skopje and in Afghanistan included details of his private life in Neu-Ulm. It is hard to imagine that such information could have been obtained by foreign services without help from their German counterparts. For example, the interrogators in Afghanistan knew that El-Masri had met a certain Reda Seyam[106] at the *Multikulturhaus* and had agreed to get a car, which Seyam had just bought with his help and had registered in the name of El-Masri's wife in order to save on the cost of insurance. El-Masri assured me that he had shared this information only with Seyam and his wife. In addition, the same interrogators confronted him with bank details of money transfers between his bank in Neu-Ulm and an account in Norway[107]. Such bank details are not normally accessible to foreign services.

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[104] My representative who travelled to Macedonia was able to see former "secret apartments", which are now closely supervised by NGOs defending human rights.

[105] In a recent development, the BND was forced to admit that one of its agents had indeed heard about El-Masri's detention at the hands of the Macedonian services and his hand-over to the Americans as early as January 2004 in a civil service canteen in Skopje (see Spiegel-Online of 31 May and 1 June 2006). The German Minister of the Interior tried to play down the importance of this revelation by calling it a mere breakdown of communications, as the higher echelons of the BND had not been informed. Nonetheless it is interesting to note that the truthfulness of the content of this conversation was never called into question.

[106] According to a German source, Mr Seyam, a German national of Indonesian origin, had returned in an unbelievable manner from a stay in that country. He had allegedly been arrested by the Indonesian authorities who suspected him of involvement in the Bali bombing. He had been released for lack of evidence, and taken back to Germany by German agents, who had been sent in order to prevent Mr Seyam being "handed over" to the Americans, who were apparently already waiting. Mr Seyam then allegedly went to Neu-Ulm at the instigation of his German "rescuers", who recommended that he go to the *Multikulturhaus*. The latter, according to the source, was under observation by both the *Baden-Württemberg* services (who had "planted" an informer there in the person of Dr Yousif, an Islamic preacher at the centre and an old acquaintance of Mr Seyam) and those of neighbouring Bavaria who – not knowing that Yousif was working for *Baden-Württemberg* – regarded him as a "preacher of hate". It was in this Islamic cultural centre frequented by Mr El-Masri that the latter came to know Mr Seyam (against whom a judicial investigation had also been opened in Germany, and closed shortly afterwards for lack of evidence). The two men, both looking for housing for their large families, became friends.

[107] According to Mr El Hasri, these were money transfers relating to Norwegian customers in connection with his car sales activity.

129. In my opinion, this detailed knowledge of Mr El-Masri's – real – life also rules out the theory that Mr El-Masri was the victim of mere mistaken identity[108], being confused with a person of the same (or similar) name, whose name appeared in the American Congressional report on the 11 September attacks[109] as having travelled by train in Germany together with members of the "Hamburg cell" of the terrorists of 11 September, including one of the murderous pilots, Muhammad Atta[110].

130. As regards the identity of "Sam", who came and interrogated Mr El-Masri in Afghanistan and accompanied him back on the return flight to Europe, speaking German with a Northern accent, Mr El-Masri remains convinced that this is Mr Lehmann, an agent of the German *Bundeskriminalamt*. He had identified him with "100%" certainty on photographs and a videotape, and with "90%" certainty at a surprise police lineup on 22 February 2006[111].

131. Mr El-Masri has also been the victim of a defamatory campaign. The press service of the Baden-Württemberg Ministry of the Interior had indicated that El-Masri was a member of "Al Tawid", implying "Al Tawid al Jihad", a group belonging to Al Quaida and headed by Abu Musab al-Zarkawi. According to Mr Gnjidic, the confusion was deliberate: El-Masri did belong to a militant anti-Syrian party (a nationalist party of the left also including Islamist elements) called "Al Tawid", founded in 1982 and wound up in 1985 after the Syrian invasion. Whereas certain members were captured by the Syrians, El-Masri fled and sought political asylum in Germany, for precisely that reason. That group allegedly had absolutely nothing in common (except part of the name, which means "all-powerful god") with the terrorist group headed by al-Zarkawi. Mr El-Masri was again faced with this confusion at his hearing by the Temporary Committee of the European Parliament, where at least one EP deputy asked him to what other terrorist groups he belonged. As Mr El-Masri was still in a fragile psychological state, I find it particularly odious that he was also the subject of an article, with a photograph, in the local press[112] once again insinuating his links with terrorist circles without any evidence whatsoever. He told us that he now hardly dares to leave his home.

132. The case of Khaled El-Masri is exemplary. Some aspects still require further investigation and it is for that reason that inquiries are ongoing in the *Bundestag*'s Committee of Inquiry and by the Munich prosecutors. The story of El-Masri is the dramatic story of a person who is evidently innocent – or at least against whom not the slightest accusation could ever be made - who has been through a real nightmare in the CIA's "spider's web", merely because of a supposed friendship with a person suspected at some point in time of maintaining contacts with terrorist groups. El-Masri is still waiting for the truth to be established, and for an apology. His application to a court in the United States has been rejected, at least in the first instance: not because it seemed unfounded, but because the Government brought to bear so-called "national security" and "state secrecy" interests. This speaks for itself.

3.2. "The Algerian Six"

133. Six Bosnians of Algerian origin – four Bosnian citizens and two longstanding residents[113] were arrested in October 2001 by order of the Supreme Court of the Federation of Bosnia and Herzegovina and

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[108] This appears to be the argument of the German government, in the context of the talks between Federal Chancellor Angela Merkel and American Secretary of State Condoleezza Rice (cf. the link to the record of the joint press conference by Mrs Merkel and Mrs Rice on 6 December 2005 [http://www.state.gov/secretary/rm/2005/57672;htm]. Mrs Merkel confirmed that she had spoken to Mrs Rice about the El-Masri case and said that the American government, the American administration, had admitted that the man had been taken by mistake and that the American administration did not deny in principle that this had occurred).

[109] Page 165.

[110] Mr El Masri stated in our talks that he had not even been questioned about this train journey mentioned in the report on 11 September. In his written deposition to the Virginia court (Declaration of Khaled El-Masri in support of plaintiff's opposition to the United States' motion to dismiss [...] dated 6 April 2006, p. 13), he said that he was interrogated in Afghanistan also about his alleged association with important terrorists such as Muhammad Atta, Ramzi Bin Al-Shibh and other presumed extremists based in Germany.

[111] To the surprise of El-Masri and his lawyer, Mr Gnjidic, the prosecutor's office immediately announced to the press that the identification of "Sam" had failed. Subsequently the magazine "Stern" unearthed a CIA agent of German origin, Thomas V., who spoke German with the "north German" accent detected in "Sam" by El-Masri who had been posted in 2000 to the United States Consulate General in Hamburg and who might be "Sam"[111]. The Munich prosecutor in charge of the case, Mr Hofmann, now rules out the possibility of "Sam" being the same person as the federal agent Lehmann, believing that it is now almost fully established that he was present at the *Bundeskriminalamt* office in Berlin throughout May 2004. But Mr El-Masri and his German lawyer Gnjidic remain convinced that "Sam" is indeed Lehmann, and that the Thomas V. trail was intended mainly to exonerate the German services.

[112] See Neu Ulmer Zeitug, *Islamisten zieht es nach Ulm; Multi-Kultur-Leute treffen sich jetzt im Donautal – Welche Rolle spielt Khaled El-Masri?* 15 March 2006.

[113] Mustafa Ait Idir, Hadz Boudella, Lakhdar Boumediene, Saber Lahmar and Mohammed Nechle and Belkacem Bensayah.

detained on remand. They were suspected of having planned bomb attacks on the American and British embassies.

134. The investigation, between October 2001 and January 2002, did not reveal any evidence linking these men to a terrorist plot. On 17 January 2002, the office of the federal prosecutor informed the investigating magistrate at the supreme court that he had no reason to keep the men in custody any longer. On that same day at about 3pm the investigating magistrate ordered the immediate release of the six men.

135. Again on the same day, at about 5pm, the Human Rights Chamber of Bosnia and Herzegovina issued an interim order, following an application lodged by four of the men[114]. The order, which had statutory force in Bosnia according to the Dayton peace accords, required the Government of Bosnia and Herzegovina to take all necessary steps to prevent the forcible deportation of the applicants from Bosnia and Herzegovina.

136. However, on the evening of 17 January 2002 the six men were arrested by Bosnian police officers, and handed over to members of the United States military forces stationed in Bosnia and Herzegovina on the morning of 18 January. This is recorded as an established fact in a judgment of the Human Rights Chamber for Bosnia and Herzegovina of 4 April 2003[115]. The Chamber refers to a document of the Council of Ministers dated 4 February 2002, according to which members of the police forces of the Federation under the authority of the Federal Minister of the Interior and of forces of the Minister of the Interior of the Canton of Sarajevo handed the applicants over to the American forces at the Butmir base on 18 January at 6am.

137. According to the victims' evidence, transmitted by their lawyers[116], the six victims were handcuffed in uncomfortable positions and hooded so that they could not see the aircraft which they were forced to board, at a given time on 18 or 19 January 2002. According to the lawyers, official documents obtained in the course of the judicial proceedings in progress show that two aircraft were assigned to this operation[117], and that the aircraft which the six men were made to board was at the Tuzla military base. After a flight of several hours, the aircraft landed and the six men were made to disembark, at a place which they describe as very cold[118]. During the flights the men were beaten and tied up in uncomfortable positions. At the stopover – probably Incirlik – they were joined by other detainees, some of whom said they came from Afghanistan. The human cargo arrived at Guantanamo on 20 January 2002.

138. The six men have been prisoners at Guantanamo until the present time, that is to say for over four years.

139. The illegal nature of these detentions was recognised by the Human Rights Chamber for Bosnia[119]. In the three decisions, the Chamber invited the Government of Bosnia to assist the six men, including recourse to diplomatic and judicial means. In the decision of 4 April 2003 concerning Mr Ait Idir, the Chamber even ordered the Government of Bosnia to take all possible steps to secure the release of the applicant and his return home[120].

140. The Bosnian government has recognised its legal obligations but not complied with them.

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[114] cf. Boudella, Boumediene, Nechle and Lahmar v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, cases nos. CH/02/8679, CH/02/8690, CH/O2/8691, Order for Provisional Measures and on the Organization of the Proceedings, 17 January 2001.

[115] Case no. CH/O2/9499, Bekasem Bensayah against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (cf. in particular paras. 50 et 164).

[116] The international law firm Wilmer Hale, which supplied written documentation and oral testimony (Mrs Karin Matussek on 11 April 2006 to our committee, and Mr Steven Oleskey to the temporary committee of the European Parliament, on 25 April 2006.) My representative also met with four WilmerHale attorneys working on this case at their offices in Boston, USA in May 2006. I am grateful to this firm for its excellent cooperation.

[117] Two C-130 cargo planes bearing serial numbers UJM166301019 and UQU09Z10L019, one of which also used the American base at Ramstein in Germany for the purposes of this operation. The documents in question also show that the aircraft transporting the six men stopped over at the American base at Incirlik in Turkey.

[118] The six men think it might have been in Turkey, on the basis of what little they were able to see and hear.

[119] Afore-mentioned judgment of 4 April 2003 concerning Mr Bensayah and Mr Ait Idir; in a judgment of 11 October 2002, the Chamber had already decided the cases of the other four men (Boudellaa, Boumediene, Nechle and Lahmar against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, cases nos. CH/02/8679, CH/02/8689, CH/02/8690, CH02/8691, decision of 11 October 2002).

[120] Idem, para. 168.

141. In the Council of Ministers document cited by the Human Rights Chamber[121], the Government of Bosnia and Herzegovina admitted that the six men had been "handed over" to the American forces by the Bosnian authorities without extradition formalities being observed[122].

142. On 21 April 2004, the Human Rights Committee of the Parliament of Bosnia and Herzegovina exhorted the Bosnian executive to execute the decision of the Human Rights Chamber and start proceedings with the United States for the repatriation of the detainees. Its report was endorsed by the parliament chamber on 11 May 2004.

143. On 11 March 2005, the Minister of Justice confirmed that the Bosnian government had sent a letter to the American government requesting the return of the six men.

144. On 21 June 2005, the Bosnian Prime Minister Mr Adnan Terzic confirmed before the Parliamentary Assembly of the Council of Europe[123] the importance of this case as an indicator of democratic progress in Bosnia, and declared his willingness to identify the best way of ensuring the release of the six Bosnian citizens and former residents from Guantanamo, in accordance with Parliamentary Assembly Resolution 1433 (2005).

145. Lastly, on 16 September 2005, the Bosnian parliament adopted a resolution inviting the Council of Ministers of Bosnia and Herzegovina to make contact with the American government in order to resolve the problem of the six men as rapidly as possible.

146. It is all the more surprising that, in spite of all these promising declarations, including that of the Prime Minister to the Parliamentary Assembly of the Council of Europe, there has been no government initiative aimed at the release of the six men.

147. According to their lawyers[124], the American government has declared on several occasions that it is willing to enter into bilateral discussions with the governments of countries whose citizens are detained at Guantanamo in order to arrange their repatriation, subject to adequate security conditions. In the case of the six men in question, such measures would be unnecessary anyway, since the charges against them have already been investigated by the competent authorities and those investigations have shown that they are innocent. Nonetheless, the Bosnian government has apparently made no credible move to initiate negotiations in that direction[125].

148. The innocence of the men in question – which is in any event presumed, and is in no sense a condition for treating the suspects in accordance with legal rules – has just been strengthened by a report drawn up by the German military. This report, produced in decidedly unusual circumstances[126], which also

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[121] Note 115 above.

[122] The Human Rights Chamber, in the above-mentioned Bensayah judgment (note 114), explains in a relevant manner that the "handing over" of the applicant can in no way be deemed to constitute extradition. In particular, the note dated 17 January 2002 from the US embassy cannot be regarded as a request for extradition by the United States. In that note, the US embassy in Sarajevo informs the Government of Bosnia and Herzegovina that it is willing to take charge of the six Algerian citizens in question and offers to arrange for the physical transfer of these persons at a time and place suitable to both parties.

[123] In reply to a question from our former colleague Kevin McNamara, following Resolution 1433 (2005) adopted by the Parliamentary Assembly on 26 April 2005, calling on all Council of Europe member States, including Bosnia and Herzegovina, to protect the rights of their citizens or residents detained at Guantanamo and to have them released and repatriated.

[124] Memorandum of 12 April 2006, addressed to the Temporary Committee of the European Parliament.

[125] See Matthew A. Reynolds, Acting Assistant Secretary, Legislative Affairs, US Department of State, letter to Senator James M. Jeffords, response to a requeset for information (copy on file with the Rapporteur), 15 June 2005: *"Although the Government of Bosnia and Herzegovina has made several inquiries regarding the condition of each detainee and has asked for their release, it has not indicated that it is prepared or willing to accept responsibility for them upon transfer."*

[126] German military personnel posed as journalists in order to conduct an interview with Mr Bensayah's wife, Mrs Anela Koblica, on 17 June 2003. The report subsequently drawn up by the German military concluded that the grounds on which the six men were arrested and deported were *"highly dubious"* and that documents examined gave rise to the suspicion that at least some of the six had been *"subjected to an injustice"*.

aroused the interest of the German media and parliamentarians[127], concluded *inter alia* that the reasons for arresting the six men were "highly dubious"[128].

149. In my opinion, the case of the "Bosnian six" is another well documented example of the abduction of European citizens and residents by the American authorities with the active collusion of the authorities of a Council of Europe member state. The government of Bosnia and Herzegovina has the merit of no longer denying the fact that it handed over the six men to the American forces. According to information I have received[129], the Bosnian authorities acted under extraordinary pressure from the American embassy in Sarajevo, but the fact remains that they acted in violation of clear decisions by the Supreme Court and the Human Rights Chamber ordering the release of these men. If the damage to the good human rights reputation of Bosnia and Herzegovina is to be repaired, official recognition of the facts is an important step in the right direction, but it must be followed as swiftly as possible with credible diplomatic intervention vis-à-vis the American government in order to secure the rapid repatriation of these six men, who have now been festering in Guantanamo Bay for over four years.

3.3. Ahmed Agiza and Mohammed Alzery (El Zari)

150. The case of the two Egyptian asylum-seekers "handed over" by the Swedish authorities to American agents who took them to Egypt, where they were tortured in spite of diplomatic assurances given to Sweden, is another very well documented case. It led to Sweden's being condemned by the United Nations Committee against Torture (UN-CAT)[130]. The Swedish authorities were also criticised for having attempted to conceal the facts from UN-CAT[131].

151. The affair was brought to public notice mainly by the "Kalla Fakta"[132] television programme, and research by the Swedish investigative journalists blew open the secret system of CIA aircraft transporting clandestine prisoners in the "war against terrorism". The aircraft used for this operation – a Gulfstream, number N379P – has become one of the most notorious "rendition" aircraft[133].

152. The behaviour of the Swedish secret police (Säpo) gave rise to a detailed investigation by the Swedish parliamentary ombudsman, Mats Melin[134]. The judicial authorities also examined the case and concluded that there were no grounds for a criminal prosecution against either the Swedish agents involved, or the pilot of the aircraft, or other American agents who were part of the team responsible for transporting Mr Agiza and Mr Alzery to Egypt[135].

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[127] See, for example, http://www.tagesschau.de/aktuell/meldungen/0,1185,OID5072374,00.htm . Journalists' associations protested vehemently at methods of investigation that involved intelligence agents masquerading as journalists, as this exposed real journalists to suspicion and possible reprisals.

[128] From a confidential source, I received a copy of this report, which, it was claimed, was deleted from the German military archives and never received by the German embassy in Sarajevo, to which it was said originally to have been addressed. See *Supplementary Intelligence Report*, 16 July 2003 (copy on file with the Rapporteur).

[129] See for example the Wilmer Hale memorandum of 12 April 2006, at page 3, supported by a wealth of documents given to us by Wilmer Hale, copies of which are all on file with the Rapporteur.

[130] United Nations Committee against Torture, decision of 20 May 2005, CAT/C/34/D/233/2003; see also United Nations Committee against Torture, Conclusions and recommendations of the Committee against Torture: Sweden. 06/06/2002, CAT/C/CR/28/6 (Concluding Observations/Comments), and the Swedish reply (Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee (CCPR/CO/74/SWE) of 14 May 2003. In that reply (para. 16), the Swedish government said that in its opinion, the "assurances" given by Egypt were being and would continue to be fully respected, and that the government had received no information to cast doubt on that conclusion.

[131] See "Kalla Fakta" (note 131 below), page 10 : the Swedish reply to the final observations (note 129 above) seems to be contradicted by the first report of the Swedish Ambassador in Egypt, according to which Mr Agiza had spoken to him about the abuse and violence which he and Mr Alzery had suffered. According to "Kalla Fakta", the Swedish government had filed this information and refused to hand it to the United Nations. In its decision of 20 May 2005 (note 129 above, para. 13.10), UN-CAT notes that Sweden has not fulfilled its obligation to co-operate fully with the Committee, and has not made all the relevant and necessary information for resolving the case available to the Committee.

[132] Translation of the title of the programme: "Cold facts"; a transcript of the broadcast of 22 November 2004 was provided to me by TV4.

[133] Kalla Fakta has given an account of its research into the owner of N379P, Premier Executive Transport Services. Posing as potential clients, journalists satisfied themselves as to the governmental, clandestine nature of this firm (cf. transcript, note 131 above, pages 4-5).

[134] See Mats Melin, Parliamentary Ombudsman (Sweden), *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens*, Adjudication No. 2169-2004, dated 22 March 2005. (Translated copy on file with the Rapporteur.)

[135] *Ibid*, at page 3.

153. In short, the facts occurred in the following manner: on 18 December 2001, Mr Agiza and Mr Alzery, Egyptian citizens seeking asylum in Sweden, were the subject of a decision dismissing the asylum application and ordering their deportation on grounds of security, taken in the framework of a special procedure at ministerial level. In order to ensure that this decision could be executed that same day, the Swedish authorities accepted an American offer to place at their disposal an aircraft which enjoyed special overflight authorisations[136]. Following their arrest by the Swedish police, the two men were taken to Bromma airport where they were subjected, with Swedish agreement, to a "security check" by hooded American agents.

154. The account of this "*check*" is especially interesting, as it corresponds in detail to the account given independently by other victims of "rendition", including Mr El-Masri. The procedure adopted by the American team, described in this case by the Swedish police officers present at the scene[137], was evidently well rehearsed: the agents communicated with each other by gestures, not words. Acting very quickly, the agents cut Agiza's and Alzery's clothes off them using scissors, dressed them in tracksuits, examined every bodily aperture and hair minutely, handcuffed them and shackled their feet, and walked them to the aircraft barefoot.

155. The ombudsman condemns as degrading the way in which the detainees were treated from the time when they were taken charge of by the American agents until the end of the operation when the two men were handed to the Egyptian authorities. He does not consider that it constitutes torture for the purposes of Article 3 of the European Convention on Human Rights, but asks the question – though he does not answer it – whether the execution of the deportation order nonetheless violates Article 3. In any event, he finds that the operation was carried out in an inhuman and therefore unacceptable manner[138].

156. According to the ombudsman's findings, the Swedish officers, who were poorly led, lost control of the operation from the start of the American team's intervention. They ought to have intervened to put an end to the degrading treatment of the detainees, which was not justified on security grounds since the Swedish police had already carried out a body search on the detainees at the time of arrest.

157. Prior to deportation of the two men to Egypt, Sweden sought and obtained "diplomatic assurances" that they would not be subjected to treatment contrary to the anti-torture convention, would have fair trials and would not be subjected to the death penalty. The "assurances" were even backed up by a monitoring mechanism, regular visits by the Swedish Ambassador and participation by Swedish observers at the trial.

158. Developments in the case show that these "assurances" were not honoured. Mr Alzery's lawyer, Kjell Jonsson[139], states that extremely grave acts of torture took place[140]. Although Mr Alzery was released from prison in October 2003, he is not allowed to leave his village without permission from the authorities. Mr Agiza was sentenced to 25 years imprisonment by a military court in a trial from which the Swedish observers were excluded for the first two days out of a total of four. Despite the fact that Mr Agiza complained of torture during his detention, which lasted over two years after his forced return to Egypt, and despite the fact that the prison doctor's report did record physical injuries sustained in prison, the military court did not act on the defence request for an independent medical examination[141].

159. The UN-CAT decision shows that the "diplomatic assurances", even with follow-up clauses attached, are not such as to prevent the risk of torture[142]. The deporting state therefore still bears responsibility.

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[138] An internal Säpo report seems to indicate that the American involvement was approved by the Ministry of Foreign Affairs; persons who attended the meeting with the minister and were questioned by the ombudsman have no recollection that this was mentioned.

[137] Owing to lack of space in the room made available to the Americans, the Swedish police were not able to observe everything. In particular, they did not see that (tranquillising) suppositories were administered and that diapers were affixed, as the detainees maintain, and as was done in other "renditions". See the earlier section of this report on the "Human Impact of Renditions and Secret Detentions".

[138] See the report by Mats Melin, *supra* note 134, page 23.

[139] Mr Jonsson testified before the Temporary Committee of the European Parliament on 23 March 2005; he spoke at great length with a member of my team during his visit to Brussels.

[140] Electric shock torture was used, with electrodes fixed to the most sensitive parts of the body, in the presence of a doctor who assesses what electrical charge the prisoner can survive. In order to prevent marks, the places affected are treated specially at the end of each torture session.

[141] A representative of Human Rights Watch observed the entire trial ; the observed violations of the rights of the defence are listed in a HRW communiqué of 5 May 2005 (Sweden Implicated in Egypt's abuse of Suspected Militant – Egypt violated diplomatic promises of fair trial and no torture for terrorism suspect (http://hrw.org/english/docs/2004/05/05/egypt8530_txt.htm).

[142] Diplomatic assurances are not the focus of my mandate; here, nevertheless, are two very pertinent reports on the subject: Amnesty International, *"Diplomatic Assurances" – no protection against torture or ill-treatment*, report No. ACT

160. All things considered, the Swedish case of Agiza and Alzery cannot be classed as "abduction" by the CIA. The two men were the subject of a Swedish deportation procedure following dismissal of the asylum application; that procedure was severely criticised by UN-CAT, and rightly so: the immediate execution of the decision deprived the two men of any possibility of appeal, including under the United Nations Convention against Torture – an appeal which moreover would have stood a good chance of success, in view of the risk of torture they faced in Egypt. Other criticisms directed at Sweden are the "slack" implementation of the follow-up clause relating to the assurances obtained prior to extradition[143], and above all the fact that Sweden did not send UN-CAT all the relevant information[144]. On the other hand, with regard to the ill-treatment of the prisoners at Bromma airport and in the aircraft, the reproach is aimed primarily at the United States. I share Mats Melin's view that such degrading and humiliating treatment is unacceptable.

161. Nonetheless, in my opinion it is for Sweden to clarify further the reasons and responsibilities: how was it that the Swedish officers present on the scene allowed their American counterparts to do as they wished, letting them take control of this operation while still on Swedish soil?

3.4. Abu Omar

162. At midday on 17 June 2003, Hassam Osama Mustafa Nasr, known as Abu Omar, an Egyptian citizen, 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 one of the best-known and best-documented cases of "extraordinary rendition"[145]. 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 Abu Omar in Egypt. 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 also worked as the American consul in Milan – was in Egypt for two weeks immediately after Abu Omar was handed over to the Egyptian authorities. It may safely be inferred that he contributed, in one way or another, to Abu Omar's interrogation. The proceedings instituted in Milan concern 25 American agents, against 22 of whom the Italian judicial authorities have issued arrest warrants. 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 verge 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 the fight against terrorism. Is it conceivable or possible that an operation of this kind, with a deployment of resources on this scale in a friendly country that was an ally (being a member of the coalition in Iraq), was carried out without the Italian authorities – or at least the corresponding Italian officials – being informed? The Italian Government has denied having been informed. There has recently been a significant new development in the investigation by the Milan prosecuting authorities, however: an agent belonging to an elite *Carabinieri* unit has admitted taking part in Abu Omar's abduction as part of an operation co-ordinated by the military intelligence services (SISMI)[146]. But General Pollari, head of SISMI, had formally denied any SISMI participation in the abduction; he had even affirmed that he had only been informed of this episode after the abduction itself[147].

40/021/2005, 1 December 2005; and Human Rights Watch, *Still at Risk: "Diplomatic Assurances" No Safeguard against Torture*, Report No. 17, Vol. 3D, 17 April 2005.

[143] See the afore-mentioned HRW communiqué of 5 May 2005: the first visit Mr Agiza received from a Swedish diplomat was only five weeks after his arrival in Egypt, despite the fact that experience shows that torture and ill-treatment take place during the first days of detention. Furthermore, the Swedish diplomats, who were not trained to recognise signs of torture, apparently gave several days' notice of their visits, and all conversations were apparently monitored by the Egyptian warders.

[144] Sweden justifies the fact that it did not send its ambassador's first visit report, in which Mr Alzery's complaints of ill-treatment are recorded, for fear of reprisals against the detainees, given doubts about respect for confidentiality within UN-CAT. But in any case those complaints were known to the Egyptian authorities, who were represented during the ambassador's visit.

[145] I met the prosecutor heading the investigation, Armando Spataro, and was able to obtain as full information as confidentiality and procedural requirements permitted. The Abu Omar case is likewise described in the aforementioned book by Guido Olimpio, *Operazione Hotel California*, Feltrinelli, October 2005. The main documents in the judicial investigation have been collected and reproduced in a book by Guido Ruotolo and Vincenza Vasile: *Milano-Cairo. Viaggio senza ritorno. L'iman rapito in Italia dalla CIA*, Tullio Pironti Editore, 2005.

[146] See *Corriere della Sera* and *La Repubblica* of 11 May 2006.

[147] Statement of General Pollari at the meeting of the TDIP on 6 March 2006.

3.5. Bisher Al-Rawi and Jamil El-Banna

163. This case, which concerns two British permanent residents arrested in Gambia in November 2002 and transferred first to Afghanistan and from there to Guantanamo (where they still are) is an example of (ill-conceived) cooperation between the services of a European country (the British MI5) and the CIA in abducting persons against whom there is no evidence justifying their continued detention in prison and whose principal crime is to be on social terms with a leading Islamist, namely Abu Qatada.

164. The information made public to date[148] shows that the abduction of Messrs Al-Rawi and El-Banna was indeed motivated by information – partly erroneous – supplied by MI5.

165. Bisher Al-Rawi and Jamil El-Banna were arrested in Gambia on 8 November 2002. They intended to join Mr Al-Rawi's brother Wahab, a British citizen, and help him set up a mobile peanut processing plant. The British authorities were well aware of this business trip[149]. On 1 November, Messrs Al-Rawi and El-Banna left on their trip, but did not get very far. At Gatwick airport they were arrested by reason of a suspect item in Mr Al-Rawi's hand luggage.

166. On the same day, a first telegram from MI5 informed the CIA that the two men had been arrested under the 2000 anti-terrorist act. That telegram contained false information, including the statement that Mr Al-Rawi was an Islamist extremist, and that the search of his luggage had revealed that he was carrying a sort of improvised electronic device which could be used, according to preliminary investigations, as a component of a home-made bomb[150].

167. The two men spent 48 hours in police custody, until the police decided that the "suspicious device" was nothing other than a battery charger on sale in several electronic goods shops (Dixons, Argos, Maplins). Mr Al-Rawi explained this when he was arrested, but it had to be checked. The conclusion to the charger episode – that it was indeed a "harmless device" – was communicated to the Ministry of Foreign Affairs by MI5 in a telegram of 11 November 2002. Unfortunately, there is no evidence that this information was ever conveyed to the CIA. The allegations concerning this "device" reappeared in their "trial" before the CSRT (Combatant Status Review Tribunal)[151] as "evidence" that they were "enemy combatants".

168. Messrs Al-Rawi and El-Banna returned home on 4 November 2002 and reorganised their trip to Gambia for 8 November. Meanwhile, several telegrams were sent by MI5 to the Americans concerning the two men, informing them that they knew Abu Qatada and that Mr El-Banna was the latter's "financier". It is true that the two men knew Abu Qatada[152]. On the other hand, according to the lawyers, Mr Al-Rawi had helped MI5 to prepare the non-violent arrest of Abu Qatada, and British agents had even thanked him for doing so[153].

169. On 8 November 2002, the day when the two men flew to Gambia, MI5 sent another telegram giving the flight details, including the departure of the delayed flight and the estimated arrival time. The telegram states that "*this message should be read in the light of earlier communications*". In addition, the telegram of 8

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[148] I wish to thank in particular my British colleague Andrew Tyrie, Chairman of the House of Commons All-Party Parliamentary Group (APPG) on renditions, who helped to arrange for two members of our committee secretariat to attend an APPG hearing withMr Al-Rawi and Mr El Banna's lawyers and family. This hearing took place on 28 March 2006. I also thank the two men's American and British lawyers, Mr Brent Mickum and Ms Gareth Peirce, along with Mr Clive Stafford-Smith, the legal director of REPRIEVE, for the detailed information they provided for my inquiries.

[149] Mr El-Banna informed his lawyer that two MI5 agents had come to his home and told him that they knew all about his planned trip. In reply to his question as to whether everything was in order, they said yes and wished him good luck. Mr El-Banna's wife confirmed this visit at the APPG hearing on 28 March 2006.

[150] Telegram of 1 November 2002, made public on 27 March 2006, with other telegrams dated 4, 8 and 11 November and 6 December 2002 ; these documents are normally classified secret, but came into the public domain after being cited on 22 and 23 March 2006 at a public hearing in the Queens Bench Division of the High Court in London, before Lord Justice Latham and Mr Justice Tugendhat. The telegrams were also the subject of the APPG hearing on 27 March 2006. It is clear to their lawyers that not everything is said in the telegrams, which moreover refer to other communications, including telephone calls.

[151] See US Department of Defense, unclassified Combatant Status Review Tribunal (CSRT) transcripts disclosed in the matter of *El-Banna et al v. Bush*, in the US District Court of Columbia (copies of all transcripts on file with the Rapporteur), October 2004.

[152] At the APPG hearing on 27 March 2006, Mr El-Banna's wife explained that their "social" relations derived from the fact that the three men had family ties with Jordan.

[153] Al-Rawi's cooperation with MI5 is said also to be the reason for several visits by MI5 agents to Guantanamo. The lawyers presented details of these conversations in public as recounted by their clients (copy in file). MI5 has not officially recognised this cooperation, which Al-Rawi also claimed in his depositions to the CSRT.

November does not mention, as the earlier telegrams do, that this information "*must not be used as the basis of overt, covert or executive action*".

170. At Banjul airport, Al-Rawi and El-Banna, accompanied by a collaborator, Mr El Janoudi, met Bisher Al-Rawi's brother Wahab, who had gone to Gambia one week before the others, and all four were arrested by Gambian agents. They were taken to a house outside Banjul. Mr Janoudi managed to telephone his wife in London, and another brother of Mr Al-Rawi, Numann, went to see his MP, Edward Davey, who informed the Foreign Ministry.

171. During the following days, according to Wahab's account, American agents were very present, but the detainees never saw a British official despite the fact that they asked to see a consular representative. Wahab stated at the APPG hearing that the CIA and Gambian officials repeatedly alluded to the fact that *"it is the British who have told us to arrest you"*. Mr El-Banna says he has continually been told the same thing during his subsequent detention at Guantanamo Bay:

> "*My interrogator asked me 'Why are you so angry at America? It is your Government, Britain, the MI5, who called the CIA and told them that you and Bisher were in The Gambia and to come and get you. Britain gave everything to us. Britain sold you out to the CIA*'"[154].

172. On 5 December 2002, after 27 days, Wahab was released and returned to the United Kingdom. Some days afterwards, on a Sunday, Bisher Al-Rawi and Jamil El-Banna were flown to Afghanistan in a military jet with over 40 seats. There were at least 7 or 8 American agents on board including a female doctor. Through their lawyers, the two men gave a detailed account of their degracing and humiliating treatment, many details of which echo the treatment suffered by other victims of "renditions"[155].

173. At Kabul, they were taken in less than 15 minutes to the prison identified as the "Dark Prison". The description of the inhuman detention conditions in this prison[156], an important link in the CIA "spider's web", corresponds in many details to that given by other victims of "renditions" who were brought there. After two weeks in this sinister prison, the two men were transferred to Bagram by helicopter. At Bagram they were imprisoned and ill-treated for a further two months. The American interrogators allegedly offered Mr El-Banna large sums of money in exchange for false witness against Abu Qatada. When these offers failed to produce the expected result, the interrogators allegedly threatened to send him back for a year to the "Dark Prison", followed by 5 or 10 years in Cuba, and made shameful threats against his family living in London[157].

174. Finally, the two men were transported to Guantanamo, where they were again subject to inhuman treatment. Mr Al-Rawi says he received many visits from MI5 agents, the first of them in early autumn 2003, and that he was interrogated by ten or so different CIA agents. One of the MI5 agents, he says, even apologised to him. In January 2004, two British agents ("Martin" and "Mathew") asked him whether he would be willing to work for MI5 again. Mr Al-Rawi replied that he would, provided that this would serve the cause of peace. Several months later, a certain "Alex" with whom Mr Al-Rawi had worked in London came to see him at Guantanamo, accompanied by an "attractive female agent". However, at the time of his "trial" before the CSRT, the British authorities refused to send to Guantanamo the witnesses he named or simply to confirm his links with MI5, thereby condemning him to continuous detention – detention which continues to this day, having lasted almost four years in all.

175. The families of Messrs Al-Rawi and El-Banna and their lawyers at the London firm Birnberg, Peirce & Partners brought an action to oblige the British government to make representations to the United States through diplomatic channels in order to secure the release and repatriation of the two men as soon as possible. According to the latest information, the British government has acted along those lines with regard to Mr Al-Rawi, but not with regard to Mr El-Banna. The judgment at first instance, given in May 2006, dismissed the families' complaints.

176. In view of these highly disturbing facts, I find that the British authorities must shed light on this case in full. I welcome the fact that our colleague, Andrew Tyrie, has devoted much energy to this matter in order for truth to be established in this disturbing case. Meanwhile, the United Kingdom, even if it has no

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[154] See El-Banna's statement to his lawyer, *supra* note 68.

[155] They were dressed in diapers, wore hoods without eye-holes, had their ears blocked up, their legs shackled and their hands painfully handcuffed behind their backs, and were denied access to toilets.

[156] *"Diabolically"* loud music round the clock, total absence of light, rotten food, no possibility to wash or use a toilet, uncomfortable handcuffing and leg shackling, cold cells, inadequate clothing, and the frequent beating and trampling of prisoners.

[157] I prefer not to quote this extremely upsetting testimony.

recognised legal obligation, must make good the consequences of the apparently very imprecise communication between the MI5 and the American services. There is indeed little doubt that the arrest of the two men was largely triggered or at least influenced by the messages of November 2002, only part of which (the afore-mentioned telegrams) is public knowledge.

3.6. Maher Arar

177. Maher Arar, a Canadian citizen of Syrian origin, came to testify in public before the Temporary Committee of the European Parliament[158]. During a stopover on return from holiday in Tunisia, in September 2002, he was arrested at JFK airport in New York by American agents. After being detained in a high-security prison and interrogated for two weeks by the New York police, the FBI and the American immigration service, he was allegedly transported from New Jersey airport via Washington, Rome and Amman to a prison belonging to Syrian military intelligence[159]. He spent more than ten months there, during which he says he was tortured, abused and forced to make false confessions. During his stay in Syria, he says, he also heard the voice of a German prisoner being tortured. After a tenacious campaign by his wife, Mr Arar was able to have irregular contacts with Canadian diplomats posted in Syria. He says he has never been the subject of criminal charges in any country. Mr Arar stills suffers from post-traumatic stress syndrome following his terrible experience.

178. The American Government considers the "rendition" of Arar as a legitimate procedure in conformity with its immigration rules[160].

179. According to Mr Arar, the agents on board the aircraft never identified themselves, but he heard that they belonged to a *"special removal unit"*. In this specific case, the transfer of Mr Arar to Syria seems to be a well established example of the "outsourcing of torture", a practice mentioned publicly by certain American officials[161].

180. The question which interests us more particularly, in view of our mandate, is whether and if so, to what extent, the European states concerned (in particular Italy and Greece) were aware of the illegal transport of Mr Arar and perhaps even gave logistical support[162].

181. Another question is the role of the Canadian authorities in the matter. This question is the subject of a very thorough investigation by a special commission[163].

182. The initial report of the investigator Stephen J. Toope was published on 14 October 2005[164]. Mr Toope, who has lengthy experience in working with torture victims, has convincingly established the truthfulness of Mr Arar's depositions, which he has compared with those of other former Syrian prisoners held in the same prison run by Syrian military intelligence (Far Falestin). His report, which also mentions the findings of specialist doctors whom Mr Arar consulted on his return, describes in detail Mr Arar's treatment in Syria, which he unhesitatingly regards as torture within the meaning of the United Nations Convention against Torture. However, that report does not cover the part played by the Canadian authorities in the matter. This point will be covered in the final report of the Commission, which is expected to be published by the end of the summer of 2006[165]. It is thus premature to draw any conclusions at this stage[166].

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[158] Accompanied by his lawyer, he also had exhaustive talks with a member of the Committee's secretariat.

[159] This journey was retraced by a British investigative journalist, whose research is corroborated by data obtained by us from Eurocontrol and national air traffic control authorities. See *Flight logs related to the rendition of Maher Arar*, in the Appendix to this report.

[160] See Bellinger, *Briefing to European Delegation, supra* note XX: "With respect to Maher Arar, I can't comment on his case either. But I do know his case has gotten added to the list of so-called renditions, when in fact his removal was dealt with as an immigration matter, which is what all countries do when they find someone in their country and they don't want to prosecute them inside their countries. So he was expelled from the United States by order of an Immigration Court. I think that's a different situation. So this is not the same situation as these other cases."

[161] See the quotations reproduced in my information report of 22 January 2006.

[162] See *Flight logs related to the rendition of Maher Arar*, in the Appendix to this report.

[163] Commission of inquiry into the action of Canadian officials in relation to Maher Arar, set up on 5 February 2004 *"to throw light on the actions of the Canadian authorities concerning the deportation and detention of Maher Arar"*. The commissioner heading the inquiry is the Honourable Dennis R. O'Connor, deputy chief judge of Ontario.

[164] Available on the commission's website : www.commissionarar.ca; the reports of experts/witnesses, the rules of procedure and – albeit greatly truncated – summaries of the hearings in camera are among other items also published on this website.

[165] See the communiqué of 11 April 2006, indicating that the delay (five months after the date originally planned) is *"largely attributable to the process that was adopted to analyse reports in regard to the government's requests designed to protect certain information on grounds of confidentiality in connection with national security (CLSN)"*. The communiqué

183. The working methods of this commission, a genuine commission of inquiry with real powers of investigation, empowered to take cognisance of classified information, strike me as very interesting. However, Mr Paul Cavalluzo, principal lawyer to the Commissioner, the Honourable Dennis O'Connor, has reportedly deplored the tendency of the Canadian authorities to use national security confidentiality; Mr Arar's lawyers, Lorne Waldman et Marlys Edwardh, have accused the Government to "hide behind" official secrecy considerations.

3.7. Muhammad Bashmila and Salah Ali Qaru

184. The cases of Mr Bashmila and Mr Ali Qaru are described in an Amnesty International report[167] based on inquiries made on the spot and intensive discussions with the victims. It is likely that they owe their recent release to Amnesty's commitment. The two men, who have never been accused of the slightest terrorist crimes, were arrested in Jordan and disappeared, as far as their families were concerned, into the American "spider's web" in October 2003[168]. According to AI's investigations, they were held in at least four secret American detention centres, probably in three different countries. The former detainees themselves say that they spent time in Djibouti, Afghanistan and - of particular interest to us - "*somewhere in eastern Europe*". The exact location of the place where they spent the final 13 months from the end of April 2004 onwards remains unknown. The men gave a precise description of their place of detention, which has not yet been published in full[169], and of the route along which they were taken. Particularly intriguing is their return flight to Yemen on 5 May 2005, reportedly a non-stop flight lasting approximately seven hours. I wrote to the Yemeni authorities and asked where the plane had come from, and the arrival of the aircraft on that date with the two men on board was officially confirmed to me. Unfortunately, although I wrote again, I have not yet received the specific information requested. Since the aircraft concerned was probably a military one, the information obtained from Eurocontrol has also been unable to clarify this matter. We have been unable to locate a site corresponding to the description provided.

3.8. Mohammed Zammar

185. Mr Zammar, a German of Syrian origin, was suspected of having been involved in the "Hamburg cell" of Al Qaeda and had been under police surveillance for several years in Germany. After 11 September 2001, he had been the subject of a criminal investigation for "support for a terrorist organisation", but there was insufficient evidence to keep him in prison.

186. On 27 October 2001, he is reported to have left Germany for Morocco, where he spent several weeks. When he attempted to return to Germany, he was allegedly arrested by Moroccan officials at Casablanca airport early in December, and to have been questioned by Moroccan and American officials for over two weeks. Towards the end of December 2001, he is said to have been flown to Damascus, Syria, on a CIA-linked aircraft[170].

187. The case has received extensive press coverage[171], and there have been allegations that Mr Zammar's arrest in Morocco was facilitated through the provision of information by German services, that he was tortured by Syrian services and that he was questioned in Syria by German officials.

188. A detailed German government report to the *Bundestag*, a copy of which I have obtained[172], gives a balanced version of this affair.

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describes in detail the procedures followed where the government invokes CLSN, disputes on the matter being settled in the last resort by the federal court.

[166] See the "summaries of hearings in camera" (note 163 above), in particular para. 12 pp and 33 Given the provisional and incomplete nature of these summaries, I prefer not to comment in greater detail.

[167] Below the radar: secret flights to torture and "disappearance", 5 April 2006, AI Index: AMR 51/051/2006. My particular thanks go to Mrs Anne Fitzgerald for her co-operation with our committee's secretariat on this subject.

[168] AI's report (pp 9-16) gives a precise description of the sufferings of the victims and their families.

[169] Cf AI report (pp 13 and 14). One particularly interesting piece of information is a geographical deduction based on the prayer times provided, which were taken from an Internet site (islamicfinder.org). The time of the sunset prayer ranged from 4.30 to 8.45 pm (allowing for the change to summer time, which the whole of Europe uses, but not Afghanistan, Jordan or Pakistan). This corresponds to a location north of the 41st parallel, so well to the north of the Middle East, and very probably within a Council of Europe member state.

[170] The Eurocontrol data available to us does not enable us to confirm this flight, which took place between two non-European airports.

[171] Examples are the items published in the Washington Post on 12 and 19 June 2002 and 31 January 2003, in *Der Spiegel* in July 2002 and November 2005, and in Focus of 20 September 2002, and shown on *Kalla Fakta* (the fourth Swedish TV channel) on 22 November 2004.

189. Mr Zammar's arrest in Morocco was objectively facilitated by exchanges of information between the German services and their Dutch, Moroccan and also American counterparts. These exchanges of information about the travel plans of a person suspected of terrorist activities (the German government's report contains detailed information which seem to justify such suspicion) are part of normal international co-operation in the fight against terrorism. It cannot be deduced from the fact that the German services informed their colleagues of the dates on which Mr Zammar had flight reservations that it was their intention - or even that they suspected - that he would be arrested and held in violation of normal procedures. The facts date back to December 2001, well before the public revelations about the illegal practice of "rendition flights".

190. The German Ministry for Foreign Affairs and the Damascus and Rabat Embassies intervened several times, firstly to establish Mr Zammar's whereabouts, then to give him consular assistance during his detention in Syria. Syria refused any kind of consular intervention, on the basis of its non-recognition of his renunciation of Syrian nationality when he underwent naturalisation in Germany, a policy applied generally by Syria.

191. German officials did indeed question Mr Zammar in Syria. While Mr Zammar is said to have told his German interrogators that he had been beaten both in Morocco and in the early stages of his detention in Syria, but nothing supports the conclusion that this mistreatment related to the presence and intervention of the German agents. The German officials are reported to have found him in a good physical and psychological condition, although he had lost a considerable amount of weight. Relations between Mr Zammar and his Syrian guards did not seem tense, although the German visitors did note a somewhat authoritarian relationship.

192. As indicated above, a *Bundestag* committee of inquiry is looking into the matter, and it is appropriate to await its results.

3.9. Binyam Mohamed al Habashi

193. Binyam Mohamed al Habashi is an Ethiopian citizen who has held resident status in the United Kingdom since 1994. While many of his family members emigrated to the United States and became naturalised citizens there, Binyam moved to the UK as a teenager and claimed asylum. He spent seven years pursuing his education in London while his asylum application was considered in a protracted, ultimately unresolved process. He had problems with drugs and converted to Islam at the age of twenty.

194. Binyam is now detained at Guantanamo Bay and has been selected as one of the first group of ten prisoners to appear before a special United States Military Commission, probably later in 2006. We were able to view Binyam's diary, an account of the last five years of his life, and a series of letters he has written from Guantanamo. A member of my team was also able to hear first-hand testimony from members of his family and his legal representatives in the United Kingdom.

195. In treating Binyam's case in my report I shall avoid any reference to the charges he is likely to face before the Military Commission. Suffice to say that I regard such commissions generally as a flawed basis on which to prosecute allegations of the most serious nature, since the defendant's due process rights are severely impaired[173]. I do not consider these commissions to be fair hearings and I reiterate my position that the global effort to bring terrorist suspects to justice should depend primarily upon judicial remedies.

196. Of greatest concern in Binyam's case are the accounts of torture and other serious human rights violations which he says he has suffered. He speaks of being wounded all over his body with a scalpel and a razor blade, beaten unconscious and hung from the walls in shackles. He suffered gross physical injuries, including broken bones. He was constantly threatened with death, rape and electrocution.

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[172] Following my request to the Chair of the *Bundestag* committee responsible for monitoring the special services, I received a copy of the public version of this report. I also received from an anonymous source a version classified "confidential/for official use only", of which I made responsible use, in the spirit of the decision taken by the Legal Affairs Committee at its meeting of 13 March 2006 on the receipt of confidential information. I was also offered a copy of an even more detailed version classified "secret", which I opted not to accept for ethical reasons. place my trust in the members of the *Bundestag* to whom this document was addressed to take the necessary action on the basis thereof, including appropriate action to alert me to any fact reported in this version directly related to my terms of reference as rapporteur.

[173] Reference to the Executive Order that established Military Commissions for Guantanamo detainees, signed by President Bush in Oct / Nov 2001.

197. It is difficult to say whether this account actually reflects reality. Let us just recall that some of these acts are included in what has been called "enhanced interrogation techniques", which have been developed by the United States in the "war on terror"[174]. Furthermore many of the abuses described by Binyam bear striking similarities to the allegations of other detainees who have been held in the same detention facilities at various points over the last few years[175].

198. Binyam's case is an example for the very numerous detainees – most of whose names and whereabouts we do not know – who have become trapped in the United States' spider's web during the course of the "war on terror". Binyam has been subjected to two CIA renditions, a US military transfer to Guantanamo Bay and several other clandestine transfers by plane and helicopter. He has been held in at least two secret detention facilities, in addition to military prisons. During his illegal interrogations, he has been confronted with allegations that could only have arisen from intelligence provided by the United Kingdom.

199. Binyam's family told my representative that he disappeared in the summer of 2001. His close-knit family subsequently endured several years of desperate uncertainty about his whereabouts and well-being, only partially clarified by their first visit from FBI agents three years later, in 2004. Although they have received a handful of letters from him in Guantanamo, none of the family has been able to see or speak to Binyam for five years.

200. According to his testimony, Binyam travelled voluntarily to Afghanistan in 2001[176] and spent some time there, probably several months, before crossing into Pakistan and seeking to return to the UK. He was arrested by Pakistani officials at Karachi Airport on 10 April 2002 for attempting to travel on a false passport. Within ten days of his arrest, he was interrogated by American officials. Upon asserting his right to a lawyer, and later upon refusing to answer questions, American officers are alleged to have told him: "*The law has been changed. There are no lawyers. You can co-operate with us the easy way, or the hard way. If you don't talk to us, you're going to Jordan. We can't do what we want here, the Pakistanis can't do exactly what we want them to do. The Arabs will deal with you.*"

201. The initial interrogations in Karachi involved Pakistani, American and British agents. Binyam was never accused of a particular crime and was told by MI6 agents that "*they checked out my story and said they knew I was a nobody*". When he was discharged from Pakistani custody, however, he was not released. Instead, the Pakistani security services took him to a military airport in Islamabad and handed him over to the United States.

202. Binyam testifies that he underwent his first rendition on 21 July 2002. He was set upon by unidentified people "*dressed in black, with masks, wearing what looked like Timberland boots*". He describes how they "*stripped [him] naked, took photos, put fingers up [his] anus and dressed [him] in a tracksuit. [He] was shackled, with earphones, and blindfolded*", before being forced onto an aircraft and flown to Morocco. Official flight records obtained by this inquiry show that the known rendition plane, N379P, took off from Islamabad on 21 July 2002 and flew to Rabat, Morocco.

203. Binyam has described various secret detention facilities in which he was held in Morocco, including one prison that was submerged "*almost underground*" and one more sanitary place in which he was apparently placed to recover from injuries sustained from his torture. Between July 2002 and January 2004 Binyam was tortured on numerous occasions by a team of interrogators and other officials, most of whom were Moroccan. Some of the officials wore masks, while others did not; at least one interrogator, who identified herself as a Canadian, is thought to have been an American CIA agent.

204. It appears that the object of the torture was to break Binyam's resistance, or to destroy him physically and psychologically, in order to extract confessions from him as to his involvement in terrorist activities. In addition to the sustained abuse and threats, the torturers used information, apparently obtained from intelligence sources, to indicate to Binyam that they knew a lot about him. Much of the personal information – including details of his education, his friendships in London and even his kickboxing trainer – could only have originated from collusion in this interrogation process by UK intelligence services.

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[174] Reference to some of the many documents on interrogation techniques obtained by the ACLU in its series of applications under the Freedom of Information Act.

[175] In this regard, see the Human Rights Watch reports on Temara in Morocco, plus a range of NGO and detainee accounts from the Dark Prison in Kabul.

[176] Binyam told his lawyer that he wanted to travel to Afghanistan to see the Taliban with his own eyes and decide "*whether it was a good Islamic country or not*". He also wanted to get away from a social life in London that revolved around drug use.

205. Binyam has described his ill-treatment in Morocco to his lawyer in several phases: an initial "softening up"; a routine "circle of torture"; and eventually a "heavy" abuse involving mental torment and the infliction of physical injury. In the first few weeks of his detention he was repeatedly suspended from the walls or ceilings, or otherwise shackled, and brutally beaten: "*They came in and cuffed my hands behind my back. Then three men came in with black ski masks that only showed their eyes... One stood on each of my shoulders and the third punched me in the stomach. The first punch... turned everything inside me upside down. I felt I was going to vomit. I was meant to stand, but I was in so much pain I'd fall to my knees. They'd pull me back up and hit me again. They'd kick me in the thighs as I got up. They just beat me up that night... I collapsed and they left. I stayed on the ground for a long time before I lapsed into unconsciousness. My legs were dead. I could not move. I'd vomited and pissed on myself.*"

206. At its worst, the torture involved stripping Binyam naked and using a doctor's scalpel to make incisions all over his chest and other parts of his body: "*One of them took my penis in his hand and began to make cuts. He did it once and they stood for a minute, watching my reaction. I was in agony, crying, trying desperately to suppress myself, but I was screaming. They must have done this 20 to 30 times, in maybe two hours. There was blood all over. They cut all over my private parts. One of them said it would be better just to cut it off, as I would only breed terrorists.*"

207. Eventually Binyam began to co-operate in his interrogation sessions in an effort to prevent being tortured: "*They said if you say this story as we read it, you will just go to court as a witness and all this torture will stop. I could not take any more... and I eventually repeated what they read out to me. They told me to say I was with bin Laden five or six times. Of course that was false. They continued with two or three interrogations a month. They weren't really interrogations – more like trainings, training me what to say.*"

208. Binyam says he was subjected to a second rendition on the night from 21 to 22 January 2004. After being cuffed, blindfolded and driven for about 30 minutes in a van, he was offloaded at what he believes was an airport. Again, Binyam's description matches the "methodology" of rendition described earlier in this report: "*They did not talk to me. They cut off my clothes. There was a white female with glasses – she took the pictures. One of them held my penis and she took digital pictures. When she saw the injuries I had, she gasped. She said: 'Oh my God, look at that'.*"

209. The second rendition of Binyam Mohamed took place within the "rendition circuit" that I have identified in this inquiry. The aircraft N313P, operated on behalf of the CIA, is shown in my official data to have flown from Rabat to Kabul in the early hours of 22 January 2004. Two days later, as part of the same circuit, the same plane flew back to Europe and was used in the rendition of Khaled El-Masri[177].

210. Binyam Mohamed's ordeal continued in Kabul, Afghanistan, where he was held in the facility he refers to as "The Prison of Darkness"[178] for four months. Detention conditions in this prison amount to inhuman and degrading treatment. In addition, forcing prisoners to remain in painful positions, sleep alteration, sensory deprivation and other recognised "enhanced interrogation techniques"[179] are known to be deployed there routinely by the United States military and its partners. At various times, Binyam was chained to the floor with his arms suspended above his head, had his head knocked against the wall and describes "*torture by music*", involving the sounds of loud rap and heavy metal, thunder, planes taking off, cackling laughter and horror sounds that amounted to a "*perpetual nightmare*".

211. Up until his transfer by helicopter to Bagram at the end of May 2004, Binyam was not allowed to see daylight. He was persistently interrogated and told about terrorist plots and activities in which he was accused of involvement. He was subjected to irregular eating patterns and "*weird*" sessions with psychiatrists.

212. In a detention facility at Bagram Air Base, Afghanistan, Binyam was forced to write out a lengthy statement prepared by the Americans. The content of the statement is unknown to us. Binyam has told his lawyers that he wrote and signed this document in a state of complete mental disarray: "*I don't really remember [what I wrote], because by then I just did what they told me. Of course, by the time I was in Bagram I was telling them whatever they wanted to hear.*"

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[177] References to the sections on rendition circuits and the individual case of El-Masri.

[178] Many other accounts in the file of the Rapporteur refer to this facility as the "Dark Prison" or the "Disco Prison".

[179] These so-called "enhanced interrogation techniques", which are considered acceptable in the context of some interrogations by the Americans, were exposed by the ACLU in its application under the *Freedom of Information Act*. In particular, these techniques are enumerated in a document from the FBI, available at www.aclu.org.

213. The case of Binyam Mohamed is sufficient grounds for an urgent and decisive change of course in the international effort to overcome terrorism. The Council of Europe is duty-bound to ensure that secret detentions, unlawful inter-state transfers and the use of torture are absolutely prohibited and never resorted to again.

214. It remains to be seen whether a Military Commission process will decide for or against Binyam Mohamed. The only certain legacy of this case is the deeply disturbing recognition that a human being has, in his own words, been completely dehumanised: *"I'm sorry I have no emotion when talking about the past, 'cause I have closed. You have to figure out all the emotional part; I'm kind of dead in the head."*

4. Secret places of detention

215. After the publication of allegations by the Washington Post and Human Rights Watch[180], we centred our search on certain sites in Poland and Romania.

4.1. Satellite photographs

216. We obtained from the European Union Satellite Centre (EUSC) in Torrejón a number of satellite photographs of the sites concerned[181], some taken at different times. We studied these with the assistance of an independent expert.

217. These photographs do not constitute conclusive evidence. With the expert's help, we were able to identify several specific locations at a civil airport and a secret services base (in Poland) and at military airfields (in Romania) which would be very suitable for the secret detention of persons flown in from abroad. There are however hundreds of equally favourable locations throughout Europe. As the EUSC did not have available, for most of the places concerned, sequences of photographs which would have shown whether physical structures (huts, fences, watchtowers, and so on) had been altered (added or dismantled) at certain relevant times, the satellite photographs do not enable us to reach any conclusions with a high degree of certainty.

218. On the other hand, they did enable us to request certain clarifications from the Polish and Romanian delegations. All the replies we received, in my opinion, show a lack of transparency and genuine willingness to co-operate in the authorities concerned[182].

4.2. Documented aircraft movements

219. As we showed above, the information received from Eurocontrol and certain national air traffic control authorities, confirmed by witnesses' accounts, makes it possible to be sure that certain flights were made between known detention centres and the suspected places in Poland and Romania. The geographical position of these places making them unlikely to be used for refuelling, the period spent on the ground in these places by these aircraft, and in particular the fact that the landings in question belong to well-established "rendition circuits"[183], allow us to suspect that they are or were places of detention which form part of the "spider's web" referred to above.

4.3. Witnesses' accounts

220. Accounts given by witnesses to Amnesty International[184] make it look very likely that a relatively large place of detention had to be located in a European country, without any more detail.

221. A journalist working for German television[185] interviewed a young Afghan in Kabul who said that he had been held in Romania. This witness, very frightened and unwilling to give direct evidence to a member

[180] See para. 7 above.
[181] The following sites were captured in the satellite photographs: Cataloi, Fetesti and Mihail Kogalniceanu in Romania; and Szczytno / Szymany in Poland.
[182] In Poland's case, we detected, at an airfield said not to have been used for military purposes since the end of World War II, a very well-maintained double fence around a structure identified as containing munitions bunkers. Our question as to the reason for keeping this double fence in perfect condition did not receive a convincing reply. Where Romania is concerned, the authorities first stated that the construction works at the airbases concerned were merely being carried out to maintain existing infrastructure; only when the question was raised again, backed up by the only single-site photo sequence available to us, clearly showing the building of a new hangar and an extension of the aircraft parking area, did the Romanian authorities confirm that some new building had also been done.
[183] See para. 52 above.
[184] See para. 184 above, the case of Mr Bashmila and Mr Ali Qaru.

of my team, was reported to have been told by a guard to whom he had complained about his conditions of detention that he was lucky in fact to be in Romania.

222. Let us recall also – as mentioned in my note of January 2006[186] - that according to a fax sent by the Egyptian Ministry for European Affairs to the Egyptian Embassy in London and intercepted by Swiss intelligence services, such centres had existed in Romania, Bulgaria, Macedonia, Kosovo and in Ukraine.

223. Both sources from inside the CIA referred to by the Washington Post, ABC and HRW are said to have named Poland and Romania, but without indicating specific places[187].

4.4. Evaluation

224. Whilst to date no evidence, in the formal sense of the term, has come to light, many coherent and convergent elements provide a basis for stating that these secret CIA detention centres have indeed existed in Europe, and we have seen that several indicators point at these two countries. As explained above, even if these elements do not constitute evidence, they are sufficiently serious to reverse the burden of proof: it is now for the countries in question to address their "positive obligations" to investigate, in order to avoid endangering the credibility of their denials.

5. Secret detentions in the Chechen Republic

225. Although massive violations of human rights in Chechnya began and were denounced long before the American "spider's web" was woven, it is regrettable and worrisome to observe that the two principal world powers cite the fight against terrorism as a reason to abandon the principle of respect for fundamental rights. This creates a mechanism of "reciprocal justification" and sets a deplorable example for other states.

226. It is hardly possible to speak of secret detention centres in Council of Europe member States without mentioning Chechnya. Mr Rudolf Bindig's very recent report also notes not only numerous cases of forced disappearance and torture, but also the existence of secret places of detention.

5.1. The work of the European Committee for the Prevention of Torture (CPT)

227. The situation in Chechnya, where unofficial places of detention are concerned, has already been roundly criticised by the CPT in two public declarations to which I referred in my memoranda of December 2005 and January 2006[188]. The positions expressed therein could not be clearer, but the Committee of Ministers of the Council of Europe has not yet given them the attention they deserve. During a very recent visit to the region, in May 2006, a CPT delegation again had grounds to believe that locations which might serve as unofficial places of detention were in the region[189].

5.2. Damning recent accounts by witnesses

228. Aaron Rhodes, Executive Director of the International Helsinki Federation for Human Rights (IHF), sent me an open letter dated 12 May 2006[190] accompanied by a report compiled by the IHF, with the help of Russian non-governmental organisations active in the region, containing damning accounts by the victims of secret detention and torture, often followed by enforced disappearance, in the North Caucasus region. Many of these cases were attributed to the *Kadyrovtsi*, the militia under the direct command of the current Prime Minister of the Chechen Republic, Ramzan Kadyrov. According to several of these accounts, some places used as unofficial places of detention were in Tsentoroy, the village where the Kadyrov family originated[191].

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[185] Ashwin Raman, one of the makers of an ARD documentary shown on the ARD channel on 1 March and on SWF on 8 March 2006.
[186] Information note dated 22 January 2006, para. 5 and 52.
[187] *Ibid*, see para. 7.
[188] See the two Public Declarations concerning the Chechen Republic, CPT/Inf (2001) 15 and CPT/Inf (2003) 33, available at: http://www.cpt.coe.int/documents/rus/2001-07-10-eng.htm
and http://www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm
[189] Cf. CPT press release: http://www.cpt.coe.int/documents/rus/2006-05-09-eng.htm. Exceptionally, a CPT visit was interrupted when access to the village of Tsentoroy (Khosi-Yurt), south-east of Gudermes, was denied on 1 May 2006; the visit resumed the next day, when the delegation gained access to the village early in the afternoon.
[190] See the letter entitled: "*Secret prisons in Europe should be of concern to the Council of Europe*", authored by Aaron Rhodes, IHF; 12 May 2006; http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4249.
[191] See note 82 above.

229. Concern about our Organisation's credibility means that these allegations deserve to be investigated in the same way as the violations committed by American services, especially as the Chechen Republic is on the territory of a member state of the Council of Europe.

6. Attitude of governments

230. It has to be said that most governments did not seem particularly eager to establish the alleged facts. The body of information gathered makes it unlikely that European states were completely unaware of what, in the context of the fight against international terrorism, was happening at some of their airports, in their airspace or at American bases located on their territory. Insofar as they did not know, they did not want to know. It is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services. If this were the case, one would be justified in seriously questioning the effectiveness, and therefore the legitimacy, of such services. The main concern of some governments was clearly to avoid disturbing their relationships with the United States, a crucial partner and ally. Other governments apparently work on the assumption that any information learned via their intelligence services is not supposed to be known[192].

231. The most disturbing case – because it is the best documented – is probably that of Italy. As we have seen, the Milan prosecuting authorities and police have been able, thanks to a remarkably competent and independent investigation, to reconstruct in detail the *extraordinary rendition* of the imam Abu Omar, abducted on 17 February 2003 and transferred to the Egyptian authorities. The prosecuting authorities have identified 25 persons responsible for this operation mounted by the CIA, and have issued arrest warrants against 22 of them. The then Justice Minister in fact used his powers to impede the judicial authorities' work: as well as delaying forwarding requests for judicial assistance to the American authorities, he categorically refused to forward the arrest warrants issued against 22 American citizens[193]. Worse still: the same Justice Minister publicly accused the Milan judiciary of attacking the terrorist hunters rather than the terrorists themselves[194]. Furthermore, the Italian Government did not even consider it necessary to ask the American authorities for explanations regarding the operation carried out by American agents on its own national territory, or to complain about the fact that Abu Omar's abduction ruined an important anti-terrorism operation being undertaken by the Milan judiciary and police. As I stated in my January 2006 memorandum, it is unlikely that the Italian authorities were not aware of this large-scale CIA operation. As mentioned in chapter 3.4 above, the investigation in progress shows that Italian officials directly took part in Abu Omar's abduction and that the intelligence services were involved.

232. In an effort to be impartial, I shall also discuss the example of my own country, Switzerland. As we shall see, a number of aircraft described as suspect and mentioned in the questionnaires sent to the member States landed in Geneva (and Zurich, as Amnesty International investigations subsequently showed). The United States did not respond to the Swiss authorities' requests for explanations for several months. A few hours before the annual clearance for aircraft flying on behalf of the American Government to overfly Swiss territory was due to expire, an American official apparently gave a Swiss Embassy representative in Washington verbal assurances that the United States had respected Switzerland's sovereignty and had not transported prisoners through Swiss airspace, thus simply reiterating the statement made by Ms Rice in Brussels on 5 December 2005. This assurance was very belated and, above all, not particularly credible in the light of the established facts: the Italian judicial authorities have established, on the basis of some very convincing evidence, that Abu Omar, abducted in Milan on 17 February 2003, was flown the same day from the Aviano base to the base at Ramstein in Germany, passing through Swiss airspace; this flight has been confirmed, moreover, by Swiss air traffic controllers. The Italian investigation also established that the head of the Milan operation stayed in Switzerland. The Swiss Government deliberately ignored these allegations[195] – despite their detailed and clearly serious nature – and settled for that vague, somewhat informal response from an official. It has taken a formalistic position, claiming that it did not have any evidence and, under international law, had to rely on the principle of trust. It clearly wished to renew the overflight clearance, which it quickly did without asking any further questions. The Confederal Prosecutor's Office has nevertheless opened a preliminary investigation to establish whether there have been violations of the law under Swiss jurisdiction in the Abu Omar case. At the same time, the Military Prosecutor's Office has begun an investigation aimed at identifying and punishing the perpetrator(s) of the leak which allowed the

[192] Some states' legislation expressly prohibits them from using or releasing information gathered by their intelligence services. This is the case in Hungary, for example.

[193] Article 4 of the extradition treaty between the United States and Italy also provides for the extradition of each country's own nationals. It should be added, however, that warrants issued by the Italian judiciary are enforceable in EU countries, as European arrest warrants do not have to be forwarded by the Ministry via diplomatic channels.

[194] ANSA agency, 27 February 2006, widely published in the Italian press.

[195] The Swiss federal prosecuting authorities have, however, instituted a preliminary investigation into these allegations.

publication of the Egyptian fax intercepted by the intelligence services. The journalists who published this are also being prosecuted, on the basis of rules whose compatibility with the principles of the freedom of the press in a democratic system seems highly doubtful. A revelation made these days rekindles the criticism directed at the authorities accused of servile obedience towards the United States: according to press reports, based on apparently well-informed sources, the Swiss authorities are said to have deliberately failed to execute an international arrest warrant brought by the Italian judicial authorities following the abduction of Abu Omar in February 2003. Robert Lady, the head of the detail wanted by the police, who was at the time in charge of the CIA in Milan holding the title and status of Consul of the United States, is said to have stayed in Geneva very recently; the police had been ordered to merely carry out discrete surveillance.

233. The principle of trust has also been invoked by other governments. This is the case with Ireland, for example: the government has stated that there was no reason to investigate the presence of American aircraft, since the United States had given assurances[196]. In Germany, the government and the ruling parties opposed – ultimately in vain – the establishment of a parliamentary commission of inquiry, despite the significant questions being raised about the role of the intelligence services, particularly in the case of the abduction of El-Masri. Lastly, in November 2005 I sent a request for information to the United States Ambassador (an observer to the Council of Europe). The Ambassador responded by sending me the public statement made by the American Secretary of State on 5 December 2005. In particular, the latter stated that the United States had not violated the sovereignty of European states, that "renditions" had saved human lives and that no prisoners had been transported for the purpose of torture[197]. European ministers, meeting in the framework of NATO, hastened to declare themselves satisfied with these assurances[198]. Or almost[199].

234. It should be pointed out that some governments have deliberately assisted in "renditions". This is especially well established with regard to Bosnia and Herzegovina, which has rendered six persons to the American forces outside of any legal procedure, as established by the national judicial authorities, as we have noted above. This certainly deserves to be stressed and welcomed. It is true that the Government of Bosnia and Herzegovina was regrettably not particularly determined, but it should not be forgotten that this young republic had been strongly pressured by a great power present on its territory. We have already criticised the Macedonian authorities, which have locked themselves up in categorical denial without having carried out any serious enquiry. Sweden has also rendered two asylum seekers to American operatives for "rendition" to the Egyptian authorities, as formally condemned by the UN Committee against Torture. The Swedish authorities, despite this international condemnation and parliamentary requests to this effect have yet to commence a proper inquiry into these facts[200].

235. When the previous memoranda, which set out interim summaries, were published, criticisms were voiced that the evidence referred primarily to NGO reports and accounts related in the press. It should be pointed that without the work undertaken by these organisations and the investigations of competent and tenacious journalists, we would not today be talking about this affair – which, nobody can now dispute, has some basis in fact. Indeed, governments did not spontaneously or autonomously take any real action to seek evidence for the allegations, despite their serious and detailed nature. Critics included those who, given their existing or previous positions and responsibilities, could have helped to establish the truth. Furthermore, it is shocking that some countries put pressure on journalists not to publish certain news items (I have mentioned the cases of the ABC and the *Washington Post*) or prosecuted them for publishing documents deemed confidential[201]. Such zeal would have been better employed in seeking to ascertain the truth – a fundamental requirement in a democracy – and prosecuting those guilty of perpetrating or tolerating any kind of abuse, such as illegal abductions or other acts contrary to human dignity.

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[196] *We would not see any reason to because we have received categorical assurances from the US that they are not using Shannon in this way* (Irish Examiner, 22 February 2006).

[197] *The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture* (statement of 5 December 2005).

[198] The German Foreign Minister, Mr Steinmeier, emphasised the need for such clarification, because, he said, *we should not diverge from one another on the interpretation of international law* (AP 8 December 2005).

[199] *Only Bernard Bot, the Dutch Foreign Affairs Minister, considered the American explanations "inadequate"; Scandinavian diplomats also protested against the American services' use of "methods on the edge of legality". On the whole, however, the Europeans, headed by Britain's Jack Straw, kept a low profile so as not to offend the "iron lady" of American diplomacy.* (Le Figaro of 8 December 2005).

[200] As condemned by the Council of Europe's Commissioner for Human Rights in his statement on "fight against terrorism by legal means" published on the Council of Europe's website on 3 April 2006.

[201] In particular, this is what happened to the two Swiss journalists who, in early January 2006, published the content of the Egyptian fax, intercepted by Swiss intelligence services, mentioning the existence of detention centres in Eastern Europe. The two journalists have published a book outlining the circumstances by which they came into possession of the document: Sandro Brotz, Beat Jost, *CIA-Gefängnisse in Europa – Die Fax-Affäre und ihre Folgen*, Orell Füssli, 2006.

236. The American administration's attitude to the questions being raised in Europe about the CIA's actions was, once again, clearly illustrated during the fact-finding visit to the United States by a delegation from the European Parliament's Temporary Committee (TDIP): no or few replies were given to the numerous questions. I have already discussed the response to my request from the United States Ambassador to the Council of Europe (3.1.4). It is obvious that if the American authorities did not constantly raise the objection of secrecy for national security reasons, it would be far easier to establish the truth. We find that today, this secrecy is no longer justified. In a free and democratic society, it is far more important to establish the truth on numerous allegations of serious human rights violations, many of which are proven to a large extent.

7. Individual cases: judicial proceedings in progress

7.1. A positive example: the Milan public prosecutor's office (Abu Omar case)

237. In this case, the Italian judicial authorities and police have shown great competence and remarkable independence in the face of political pressures. Their competence and independence was already proven during the tragic years stained with blood by terrorism. The Milan public prosecutor's office was able to reconstitute in detail a clear case of "rendition" and a regrettable example of the lack of international cooperation in the fight against terrorism[202]. As I have already said[203], the Italian judicial authorities have brought international arrest warrants against 22 American officials. In addition, the ongoing investigation seems to be in the process of showing that operatives belonging to the Italian services have participated in the operation.

7.2. A matter requiring further attention: the Munich (El-Masri case) and Zweibrücken (Abu Omar case) public prosecutors' offices

238. The German justice system gave its attention to the Abu Omar and El-Masri cases in terms of criminal proceedings for abduction against persons unknown. In the first-named case, normal co-operation took place with the Milan public prosecutor's office. As I have already stated, in my memorandum of January 2006, the Zweibrücken public prosecutor's office came up against a total lack of co-operation by the American authorities, who refused to provide any information on what had happened at the Ramstein base.

239. Where the second case is concerned, I have already[204] given some information showing that certain serious investigative measures have already been taken and that more remains to be done, especially in relation to the witnesses named by El-Masri and to clarification of the possible role played by the various German intelligence services.

7.3. Another matter requiring further attention: the Al Rawi and El Banna case

240. Where the case of Al Rawi and El Banna is concerned, the British justice system has had to deal with an application by the families of the persons concerned attempting to force the UK government to intercede with the US government to obtain the release of both men, who are still held at Guantánamo Bay. It was in the framework of this procedure that the telegrams proving that the MI5 was involved in the two men's arrest in Gambia came into the public domain. After proceedings had begun, the UK authorities agreed to intercede on Mr Al Rawi's behalf, but not on that of his fellow detainee, Mr El Banna, although he had been arrested for the same reasons with the assistance of the UK services. In May 2006, the action was dismissed by the court of first instance.

241. In view of the circumstances which have led up to the arrest of these two men, one may think that the UK government is under at least a moral and political obligation to do everything in its power to actively intercede to secure their release from Guantanamo so that they can return to the country.

7.4. Sweden: what next in the Agiza and Alzery case?

242. Sweden was condemned by the UN Committee against Torture in respect of the case of Mr Agiza and Mr Alzery, which led to an investigation by the parliamentary ombudsman, Mr Mats Melin. He noted that a preliminary investigation by the judicial authorities had culminated in the termination of the proceedings[205].

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[202] I talked to Chief Prosecutor Mr Spataro for several hours and I wish to thank him for being so generous with his time.
[203] In para. 162
[204] In para. 103
[205] See above, para. 152

243. According to some criticisms, which do not appear unfounded, different aspects of the case need further investigation. This disguised extradition, without any possibility of appeal and judicial scrutiny, and the ill-treatment at Bromma airport, still on the ground, under the eyes of Swedish officials, as well as the incomplete information provided to UN-CAT are serious matters which require that the whole truth be exposed.

7.5. Spain

244. The Palma de Mallorca public prosecutor's office has begun an investigation following the transmission of a *Guardia Civil* file containing the names of the passengers on the aircraft which took off from the local airport bound for Skopje, where they were most likely joined by Mr El-Masri and flown on to Afghanistan[206].

7.6. Mr El-Masri's complaint in the United States

245. With the assistance of the American Civil Liberties Union[207], Mr El-Masri has taken judicial action in Alexandria, in Virginia, seeking compensation from the CIA. On 19 May 2006, his complaint was rejected by the court of first instance, without a ruling on the merits of his application, as the court accepted the US government's argument that continuation of the proceedings would have jeopardised national security. In the course of the trial, the CIA's secret methods would indeed become the subject of discussions before the court.

8. Parliamentary investigations

246. As long ago as January, I called on national parliaments to put questions to their governments and to begin inquiries, where appropriate, to clarify the role of European governments in this affair. A large number of questions were indeed raised in the parliaments of numerous Council of Europe member States, which is very gratifying. Unfortunately, the government replies were almost without exception vague and inconclusive. The German and UK parliaments were particularly active, whereas parliamentary reactions in three of the main countries concerned by the allegations that are the subject of this report (Poland, Romania and "the former Yugoslav Republic of Macedonia") were particularly feeble, if not inexistent.

8.1. Germany

247. Opposition MPs in Germany, although few in number since the recent elections, have put numerous questions to their government[208]. The replies were very general in every case[209]. The government systematically hid behind the responsibility of the parliamentary monitoring committee (*parlamentarisches Kontrollgremium*, known as the PKG) for dealing with matters relating to the activities of the secret services. A number of questions relating to the subject of this report have effectively been discussed within the PKG, but the government's detailed report to this very select group, which works in very carefully maintained secrecy, was classified "secret". The chair of the committee, Mr Röttgen (CDU), in response to my request, sent me the "public" version of this report, which is, frankly, not very informative and does not mention the individual cases raised by the media. The government attempted to avoid setting up a committee of inquiry by sending all members of the *Bundestag* a more informative version, classified "confidential", which contains some information about some of the aforementioned individual cases[210]. At the insistence of the three opposition parties, a committee of inquiry has nevertheless been set up, and it started work in May[211]. Its mandate includes investigation of the allegations of collusion between the German authorities and the CIA in the case of Mr El-Masri. In short, the *Bundestag* has been highly active, urged on by the opposition parties in particular.

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[206] I have in my possession a copy of this list, but I have no information on the states concerned.
[207] I should like to thank the ACLU for making detailed documentation about this case available to me.
[208] I should like to thank not only our Committee colleague Sabine Leutheusser-Schnarrenberger (Liberal), but also Mr Stroebele (Green party), for the information they have regularly supplied to me on this subject.
[209] The same is true of the replies given by other governments questioned by members of their parliaments, such as those of Belgium, the United Kingdom, Sweden and Ireland.
[210] The names of persons were represented by initials. See note 92 above in respect of my approach to the "confidential" and "secret" versions of this report.
[211] I have been invited to address this committee in the near future.

8.2 The United Kingdom

248. Our work regarding the United Kingdom benefited greatly from the efforts of a variety of interlocutors, whom I should like to salute in this report[212]. The United Kingdom parliament has not yet established a formal inquiry into possible British participation in abuses committed by the United States in the course of the "war on terror", but there have been several noteworthy parliamentary initiatives designed to broaden the public debate and encourage greater openness.

249. Late last year, one of the UK Parliament's standing committees, the Joint Committee on Human Rights (JCHR), launched an inquiry into UK Compliance with the United Nations Convention against Torture. As part of its mandate the Committee examined several issues of relevance to this inquiry, including the use of diplomatic assurances and the practice of "extraordinary rendition".

250. The JCHR held a series of evidentiary sessions, featuring Ministers of the United Kingdom Government[213] as well as representatives of non-governmental organisations[214]. Members of my team, on a visit to London in March 2006, met with a Committee Specialist of the JCHR and attended its evidentiary session with the UK Minister of State for the Armed Forces, Rt. Hon. Adam Ingram. In its report on UK Compliance with UNCAT published on 26 May 2006[215], the JCHR recognised the "*growing calls for an independent public inquiry*" in the UK, but ultimately decided that such an inquiry would be "*premature*" until the Government's own inquiries have been given a chance to publish the "*detailed information required*".

251. In the meantime an ad-hoc body known as the "All-Party Parliamentary Group (APPG) on Extraordinary Renditions" has engaged Members of the UK Parliament belonging to all political parties. On Tuesday 28 March, members of my team attended the APPG's information session on the cases of Bisher Al-Rawi and Jamil El-Banna[216], which featured testimony from both men's legal representatives, MPs and family members. This session stimulated considerable media interest in the case and coincided with the public release of government telegrams passed on to the CIA in advance of the men's rendition. I wish to thank the Chairman of the APPG, Mr Andrew Tyrie MP, along with his dedicated staff, for their valuable support.

8.3. Poland: a parliamentary inquiry, carried out in secret

252. A parliamentary inquiry into the allegations that a "secret prison" exists in the country has been conducted behind closed doors in Poland. Promises made beforehand notwithstanding, its work has never been made public, except at a press conference announcing that the inquiry had not found anything untoward. In my opinion, this exercise was insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations.

8.4. Romania and "the former Yugoslav Republic of Macedonia": no parliamentary inquiry

253. To my knowledge, no parliamentary inquiry whatsoever has taken place in either country, despite the particularly serious and concrete nature of the allegations made against both. What is more, the committee which supervises the secret services in "the former Yugoslav Republic of Macedonia" ceased operations three years ago[217], and this is particularly worrying in a country where the secret services not so very long ago played a particularly important and controversial role.

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[212] In this regard, I should like to make particular mention of the London-based non-governmental organisation REPRIEVE, which has supported my team by providing contacts, research insights and materials relating to the cases they work on.

[213] For example, on 6 March 2006 the JCHR heard evidence from the Solicitor General and Minister of State in the Department for Constitutional Affairs, Harriet Harman, along with other officials from her department. An uncorrected transcript of the session is available online at:
http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/uc701-iii/uc70102.htm

[214] On 21 November 2005 the JCHR heard evidence from Human Rights Watch, Amnesty International and REDRESS. An uncorrected transcript of the session is available online at:
http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/uc701-i/uc70102.htm

[215] The full report is available online at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm; a full record of oral and written evidence was published in a separate volume, available at:
http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-ii.pdf.

[216] See to the section of the report that treats these cases, at 3.5 above.

[217] Response of the Parliament of the former Yugoslav Republic of Macedonia (Sobranie) to the questionnaire of the TDIP Temporary Committee of the European Parliament. Available at: www.statewatch.org/rendition.

9. Commitment to combating terrorism

9.1. Fight against terrorism: an absolute necessity

254. The fight against terrorism is unquestionably a priority for every government and, above all, for the international community as a whole. The use of terror, previously employed primarily as a weapon against individual governments, has increasingly become a means of attacking a political and social model, and indeed a lifestyle and civilisation represented by large parts of the planet. Terrorism has taken on a clear international connotation in recent years, and it too has taken advantage of the tremendous technological progress made in the fields of arms, telecommunication and mobility. It is consequently vital to co-ordinate the fight against terrorism at the international level.

255. It has to be said, however, that there are still significant deficiencies in such co-ordination, and that it too often depends on the goodwill, but also the arbitrary nature, of intelligence services. An understanding of this phenomenon, its structures, the resources at its disposal and its leaders is essential in order to deal with the terrorist threat successfully. Intelligence services consequently play an important and irreplaceable role. That role must, however, be specified and delimited within a well-defined institutional framework consistent with the principles of the rule of law and democratic legitimacy. This also calls for effective supervisory mechanisms; the evidence under consideration has highlighted alarming flaws in such mechanisms. It is a well-known fact that the various American and European intelligence services have set up working groups and exchanged information. This initiative can only be welcomed. The events of recent years show, however, that international co-ordination is still seriously inadequate. The Milan imam's abduction is emblematic in this regard: the operation by CIA agents ruined the efforts of the Italian judiciary and police, who were involved in a major anti-terrorism investigation targeting precisely the Milan mosque[218].

256. The governments' very replies and especially their silence are a telling indication that intelligence services appear increasingly to work outside the scope of proper supervisory mechanisms. The way in which American services were able to operate in Europe, carrying out several hundred flights and transporting illegally arrested persons without any scrutiny, can only point to the participation or collusion of several European services – or, alternatively, incredible incompetence, a scenario which, frankly, is difficult to envisage. Indeed, everything seems to indicate that the American services were given considerable latitude and allowed to act as they saw fit, even though it would have been impossible not to be aware that their methods were incompatible with national legal systems and European standards relating to respect for human rights[219]. Such passivity on the part of European governments and administrative departments is disturbing, and such a careless, laissez-faire attitude unworthy.

257. The Council of Europe has already had the opportunity to voice clearly its concern *about certain practices that have been adopted, particularly in the fight against terrorism, such as the indefinite imprisonment of foreign nationals on no precise charge and without access to an independent tribunal, degrading treatment during interrogations, the interception of private communications without subsequently informing those concerned, extradition to countries likely to apply the death penalty or the use of torture, and detention or assault on the grounds of political or religious activism, which are contrary to the European Convention on Human Rights (ETS n° 5) and the protocols thereto, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS n° 126), and the Framework Decision of the Council of the European Union*[220].

9.2. The strength of unity and of the law

258. The Parliamentary Assembly has already expressed its views very clearly: it unreservedly shares *the United States' determination to combat international terrorism and fully endorses the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives*[221]. This determination must also be shared by all of Europe. Back in 1986, the Assembly regretted *the procrastination of European states in reacting multilaterally to the terrorist threat, and the absence up to the present time of a coherent and binding set of co-ordinated measures adopted by common consent*[222].

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[218] This fact was expressly confirmed by Milan's Deputy Public Prosecutor, during his hearing before the European Parliament's Temporary Committee in Brussels on 23 February 2006.

[219] In an interview with the German magazine *Die Zeit* on 29 December 2005, Mr Michael Scheuer, former head of the CIA's "Bin Laden" unit and one of the architects of the "rendition" system further developed during Bill Clinton's presidency and with his agreement, stated that the CIA was within its rights to break all laws except American law. See also Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorist Centre, *supra* note 19.

[220] Recommendation 1713 (2005) of the PACE on *Democratic oversight of the security sector in member States.*

[221] Resolution 1433 (2005), on *Lawfulness of detentions by the United States in Guantánamo Bay*, § 1.

[222] Resolution 863 (1986) on the European response to international terrorism, § 3.

Despite the intervening years and the spectacular development of this threat, no significant progress has really been made. It is more necessary than ever to extend this *coherent and binding set of co-ordinated measures* to Europe and to other parts of the world, starting with the United States. The approach of simply leaving the United States to it and pretending not to know what is happening, in many cases even on one's own territory, is unacceptable. Only the adoption of a joint strategy by all the countries concerned can successfully counter the new threats, such as terrorism and organised crime. If, as the United States believes, existing legal instruments are no longer adequate to counter the new threats, the situation must be analysed and discussed on a joint basis.

259. It is highly likely that existing resources and arrangements will have to be adapted in order to combat international terrorism effectively. This is the view held by the United States Government, in particular[223]. Police investigation tools and the rules of criminal procedure clearly need to take into account the development of more serious forms of crime. However, such adaptation calls for multilateral consultation, presupposing dialogue, debate or even a frank and open confrontation, which clearly have yet to take place. On the contrary, the states of the European Union have just issued a particularly negative signal: giving in to what appears to be a nationalist reflex, in late April 2006 they turned down a Commission proposal to step up judicial and police co-operation under the Schengen Agreement[224].

260. Efforts to combat impunity are undoubtedly a crucial element in the fight against terrorism. It is unfortunate that the American administration has systematically opposed the establishment of a universal jurisdiction, refusing to ratify the Rome agreement on the establishment of the International Criminal Court[225]. Handing over terrorist suspects (without, moreover, any verification of the substance of the accusations by a judicial authority) to states one knows, or must presume, will not respect fundamental rights, is unacceptable. Relying on the principle of trust and on diplomatic assurances given by undemocratic states known not to respect human rights is simply cowardly and hypocritical.

261. The American administration states that *rendition* is a vital tool in the fight against international terrorism[226]. We consider that *renditions* may be acceptable, and indeed desirable, only if they satisfy a number of very specific requirements (which, with a few exceptions[227], has not been the case in any of the known *renditions* to date). If a state is unable, or does not wish, to prosecute a suspect, it should be possible to apply the following principle: no person genuinely suspected of a serious act of terrorism should feel safe anywhere in the world. In such cases, however, the person in question may be handed over only to a state able to provide all the guarantees of a fair trial, or – even better – to an international jurisdiction, which in my view should be established as a matter of urgency.

262. The UN High Commissioner for Human Rights, Louise Arbour, has publicly criticised the practice of handing over detainees – outside the scope of the justice system – to countries known to use torture, while demanding assurances that these prisoners will not be ill treated. She added that secret detention was a form of torture[228].

263. Abandoning or relativising human dignity and fundamental human rights is utterly inconceivable. All of history shows that arbitrary decisions, contempt for human values and torture have never been effective, have failed to resolve anything and, ultimately, have led only to a subsequent exacerbation of violence and brutality. In the end, such abuses have served only to confer a sense and appearance of legitimacy on those who attack institutions. In fact, giving in to this temptation concedes a major initial victory to the very people attacking our values. Furthermore, attempting to focus solely on security aspects, as is the case at present – with an outcome that is more than questionable – plays into the hands of the terror lords. It is imperative for a global anti-terrorism strategy to consider political and social aspects. Above all, we must be mindful of the strength of the values of the society for which we are fighting[229]. Benjamin Franklin inevitably comes to mind,

[223] *The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have had to adapt.* (Ms Rice, statement of 5 December 2005).
[224] See, for instance, Le Figaro of 28 April 2006.
[225] See, for example, Resolution 1336 (2003) on *Threats to the International Criminal Court.*
[226] *Rendition is a vital tool in combating transnational terrorism* (Ms Rice, in her statement of 5 December 2005).
[227] In particular, this applies to the case of the terrorist Carlos, which was mentioned by Ms Rice. She appears to forget, however, that Carlos was abducted in Sudan, where he enjoyed total impunity and was transported to France, where he was judged according to a procedure consistent with the European Convention on Human Rights.
[228] Le Monde of 9 December 2005.
[229] A judgment of the Israeli Supreme Court, called to rule on an alleged breach of the principle of equality following the distribution of gas masks on the West Bank during the Gulf War, contains the following remarkable passage written by the President of the Court, Aaron Barak, himself a survivor of the Kovnus ghetto in Lithuania: "*When the guns speak, the Muses fall silent. But when the guns speak, military commands must comply with the law. A society that wishes to be able to confront its enemies must above all be mindful that it is fighting for values worth protecting. The rule of law is one*

and his approach seems more relevant than ever: *they that can give up essential liberty to attain a little temporary security deserve neither liberty nor safety*[230].

264. Legality and fairness by no means preclude firmness, but confer genuine legitimacy and credibility on a state's inevitable preventive actions. In this respect, some of the international community's attitudes are disturbing. I have already mentioned the unacceptable practice involving the application of UN Security Council sanctions on the basis of black lists. Another example is the situation in Kosovo, where the international community intervened to restore peace, justice and democracy: the inhabitants of this region are still the only people in Europe – with the exception of Belarus – not to have access to the European Court of Human Rights; its prisons are a virtual black hole, not open for inspections or monitoring by the Committee for the Prevention of Torture. In the name of what legitimacy, and with what credibility, is this same international community entitled to lecture Serbia? *Examples are more effective than threats* (Corneille).

10. Legal perspectives

10.1. The point of view of the United States

265. In May 2006 the United States sent its first state delegation to the United Nations Committee against Torture (UN CAT) since the Bush Administration came to power. The delegation was headed by the Chief Legal Advisor to the Department of State, Mr John Bellinger.

266. Mr Bellinger oversaw the presentation of a 184-page submission to UN CAT, in which the United States set out its "exhaustive written responses" to most of the Committee's list of issues. The United States should certainly be commended for this level of engagement, notwithstanding that its policy regarding secret detentions and intelligence activities remained, for the most part, at a firm "*no comment*"[231].

267. There can have been few more opportune times at which to engage Mr Bellinger on discussion of pertinent legal issues than in the week of his return from the UN CAT to Washington, DC. In a briefing lasting about one hour[232], Mr Bellinger and his colleague Dan Fried, Assistant Secretary of State for European Affairs, provided us with a range of valuable perspectives, which I think it worthwhile to indicate in this report as the best contemporary first-hand portrayal of the US legal position.

268. Mr Bellinger made clear on several occasions that a programme of renditions remains a key strand of United States' foreign policy: "*As Secretary Rice has said, we do conduct renditions, we have conducted renditions and we will not rule out conducting renditions in the future.*"

269. He was very decisive, however, in drawing a distinction between the original meaning of rendition and the popular, media-driven notion of Extraordinary Rendition:

> "*To the extent that extraordinary rendition – as I have seen it defined – means the intentional transfer of an individual to a country, expecting or intending that they will be mistreated, then the United States does not do extraordinary renditions to begin with. The United States does not render people to other countries for the purpose of being tortured, or in the expectation that they will be tortured.*"

270. Dan Fried used the briefing to explain some of the underlying considerations for the United States in pursuit of its "war on terror":

> "*We are attempting to keep our people safe; we are attempting to fight dangerous terrorist groups who are active and who mean what they say about destroying us. We are trying to do so in a way consistent with our values and our international legal obligations. Doing all of those things in practice is not easy, partly because – as we've discovered as we've gotten into it – the struggle we are in does not fit neatly either into the criminal legal framework, or neatly into the law of war framework.*"

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of those values"; in: Aaron Barak, *Democrazia, Terrorismo e Corti di giustizia*, Giurisprudenza Costituzionale, 2002, 5, p. 3385.

[230] Quoted just recently by Heinrich Koller, *Kampf gegen Terrorismus – Rechstaatlichen Grundlagen und Schranken*, conference held in Zurich on 19 January 2006 before the *Schweizerische Helsinki Vereinigung für Demokratie, Rechtsstaat und Menschenrechte.*

[231] See the CAT submission of the United States and the newly-published comments of the Committee (at page 4) on secret detentions, available at www.usmission.ch.

[232] Detailed notes of the meeting with Mr Bellinger and transcripted comments are on file with the Rapporteur.

271. With regard to the question of fitting into legal frameworks, I find it particularly noteworthy that the United States does not see itself bound to satisfy anyone's interpretation of international law but its own. Mr Bellinger continually expressed this view: *"We have to comply with our legal obligations. None of this can be done in an illegal way. We think from our point of view that we comply with all the legal obligations we have."*

272. Similarly, in one of his longer explanations, Mr Bellinger defended the United States' record in the eyes of its European partners:

> *"For those who say we're not following our international obligations in certain cases, I have to say that sometimes it comes down to a disagreement on what the obligation is.*
>
> *With regard to Article 3 of CAT, this is a technical issue. The obligation under Article 3 of the Convention Against Torture requires a country not to return, expel or refouler an individual. For more than a decade, the position of the US Government, and our courts, has been that all of those terms refer to returns from, or transfers out from the United States.*
>
> *So we think that Article 3 of the CAT is legally binding upon us with respect to transfers of anyone from the United States; but we don't think it is legally binding outside the United States.*
>
> *Similarly the Senate of the United States and our courts for more than ten years have taken a position that the words 'substantial grounds' means 'more likely than not'. If we transfer a person from one point outside the United States to another point outside the United States then, as a policy matter, if we think there are substantial grounds to believe that the individual will be tortured or mistreated, we follow the same rules. I think it is a reasonable position for our courts to have set – that 'substantial grounds' means 'more likely than not'.*
>
> *What I can say, though, is that there are different legal regimes between the European Court of Human Rights and our courts, and you can't 'beat up' our courts and our Senate based on some things that they said ten years ago as how they interpret the law.*
>
> *You may wish that the ECtHR interpretation of the CAT was the same position that we have here, but it is not. We do, though, take our legal obligations seriously. And there needs to be a recognition that there may be different interpretation of the terms, but nonetheless the United States still takes our legal obligations seriously – and we do that."*

Mr Bellinger's interpretation also serves to explain why a detention facility like Camp Delta is situated at Guantanamo Bay, in Cuba, and not in the desert of Arizona. The United States' formalistic and positivist approach shocks the legal sensibilities of Europeans, who are rather influenced by "teleological" considerations. In other words, the European approach is to opt for an interpretation that affords maximum protection to the values on which the legal rule is based.

273. Mr Bellinger was predictably reluctant to discuss the legal issues surrounding any of the cases of rendition that are alleged to have occurred, including the case studies treated in this report. He cited a considered policy on the part of the US Government to refrain from commenting:

> *"We have thought seriously about whether we can answer specific questions publicly and say that there were one, two, or three renditions and where they went through. But we have concluded that, due to the nature of intelligence activities, we simply cannot get into the business of confirming or denying specific questions – as much as we would like to. I'm not going to confirm or deny whether there have been any renditions that have gone through Europe at all."*

274. The United States Government is always prepared, however, to explain the "hard choices" it feels it has to make to protect its citizens[233]. Mr Bellinger, for his part, described a hypothetical *"policy dilemma"* based loosely on a real-life scenario, where a member of Al-Qaeda is captured at the Kenyan border, *"trying to enter the country but the Kenyans don't want him there"*. The captive is known to be wanted by *"some other country such as Egypt, Pakistan or Jordan"* and the United States has an aircraft it could use to render him back. Mr Bellinger concluded his briefing by characterising the choice:

> *"If the choice is between letting a person go who's suspected of involvement in terrorism, or taking them back to their country of nationality, or some other country where they're wanted – then that's*

[233] See Secretary Rice's remarks upon her departure for Europe, Andrews Air Base, 5 December 2005: *"Protecting citizens is the first and oldest duty of any government. Sometimes these efforts are misunderstood. I want to help all of you understand the hard choices involved, and some of the responsibilities that go with them."*

your choice, because there's no extradition treaty and you obviously don't want us to put more people in Guantanamo.

If the choice is whether the person will disappear and be let go, or the country of his nationality or some other country wants him back, and the US is able to provide that – what should be done? That's your choice.

The United States says there are cases where in fact rendition might make sense."

10.2. The point of view of the Council of Europe

10.2.1. The European Commission for Democracy through Law (Venice Commission)

275. The legal issues raised by the facts examined in this report, from the point of view of the Council of Europe, have been set out clearly and precisely by the Venice Commission, whom the Committee on Legal Affairs and Human Rights had asked for a legal opinion in December 2005[234].

276. In its conclusion, the Venice Commission stresses the responsibility of the Council of Europe's member States to ensure that all persons within their jurisdiction enjoy internationally agreed upon fundamental rights (including the right to security of the person, freedom from torture and the right to life), even in the case of persons who are aboard an aircraft that is simply transiting through its airspace[235]. The Venice Commission also confirms that the obligations arising out of the numerous bilateral and multilateral treaties in different fields such as collective self-defence, international civil aviation and military bases, "*do not prevent States from complying with their human rights obligations*"[236].

277. In reply to the specific questions asked by the Committee on Legal Affairs and Human Rights, the Venice Commission has drawn the following conclusions:

"As regards arrest and secret detention

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

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

c) *The Council of Europe member State's responsibility is engaged also in the case where its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention without government knowledge, acting ultra vires. The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability for all form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.*

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[234] Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) on the basis of comments by Mssrs Iain Cameron (Substitute Member, Sweden), Pieter van Dijk (Member, the Netherlands), Olivier Dutheillet de Lamothe (Member, France), Jan Helgesen (Member, Norway), Giorgio Malinverni (Member, Switzerland) and Georg Nolte (Substitute Member, Germany) – opinion no. 363/2005, CDL-AD(2006)009.

[235] cf. Opinion cited above, paras. 143-146.

[236] ibid., para. 156. See EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006 on "*The Human Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ('Extraordinary Renditions')*, 25 May 2006, at page 7. The Network reaches the same conclusion on the basis of Article 6(1) EU.

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

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

As regards inter-state transfers of prisoners

f) *There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected.*

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

h) *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 member States: they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.*

As regards overflight

i) *If a Council of Europe member State has serious reasons to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3 of the European Convention on Human Rights, it must take all the necessary measures in order to prevent this from taking place.*

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

k) *If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefor, the duty to submit to searches; if the overflight permission derives from a bilateral treaty or a Status of Forces Agreement or a military base agreement, the terms of such a treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.*

l) *In granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.*

m) *With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent*

authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

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

10.2.2 The Secretary General of the Council of Europe (Article 52 ECHR)

278. The Secretary General has made use of his power of enquiry under Article 52 ECHR as rapidly and as completely as possible. In his report dated 28 February 2006[237], the Secretary General takes a clear position as regards member States' responsibilities:

> *"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."*[238]

As regards the result of the Secretary General's request for information, the report of 28 February concludes in a preliminary fashion 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."[239]

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[237] SG/Inf (2006)5, available at the Council of Europe's website (http://www.coe.int).
[238] ibid., para. 23 ; see also the excellent analysis of the case law of the European Court of Human Rights regarding member States' "positive obligations" in paras. 24-30
[239] *Ibid.*, p. 1 (non-official executive summary)

279. In this context, the Secretary General, referring to my memorandum of 21 January 2006, was worried about the fact that some countries have not replied, or have not replied completely, to his question concerning the involvement of any public official in such deprivation of liberty or transport of detainees, and whether any official investigation is under way or has been completed. Consequently, the Secretary General has asked additional questions to some countries. The replies are not yet in the public domain.

11. Conclusion

280. Our analysis of the CIA "rendition" programme has revealed a network that resembles a "spider's web" spun across the globe. The analysis is based on official information provided by national and international air traffic control authorities, as well as other information including from sources inside intelligence agencies, in particular the American. This "web", shown in the graphic[240], is composed of several landing points, which we have subdivided into different categories, and which are linked up among themselves by civilian planes used by the CIA or military aircraft.

281. These landing points are used for various purposes that range from aircraft stopovers to refuel during a mission to staging points used for the connection of different "rendition circuits" that we have identified and where "rendition units" can rest and prepare missions. We have also marked the points where there are known detention centres (Guantanamo Bay, Kabul and Baghdad...) as well as points where we believe we have been able to establish that pick-ups of rendition victims took place.

282. In two European countries only (Romania and Poland), there are two other landing points that remain to be explained. Whilst these do not fall into any of the categories described above, several indications lead us to believe that they are likely to form part of the "rendition circuits"[241]. These landings therefore do not form part of the 98% of CIA flights that are used solely for logistical purposes[242], but rather belong to the 2% of flights that concern us the most. These corroborated facts strengthen the presumption – already based on other elements - that these landings are detainee drop-off points that are near to secret detention centres.

283. Analysis of the network's functioning and of ten individual cases allows us to make a number of conclusions both about human rights violations – some of which continue – and about the responsibilities of some Council of Europe member States.

284. It must be emphasised that this report is indeed addressed to the Council of Europe Member states. The United States, an observer state of our Organisation, actually created this reprehensible network, which we criticise in light of the values shared on both sides of the Atlantic. But we also believe to have established that it is only through the intentional or grossly negligent collusion of the European partners that this "web" was able to spread also over Europe.

285. The impression which some Governments tried to create at the beginning of this debate – that Europe was a victim of secret CIA plots – does not seem to correspond to reality. It is now clear – although we are still far from having established the whole truth - that authorities in several European countries actively participated with the CIA in these unlawful activities. Other countries ignored them knowingly, or did not want to know.

286. In the draft resolution, which sums up this report's conclusions, I have not directly named the countries responsible simply because there is not enough room in such a text to adequately develop the nuances of each individual case. In addition, we only know part of the truth so far, and other countries may still turn out to be implicated in light of future research or revelations. This explanatory note, however, explains the discovered facts in far greater detail. Finally, the purpose of this report is not to attribute "grades" to different member States, but to try to understand what really happened throughout Europe and to stop certain violations shown from reoccurring in future. I would add that a key element seems to be the urgent need to improve the international response to the threat of terrorism. This response presently appears today as largely inadequate and insufficiently coordinated.

287. Whilst hard evidence, at least according to the strict meaning of the word, is still not forthcoming, a number of coherent and converging elements indicate that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe. I do not set myself up to act as a criminal court, because this would require evidence beyond reasonable doubt. My assessment rather reflects a conviction

[240] See graphic annex to this report: "The global "spider's web" of secret detentions and unlawful inter-state transfers"
[241] See paragraph 51 above.
[242] See paragraph 49 above (quoting Michael Scheuer, architect of the rendition programme).

based upon careful examination of balance of probabilities, as well as upon logical decuctions from clearly established facts. It is not intended to pronounce that the authorities of these countries are "guilty" for having tolerated secret detention sites, but rather it is to hold them "responsible" for failing to comply with the positive obligation to diligently investigate any serious allegation of fundamental rights violations.

288. In this sense, it must be stated that to date, the following member States could be held responsible, to varying degrees, which are not always settled definitively, for violations of the rights of specific persons identified below (respecting the chronological order as far as possible):

- Sweden, in the cases of Ahmed Agiza and Mohamed Alzery ;
- Bosnia-Herzegovina, in the cases of Lakhdar Boumediene, Mohamed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir and Saber Lahmar (the "Algerian six") ;
- The United Kingdom in the cases of Bisher Al-Rawi, Jamil El-Banna and Binyam Mohamed ;
- Italy, in the cases of Abu Omar and Maher Arar ;
- "The former Yugoslav Republic of Macedonia", in the case of Khaled El-Masri ;
- Germany, in the cases of Abu Omar, of the "Algerian six", and Khaled El-Masri ;
- Turkey, in the case of the "Algerian six".

289. Some of these above mentioned states, and others, could be held responsible for collusion – active or passive (in the sense of having tolerated or having been negligent in fulfilling the duty to supervise) - involving secret detention and unlawful inter-state transfers of a non specified number of persons whose identity so far remains unknown:

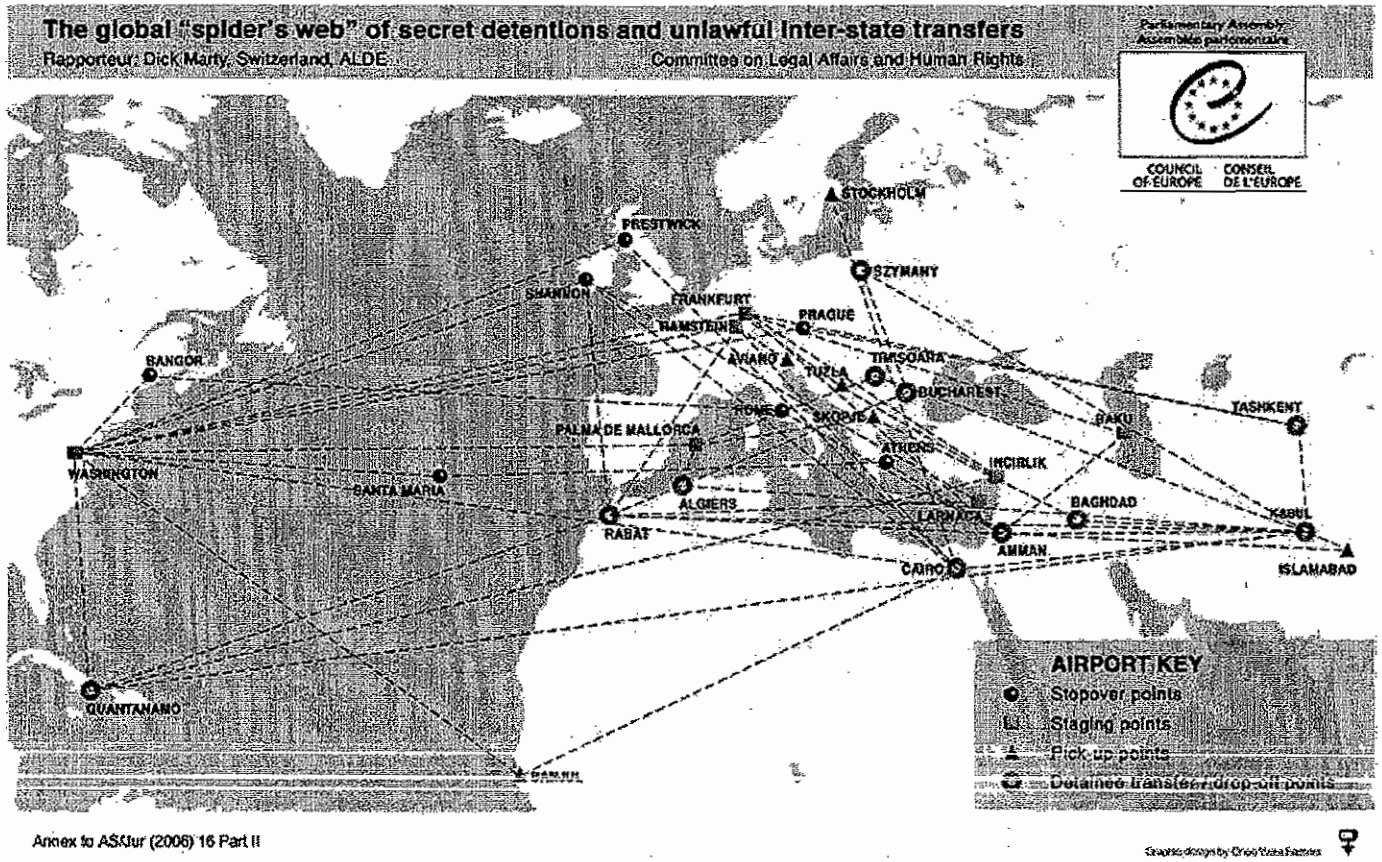
- Poland and Romania, concerning the running of secret detention centres;
- Germany, Turkey, Spain and Cyprus for being "staging points" for flights involving the unlawful transfer of detainees;
- Ireland, the United Kingdom, Portugal, Greece and Italy for being "stopovers" for flights involving the unlawful transfer of detainees.

290. Other States should still show greater willingness and zeal in the quest for truth, as serious indications show that their territory or their airspace might have been used, even unbeknownst, for illegal operations (the example of Switzerland was cited in this context).

291. The international community is finally urged to create more transparency in the places of detention in Kosovo, which to date qualify as "black holes" that cannot even be accessed by the CPT. This is frankly intolerable, considering that the international intervention in this region was meant to restore order and lawfulness.

292. With regards to these extremely serious allegations, it is urgent – that is the principal aim of this report – that all Council of Europe member States concerned finally comply with their positive obligation under the ECHR to investigate. It is also crucial that the proposals in the draft resolution and recommendation are implemented so that terrorism can be fought effectively whilst respecting human rights at the same time.

ANNEX



Annex to AS/Jur (2006) 16 Part II

ANNEX

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10748 and Reference No 3153 of 25 November 2005

Draft resolution and draft recommendation unanimously adopted by the Committee on 7 June 2006

Members of the Committee : Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr Eduard Lintner, Mr Adrien Severin (Vice-Chairpersons), Mrs Birgitta Alhqvist, Mr Athanasios Alevras, Mr Rafis Aliti, Mr Alexander Arabadjiev, Mr Miguel Arias, Mr Birgir Ármannsson, Mr José Luis Arnaut, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bernelmans-Videc**, Mr Giorgi Bokeria, Mrs Olena Bondarenko, Mr Erol Aslan Cebeci, Mrs Pia Christmas-Møller, Mr Boriss **Cilevičs**, Mr Domenico Contestabile, Mr András Csáky, Mrs Herta **Däubler-Gmelin**, Mr Marcello Dell'Utri, Mrs Lydie Err, Mr Jan Ertsborn, Mr Václav **Exner**, Mr Valeriy Fedorov, Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Michel **Hunault**, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Sergei Ivanov, Mr Tomáš Jirsa, Mr Antti Kaikkonen (alternate: Mr Kimmo **Sasi**), Mr Uyriy Karmazin, Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Humfrey Malins, Mr Andrea Manzella, Mr Alberto Martins, Mr Tito Masi, Mr Andrew McIntosh, Mr Murat Mercan, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Ms Ann Ormonde, Mr Rino Piscitello, Mrs Maria Postoico, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine, Mr Armen Rustamyan, Mr Michael Spindelegger, Mrs Rodica Mihaela Stănoiu, Mr Christoph Strasser, Mr Petro Symonenko, Mr Vojtech **Tkáč**, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis (alternate: Mrs Elsa **Papadimitriou**), Mrs Renate Wohlwend, Mr Krysztof Zaremba, Mr Vladimir Zhirinovsky, Mr Zoran Žižić, Mr Miomir **Žužul**

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Ms Heurtin, Mr Simpson