



Provisional version

## **Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations<sup>1</sup>**

### **Report**

Rapporteur: Dick Marty, Switzerland, Alliance of Democrats and Liberals for Europe

#### **A. Draft resolution**

1. The Assembly considers that judicial and parliamentary scrutiny of government and its agents is of vital importance for the rule of law and democracy. This also applies especially to so-called special services whose activities are usually kept secret. Security and intelligence services, the need for which cannot be put into doubt, must nonetheless not become a “state within the state”, exempted from accountability for their actions. Such lack of accountability leads to a dangerous culture of impunity, which undermines the very foundations of democratic institutions.
2. In combating terrorism, governments are increasingly invoking “state secrecy” or “national security” in order to ward off parliamentary or judicial scrutiny of their actions.
3. In some countries, in particular the United States, the notion of state secrecy is used to shield agents of the executive from prosecution for serious criminal offences such as abduction and torture, or to stop victims from suing for compensation. The United States also refused to co-operate, in particular, with the judicial authorities of Germany, Lithuania and Poland in the criminal investigations launched in those countries in view of numerous elements of proof of abductions, secret detentions and illegal transfers of detainees (see Resolution 1507 and Recommendation 1754 (2006) and Resolution 1562 and Recommendation 1801 (2007) of the Assembly).
4. The Assembly recognises the need for states to ensure effective protection of secrets affecting national security. But it considers that information concerning the responsibility of state agents who have committed serious human rights violations, such as murder, enforced disappearance, torture or abduction, should not be subject to secrecy provisions. Such information should not be shielded from judicial or parliamentary scrutiny under the guise of “state secrecy”.
5. The Assembly believes that there is no reason why judicial and parliamentary institutions should be less trusted than state executive bodies and their agents where the protection of legitimate secrets is concerned. As Canada demonstrated in the Maher Arar case, it is possible to put in place special procedures for the supervision of the activities of the special services guaranteeing both the adequate protection of legitimate state secrets and the protection of fundamental rights and freedoms.
6. Parliamentary supervision of the security and intelligence services, both civilian and military, is either non-existent or grossly inadequate in many Council of Europe member states. The permanent or ad hoc parliamentary commissions set up in several countries to oversee the activities of the secret services are hampered by a lack of information, which is under the exclusive control of the executive itself, and most often of a very small circle within the latter.

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1. Draft resolution and draft recommendation adopted unanimously by the committee in Paris on 7 September 2011.

7. The Assembly welcomes the growing co-operation between different countries' secret services, which constitutes an indispensable tool to confront the worst forms of organised crime and terrorism. This international co-operation should, however, be accompanied by equivalent co-operation between oversight bodies. It is unacceptable that activities affecting several countries should escape scrutiny because the services concerned in each country invoke the need to protect future co-operation with their foreign partners to justify the refusal to inform their respective oversight bodies.

8. The media play a vital role in the functioning of democratic institutions, in particular by investigating and publicly denouncing unlawful acts committed by state agents, including members of the secret services. They rely heavily on the co-operation of "whistleblowers" within the services of the State. The Assembly reiterates its calls for adequate protection for journalists and their sources (Recommendation 1950 (2011) and for "whistleblowers" (Resolution 1729 and Recommendation 1916 (2010)) .

9. The Assembly can only welcome the publication, in particular via the "Wikileaks" site, of numerous diplomatic reports confirming the truth of the allegations of secret detentions and illegal transfers of detainees published by the Assembly in 2006 and 2007. It is essential that such disclosures are made in such a way as to respect the personal safety of informers, human intelligence sources and secret service personnel. The appearances of such websites is also the consequence of insufficient information made available and a worrying lack of transparency of Governments.

10. In some circumstances, in particular in the framework of the fight against terrorism, measures restricting freedom and violating fundamental rights are taken against suspect individuals who are not even informed of the - "secret" - grounds for suspicion on which these measures are based and do not have the possibility to seize an independent complaints mechanism. The Assembly reiterates its appeal in Resolution 1597 (2008) to the competent United Nations and European Union bodies to reform the "blacklisting" procedures, putting an end to such arbitrary methods and putting into place mechanisms that are both effective and respectful of the rule of law in order to neutralise persons suspected of supporting terrorism.

11. With regard to judicial inquiries, the Assembly:

11.1. welcomes the inquiries conducted professionally by the competent German and Italian authorities, which have shed considerable light on the abductions of Khaled El-Masri and Abu Omar;

11.2. welcomes the friendly settlements reached by the British authorities with the alleged victims of abuses committed by the British services and urges all interested parties to agree immediately on a framework satisfying the requirements of the European Convention on Human Rights regarding the duty to investigate allegations of torture for the special inquiry under the aegis of Sir Peter Gibson announced by the Prime Minister in July 2010;

11.3. urges the Lithuanian, Polish, Portuguese and Spanish prosecuting authorities to persevere in seeking to establish the truth about the allegations of secret CIA detentions and urges the American authorities to cooperate with them;

11.4. calls on the Romanian judicial authorities and those of "the former Yugoslav Republic of Macedonia" to finally initiate serious investigations following the detailed allegations of abductions and secret detentions in respect of those two countries, and on the American authorities to provide without further delay the judicial assistance requested by the prosecuting authorities of the European countries concerned;

12. With regard to parliamentary inquiries, the Assembly:

12.1. welcomes the determination of many members of the commission of the German *Bundestag* responsible for investigating the alleged involvement of the German services in CIA actions, while regretting that the government persisted in withholding the information requested by the commission, to the point that the Federal Constitutional Court, following an application by the opposition representatives, was forced to censure the government's behaviour; deplores, however, that the end of the legislature did not allow for the commission's work to continue after the judgment, as it was dissolved and not reconstituted;

12.2. welcomes the inquiry by the national security and defence committee of the Lithuanian *Seimas* which established the existence of two CIA secret detention centres on Lithuanian territory, while noting that the inquiry was unable to establish whether people had actually been detained and ill-treated in those places, and whether Lithuanian senior officials were aware of the CIA actions in collaboration with agents of the Lithuanian secret service (SSD);

12.3. welcomes the untiring efforts of the All Party Parliamentary Group to establish the truth about the involvement of the British authorities in cases of illegal transfers of detainees concerning the United Kingdom;

12.4. deplores that the Polish and Romanian parliaments confined themselves to inquiries, whose main purpose seems to have been to defend the official position of the national authorities;

12.5. is surprised that the parliament of “the former Yugoslav Republic of Macedonia” considered it unnecessary to launch an inquiry into the El-Masri case, in the light of the clear findings of the European and German inquiries on this subject.

13. With regard to procedures for monitoring the secret services in general, the Assembly calls on Council of Europe member and observer states still lacking equivalent bodies to set up:

13.1. a parliamentary mechanism for monitoring the secret services, while ensuring that it has sufficient access to all the information needed to discharge its functions whilst respecting a procedure which protects legitimate secrets;

13.2. special procedures so that legitimately secret information can be handled without endangering state security in criminal or civil proceedings concerning the activities of special services;

13.3. an adversarial procedure before a body allowed unrestricted access to all information to decide, in the context of a judicial or parliamentary review procedure, on whether or not to publish information which the government wishes to remain confidential.

14. With regard to international co-operation between oversight bodies, the Assembly calls on parliaments participating in the development of the future “Network of European expertise relating to parliamentary oversight of security and intelligence services” to consider widening the terms of reference of the future network and the range of participants in order to make it an effective instrument of co-operation between the competent bodies of all Council of Europe member and observer states, making it possible to remedy the shortcomings in parliamentary oversight resulting from increased international co-operation between the services in question.

**B. Draft recommendation**

1. The Assembly refers to its Resolution \*\*\* (2011) and recalls its Recommendations 1916 (2010) on protection of “whistleblowers”, 1876 (2009) on the need to eradicate impunity, and 1950 (2011) on protection of journalists’ sources.
2. It calls on the Committee of Ministers to:
  - 2.1. draw up a recommendation on the notion of state secrecy specifying that the legislation of a member state cannot rely on state secrecy and national security to cover up unlawful actions of public officials, or those directly mandated by them, and thus exempt them of their responsibility for criminal acts;
  - 2.2. invite all member states to review, or if necessary, set up suitable and effective parliamentary mechanisms for the oversight of the secret services and to ensure that they have the powers to obtain information needed to discharge their function;
  - 2.3. invite all member states to review, or as appropriate set up, special procedures in the criminal and civil courts to permit proper conduct of proceedings involving the handling of information of a sensitive nature covered by secrecy, taking into account the state’s legitimate interests and its security.

## C. Explanatory report by Mr Marty, Rapporteur

***“Real power begins where secrecy begins.”***

**Hannah Arendt**

*(The Origin of Totalitarianism, 1951)*

1. **Introduction**
  - 1.1. Procedure
  - 1.2. Background
2. **Attempts at judicial scrutiny of alleged illegal activities by the secret services**
  - 2.1. Criminal proceedings against secret agents responsible for criminal acts
  - 2.2. Actions for damages brought by victims of unlawful acts
3. **Parliamentary inquiries into alleged illegal activities by the secret services**
4. **Conclusions**
  - 4.1. Assessment of the situation and the efforts being made
  - 4.2. Basic principles for judicial and parliamentary scrutiny of the secret services
  - 4.3. Proposals to improve scrutiny of secret services

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### 1. Introduction

#### 1.1. Procedure

1. The motion for a resolution of 6 May 2009<sup>2</sup> was referred to the Committee on Legal Affairs and Human Rights for report at the Bureau meeting in Ljubljana on 28 May 2009<sup>3</sup>. Mr Marty was appointed rapporteur at the meeting of the Committee on Legal Affairs and Human Rights on 23 June 2009. The committee held a hearing with experts at its meeting in Tbilisi on 17 September 2010. The report of the hearing was declassified by the committee on 5 October 2010<sup>4</sup>.

#### 1.2. Background

2. The motion for a resolution on which this report is based is also the result of knowledge acquired in preparing the reports on illegal transfers of detainees and secret CIA detentions<sup>5</sup> and on the Terrorism Black Lists of the UN Security Council and of the European Union<sup>6</sup>. We described how our research into the activities of the CIA and the implication of the authorities of European states came up against a real wall of silence from the governments of the countries whose secret services were suspected of collaborating with the CIA in illegal activities. Questionnaires sent out on the committee's behalf brought extremely formalistic replies lacking in substance or were simply ignored, even after reminders. It was only by resorting to other sources of information, such as “whistleblowers”<sup>7</sup>, honest officials of the United States and of European countries, who were no longer willing to be accessories to criminal acts, that we were able to discover part of the truth. Once the “truth process” was in motion, others felt motivated or even compelled to react, and our findings, for which there was already considerable evidence at the time, all turned out to be correct, and were even supplemented by further revelations – such as, for example, the existence of other “secret CIA prisons” in Lithuania, in addition to those we had already revealed in Poland and Romania.

3. It should be emphasised, however, that, for the most part, these additional revelations were the outcome, not of parliamentary and judicial inquiries launched in the wake of the two Parliamentary Assembly reports and that of the European Parliament, but of relentless efforts by investigative journalists and non-governmental organisations. The fact is that the “official” investigations are stalled or have even already been abandoned or dismissed without addressing the merits of the cases, as in the case of the compensation

<sup>2</sup> Document 11907 (2009).

<sup>3</sup> Reference no. 3571.

<sup>4</sup> [http://assembly.coe.int/CommitteeDocs/2010/20100922\\_meetingheldinTbilisi\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2010/20100922_meetingheldinTbilisi_E.pdf).

<sup>5</sup> [Document 11302 rev](#) of 11.06.2007 and [Document 10957](#) of 12.06.2006.

<sup>6</sup> Document 11454 of 16.11.2007

<sup>7</sup> See the report by Pieter Omtzigt (Netherlands, EPP/CD) on “protection of whistleblowers”, [Document 12006](#) du 14.09.2009.

claims brought before the American courts by victims of the “renditions”. Official procedures have in every case come up against the argument of “state secrecy”, used by the governments concerned to impede the course of justice and the requests of the parliamentary commissions of inquiry set up in several countries. We consider that this is simply unacceptable: a democratic state based on the rule of law is duty-bound to have judicial and parliamentary mechanisms to get to the bottom of serious human rights violations committed by agents of the executive, however “special” they may be. A “licence to kill” (or to abduct and torture) only exists in certain films, and in dictatorial regimes. In democratic systems, parliaments, as representatives of the people, have a right and duty to know what the government is doing in the name of the people, and the justice system has a duty to prosecute and punish the perpetrators of criminal acts, including, where appropriate, agents of the executive. The principles of separation of power and “checks and balances” must not only be quoted in nice speeches; they must above all be implemented!

4. Plainly, however, this clear and simple rule does not seem to apply, or at least not completely, to the activities of so-called special services, and particularly when they claim to act in the framework of the fight against terrorism. This fight, as we have already shown, has already given rise to numerous abuses and violations of human rights, with doubtful results, contributing to increase the number of terrorist recruits<sup>8</sup> and creating a climate of sympathy for those criminals who can thus pretend that they fight against a system which employs criminal methods.

5. It is obvious that all states, including democratic law-based states, legitimately feel the need to protect their secrets. I do not wish to attempt in this report to develop a “positive” definition of the notion of state secrecy. Suffice it to say that an excessively broad and/or vague definition of state secrecy as protected by the laws criminalising espionage or violations of state secrecy poses dangers to freedom and allows all kinds of abuse. But the subject of this report is not the danger represented by abuse of the notion of state secrecy to silence or imprison journalists, scientists, lawyers and other “whistleblowers”<sup>9</sup>. This report is intended to focus on abuse of state secrecy to prevent or block judicial or parliamentary inquiries set up to establish the truth about unlawful acts committed by agents of the executive. In this context, it is enough, where the definition of state secrecy is concerned, that we agree on a distinction between legitimate secrets and others which do not warrant protection. A “negative” definition is therefore sufficient: secrets not “worthy of protection”<sup>10</sup> are those which in reality relate to information concerning criminal acts. If we agree on this premise, it is enough to identify appropriate procedures for ensuring that judicial and parliamentary oversight bodies are able to perform their task of doing justice and establishing the truth without jeopardising the (only) legitimate state secrets. That is the purpose of this report, which will attempt to take stock of efforts to perform judicial (II. below) and parliamentary (III. below) scrutiny of alleged illegal activities by the secret services<sup>11</sup>, before suggesting, by way of a conclusion, some possible solutions to remedy the shortcomings observed.

## **2. Attempts at judicial scrutiny of alleged illegal activities by the secret services**

### *2.1. Criminal proceedings against secret agents responsible for criminal acts*

6. At the hearing in Tbilisi, Mr Armando Spataro, the Milan prosecutor responsible for prosecuting the abductors of Abu Omar<sup>12</sup>, described the difficulties which the Milan prosecutor’s office had encountered in this case. The Italian Constitutional Court confirmed the lawfulness in principle of the proceedings against the CIA and SISMI (the Italian military intelligence agency), which even led to convictions – the only ones handed down so far against participants in the CIA programme of illegal transfers and secret detentions. 25 people, including 22 CIA agents and an American military officer, were sentenced to lengthy terms of imprisonment, the American citizens in absentia. Their extradition has never been officially requested by the Italian government, despite the existing extradition treaty between the two countries which foresees the extradition of their own nationals. Two Italian secret agents were also convicted of participation in this

<sup>8</sup> See the report adopted in June 2010 on “Legal remedies for human rights violations in the North Caucasus Region” ([Document 12276](#) of 4.06.2010); the report by Kevin McNamara (United Kingdom, SOC) on Guantanamo Bay prison camp ([Document 10497](#) of 8.04.2005); see also the report by Lord Tomlinson (United Kingdom, SOC) on “terrorism and human rights”, currently in preparation [doc.AS/Jur (2011)33].

<sup>9</sup> See in this connection the report by Christos Pourgourides (Cyprus, EPP/CD) on fair trial issues in criminal cases concerning espionage or divulging state secrets ([Document 11031](#) of 25.09.2006).

<sup>10</sup> This is the translation of the German term “schutzwürdig”.

<sup>11</sup> I wish to thank Amnesty International for its extensive research and compilation work on this subject in the report “Open Secret – Mounting evidence of Europe’s complicity in rendition and secret detention” published in 2010. One of the authors of this report, Mrs Julia Hall, gave me invaluable assistance in updating the information for sections II. and III.

<sup>12</sup> See Document 10957 of 12 June 2006, paragraph 162 and Document 11302 of 11 June 2007, paragraphs 316-324.

abduction. The Milan Court of Appeal upheld these convictions on 15 December 2010<sup>13</sup>. However, the former head of SISMI<sup>14</sup>, Mr Pollari, and other senior military intelligence officials could not be prosecuted because they had not been released from their professional secrecy obligations in accordance with the procedure designed for this purpose. The evidence against him and his colleagues could not be divulged for reasons of state secrecy. Mr Armando Spataro, the chief prosecutor in charge of the case, explained the relevant Italian legislation in his statement at the hearing in Tbilisi in September 2010. The law provides for an adversarial procedure with, at last instance, a decision by the Constitutional Court, which has the power to lift the secrecy imposed by the prime minister. In the Abu Omar case, the Constitutional Court issued some rather general guidelines which need to be applied by the ordinary courts to each document and witness on a case-by-case basis. Their application of the rules may be subject to appeals to higher courts. According to Mr Spataro, everything depends on how the legislation is applied in practice, which may lead to tensions between the judiciary and the executive.

7. As regards the German part of the abduction of Abu Omar in Milano, who was flown from there to Egypt via the American base in Ramstein, a judicial investigation was initiated by the public prosecutor's office in Zweibrücken. As already mentioned in my 2006 report<sup>15</sup>, this investigation was unsuccessful owing to the lack of co-operation by the American authorities, from whom the prosecutor's office had requested information concerning the movements of US personnel involved in the prisoner's transfer from the Aviano base in Italy via Ramstein.

8. With regard to the abduction of Khaled El Masri, the Munich prosecutor's office conducted an investigation which resulted in arrest warrants against 13 CIA agents. This investigation, of remarkable quality as that in Milano, made it possible to identify those responsible and to trace the victim's movements, leaving no doubt as to the truthfulness of his account. But, as we regret to note, the arrest warrants were never transmitted to the competent American authorities via diplomatic channels, as required under the co-operation agreement in criminal matters between Germany and the United States. A complaint by Mr El Masri before the Administrative Court in Cologne aimed at obliging the Government to request the extradition of these agents by the United States was rejected. The Court argued that the Government had a margin of appreciation allowing it to take into account the fact that the United States had announced from the outset that any extradition request would be refused on national security grounds<sup>16</sup>.

9. In Poland<sup>17</sup>, judicial proceedings which looked quite promising have so far failed to produce any results, also because of the American authorities' refusal to provide the requested judicial assistance. The first request in March 2009 was rejected in October 2009. The American authorities have not yet given a decision on the second request, lodged on 22 March 2011. One interesting development came when Abd al-Rhim al-Nashiri and Abu Zubaydah (who are currently being held at Guantanamo Bay) were granted victim status. But the prosecutorial enquiry started only in March 2008, almost three years after credible allegations of secret detentions in Poland first emerged.

10. The Polish Helsinki Foundation, in tandem with the Open Society Justice Initiative, has succeeded in obtaining and publishing some important information, including data collected by the Polish Air Navigation Services Agency (PANSa) on suspicious movements of aircraft belonging to CIA shell companies<sup>18</sup>, information which the Polish authorities officially refused to disclose to us and to the European Parliament during our inquiries in 2006/2007. These data, along with those made available to the Helsinki Foundation by the Polish Border Guard, provide definite proof that seven CIA-associated aircraft landed at Szymany airport between 5 December 2002 and 22 September 2003<sup>19</sup>.

<sup>13</sup> See Amnesty International, AI index EUR 30/010/2010 of 17 December 2010 : Italy : Court upholds convictions in Abu Omar kidnapping case.

<sup>14</sup> "Servizio per le informazioni e la sicurezza militare".

<sup>15</sup> Document 10957 (2006), paragraph 238.

<sup>16</sup> Judgment of 07.12.2010 (Az.: 5 K 7161/08); see

<http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VG%20K%F6ln&Datum=07.12.2010&Aktenzeichen=5%20K%207161/08>.

<sup>17</sup> The information on the current situation in Poland comes largely from the Helsinki Foundation for Human Rights, Poland, which has also made an invaluable contribution to the search for truth by regularly approaching the Polish prosecuting authorities and issuing requests for information based on the Polish Freedom of Information Act (the Polish equivalent of the FOIA in the United States and the United Kingdom).

<sup>18</sup> Data supplied by PANSa available on the website of the Polish Helsinki Foundation at:

[http://www.hfhrpol.waw.pl/pliki/OBS\\_CIA.zip](http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip).

<sup>19</sup> Data supplied by the Polish Border Guard available on the website of the Polish Helsinki Foundation.

11. The Polish Helsinki Foundation noted a positive change of attitude on the part of the prosecuting authorities, reporting that they have released more information of late and that their second request to the United States for judicial assistance shows how seriously they are taking the case. In a recent development, prosecutor Jerzy Mierzewski was removed from the file and replaced by the recently appointed Deputy Appellate Prosecutor Waldemar Tyl<sup>20</sup>. Adam Bodnar, of the Polish Helsinki Foundation, criticised this decision as “irrational” and expressed his fear that sooner or later the Polish investigation would be discontinued, as had happened in Lithuania<sup>21</sup>, for which there was “no objective reason”. The new Prosecutor in charge of the case, Mr Tyl, called the worries “groundless”. Time will tell.

12. The Polish prosecuting authorities have not yet secured the desired co-operation from the American authorities or even an opportunity to hear Mr al-Nashiri himself as a witness. But the data collected by the Polish Helsinki Foundation and the victims’ lawyers should be sufficient to confirm the presence at the Stare Kiejkuty site of a half-dozen detainees and to identify the head of the “black site” and at least one other person alleged to have committed acts which are described as “unauthorised and undocumented” in the Report by the CIA Inspector General (see below) and which seem to correspond to the definition of torture in Article 3 of the ECHR as interpreted by the Strasbourg Court in the case of *Ireland v. United Kingdom*<sup>22</sup>. The Polish prosecuting authorities therefore have a duty, under the Court’s case-law, to investigate these acts and prosecute those responsible, especially as one of them, a private contract worker, is not even covered by any form of immunity.

13. The human rights NGO Open Society Justice Initiative (OSJI) recently lodged an application against Poland on Mr al-Nashiri’s behalf before the European Court of Human Rights. This is the second application by a victim of CIA renditions. It has two main strands relating to fundamental values of the Council of Europe. Where the first is concerned, namely the ill-treatment allegedly suffered by Mr al-Nashiri on Polish territory, even under the control of American agents, Poland could be found responsible for violations of Article 3 of the Convention in view of the Polish authorities’ failure to discharge their responsibility to protect all persons on national territory from torture. If the direct responsibility of the Polish authorities cannot be proved, the Court’s case-law concerning a procedural violation of Article 3<sup>23</sup> may also be applicable in view of the alleged failure of the judicial authorities to fulfil their positive obligation to conduct an effective investigation despite there being strong evidence that such acts had taken place. The second strand of the application concerns Mr al-Nashiri’s transfer from Poland to Guantanamo Bay, where he was allegedly subjected to further ill-treatment; following this transfer, he now risks being subjected to a manifestly unfair trial by a military commission and – this would be a most blatant violation of the European Convention on Human Rights – being sentenced to death.<sup>24</sup> The Strasbourg Court has already held in its case-law<sup>25</sup> that extradition to a country in which the person is in danger of being sentenced to death may constitute a violation of Articles 2 and 3 of the Convention. A fortiori, that must be the case when the death penalty is likely to be imposed following unfair proceedings, such as those conducted by the Guantanamo Bay “military commissions”<sup>26</sup>. The work of al-Nashiri’s lawyers has been made extremely difficult by state secrecy issues because everything Mr al-Nashiri says is presumed to be classified. Lieutenant Commander Stephen Reyes, Mr al-Nashiri’s military defence counsel, has provided the following description of events:

"A few months ago, I was asked by the government for the correct spelling of my client's name, according to him. I was unable to answer this simple question, because any statements made by my client are presumed to be top secret."

<sup>20</sup> See *Gazeta Wyborcza* of 20 May 2011, *Prokurator odsunięty od śledztwa w sprawie więźni CIA*; and *Washington Post* of 24 May 2011, *Prosecutor removed from Polish investigation into alleged secret CIA prison*.

<sup>21</sup> Interview with *Washington Post* (note above).

<sup>22</sup> 25 – 18.1.78.

<sup>23</sup> See Document 12276 (2010), paragraphs 21 pp. for further details of the case-law on procedural violations.

<sup>24</sup> The European Parliament, in a resolution of 9 June 2011, called on the United States not to request the death penalty against Mr Al-Nashiri and to ensure a fair trial against him in line with international standards on the rule of law (see document B7-0375/2011).

<sup>25</sup> See, for example, *Soering v United Kingdom* 11 Eur. Ct. H.R. (ser. A) (1989).

<sup>26</sup> See, for example, William Glaberson, *U.S. May Revive Guantanamo Military Courts*, *New York Times*, 1 May 2009, available at: <http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html>.

14. In Lithuania, the prosecuting authorities launched a criminal investigation following the revelations of the parliamentary inquiry<sup>27</sup> concerning the existence of two “black sites” in the country. The investigation drew in particular on information published in February 2010 in the UN joint study on secret detention<sup>28</sup>, which was based on analysis of flight plans and “data strings”, analogous data to those already used by us to discover the existence of “black sites” in Poland and Romania. The British NGO “Reprieve” also gave the Lithuanian Attorney-General some important elements in its letter of 21 September 2010<sup>29</sup>. “Reprieve” presented information according to which a “high-value detainee” known as Abu Zubaydah had been detained secretly in Lithuania between 2004 and 2006, in the course of a journey which had allegedly taken him from Thailand to Szymany in Poland, then to Guantanamo Bay and Morocco. After his spell in Lithuania between spring 2004 and September 2006, he was allegedly returned to Guantanamo Bay. But the Lithuanian prosecuting authorities eventually suspended their investigation without any result - despite protests by Amnesty International<sup>30</sup>. Amnesty International considers that numerous “obvious” leads had not been followed up by the prosecutors, who in their view also accepted too easily the limits imposed on their investigation by the invocation of state secrecy. The prosecutor’s office, on its part, justifies its decision to suspend the investigation by the statute of limitations for a possible abuse of authority and by the refusal of the American authorities to provide the information requested. We consider that the lack of cooperation of the American authorities, as noted before in relation to the German, Italian and Polish authorities, raises a serious problem indeed. This situation is also due to the attitude of those European Governments, which abandoned all control over the use of their own infrastructures they unconditionally put at the disposal of the American administration, in the wake of the acceptance of the implementation of Article 5 of the NATO treaty<sup>31</sup> and of the operative measures accepted by the members of the alliance<sup>32</sup>. In this way, the European Governments effectively placed themselves in a position of reliance or even dependence on the good will of the American authorities.

15. The CPT, in its report on the visit to Lithuania from 14-18 June 2010, published with the agreement of the Lithuanian authorities on 19 May 2011<sup>33</sup>, provided an initial evaluation of the criminal investigation concerning the secret prisons, raising critical questions as to the promptness of the investigation, the comprehensiveness of its scope and its thoroughness. Most importantly, for this report, the CPT pointed out that it

“did not receive the specific information it requested, either during the above-mentioned meeting or from the Lithuanian authorities’ response of 10 September 2010. [...] It is affirmed that more specific information cannot be provided as the major part of the data gathered during the investigation constitutes a state or service secret.”

The CPT has an impeccable track record, over 20 years, of keeping the confidentiality of information received in the pursuit of its delicate mission. It publishes only the final report, and only upon the request of the national authorities. It is therefore unacceptable, in my view, that even the CPT did not get access to the information required in order to determine, in accordance with its mandate, whether the investigation by the Lithuanian prosecutor’s office into the serious torture allegations in question was performed with due diligence, as required both by the European Convention against Torture and Inhuman and Degrading Treatment and the European Convention on Human Rights.

<sup>27</sup> See below, paragraph 37.

<sup>28</sup> *UN Joint Study on Secret Detention*, published in February 2010 (joint report by the special rapporteurs on the protection of human rights while countering terrorism, Martin Scheinin, and on torture and other inhuman or degrading treatment, Manfred Nowak, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc>).

<sup>29</sup> Available on the Reprieve website at [http://www.reprieve.org.uk/static/downloads/2010\\_09\\_20\\_CSS\\_Letter\\_Darius\\_Valys\\_Lithuania\\_investigation.pdf](http://www.reprieve.org.uk/static/downloads/2010_09_20_CSS_Letter_Darius_Valys_Lithuania_investigation.pdf)

<sup>30</sup> See “Open Secret”, op. cit. (note 10), pages 24 et 25.

<sup>31</sup> See document 11302 rev. of 11 June 2007, paras. 72-105.

<sup>32</sup> See document 11302 (note 30), paragraphs 91-98.

<sup>33</sup> Available at: <http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm>.

16. In Spain, criminal proceedings were also initiated following publication of the Assembly report. The United States put pressure on the Spanish authorities not to press charges, as follows from the publication of US diplomatic cables via Wikileaks<sup>34</sup>.

17. In Portugal too, criminal proceedings were initiated to no effect, despite the determination of Portuguese MEP Ana Gomes, who appealed against the closure of the investigation while drawing the attention of the prosecuting authorities to its many shortcomings.

18. In “the former Yugoslav Republic of Macedonia”, Khaled El-Masri – a German of Lebanese origin arrested at the border, held for 23 days in a hotel in Skopje by Macedonian agents, then handed over to CIA agents to be detained and ill-treated in American prisons in Afghanistan<sup>35</sup> - filed a complaint with the Skopje public prosecutor on 6 October 2008 for illegal detention and abduction and for torture or inhuman and degrading treatment. According to the complainant, no investigative steps were taken following his complaint<sup>36</sup>. On 20 July 2009, Khaled El-Masri, with the help of OSJI, lodged an application with the European Court of Human Rights against “the former Yugoslav Republic of Macedonia”<sup>37</sup>. This was the first rendition case to be brought before the Court.

19. In France, in the so-called Karachi affair, a “priority question of constitutionality” challenging the current official secrets legislation was referred to an anti-terrorist judge. If the question, which was remitted initially to the Paris Court of Appeal, passes the final stage of the Court of Cassation, the Constitutional Council will give a ruling on the validity of the legislation in question within a period of three months<sup>38</sup>. The Law of 29 July 2009 seeks to “sanctuarise” certain places such as ministries or police premises. Judges may no longer enter these places or seize documents or other items there unless they are accompanied by the Chair of the Consultative Commission on National Defence Secrecy – who must also give the minister an opinion on whether or not use of the seized documents or other items should be authorised. The list of “classified places” is itself classified. A judge wishing to conduct a search must therefore find out from the Ministry of Justice, which keeps the list, whether the place he plans to search is on the list. Clearly these rules further complicate the work of judges in cases aimed at establishing the truth about the conduct of the executive authorities concerned.

20. In the United Kingdom, criminal proceedings relating to involvement in renditions have been brought in only one case – that of an MI5 agent (“witness B”) alleged to have aided and abetted the mistreatment of Binyam Mohamed, whom he interrogated in Pakistan during his detention under the control of American agents. The Attorney General called for a police investigation in March 2009, but the investigation failed to produce sufficient evidence, as announced by the Director of the Crown Prosecution Service on 17 November 2010<sup>39</sup>. Other criminal investigations concerning this case are still ongoing.<sup>40</sup>

21. In the United States, no criminal proceedings have been brought against the perpetrators or instigators of acts of torture (such as “waterboarding”). The Obama administration preferred to draw a line under the acts of its predecessors, even – and that is difficult to understand, not to say shocking – for those who went beyond the authorisation to employ the “11 techniques” for interrogation (including “waterboarding”) covered

<sup>34</sup> See Giles Tremlet, Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture, Leaked cables show Spanish officials and prosecutors shared information about investigations into US human rights abuses, Guardian, 1.12.2010, at: <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>.

<sup>35</sup> See Document 10957 of 12 June 2006, paragraphs 92-132 and Document 11302 of 11 June 2007, paragraphs 272-309. An excellent update of the situation in Spain is available in the report of Human Rights Watch of 12 July 2011 (“Getting away with torture – the Bush administration and mistreatment of detainees”, in the chapter relating to Spain, appendix on “Foreign state proceedings regarding US detainee mistreatment” (available at: <http://www.hrw.org/en/node/100262/section/7>).

<sup>36</sup> See the Statement of Facts in the case of Khaled El-Masri against “the former Yugoslav Republic of Macedonia” (appl. no. 39630/09) of 8 October 2010, page 10).

<sup>37</sup> Application no. 39630/09 of 20 July 2009; a summary of the facts dated 8 October 2010 is available on the Court website.

<sup>38</sup> See Gérard Davet and Fabrice Lhomme, *Affaire Karachi : loi sur le secret-défense contestée*, in *Le Monde* of 28 April 2011 (French only): [http://www.lemonde.fr/politique/article/2011/04/28/affaire-de-karachi-la-loi-sur-le-secret-defense-contestee\\_1513887\\_823448.html](http://www.lemonde.fr/politique/article/2011/04/28/affaire-de-karachi-la-loi-sur-le-secret-defense-contestee_1513887_823448.html).

<sup>39</sup> See Richard Norton-Taylor, MI5 officer will not be prosecuted over Binyam Mohamed abuse. CPS finds insufficient evidence to charge MI5 officer who interviewed Binyam Mohamed in Pakistan, The Guardian, 17 November 2010; see also the statement by the Chairman of the APPG, Andrew Tyrie, on 17 November 2010 (on the APPG website [www.extraordinaryrendition.org](http://www.extraordinaryrendition.org)).

<sup>40</sup> See the statement of the Director of Prosecutions of 17 November 2010 ([http://www.cps.gov.uk/news/press\\_releases/141\\_10/index.html](http://www.cps.gov.uk/news/press_releases/141_10/index.html)).

by the infamous “torture memos”<sup>41</sup> issued by the Justice Department’s Office of Legal Counsel (OLC) under the Bush administration. Indeed, the report by the CIA Inspector General, John Helgerson, parts of which were published on 24 August 2009, reveals “undocumented and unauthorised” practices going beyond the “11 techniques”, such as operating a power drill and a handgun close to the head of the blindfolded victim, (as was the case, for example, of al-Nashiri), excessive use of waterboarding (over 180 times in one case), or threats against members of the victim’s family. Those responsible for these practices are therefore not covered by the “good faith” argument applied by the Justice Department’s Office of Professional Responsibility (OPR) to those who confined themselves to implementing the methods described in the “torture memos”; this applies also to the authors of these documents, which are in effect handbooks for acts of ill-treatment, which in most cases constitute real acts of torture. The Attorney General, Minister of Justice in the American system, therefore has a discretionary power to prosecute, or not, the perpetrators of those acts. A preliminary review seems to be pending by prosecutor John Durham at the request of Attorney General Eric Holder “into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations”. In any case, the authors of the “torture memos” and those who carried out “in good faith” the acts described in them appear to be excluded from the scope of this inquiry<sup>42</sup>. Mr Holder appears to have accepted at the end of June 2011 the recommendation by Mr Durham to conduct a full criminal investigation, but limited to two deaths which occurred during detention under American control (one in Iraq and one in Afghanistan)<sup>43</sup>. This would be perfectly in line with the spirit of President Obama’s famous speech on national security on 21 May 2009<sup>44</sup>, in which he advocated a “forward-looking” approach to the fight against terrorism (according to the infamous principle, found in many other cases of impunity, according to which “the past is the past!”). This promise of impunity for the American perpetrators and instigators of violations committed in the exercise of their official duties is one of the few undertakings in this speech which President Obama has honoured. Those not honoured include the closing down of Guantanamo Bay prison camp and the abolition of military commissions to try foreign nationals held outside the United States and accused of terrorism. I share the view of Kenneth Roth, Executive Director of Human Rights Watch, who considers that President Obama effectively treated torture as an unfortunate political choice rather than a crime and that his decision to end the abusive methods of interrogation will remain uncertain, being easily reversible, unless and until the legal prohibition of torture is clearly re-established<sup>45</sup>.

## 2.2. Actions for damages brought by victims of unlawful acts

22. Khaled El-Masri, arrested in Skopje, held and ill-treated in American prisons in Afghanistan, brought an action for damages against CIA agents before US courts<sup>46</sup>. His complaint, supported by the American non-governmental organisation for the defence of human rights ACLU, was dismissed after the US administration – President Obama’s, of course – had invoked the doctrine of state secrets privilege<sup>47</sup>. According to this doctrine, dating back to the time of the cold war, American courts cannot proceed with a case when the administration invokes “state secrets privilege”. In these proceedings, I intervened as *amicus curiae* before the Supreme Court of the United States to explain that Mr El-Masri’s ordeal could by no means be considered a “state secret”, considering that all details needed to substantiate the damages claim were known to the public and appeared in the Assembly’s reports of 2006 and 2007. Unfortunately the Supreme Court, in a narrow vote, did not see fit to intervene.

23. ACLU also supported the complaint of five other victims of renditions – Binyam Mohamed, Abu Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi – against the private company Jeppesen Dataplan Inc. Jeppesen’s implication in the transfer of suspected terrorist prisoners for purposes of inflicting torture was publicly certified by documentary evidence and eye witnesses, including a former Jeppesen employee who had also been told by a senior company manager about financial profits derived from these “torture flights”. The complaint was nevertheless dismissed on 13 February 2008<sup>48</sup> after state secrets privilege was yet again invoked by the Director of the CIA. ACLU appealed, at first successfully:

<sup>41</sup> See, for example, Peter M. Shane, Three Takes on OLC Torture Memos, at : <http://www.acslaw.org/acsblog/node/13295>).

<sup>42</sup> See the speech of Attorney General Eric Holder at <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>.

<sup>43</sup> See the press release by HRW of 11 June 2011 (launching the above-mentioned report) at <http://www.hrw.org/node/100390>, and the article of Lichtblau and Schmitt, US Widens Inquiries into 2 Jail Deaths, New York Times of 30 June 2011 (at : <http://www.nytimes.com/2011/07/01/us/politics/01DETAIN.html>).

<sup>44</sup> Full text reproduced in the New York Times of 21 May 2009: <http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html?pagewanted=print>).

<sup>45</sup> See the above-mentioned press release by HRW of 11 July 2011.

<sup>46</sup> *El-Masri v. George Tenet et al.*, 437 F. Supp. 2d 530, 534 (E.D.VA.2006).

<sup>47</sup> U.S. Court of Appeals for the Fourth Circuit (*El-Masri v. United States et al.*, 479 F.3d 296, 301-302); the United States Supreme Court refused to review the case (*El-Masri v. United States*, 128 S.Ct. 373, 169 L. Ed. 2d 258 (2007)).

<sup>48</sup> *Mohamed et al. v. Jeppesen Dataplan, Inc.*, Civil Action No. 5 :07-cv-02798-JW (United States District Court for the Northern district of California), 30 May 2007.

a bench of three judges of the Court of Appeal overturned the decision of dismissal at first instance and referred the case back for the proceedings to be continued<sup>49</sup>. The Court of Appeal noted that the Government's argument for the dismissal of the case in its entirety from the outset had "no logical limit" and was tantamount to asking that the courts should effectively remove every action declared secret by the Government from all judicial scrutiny, consequently freeing the CIA and its associates from all the demands and limitations prescribed by law. The Court recalled that the executive's prerogatives on grounds of security were not the sole constitutional values at stake. The Constitution most certainly would contemplate a role for each of the three powers when individual freedoms were at stake. But the Administration appealed to a full bench of 11 judges of the Court of Appeal, which finally accepted the plea of state secrets privilege by a very narrow majority, 6 votes to 5<sup>50</sup>. An appeal by ACLU to the Supreme Court of the United States was denied on 16 May 2011<sup>51</sup>. I had joined an *amici curiae* brief by professors and representatives of human rights organisations in support of the application<sup>52</sup>. I should like to pay tribute, once again, to American civil society, which is engaged without fail in order to help the United States regain their position as leader in the defense of civil liberties and fundamental rights.

24. Maher Arar, a Canadian of Syrian origin, was subjected to a "rendition" and handed over by the CIA, with the cooperation of Canadian police, to Syria, where he was atrociously tortured. He succeeded in having the role played by the Canadian authorities elucidated and obtained financial compensation for his dreadful ordeal<sup>53</sup>. As to the role played by the United States authorities, Arar, with the help of the "Center for Constitutional Rights", brought an action for damages against the former Attorney General John Ashcroft and other representatives of the Bush administration, with the help of the "Center for Constitutional Rights"<sup>54</sup>. In February 2006, accepting the US Government's plea of state secrets privilege, the complaint was dismissed on grounds of national security and foreign policy considerations<sup>55</sup>. The Court of Appeal upheld the dismissal<sup>56</sup>. The United States Supreme Court refused to review the case.<sup>57</sup> It should be recalled that no accusation was ever made against Arar. His life and that of his family was turned upside down and he will suffer to the end of his days from the after effects of this terrible experience. But once again, the perpetrators of this criminal act go unpunished and the victim has not even obtained one dollar of compensation or even an apology from the authorities of a country that is generally considered as highly civilised and very democratic. In this particular case, the Canadian authorities have in fact assumed their responsibilities. But this is an exception. Can one still talk of "rule of law" in these circumstances?

25. The actions for damages brought by victims of renditions therefore proved unsuccessful in the end. The reason in each case was the government's plea of state secrets privilege. The complaints were dismissed from the outset because, the government contended, the proceedings could not go ahead without disclosure of secrets imperilling state security. On each occasion, the public interest in state security has been held against the victim's "private" interest in seeing justice done – as if there was not a public interest in every citizen being able to obtain justice and as if justice could not be done without duly protecting the legitimate interests of the state.

26. A legislative initiative seeking to limit improper assertion of state secrecy privilege (bill H.R. 984), though favourably received in committee, has not yet been passed for want of parliamentary time<sup>58</sup>. President Obama's administration did not take a stance on this initiative; instead, the Justice Department adopted directives on self-surveillance – which, in the opinion of the ACLU, would "change nothing" compared to the present situation,

<sup>49</sup> Mohamed et al. v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Circ. 2009).

<sup>50</sup> See Charlie Savage, Court dismisses a case asserting torture by the CIA, New York Times, 9 September 2010 and editorial "Torture is a crime, not a secret" (NYT of the same date).

<sup>51</sup> See text of ACLU appeal at:

<http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc-petition-certiorari>.

<sup>52</sup> See AS/Jur /Inf (2011)03, item 8.3 at [http://assembly.coe.int/CommitteeDocs/2010/20101108\\_infogenerale\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2010/20101108_infogenerale_E.pdf).

<sup>53</sup> See Document 11302 of 11 June 2007, paragraphs 325-334.

<sup>54</sup> Link to the Center's website: <http://ccrjustice.org/>.

<sup>55</sup> See Tim Harper, US ruling dismisses Arar lawsuit, Toronto Star of 17 February 2006.

<sup>56</sup> Arar v. Ashcroft et al., 06-4216-cv (U.S. Court of Appeals for the Second Circuit 2007).

<sup>57</sup> See Washington Post of 14 June 2010 ("High court rejects appeal in rendition case").

<sup>58</sup> See the fine expert statement by Ben Wizner, jurist with the American Civil Liberties Union (ACLU), before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on 4 June 2009 (available on the ACLU website).

27. In the United Kingdom sixteen people (including Bisher al-Rawi, Jamil el Banna and Binyam Mohamed) who accused the British security forces of abetting their transfer abroad in order to be tortured received significant financial compensation<sup>59</sup>. The Government, which continues to refuse admitting that the authorities committed wrongful acts engaging their legal responsibility, signified its wish to avoid continuation of the court proceedings already brought by six former Guantanamo prisoners which could have lasted for at least another three years and cost millions of pounds sterling. A pragmatic solution, certainly, but is this really an act of justice?

28. The origin of this “friendly settlement” is worth outlining as it may help provide a better grasp of the attitude – protective of the rights of persons before the courts – adopted by British justice towards the government’s will to keep its actions and mistakes secret. Indeed, Binyam Mohamed, supported by the British NGOs “Liberty” and “Justice”, sought a court injunction that the government release to him the seven-paragraph account of the ill-treatment which he underwent in American custody in Pakistan, to assist his defence against charges of terrorism in the United States. Following a High Court ruling in his favour, the government issued a certificate of “public interest immunity” (PII) on the ground that the publication of this information, which the British authorities had received from their US counterparts, without the consent of the latter, would imperil co-operation and intelligence sharing with the US authorities in future. The court at first refused the request to make these seven paragraphs public. It subsequently authorised publication of the text after President Obama’s election, arguing that there was no longer a cogent basis for the fear that the US government would react negatively to publication. The British Government appealed, and the Court of Appeal decided on 10 February 2010 that the seven paragraphs could be published. The government’s counsel, having received the draft judgment of the Court of Appeal, made the unusual request to the presiding judge of the Court of Appeal (the Master of the Rolls) that a paragraph be deleted from the draft judgment. On 26 February, the Master of the Rolls refused the government’s request and published the contentious paragraph with only minor changes.

29. In separate proceedings, Binyam Mohamed and other former Guantanamo inmates lodged complaints against the British Government claiming damages for the part of the British secret services in the unlawful detention and ill-treatment undergone by the plaintiffs. The Government asked the Court to sit in camera (closed material procedure), with the plaintiffs and their counsel barred from the hearing of the case, leading to a “closed judgment” which they would not be allowed to see. On 18 November 2009, the High Court assented to the government’s request. On 4 May 2010, however, the Court of Appeal held that “a litigant’s right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial”. The British Supreme Court confirmed the judgment of the Court of Appeals in the Al Rawi case on 13 July 2011.<sup>60</sup>

30. The arguments of senior British judges<sup>61</sup> must challenge all those, outside the United Kingdom too, who accept the argument that publication of information in the context of judicial and other proceedings which originates from an allied secret service is harmful to future international co-operation. The judges pointed out that among allied countries united in the common cause of defending the law-based state against the terrorist threat, all operators knew that a court of justice in each country could intervene and not accept the principle, which is generally accepted by intelligence agencies according to which the agency which has provided the information is solely responsible for deciding on its use and its control, in particular in cases where the publication of an information item could not in any circumstances prejudice state security. The Court of Appeal specified that it did not object to the actual principle of safeguarding secrets affecting state security, but that it was a matter for justice to weigh the assertions of the government regarding the need to keep a given piece of information secret.

<sup>59</sup> See BBC news of 16 November 2010.

<sup>60</sup> Judgment available at : <http://www.supremecourt.gov.uk/decided-cases/index.html>; the NGO « Justice » welcomed this judgment in a statement published on its site at <http://www.justice.org.uk/news/php/37/uk-supreme-court-rules-against-secret-evidence-in-civil-claims>.

<sup>61</sup> See excerpts published in the APPG press release of 26 February 2010 and article by Richard Norton-Taylor, in the Guardian of 10.2.2010 (Binyam Mohamed torture evidence must be revealed, judges rule).

31. These decisions also informed the (new) British government's preference for negotiating a "friendly settlement" of the cases already pending before the courts, which also facilitated the holding of an independent extrajudicial inquiry to elucidate once and for all the British authorities' involvement in the unlawful detentions and ill-treatment committed in connection with the fight against terrorism, as Prime Minister David Cameron announced on 6 July 2010<sup>62</sup>.

### 3. Parliamentary inquiries into alleged illegal activities by the secret services

32. In Germany, the *Bundestag* carried out what is probably the most probing and serious parliamentary inquiry into the allegations of secret detentions and unlawful transfers of detainees, between 2006 and June 2009. But as I was able to observe at my own hearing before this commission of inquiry, political loyalties had far greater prominence than the will to get at the truth. So it was mainly thanks to the dedication of the representatives of the small opposition parties in confronting the "big governing coalition" of the time between Christians Democrats and Social Democrats that the requests for sensitive information were put to the government. The commission of inquiry heard numerous witnesses, former ministers and senior officers of the secret services among them, and victims including Khaled El-Masri and Murat Kurnaz. The commission, including the representatives of the governing majority, ended up fully convinced of the truth of Khaled El-Masri's statements. It is thus all the more surprising that the authorities of "the former Yugoslav Republic of Macedonia" should persist in denying the obvious. However, the commission was unable to ascertain whether the top German political leaders were informed of the activities in question<sup>63</sup>. This is not surprising: the Government refused to provide important items of information and presented documents that were largely redacted for "state secrecy" reasons. Civil servants called to testify were given very limited authorisations of disclosure. This irritated a number of parliamentarians who seized the Federal Constitutional Court to assert their rights regarding information. The Constitutional Court found largely in favour of the complainants – but its judgment came too late, on 17 June 2009, at a time when the commission of inquiry had just completed its work and the Bundestag's term of office was drawing to a close. The judgment<sup>64</sup> is nevertheless of great importance for the future, in circumscribing more clearly the executive's monopoly on information in matters concerning state secrecy and national security and in considerably widening parliamentary rights as regards information. The arguments of the German court deserve full attention, not only in Germany, but also in the other member states of the Council of Europe.

33. The Federal Constitutional Court stressed that, in each case, the government's interest in protecting its internal decision-making process must be weighed against the parliament's interest in being informed, with due regard to the separation of powers. The latter interest weighed very heavily when it was a matter of detecting possible breaches of the law and like abuses within the government<sup>65</sup>. The executive must give specific and detailed reasons and not merely refer in general terms to state secrecy as justification for withholding information. In other words, specific information must be given that allows the verification – ultimately by the Constitutional Court itself – of the cogency of those reasons in the case in point. The highest German court recalled that the safeguarding of the state's interests, including its security, was equally and jointly assigned to the government and to the parliament by the *Grundgesetz*. Parliament and its organs were not to be regarded as third parties from whom information must be kept secret to protect the interests of the state. The Court observed that Parliament had its own rules guaranteeing the protection of state secrets and that a risk of "leaks" existed in all state organs<sup>66</sup>. Information on contacts with foreign secret services was not automatically shielded from parliament's requests for disclosure. The reasons why publication of this information could be harmful to future co-operation between these services should have been explained. The Court emphasised that the mere fact that the publication of such information might embarrass the Government did not constitute a danger to the interests of the state, but a consequence, ordained by the Constitution, of the exercise of the right of parliamentary inquiry<sup>67</sup>. The Court recalled that a commission of inquiry performed a function of oversight which by its very nature demanded the disclosure of information even against the government's wishes. The purpose of a commission of inquiry could be precisely the detection of abuses and infringements of the law, in order to clarify accountability for these and to take effective measures to guard against them in future. The Court stressed that there should be no "areas exempt from oversight" when it came to investigating breaches of the law or like abuses<sup>68</sup>. For the function of parliamentary oversight – viewed by the Court as one of the oldest and most important rights of Parliament –

<sup>62</sup> See statement by Andrew Tyrie, Chair of the APPG, on 6 July 2010 (available on the APPG site ([www.extraordinaryrendition.org](http://www.extraordinaryrendition.org))).

<sup>63</sup> Link to the final report (BT-Drucksache 16/13400, in German, 1430 pages): <http://dipbt.bundestag.de/dip21/btd/16/134/1613400.pdf>.

<sup>64</sup> Text (in German) available at [www.bundesverfassungsgericht.de/entscheidungen/es20090617\\_2bve000307.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090617_2bve000307.html)

<sup>65</sup> See paragraph 127 of the aforementioned judgment.

<sup>66</sup> See paragraph 130 of the aforementioned judgment.

<sup>67</sup> See paragraph 154 of the aforementioned judgment.

<sup>68</sup> See paragraphs 136 and 145 of the aforementioned judgment.

to be effective, the government must not be in a position to determine of its own motion the scope of an investigative mandate and of the inquiry commission's right to demand evidence, otherwise it would take control over its own overseers.<sup>69</sup> The Court also attached special importance to the passage of time: while the preparation of government decisions and the decision-making process were generally part of the "central area of the executive's responsibility in its own right" (*Zentralbereich exekutiver Eigenverantwortung*), that was not necessarily so once the decision is taken and the case under consideration has played out. Yet even in an *ex post* assessment the effect of granting exhaustive information on an analogous future case must be taken into account.

34. In the United Kingdom, the All Party Parliamentary Group on Extraordinary Rendition (APPG) made up by some sixty members of the Commons and the House of Lords and chaired by the Conservative MP Andrew Tyrie, has worked tirelessly since 2005 trying to shed light on British involvement in the CIA's programme of transfers of detainees<sup>70</sup>. It was thanks to the detailed and praiseworthy work of this informal all-party group of parliamentarians (and the witnesses and experts whom it heard, in particular the lawyers of the British NGO Reprieve) that the cases of Bisher Al-Rawi, Jamil el-Banna and Binyam Mohamed were reconstituted in detail. The APPG also involved itself in an information-seeking campaign in the United Kingdom and the United States alike, basing its requests on the laws governing freedom of information (Freedom of Information Act/FOIA) existing in both countries. Just lately, on 18 April 2011, the "Information Tribunal" instituted by the British FOIA has taken a remarkable position inspired by the spirit of openness of the British courts already noted with regard to civil proceedings; it invalidated the refusal of the Ministry of Defence to deliver to the APPG information on agreements concerning the treatment of prisoners. The Tribunal's argument is telling: "Since ... protection of fundamental rights is known to be a core value of the government of the United Kingdom, it is difficult to see how any responsible government with whom we have friendly relations could take offence at open disclosure of the terms of an agreement or similar practical arrangements to ensure that the law is upheld."<sup>71</sup> Note that the FOIA type instruments existing in various countries can be very useful not only to parliamentary investigators but also to players in civil society (as was the case especially in the United Kingdom, the United States and Poland).

35. The Intelligence and Security Committee (ISC) has also conducted two inquiries, one on British involvement in the questioning of prisoners in Afghanistan, at Guantanamo and in Iraq, and the other more specifically concerning the British authorities' knowledge of, and possible collusion in, the American programme of renditions. The inquiries led to the publication of crucial information concerning in particular the cases of Binyam Mohamed and of Messrs el Banna and al Rawi<sup>72</sup>. But it turned out that the executive authorities had withheld from the ISC numerous documents (42) subsequently made public in the context of judicial procedures (below). The letter of 8 February 2010 from Jonathan Sumption, the Government's legal counsel in the Binyam Mohamed case<sup>73</sup>, reveals the tensions between the services concerned and the ISC. The paragraph which Mr Sumption wanted deleted from the draft judgment included, according to the letter, observations to the effect that the officers of the Service had deliberately misled the ISC in this regard and that "this reflects a culture of suppression in its dealings with the Committee, the Foreign Secretary and indirectly the Court". The weakness of the parliamentary machinery for oversight of the British secret services was highlighted by Professor Leigh at the hearing before the Committee on Legal Affairs and Human Rights on 17 September 2010 in Tbilisi. Reforms to strengthen the ISC were recommended as from July 2007 in the Green Paper on the governance of the United Kingdom. But there has been no change in the arrangement whereby – unlike other standing committees – the ISC's members are not elected by Parliament but appointed by the Prime Minister in consultation with the leader of the opposition, a procedure that is still in force and was also criticised by British participants in the Tbilisi hearing<sup>74</sup>.

<sup>69</sup> See paragraphs 46, 53 and 105 of the aforementioned judgment.

<sup>70</sup> See website created by the APPG at [www.extraordinaryrendition.org](http://www.extraordinaryrendition.org).

<sup>71</sup> See also the statement by Andrew Tyrie, Chair of the APPG, of 18 April 2011 (available on the APPG site [www.extraordinaryrendition.org](http://www.extraordinaryrendition.org) with more details on the APPG's requests for information under the FOIA.

<sup>72</sup> See in particular the report on renditions published in July 2007, available on the MI5 site ([http://www.cabinetoffice.gov.uk/sites/default/files/resources/20070725\\_isc\\_final.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/20070725_isc_final.pdf)).

<sup>73</sup> Reproduced on the APPG site ([www.extraordinaryrendition.org](http://www.extraordinaryrendition.org)) in the context of the press release of 26 February 2010.

<sup>74</sup> For more details, see excerpt from the first report of the committee on parliamentary reform (Reform of the House of Commons Select Committee) of 12 November 2009, reproduced in the aforementioned APPG press release of 26 February 2010.

36. Preparations for the special inquiry announced in July 2010 under the aegis of judge Sir Peter Gibson (“Detainee inquiry”) have reached a decisive stage. Nine British NGOs<sup>75</sup> in February 2011 issued Sir Peter Gibson with a reminder of the demands which an investigation must fulfil in order to comply with Article 3 of the ECHR, as interpreted by the European Court of Human Rights. As far as our assignment is concerned, the most important points raised in this letter<sup>76</sup> are the obligation to provide victims with effective remedies enabling them to ascertain the truth and to secure recognition of their suffering, guarantees that it will not recur, and adequate compensation<sup>77</sup>; in addition, the need for an independent mechanism to decide whether or not to publish information collected by the investigation – it being understood that the investigation may rightfully take cognisance of all items of information ; and finally the power of the inquiry to compel if necessary the co-operation of the agencies concerned by allowing access to the documents and witness statements which it needs to perform its function – on this topic. The Prime Minister’s announcement that the Cabinet Secretary and the heads of the intelligence services had instructed all staff to co-operate fully in the investigation has been deemed insufficient to ensure the production of documents and the attendance of witnesses in all cases. Initial replies from the UK Government did not convince the NGO’s, as they fear that the inquiry might not proceed in a human-rights compliant manner. On 6 July 2011, the terms of reference and rules of procedure for the enquiry were published<sup>78</sup>, as well as a direct response to their concerns, from Government. The NGOs concerned do not appear to be satisfied. The criticism concerns mainly the fact that there will be neither a mechanism independent of the Government to decide on the publication of information, nor a meaningful participation of past and present detainees or of other interested parties. Under these circumstances, the former detainees and the NGOs would refuse to take part in this inquiry.<sup>79 80</sup>

37. In Lithuania, the *Seimas* finally undertook a fairly serious inquiry, following some initial hesitations. Indeed, when ABC News caused an outcry by mentioning anonymous sources linked with the CIA which claimed that Lithuania had provided a site outside Vilnius where “high-value detainees” were held up to the end of 2005, the chairman of the parliamentary committee on national security and defence, Mr Arvydas Anusauskas, initiated a preliminary inquiry. The fairly swift conclusion presented at a joint meeting of that committee with the committee on external relations was that there was not enough evidence to justify the opening of a formal parliamentary inquiry<sup>81</sup>. But on the occasion of the visit of the Council of Europe Commissioner for Human Rights Thomas Hammarberg in October 2009, the Commissioner and the President of Lithuania, Mrs Grybauskaite, publicly expressed scepticism about the preliminary inquiry. On 5 November 2009, the Lithuanian parliament finally instructed the committee on national security and defence to undertake a full parliamentary inquiry, which yielded its results as early as 22 December that year. Despite the short time allowed, the findings were quite substantial: Lithuanian agents had participated in the American programme of transfer of prisoners and secret prisons ; it was possible to trace at least six landings of aircraft used in this programme. The CIA asked the Lithuanian secret service (SSD) for assistance in preparing places of detention for persons suspected of activities linked with terrorism, and two locations are said to have actually been prepared for this purpose: the first had apparently never been used while the investigation was unable to establish whether people had actually been held prisoner at the second (at Antaviliai on the outskirts of Vilnius). But it reportedly emerged that the CIA agents had been able to use it as they pleased without the slightest oversight by the SSD at certain periods. Finally the investigation was also unable to establish whether the state’s top leaders were informed of this co-operation. The investigation caused a spate of resignations including those of the SSD chief Povilas Malakauskas and Foreign Affairs Minister Vygaudas Usackas. The main recommendation of the parliamentarians’ report was to open the judicial investigation mentioned above, currently impeded by complete lack of co-operation from the US authorities.

<sup>75</sup> Amnesty International, The Aire Centre, British Irish Rights Watch, Cageprisoners, Justice, Liberty, Medical Foundation, Redress and Reprive.

<sup>76</sup> Available at:

<http://www.cageprisoners.com/our-work/reports/item/1187-joint-ngo-letter-to-gibson-detainee-inquiry>.

<sup>77</sup> In this connection, note the compromise reached in July 2010 for resolving the pending disputes (see paragraph 27 above).

<sup>78</sup> Available at : <http://www.detaineeinquiry.org.uk/2011/07/news-release-terms-of-reference-and-protocol-published/>.

<sup>79</sup> A letter to this effect would be addressed to Sir Gibson and to the Government in August.

<sup>80</sup> Andrew Tyrie, chairman of the APPG on “renditions”, also criticized the terms of reference and the working methods announced by Sir Peter Gibson, notably the fact that the latter did not intend to request information from foreign bodies, including American ones (press release of 6 July 2011, available at the APPG’s website).

<sup>81</sup> See Associated Press article of 27 October 2009 “Lithuanian Lawmaker: No Evidence CIA Planes Landed”.

38. During the parliamentary inquiry, members of the commission were able to visit the two sites in question but the authorities did not allow access for media and civil society representatives.

39. However, the CPT was able to tour the two sites during a visit to Lithuania between 14 and 18 June 2010. The report on the visit was published with the consent of the Lithuanian authorities on 19 May 2011<sup>82</sup>. The CPT concluded that “the premises did not contain anything that was highly suggestive of a context of detention; at the same time, both of the facilities could be adapted for detention purposes with relatively little effort”<sup>83</sup>.

40. In Poland, the Commission responsible for oversight of the intelligence services<sup>84</sup>, generally working in camera and, in such cases, without minutes, held a one-day meeting on 21 December 2005 to discuss the allegations of secret CIA prisons in Poland. No minutes of that meeting have yet been published. The only public indication given by the Commission was that there have not been any CIA prisons in Poland.

41. In Romania, parliament has also conducted no more than a superficial inquiry, of which a critical presentation was already given in my 2007 report. Unfortunately, there has been nothing to add since then.

42. The parliament of “the former Yugoslav Republic of Macedonia” has undertaken no inquiry. Moves by individual parliamentarians such as Silvana Boneva and Slobodan Casule did not lead to the appointment of a special commission of inquiry into the El Masri case. The Chair of the Committee on European Affairs, Mrs Carolina Ristova Aseterud, would rather have co-operated with the European Parliament special commission (TDIP) than commence her own inquiry. But this co-operation has not given rise to any results.

43. On 14 November 2007, the Swiss Federal Council – the Government – had thousands of documents confiscated and destroyed at the Office of the General Prosecutor of the Confederation (OGP). This is definitely the world turned upside down – the executive carrying out a search and seizure with a judicial authority in the midst of criminal proceedings! In fact, these actions concerned ongoing criminal proceedings against the Tinner family, father and two sons, all engineers, suspected of trafficking in nuclear materials. The Tinner family were apparently active in this field for many years, having had close contacts in succession with the notorious scientist Abdul Qaader Kahn, father of the Pakistani nuclear programme and suspected of being one of the principal actors of illicit trafficking in nuclear plans and materials, working with the intelligence services of various countries. The Tinner family had allegedly worked, inter alia, for the CIA. The intervention of the Swiss Government took place in response to pressure by the US authorities, who had requested the Swiss Government to hand over sensitive information and documents collected during the judicial proceedings “in order to guard them more securely”<sup>85</sup> (which insinuates that the Swiss authorities were unable to do so themselves). Besides, even before the seizure of the documents and their destruction, the Swiss Government had refused to grant a request from the OGP (authorisation of the executive needed in such cases) to extend the proceedings to possible violations of articles 271 (illicit acts on behalf of a foreign state) and 301 (military espionage to the detriment of a foreign state) of the Criminal Code. This would obviously have drawn Swiss and foreign intelligence agents into the investigation, in particular of the CIA, who had acted on Swiss territory for many years.

44. In order to justify such a massive intervention, which was unprecedented in Swiss judicial history, in the midst of ongoing judicial proceedings, aimed at eliminating evidence, the Swiss Government invoked an exceptional right based on constitutional provisions intended in fact for wartime situations.<sup>86</sup> The Government based itself on a legal opinion prepared by its own services. This Government intervention is in fact an act of sabotage of the criminal proceedings, as decisive elements of proof were destroyed. It also prevents shedding light on the activities of Swiss and foreign intelligence services over the last twenty years in the field of nuclear proliferation. Without denying the sensitivity of this case and the very real danger caused by the documents which were destroyed (which could have, in extremis, aided the construction of nuclear bombs), the modalities of the Government’s intervention, which violated the separation of powers in a way that we dare qualify as spectacular, give nevertheless rise to questions. Could an agreed solution, in particular with the Federal Tribunal, really not be envisaged? In any case, we believe that, for the future, different procedures should be put in place. Does the executive really have the monopoly on wisdom? Under the rule of law, should such decisions not be taken jointly with the other powers, which also have the well-

<sup>82</sup> See CPT/Inf (2011) 17, available at <http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.pdf>, paragraphs 64 to 74

<sup>83</sup> Report cited above, paragraph 68.

<sup>84</sup> *Komisja do Spraw Służb Specjalnych*.

<sup>85</sup> On the topic of this case, see the Report of the delegation of the audit committees of the Federal Chambers of 19 January 2009 (<http://www.parlament.ch/f/dokumentation/berichte/berichte-delegationen/berichte-der-geschaefspruefungsdelegation/Documents/bericht-gpdel-fall-tinner-2009-01-19-f.pdf> (in French)).

<sup>86</sup> Article 184 paragraph 3 (protection of the interest of the country) and 185 paragraph 3 (external and internal security)

being of the state in mind? We cannot hide our deception with the lukewarm reaction of the Swiss political class to this decidedly worrying case.

#### 4. Conclusions

##### 4.1. *Assessment of the situation and the efforts being made*

45. From the cases examined above results a rather unsatisfactory picture, which is under a number of aspects clearly unacceptable in a democratic system under the rule of law. Numerous European Governments seem to have accepted the doctrine of the previous US Administration : terrorism is a phenomenon that cannot be dealt with by the judiciary and, to the extent that one claims being at war, the Geneva Conventions are not or only very partially applicable. Worse: security must have precedence over freedom, as if the two concepts were irreconcilable. It is obvious that over the last years, also due to the overdramatisation of the “war against terrorism”, the balance between the different powers of state has shifted in favour of the executive, to the detriment of parliament and of the judiciary. Parliaments are not without blame for this situation. Numerous parliamentarians seem to give priority, all too often, to governmental and party-political solidarity rather than to their duty to assume their responsibility of critical scrutiny. Democracy, as we know, is based on a complex and delicate balance which must be protected carefully. I believe that it is precisely up to the parliamentarians who belong to this Assembly to be particularly vigilant on this point and to be at the forefront to defend the fundamental principles of the separation of powers and of “checks and balances”. The systematic and arbitrary invocation of the state secrecy privilege, in particular for the purpose of ensuring the impunity of public officials, is a dangerous movement against which parliamentarians must be the first to react.

46. But it must also be acknowledged that some positive signs have emerged, in particular from the judiciary. We have referred to examples from the United Kingdom and in Germany<sup>87</sup>. The questioning yet responsible approach of higher courts in these countries with regard to state secrecy’s role as an obstacle to judicial and parliamentary scrutiny of the executive helps us to arrive at proposals which are applicable also in other countries.

47. At (inter-) parliamentary level, the “Declaration of Brussels”, adopted on 1 October 2010 at the Sixth Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States<sup>88</sup>, has the advantage of recognising quite explicitly that there is a need for international co-operation between bodies scrutinising the activities of the secret services. The main proposal (under point b. of the Declaration), which is to set up a European Intelligence Review Agencies Network, was an item on the agenda of the Conference of the Speakers of European Union Parliaments in Brussels on 4 and 5 April 2011. The Speaker of the Belgian Senate, Mr Danny Pieters, presented a plan for a database for the exchange of information between the relevant parliamentary committees in the context of the establishment of a “network of European expertise relating to parliamentary oversight of the security and intelligence services”<sup>89</sup>. These initial attempts to improve co-operation between parliamentary committees for the oversight of secret services should be welcomed. In my view, these efforts should be continued and stepped up. In particular, the restrictions spelt out in point c. of the Declaration – especially the clause according to which the initiative should not serve as an instrument to launch joint investigations or to exchange operational or classified information – should not be considered as final. These restrictions show the hesitations still existing at this level, even among parliamentarians from countries as close as the European Union member states. The contrast with the ease with which European secret services co-operate, even with colleagues from countries which are much less concerned about democracy and respect for human rights, is striking, and shows how much more work needs to be done. It is to be hoped that this work will include the extension of the future European information network to all the Council of Europe member states, which are all subject to the same rules under the European Convention on Human Rights.

<sup>87</sup> According to the information provided by the Polish Helsinki Federation, Polish justice is also beginning to adjust its case law on judicial scrutiny of the various levels of classification of information provided for by the still recent Polish law on protection of classified information (Ustawa o ochronie informacji niejawnych, 5 August 2010, Official Gazette no. 182, sec. 1228). This chiefly comprises the Supreme Administrative Court judgment of 14 September 2010 (no. I OSK 1047/10) enabling the courts to ascertain whether a piece of information has been classified in accordance with the law where the administration denies access to such information. Judicial scrutiny is not expressly provided for by this law, but the judicial authorities themselves would seem to be setting up such a process.

<sup>88</sup> The Declaration, the conference programme and the speakers’ contributions are available at <http://www.parlement.eu2010.be/en/evenement30sep-1okt2010E.html>; see in particular the outstanding presentation by Professor Ian Leigh (one of the contributors to the Legal Affairs Committee’s hearing in September 2011 in Tbilisi).

<sup>89</sup> See conclusions of the Presidency, available at <http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/Speakers/PRESIDENCY%20CONCLUSIONS.pdf>.

48. However, to have the right and the ability to gain access to such a network, all the Council of Europe member states which do not yet have a parliamentary committee for the oversight of secret services must set one up at national level. For this purpose, it is important to recall the compilation – prepared at the request of the UN Human Rights Council by Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – of “good practices” with regard to legal and institutional frameworks and measures which intelligence agencies are required to take in order to ensure respect for human rights when combating terrorism, including their oversight. This compilation also includes measures intended to establish controls over the activities of these agencies.<sup>90</sup> The 35 “good practices” described by the Special Rapporteur cover matters such as the tasks of secret services and their limits, measures to protect human rights, state responsibility for the actions of secret services and the individual responsibility of agents ; regarding oversight mechanisms, the proposed measures cover their legal basis, the powers of investigation of the oversight bodies and, in particular, oversight of international co-operation activities.

49. Regarding the arrangements for oversight of secret services, the Venice Commission has also made a significant contribution<sup>91</sup>. The Commission has already highlighted the need to monitor the security services more effectively to prevent them from developing a “state within the state” mentality. It notes rightly that proper government scrutiny, based on internal review and proper documentation of political directives (“paper trails”), is one of the prerequisites for effective parliamentary oversight. It also points out that international exchanges of intelligence can easily escape existing national oversight mechanisms. Another important point raised by the Venice Commission is the fact that the ECHR requires the functions of oversight and redress (which must be available to persons who claim they have suffered damage due to secret service activities) to be exercised by different bodies. For judicial scrutiny to be effective, judges must be independent and have the necessary expertise. However, steps also have to be taken to avoid “case-hardening” on the part of judges who may come over time to identify too much with secret agents and their culture. The Venice Commission therefore recommends that this role is not assigned to the same judges for too long.<sup>92</sup>

50. Finally, the fundamental role played by whistleblowers must not be forgotten. Their importance of their contribution is in fact proportionate to the extent that secrecy is still imposed. It is not exaggerated that, still today – and in some cases even more so than in the past – we are confronted with a real cult of secrecy; secrecy as an instrument of power, as Hannah Arendt reminds us in the citation at the very beginning of this report. It is therefore justified to say that whistleblowers play a key role in a democratic society and that they contribute to making up the existing deficit of transparency. We said so before: the Assembly’s reports of 2006 and 2007 and, more recently, the revelations concerning “black sites” in Lithuania are due to a large extent to honest officials who, for ethical reasons and taking great risks, could not and would not take part any longer in illegal activities or cover them up by remaining silent. In this connection, we should also remember Bradley Manning, the young American soldier accused of providing Wikileaks with a large number of confidential documents. High-ranking American officials and numerous voices of international public opinion have expressed indignation at the inhuman and degrading treatment which Mr Manning is said to have undergone<sup>93</sup>. It will be up to the courts to judge. But we cannot ignore that according to the very accusations made against him we are indebted to him for the publication both of a recording of a helicopter attack in Iraq, in which the crew seems to have intentionally targeted and killed civilians<sup>94</sup>. The video

<sup>90</sup> Document A/HRC/14/46 of 17 May 2010, 14th session of the Human Rights Council: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including their oversight (available on the Human Rights Council’s website at <http://www2.ohchr.org/english/bodies/hrcouncil/14session/reports.htm>).

<sup>91</sup> European Commission for Democracy through Law (Venice Commission), Report on the democratic oversight of the security services (CDL-AD(2007)016), adopted by the Venice Commission at its 71st plenary meeting (Venice, 1 and 2 June 2007), on the basis of the observations of Ian Cameron (substitute member, Sweden), Olivier Dutheillet de Lamothé (substitute member, France), Jan Helgesen (member, Norway), Ian Leigh (expert, United Kingdom), Franz Matscher (expert, Austria) and Valery Zorkin (member, Russian Federation) (available on the Venice Commission’s website, <http://www.venice.coe.int>).

<sup>92</sup> See aforementioned report, paragraphs 30 and 213.

<sup>93</sup> See in particular P.J. Crowley, spokesman for the US State Department who resigned after criticising the treatment of Mr Manning (see P.J. Crowley, Ridiculous, counterproductive and stupid, in: [http://www.economist.com/blogs/democracyinamerica/2011/03/pj\\_crowley?page=2](http://www.economist.com/blogs/democracyinamerica/2011/03/pj_crowley?page=2)); on the other hand, President Obama has reportedly expressed satisfaction with Mr Manning’s conditions of detention (see Scott Shane, Obama defends jail conditions for soldier accused in Wikileaks case, New York Times, 11 March 2011).

<sup>94</sup> See Guardian of 5 April 2010, Chris McGreal, Wikileaks reveals video showing US air crew shooting down Iraqi civilians, Footage of July 2007 attack made public as Pentagon identifies website as threat to national security (at: <http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack>).

recording seemingly indicates a deliberate criminal act which deserves at least an investigation, which, without this indiscretion, would have never been requested. This is a classic example of an illegitimate secret<sup>95</sup>. In addition, the publication of a large number of embassy reports has allowed us to learn significant details of important recent events and which are obviously of general interest. We must not forget either that these publications have brought numerous confirmations of findings included in the Assembly's reports of 2006 and 2007 on the CIA flights and secret prisons<sup>96</sup>. All those who at the time called for "proof, proof!" have in any case been well served.

51. Before making practical proposals, we should sum up some basic principles.

*4.2. Basic principles for judicial and parliamentary scrutiny of the secret services*

(1) There must not be "areas removed from any kind of control", as the German Constitutional Court states very convincingly. It must therefore be possible for the criminal and civil courts and parliamentary committees of oversight to investigate serious allegations of crimes and human rights violations without being prevented from doing so through the unilateral and apodictical reliance, by the very agencies being investigated, on state secrecy or national security to block access to relevant information.

(2) The three powers of the state – the executive, the judiciary and parliament – are, as has also been pointed out by the German Constitutional Court, jointly and equally responsible for safeguarding the state's interests and security. There is no reason why parliamentary and judicial institutions and the people working there should be trusted any less than executive bodies and their staff. All three powers can and must make the necessary arrangements for secrets threatening state security not to be disclosed.

(3) Breaches of the law and comparable abuses by agents of the Government are not by their nature legitimate secrets. This is also true for information on individual or political responsibility for such acts. Even if there is no specific legislative provision on the subject, the courts have the right, and I would even say the duty, not to consider such facts as secrets worthy of protection by way of interpretation of the law. In democracies governed by the rule of law, it is precisely the role of judicial and parliamentary control mechanisms to hold the perpetrators, organisers and instigators of such acts accountable to the people.

(4) To prevent legitimate secrets from being revealed because they are inextricably linked to illegitimate ones, courts and parliamentary committees must foresee suitable procedures making it possible both to protect legitimate secrets and to prosecute the perpetrators of crimes and award damages to victims.

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<sup>95</sup> See paragraph 51 (point 3) below.

<sup>96</sup> See for example Mark Tran, Guardian of 17 January 2011, WikiLeaks cables: Turkey let US use airbase for rendition flights; note 26 above concerning Spain; Gerard Cunningham, [www.newswhip.ie](http://www.newswhip.ie) of 18 December 2010: Wikileaks: Ahern "convinced" renditions used Shannon

(5) These principles also apply, and are particularly relevant, in the field of international co-operation in the fight against terrorism and organised crime. It is unacceptable for acts of co-operation, and in some cases complicity, between secret services in different countries to escape the usual oversight to which they are subject in their own country – a situation which each service puts down to the potential threat to future co-operation with others. Increased co-operation between secret services – which is a good thing in itself in the light of the international nature of terrorism and organised crime in particular – must go hand in hand with equivalent co-operation and mutual trust between oversight bodies. The UK judges quoted above presented a convincing argument when they placed provisos on the “control principle”, according to which the service which first unearthed a piece of information has control over it. When services from partner countries work together to protect democratic states from the threat of terrorism, it goes without saying that the courts in each of the countries involved may ask for explanations from the perpetrators of any crimes committed in this process and require the service in question to disclose information which may even come from a partner service as part of a clearly defined procedure including appropriate safeguards. On this point, we refer to the highly pertinent considerations of the British judges we quoted above.<sup>97</sup>

#### 4.3. *Proposals to improve scrutiny of secret services*

52. The dualist system of scrutiny of the work of the secret services, by both the judiciary and parliament, which exists in most of the countries examined, seems to be at least in principle a reasonable approach, though at times very sketchy in its practical application.

53. To make that scrutiny more effective, it should first be made clear, through legislation or judicial interpretation, that secrets relating to individual criminal or political responsibility for crimes and/or serious human rights violations are not covered by laws designed to protect state secrets and national security.

54. The next stage is to prevent the disclosure of legitimate secrets by setting up special judicial procedures in countries which do not yet have them to ensure the handling of “legitimate” secret information during criminal proceedings or civil actions for damages with appropriate care and discretion.

55. Concerning parliamentary scrutiny, committees for the oversight of secret services need to be set up in countries where such bodies do not yet exist, or existing oversight committees reinforced and given sufficiently extensive investigating powers and resources to effectively investigate suspected abuses, where necessary against the will of the services concerned and the government. These committees must be independent from government in every respect, with members appointed by parliaments themselves, and have their own investigative capability. A “general inspector” of secret services should monitor the work of secret services regularly and have the power to refer to the oversight committee if necessary. The committee must be able to fully protect legitimate secrets which it learns of in the course of its work and bring cases to the attention of the courts and, in certain particular cases, alert public opinion when it identifies abuses committed by the secret services, particularly human rights violations.

56. It is obvious that differences of opinion may occur between the three powers of the state, in particular as to the notion of secrets deserving protection and of the right of public opinion to be informed. A secure mechanism should be set up for the settlement of disputes between the executive and the judicial or parliamentary institution involved in a specific set of proceedings. Matters could be referred to this mechanism according to a similar procedure to that governing preliminary rulings. Such a body could be made up of judges, assisted by specially sworn-in experts on secret services, who would have access to any information held by the executive without exception and to rule in full knowledge of all the facts on disputes concerning the appropriateness of disclosing sensitive information between courts and parliamentary committees of inquiry on the one hand and the executive authorities on the other. Proceedings before this mechanism should be confidential but adversarial to enable balanced decisions to be taken in full knowledge of all the interests and issues at stake. The mechanism should also be authorised to submit documents in which certain passages considered very sensitive have been rendered illegible to courts or parliamentary bodies or to hand over information on condition that it is dealt with following a procedure that guarantees the necessary confidentiality.

57. To reflect the internationalisation of the work of the secret services, judicial and parliamentary scrutiny of these services will also have to take place on an international scale. From a practical viewpoint, this means setting up arrangements to facilitate contact between parliamentary committees (such as regular joint sessions and the appointment of contact persons). The network of European expertise relating to

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<sup>97</sup> See paragraph 30 above.

parliamentary oversight of the security and intelligence services should be strengthened and extended to cover all the oversight committees of all the Council of Europe member and observer states.

58. To conclude, the protection of whistleblowers should be enhanced, as the Assembly has already recommended in Resolution 1729 (2010) and Recommendation 1916 (2010), based on Pieter Omtzigt's report<sup>98</sup>. Beyond the offences he may have committed, Bradley Manning acted as a whistleblower and should be treated as such. This means his motivations should be taken into account, which are certainly not those of a terrorist. We therefore join Amnesty International in expressing our worries as to the treatment he receives<sup>99</sup>.

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<sup>98</sup> Document 12006 of 14 September 2009 (Protection of "whistleblowers").

<sup>99</sup> Let us recall the case of Daniel Ellsberg and the Pentagon Papers. At the time considered as a traitor of the fatherland for having published secret papers documenting the lies of the Government concerning the Vietnam war, he risked a prison term of more than one hundred years. He was finally acquitted after numerous procedural irregularities (including contacts between the judge and Government agents). It was later recognised that the revelations by Daniel Ellsberg contributed to speeding up the end of the war. Ellsberg received numerous prizes and honours (Ron Ridenhour Courage Prize, Gandhi Peace Award, Right Livelihood Award). Ellsberg recently indicated in an interview that he feared for the lives of Bradley Manning and Julian Assange.