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## Case sheet 1 – Mustafa Aït Idir and five others

**Mustafa Aït Idir, Belkacem Bensayah, Lakhdar Boumediene, Boudella El Hadj, Nechla Mohamed and Saber Lahmar Mahfoud** came from Algeria to Bosnia and Herzegovina (BiH) in the early to mid-1990s; they are all married and have children. At the time of their detention, four of them had been granted BiH citizenship, one had residency status and one had been granted BiH citizenship which had subsequently been revoked.

On 17 January 2002 the six men were arrested by Federation of Bosnia and Herzegovina (FBiH)<sup>1</sup> police who, with the help of Sarajevo's cantonal police, handed them over early the next morning to US forces then stationed in BiH as part of the North Atlantic Treaty Organization (NATO)-led peacekeeping Stabilization Force (SFOR).

The US forces took the six men to the NATO/SFOR base in Tuzla in BiH. From there they transferred the men to the Incirlik airbase in Turkey, where the US Air Force maintains a forward operating base, and then to the US naval base at Guantánamo Bay, Cuba. The men were transferred from Tuzla to Incirlik on a US military C-130 aircraft, not one of the privately-leased jets used in other US renditions.

According to their lawyer, during the flights, the six men were shackled, their eyes were covered by opaque goggles and their hands were put in mittens; records indicate that they were held like this for at least 30 hours.<sup>2</sup>

The six men have now been held at Guantánamo Bay for more than six years without charge. Their lawyers say that all have been tortured or otherwise ill-treated, including by extended periods in solitary confinement, exposure to extreme temperatures, sleep deprivation, and inadequate opportunity for

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<sup>1</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995 established two semi-autonomous entities in the country, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska.

<sup>2</sup> See *Memorandum from Stephen Oleskey to the European Parliament's Temporary Committee investigating renditions*, 11 April 2006.

exercise.<sup>3</sup> The lawyers also say that the men are suffering from medical conditions caused or exacerbated by the conditions of detention.<sup>4</sup>

A lawsuit filed in April 2005 on behalf of Mustafa Aït Idir alleges that during a cell search in 2003, guards bound his hands and slammed his body and head into the steel bed and floor; forced his face into the toilet and repeatedly pressed the flush button; and pushed a garden hose into his mouth and turned the water on until he felt he would suffocate.

Mustafa Aït Idir alleges that during another cell search in 2004, guards forced him to lie on the floor while men jumped on his back; threw him onto gravel while a man jumped on the side of his head; and dislocated two of his fingers. The lawsuit alleges that “one half of his face became paralysed. He was in pain. He could not eat normally; food and drink leaked from his non-functioning mouth. Guards teased him because of his condition.”<sup>5</sup> Mustafa Aït Idir has since been diagnosed with Bell’s palsy, which he believes was caused by the 2004 assault.

As of April 2008 Saber Lahmar had been held in isolation in Guantánamo for over 22 months. His lawyers say that the conditions there, which include limited space and lack of opportunity for meaningful exercise, have exacerbated existing nerve and muscle damage to both of his legs. He has a variety of other physical ailments for which he reports he is given no effective medical treatment. When his lawyers visited him in April 2008, he appeared psychologically and physically debilitated and depressed, and was suffering severe leg pains. He is not allowed to send or receive mail from his family and is often refused a pen and paper.

Lakhdar Boumediene has been on a hunger strike since December 2006. According to his lawyer, he is kept in isolation. Twice a day, he is strapped in a chair (by his feet, thighs, waist, chest, head, wrists and biceps), with a mask over his mouth, and force-fed through a 43-inch tube inserted through one

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<sup>3</sup> For more information on conditions of detention and prolonged solitary confinement at Guantánamo Bay, see Amnesty International, *USA – Cruel and inhuman: Conditions of isolation for detainees at Guantánamo Bay* (AI Index AMR 51/051/2007).

<sup>4</sup> See Amnesty International, *USA – Cruel and inhuman: Conditions of isolation for detainees at Guantánamo Bay* (AI Index: AMR 51/051/2007) and Amnesty International Press Release, *USA: Guantánamo hunger strikers critically ill* (AI Index: AMR 51/154/2005), 23 September 2005

<sup>5</sup> *Stephen Oleskey v. US Department of Defense and Department of Justice*, filed in the United States District Court, District of Massachusetts, 13 April 2005.

nostril into his stomach. Liquid protein is then dripped through that tube into his stomach. This is reportedly an excruciatingly painful process.

No other information is available about the other three men.

The families of the six men have also suffered because of the renditions.<sup>6</sup> Sabiha Delić Aït Idir, the wife of Mustafa Aït Idir, told Amnesty International in April 2008:

*"[Mustafa] has never seen his youngest child (except on photos). He has not heard his voice either. We are in a very difficult situation and I can only hope that somebody will hear my cry for help and contact the authorities in Bosnia asking them to do everything they can to ensure that my husband is released from Guantánamo."*

For other families, the renditions marked the beginning of years of campaigning. Nadja Dizdarević, the wife of Boudella El Hadj, feels this has led to her children being neglected. She has organized numerous demonstrations in BiH, and collected signatures for an international petition. The petition calls on the BiH authorities to make diplomatic representations for the release and return of the six men to BiH, to ensure that they are not sent to Algeria where they would be at further risk of human rights violations, and to investigate and punish those responsible for violations of their rights. In July 2007, Nadja Dizdarević wrote to Amnesty International:

*"I've realized that they [the Bosnian authorities] want these people forgotten. Even media don't have as much freedom as they did before, so it is easier for me to pressure authorities from outside of BiH than from here..."*

Many of the other family members in BiH are reluctant to speak out, fearing reprisals. Nadja Dizdarević herself has received threatening telephone calls and on 25 May 2004 she was attacked in her home by unidentified assailants.

## **BiH's role**

In October 2001 Mustafa Aït Idir, Belkacem Bensayah, Lakhdar Boumediene, Boudella El Hadj, Nechla Mohamed and Saber Lahmar Mahfoud were detained

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<sup>6</sup> On the effect of prolonged detention at Guantánamo Bay on the families of detainees, see Amnesty International, *USA – Guantánamo: Lives Torn Apart – The impact of indefinite detention on detainees and their families* (AI Index: AMR 51/007/2006).

by FBiH police on suspicion of involvement in a plot to attack the US and UK embassies in Sarajevo.

Although the US embassy in Sarajevo had indicated that it had evidence linking the men to al-Qa'ida and supporting the allegations of the planned embassy attacks, no such evidence was produced. On 17 January 2002 the FBiH Supreme Court, finding there was no basis to hold the men, ordered their release and shortly afterwards the Sarajevo prison authorities freed the men.

The same day the Human Rights Chamber of Bosnia and Herzegovina issued an interim order for provisional measures to be taken to prevent the deportation, expulsion or extradition of four of the men, following their applications to the court.

Despite this, FBiH police seized the six men the day of their release and handed them over to US authorities. Stephen Oleskey, a US lawyer representing the six men, alleges that US officials put pressure on the Bosnian authorities to take part in the illegal detention:

*“The Bosnian government was told by US officials that if these six people were not arrested, the US would withdraw its support for Bosnia.”<sup>7</sup>*

In response to inquiries by Terry Davis, the Secretary General of the Council of Europe, the BiH Foreign Affairs Minister Mladen Ivanić admitted that, in the case of the six men, “a formal and legal procedure for extradition was not carried out, instead this was labelled as a ‘handover’.”<sup>8</sup>

The Human Rights Chamber for BiH ruled on the cases of Boudella El Hadj, Lakhdar Boumediene, Saber Lahmar Mahfoud and Nechla Mohamed in October 2002 and the cases of Belkacem Bensayah and Mustafa Aït Idir in April 2003. It found that BiH and the FBiH had arbitrarily expelled the men, and acted in contravention of its human rights obligations in transferring them to illegal detention in BiH by the US. It ordered BiH to use diplomatic channels to protect the men's rights. It ordered the authorities to take all possible steps to contact them, provide them with consular support and ensure they would not be subjected to the death penalty. It also instructed them to

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<sup>7</sup> European Parliament press release, “MEPs examine the case of six prisoners taken from Bosnia to Guantánamo”, 26 April 2006.

<sup>8</sup> Letter dated 4 April 2006 to Terry Davis, Secretary General of the Council of Europe, from Mladen Ivanić, Minister of Foreign Affairs, p. 6. <http://www.coe.int/t/E/Com/Files/Events/2006-CIA/annexes2/Bosnie%20herzegovine.pdf> .

retain lawyers to protect the men's rights in US custody and in case of possible proceedings involving them, and to pay compensation.<sup>9</sup>

As a result, the BiH and FBiH authorities paid compensation to the families for the violation of the men's right to liberty, their expulsion and the failure of the authorities to secure diplomatic assurances that the men would not face the death penalty.

The BiH authorities reportedly sent a letter to the US government requesting the return of the men. A resolution adopted by the BiH parliament on 16 September 2005 invited the BiH Council of Ministers to contact the US government "in order to solve the problem of the six men as rapidly as possible".

However, the BiH authorities appear to have made no meaningful attempt to negotiate with the US authorities for the repatriation of its citizens held in Guantánamo Bay.

In June 2004, a BiH government delegation went to Guantánamo to visit the men, but had very limited access to most of them. Despite this, the head of the delegation announced that the prisoners were being fairly treated. The delegation provided little information to the families.

In September 2006 the US State Department invited countries whose nationals were in Guantánamo to state what they intended to do if the detainees were not convicted. The Council of Ministers of BiH subsequently asked the Ministry of Foreign Affairs and the Ministry of Justice to contact the US administration and request the release of the six men, which they did. In August 2007 the BiH authorities requested guarantees from the US authorities that the detainees would not be subjected to the death penalty, torture and ill-treatment. Reportedly, the Council of Ministers of BiH has also drafted a plan of action in preparation for their release.

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<sup>9</sup> Human Rights Chamber for Bosnia and Herzegovina, *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Case No. CH/02/8679), Decision on admissibility and merits, 11 October 2002 (Boudellaa Decision), paras 323-332 and Conclusions. *Bensayah v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Case No. CH/02/9499), Decision on admissibility and merits, 4 April 2003 (Bensayah Decision), paras 212-219 and Conclusions. *Ait Idir v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Case No. CH/02/8961), Decision on admissibility and merits, 4 April 2003 (Ait Idir Decision), paras 163-171 and Conclusions.

In March 2006, the BiH State Commission for the Revision of Decisions on Naturalization of Foreign Citizens began reviewing the status of citizens who acquired BiH citizenship between 1992 and 2006. The Commission can propose to the BiH Council of Ministers to withdraw citizenship from people on various grounds. This may affect hundreds of people who came to BiH to join Bosnian Muslim (Bosniak) forces during the 1992-95 war, or to work for Islamic charities during and after the war. It was reported that the Commission was recommending that Lakhdar Boumediene and Saber Lahmar Mahfoud should have their citizenship revoked; however, to date it has not been revoked.

In May 2007 Amnesty International, the Helsinki Committee for Human Rights in BiH and Human Rights Watch wrote an open letter to BiH authorities expressing concern about the deportation, extradition or other removal of those stripped of their citizenship to countries where there are grounds to believe they would face a real risk of torture or other ill-treatment.<sup>10</sup> Such action would violate the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which BiH is a state party.

If BiH refuses to accept the six men if they are released and wish to return to BiH, they may be sent against their will to countries where they may face a real risk of torture and other human rights violations. There have been rumours that some of the men might be returned to Algeria following visits by Algerian security officials to Guantánamo.

### **Legal developments**

In April 2006, following a complaint submitted by Nadja Dizdarević, the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina<sup>11</sup> concluded that the BiH authorities had failed to implement the 2002 decision of the Human Rights Chamber with regard to her husband, Boudella El Hadj. The Commission said the authorities had failed to use diplomatic channels to protect his rights, provide him with consular support

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<sup>10</sup> For the open letter sent to BiH authorities signed by Amnesty International, Helsinki Committee for Human Rights in Bosnia and Herzegovina, and Human Rights Watch, see Amnesty International, *Open letter to the authorities in Bosnia and Herzegovina on citizenship review and forcible returns to countries where there is a risk of torture* (AI Index: EUR 63/004/2007), 11 May 2007.

<sup>11</sup> The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina is the legal successor to the Human Rights Chamber for Bosnia and Herzegovina.

and take all necessary steps to ensure that he would not be subjected to the death penalty, including by asking the USA for guarantees to that effect.

Nadja Dizdarević had also filed a criminal complaint in January 2006 against several BiH officials for their role in the rendition, including Zlatko Lagumdžija, Chair of the BiH Council of Ministers at the time of the rendition, and Tomislav Limov, then FBiH Deputy Minister of the Interior.<sup>12</sup> She told Amnesty International in December 2007 that to her knowledge the authorities had taken no action.

In January 2007, the European Court of Human Rights granted priority treatment to applications filed in September 2006 on behalf of the six men. The applications claim that the failure of the authorities in BiH to implement binding decisions by domestic courts in allowing the men to be unlawfully transferred to NATO custody, and to protect the rights of the detainees during their transfer and their detention at Guantánamo Bay, violated a number of provisions of the ECHR. A number of human rights organizations have intervened in the case.<sup>13</sup>

On 5 December 2007, the US Supreme Court heard oral argument in the case of *Boumediene v. Bush*, a *habeas corpus* petition filed in July 2004 on behalf of the six men and a number of others. These cases concern detainees held in indefinite detention without charge or trial at Guantánamo Bay. The issue before the Court centred on whether the US Military Commissions Act (MCA), signed into law on 17 October 2006, violates the US Constitution by stripping the courts of jurisdiction to consider *habeas corpus* petitions from the Guantánamo detainees. Amnesty International and many others filed *amicus curiae* briefs<sup>14</sup> in the Supreme Court in August 2007, seeking to have the Court recognize the right to *habeas corpus* as a right guaranteed to the

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<sup>12</sup> *FENA News*, "Sarajevo: Nadja Dizdarević raises criminal charges against Lagumdžija, Limov and others", 24 January 2006.

<sup>13</sup> See Third party intervention by INTERIGHTS and the International Commission of Jurists before the European Court of Human Rights in the case of *Boumediene and Others v Bosnia and Herzegovina*, 7 November 2007, at <http://www.interights.org/documentbank/index.htm?id=257>. Center for Constitutional Rights Press Release, *CCR Files Amicus Brief in First Guantánamo Case Before European Court of Human Rights*, 15 November 2007, <http://ccrjustice.org/newsroom/press-releases/ccr-files-amicus-brief-first-guant%C3%A1namo-case-european-court-human-rights>.

<sup>14</sup> Amnesty International's co-signatories were the International Federation for Human Rights, the Human Rights Institute of the International Bar Association, and the International Law Association. See: [http://www.mayerbrown.com/public\\_docs/probono\\_Amnesty\\_International.pdf](http://www.mayerbrown.com/public_docs/probono_Amnesty_International.pdf).



detainees regardless of whether they are deemed to be within reach of the US Constitution.<sup>15</sup> On 12 June 2008, the Supreme Court delivered a landmark judgment in *Boumediene v. Bush* and *al Odah v. United States*, in which the court unreservedly affirmed that foreign nationals held at Guantánamo Bay are entitled, under the US Constitution, to effective means and procedures to challenge the legality of their detention before an independent and impartial court that has the power to order their release, ie. *habeas corpus*.<sup>16</sup>

A lawsuit was also filed on behalf of Mustafa Ait Idir in US federal courts under the US Freedom of Information Act. The lawsuit alleges that he was tortured and ill-treated in Guantánamo and seeks to ask a judge to order the military to hand over documents, including medical records, pertaining to the six men.<sup>17</sup>

### **Role of NATO**

In June 2006, Amnesty International wrote to NATO Secretary General Jaap de Hoop Scheffer detailing concerns about the role played by members of SFOR in BiH in the rendition of the six men, and calling on him to undertake a thorough and impartial investigation, to take necessary measures to ensure that SFOR members found responsible in the unlawful transfer are brought to justice, and to ensure adequate reparation to the six men for the involvement by SFOR in the unlawful transfer. As of May 2008, Amnesty International had not received a response.

### **BiH's responsibility**

BiH is obliged to protect the human rights of its nationals and everyone on its territory. The arbitrary detention of the six men, and their subsequent further unlawful detention and transfer to US custody, constitute serious violations of the right to liberty and security of the person, and other rights. The fact that

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<sup>15</sup> For further information on the *habeas corpus* cases, see Amnesty International, *USA: No substitute for habeas corpus: six years without judicial review in Guantánamo* (AI Index: AMR 51/163/2007), November 2007.

<sup>16</sup> *USA: Time for real change as Supreme Court rules on Guantánamo detentions*, AI Index: AMR 51/061/2008, 13 June 2008.

<sup>17</sup> Charlie Savage, "Guantánamo detainee is alleging that he was brutalized," *Boston Globe*, 13 April 2005.

this was done in the face of the FBiH Supreme Court's ruling that there was no basis for their detention, as well as the interim order for provisional measures to prevent the deportation, expulsion or extradition of four of the men, aggravates the seriousness of the violations and also constitutes a fundamental lack of respect for the rule of law.

BiH is responsible for its aid and assistance in the unlawful transfer of these men and for any further violations that were the reasonably foreseeable consequence of its actions. In light of BiH's having contributed to the men being at Guantánamo Bay, it remains under an obligation to make diplomatic representations on their behalf, to seek and facilitate their return to BiH if they wish it, to insist on being able to provide consular services to its citizens, and to request to do so in respect of the others.

### **ACTION NEEDED NOW**

The BiH authorities should:

- ensure full implementation of the decisions of the Human Rights Chamber and Human Rights Commission;
- bring to justice those responsible for violations of international or national law in relation to the men's rendition;
- review and amend any procedures that allowed the transfer of the six men to US custody, despite an order for their release by the FBiH Supreme Court and provisional measures by the Human Rights Chamber of Bosnia and Herzegovina to prevent the deportation, extradition or expulsion of four of the men;
- take all necessary measures to ensure that the US authorities investigate the allegations of torture and release the six men if they are not to be charged with a recognizably criminal offence and given fair trials without delay;
- take all possible measures to protect the rights of the six men, such as offering regular consular and legal assistance, and insisting on it where BiH has the right to do so, making representations to the US authorities asking for and otherwise facilitating the return of the men to BiH, if they so wish;

- ensure that, if released, the six men are allowed to return to BiH, and are not sent against their will to Algeria or any other state where there are substantial grounds to believe they would be at a real risk of torture or other ill-treatment;
- grant the six men full reparation – including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition – for the human rights violations they have suffered as a result of actions of BiH;
- insist, through diplomatic representations and, if necessary, an international legal claim, that the USA provide full and effective reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, for violations of the rights of BiH nationals.

NATO should:

- thoroughly and impartially investigate the involvement of members of SFOR in the unlawful transfer of the six men to US custody; take all necessary measures to ensure that the perpetrators of human rights violations are brought to justice by the relevant authorities in accordance with international standards; and ensure adequate reparation to the men for the involvement by SFOR in the unlawful transfer.

## Case sheet 2 – Muhammad Haydar Zammar

**Muhammad Haydar Zammar**, a 47-year-old Syrian-born German national, left Germany for Mauritania and Morocco on 27 October 2001. He was detained by Moroccan law enforcement officials before boarding his return flight to Germany in early December 2001. He was suspected of involvement in the “Hamburg Cell”, a group that included the presumed leaders of the 11 September 2001 attacks in the USA.

Muhammad Zammar was held without charge for a few weeks in Morocco.<sup>18</sup> During this period, he was reportedly interrogated by Moroccan and US intelligence officials.<sup>19</sup> He has apparently alleged that he was ill-treated in Morocco. He was then flown, reportedly in a CIA plane, to Syria, where he was held incommunicado and allegedly subjected to torture or other ill-treatment. The CIA later confirmed that Muhammad Zammar “was moved from Morocco into Syrian custody, where he has remained”.<sup>20</sup> US intelligence officials have also reportedly said that although they did not have direct access to Muhammad Zammar in Syria, they did submit questions to his Syrian interrogators.<sup>21</sup>

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<sup>18</sup> For Amnesty International’s documents on the case of Muhammad Haydar Zammar, see Amnesty International, *Appeal Case: Syrian-born German held three years without charge in rat-infested Syrian “tomb”* (AI Index: MDE 24/066/2004), 8 October 2004, and three subsequent updates: *1st Update – “Disappearance” of Muhammad Haydar Zammar* (AI Index: MDE 24/016/2005), 6 April 2005, *2nd Update* (AI Index 24/105/2005), 8 December 2005, and *3rd Update: Unfair trial and sentencing of Muhammad Haydar Zammar* (AI Index: MDE 24/020/2007), 22 March 2007. For details on Germany’s role in the rendition of Muhammad Zammar, see Amnesty International, *Partners in Crime: Europe’s role in US renditions* (AI Index: EUR 01/008/2006), pp. 16-19.

<sup>19</sup> Peter Finn, “Al Qaeda Recruiter Reportedly Tortured”, *The Washington Post*, 31 January 2003.

<sup>20</sup> Testimony of George Tenet to the Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, <http://files.findlaw.com/news.findlaw.com/cnn/docs/911rpt/part2.pdf>.

<sup>21</sup> See Mitch Frank, “Help from an unlikely ally,” *Time*, 1 July 2002. A former advisor to the Syrian government has confirmed this; see Statement of Murhaf Jouejati to the National Commission on Terrorist Attacks Upon the United States, [http://www.globalsecurity.org/security/library/congress/9-11\\_commission/030709-joujati.htm](http://www.globalsecurity.org/security/library/congress/9-11_commission/030709-joujati.htm), 9 July 2003.

Muhammad Zammar was reportedly held without charge in prolonged, solitary and incommunicado confinement in the Palestine Branch (Far' Falastin) of Military Intelligence until around October 2004. To the extent his conditions of detention are known, they would appear to have amounted to cruel, inhuman and degrading treatment. He was allegedly subjected to torture or other ill-treatment at the beginning of his detention in Syria. For many years, torture and other ill-treatment of security detainees like Muhammad Zammar has been widely reported at Far' Falastin<sup>22</sup>.

Muhammad Zammar's underground cell was said to be 1.85m long, less than 0.9m wide, and less than 2m high – dimensions that would not allow him to lie down or stand up comfortably. These cells are often referred to as “tombs” or “graves”. Former detainees say the underground section of Far' Falastin is infested with rats and lice. There is no bed or mattress in a “tomb” cell, only a couple of old and filthy blankets. One plastic bottle is provided for drinking water, another for urine. Access to fresh air and sunlight in the yard is restricted to a maximum of 10 minutes a month, but can be as infrequent as 10 minutes every six to eight months.

A former detainee, who wished to remain anonymous, was held in an adjacent underground cell to Muhammad Zammar. He told Amnesty International that he recalled Muhammad Zammar:

*“arguing relentlessly and exposing himself to more torture, in the hope of improving the conditions and the treatment for all of us. I do not forget how he used to stand up for the others in his section of graves/cells, how he pushed to get the washrooms cleaned, how he persistently pushed to have more time in the washroom for all the cell... I think everyone who went through that dark corner of the world, in the 19 solitary confinement cells of Far' Falastin, owes Mr Zammar for making his situation, directly or indirectly, relatively better.”*

Amnesty International received information that Muhammad Zammar was taken out of solitary confinement in Far' Falastin in October 2004 and moved to Sednaya prison where conditions are still poor but better than in Far' Falastin.

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<sup>22</sup> See *Syria: Torture by the Security Forces*, AI Index: MDE 24/09/87; *Indefinite Political Imprisonment*, AI Index: MDE 24/12/92; *Repression and impunity: The forgotten victims*, AI Index: MDE 24/02/95; *Smothering freedom of expression: the detention of peaceful critics*, AI Index: MDE 24/007/2002.

Muhammad Zammar's family in Germany received its first direct communication from him when they received a brief letter, dated 8 June 2005, which was sent to them through the International Committee of the Red Cross (ICRC) in Damascus.

Almost five years after his arrest in Morocco and secret transfer to Syria, Muhammad Zammar appeared before the Syrian Supreme State Security Court (SSSC) on 8 October 2006. Amnesty International understands that from the time of his detention in Far' Falastin in December 2001 until his first court appearance in October 2006, he had been held incommunicado, unable to contact anyone outside the prison.

On 11 February 2007 he was sentenced to 12 years in prison for four offences. One conviction was for membership of the outlawed Syrian Muslim Brotherhood organization. He was sentenced under Law 49 of July 1980, which makes this offence punishable by the death penalty. Under current practice, this sentence is immediately commuted to 12 years' imprisonment. Muhammad Zammar reportedly denied that he had ever been a member of the organization, and no evidence of membership was reportedly presented during the trial. He was also found guilty on three charges carrying lesser sentences, namely belonging to an "organization formed with the purpose of changing the economic or social status of the state" (Article 306 of the Syrian Penal Code); "carrying out activities that threaten the state or damage Syria's relationship with a foreign country" (Article 278); and "weakening national sentiments and inciting sectarian strife" (Article 285). Hearings before the SSSC fall far short of international standards for fair trial. The SSSC lacks independence and impartiality, defendants do not have a right of appeal and have restricted access to their lawyers. The SSSC has systematically failed over the years to seriously examine and ensure independent investigation of numerous allegations of torture and extraction of "confessions" under duress brought to its attention by prisoners of conscience and political detainees. The UN Human Rights Committee has deemed the procedures of the SSSC to be incompatible with the International Covenant on Civil and Political Rights.

Since his conviction visits by the family have been granted more frequently while consular visits by German diplomats are being permitted at irregular intervals.

## Germany's role and investigations

Muhammad Zammar had been under intermittent surveillance in Hamburg, Germany, for some years before his arrest. He had been questioned by German police after the 11 September 2001 attacks in the USA, and was brought before a court in Hamburg less than a week later. There was not enough evidence to hold him, but the Federal Public Prosecutor initiated an investigation into allegations that he had “supported a terrorist organization”. Muhammad Zammar then left Germany for Morocco.

Information about Muhammad Zammar's travel plans, supplied by Germany's Federal Investigation Office (Bundeskriminalamt, BKA) to US agents, may have been instrumental in his arrest in Morocco and subsequent rendition to Syria. While the German authorities have denied any knowledge of the US-led rendition programme in 2001<sup>23</sup>, the head of the CIA's European operations at the time, Tyler Drumheller, has reportedly confirmed that he discussed possible covert counter-terrorism operations with German authorities shortly after the attacks on the USA in September 2001.<sup>24</sup>

Officially it has been stated that the German authorities were informed about Muhammad Zammar's detention in Syria in June 2002 through media reports, and that thereafter he was the subject of communication and cooperation between German and Syrian intelligence agencies. It was stated that Syrian intelligence confirmed his detention in July 2002. According to hearings of the German parliamentary committee of inquiry, which examined his case, it was confirmed that the BKA had provided a “detailed biography” of Muhammad Zammar, a “list of his relatives in Syria and Morocco”, and his flight information in response to requests for information from US intelligence agencies. It was also confirmed that five German intelligence and law enforcement officials went to Syria in November 2002 and interrogated Muhammad Zammar for three days. The BKA also supplied information about Muhammad Zammar to Syrian authorities in the period leading up to and during their visit to interrogate him in Syria in November 2002. The intelligence agencies told the inquiry that the interrogation of Muhammad Zammar by agents of Germany's BKA, Federal Intelligence Service (Bundesnachrichtendienst, BND), and Federal Office for the Protection of the

<sup>23</sup> “Minister denies Germans complicit in U.S. rendition”, *Reuters*, 13 March 2008.

<sup>24</sup> “Ex-CIA Mann belastet deutsche Kollegen”, Uli Rauss und Oliver Schröm, *Stern*, 11 March 2008, <http://www.stern.de/politik/deutschland/613825.html?q=drumheller>

Constitution (Bundesamt für Verfassungsschutz, BfV) yielded new information. Other witnesses questioned this assessment. Guido Steinberg, a staff member of the Office of the Chancellor from 2000 to 2005 and an expert on international terrorism, told the inquiry that the interrogation of Muhammad Zammar had not yielded relevant information about terrorist sources of danger. Guido Steinberg added that he had warned against cooperation with the Syrian intelligence agencies because of human rights violations and the frequent use of torture of political prisoners in Syria.<sup>25</sup>

Although the German authorities knew that Muhammad Zammar was being detained in Syria, Muhammad Zammar's family in Germany was only notified of this fact in a letter from the Foreign Ministry dated 23 December 2002.

Furthermore, through the work of the parliamentary inquiry it was brought to light that the government had taken a decision not to pursue consular access via the German embassy in Damascus for a prolonged period of time. On 7 November 2006, a month after his first appearance before the SSSC and after nearly five years of incommunicado detention, Muhammad Zammar reportedly received his first visit from a German diplomat. During this meeting, Muhammad Zammar was reported to have asked the diplomat for winter clothing, some money, and a lawyer.<sup>26</sup>

### **Hearings of the parliamentary committee**

Muhammad Zammar's case was investigated by the parliamentary committee of inquiry (Untersuchungsausschuss) in Germany that was set up to investigate Germany's role in events relating to the Iraq War and combating international terrorism.<sup>27</sup> From October 2007 until March 2008 the committee was investigating the role of different intelligence agencies, law enforcement offices and ministries in the case of Muhammad Zammar. Among the many areas which the committee investigated are the following: cooperation and

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<sup>25</sup> "Zeuge warnte vor Zusammenarbeit mit Syrern", *Heute im Bundestag*, 13 December 2007, <http://www.bundestag.de/cgi-bin/druck.pl>

<sup>26</sup> Holger Stark, "A German Islamist Faces Death Penalty in Syria," *Der Spiegel*, 27 November 2006.

<sup>27</sup> On 20 February 2006 the German Federal Government presented the Parliamentary Control Panel of the German Parliament with a report on "events relating to the Iraq War and combating international terrorism". A parliamentary Committee of Inquiry was then established to clarify still unresolved questions concerning a wide range of issues, including into CIA rendition flights and the role played by various German authorities.



exchange of information with foreign intelligence agencies; Muhammad Zammar's interrogation by German officials while he was detained in circumstances which violate human rights law; the cooperation with Syrian officials while knowing that the charge against Muhammad Zammar potentially carried the death penalty; and the suspension of efforts to gain consular access to Muhammad Zammar.

#### *Exchange of information with foreign intelligence agencies*

During the committee hearings it was stated that shortly after the attacks of 11 September 2001, there was a common understanding among all German intelligence agencies and law enforcement offices that there was a need for increased co-operation with foreign intelligence agencies to face the security challenges posed by "international terrorist networks". Apparently Syria was judged as a country which could provide important information on individuals and "terrorist networks". Therefore, in 2002 and 2003, the German intelligence agencies – the BND and BfV, as well as the law enforcement office of the BKA – sought closer co-operation with the Syrian intelligence agencies; this effort was coordinated through the Office of the Chancellor (responsible for the coordination of the intelligence agencies).

During the hearings it was confirmed that information gathered by the BKA, BND and BfV about Muhammad Zammar had been forwarded to the Syrian military intelligence agency. It was also disclosed that the German agencies provided a list of questions which was given to the Syrians to ask during the interrogations. The Syrian military intelligence agency in return provided the results of its interrogations. The specifics of this co-operation remained vague as the members of the parliamentary committee of inquiry did not have access to all classified documents, large parts having been redacted. Those witnesses from the BKA, BND and BfV who were questioned in public hearings could not remember what kind of information had been forwarded to Moroccan and Syrian authorities. Most of the relevant questioning took place in strictly confidential hearings. Yet through the public hearings it emerged that the three German agencies wanted to interrogate Muhammad Zammar in Damascus because they felt that the information obtained by the Syrians was not detailed enough, and that he could provide them with more information if they questioned him themselves.

*Interrogation of a detainee who was detained under circumstances which violate human rights law*

In the course of the committee's hearings senior officials of the three intelligence agencies, the BND, BfV and BKA, as well as politically responsible officials have conceded – after being confronted with reports by human rights organizations and a confidential report by the Foreign Ministry about torture in detention by Syrian intelligence officers – that they were either vaguely aware or knew in more detail that torture (euphemistically referred to as “treatment that does not conform with rule of law standards”) takes place in Syria. They also conceded that they did not have detailed information about Muhammad Zammar's conditions of detention.

All witnesses and senior officials stressed that the five officials who were sent to Damascus were instructed to break off the interrogation if they got the impression that Muhammad Zammar had been tortured or was under duress. The officials later said that they did not have any concrete indication or evidence that Muhammad Zammar had been subjected to torture. It was also disclosed that the three-day interrogation of Muhammad Zammar took place in the presence of a Syrian official and the whole interrogation was tape-recorded by the Syrian military intelligence<sup>28</sup>.

Amnesty International understands that Muhammad Zammar told the German interrogators that he had been beaten in detention in Morocco and at the beginning of his detention in Syria. Yet according to the public committee hearings, this information was not contained in any of the three written reports about the interrogation of Muhammad Zammar (classified unpublished reports of the BND, BfV and BKA). This information was reportedly disclosed in a confidential government report to the Parliamentary Control Panel (Parlamentarisches Kontrollgremium, PKGr).<sup>29</sup>

The senior officials justified their decision to carry out the interrogations on the basis of the need to balance different interest and values. They argued that in this case security and the need to obtain as much information as possible for the sake of preventing future attacks was more relevant than other considerations. They all strongly opposed any suggestion that Germany was

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<sup>28</sup> [http://www.bundestag.de/ausschuesse/ua/1\\_ua/protkoll/januar\\_protokoll.pdf](http://www.bundestag.de/ausschuesse/ua/1_ua/protkoll/januar_protokoll.pdf)

<sup>29</sup> The PKGr is a parliamentary panel which meets secretly and which exerts parliamentary control over the intelligence agencies. For the PKGr official assessment and dissenting assessment, see: <http://dip.bundestag.de/btd/16/008/1600800.pdf>

complicit in torture, and stressed that there was no evidence that Muhammad Zammar had been tortured, although they did concede that he had been subjected to “non-rule of law treatment” and that “he may have been treated differently in Syria than in Germany”.

*Co-operation in interrogation of detainee who could face the death penalty*

German officials knew at a very early stage that Muhammad Zammar had been detained by the Syrians on charges that he was a member of the Muslim Brotherhood. At least one senior official of the BKA said during the hearing that he had learned this from his Syrian counterparts as early as summer 2002. As a matter of standard practice, German officials should not provide information about a detainee or defendant to a foreign state if he or she is facing the death penalty. When confronted with this departure from practice, the answers of the officials were very vague. Some did not know that membership of the Muslim Brotherhood is punishable with the death penalty; some said that “Zammar did not say anything in the interrogation which was harmful”; one said that he thought that the Syrian authorities would be able to make a distinction between an “active member and a supporter”. Some also said that they urged the Syrians not to hand down the death penalty against Muhammad Zammar.

*Suspension of efforts to establish consular support*

During the hearings it emerged that the German embassy had suspended its efforts to gain access to Muhammad Zammar and to offer consular support for a prolonged period of time, at least from the summer of 2002 until the autumn of 2004. Apparently the government had misled the public when it informed Parliament in December 2005 that there had been a series of verbal notes, or demarches, to the Syrian government in order to get access to Muhammad Zammar. It was disclosed that a number of these verbal notes were in fact letters rogatory, asking the Syrian authorities to provide information about Muhammad Zammar’s contacts in Syria. The decision to suspend efforts to establish consular support was apparently taken in the Office of the Chancellor. The official justification was that since the intelligence agencies were trying to intensify their cooperation with their Syrian counterparts and were conducting a dialogue, this seemed to be a better channel for “trying to get access”.

Amnesty International is concerned by reports that the parliamentary committee of inquiry was not provided with all the relevant information, and that no documentation was made available concerning executive government meetings and meetings with foreign embassy officials or foreign intelligence agencies. Moreover, much of the crucial information in documentation was heavily redacted. The organization is also concerned that senior government and intelligence officials withheld information during the public hearings, and that witnesses were authorized to provide only limited information to the inquiry. Thus the organization is concerned that the parliamentary inquiry failed to adequately fulfil the government's obligation to carry out a full, thorough, independent and impartial investigation into the human rights violations suffered by Muhammad Zammar, and Germany's role in such violations.

### **Germany's responsibility**

Muhammad Zammar was the victim of an enforced disappearance.

Prolonged incommunicado detention is a violation of human rights and can, particularly where the detention is unacknowledged or the person is held in a concealed location, in and of itself, constitute torture or other cruel and inhuman treatment.<sup>30</sup>

It is unclear whether German intelligence and law enforcement agencies knew what use would be made of the information they provided to their US counterparts in 2001, but if it was reasonably foreseeable that it would be used to carry out Muhammad Zammar's detention in Morocco and rendition to Syria, Germany would be responsible for any reasonably foreseeable human rights violations suffered as a result of that rendition and detention.

Germany violated international human rights when its agents interrogated Muhammad Zammar in 2002 for the purpose of obtaining intelligence information while knowing that he was being held in prolonged incommunicado detention in a prison infamous for torture, and that he was at high risk of being subjected to torture or other ill-treatment.

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<sup>30</sup> See, for example, *El-Megreisi v. Libya*, U.N. Doc. CCPR/C/50/D/440/1990, 24 March 1994, para. 5.4. *Kimouche v. Algeria*, UN Doc. CCPR/C/90/D/1328/2004, 16 August 2007, paras. 7.5-7.6,

Where a State refuses to acknowledge the detention of a person who has been disappeared, and to disclose their whereabouts and fate, this refusal can constitute a separate violation of the rights of close family members, who may be recognized as themselves suffering inhuman or degrading treatment as a result. In this case, it appears that German officials were aware of Muhammad Zammar's fate and whereabouts in mid-2002, but did not inform the family in Germany until December 2002. Nor did the authorities notify the family that he had been interrogated by German agents. This too must be investigated as a possible violation of the rights of Muhammad Zammar's wife and other close family members in Germany.

### **UN Working Group on Arbitrary Detention**

The UN Working Group on Arbitrary Detention (WGAD) examined the case of Muhammad Zammar and Ayman Armenli, another man held in Far' Falastin.<sup>31</sup> In May 2007 it said that Muhammad Zammar had been arbitrarily deprived of his liberty, noting that he was "held in incommunicado detention for a significant period of no less than five years"; "he did not enjoy his right to legal defence and procedural safeguards"; and that he was not "able to challenge the accusations against him". In a January 2008 report, the WGAD reported that in a note verbale dated 7 November 2007, from the Permanent Mission of the Syrian Arab Republic to the UN Office at Geneva, the Syrian government reported that Muhammad Zammar's trial had been conducted in conformity with Syrian law and international norms.<sup>32</sup> The WGAD also stated that on 18 May 2007 it had written to the Permanent Representative of Germany to the UN Office at Geneva requesting information on the circumstances of Muhammad Zammar's arrest, detention, interrogation and subsequent transfer to Syria. On 23 May 2007 it also wrote to the Government of the Kingdom of Morocco requesting the same information. No response to these communications had been received by January 2008.

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<sup>31</sup> UN Working Group on Arbitrary Detention, Opinion No. 8/2007 (Syrian Arab Republic).

<sup>32</sup> Report of the UN Working Group on Arbitrary Detention, A/HCR/7/4, 10 January 2008, para. 15.

## **ACTION NEEDED NOW**

The German authorities should:

- make strong diplomatic representations on Muhammad Zammar's behalf to ensure that his rights are respected in Syria and that allegations of torture or other ill-treatment are investigated; seek regular consular access to him should he wish it; demand that he be given a new and fair trial or released; and seek and facilitate his return to Germany;
- confirm that information obtained under torture or other ill-treatment, from Muhammad Zammar or anyone else, will not be used in any proceeding of any kind in Germany;
- ensure that all allegations of human rights violations relating to German involvement are the subject of full, effective, independent and impartial investigation, including by correcting the deficiencies in the parliamentary committee as identified above, including ensuring that the committee has access to all crucial evidence, that the inquiry is carried out impartially, that the inquiry is conducted in a manner allowing public scrutiny, and that the inquiry can ensure that state secrecy is not maintained over evidence of human rights violations;
- bring to justice those found responsible, directly or indirectly, for human rights violations suffered by Muhammad Zammar;
- ensure that Muhammad Zammar and his family are granted full reparation for any violations suffered as a result of Germany's actions, including restitution, compensation, rehabilitation, and measures to end the ongoing violations and prevent re-occurrence;
- insist, through diplomatic representations and, if necessary, an international legal claim, that the responsible states provide full and effective reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, for violations of the rights of its national.

## Case sheet 3 - Abu Omar

**Usama Mostafa Hassan Nasr**, better known as Abu Omar, an Egyptian national with recognized refugee status and Italian residency, was walking down a street in Milan on 17 February 2003 on his way to the nearby mosque. An Italian-speaking man approached him, identified himself as a policeman, and demanded to see his papers. The next thing he knew something was being sprayed into his mouth and he was being bundled into a white van.

*“They threw me on the floor of the car. My nose and mouth were bleeding. I was injured in my knee and my right hand. They threw me very harshly. Then they covered my face with the hat I was wearing until I was completely hooded and could not see anything. The car took off with great speed. While the car was travelling, I had a seizure... I started to make gurgling noises. Something like froth came out of my mouth and my body became stiff as if my soul was coming out and my legs touched each other as if I was dying. One of them sensed I was having problems. He shouted and quickly tore off my clothes while I was still hooded and could not see anything; he began to rub the heart area very strongly, the other took off my hood and switched on a flashlight and moved it with his hand... When they realized I was still alive, they gave me first aid until I came round. Then they put the hood back on and left me, of course, after they had handcuffed me. They feared I would resist them and attempt to escape or resist again.”*

Nabila Ghali, Abu Omar’s wife, told Amnesty International:

*“Our life went on peacefully till that painful day, 17 February, which I can never forget. That day, I returned home from school and called him, but the phone was switched off, for the first time ever. I called the mosque’s Imam and other acquaintances. They all denied seeing him that day. The following day, we inquired with police stations and hospitals. I went to report his disappearance to the local police station and submitted a memorandum to the police headquarters in Milan...”*

*“An Egyptian woman, who had witnessed the event, told us how he had been kidnapped and put in a car that was shaking while going away...”*

*Then I knew that my husband was kidnapped... I was crying all the time during this period.”<sup>33</sup>*

US agents took Abu Omar to the NATO airbase at Aviano, northern Italy. At Aviano he was reportedly put on a Learjet LJ-35 (SPAR-92), part of a military airlift service that reportedly uses executive-style jets to transport senior military officers and civilian VIPs, and flown to Ramstein NATO airbase in Germany. In Ramstein, he was transferred to another plane, the Gulfstream IV jet (N85VM), chartered by the CIA from Richmor Aviation, and flown to Cairo in Egypt, where he was detained in secret for the next 14 months.

Abu Omar says that on arrival in Cairo, he was taken by Egyptian security officers to a building he later discovered was the national intelligence headquarters. In a letter from prison, he said that he suffered torture up to 12 hours a day over a period of seven months:

*“I was hung like slaughtered cattle, head down, feet up, hands tied behind my back, feet also tied together, and I was exposed to electric shocks all over my body and especially the head area to weaken the brain and paralyse it and in the nipples and my genitals and my penis and I was beaten in my genitals with a stick and they were squeezed if I refused to answer...”*

He said that he was “crucified” on a metal door and on a wooden apparatus which they called *el-arousa* (the bride). During this form of torture, he was given electric shocks, kicked and beaten with electric cables and water hoses and whipped. He says they beat him so severely on his ears that he lost his hearing in one ear.

Abu Omar described being held in a tiny, poorly-ventilated cell infested with rats and cockroaches. The cell was stiflingly hot in summer and cold in winter. He was given one blanket on which to sleep and fed a diet of hard, stale bread that had to be softened with water to make it edible.

Throughout his detention, he was not allowed any contact with the outside world. For 14 months, his family and friends did not know where he was.

On 20 April 2004, Abu Omar was released from prison and warned by Egyptian officials not to tell anyone about what had happened to him. About three weeks later, however, on 12 May, after he had phoned his wife and friends in Milan and described his ordeal, he was re-arrested, reportedly on the

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<sup>33</sup> Amnesty International interview with Abu Omar and Nabila Ghali, April 2007.



orders of the Interior Minister. He was then taken to State Security Investigations (SSI) office in Nasr City and from there to Istiqbal Tora Prison. Subsequently he was transferred to Damanhur Prison and held in administrative detention, without charge. In February 2005 Abu Omar was taken back to Istiqbal Tora Prison and kept in solitary confinement. Although courts ordered his release at least 16 times, the Interior Minister repeatedly renewed his detention order using emergency legislation.

Abu Omar was finally released in February 2007 and is now living in Alexandria. He says he was told by SSI officers not to leave the city, but has nevertheless travelled to Cairo to publicize what happened to him. He wants to return to Italy, even though he may face terrorism-related charges. Abu Omar is under investigation for association with international terrorism, and an international arrest warrant has been issued against him by Italian prosecutors.

On 3 July 2007 Abu Omar was summoned to the SSI office in Alexandria. Two officers threatened to detain him if he continued talking to the media and human rights organizations. He was allowed home that evening.

Abu Omar spoke to Amnesty International in April 2007 about the impact of the abduction and torture he suffered.

*"I can't walk alone in the street. I expect to be kidnapped again, to face fabricated charges or even to be killed. I go out accompanied by my wife or a family member, or sometimes I go out early morning so that no one can see me..."*

*"My life has changed completely after my release, and so has my relation with my wife. Before my imprisonment, we had no problems or disputes, but my prison experience changed my life, as torture left some sternness in me. In fact, I make big problems for trivial reasons... I am always afraid, and suffer from health problems, tension and eat with greed. I have lost any interest in talking to others; I just spend my time with the internet. I do not want to go out of my home, even if allowed to. I do not want to see or receive visitors. All night long, I suffer nightmares, and all day long I remember torture so I shake..."*

His wife Nabila Ghali told Amnesty International:

*"When he came back home, he became a different person. Frankly, he has become nervous, impatient and stern. He has changed completely. I*

*understand his suffering and find excuses for him, but who is responsible for this? Who is responsible for the current situation?"*

### **Italy's role and investigations**

The Italian government and security services initially denied any knowledge or involvement in the abduction of Abu Omar and his subsequent rendition to Egypt. However, in late 2006, after extensive investigations, Italian magistrates tracked down a *carabinieri* officer, Luciano Pironi, who had been involved in the abduction. The officer admitted that he had stopped Abu Omar in the street, on the pretext of checking his identity papers, and led him to the van used in the abduction. He said that he was told by the CIA that the operation had been organized with the full co-operation of the Italian secret services. Luciano Pironi cooperated with the investigation and was given a suspended sentence.

Several Italian Military Intelligence and Security Service (Servizio per le Informazioni e la Sicurezza Militare, SISMI) agents were investigated by Italian magistrates for kidnapping or complicity in kidnapping. They included General Nicolò Pollari, head of SISMI at the time of the abduction, and Marco Mancini, head of SISMI's anti-terrorist division.

It has been alleged that in a conversation between SISMI agent Gustavo Pignero, who died of cancer in September 2006, and Marco Mancini, which was recorded on 2 June 2006, Gustavo Pignero admitted that he had been ordered by Nicolò Pollari to keep Abu Omar under surveillance. He also reportedly stated that in the late autumn of 2002 there had been a SISMI meeting in Bologna, which discussed the proposed abduction of Abu Omar.<sup>34</sup>

The Italian investigations into Abu Omar's abduction began when his wife reported him missing to Italian police, who opened a missing person investigation. Little progress was made until April 2004, when Nabila Ghali finally spoke to her husband in Egypt after he was temporarily released and found out the exact time and date of his abduction.

Using these details, by mid-2004 Italian investigators led by Milan prosecutor Armando Spataro eventually identified 17 mobile phones used in the area at the time Abu Omar was abducted. The phone trail eventually led to Robert

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<sup>34</sup> According to information that is emerging in the context of the criminal proceedings in Milan.

Seldon Lady, a consul in the US consulate in Milan and thought to be the CIA's highest ranking officer in Milan; he was identified as someone who had been in frequent contact with Luciano Pironi. Investigators found a computer in Robert Lady's house with pictures of Abu Omar, a map showing the best route to Aviano airbase, an airline ticket for Robert Seldon Lady to fly to Cairo, and important emails.

The phone trail also led to other CIA agents. The Milan Public Prosecutor's Office sought the extradition of 22 CIA agents in 2005 in connection with the abduction of Abu Omar. Successive Justice Ministers have not forward these requests to the USA, despite calls by Amnesty International and many others for them to do so.<sup>35</sup> The prosecutor's request to issue extradition warrants to the USA was refused by the Justice Minister Roberto Castelli on 12 April 2006. In July 2006 the Milan Public Prosecutor's Office issued arrest warrants for four more US citizens, and renewed the application to the new Justice Minister for the extradition of 26 US citizens, including consular staff, CIA agents and an air force colonel. Justice Minister Clemente Mastella did not respond to this request.

Based on telephone numbers provided by the Italian investigators, the prosecutor determined that two individuals present in Milan at the time of the abduction also travelled to the Ramstein airbase in Germany. However, he has been unable to locate these individuals and the US authorities have not provided any information about them.<sup>36</sup>

On 5 December 2006 the Milan Public Prosecutor's Office requested that 26 US citizens, eight Italian intelligence and police officials and one journalist<sup>37</sup> involved in the abduction be brought to trial. In February 2007 a judge in Milan ruled that 33 people, seven Italian and 26 US citizens, should go on trial in connection with Abu Omar's abduction. In February, the US Department of State's legal adviser reportedly said that the USA would not

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<sup>35</sup> AI Index: EUR 30/002/2007

<sup>36</sup> Telephone interviews with Eberhard Bayer, German prosecutor on the Abu Omar case, November 2005 and February and May 2006.

<sup>37</sup> Renato Farina, a journalist, was charged with *favoreggiamento* (as an accessory, not to the kidnap, but to the cover-up). He admitted his part in the conspiracy and was given a six-month suspended sentence (which was converted into a €6840 fine). (See article by Leo Sisti, "Anatomy of a Rendition: In cleric's abduction in Italy, the CIA all but left a calling card", in *The Center for Public Integrity, Investigative Journalism in the Public Interest*, 24 May 2007. <http://www.publicintegrity.org/militaryaid/report.aspx?aid=875>)

extradite the US citizens were a request to be made.<sup>38</sup> In May the US authorities repeated that they would not comply with the extradition orders for the 26 US citizens.<sup>39</sup> The trial was due to start in June 2007.

In the run-up to the trial, in February and March 2007, the Italian government lodged a case before the Constitutional Court, including on the basis that the Italian prosecution had breached state secrecy by ordering wiretaps of SISMI agents' telephones and by using documents which were state secrets.<sup>40</sup>

Moreover, the then Prime Minister (President of the Council of Ministers) Romano Prodi declared that all documents relating to counter-terrorism measures after the attacks on the USA in September 2001, including Italy's relationship with its allies, were deemed to be state secrets.<sup>41</sup> However, according to information emerging in the criminal trial and mentioned in the prosecutors' submission to the Constitutional Court, at the time that the SISMI documentary evidence was obtained, they did not stipulate that the materials were state secrets. If the disclosure of evidence of possible criminal activities is blocked, this could result in impunity for Italian security services agents and others who may have engaged in grave human rights violations. This would fly in the face of the recommendation made by PACE in 2007 that "information and evidence concerning the civil, criminal or political liability of the state's representatives for grave human rights violations committed" be "excluded from protection as state secrets".<sup>42</sup>

Following the case being lodged before the Constitutional Court, at the request of Nicolò Pollari and other defendants, the Milan judge decided, on 18 June 2007, to suspend the trial pending the Constitutional Court hearing. That decision was confirmed on 31 October 2007, when the judge adjourned the trial to 12 March 2008.

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<sup>38</sup> "Contemporary Practice of the United States Relating to International Law", *101 American Journal of International Law* 866 (2007), p. 890.

<sup>39</sup> John Foot, "The Rendition of Abu Omar", *London Review of Books*, 2 August 2007

<sup>40</sup> Issued on 15 February 2007 by the former President of the Council of Ministers, Romano Prodi, against the Milan Prosecution office and on 14 March against Judge Caterina Interlandi, who, it was claimed, in issuing the indictments unlawfully relied on state secrets to justify the charges.

<sup>41</sup> A note for the press released by the Press Office of the President of the Council of Ministers, 5 June 2007.

<sup>42</sup> PACE Recommendation 1801 (2007), adopted by the Parliamentary Assembly of the Council of Europe on 27 June 2007

In the meantime, a criminal investigation was triggered in Brescia by denunciations submitted by former President of the Republic Francesco Cossiga and by Nicolò Pollari against the Milan Chief Prosecutor Manlio Claudio Minale, the Deputy Chief Prosecutors Armando Spataro and Ferdinando Pomarici, the judge of the preliminary investigations Judge Enrico Manzi and officers from the police who have been dealing with the investigations in the Abu Omar kidnapping. The investigation in Brescia related to charges of “dissemination of information covered by state secrecy”, “procurement of information relating to State security” and other similar crimes. On 4 December 2007, at the request of the Brescia public prosecutor, the Brescia judge dismissed the proceedings on the basis that “no violation of law has been perpetrated” by the prosecutors and other officers.

The Constitutional Court was scheduled to hold a hearing on 29 January 2008; however it was postponed on 28 January. On 4 March the Constitutional Court re-scheduled the hearing for 8 July.

In March 2008, the prosecutor in the case against those involved in Abu Omar’s abduction and rendition asked for the trial to proceed, in view of the fact that the suspension was not mandatory. The judge had stated, when suspending the trial, that a suspension was not mandatory but was deemed to be appropriate for the sake of “procedural economy”.

On 19 March 2008 the judge decided to re-open the trial; after preliminary hearings on that date, trial hearings were set from April to September. During the criminal trial, information emerged that steps have been taken by the government and the prosecutors to reach an agreed resolution of the conflict but to date this resolution has not been achieved.

Most recently, on 30 May, the Italian government submitted a further appeal to the Constitutional Court. The hearing on admissibility could be heard on 24 June and at the time of writing, it was not known whether the 8 July hearing of the Constitutional Court may be postponed further. The appeal reportedly is against the judge of the criminal trial for resuming the trial before the Constitutional Court had resolved the issues.

Moreover, although the Italian government claimed that it had no knowledge of Abu Omar’s rendition to and detention in Egypt, information in the documents submitted to the Constitutional Court suggests otherwise. Specifically, in the documents there is reference to communications from the CIA to SISMI, dated 15 and 21 May 2003, about Abu Omar being arrested in Egypt, and

interrogated by Egyptian secret services in a secret location. This information is included in the so-called “exhibit D21”, the admissibility of which the government is challenging before the Constitutional Court.<sup>43</sup> Information in the documents submitted to the Court also reveals that Gianfranco Battelli, the previous head of SISMI, stated that he had been approached in October 2001 by the CIA about possible abductions of suspects and that because he was at the end of his term of office, he passed this information on to Nicolò Pollari.

### **Italy’s responsibility**

Abu Omar was the victim of an enforced disappearance. The initial stage of that disappearance was his arbitrary detention in, and illegal transfer from, Italian territory.

Italy is responsible for violating its obligation to protect everyone on its territory against human rights violations, particularly as at least one Italian official has already admitted to cooperating in Abu Omar’s abduction. Italy is responsible for any further violations suffered by Abu Omar that were the reasonably foreseeable result of its agents’ actions. Italy has an obligation to investigate and bring to justice both its own agents and any agents of other states, or private actors, who were involved in the abduction and rendition in Italy.

Where a State refuses to acknowledge the detention of a person who has disappeared, and to disclose their whereabouts and fate, this refusal can constitute a separate violation of the rights of close family members, who may be recognized as themselves suffering inhuman or degrading treatment as a result. In this case, there is some evidence that Italian officials were informed of Abu Omar’s fate and whereabouts in May 2003, but did not inform his wife, Nabila Ghali, in Italy. This too must be investigated as a possible violation of the rights of Nabila Ghali.

Claims of state secrecy over evidence of serious human rights violations cannot be permitted to deprive victims of compensation, or to grant *de facto* or *de jure* impunity to the perpetrators of the violations.

The violations suffered by Abu Omar for which Italian and foreign responsibility must be investigated and remedied include his right to personal liberty, his right not to be tortured, his right not to be subjected to enforced

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<sup>43</sup> Prosecutor Armando Spataro’s submission to the TDIP, October 2006, see <http://www.statewatch.org/documents/spataro-abu-omar.pdf>

disappearance, and his right not to be transferred to a country where there are substantial grounds for believing he would face a real risk of being tortured or otherwise ill-treated.

### **Germany's role and investigations**

Flight records show that the Learjet involved in Abu Omar's rendition left Aviano at 6.20pm and arrived about an hour later in Germany at Ramstein airbase, a NATO airbase which is the headquarters of US Air Forces Europe. In Germany, Abu Omar was transferred to a Gulfstream IV jet (N85VM), chartered by Richmor Aviation, which had been leased to the CIA on several occasions. The jet was bound for Egypt, a country known to pose a real risk of torture or other ill-treatment, particularly to detainees suspected of terrorist acts.

In 2005, after receiving files from the Italian prosecutors indicating that Abu Omar had been transported from Aviano to Ramstein by the CIA, the Zweibrücken Public Prosecutor's Office, with the cooperation of the Milan Public Prosecutor, led an inquiry into the events at Ramstein. The prosecutor told Amnesty International in early 2006 that he had at that point found no evidence implicating German officials in the abduction of Abu Omar.

The findings of Italian investigations indicate that the US agents holding Abu Omar stepped out of the plane onto German soil to transfer him to the plane bound for Egypt.

### **Germany's responsibility**

Abu Omar was the victim of an enforced disappearance. One of the initial stages of the disappearance was his arbitrary and secret detention during the transfer on and through German territory.

Germany is obliged to protect everyone within its territory against human rights violations, even where it has temporarily granted effective control over a part of that territory to another state (such as on a foreign-operated military base). As it appears that violations of the European Convention on Human Rights occurred in its airspace and on its territory, Germany has an obligation to conduct a full, thorough, effective and independent investigation, and to bring perpetrators to justice. That obligation could include seeking extradition of the agents from the plane or who knowingly assisted on the ground.

## **ACTION NEEDED NOW**

The Italian authorities should:

- do all in their powers to ensure that CIA and SISMI agents committed for trial in Milan in connection with the abduction and unlawful transfer of Abu Omar be submitted to a prompt and fair judicial proceeding;
- demand that the US authorities extradite the 26 people for whom arrest warrants have been issued, and forward the extradition requests even if US authorities have said until now they will not honour them;
- give the Italian judiciary all relevant information they have on the actions of CIA and SISMI agents before, during and after the abduction of Abu Omar, including by ensuring that no claim to state secrecy, national security secrecy, or secrecy in protection of international relations, is made over evidence of serious human rights violations;
- provide appropriate reparation to Abu Omar and his family for any violations of human rights resulting from Italian actions, including measures to end ongoing violations and prevent reoccurrence;
- press the Egyptian authorities to investigate the alleged torture or other ill-treatment of Abu Omar, hold accountable any individual responsible, and provide full reparation;
- restore Abu Omar's right of residency in Italy. If he is arrested on his return, ensure that he is charged with a recognizably criminal offence, and tried promptly in accordance with international fair trial standards or released.

The German authorities should:

- implement effective measures to prevent German territory from being used by the USA or any other country to transport people to countries where they may face serious human rights violations, including torture or other ill-treatment, including by amending status of forces agreements or overflight clearances to ensure Germany retains jurisdiction and authority to fully investigate and remedy violations of human rights on its territory;



- co-operate fully with the parliamentary committee of inquiry investigating Germany's involvement in US renditions and other issues and press the US authorities to provide all relevant information;
- ensure a full effective and independent investigation into possible individual criminal responsibility in relation to the use of its territory and possible actions of its agents, and bring to justice any perpetrators, including if necessary by seeking extradition of US agents involved in the transfer on German territory.

## Case sheet 4 - Khaled el-Masri

*“The story of El-Masri is the dramatic story of a person who is evidently innocent – or at least against whom not the slightest accusation could ever be made – who has been through a real nightmare in the CIA’s ‘spider’s web’...”<sup>44</sup>*

Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe

*“There is nothing the ministry has done illegally... The man is alive and back home with his family. Somebody made a mistake. That somebody is not Macedonia.”*

Hari Kostiv, then Interior Minister and later Prime Minister of Macedonia

**Khaled el-Masri**, a 44-year-old German of Lebanese origin, was seized by Macedonian officials on 31 December 2003 while on a trip to Macedonia. He was interrogated at the Serbian border, and then driven to the Macedonian capital Skopje by Macedonian security agents. He was held in a hotel room for 23 days by teams of armed men and interrogated in English, a language he says he barely understands, about his activities and about Islamist organizations. He says he asked repeatedly for access to the German embassy, but this was not granted.

Khaled el-Masri says he was forced to record a video saying that he had been treated well and was told that he was being flown back to Germany. He was then blindfolded and driven to an airport. According to a lawsuit later filed by Khaled el-Masri against the CIA director, George Tenet: “After a drive of approximately one hour, the car came to a halt, and Mr. El-Masri could hear the sound of airplanes. He was removed from the vehicle, still handcuffed and blindfolded, and was led to a building. Inside, he was told that he would be medically examined. Instead, he was beaten severely from all sides with fists and what felt like a thick stick. His clothes were sliced from his body with scissors or a knife, leaving him in his underwear. He was told to remove his underwear and he refused. He was beaten again, and his underwear was forcibly removed. He heard the sound of pictures being taken. He was thrown

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<sup>44</sup> *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states: Report*, Parliamentary Assembly of the Council of Europe, 11 June 2007, para. 132.

to the floor. His hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus. Mr. El-Masri was pulled from the floor and dragged to a corner of the room. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in a diaper. He was then dressed in a dark blue short-sleeved track suit, and placed in a belt with chains that attached to his wrists and ankles. The men put earmuffs and eye pads on him, blindfolded him, and hooded him.”<sup>45</sup> He was then thrown to the floor of the plane and strapped down.

He was flown by the CIA, on a Boeing 737 (N313P)<sup>46</sup> to Kabul in Afghanistan and taken to a detention facility nearby.

He says he was detained in a dark cell where he was beaten, given inadequate and dirty food and water, and interrogated. Isotope analysis of his hair, carried out after his release, confirmed that he had spent time in a south Asian country. To protest against his treatment, he says, he went on hunger strike, and was subsequently force-fed. He says he was interrogated repeatedly by US agents, and also by a uniformed German-speaker who identified himself only as “Sam”.

On 28 May 2004, Khaled el-Masri was freed without ever having been charged with a crime or brought before a court. A US official reportedly later revealed that Khaled el-Masri had been released because there was not sufficient intelligence to justify his continued detention. The official said Khaled el-Masri was seized because his name was similar to a militant leader's and because officials thought his passport was forged.<sup>47</sup> *NBC* news reported that the CIA continued to detain him, even after they became aware in March that his

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<sup>45</sup> *El-Masri v. Tenet*, Complaint filed in December 2005, paras. 28-29.

<sup>46</sup> Flight records obtained by Amnesty International show that the Boeing 737, then registered as N313P, flew from Ireland to Majorca, Spain, left Majorca on 23 January 2004, and landed at the Skopje airport in Macedonia that evening. The jet left Skopje, with Khaled el-Masri on board, more than three hours later, flying first to Baghdad and then on to Kabul, Afghanistan. It returned to the US after the rendition via Romania and Spain.

<sup>47</sup> According to the *Washington Post* of 7 December 2005, a senior administration official travelling to Romania with US Secretary of State Condoleezza Rice confirmed that US officials had previously informed the Germans of the reasons for the release of Khaled el-Masri.

passport was genuine, and despite an intervention by US Secretary of State Condoleezza Rice.<sup>48</sup>

The extraordinary manner of his return to Europe highlights the disregard shown for human rights in the context of anti-terrorism measures. On 28 May 2004, Khaled el-Masri was put on a plane and flown to Albania. After being blindfolded and taken on a long drive, Khaled el-Masri was released and told to walk away without looking back. It was dark, he said, and “as I walked I feared that I was about to be shot in the back and left to die.”<sup>49</sup>

In fact, he was met by Albanian officials who drove him to an airport. A ticket was bought for him to Frankfurt, Germany, where he arrived on 29 May 2004.

Khaled el-Masri went home to find his family gone. His wife, who had not known where he was or if he would ever return, had taken their children to her family’s home in Lebanon. They have since returned to Germany.

### **Macedonia’s role and investigations**

Macedonian officials apprehended Khaled el-Masri, drove him to Skopje and then held him for 23 days without informing his family or a lawyer. According to an inquiry by the Parliamentary Assembly of the Council of Europe (PACE), Macedonia’s Security and Counter-Intelligence Service (Uprava za bezbednost i kontrarazuznavanje, UBK) was in contact with the CIA while Khaled el-Masri was being held, and the CIA had asked the UBK “to assist in securing and detaining Mr El-Masri until he would be handed over to the CIA for transfer.” In early 2006, two senior Macedonian officials told *The New York Times* that the USA had asked them to keep Khaled el-Masri detained in Macedonia, saying “We cannot refuse them.”

Macedonian authorities, however, continue to deny that Khaled el-Masri was held illegally in Macedonia.

In 2006, Macedonia refused to co-operate fully with investigations carried out by the Council of Europe and European Parliament. The 2006 and 2007 reports by the Committee on Legal Affairs and Human Rights of the PACE noted that the Macedonian authorities had not only denied, but had actively

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<sup>48</sup> “CIA accused of detaining innocent man”, *NBC*, 21 April 2005, <http://www.msnbc.msn.com/id/7591918/>

<sup>49</sup> *El-Masri v. Tenet*, Declaration of Khaled el-Masri, April 2006.

tried to cover up their role in Khaled el-Masri's incommunicado detention. The European Parliament's Temporary Committee investigating the case in April 2006 found several inconsistencies in accounts given by Macedonian authorities.

On 18 May 2007 in a closed hearing, a Macedonian parliamentary committee considered written statements by the Ministry of the Interior and on behalf of Khaled el-Masri. They concluded that the security services had not overstepped their powers in relation to his detention in a Skopje hotel before unlawfully transferring him to the US authorities at Skopje airport. The committee chair noted that unless provided with "strong evidence" to the contrary the committee would continue to believe the Ministry.

On 3 April 2008 the UN Human Rights Committee adopted Concluding observations on Macedonia's second periodic report on its compliance with the International Covenant on Civil and Political Rights (ICCPR).

The Committee "noted the investigation undertaken by the State party and its denial of any involvement in the rendition of Khaled al-Masri, notwithstanding the highly detailed allegations as well as the concerns expressed inter alia by the Temporary Investigative Committee of the European Parliament, in the Report by Dick Marty on behalf of the Council of Europe and in the Concluding Observations of the Committee on the Elimination of Racial Discrimination (arts. 2, 7, 9, 10)". The Committee recommended that:

"The State party should consider undertaking a new and comprehensive investigation of the allegations made by Mr. Khaled al-Masri. The investigation should take account of all available evidence and seek the cooperation of Mr. al-Masri himself. If the investigation concludes that the State party did violate the Covenant protected rights of Mr. al-Masri, it should provide him with appropriate compensation. The State party should also review its practices and procedures whereby it would never perpetrate acts such as those alleged by Mr. al-Masri."<sup>50</sup>

Khaled el-Masri's Macedonian lawyer, Filip Medarski, has filed freedom of information requests about the case with various government authorities in Macedonia, and was reported in early June to be about to file a request for a

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<sup>50</sup> HRC, Concluding observations on the Second periodic report of the Former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/2, 3 April 2008

full-fledged criminal investigation with the office of the Macedonian Public Prosecutor.

### **Macedonia's responsibility**

Khaled el-Masri was the victim of an enforced disappearance. The initial stages of that disappearance were his arbitrary and secret detention in Macedonia and his transfer to US control for rendition.

The arbitrary detention of Khaled el-Masri by Macedonian agents and the subsequent 23 days of incommunicado detention violated his right to liberty and security of the person. This contravened Macedonia's obligations under the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

His treatment in custody violated his right not to be subjected to torture or other ill-treatment under these treaties as well as under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The actions of Macedonian officials ensured the concealment of Khaled el-Masri's whereabouts. Their actions placed him outside the protection of the law and were the beginning of his enforced disappearance

At all stages of Khaled el-Masri's ordeal in Macedonia, from the beginning of his arbitrary detention to his transfer out of the country, Macedonia is responsible for the violations he suffered, and may also be considered responsible for any further subsequent violations that were a reasonably foreseeable consequence of its actions.

### **Germany's role and investigations**

Khaled el-Masri's lawyer in Germany, Manfred Gnjjidic, believes that German officials were informed early on about his detention. Furthermore he says the evidence strongly suggests that there had been an exchange of information between German and US officials in the course of Khaled el-Masri's detention.<sup>51</sup> However, the German authorities insisted that they knew nothing

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<sup>51</sup> Telephone interview with Manfred Gnjjidic, 26 May 2008.

of Khaled el-Masri's plight until 31 May 2004, shortly after he was freed.<sup>52</sup> In May 2004, the then US ambassador to Germany, Daniel Coats, reportedly had told Interior Minister Otto Schily that Khaled el-Masri had been wrongfully detained and would be shortly released, and requested that the German government keep silent on the issue.<sup>53</sup> Whether Interior Minister Otto Schily was informed shortly before or immediately afterwards, his failure to make the information known made a speedy clarification of the case impossible. When he was interviewed by the parliamentary committee of inquiry, he did not provide details about his meeting with Daniel Coats and said that because it was confidential he had not informed anyone.

On 1 June 2006 the German Federal Intelligence Service (Bundesnachrichtendienst, BND) acknowledged that a staff member had been told informally about Khaled el-Masri's detention in January 2004, but had failed to report it. The staff member, apparently a radio engineer, did not report the incident at the time "because he did not attach any significance to it". The BND has pledged to take action to avoid a repeat of such a breakdown in communications.

The German authorities officially took up his case in June 2004, only after Khaled el-Masri's lawyer informed the German authorities of his client's experience. The Federal Prosecutor's Office decided that this case should be investigated by the Public Prosecutor's Office in Memmingen, which then handed over the criminal investigation on 30 June 2004 to the Munich I Public Prosecutor's Office.

Khaled el-Masri had alleged that a German official called "Sam" had interviewed him several times in Afghanistan shortly before he was released, and that "Sam" accompanied him on his return flight to Europe. In February 2006 Khaled el-Masri picked a senior German police official out of a line-up and said he was "90 per cent" certain that this was "Sam", the man who had interrogated him in Kabul. The police official, however, said that he had been "on holiday" somewhere in Germany, although he could not remember precisely where, at the time Khaled el-Masri claimed to have seen him in Afghanistan.

On 31 January 2007, a court in Munich issued arrest warrants for 13 US citizens, of whom at least 10 were then thought to be CIA agents, believed to

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<sup>52</sup> "Macedonia faces tough questions on CIA prisoner", *Reuters*, 27 April 2006.

<sup>53</sup> The *Washington Post*, 4 and 8 December 2005

be responsible for Khaled el-Masri's rendition. The German government forwarded the warrants to Interpol in February, which reportedly prompted strong US protests.<sup>54</sup> In June 2007, the public prosecutors formally asked the German Ministry of Justice to ask the US authorities for their extradition. A US Department of State spokesman indicated that the USA would not agree to any such request.<sup>55</sup> In light of the US position, the German Ministry of Justice decided not to request extradition. As German law does not allow for trials in absentia, this means that German courts will be unable to hold accountable individuals against whom there is evidence of involvement in Khaled el-Masri's abduction, unlawful detention and alleged torture.

On 9 June 2008 the European Center for Constitutional and Human Rights filed a suit against the German government at the Berlin administration court for its failure to demand the extradition of 13 US citizens, alleged to be CIA agents responsible for the rendition of Khaled el-Masri from Macedonia to Afghanistan.

Khaled el-Masri's case was the first case to be investigated by the German parliamentary committee of inquiry (Untersuchungsausschuss) set up to investigate Germany's role in events relating to the Iraq War and combating international terrorism. The committee's investigation in this case began in May 2006 and ended in late 2006. The report is not expected to be published until 2009. The PACE 2007 report raised questions about the incompleteness of information provided to the committee because of government censorship, the committee's apparent willingness to accept witnesses' refusal to answer questions on the grounds of state secrecy, the extent to which parliamentarians can demand access to classified materials, and can make them public if they consider that certain matters should be disclosed.

### **Germany's responsibility**

Khaled el-Masri was the victim of an enforced disappearance.

If German agents participated in his interrogation in a place where he was being held in prolonged incommunicado detention in a secret location or otherwise subject to torture or other ill-treatment, then Germany would be

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<sup>54</sup> "Contemporary Practice of the United States Relating to International Law", *101 American Journal of International Law* 866 (2007), p. 891

<sup>55</sup> <http://www.state.gov/r/pa/prs/dpb/2007/jun/87258.htm>



responsible for violations of Khaled el-Masri's human rights. German agents participating in such interrogations may also be individually criminally responsible for participation in torture or other ill-treatment. It is also possible that the failure of Germany to ensure that Khaled el-Masri's family was informed of his fate and whereabouts, once that information came within its knowledge, could constitute a separate violation of the rights of his close family members.

### **Developments in the USA**

On 6 December 2005 the American Civil Liberties Union (ACLU) filed a complaint in a US District Court on Khaled el-Masri's behalf against former CIA Director George Tenet, three CIA-linked air transport companies and 20 employees of the CIA or the transport companies.

The case was dismissed in May 2006 on grounds of state secrecy after US government lawyers argued that the suit could jeopardize US national security interests by exposing CIA methods and activities to the general public. The ACLU noted that the US government is "abusing the state secrets privilege to cover up its kidnapping and torture of an innocent man". A November 2006 appeal to the US Court of Appeals failed, and in October 2007 the US Supreme Court declined to review the case, effectively bringing it to an end.

### **ACTION NEEDED NOW**

The Macedonian authorities should:

- initiate a full, effective, independent and impartial investigation into violations of Khaled el-Masri's rights from the moment of detention to his departure from Macedonia, including examining whether or not the violations he subsequently suffered were foreseeable, make its findings and results public, and bring to justice those responsible;
- ensure that Khaled el-Masri is granted full reparation, including restitution, compensation, rehabilitation, satisfaction for the abuses he suffered as a result of Macedonian actions, and measures to prevent reoccurrence.

The German authorities should:

- forward the extradition requests to US authorities, even if US officials have indicated that they will not honour them;
- insist, through diplomatic representations and, if necessary, an international legal claim, that the USA and Macedonia provide full and effective reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, for violations of the rights of its national;
- if it is found that German officials contributed to or participated in violations of his rights or those of his family, provide full reparation, including restitution, adequate and fair compensation, and rehabilitation, satisfaction for any abuses suffered as a result of German actions, and measures to prevent recurrence.

## Case sheet 5 – Ahmed Agiza and Mohammed El Zari

**Ahmed Agiza** and **Mohammed El Zari**, both Egyptian nationals, had their applications for asylum in Sweden rejected on 18 December 2001.<sup>56</sup> Their lawyers were not informed and they were not given the opportunity to appeal against the decision. Within hours of the decision, Swedish police had picked up Mohamed El Zari and Ahmed Agiza and taken them to Bromma Airport, near Stockholm.<sup>57</sup>

At the airport, a team of masked US agents took them to a small changing room where they carried out a body search that amounted to a serious physical assault. The men's clothes were cut off with scissors, and their hair, mouth and ears were examined. One of the men reportedly said that he had something forcibly inserted into his anus. They were then dressed in boiler suits, blindfolded, hooded and photographed.<sup>58</sup> The two men were then escorted barefoot onto a plane, despite the freezing temperature. Once on board the CIA-leased Gulfstream V executive jet (N379P), they were forced

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<sup>56</sup> Unless otherwise stated, the following information is based on the extract from Scrutiny Report 2005/06:KU2 from Sweden's Parliamentary Committee on the Constitution (a summary available in English at [http://www.riksdagen.se/templates/R\\_PageExtended\\_7639.aspx](http://www.riksdagen.se/templates/R_PageExtended_7639.aspx)), or the report of the inquiry, registration number 2169-2004, by Mats Melin, Sweden's Chief Parliamentary Ombudsman, date of adjudication: 22 March 2005, available in English at [http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=Dyna mX\\_SFS\\_Decision&Id=1662](http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=Dyna mX_SFS_Decision&Id=1662).

<sup>57</sup> For further details on the case of Mohammed El Zari and Ahmed Agiza, see Amnesty International, *Partners in Crime: Europe's role in US renditions* (AI Index: EUR 01/008/2006), pp. 34-42, Amnesty International, *Sweden – The Case of Mohamed El Zari and Ahmed Agiza: violations of fundamental human rights by Sweden confirmed* (AI Index: EUR 42/001/2006), and *Egypt: Systematic abuses in the name of security* (AI Index: MDE 12/001/2007), pp. 34-35. For further details on the aircraft used by the CIA, see Amnesty International, *Below the Radar: Secret flights to torture and 'disappearance'* (AI Index: AMR 51/051/2006).

<sup>58</sup> For a more complete account of the ill-treatment of Mohamed El Zari and Ahmed Agiza at Bromma Airport and during their transfer to Cairo, see Amnesty International, *Partners in Crime* (AI Index: EUR 01/008/2006), pp. 34-40, and Amnesty International, *Sweden – The Case of Mohamed El Zari and Ahmed Agiza* (AI Index: EUR 42/001/2006), pp. 2-4. For details on their treatment in detention in Egypt, see *Egypt: Systematic abuses in the name of security* (AI Index: MDE 12/001/2007), pp. 34-35.

into a painful position, and strapped to mattresses on the floor, where they remained handcuffed and shackled during the entire flight to Egypt.

On arrival in Cairo, Ahmed Agiza and Mohammed El Zari were held incommunicado for five weeks. The Swedish authorities had obtained “diplomatic assurances” from Egypt that the men would not be tortured or subject to the death penalty, and would be given a fair trial. These assurances proved worthless. As early as January 2002, both men told Swedish diplomats that they had been tortured.

Ahmed Agiza later told relatives that he was tortured with electric shocks, placed in solitary confinement in harsh conditions, and threatened that his wife and mother would be sexually assaulted in his presence. Mohammed El Zari said he was tortured, including with electric shocks to his genitals, nipples and ears.

Ahmed Agiza was sentenced to 25 years’ imprisonment on 27 April 2004, after an unfair re-trial before a military court.<sup>59</sup> His sentence was later reduced to 15 years and he remains in prison in Egypt. His wife Hanan Attia and their five children are seeking Swedish citizenship; they were granted refugee status in 2005. She says she is “extremely concerned” about her husband’s health and is campaigning for better medical treatment for him.

Mohammed El Zari was released from prison in Cairo on 27 October 2003 without ever having been charged. He remains at liberty in Egypt. He reapplied for a Swedish residence permit, but his application was refused in May 2007. He has appealed against this decision.

### **Sweden’s role and investigations**

Ahmed Agiza and Mohammed El Zari were denied access to a full and fair asylum determination process in Sweden. The immigration authorities found that the men had successfully established that their fear of persecution in Egypt, including the risk of being tortured, was well-founded, but referred the

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<sup>59</sup> In 1998, Ahmed Agiza had been tried *in absentia* before a military court in Egypt “for terrorist activity directed against the state”. He had been found guilty of belonging to an illegal group, *Al Jihad*, and had been sentenced to 25 years’ imprisonment without the possibility of appeal. See Human Rights Watch, *Sweden Implicated in Egypt’s Abuse of Suspected Militant – Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect*, 5 May 2004.

case to the government for a final decision, because Sweden's Security Police (Säkerhetspolisen, Säpo) had said the men were threats to national security. These decisions were taken on the basis of secret intelligence, allegedly provided by foreign intelligence agencies to Säpo, which was withheld from the two men and their lawyers. The decision of the Minister for Foreign Affairs to exclude the two men from refugee protection was not relayed to the men's lawyers until after Ahmed Agiza and Mohammed El Zari had been returned to Egypt. They were given no opportunity to appeal to an independent or impartial body against the decisions to deny them refugee status and to deny them protection against *refoulement*, or against the subsequent decision to summarily expel them from Sweden. Their summary expulsion to Egypt contravened the prohibition of *refoulement*, including the prohibition against transferring a person to another state where there are grounds to believe they would face a real risk of torture.

Sweden apparently continued to recognize that the men were at risk of torture or other ill-treatment, however, as Swedish authorities sought diplomatic assurances from the Egyptian authorities that the men would not be tortured or otherwise ill-treated.

Despite the men's allegations of torture and other ill-treatment, raised during the Swedish Ambassador's first prison visit in January 2002 and in subsequent visits, the Swedish authorities continued to accept simple assertions from the Egyptian authorities that they were not being ill-treated. According to the account established by the UN Human Rights Committee, the Swedish authorities accepted the explanation of these allegations given by their Egyptian counterparts – that such allegations were “something to be expected from ‘terrorists’.”<sup>60</sup> In 2003, the Swedish authorities told the Human Rights Committee that the assurances they had been given were “satisfactory and irrevocable and that they are and will be respected in their full content. The government has not received any information which would cast doubt at this conclusion.”<sup>61</sup>

Subsequently, Sweden's Parliamentary Committee on the Constitution concluded that the government should not have accepted the Egyptian

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<sup>60</sup> HRC Communication No. 1416/2005: Sweden; CCPR/C/88/D/1416/2005; 10 November 2006, para.3.14.

<sup>61</sup> *Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee*, CCPR/CO/74/SWE/Add.1, para.16.

authorities' diplomatic assurances and therefore should not have expelled the two men.

To enforce the expulsion, the Swedish authorities chartered a plane, which was scheduled to leave on 19 December 2001. However, before the expulsion decision was made, the CIA offered the Säpo the use of a plane that "was said to have what was referred to as direct access so that it could fly over Europe without having to touch down"<sup>62</sup>. Säpo later said that the offer was accepted in order to avoid undue delay.

In his 2005 report into events at Bromma Airport, the Swedish Parliamentary Ombudsman stated that the information available to him strongly suggested that the then Swedish Foreign Minister "was informed about the alternative involving the use of an American aircraft for the enforcement [of the expulsion] and the Security Police received the impression that this procedure had been accepted."<sup>63</sup>

Swedish police officers detained both men and took them to Bromma Airport, arriving at 8.20pm and 8.30pm respectively, just before the CIA plane landed. A Säpo officer and a civilian interpreter were on the flight to Cairo. They subsequently confirmed that Ahmed Agiza and Mohammed El Zari were strapped to mattresses and remained shackled during the entire flight to Egypt. The Säpo officer said that the body search and the use of handcuffs and shackles were ordered by the plane's captain. He said the captain told him that this "security check" and the hooding of both men were requirements of a policy implemented after 11 September 2001 concerning the transport of individuals with terrorist links.

The Swedish officer later reported the case to the head of the Security Police, who drew up a memorandum on the expulsion and submitted it to the Swedish Ministry of Justice. In turn, the Ministry of Justice found that "the measures adopted [during the expulsion] were not obviously incompatible with Swedish law but that at the same time they were not totally in accord with Swedish police procedures. The conclusions reached by the Ministry were presented to the Minister of Justice on 26 March 2002. The Ministry of Justice took no measures as a result of the account presented in the Security Police's memorandum."<sup>64</sup>

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<sup>62</sup> See English summary of the Chief Parliamentary Ombudsman's inquiry, s. 2.4.1.

<sup>63</sup> Ibid. s.3.1.2.

<sup>64</sup> English summary of the Chief Parliamentary Ombudsman's inquiry, s.2.6.

The investigation by the Ombudsman concluded that Säpo officers at the airport acquiesced in the acts of US officials, allowing them to exercise public authority on Swedish territory:

*“In reality, the Security police officers at the airport relinquished the enforcement to American officials and gave them free hands to exercise public authority. There is no basis in law for conduct of this kind.”*<sup>65</sup>

The Ombudsman considered that the treatment Ahmed Agiza and Mohammed El Zari suffered from the time of their arrival at the airport until they arrived in Cairo must in its entirety be characterized as inhuman and degrading. He also criticized the behaviour of the Swedish security police, saying that they should have prevented the two men from being treated in this way.

The decisions and inaction of Swedish officials caused the unlawful transfer of Ahmed Agiza and Mohammed El Zari to Egypt. Once the men were in Egypt, the Swedish authorities failed to take effective steps to try to remedy the consequences of the wrongful expulsion. They did not take effective steps even to try to detect whether the men were being subjected to torture. The Swedish Ambassador did not seek a meeting with the men until they had already been detained for five weeks – thus neglecting, as the Human Rights Committee described it, “a period of maximum exposure to risk of harm”. Moreover, once they became aware of allegations of torture and ill-treatment the Swedish authorities simply accepted denials made by the Egyptian counterparts. The Swedish Ambassador’s first and subsequent prison visits were not conducted in private – Egyptian prison personnel were present and took notes – and the Swedish authorities failed to ensure that allegations of torture were communicated to the Swedish lawyers acting for the two men.

In 2007, after a change in government, the Swedish government re-evaluated the decision that its predecessor had taken to expel Mohammed El Zari. In May 2007 it did the same with regard to the decision to expel Ahmed Agiza. As a result the expulsion orders against both men were reversed. Following the review of the decision to expel Mohammed El Zari, the new Minister of Migration and Asylum Policy, Tobias Billström, finally acknowledged that he had been subjected to unfair treatment. In particular, the Minister said, the treatment he suffered at Bromma Airport “was totally unacceptable” and “to

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<sup>65</sup> English summary of the Chief Parliamentary Ombudsman’s inquiry, s.3.1.2.

the extent that there is any possibility to give any apologies for that treatment, it is of course conveyed through this decision".<sup>66</sup>

In addition, the Swedish authorities revoked the expulsion orders against them. Both men then reapplied for a resident permit in Sweden.

In May 2007 the Swedish Migration Board rejected Mohammed El Zari's application for a residence permit. This was on the basis of advice from Säpo that Mohammed El Zari would pose a threat to Swedish national security if permitted to return.<sup>67</sup> Mohammed El Zari has appealed.

On 9 October 2007 the Swedish Migration Board refused Ahmed Agiza's application for residence and work permits. Although the Board recognized that Ahmed Agiza's family connections in Sweden were such that he would normally be granted a residence permit, it refused his application on the grounds that the length of Ahmed Agiza's prison sentence meant that his application to live in Sweden was not an "actual possibility".<sup>68</sup> The Board said that if Ahmed Agiza reapplied near the time of his release, it would consider whether he "constitutes a threat to the common order and security". Ahmed Agiza has appealed.

The Swedish government will make the final decision on these two applications for residence permits.

No decision has yet been made public on the claims for compensation, which have been submitted to the Swedish authorities on behalf of both men.

### **Sweden's responsibility**

On 20 May 2005 the UN Committee against Torture (CAT) found that Sweden had violated the Convention against Torture by returning Ahmed Agiza to a country where there were substantial grounds for believing that he would be in danger of being subjected to torture. It also concluded that Ahmed Agiza had suffered "at least" cruel, inhuman or degrading treatment at the hands of

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<sup>66</sup> Unofficial AI translation from the original Swedish interview with *Sveriges Radio*, 1 March 2007 – <http://www.sr.se/ekot/artikel.asp?artikel=1230523> .

<sup>67</sup> AI translation of Swedish Migration Board, *Decision: Matter concerning residence permit etc.*, 10 May 2007

<sup>68</sup> AI translation of Swedish Migration Board, *Decision: Matter concerning residence permit etc.*, 9 October 2007.



foreign agents on Swedish territory, with the acquiescence of the Swedish police.<sup>69</sup>

The CAT stated that at the time of Ahmed Agiza's removal, the Swedish authorities knew or should have known that the use of torture was widespread in Egypt and the risk was particularly high in relation to people detained for political and security reasons. It concluded that "the procurement of diplomatic assurances, which moreover provide no mechanism for their enforcement, did not suffice to protect against this manifest risk."<sup>70</sup>

On 10 November 2006, the UN Human Rights Committee also found that the Swedish authorities were responsible for multiple human rights violations in connection with summary expulsion of Mohammed El Zari from Sweden to Egypt.<sup>71</sup> It concluded that Sweden had violated the prohibition of *refoulement*.

The Committee also found that the use of force against Mohammed El Zari at Bromma Airport was excessive and violated Article 7 of the ICCPR. Further, it found that Sweden was responsible for these acts, since they had been performed by foreign officials exercising sovereign authority on its territory with the consent or acquiescence of Swedish officials.

In relation to the treatment of Mohammed El Zari at Bromma Airport, the Human Rights Committee found that the delay by the Swedish authorities in instigating a criminal process, despite their knowledge of the ill-treatment from the moment it took place, before the very eyes of agents of the Swedish state, also violated Article 7.

The Committee found that the Swedish authorities' failure to notify Mohammed El Zari's lawyer of the decision to expel him before it was put into effect violated Mohammed El Zari's right of complaint, including to seek interim measures of protection, guaranteed by Article 1 of the Optional Protocol to the ICCPR.

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<sup>69</sup> UN Committee against Torture, *Agiza v. Sweden*, 24 May 2005, para.13.4.

<sup>70</sup> *Ibid.*

<sup>71</sup> HRC Communication No. 1416/2005: Sweden; CCPR/C/88/D/1416/2005; 10 November 2006. Note that 'El Zari' is Amnesty International's chosen transliteration from Arabic. However, the English spelling used in the UN Human Rights Committee's decision, and much of the reporting of this story in the Swedish press, is 'Alzery'. For a full analysis of and response to the HRC's findings, please see Amnesty International, *Sweden – The Case of Mohamed El Zari and Ahmed Agiza* (AI Index: EUR 42/001/2006), pp. 6-11.

The Human Rights Committee further noted that even after investigations by the Ombudsman and prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation. In addition to the undue delay before the case was finally referred to prosecutorial authorities, the Committee also noted that the Parliamentary Ombudsman, having decided not to initiate a preliminary criminal investigation, proceeded to an “informational investigation including substantial compelled testimony”, and ultimately the systemic effect was to “seriously prejudice the likelihood of undertaking effective criminal investigations at both command and operational levels of the Security Police”. This led the Committee to stress Sweden’s obligation “to ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence”. The Committee held that Sweden’s failure to do so in this case constituted a further violation of its obligations under the ICCPR.

In light of its decision, the Human Rights Committee found that Sweden was obliged to provide Mohammed El Zari with an effective remedy, including compensation, and that it wished to receive from Sweden, within 90 days, information about its views and measures taken avoid similar violations in the future.

Most recently, in May 2008, the CAT, in its Concluding observations on Sweden’s compliance with the Convention against Torture, stated that it regretted “the lack of full implementation of the key elements in this decision [the CAT decision in *Agiza*], in particular an in-depth investigation and prosecution of those responsible, as appropriate. It further regrets the lack of full implementation of the Views of the Human Rights Committee in [El Zari’s case], including the recommended remedies”. Furthermore the Committee recommended that “The State Party should take all necessary measures to implement the decision[s] [...] and provide them with fair and adequate compensation. Furthermore, the State party should undertake an in-depth investigation into the reasons for their expulsion and prosecute those responsible, as appropriate.”

Despite the findings of the Ombudsman and the UN bodies, the Swedish authorities have failed to instigate a full and independent investigation into all aspects of the role played by the Swedish authorities in the men’s transfer and

ill-treatment, both at Bromma Airport and after their transfer to US and subsequently Egyptian custody. To date no individuals have been held fully responsible in relation to the violations committed in the course of the operation that led to Ahmed Agiza and Mohammed El Zari being subjected to a serious physical assault on Swedish territory, and being returned to face torture in Egypt.

Even though Sweden had accepted that it violated its obligations under the ICCPR, the Swedish government has:

- maintained that it bears no responsibility for what happened to Ahmed Agiza and Mohammed El Zari in Egypt;
- maintained that it has no outstanding obligation to conduct an independent and thorough investigation into these events, on the ground that various domestic investigations, including by prosecuting authorities, have already examined aspects of the events leading to the expulsion;
- failed to date to provide full reparations to the men for the violations suffered as a result of violations by Sweden;
- failed to confirm that it will, as an initial measure of reparation, overturn the initial decisions of the Migration Board and give both men residence permits to allow them to return to Sweden.

### **Developments in the USA**

On 30 May 2007 the American Civil Liberties Union (ACLU) filed a federal lawsuit in the USA on behalf of Ahmed Agiza and two other rendition victims against Jeppesen Dataplan, Inc., a wholly owned subsidiary of Boeing Company. In August 2007, two more rendition victims, Bisher Al-Rawi and Muhammad Faraj Ahmed Bashmilah, and their lawyers, joined the lawsuit. The lawsuit accused Jeppesen of knowingly providing direct flight services to the CIA that enabled the rendition of terror suspects to face torture and other ill-treatment.<sup>72</sup> In February 2008 the case was dismissed by the court, based on US government arguments that the matter could not be considered without

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<sup>72</sup> See ACLU Press Release, *ACLU sues Boeing subsidiary for participation in CIA kidnapping and torture flights*, 30 May 2007, <http://www.aclu.org/safefree/torture/29920prs20070530.html>

revealing state secrets. In March 2008, the ACLU announced that it would appeal against this decision.

### **ACTION NEEDED NOW**

The Swedish authorities should:

- ensure a full, effective, independent and impartial investigation into possible individual criminal responsibility of Swedish and foreign agents involved in the human rights violations suffered by Ahmed Agiza and Mohammed El Zari and bring any perpetrators to justice;
- press the Egyptian authorities to investigate the alleged torture of Ahmed Agiza and Mohammed El Zari; and to either release Ahmed Agiza or promptly proceed with a new and fair trial and provide him with unfettered access to his lawyers and family and appropriate medical care;
- provide adequate reparation to Ahmed Agiza and Mohammed El Zari for the human rights abuses suffered as a result of Sweden's actions, including facilitating their return to Sweden.

## Case sheet 6 – Bisher Al-Rawi and Jamil El-Banna

On 8 November 2002 **Bisher Al-Rawi** and **Jamil El-Banna** flew from the UK to Gambia reportedly to set up a peanut processing business.<sup>73</sup> Bisher Al-Rawi, an Iraqi national, had been lawfully resident in the UK since 1983; Jamil El-Banna, a Jordanian national, had arrived in the UK in 1994 and was given indefinite leave to remain<sup>74</sup> in the UK as a refugee.<sup>75</sup>

Six days earlier, Bisher Al-Rawi, Jamil El-Banna and Abdullah El-Janoudi, a UK national with whom they apparently planned to set up the business, had been detained at London's Gatwick Airport just before they tried to board a flight to Gambia, because a "suspect device" – which later turned out to be a modified battery charger – was found in Bisher Al-Rawi's luggage. After two days of questioning by UK authorities about their alleged association and involvement with international terrorism, the three men were released without charge and told they were free to travel to Gambia.

On their arrival at Banjul Airport in Gambia, Bisher Al-Rawi, Jamil El-Banna and Abdullah El-Janoudi were detained by the Gambian National Intelligence Agency (NIA). Bisher Al-Rawi's brother, Wahab Al-Rawi, a UK national who had gone to the airport to meet them, was also detained. After initial questioning at the NIA headquarters in Banjul on the purpose of their visit to Gambia, the interrogation of the four men was apparently taken over by US agents. The men were held in several undisclosed locations in Banjul during this time.

The US authorities informed the UK security services in November 2002 of their intention to transfer all four men to the US detention facility at Bagram

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<sup>73</sup> For a more complete description of the rendition of Bisher Al-Rawi and Jamil El-Banna, and UK authorities' involvement in their detention and possibly their rendition, see Amnesty International, *Partners in Crime: Europe's role in US renditions* (AI Index: EUR 01/008/2006), pp. 42-46.

<sup>74</sup> Indefinite leave to remain is defined by the UK Borders and Immigration Agency as 'permission to stay permanently (settle) in the United Kingdom, free from immigration control'.

<sup>75</sup> Bisher Al-Rawi's relatives living in the UK are all UK nationals, as are Jamil El-Banna's five young children.

airbase in Afghanistan.<sup>76</sup> The UK authorities made consular representations to their US counterparts on behalf of the two UK nationals, Wahab Al-Rawi and Abdullah El Janoudi, and both men were released without charge in December 2002 and returned to the UK. However, the UK government told the US authorities in a telegram sent on 6 December that it “would not seek to extend consular protection to non-British nationals”.<sup>77</sup>

Bisher Al-Rawi and Jamil El-Banna were held incommunicado for over a month in Banjul and questioned by US agents about their alleged links with al-Qa’ida. On 9 December 2002<sup>78</sup> the US authorities secretly transferred both men to Bagram. Their transfer took place before they were allowed to consult a lawyer, without independent review of any evidence against them, and despite the fact that a habeas corpus petition on their behalf was pending in the High Court in Gambia. After approximately a month in Bagram they were transferred to Guantánamo Bay.

Bisher Al-Rawi and Jamil El-Banna have alleged that they were tortured and otherwise ill-treated during their transfer from Gambia to Afghanistan and during their detention in Afghanistan.<sup>79</sup> They say that they were handcuffed and hooded, had their clothes cut off, were physically assaulted, and were shackled and harnessed on a plane for the transfer from Gambia to Afghanistan. They also allege they were handcuffed, given inadequate food and water, and kept in freezing, dark cells in Afghanistan.<sup>80</sup>

In April 2006 the then UK Foreign Secretary, Jack Straw, wrote to his US counterpart, Condoleezza Rice, to request the release and return to the UK of Bisher Al-Rawi. On 1 April 2007 Bisher Al-Rawi was returned to the UK and

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<sup>76</sup> According to a report published on 26 July 2007 by the UK’s Intelligence and Security Committee (see below).

<sup>77</sup> See Intelligence and Security Committee, *Rendition*, para. 135.

<sup>78</sup> *Mohamed et al v. Jeppesen Dataplan*, first amended complaint, Civil Action No. 5:07-cv-02798 (JW), August 2008, para. 54.

<sup>79</sup> See, among others, Amnesty International, *Partners in Crime: Europe’s role in US renditions* (AI Index: EUR 01/008/2006), pp. 42-46, Amnesty International, *USA – Guantánamo and beyond: The continuing pursuit of unchecked executive power* (AI Index: AMR 51/063/2005), p. 123 and Amnesty International, *USA: Who are the Guantánamo detainees? Case sheet 3: Detainees from the UK* (AI Index: 51/072/2004).

<sup>80</sup> See Amnesty International, *USA – Guantánamo and beyond: The continuing pursuit of unchecked executive power* (AI Index: AMR 51/063/2005), p. 123 and David Rose, “A secret agent’s story: ‘I helped MI5. My reward: brutality and prison’,” *The Observer*, 29 July 2007.

reunited with his family, after more than four years in Guantánamo. He was not charged with any offence on his return to the UK.

He told the media on his arrival:

*"I would like to thank Amnesty International and all those there whose good work through out the world is a blooming flower of hope. I sincerely believe that without Amnesty's immediate intervention in our case during those extremely difficult first days after our arrest in The Gambia, we probably would have been goners."*

The UK's belated intervention on his behalf occurred only following revelations in court about possible connections between Bisher Al-Rawi and the UK security services (see below).

In August 2007, Bisher Al-Rawi, along with Muhammad Bashmilah,<sup>81</sup> a Yemeni national and another victim of rendition, joined a lawsuit filed in the USA in April 2007 by the American Civil Liberties Union (ACLU) on behalf of three other rendition victims against Jeppesen Dataplan, Inc., a subsidiary of Boeing Company.<sup>82</sup> The lawsuit charged Jeppesen Dataplan of knowingly providing direct flight services to the CIA that enabled the rendition of terror suspects to face torture and other ill-treatment.<sup>83</sup> In February 2008 the case was dismissed by the court based on US government arguments that the matter could not be considered without revealing state secrets. In March 2008, the ACLU announced that it would appeal against this decision.

Bisher Al-Rawi's lawyers suspect that some of the logistical support for the CIA flights leased from Jeppesen Dataplan was arranged on British territory at Jeppesen's office in West Crawley, near London's Gatwick airport.<sup>84</sup>

In relation to Jamil El-Banna, the UK government announced on 7 August 2007 that it would make representations on his behalf (and on behalf of four

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<sup>81</sup> For a details of the rendition of Muhammad Faraj Ahmed Bashmilah, see Amnesty International, *USA: Below the radar: Secret flights to torture and 'disappearance'* (AI Index: AMR 51/051/2006).

<sup>82</sup> See ACLU Press Release, *Two More Victims of CIA's Rendition Program, Including Former Guantánamo Detainee, Join ACLU Lawsuit Against Boeing Subsidiary*, 1 August 2007, <http://www.aclu.org/safefree/torture/31165prs20070801.html>.

<sup>83</sup> See ACLU Press Release, *ACLU sues Boeing subsidiary for participation in CIA kidnapping and torture flights*, 30 May 2007, <http://www.aclu.org/safefree/torture/29920prs20070530.html>

<sup>84</sup> Ian Cobain, "Air firm accused of rendition flights role," *The Guardian*, 27 November 2007.

other UK residents) then still held at Guantánamo Bay, on the basis that the five men “have links to the UK as former residents, having been granted refugee status, indefinite leave or exceptional leave to remain prior to their detention”.<sup>85</sup> The UK Foreign Secretary wrote on the same day to the US Secretary of State to make a formal request for the release and return of the five men.<sup>86</sup>

Jamil El-Banna was returned to the UK on 19 December 2007, along with two of the other UK residents, Omar Deghayes and Abdennour Sameur. All three were detained on arrival in the UK. Abdennour Sameur was subsequently released without charge. Jamil El-Banna and Omar Deghayes were released on bail pending a full hearing of a request for their extradition to Spain, following the issue of European Arrest Warrants in their names by a Spanish court.

These extradition proceedings cast a shadow over their lives until 6 March 2008, when they were dropped unconditionally, the court in Spain recognizing that the disastrous effect of years of unlawful custody and alleged ill-treatment on the physical and mental health of Jamil El-Banna meant that he would be unfit to stand trial.

Jamil El-Banna’s release allowed him to see his youngest child for the first time, since she had been born after his transfer to Guantánamo. His family have described the pain of not knowing if and when they would ever be reunited with him.<sup>87</sup> In a statement delivered to an Amnesty International/Reprieve conference in November 2005, his wife, Sabah El-Banna, described her family’s anguish:

*“My pen cannot express the pain and sadness I feel in my heart for what my family has been going through...[M]y children and I have been suffering this injustice. They have not only treated my husband unjustly... but they have treated my children and me even more unfairly. I cannot tell you just how exhausting and worrying the past three years have been for me... The only thing I can think about is my children and*

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<sup>85</sup> See UK Foreign and Commonwealth Press Office Press Release, *Guantanamo Bay: Former UK Residents*, 7 August 2007.

<sup>86</sup> Amnesty International Press Release, *USA (Guantánamo Bay) - Government decision to intervene for UK residents welcomed: ‘Travesty of justice’ condemned and UK urged to speak out*, 7 August 2007.

<sup>87</sup> On the effect of prolonged detention at Guantánamo Bay on the families of detainees, see Amnesty International, *USA – Guantánamo: Lives Torn Apart – The impact of indefinite detention on detainees and their families* (AI Index: AMR 51/007/2006).



*my husband. I do not even think of myself, it's the last thing on my mind".<sup>88</sup>*

### The UK's role and investigations

*"This case, which concerns two British permanent residents arrested in Gambia in November 2002 and transferred first to Afghanistan and from there to Guantanamo... is an example of (ill-conceived) cooperation between the services of a European country (the British MI5) and the CIA in abducting persons against whom there is no evidence enabling them to be kept in prison lawfully..."*

Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe<sup>89</sup>

Since November 2002, Amnesty International has repeatedly raised its concerns about the treatment of Bisher Al-Rawi and Jamil El-Banna with the UK authorities, asking in particular whether they had played any role in the men's unlawful transfer by US agents, and what steps, if any, the UK had taken to intervene on their behalf.<sup>90</sup>

In 2006, the possible extent of the UK's involvement in the detention and rendition of Bisher Al-Rawi and Jamil El-Banna became clearer as the result of a series of revelations during judicial review proceedings before the High Court of England and Wales.<sup>91</sup> Documents disclosed by the UK security services

<sup>88</sup> Amnesty International/Reprieve – The Global Struggle against Torture: Guantánamo Bay, Bagram and Beyond. 19-21 November 2005

<sup>89</sup> Op. cit., 2007 PACE report, para.163.

<sup>90</sup> Amnesty International first wrote to the UK authorities concerning these cases in February 2003, urging the UK to intervene on behalf of the men and to clarify any role that the UK may have played in their transfer to US custody. Since December 2002, i.e. shortly after their arrest, AI members had been sending urgent appeals to the Gambian and US authorities seeking clarification of their fate – see the initial Urgent Action appeal issued on 11 December 2002, AI Index: [AFR 27/006/2002](#).

<sup>91</sup> Judicial review proceedings in the UK allow the courts to review the legality of the actions of public bodies, including the executive, on an application from an individual or organization affected by those actions. In 2006 the High Court heard a challenge by way of judicial review to, among other things, the refusal of the UK authorities to make representations on behalf of UK residents in Guantánamo. See *R (on the application of Al Rawi & Ors) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 972 (Admin).

confirmed that the UK security services had kept Bisher Al-Rawi and Jamil El-Banna under surveillance prior to their departure for Gambia. The High Court also heard how the UK security services had provided information about the two men to a country other than Gambia, the identity of which was not disclosed at the time.

A report by the UK's Intelligence and Security Committee (ISC) of its investigation into whether UK security and intelligence agencies knew or were involved in US renditions<sup>92</sup> confirmed in July 2007 that this third country was the USA. It also gave further details of what information had been given, and when.

The UK security service sent a telegram to their US counterparts on the day that Bisher Al-Rawi and Jamil El-Banna were arrested at Gatwick airport, to inform them of their assessment of the two men. On 4 November, when Jamil El-Banna and Bisher Al-Rawi were released without charge by police in the UK, the UK security service sent another telegram to their US counterparts, including details of the plans that Bisher Al-Rawi and Jamil El-Banna had to travel to the Gambia in the near future. The telegram included a request from the UK for the USA to ask the Gambian security services to "cover" the two men while they were in the Gambia. Finally, on 8 November, the UK security services sent a third telegram to the US authorities, giving details of the flight on which the men were travelling. The first two of these telegrams included caveats against any "overt, covert or executive action" on the basis of the information they contained, while the third, containing the men's flight details, included a caveat stating that the information was not for distribution to third countries.<sup>93</sup>

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<sup>92</sup> The Intelligence and Security Committee's Report into Rendition, 2007 (submitted by the ISC to the Prime Minister on 28 June 2007, and made partially public in redacted form the following month), and the related press release, "UK Agencies and Rendition," 25 July 2007, both of which are accessible from: <http://www.cabinetoffice.gov.uk/intelligence.aspx>. The Intelligence and Security Committee (ISC) is a body made up of parliamentarians. Its members are appointed by the Prime Minister, to whom it reports directly. Its statutory function is to "examine the policy, administration and expenditure" of the intelligence and security agencies; it describes itself as having a general 'oversight' remit.

<sup>93</sup> The full text of these telegrams, and other documents referred to here, are available from the website of the All Party Parliamentary Group on Extraordinary Rendition: [http://www.extraordinaryrendition.org/component/option,com\\_docman/task,doc\\_download/gid,20/Itemid,27/](http://www.extraordinaryrendition.org/component/option,com_docman/task,doc_download/gid,20/Itemid,27/)

The first telegram included information to the effect that the suspect item found in the men's luggage was a possible "improvised explosive device". The UK security services later failed to inform the US that they had examined this device and that it had been shown to be a modified battery charger, commercially available in an unmodified form. The ISC reported that it had not seen "any evidence that the Security Service told the US of the final assessment of the device".<sup>94</sup>

In the course of the High Court hearing, it also emerged that Bisher Al-Rawi claimed that, at the request of the UK security services, he had agreed to inform them about someone who was in hiding and whom the authorities suspected of involvement with terrorism. This was later confirmed by the ISC report to be Abu Qatada, a Jordanian national who had been living in the UK as a refugee. In court it was claimed that the UK security services had promised Bisher Al-Rawi that they would assist him if he found himself in any difficulty.

No assistance was forthcoming when Bisher Al-Rawi was in Guantánamo. However, following these damaging revelations in the High Court the UK authorities agreed to petition their US counterparts to seek the release of Bisher Al-Rawi and his return to the UK.

In July 2007, following his return to the UK, Bisher Al-Rawi gave a number of interviews to the UK media.<sup>95</sup> In one of these interviews he said he felt he had been betrayed by the British intelligence agency. He alleged that intelligence provided by UK security services to their US counterparts was the basis for his detention, and that the UK authorities refused to identify his intelligence agency "handlers" in order to allow them to corroborate his story during his hearing before the Combatant Status Review Tribunal (CSRT) in Guantánamo.

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<sup>94</sup> *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states: Report*, PACE Doc. 10957, 12 June 2006. This report notes: "The conclusion to the charger episode – that it was indeed a 'harmless device' – was communicated to the [UK] Ministry of Foreign Affairs by MI5 in a telegram of 11 November 2002. Unfortunately, there is no evidence that this information was ever conveyed to the CIA. The allegations concerning this 'device' reappeared in their 'trial' before the CSRT (Combatant Status Review Tribunal) as 'evidence' that they were 'enemy combatants'" (para. 167).

<sup>95</sup> David Rose, "A secret agent's story: 'I helped MI5. My reward: brutality and prison'," *The Observer*, 29 July 2007, <http://www.guardian.co.uk/guantanamo/story/0,,2137161,00.html>, and Channel 4 Program, "Bisher Al-Rawi tells his story", 30 July 2007, <http://www.channel4.com/news/articles/world/americas/bisher+alrawi+tells+his+story/639472>.

The record of the CSRT proceedings in Bisher Al-Rawi's case shows that the President of the Tribunal considered that the testimony of these individuals could have been relevant to the question of whether Bisher Al-Rawi was properly classified as an "enemy combatant". Since Bisher Al-Rawi did not know his handlers' full names, they could not be identified and therefore could not give evidence to the CSRT. The Tribunal President stated that the CSRT had "contacted the British government" in an effort to identify these witnesses but that the UK authorities were "not willing to provide the Tribunal with that information".<sup>96</sup>

Bisher Al-Rawi told the journalist interviewing him after his release from Guantánamo:

*"I used to think of them [his alleged contacts in MI5] as cool, tough, as gentlemen. I used to speak about them in the Muslim community, saying they had a level of dignity and that we could trust them. When I got back home one of the first messages I got was from a friend who had heard me say that. He said: 'Bisher, they weren't very honourable, were they?'" I suppose he was right. All the credit for what I went through goes to them.*"<sup>97</sup>

Amnesty International has called repeatedly on the UK authorities to establish a full, effective, independent and impartial investigation into the extent of the UK's involvement in the detention and rendition of Bisher Al-Rawi and Jamil El-Banna with a view to establishing, among other things, any specific responsibilities of UK agents for the human rights violations suffered by these two men.<sup>98</sup>

The UK authorities have made it clear that its belated decision to make representations on behalf of Bisher Al-Rawi and Jamil El-Banna did not amount to any acknowledgement either that the UK was under any obligation to intervene on their behalf, or that the UK shared any responsibility for the detention of the men or for their subsequent transfer by US authorities to Guantánamo Bay.

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<sup>96</sup> See p. 18 of the transcript released by the US Department of Defense, [http://www.dod.mil/pubs/foi/detainees/csrt/Set\\_8\\_0887-1017.pdf](http://www.dod.mil/pubs/foi/detainees/csrt/Set_8_0887-1017.pdf).

<sup>97</sup> Quoted in David Rose, "A secret agent's story," *The Observer*, 29 July 2007.

<sup>98</sup> See, for example, Amnesty International, *Partners in Crime* (AI Index: EUR 01/008/2006) and Amnesty International Press Release, *UK: Court of Appeal misses opportunity on UK residents held at Guantánamo* (AI Index: EUR 45/018/2006), 12 October 2006.

In a letter to Amnesty International in April 2007 then Foreign Secretary Margaret Beckett stated that “the UK did not request the detention of either of the men in Gambia and did not play any role in their transfer to Afghanistan and Guantanamo Bay”, a position repeated almost verbatim by her successor David Miliband in a letter to Amnesty International in October 2007.

In correspondence with the Foreign Secretary in June 2007, Amnesty International noted that it considered that the UK was indeed implicated both in the detention of the two men in Gambia and in their subsequent transfer to Afghanistan and Guantánamo Bay, based on the information summarized above concerning intelligence shared by the UK security services with their US counterparts. The provision of this information led to their rendition, torture and other ill-treatment and prolonged detention without trial. In addition, the fact that UK authorities did not make timely diplomatic representations on behalf of the two men when it was told of the intention to transfer them unlawfully to a place of secret detention; the apparent failure to communicate their conclusion about the battery charger. UK intelligence initially sent to their US counterparts; or to respond to Bisher Al-Rawi’s request for corroboration of his relationship with UK intelligence in the context of his ‘Combatant Status Review Tribunal’, may have contributed to the continued detention of the two men in Guantánamo Bay.

It is not sufficient for the UK to say that it did not “request” the detention and rendition of Jamil El-Banna and Bisher Al-Rawi. That position, even if accurate, leaves open the possibility that UK agents knew or should have known that their actions would aid and assist others to violate the rights of the men.

In its report the ISC detailed a “gradual awareness” on the part of UK security services of the US system of rendition.<sup>99</sup> One of the cases in which the ISC found UK agencies to have been involved, albeit in its view “indirectly, and inadvertently”, was that of Bisher Al-Rawi and Jamil El-Banna.<sup>100</sup> It said the men’s detention in Gambia, transfer by US authorities to Afghanistan and subsequent transfer to Guantánamo Bay represented a “step change” from existing practice. The ISC appears to have conducted its investigation on the basis that theirs was “the first case in which the U.S. agencies conducted a

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<sup>99</sup> Intelligence and Security Committee, *Report into Rendition*, para. D, p. 29.

<sup>100</sup> For the ISC’s investigation into the case of Bisher Al-Rawi and Jamil El-Banna, see the ISC’s *Report into Rendition*, 2007, paras. 65-66, 111-147, D-I and P-X, and the related press release, “UK Agencies and Rendition,” 25 July 2007. The quote is in reference to the press release.

'Rendition to Detention' of individuals entirely unrelated to the conflict in Afghanistan".

The ISC also found that there was "nothing exceptional" in UK security services' decision to inform their US counterparts that the men had been detained at Gatwick airport on their way to the Gambia, along with a security assessment of the men. In addition, it found that the telegram making this communication "was correctly covered by a caveat prohibiting the US authorities from taking action on the basis of information it contained," and that the UK security services fully expected their US counterparts to honour the caveat. The ISC concluded that for two reasons: (1) because it believed this to be the first such case of "rendition to detention," and given that "agency priorities at the time were – rightly – focused on disrupting attacks rather than scrutinizing American policy", and (2) because it believed that the fact that the security services included a caveat in their communications to their US counterparts meant that UK security services "did not intend the men to be arrested", and did not foresee, and could not have foreseen, that the caveat would be disregarded.

Amnesty International is concerned that the ISC's understanding of the publicly available information detailing the extent of the US programme of renditions prior to November 2002 appears to have been incomplete. The ISC – at least, in the unredacted, public sections of its report – makes no reference to the case of six Bosnian-Algerians who were subject to rendition from Bosnia to Guantánamo Bay in January 2002.<sup>101</sup> This case was, at very least, relevant to the question of what the UK security services could have been aware in November 2002.

Amnesty International continues to have serious concerns not only about deficiencies in the ISC report, but about characteristics of the ISC itself which mean that it was not the appropriate body to carry out an adequately independent, impartial and effective investigation.<sup>102</sup>

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<sup>101</sup> Amnesty International made its concerns public on the case of the unlawful transfer of these six men on 18 January 2002. See Amnesty International, *Bosnia-Herzegovina: Letter to the US Ambassador regarding six Algerian men* (AI Index: EUR 63/003/2002).

<sup>102</sup> Amnesty International representatives gave evidence to the ISC during its investigation into renditions, but made clear both at the time and subsequently that the organization did not consider the ISC to be the appropriate body to conduct the necessary full and independent investigation into these allegations.

Firstly, the members of the ISC are appointed by the Prime Minister, and the ISC reports directly to the Prime Minister. Secondly, it is the Prime Minister who decides whether to place any ISC report<sup>103</sup> before parliament, and decides the extent to which the report's content should be redacted on the grounds that it might harm the ongoing operation of the security services. The ISC report on renditions was, as far as can be judged, subject to extensive redaction prior to publication. As such, Amnesty International does not consider that the ISC is endowed with adequate institutional and functional independence from the those potentially responsible for the violations, nor sufficient powers or transparency to produce fully effective, independent, impartial and adequately public findings and results as required by international human rights law.

### **The UK's responsibility**

The various investigations held so far make clear that the UK authorities were implicated in the arrest of Jamil El-Banna and Bisher Al-Rawi. Though the UK placed certain caveats on the information they provided, it is clear these caveats were not respected in practice. If the UK knew or should have known that the information they provided would be used to carry out the arbitrary detention and rendition of the men, it would be responsible for its contribution to the violations. The apparent failure to correct the accusatory information about the suspected explosive device may have contributed to the length or severity of the violations to which the men were subject.

The men suffered violations of the right to have access to a court to test the legality of their detention; the right to liberty and security of person; the right not to be tortured or otherwise ill-treated and the right to an effective remedy. The UK must institute fully independent and effective investigations into the degree of involvement and knowledge of UK agents of the circumstances.

### **ACTION NEEDED NOW**

The UK authorities should:

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<sup>103</sup> Other than the ISC Annual Report, which the Prime Minister is required by law to lay before Parliament; even this, however, is subject to the same provisions as all other ISC reports, which give the Prime Minister the power to order such redactions as he considers necessary before publication.

- establish a full, effective, independent and impartial investigation into the UK's involvement in the detention and rendition of Bisher Al-Rawi and Jamil El-Banna and make public the findings and results;
- make full reparation for any knowing failure to correct any previously provided incorrect information which is determined to have exacerbated or prolonged the violations suffered by the men, and, if the investigations find UK responsibility in relation to other violations, provide reparations and bring the perpetrators to justice.