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REDRESS would like to thank Freshfields Bruckhaus Deringer LLP for supporting this initiative and for hosting this event.

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REDRESS

Seeking Reparation for Torture Survivors

REINTEGRATION AND REPARATION FOR VICTIMS OF RENDITION AND UNLAWFUL DETENTION IN THE 'WAR ON TERROR':

A EUROPEAN PERSPECTIVE

A Report on Proceedings of a Conference that took place in London, 10-11 September 2008

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I. Introduction

A terror suspect is kidnapped, tortured, arbitrarily detained for years without charge and isolated from family. Eventually, he or she is released. We celebrate because the mockery of our justice systems and their torment, has ended; but has it? What actually happens to these individuals after they have been released? Do they seamlessly pick up their lives as if nothing had happened?

As Dick Marty, Rapporteur of the Parliamentary Assembly of the Council of Europe's Inquiry into secret detentions and illegal transfers of detainees in Council of Europe member states, has indicated:

> After the suffering they went through, they were released without a word of apology or any compensation – with one remarkable exception owing to the ethical and responsible approach of the Canadian authorities – and also have to put up with the opprobrium of doubts surrounding their innocence and, right here in Europe, racist harassment fuelled by certain media outlets. These are the terrible consequences of what in some quarters is called the "war on terror".[1]

This Report summarises the proceedings of a Conference convened by REDRESS and Freshfields Bruckhaus Deringer LLP in September 2008 which considered the multiple challenges facing individuals who had been subjected to 'extraordinary rendition' and unlawful and prolonged detention in the context of the 'war on terror'. With a particular focus on Europe, the Conference reflected on the different types of problems experienced by such individuals upon release from detention and return to their families and communities. Further, it considered whether, and to what extent governments, lawyers, health professionals and other service providers are responding to the challenges.

The counter-terrorism tactics instituted by the United States (U.S.) government with the assistance, support or knowledge of numerous countries worldwide, in the aftermath of the 11 September 2001 attacks are well-known.

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[1] Council of Europe, Parliamentary Assembly, "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Part C 'Explanatory memorandum', Doc. 11302 rev. (11 June 2007), at para. 2.

The measures which have particular relevance for the Conference and this Report include:

- The practice of 'extraordinary rendition': this typically consists of the extra-judicial abduction and transfer of terror suspects, without any formal charge and outside the remit of any legal process for the purposes of coercive interrogation and intelligence-gathering;

- The unlawful and prolonged detention of suspects in secret or other locations outside of the reach of regular legal systems;

- The use of interrogation tactics and inhuman detention conditions which may amount to torture or cruel, inhuman or degrading treatment or punishment.

These measures are recognised to contravene international law binding on all states. As stated by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "[i]mpermissible under international law is the "extraordinary rendition" of a person to another State for the purpose of interrogation or detention without charge".[2] This type of rendition, he adds, "runs the risk of the detained person being made subject to torture or cruel, inhuman or degrading treatment".[3]

While the campaigns and litigation for the release of these individuals have been well-publicised, very little information is available on the individuals' lives once they are actually released. Since 2002, approximately 525 individuals – out of the approximately 800 reported to have been detained at Guantánamo Bay alone since January 2002 - have been released.[4] The detention site at Guantánamo Bay has received the most public attention, however there are a number of secret and other detention facilities around the world about which there is little information, and the number and whereabouts of former and current detainees of these sites remains obscure.

The consequences of 'extraordinary rendition', unlawful prolonged detention and ill-treatment are multi-faceted and pervade almost all aspects of these

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[2] UN Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: addendum: mission to the United States of America", UN Doc. A/HRC/6/17/Add.3 (22 November 2007), para 36.

[3] *Ibid*.

[4] U.S. Department of Defense, News Release, "Detainee Transfer Announced" (17 January 2009), available at: http://www.defenselink.mil/releases/release.aspx?releaseid=12449.

individuals' lives as well as that of their families. Beyond the physical suffering associated with torture and other forms of prohibited ill-treatment, survivors typically experience emotional and psychological trauma resulting also from torture, the abrupt and prolonged separation from their families, isolation and the lack of a clear legal situation. As Murat Kurnaz, former Guantánamo Bay detainee has stated: 'From 2002 until my lawyer visit in 2004, in Guantánamo, I had no idea anyone even knew Guantánamo existed or that I was alive.'[5]

The nature and consequences of the violations give rise to complex needs, also recognised as inalienable rights. The challenges faced by these individuals are immense. They have faced overwhelming obstacles when seeking to access justice – both with civil claims for damages and criminal proceedings brought to hold the officials responsible for their treatment to account. Access to information that would corroborate their claims has been made impossible in most instances on the basis of national security considerations. Invariably, there has been no acknowledgement from those who are responsible or were implicated in their rendition, unlawful detention and/or torture or other prohibited ill-treatment. Often upon their release, these victims are at risk of further detention, investigation and surveillance and control orders. At times, they face further extradition or deportation proceedings.

These individuals have also encountered various difficulties in seeking to access medical and psychological care, social benefits that assist them in rebuilding their lives, support in finding a job and overcoming stigma in society.

Efforts to ensure that these individuals reintegrate into society and obtain adequate and appropriate remedies and reparation for the harm they suffered is crucial both for the individuals concerned and broader society. These measures include full disclosure of what occurred, acknowledgement that what was done to them was wrong, accountability of the individuals and governments involved, restoration of their rights that would have existed but for the violations, rehabilitation and social care and compensation for pecuniary and non-pecuniary losses.

There are encouraging signs that the United States government's counter-terrorism strategy is shifting towards a greater respect for human rights and

[5] Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, Testimony of Murat Kurnaz, 20 May 2008, available at: http://foreignaffairs.house.gov/110/kur052008.pdf.

the rule of law. In his first day in office, President Obama signed three executive orders which determined the closure of the detention site at Guantánamo Bay within one year as well as of other CIA-operated detention facilities. Also, he initiated a six-month inter-agency review of interrogation and detention policies, options for the disposition of individuals captured in connection with armed conflicts and counter-terrorism operations and of the situation of each of the remaining (approximately 245) Guantánamo Bay detainees.[6]

These new developments do not end debate on extraordinary renditions and unlawful detention. To the contrary, they raise questions as to the fate of those currently detained at Guantánamo Bay and elsewhere under similar conditions and as to the accountability of those responsible for human rights violations. In the words of the Council of Europe's Commissioner for Human Rights,

> Closing Guantánamo Bay does not mean that past abuses suffered by detainees should be brushed under the carpet. Those responsible for devising and approving the interrogation systems or those involved in sanctioning torture should be brought to justice. (…) It is essential that innocent men who have been detained should have their names cleared and should receive compensation for their unlawful detention and ill-treatment.[7]

Plans to close the detention site at Guantánamo Bay raise questions about the fate of the detainees. There are no European nationals amongst the current detainees. There is still, however, one individual who was previously resident of the United Kingdom (U.K.). Out of these remaining detainees, reportedly around 60 have already been cleared for release by the Administrative Review Board but cannot be returned to their country of nationality because

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[6] Executive Order "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (22 January 2009), available at: http://www.whitehouse.gov/briefing_room/executive_orders; Executive Order "Ensuring Lawful Interrogations", (22 January 2009), available at: http://www.whitehouse.gov/briefing_room/executive_orders; Executive Order "Review of Detention Policy Options" (22 January 2009), available at: http://www.whitehouse.gov/briefing_room/executive_orders

[7] Council of Europe Commissioner for Human Rights Viewpoint "Europe must open its doors to Guantánamo Bay detainees cleared for release" (19 January 2009), available at: www.coe.int/t/commissioner/Viewpoints/090119_en.asp.

of the risk of persecution, torture or other human rights violations on return or because they are stateless.[8]

In Europe, debate has centred on whether states will agree to receive detainees who cannot be transferred to their countries of nationality. The debate has been primarily framed as the 'moral duty' of European states to assist the U.S. government to implement a measure that these states had long been calling for – the closure of Guantánamo Bay, and also in terms of the security questions that receiving these individuals poses. Opinions in the European Union (EU) are split as to whether they should offer to host former detainees that have no prior connection (nationality or residency) with those states.[9] The United Kingdom, for example, has urged other EU Member States to follow its example in seeking the release of former residents but has not offered to take any more inmates with no connection to the country. France has proposed that EU Member States adopt a common position regarding Guantánamo Bay but has recommended that the decision of whether and how many inmates it can receive, and which detainees it would accept, should be left to each country.[10] Coordinated action by EU member states is necessary given that under the Schengen agreement any individual received by one member state would then be able to move freely to another country within the Schengen area. The French proposal reportedly also foresees that EU funds would be provided to assist with the reception of these detainees.[11] A number of other intergovernmental bodies and non-governmental groups have also called upon European governments to receive some of the detainees and to provide them with adequate protection.[12]

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[8] The individuals in this situation are reportedly from countries like Algeria, Libya, the Occupied Palestinian Territories, Russia, Syria, Tajikistan, Tunisia, Uzbekistan, and the group of Muslims from the Uighur Autonomous Area in western China.

[9] Peter Walker and Mark Tran, "EU doubts over taking in former Guantánamo prisoners", *The Guardian* (26 January 2009), available at: www.guardian.co.uk/world/2009/jan/26/eu-guantanamo-inmates-offer.

[10] See Matthias Gebauer, "EU Delegation Plans Guantánamo Trip", *Spiegel Online International* (27 January 2009), available at: www.spiegel.de/international/europe/0,1518,druck-603735,00.html, and "France Reportedly has Gitmo Plan", *United Press International* (25 January 2009), available at: www.timesoftheinternet.com/40547.html.

[11] *Ibid*.

[12] See Council of Europe Commissioner for Human Rights Viewpoint (19 January 2009), *supra* note 7, also referring to the calls from the Legal Affairs and Human Rights Committee of the Council of Europe's Parliamentary Assembly, from the European Union's Counter-Terrorism Coordinator, and from a group of NGOs (The Center for Constitutional Rights, Amnesty International, Reprieve, Human Rights Watch and the International Federation for Human Rights) which convened as a working group on efforts to provide humanitarian protection to Guantánamo detainees.

The group of individuals whose situation is least clear includes those against whom there appears to be strong evidence of their involvement in committing serious crimes and those against whom it is not yet clear if such evidence exists. Calls from outside the U.S. have demanded that those individuals who can be prosecuted are brought before federal courts in the U.S. itself, while some calls from within the U.S. aim to avoid precisely that.[13]

At the European level, the debate has focused much less – if at all - on the *conditions* that former detainees potentially hosted by European states would face upon arrival to the host country. Questions of reintegration and access to a remedy and reparation have been largely absent from the official and political debate.

While some European states have already demonstrated their willingness to receive former Guantánamo detainees – such as Portugal,[14] Germany[15] and Sweden – not much has been said about the status these individuals would enjoy in these countries.[16] This is a crucial question as it determines the protection regime that these individuals will be able to avail themselves of.[17] As non-nationals these individuals could presumably apply for asylum and benefit from the guarantees provided to refugees under international law. However, the dangers posed by a possible creation of some sort of *ad hoc* status for these individuals which would prevent them from enjoying the rights of refugees, namely because of their potential status as serious crime

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[13] Daniel Nasaw, "Republicans try to block Guantánamo detainees from prisons in their districts", *The Guardian* (17 February 2009), available at: www.guardian.co.uk/world/2009/feb/16/guantanamo-republicans-prisons.

[14] William Glaberson, "Portugal may help U.S. shut Guantánamo prison", *International Herald Tribune* (12 December 2008), available at: www.iht.com/articles/2008/12/12/europe/gitmo.php. Since this offer, which was welcomed by the U.S. government, controversy around it was sparked by reports that 'over 700 prisoners were apparently rendered by US military planes through Portuguese airspace to Guantánamo Bay'. See Reprieve, "Reprieve Submission to Portuguese Inquiry on Rendition" (2 April 2008), p. 3, available at: www.reprieve.org.uk/documents/080403FINALREPRIEVEPORTUGALREPORT.pdf.

[15] See Associated Press, "Germany considers taking in Guantanamo prisoners", *International Herald Tribune* (22 December 2008), available at: www.iht.com/articles/ap/2008/12/22/europe/EU-Germany-Guantanamo-Prisoners.php.

[16] However, the Spiegel Online International reported that 'Released detainees would be granted refugee status by their host EU countries'. See, Matthias Gebauer (27 January 2009), *supra* note 10.

[17] Note that having the status of a national or only of a resident of a certain state has led to different treatment: the case of Murat Kurnaz, a Turkish national resident in Germany who was detained at Guantánamo Bay, raised controversy as it became clear that he could have apparently been released much earlier if Germany had decided to request his release. See Council of Europe (2007), *supra* note 1, at para. 311.

suspects[18] are significant. This issue requires serious debate prior to the reception of these individuals in Europe. So far, in Europe, only Albania has accepted former detainees from Guantánamo Bay which had no prior connection with the country.

The other issue that remains unresolved is the degree to which European states are prepared to accept responsibility for contributing to the precarious situations these individuals found themselves in.

This report is structured around the seven key themes which were addressed at and provided the framework for the conference: *1) Reception in EU Member States: Detention, Deportations and Investigations of Returnees; 2) Access to Health and Psychological Care; 3) Access to Employment, Housing and Disability Benefits, Supportive Communities and Dealing with Stigma; 4) Support for Family Members; 5) Access to Justice in the U.S.; 6) Investigations into Allegations of EU Involvement in Renditions and Unlawful Detentions; 7) Access to Courts in the EU: Civil Claims for Compensation and Diplomatic Protection*.

In each of these thematic sections, a detailed summary of presentations given at the conference is provided. These are complemented by additional analysis, updates of events or case developments that occurred subsequent to the conference and other additions, where deemed appropriate.

We are grateful to all the speakers and conference attendees for sharing their expertise. We are also grateful to OXFAM/NOVIB and Freshfields Bruckhaus Deringer LLP for supporting this initiative.

[18] Under Article 1(F) of the 1951 UN Convention Relating to the Status of Refugees ("Refugee Convention"), the provisions of the Convention, and thus the protection it provides for, "shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations." See also the Council of Europe's *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002, which state in Guideline XII (1) that "when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person."

II. Key Themes

Paul Lomas, partner at Freshfields Bruckhaus Deringer and ***Lorna McGregor***, International Legal Advisor at REDRESS, welcomed the participants and provided an overview of the themes of the conference.

As ***Paul Lomas*** explained, the lawyers at Freshfields Bruckhaus Deringer LLP, through the firm's pro-bono work, have followed and been involved in cases relating to torture and detention at Guantánamo Bay. He noted that the conference was quite unusual, if not unique, in that it tried to look at the consequences of torture from several perspectives - legal, social, medical and psychological, and also in terms of policy. The conference also brought together speakers with mixed backgrounds and skills: lawyers specialising in this field, torture survivors, doctors, social policy experts and theorists.

As ***Paul Lomas*** pointed out, concerns over the rule of law and of how well entrenched it is in modern society have not been as great in the past as they are now. Torture, in his view, is one of the most graphic illustrations of what happens when the rule of law breaks down.

Lorna McGregor explained the rationale for the conference. On the one hand, it recognises the crucial work of organizations and practicing lawyers around the world in investigating renditions and unlawful detention, establishing where these individuals were being held, how they were being treated and in securing their release. On the other hand, it shows that much more still needs to be done to reintegrate, rehabilitate and secure reparation for these individuals once they have been released.

She explained that the conference would focus on the European experience, and noted that a number of European nationals, permanent or long-term residents, individuals with refugee status have already been released back into European countries from Guantánamo Bay and other rendition experiences.

The first objective of this conference was to gain a much better appreciation of what the experience of these individuals has actually been, including the range of experiences they had when they came back: in terms of access to health care (medical and psychological), access to housing, employment; all the types of social challenges that may result from their experiences of detention in terms of stigma; whether communities were receptive; and also looking at justice issues – whether they have been able to bring a legal claim

for what has happened to them through their detention and also possibly their torture or cruel, inhuman and degrading treatment. The first objective of the conference was thus to understand what they have gone through and the challenges they are facing on a daily basis. The challenges vary depending on individuals' experiences, where they have been returned to, what communities they are living in, and the relevant legal systems.

From that more informed position, the second objective of the conference was to try to understand how individual states within Europe, and Europe as a whole – including institutions like the European Union and the Council of Europe - can respond appropriately to the needs of these individuals, because more individuals may be returned to Europe. It is important to understand from a policy and legal perspective, the obligations of states and whether there are examples of best practices or factors that have helped individuals move forward with their lives; and if so, whether those examples can be replicated in other countries or if they are particular to specific European countries.

Behind the discussions and the individual experiences, the objective was not to generalise – but to try to draw common themes in order to improve the experiences of those who have returned and those who will still be released and returned in future.

A. Reception in EU Member States: Detention, Deportations and Investigations of Returnees

What awaits victims of rendition and unlawful detention upon their release from detention varies considerably depending on the particular circumstances of each individual case and on the receiving state.

So far, there has been no common position taken by EU member states as to which procedures should be followed when receiving such individuals. Discussions at the EU level relating to the fight against terrorism have thus far failed to engage with the fact that the individuals who have been and will be released are, regardless of their previous conduct and potential links to terrorism, victims of unlawful counter-terrorism measures with rights to justice. Instead, these discussions have focused primarily, if not exclusively, on the security risks these individuals may pose, on the need for cooperation

in information exchange as a key element of an effective counter-terrorism strategy, and on preventing "radicalization and recruitment".[19]

Because of the particular situation of these individuals - namely, the fact that they were being held allegedly on grounds of involvement in terrorist acts – they are particularly vulnerable to further detention, investigation and especially if they are not nationals of the state where they are released to, further deportation or extradition.

After 9/11, many European states adopted specific legislation aimed at combating terrorism.[20] Typically, such legislation provides for more stringent procedural regimes for suspects of terrorism.

Even when extradition or deportation is not at stake, the individuals who have returned from Guantánamo Bay and other sites to Europe have faced other difficulties. While none of the individuals who were returned from Guantánamo Bay to the UK were the object of further criminal investigations, this was not the case in other countries.

The restraints placed on these individuals upon return – such as the control orders existing in the UK under the 2005 Prevention of Terrorism Act – more often than not place a disproportionate burden on individuals that further impairs them from recovering from the violations they have just suffered.

Even if investigations on the involvement of these individuals in serious crimes are appropriate and control orders necessary while they are being investigated, it must also be acknowledged from the moment of their reception that these individuals are victims of human rights violations – including, very likely, torture – and who therefore need to be treated as such. When they exist, security considerations as well as possible criminal responsibility, must at least be accompanied by actions to provide these individuals with the medical and psychological care they need.

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[19] Council of the European Union, EU Counter-terrorism strategy – Discussion Paper (19 November 2008), 15983/08.

[20] For an overview of the legislation adopted by Council of Europe member states on terrorism, see, the Country Profiles on Counter-Terrorism Capacity of the Council of Europe's Committee of Experts on Terrorism (CODEXTER) and also the website: www.legislationline.org/topics/topic/5 of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe.

Christophe Marchand, a Belgian lawyer who has represented terror suspects before Belgian courts, noted that since the 9/11 attacks, there has been a 'panic reaction' by governments. The 'panic reaction' is most apparent with cases of rendition.

As an example of how transfers and deportations are taking place outside judicial processes and at the total discretion of governments, he gave an account of one of the cases he was involved in – the case of 'X', where the suspect, who was previously a UK resident, was arrested in Belgium. Belgian criminal proceedings had been initiated, when, without any notification or explanation, he was simply transferred back to the UK.

As ***Marchand*** indicated, "what was so strange was that during his trial, he was very suddenly transferred to the UK, so from one day to the next he was not there anymore in court, and all the judges were wondering where he was and were asking me "where is your client?" I had no answer." Apparently, there had been an agreement between Belgian intelligence services and British intelligence services to return him to the UK.

Those who have been illegally abducted, transferred and detained in connection with the 'war on terror' have regularly faced the risk of further deportations and extradition proceedings.

Although governments ultimate decide whether to comply with an extradition request, usually on the basis of bilateral agreements, states must comply with international law when taking such decisions. In particular, the absolute principle of *non-refoulement* provides that no one can be expelled, returned or extradited to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other prohibited ill-treatment.[21] This principle is well established in

[21] Article 3 (1) of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 10 December 1984. Note that both the European Court of Human Rights and the UN Human Rights Committee have indicated that this principle applies both to torture and to cruel, inhuman and degrading treatment or punishment. European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; *Ahmed v. Austria*, Judgment of 7 December 1996, 1996-VI, no. 26; *Scott v. Spain*, Judgment of 18 December 1996, 1996-VI, no. 27; *Boujlifa v. France*, Judgment of 21October 1997, 1997-VI, no. 54; *D. v. The United Kingdom*, 02 May 1997, 1997-III, no. 37; *Paez v. Sweden* Judgment of 30 October 1997, 1997-VII, no. 56. United Nations Human Rights Committee, General Comment N° 20, (10 March 1992), at para. 9.

international law, both in international[22] and regional[23] treaties, and has been confirmed by human rights treaty bodies as well as by human rights courts. It constitutes a norm of *jus cogens*, which is non-derogable even in times of emergency. In relation to refugees, in particular, the principle of *non-refoulement* is established in Article 33 (1) of the 1951 UN Convention on the Status of Refugees.

As noted by ***Christophe Marchand***, the European Court of Human Rights has significant case law in relation to the application of the principle of *non-refoulement* in cases related to counter-terrorism. In *Saadi v. Italy*,[24] the Court reaffirmed the absolute prohibition of torture, and in particular the absolute prohibition to expel, return or extradite a person to a state where there are grounds for believing he will be subjected to a real risk of torture or other prohibited ill-treatment. In this case the Court followed its decision in *Chahal v. UK*[25] by affirming that it is sufficient to establish that there is a 'real risk' of torture in that state.

By doing so, the Court resisted the attempt of a group of European governments led by the UK, (who also intervened as a third party in the related case of *Ramzy v. the Netherlands*[26]) to lower the test of 'real risk' of torture and to raise the burden of proof in cases where the individual is alleged to have committed terrorist acts and thus represents a considerable security threat to the state aiming to deport or extradite him. In the view of the intervening governments, the security risk posed by the individual should be weighed against the risk the individual runs of being tortured in the receiving state. In assessing whether the expulsion would constitute a breach of Article 3, they argued, the 'real risk' test should be replaced with the test of whether the individual is 'more likely than not' to be exposed to torture.[27]

In the *Saadi* case, the Court also held that even when diplomatic assurances were given, in a particular case, the Court had "the obligation to examine whether such assurances provided, in their practical application, a sufficient

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[22] Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[23] Article 13 (4) of the Inter-American Convention to Prevent and Punish Torture.

[24] This case concerns a Tunisian national who was lawfully residing in Italy and who had been tried *in absentia* in Tunisia for his alleged involvement in terrorist acts and sentenced to 20 years. The Italian authorities had decided to extradite him to Tunisia in spite of his claims that he would face a real risk of torture and ill-treatment.

[25] European Court of Human Rights, *Chahal v. The United Kingdom*, Application no. *22414/93*, Judgment of 15 November 2006.

[26] European Court of Human Rights, *Ramzy v. The Netherlands*, Application no. *25424/05*.

[27] European Court of Human Rights, *Saadi v. Italy*, Application no. *37201/06*, Judgment of 28 February 2008, at para. 122.

guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention".[28]

As explained by ***Christophe Marchand***, this question was raised in another case in Belgium – the case of *El-Haski*[29] who, after being held in solitary confinement for more than two years, was tried in Belgium. In the meantime, following a request for extradition from Morocco, the Belgian government decided to extradite him, in spite of the risk of torture that he would face in Morocco, and without any sort of assurance. Declarations made by people arrested and tortured in Morocco were said to have been used as evidence before Belgian courts against *El-Haski*. The decision on extradition is pending, and the case is now being considered by the European Court of Human Rights.

Marchand also spoke of his meeting in Istanbul with a Turkish human rights organization. They spoke of a man who had returned from Guantánamo Bay and had been working with them in their organization and has now been arrested and remains in detention without charge. His colleagues believe he has been singled out because he is a former Guantánamo Bay detainee.

He also spoke of "Y", a Belgian citizen who spent 3 years and 4 months in Guantánamo Bay. When he returned to Belgium he was charged with being a member of a criminal organisation. This was a strange charge as it related to an offence set out for the first time in a 2003 law on terrorist organizations, and in 2003 "Y" was already in Guantánamo Bay. The public prosecutor wanted to detain him but he was conditionally released, and remained under conditions for 1 year and 3 months. The conditions included that he advise the Belgian police of his current address, that he could not leave Belgium, that he could not meet with other Belgians who came back with him from Guantánamo Bay, and that he would need to meet an official from probation services. This official was actually a member of the intelligence services. He had to report what he was doing, where he was going, but he didn't have to report anything about his social situation, his health situation, his family situation or the like.

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[28] *Saadi v. Italy*, *ibid.*, at para. 147. In this case, the Tunisian authorities had not provided Italy with diplomatic assurances. The Court asserted that 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.'

[29] Lahoussine El-Haski, originally from Morocco was arrested in Belgium in 2004 after having sought political asylum.

When the conditions formally ended, the intelligence agent advised him that he would nonetheless have to continue to report to him. He received no help from the Belgian government.

There is no question of any reparation. According to Marchand, in response to the question "Do you think you are a torture survivor?", "Y" said "yes, I've been tortured". He does not want to take any steps to obtain reparation, though of course he would like – and this is his goal – that no other person would be submitted to such a treatment, but he is afraid. He believes that the prosecution for his membership in a criminal organization, which is ongoing, is a way to hamper him from taking steps to get any kind of reparation. He thinks that '*they*', as he puts it, that they think that 'if you do nothing, we do nothing'.

The record of the Belgian government and the Belgian authorities in this 'panic reaction' is not good at all. There is a great need to organise, strategise for the defence of the Guantánamo victims when they come back, just to show that the system and the rule of law is really something that is still working.

Edward Fitzgerald QC, a barrister of Doughty Street Chambers in London, noted that the United Kingdom has heavily relied on diplomatic assurances when it receives extradition requests, particularly from the U.S. He welcomed the case law of the European Court in this regard, and noted that the Court, in a significant move, has even used Rule 39 of the Rules of Court (on interim measures) to give protection to individuals subject to U.S. extradition requests.[30] In these cases, the Court has unequivocally considered that if extradition to the U.S. meant these individuals would be subject to Military Order nr 1, then it meant these individuals would face a real risk of torture, regardless of any diplomatic assurances, and thus could not be extradited.

He also noted with satisfaction that the European Court's case law has been instrumental in promoting a gradual shift in attitude towards diplomatic assurances, including in the UK. In fact, UK courts have accepted that extradition to Guantánamo Bay represented a risk of violation of Article 3 as well as of Article 6 of the European Convention given that the proceedings before the Military Commissions in Guantánamo Bay consisted in a 'flagrant denial of justice'.

In his opinion, the detention centre at Guantánamo Bay – with the notoriety it attained and its widespread condemnation - could be now used in a positive

[30] See, e.g., European Court of Human Rights, *Mustafa Kamal Mustafa (Abu Hamza) v. The United Kingdom*, Application no. 36742/08, rule 39 order 4 August 2008.

way. In the context of the judicial decisions just mentioned, the 'threat' of being sent to Guantánamo Bay could be used as a tool to effectively avoid extradition of suspects of terrorism to the U.S., as in the cases of Ahmad, Aswat and Abu Hamza.

On the other hand, Guantánamo Bay – for those who have been detained there and released – may also be used as an argument to avoid further extradition. The example of *El-Banna* and *Deghayes* was given: both individuals were detained at Bagram airbase and then at Guantánamo Bay for 5 years until they were cleared for release to the UK by the Administrative Review Board in 2007. Their case had prompted litigation in the UK seeking to compel the British government to intervene on their behalf, which went to the Divisional Court and the Court of Appeal[31] and was pending before the House of Lords when they were cleared by the Administrative Review Board and then returned to the UK.

They were immediately arrested upon arrival to the UK due to an extradition request from Spain where they were charged with being members of an Al-Qaeda cell responsible for the Madrid attacks. Given the special extradition arrangements within Europe (European Arrest Warrant), ***Edward Fitzgerald*** noted that we can't fight an extradition on the basis that the requesting state has no evidence – under the existing arrangements, they don't have to have any evidence at all, they simply have to have an allegation. So extradition requests can only be challenged on the following collateral grounds: lapse of time, abuse of process, and inhumanity of treatment. At the time, questions were raised as to the involvement of Spanish officials in the interrogation of these two individuals, so perhaps the fear of embarrassment played a role in the decision to drop the extradition request. Officially, it was dropped on health reasons given that these individuals had already been subjected to very harsh treatment during their detention at Guantánamo Bay.

This reveals the way in which European countries, including the UK, have been deeply complicit in the Guantánamo process, by sending their own interrogation officials (whether police, MI5 or security services) to interrogate people in Guantánamo Bay, and providing information on the basis of which the U.S. authorities then rely to continue to detain the individuals in Guantánamo Bay.

The possibility of redress for victims of counter-terrorism measures is quite remote. Theoretically, there is criminal liability for torturers and their

[31] *R (on the Application of Al Rawi & Others) v. The Secretary of State for Foreign and Commonwealth Affairs & Anor*. [2006] EWHC 458.

accomplices, and the principle of universal jurisdiction is well-recognised for torture. And therefore, those who torture Guantánamo Bay detainees, and the security services that connive in or are otherwise involved in it, are theoretically liable to criminal prosecution. Whether there will ever be a prosecution of anybody in these circumstances is, as a matter of political reality, seriously open to question.

The second possible avenue is civil liability. In the case of *Jones v. Saudi Arabia*, the English Court of Appeal did say that you could sue foreign agents in UK courts for their individual acts of torture,[32] but this was overruled by the House of Lords,[33] which said that you couldn't because, in effect, that would interfere with state sovereignty, and that case is going to the European Court.

The last possibility, according to ***Edward Fitzgerald,*** is that there have been different compensation schemes at various times. For example, the compensation scheme for the victims of detention in Japanese prisoner of war camps. Particularly given that there is an argument of some element of connivance or acquiescence of foreign states in relation to the detention and treatment at Guantánamo Bay there is quite a strong moral argument for the establishment of a compensation scheme for at least British citizens and residents who have been detained in Guantánamo by this country. The trouble again is the politics of it – some people would say 'why should we give any compensation to people who at least were suspected of being involved in terrorism?' So there might be a political resistance to that. But that actually might be the most practical way forward in terms of some civil redress.

B. Access to Health and Psychological Care

The multiple types of human rights violations endured by the victims of the 'war on terror', combined with the prolonged period they were typically subjected to such treatment, has invariably led to severe damage to their lives and the lives of those around them.

These individuals report having been subjected to severe and constant physical and psychological torture. They were snatched and transferred to various detention sites where they were held incommunicado and in cruel, inhuman and degrading conditions. Many suffered torture on route to their final destinations or once they arrived. They were uninformed of the reasons for their detention and communication with loved ones and with anyone who

[32] [2004] EWCA Civ 1394.
[33] [2006] UKHL 26.

might be able to help them was, and is, and for those who remain detained, extremely restricted.

The extent of immediate and long-term harm they have suffered is difficult to capture in words. Some recent studies have attempted to gauge the different forms of harm that was inflicted upon them while they were under U.S. custody (from the time of abduction to the time of release) and to grasp the consequences of that harm, both while in custody and in the aftermath of their release.[34]

The conditions in which these individuals have been detained and their often irreversible consequences, has been the object of unrelenting protests of NGOs, in media accounts and of official reports. As Dick Marty, Rapporteur of the Parliamentary Assembly of the Council of Europe's Inquiry into secret detentions and illegal transfers of detainees in Council of Europe member states, has indicated:

> The gradual escalation of *applied physical and psychological exertion*, combined in some cases with more *concentrated pressure periods* for the purposes of interrogation, is said to have caused many of those held by the CIA to develop enduring psychiatric and mental problems.[35]

What has also became clear from the experiences of victims of rendition and unlawful detention so far in Europe is that the medical and psychological assistance available and effectively provided to them falls short of their needs and of states' obligations in this regard.

As noted in a comparative analysis of four European centres dealing with torture victims, treatment and rehabilitation for torture victims is to a great extent offered by NGOs, when they should "clearly be tasks of the mainstream public health services of the (European Union Member) states".[36] Most of these centres that operate outside the public health system are funded

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[34] Physicians for Human Rights, "Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact" (June 2008); Laurel E. Fletcher, Eric Stover *et al*., "Guantánamo and its Aftermath: US Detention and Interrogation Practices and Their Impact on Former Detainees", Human Rights Centre, International Human Rights Law Clinic (University of California, Berkeley) and Center for Constitutional Rights (November 2008). See also Centre for Constitutional Rights, "Report on Torture, Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba" (July 2006).

[35] Council of Europe (2007), *supra* note 1, at para. 271.

[36] Sarah Guillet *et al.*, "Evaluations EIDHR: Torture rehabilitation centres in Europe" (January 2005), p. 30.

by the European Union under its European Initiative for Democracy and Human Rights (EIDHR).

The main impediment for victims of rendition and unlawful detention to access timely and appropriate medical and psychological care, seems to be, however, the lack of recognition of these individuals as *victims*, and more particularly as victims of torture. This is primarily a result of how these cases have been handled in the political sphere and by certain media.[37]

However, states have assumed obligations in respect of the treatment of victims of torture that they must honour, even in these 'politically sensitive' cases.

Besides all the relevant provisions in international treaties establishing the duty of states to provide an effective remedy and reparation to victims,[38] important documents at the European level set out clearly what are the obligations at stake.

According to the 2006 Council of Europe Recommendation on assistance to crime victims, "States should identify and support measures to alleviate the negative effects of crime and to undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace".[39] It specifies that "The assistance available should include the provision of medical care, material support and psychological health services as well as social care and counselling".[40]

The EU Council Directive on compensation to crime victims provides that that "[c]ompensation shall be paid by the competent authority of the Member State on whose territory the crime was committed".[41] In the context of this conference, this would apply to the illegal abductions, transfer and detention of prisoners on European territory.

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[37] See e.g., Council of Europe (11 June 2007), *supra* note 1, at para 2.

[38] See the *U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by the U.N. General Assembly Resolution 60/147 of 16 December 2005, and also Article 2(3), 9(5) and 14(6) of the International Covenant on Civil and Political Rights (ICCPR), Article 14 of the Convention against Torture, Article 13 of the European Convention on Human Rights, and Articles 1, 5, 13 and 41 of the American Convention on Human Rights.

[39] Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies, para. 3.1.

[40] *Ibid*., para. 3.2.

[41] Council of the European Union, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Official Journal of the European Union, 6 August 2004, art. 2.

In respect of those victims of counter-terrorism measures who may be received by EU member states, the EU Directive laying down minimum standards of reception of asylum seekers, establishes that "Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness".[42] Further it provides that "Member States shall take into account the specific situation of vulnerable persons such as (…) persons who have been subjected to torture (…) in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care."[43]

The Council of Europe Guidelines on Human Rights and the Fight Against Terrorism contain a number of provisions on the rights of terror suspects but are silent on the right to a remedy and reparation for those who have been victims of illegal counter-terrorism measures. They do contain a provision on compensation but this only applies to victims of terrorist attacks.[44]

In the recent discussions at the EU level on whether EU member states should receive former detainees from Guantánamo Bay, the French government has reportedly presented a proposal that foresees that the EU would provide funds for the reception of those former detainees. It is not yet clear, however, how those funds would be spent.

Dr. Önder Özkalipci M.D., a forensic physician at the International Rehabilitation Council for Torture Victims (IRCT), reported on the recent study carried out by Physicians for Human Rights (PHR), to which he also contributed. This study provides the accounts of eleven former detainees under U.S. custody outside the U.S. as well as medical evidence of torture and other ill-treatment they suffered.

The report states: "All of the former detainees evaluated by PHR reported having been subjected to multiple forms of torture or ill-treatment that often occurred in combination over a long period of time".[45]

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[42] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal of the European Union 6 February 2003, art. 15.
[43] *Ibid.*, art. 17. In a recent report on "Evaluation of the Impact of EIDHR Support for Torture-Prevention and Torture-Rehabilitation Centres" published in June 2008, it was acknowledged that in relation to this directive, "many EU governments, such as France and Spain for example, have shown that they are ready and able to take responsibility for financing the medical and other support measures required. However, not all EU countries have accepted their obligations so far and they continue providing little more than emergency relief to the neediest refugees they are hosting."
[44] Council of Europe, *Guidelines on human rights and the fight against terrorism, supra* note 18.
[45] PHR, "Broken laws", *supra* note 35, p. 1.

The frequent experiences of torture and other prohibited ill-treatment listed throughout the report and described by ***Dr. Önder Özkalipci*** include:

a) beatings during the arrest, transport and initial custody (beatings with sticks and fists, kicks to the stomach and genitals, blows to the head);

b) deprivation of basic necessities and sanitary conditions (e.g. placement in a urine-soaked punishment room, being forced to wear soiled underwear, denial of access to food, water and toilets, exposure to cold);

c) stress positions (forced standing, suspension from walls, being chained in a crouching position to a ring on the floor, handcuffing and shackling);

d) isolation, sensory deprivation by means of hooding, blindfolding which instil "a sense of fear, disorientation, and dependency on their captors";

e) sensory bombardment with loud noise or music;

f) threats of severe harm or execution through verbal threats and dogs, threats that their families would be killed or severely harmed;

g) exposure to extremes of temperature in cells, pouring of cold water over them during interrogation;

h) electric shocks, sexual assault and physical assaults (including being kicked, stepped on, dragged, slapped, forcefully thrown against a wall), being sodomised with a broomstick or a rifle, being subjected to electric shocks, being struck with a rifle, being stabbed in the cheek with a screwdriver, being burned on the chest with a cigarette;

i) sleep deprivation through loud noise or banging, the use of cold water or stress positions;

j) humiliation (being taunted, shamed, insulted, spat at and urinated upon, being forced to be naked, having their beards forcibly cut or their heads shaved);

k) cultural and religious humiliation (including being taunted at prayer, desecrating the Koran);

l) sexual humiliation (e.g., being paraded naked in front of female soldiers, being touched or provoked in a humiliating way).

m) witnessing torture and cruel treatment.[46]

The study also reported on the harm – both physical and psychological - that results from this type of treatment. It explains that these individuals

[46] *Ibid*., pp. 4-7.

> continue to experience physical after-effects from the torture they experienced, including chronic headaches as well as persistent pain in their limbs, joints, back, muscles, and ligaments from being beaten or kept suspended or in other stress positions for long periods of time. [47]

Moreover, they have:

> experienced shame, humiliation, and terror that they or their loved ones would suffer even more; others were terrified by the claustrophobic conditions of isolation. These in turn brought about symptoms ranging from chest pain to severe anxiety to sleeplessness.[48]

The physical consequences of such treatment may ease with time and often it may be difficult to find clinical evidence of that physical harm. In contrast, the psychological consequences persist much more starkly for a long period of time. As the report notes,

> the former detainees have experienced and continue to experience severe psychological effects of torture and ill-treatment.[49]

Dr. Önder Özkalipci also highlighted the disturbing role of medical practitioners and psychologists in the interrogations and their complicity in torture. As also documented in the report, these practitioners shared information with the interrogators that they had obtained while giving assistance to the detainees, they gave injections to the detainees without their consent, for example on their way to Guantánamo, they provided medical help during interrogations so that the questioning could continue and failed to stop or denounce the practices of torture and ill-treatment they were witnessing.

So far, however, these medical practitioners have not been called to account and little is being discussed about their own responsibility.

Dr. Önder Özkalipci gave the example of Adeel (not his real name) in order to illustrate the torture inflicted upon these detainees and the complicity of the medical profession in it. Adeel was working in Pakistan as a teacher when he was detained in Pashawer for 9 days, handed over to U.S. soldiers and then transferred to the Bagram detention centre where he was held for two months.

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[47] *Ibid.*, p. 8.
[48] *Ibid.*, p. 8.
[49] *Ibid.*, p. 8.

In Bagram, Adeel was subjected to beatings every day, was not allowed to speak or move – except for walking to the toilet once per day. The toilet was made from a barrel and there was no protection around it and everybody was able to see him when he went to the toilet. Three armed soldiers waited for him while he was at this barrel toilet. He was handcuffed and chained, did not have a mattress to sleep, he was subjected to forced nudity, religious humiliation, strong lights and loud music for 24 hours a day, sleep deprivation, and also food and water deprivation. When Adeel or other detainees broke these rules, they were subjected to beatings and were chained as punishment.

Adeel was then transferred to Guantánamo Bay. On the way there, as it happened to other detainees, he was subjected to beatings, forced to wear black goggles, respiratory masks, earphones with a humming sound, gloves that impeded the movement of the fingers, was chained to the floor and shackled. As with other prisoners, he was also tightly chained to the seat without being able to move any part of his body, subjected to sexual humiliation and given drugs that caused hallucination.

Once in Guantánamo Bay, he was subjected to the treatment described above and documented in the report. He was exposed to hot sun for several hours, subjected to interrogation for five hours, forced anal examination, and held in isolation for one month when he could only exchange a few words at the time when the guards would bring his food. He was held in a small cell with just a metal container, a bed, mattress and a sheet, which was very cold. One month after his arrival he was moved to another place where he could communicate with the other detainees. He kept being threatened with being sent to another camp where dogs would jump and bark at detainees, and was forcibly given medication and injections.

Adeel suffered from several medical problems which are consistent with the treatment he alleges to have been subjected to. These include: a knee problem probably associated with the restrictions on movement, tuberculosis, gastric problems, gastric constipation, serious ear problems, gingival, lumber and skin problems, and hepatitis B. He suffers from post-traumatic stress disorder (PTSD), had/has transitory psychotic episodes, sleeping problems, irritability, inability to concentrate, memory loss, loss of trust and feelings of hopelessness.

Dr. Önder Özkalipci further explained the problems faced by former detainees upon their release. For those who return to their home countries, they typically face continued fear, stigma, social isolation, pressure from the

police, threat or actual detention, and economic hardships. For those who return to third countries, there are additional problems such as isolation, separation and limited communication with their families, unemployment, problems in obtaining visas, very limited support or social assistance, and restrictions because they are kept, for example, in refugee camps. Because of these conditions, the return to a third country has been referred to as 'camp 7'.

The treatment inflicted upon the detainees and the harm resulting therefrom go some way to explain the complex needs of these victims. Medical and psychological treatment is crucial in this process. However, accounts suggest that there have been serious deficiencies in the medical and psychological care afforded to victims of the 'war on terror'.

As ***Steven Watt***, a staff attorney at the American Civil Liberties Union, explained, the case of Khaled El-Masri provides a good illustration of the difficulties for victims of rendition and illegal detention to receive the assistance they need when they return.

Khaled El-Masri is a German citizen of Lebanese descent. At the end of 2003 Khaled was on a short vacation on route to Macedonia, and at the border he was apprehended by Macedonian agents. He was subsequently detained for 23 days virtually incommunicado, interrogated about his alleged associations with alleged Islamic extremists in Germany, and his association with his mosque in his hometown. After 23 days he was told by his Macedonian captors that he was going to be flown back to Germany – they videotaped him, blindfolded him, put him in the back of a car and took him to an airport. Rather than flying him to his home in Germany, they handed him over to American officials, and he was beaten, stripped, chain-shackled and put in the back of an aircraft. He was flown half way around the world to Afghanistan, where he was detained in a secret CIA-run prison outside Kabul known as the 'salt pit' for some 5 months.

During that time he was held in virtual incommunicado detention. He was interrogated repeatedly by his American captors, and also on several occasions by someone who Khaled identified as being a German citizen. By Khaled's own admission, he wasn't treated as badly as some of the men there, and certainly not the in way that Dr. Önder Özkalipci described men were held in the Bagram facility, however he remains deeply traumatised by his whole experience.

At the end of May 2004, Khaled without reason and without ever having been charged, was released from the 'salt pit' and flown back, not to Germany' but dumped on a hilltop in Albania in the dead of night. He was pointed down a

road and he believed – and still does to this day – that there was going to be a bullet in the back of his head and that was going to be the end of him. But he came across some Albanian border guards who took him to the airport in Tirana and used his money to fly him back to Frankfurt. Khaled found his own way back to his home in Ulm, only to find that his family had disappeared. They had believed that *he* had been disappeared and was never going to be seen again, and rather than stay in Germany they had gone back to his wife's parents' home in Lebanon.

Shortly after Khaled's return, he had the great fortune of paying a visit to Manfred Gnjidic, a private attorney practicing in Ulm. Manfred believed Khaled's incredible story and for no payment, Manfred assisted Khaled immediately at that time and ever since. Khaled is actually now employed by Manfred – he's Manfred's driver. A criminal complaint was filed with the office of the prosecutor. An investigation was opened, and even at very early stages the office of the prosecutor was able to corroborate much of Khaled's version of events. Manfred was also instrumental in assisting Khaled and his family to access and negotiate their way through the German social security system, to ensure that they had the necessary social assistance and also psychological and medical care that were necessary to reintegrate them back into their home in Germany, and in particular for Khaled to deal with the trauma that he had experienced.

Khaled's lawyer identified social assistance as a priority upon Khaled's return, but faced a significant problem in that the German social security system requires individuals to make themselves available for employment, and to basically sign-on for their availability on a periodic basis. Because Khaled had been detained for a significant period outside the U.S., he was unable to do that and to show his availability for employment, and this problem was made all the worse because – unlike men who had been detained at Guantánamo Bay or known facilities by the U.S. in the war on terror – Khaled was secretly detained so there was no way of officially confirming his version of events (this is regardless of what the prosecutor had unearthed at the beginning). However Manfred, through many hours of work, conversations with the relevant authorities, letters, etc, was able to convince the authorities that Khaled had not voluntarily left, that he had been unable to sign on for employment, and they accepted informally that version of events. If they had not accepted that version of events, he would have had to go through a formal appeal process, and again the issue of whether his story was true or not would have been an impediment to a successful appeal.

Once the necessary social assistance was in place, Khaled's lawyer began the very long process of accessing adequate medical and psychological assistance

for both Khaled and his family. It was fortuitous that in Ulm itself there is actually a centre which specialises in the treatment of torture survivors – the Rehabilitation Centre for Torture Victims. However, it took Manfred some 2.5 years from Khaled's return to access the necessary social assistance to pay for sufficient treatment at that centre. And even once the funding was secured from the government, the coverage was not adequate in the view of the doctor who was treating him at the time. The doctor was only able to see him about 2 times a month and she considered, given the trauma that he had undergone, that he needed much more than that. And she also was of the opinion that not only did Khaled need treatment – the whole family needed treatment, and again that needed further funding, which was not forthcoming initially by the German government.

The problem of the adequacy of the coverage for Khaled and his family's care was resolved – albeit in an unusual and rather tragic manner. In May 2007, Khaled was involved in a criminal incident in which he set fire to a building after an altercation with a member of the building staff, and caused a significant amount of damage. It was an act of arson, and that was clearly as a direct consequence of his PTSD, feelings of paranoia and all those that accompanied him since his return from secret detention. The judge in the case ordered that Khaled be immediately detained and undergo a period of intensive psychological evaluation at a government-run facility, and unfortunately that facility was very many miles away from his home and his family. However he got some treatment – albeit under the orders of the court. But that treatment was ostensibly to determine his mental fitness to stand trial on the arson charges, and in the trial Manfred – who again represented him in that criminal proceeding – was able to convince the judge that Khaled's criminal behaviour was a direct result of the trauma he had experienced as a consequence of his secret detention. The judge - hearing psychiatric evidence – believed that version and ordered Khaled be immediately released, and also ordered that he undergo a period of intensive trauma counselling. Khaled, since those orders, has been undergoing treatment at the rehabilitation centre in his hometown of Ulm.

Although there is an ongoing criminal investigation in Germany, which has verified much of Khaled's version of events, there is also an ongoing parliamentary investigation, in which senior German officials have said that Khaled's version of events is true, and there have been investigations by the Council of Europe and the European Parliament. All of these investigations have corroborated much if not all of Khaled's version of events. Indeed, Khaled's case figured prominently in the 2007 Council of Europe Report, where it is said that:

> Mr El-Masri himself is still suffering severely from the psychological consequences of the ordeal he has gone through. He has been repeatedly victimised by personal attacks in the local media and has been unable to find employment in the last three years. In January 2007, he lashed out physically at a vocational training officer, who he felt had treated him unfairly. On 17 May 2007, he was arrested in Neu-Ulm as a suspect in a case of arson and placed in a psychiatric hospital. This dramatic development in Mr El-Masri's personal situation merely confirms the repeated claims by his lawyer, Mr Gnjidic, that Mr El-Masri is in desperate need of immediate professional psychosocial post-traumatic care. According to his current therapist, the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth simply adds to Mr El-Masri's problems.[50]

Despite the findings of the various investigations, there are still people in Germany and people around the world that do not believe Khaled, or believe that there is some reason why he was targeted for rendition and secret detention. And this situation continues because the U.S. in particular has refused to openly acknowledge that he was detained, and that in detaining him they had made a mistake.

Khaled still feels very isolated in his community. He feels that people – strangers as well as former acquaintances – avoid him because of a fear that they too will be subject to surveillance, so it is a fairly horrific situation he finds himself in now. ***Steven Watt*** and others strongly believe, and Khaled strongly believes, that this situation will continue until the U.S. and German officials who were responsible for this egregious mistake are held to account. And this is why Khaled has engaged in litigation.

The ACLU filed a case on his behalf, ultimately unsuccessful, in the U.S. courts, and subsequently filed a case seeking to hold the U.S. responsible for what happened to him before the Inter-American Commission on Human Rights. These cases have been filed because Khaled believes that these mechanisms of accountability, or attempts to get some accountability, are an integral part of his process of making himself whole again, and beginning on that path of recovery.

As explained by ***Prof. Renos K. Papadopoulos***, a professor at the Centre for Psychoanalytic Studies at the University of Essex, it is clear that rendition and unlawful detention have adverse effects on the survivors, both physically and

[50] Council of Europe (2007), *supra* note 1, at para. 296.

psychologically, during and after their detention. With this in mind, it is essential to identify and acknowledge the specific assistance to be provided to them and their families.

This is, however, a difficult process due to the so-called 'systemic traps', which we must be aware of in order to ensure the quality of the assistance provided.

To begin with, it is important to acknowledge the difference between the legal and psychological realities and find fruitful ways of connecting them. For example, it is essential to distinguish between the 'event' that occurred and the way the survivor experienced and processed what happened to him or her. Some survivors react to adversity by strengthening their resolve to stand up against injustice, whereas others are crushed psychologically by it. Although legally the torturing of prisoners is condemnable, psychologically, it is important to discern the specific way that each survivor responded to it and validate that unique experience. However, it is difficult to maintain clarity in these situations because easily we fall into the archetypal roles of the victim triangle, i.e. the victim, the perpetrator, and the rescuer.

For those who are trying to help the survivor, the challenge is to find the delicate balance between on the one hand, validating their experience and helping them, and on the other hand, inadvertently perpetuating their helplessness, fostering their dependence and emphasising their 'damagedness'. The risk of further 'pathologising' the survivors is great due to the strong relationship that may develop between the survivor and the carer and the danger of the latter falling into the role of a 'rescuer'.

It is crucial to appreciate that what matters more is not the initial reaction to adversity but the way one responds to that initial reaction, in the context of the wider societal discourses about such events and reactions. For example, two survivors may respond differently to being psychologically distressed after being abducted and tortured; one by appreciating this as an expected reaction whereas the other by considering himself/herself as psychiatrically disturbed.

Also, it is important to bear in mind that the term 'trauma', beyond its clinical meaning and the set of personal experiences it describes, is also the object of a specific societal discourse. This societal discourse, together with the actual external conditions surrounding the survivor, also play a role in the circular epistemology of trauma.

Although it is well known that there are many factors that contribute to the way each individual responds to being exposed to 'devastating events', often this complexity is ignored under the emotional pressure of these situations. These contributing factors include: personal, relational, gender-related, power position, support systems, hope, current conditions, future prospects as well as the meaning given to the events and the experience of these events.

In ***Prof. Papadopoulos***' view, the main casualty of the discourse on trauma is complexity. There tends to be an oversimplification, generalisation and polarisation of the 'perception', 'account' of and the 'response' to trauma.

In fact, it must be recognised that while some functions of one same person may be negatively affected by a traumatic event, other functions may be positively affected. It is thus important to be open to a wide range of responses that people have to adverse experiences.

In addition to the negative responses, there are also resilient responses which refer to existing positive qualities and strengths that continue even after the exposure to adversity. Particular emphasis needs to be given to another category of positive responses called 'adversity-activated development' (AAD) and which refer to new strengths and positive characteristics that the survivor develops as a result of being exposed to adversity.

C. Access to Employment, Housing and Disability Benefits, Supportive Communities and Dealing with Stigma

Very little consideration has been given to the experiences of individuals who have been subjected to 'extraordinary rendition' and unlawful and prolonged detention in the context of the 'war on terror' in rebuilding their lives after their release. The accounts of former detainees and of those who have been trying to assist them reveal a bleak picture.

These individuals are working to overcome physical and psychological harms. At the same time, they are trying to rebuild their relationships with their families, their communities and to find ways of sustaining themselves and their families. In addition, they still have to find energy and resources for their legal battles to obtain justice and reparation. The obstacles to reintegration are even greater when these individuals are taken into custody and subjected to investigations and control orders immediately upon arrival. This is the case even if they are then released in a short period of time, as has

reportedly been the case for most former detainees who have been taken into custody in their own countries once released from U.S. custody.[51]

Most of the former detainees have reported economic hardship as one the main difficulties of reintegration.[52] To begin with, most have lost their livelihoods – some who had small business of their own found they had collapsed in their absence; others have simply lost the jobs they had.

In many cases, their families have spent most of their savings in trying to secure their release. In other cases, their families (wives and children) left the place where they used to live and their property has been illegally appropriated by others.

This implies that in many, if not all the cases, they need to 'start from scratch'.

For most of these individuals it has been extremely difficult to find a job again. On the one hand, the physical and psychological consequences of torture they continue to endure make it very difficult for them to undertake employment. The greatest obstacle in finding a job, however, seems to be the stigma, suspicion and lack of trust that society (including potential employers) have towards them.[53]

The stigma these individuals suffer from – of being 'terrorists', 'criminals', 'extremists', 'extremely dangerous', and the like – is very visible in certain media reports and in discussions both at the public and private level on the 'threat' they pose.[54]

Most of the former detainees, however, have never been formally charged of any crime, thus they cannot properly be termed 'criminal suspects'. They are taken to be suspects simply because they have been detained, regardless of the legality and justification for such detention.

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[51] See Laurel E. Fletcher, Eric Stover et al., "Guantánamo and its Aftermath", *supra* note 35, p. 62.

[52] PHR, "Broken laws", *supra* note 35, p. 93. The PHR study reports that out of their eleven interviewees, "All except one lost their livelihood and are facing financial hardships, and many were concerned about their physical safety and security" (p. 9).

[53] *Ibid*. The PHR study reports that "[m]any former detainees reported encountering social stigma and fear in their communities as a result of their status as former US detainees" (p. 9).

[54] See, Laurel E. Fletcher, Eric Stover et al., "Guantánamo and its Aftermath", *supra* note 35, in which it is explained that "[s]ome respondents who returned to Western European countries reported that they received death threats over the phone, saw signs denouncing them in their neighbourhood, and encountered people shouting profanities in their direction on the street" (p. 63).

The fact that most of the detainees were released without a formal process that recognised that there was no evidence to prove their guilt, and without any official acknowledgement from any state that they had indeed been illegally detained, contributes to the perpetuation of the suspicions of the individuals' links to terrorism. It also adds to the stigma. Their names have not been officially or legally 'cleared'.

The lack of acknowledgement and an apology is even more difficult to understand in cases that have been widely reported and where clear evidence points to the innocence of the individual and to the torture and other wrongdoing inflicted upon him or her.

The 2007 Council of Europe Report recognised this problem in the case of Khaled El-Masri, when it noted:

> it is regrettable that Mr El-Masri has not yet been given an official apology for the abuses he has suffered, despite the fact that Mr Schily has stated before the *Untersuchungsausschuss* that Mr El-Masri is innocent and that the Americans have long since offered their own apology to the German Government.[55]

It is for this reason that many former detainees are untiringly seeking an official acknowledgement in court. Until such time as a formal acknowledgement is provided, these individuals will continue to face stigma and suspicions.

For those who are released and hosted as refugees, besides the stigma, they have the additional burden of adjusting to a new country, often in a language they do not speak, and many times with completely different cultural traditions to their own. Reintegration in such cases may become even more cumbersome. Although some European countries, with a long history and experience of receiving refugees from different parts of the world may be better prepared for these situations, others are clearly unprepared.

Moazzam Begg, a former Guantánamo Bay detainee and spokesman for Cageprisoners, described the hurdles faced by former detainees upon their return – a day they had been dreaming about while in detention. He highlighted the irony of the different treatment given to released hostages who are greeted upon their arrival to the United Kingdom with a heroes' welcome, and the treatment of former Guantánamo Bay detainees who are regarded with suspicion and usually taken immediately from the airport to a

[55] Council of Europe (2007*), supra* note 1, at para. 297.

police station. As he explained, former detainees are the object of ongoing suspicion as people think that if they were detained 'they must have done something wrong'.

Their situation is aggravated by the fact that they are normally kept under surveillance, their documents are held, and their right to travel revoked. The Guantánamo detainees that returned to the UK received a letter from the Home Office under the 'Royal Prerogative' a few days after their arrival informing them they could not travel. In such situations, it is incredibly difficult for them to rebuild their lives. For example, the fact of not having one's identification documents means that it is impossible to attend university. This, again, comes in stark contrast with the treatment of even those who *have* been convicted of a crime and who are offered education courses while in prison. It is also very difficult in these circumstances to find a job because of the need to justify the absence for the past four or more years, and the difficulties in getting references.

As ***Moazzam*** pointed out, the problem is that there is no system in place to receive and assist these individuals, as there is for other people who return to the country (such as for the British soldiers who were captured in Iran). Former detainees are literally left to their own devices.

In his view, one of the greatest tragedies of unlawful detention is the impact it causes on the families, the stress and trauma it causes.

In his words, what former detainees wish for is not pity, but they would like to get a sense of justice, that people would recognise the trauma they have suffered. It is also important to bear in mind that this problem is not completely new. Arbitrary detention and torture have taken place in the context of the conflict in Northern Ireland, and certainly prior to 9/11.

Some of the former detainees are more fortunate because they have the backing of their communities or at least extended families, but that is not the case with all of them. Each detainee has had his own unique experience. Detainees and their families have also benefited from the work of organizations such as HHUGS, or Reprieve and Cageprisoners and others who have offered their support and understanding. Their religious faith has also helped many of them to face the difficulties while they were detained, and still does now. For former prisoners, it is important to have a platform where they can tell their stories, but these opportunities should not be limited to those who are English-speaking.

Julia Hall, senior counsel in the terrorism and counterterrorism program at Human Rights Watch (HRW), spoke about the ongoing campaign to resettle some of the Guantánamo detainees who cannot be repatriated to their home countries because of the risk of torture or persecution. In her view, there seems to be greater sympathy and a more "thoughtful approach" from governments, namely European governments, to accept these detainees in comparison to their attitudes towards former detainees who have been previously released. This is related to the public outcry against Guantánamo Bay and also to the fact that the U.S. has cleared many of these men for release.

Julia Hall described three different types of cases of resettlement that HRW has been involved in. In the case of Oybek Jabbarov, an Uzbek national who has been detained at Guantánamo Bay for over 6 years, when HRW approached a certain government to receive him, there were concerns over his reintegration, namely over his mental health, his ability to work, his ability to learn the language. As she notes, the complex needs of these individuals may be disincentives to governments to host them. She also spoke about the five Chinese Uigurs who were former Guantánamo Bay detainees and who were resettled in Albania in 2006, apparently, thanks to the financial incentives given by the U.S. to Albania. They could not be returned to China for fear of persecution and torture. Their story has become an unfortunate example of lack of integration and assistance.[56] They were reportedly kept in a closed refugee centre, were given $1 per day by UNHCR and eventually had language classes, but they were in a state of despair. HRW and the Centre for Constitutional Rights tried to help resettle one of them - Adil Hakimjan - in Sweden on the basis of the principle of family reunion and also given the lack of reintegration prospects in Albania. However, his asylum application was rejected by the Swedish Migration Board in part because he had been granted residency in Albania and there was little risk of him being deported back to China and also on the grounds that his sister failed to mention him when she applied for asylum herself. Hakimjan's attorney appealed the case, strengthening his client's claims with new DNA evidence proving that the woman was Hakimjan's sister. In February 2009, this decision was overturned.[57] It has been reported that the Swedish Migration Board will appeal.

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[56] The Council of Europe Commissioner for Human Rights recognized that "They [the Chinese Uighurs received by Albania] found their life in Tirana very difficult, with little support to help their integration into society." Council of Europe Commissioner for Human Rights Viewpoint (19 January 2009), *supra* note 7. See also, Besar Likmeta and Ben Andoni, "Ex-Guantanamo Prisoner Rebuilds Life in Albania", *Balkan Insight* (19 January 2009).

[57] "Sweden grants asylum to former Guantanamo detainee", *Associated Press* (18 February 2009).

Finally, ***Julia Hall*** spoke of a case that in her view constitutes an example of some accountability, or as she put it, the silver lining in an otherwise extremely dark cloud. The UN Committee Against Torture and the Human Rights Committee found that Sweden had violated its international obligations by colluding with U.S. CIA agents to render two individuals – Mohammed Alzery and Ahmed Agiza – to Egypt in December 2001.[58] In 2008, the Swedish government revoked the original expulsion orders of these individuals which led to their renditions to Egypt. The government said that the orders were inappropriately issued and offered compensation in the amount of 3 million kroner (about $500,000) to Mr. Alzery. The lawyers had asked for 30 million kroner but brokered a deal for a fraction of that. Symbolically, the award is important. There are still negotiations over the amount for Agiza but because his family remains in Sweden and actually had to go into hiding after Agiza was returned, they suffered significant moral injury in terms of 5 children in hiding and the psychological impairment.

Clara Gutteridge, an investigator at Reprieve, described the difficult situation also faced by those who were illegally abducted and detained in East Africa in December 2006 and January and February 2007. As she pointed out, these cases differ from the Guantánamo Bay ones in the sense that they occurred 'below the radar', there was no official intervention in these cases.

At least 150 people, including children of 21 different nationalities, were arbitrarily detained in Kenya. Many were reportedly fleeing to Kenya from the conflict in Somalia when they were illegally captured. They were held in detention in Kenya without charge. The majority were denied access to a lawyer, consular assistance, the ability to challenge the legality of their detention or consideration of their potential refugee status. Even though among them there were some UK nationals and residents, for example, the UK government was refusing to give them consular assistance and request their release. When approached by Reprieve, the UK Foreign and Commonwealth Office said they had not been in contact with the detainees. However, Reprieve was aware that the MI5 had interrogated these individuals in luxury hotel suites, while they continued to be denied any type of consular assistance. A similar situation took place with Danish nationals who were being detained in Ethiopia and also interrogated by Danish secret services officials.

[58] Committee against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003 (2005), Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (2006).

Some former detainees have alleged that they were tortured; that the conditions of their detention amounted to cruel, inhuman or degrading treatment or punishment; and that they were interrogated by the intelligence services of foreign governments. Some of the individuals were released in Kenya or deported to their country of origin. At least 117 individuals, however, were 'rendered' to Somalia outside of any legal process; about 41 are known to have then been transferred to Ethiopia but the whereabouts of others remains unknown.

Clara described the experiences of the four British citizens who were detained in Somalia. Upon arrival to the UK, they faced problems such as racist comments and general harassment by the security services. A Swedish woman in a similar situation also reported she felt watched, trapped and was unable to travel after she returned. Furthermore, she received a bill from the Swedish government for her flight home from secret detention.

In ***Clara***'s view, people are being left to their own devices. Also, stigmatisation is a common theme for all those who returned – something intangible but very pervasive.

These individuals reported to have been and continue to be harassed, to still be under surveillance of the intelligence services, and to suffer from stigma.

In addition, a Kenyan citizen, Mohamed Abdulmalik, was detained in Kenya and later surfaced in the United States' detention centre at Guantánamo Bay. He is also thought to have been subjected to a similar process of rendition, though his exact trajectory is not yet known as no independent investigation has been undertaken by the Kenyan Government, despite repeated calls for this to be done.

Asim Qureshi, who has been working together with Clara Gutteridge on these cases, pointed out that European countries do not want to be seen as being involved in torture; that is why they engage in 'proxy detention' and the 'outsourcing of torture'. By giving the example of a number of individuals, ***Asim*** explained how European intelligence services have been feeding information to interrogators in other countries,[59] such as Pakistan, while being aware of the torture being committed in these countries during the

[59] Examples include: Rangzieb Ahmed, Zeeshan Siddiqui, Shoaib Siddiqui, Salahuddin Amin and Rashid Rauf in Pakistan, Detainee AN in Syria, and Mohammed Ezzouek, Reza Asfarzadagen, Shahjahan Janjua and Hamza Chentouf in Kenya. All these men were tortured abroad and faced questioning with varying levels of British complicity. This of course excludes all the British citizens and residents who were rendered from Pakistan and Afghanistan to Guantanamo Bay.

interrogations. Furthermore, information obtained through torture has been used in proceedings against these individuals upon return, when they are arrested in connection with terrorism charges and, in the UK at least, put under control orders.

According to ***Saadiya Chaudary***, a solicitor at Bindmans LLP, the seven Russians who were detained at Guantánamo Bay and then released back to Russia in March 2004, on the basis of diplomatic assurances that Russia gave the U.S., suffered extreme stigma on return. The type of harassment they suffered once in Russia was quite severe.[60] They were taken into custody immediately upon arrival on charges of conspiracy but were released a few months later without charge. Since then they have been systematically persecuted by the Russian authorities. Three have managed to flee Russia to escape the persecution, three others were rearrested on terrorism charges, and one man was shot dead by the Russian Security Services in June 2007.

The three individuals who were rearrested say they were violently abducted and questioned about their time at Guantánamo Bay despite the fact that they had been arrested for unrelated incidents. One of them, Rasul Kudaev, had been held since 2005 at a pre-trial detention centre (SIZO) in the Russian Republic of Kabardino-Balkaria. Rasul was detained and tortured to the point that within one month he was unable to walk. However, he remains in custody without a trial. This case has been brought before the European Court. The other two men, Ravil Gumarov and Timur Ishmuratov have stood trial for the explosion of a pipeline in Bugulma. According to a report by Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers,

> In detention, interrogators pulled hairs from Ravil Gumarov's beard and forced vodka down his throat, which is a particularly offensive form of ill-treatment for abstinent Muslims, in an effort to force him to confess to the crime. Interrogators warned Timur Ishmuratov that they would call in his pregnant wife for questioning and could not guarantee the safety of the foetus. Both men confessed during the investigation, but subsequently withdrew their confessions in court.[61]

Ravil and Timur were acquitted in 2005 and the court recognised that they had been subjected to torture, but this decision was overturned by the

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[60] See, generally, Human Rights Watch, "The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States" (March 2007).

[61] Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum: Situations in specific countries or territories, UN Doc. A/HRC/4/25/Add.1, 5 April 2007, at para. 301.

Supreme Court following a retrial. The two men were convicted and they are now serving their sentence in Siberia, far from their family and friends.[62]

In fact, for many of the individuals who were released from U.S. custody, it was like living one nightmare after another. One former detainee was quoted as saying: 'I was living in hell in Guantánamo. And when I returned home, it was another hell'.[63]

Murat Kurnaz, a Turkish national resident in Germany, is a human rights activist and author of the book *Five Years of my Life: An Innocent Man in Guantánamo*.[64] In November 2001 when he was about to return to Germany after having spent one month in Pakistan in a school of an organization that helps youngsters worldwide, he was made to leave the bus he was in at the airport, he was questioned and was arrested without explanation. At that time he was 19 years old. He was kept in an underground prison with no windows, shackled, handcuffed, his captors put a bag over his head, and he was denied any phone calls. After some time, he was handed over to U.S. forces and taken to a U.S. base in Kandahar, Afghanistan where he was interrogated by U.S. soldiers and tortured when he refused to confess – for example, he was beaten in his stomach while his head was plunged in water. He was then taken to Guantánamo Bay in February 2002 where he was detained for more than four years. Although apparently it was already clear before that there was no evidence against him, the German government failed to immediately ask for his return to Germany because he was not a German national.

According to testimony he gave to the Senate Committee on Foreign Affairs,

> As my story demonstrates, it is not the existence of a security threat that keeps someone in Guantánamo. Because there was no law in Guantánamo, in order to be released, I needed to have a country that would fight for my release. For too long, there was no country that would do that: the German government for years refused to claim me because they considered me a Turkish citizen. The German government even tried to revoke my German residency while I was in Guantánamo. Also, I did not have a strong connection to the Turkish government, since I lived my whole life in Germany. I was not a refugee and could have returned to either of these countries. Instead, I was left behind

[62] "Russia 'abused returned suspects'', *BBC News* (29 March 2007). These cases have also been reported by Human Rights Watch (March 2007), *supra* note 61.
[63] Laurel E. Fletcher, Eric Stover et al., "Guantánamo and its Aftermath", *supra* note 35, p. 65.
[64] Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantanamo*, Palgrave Macmillan, April 2008.

waiting for politicians to do the right thing for me.[65]

Upon his return, he was surprised to see how much had been kept hidden from the public by the government. According to him, the official discourse of the German government continued to be that he was a 'criminal', a 'terrorist' and a danger for Germany. In his view, the government has done this to hide its own mistakes. This was reinforced by media articles labeling him "the German Taliban", which were extremely harmful to him.

This is reinforced by the Council of Europe report which stated that:

> The cases of Mr El-Masri and Mr Kurnaz, whose responsibility was never established, and who suffered extreme hardships, spending months and years in unlawful detention without any excuse having been offered or compensation paid, gave rise to unpleasant comments in the tabloid press about these two men of Arab origin and of Muslim faith. The apparent success of this media strategy may also be a symptom of latent islamophobia, a worrying phenomenon which should cause concern to political leaders and to all who play an active role in civil society.[66]

D. Support for Family Members

It is well known and documented that gross human rights violations have severe detrimental effects not only on the direct victim but also on members of his or her family. Family members, in particular, spouses, children and others the individual may have supported economically and emotionally are often severely affected.

The increasing recognition of the impact of such violations on the next-of-kin and of their own needs has led to the inclusion of next-of-kin in the definition of victim in key international documents.

According to the definition of "victim" in the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, "[w]here appropriate, and in accordance with domestic

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[65] U.S. House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight , Testimony of Murat Kurnaz, 20 May 2008, available at http://www.internationalrelations.house.gov/110/kur052008.pdf.

[66] Council of Europe (2007), *supra* note 1, at para. 311.

law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".[67]

Similarly, in Article 1 (1.1) of the *Council of Europe Recommendation on assistance to crime victims* it is stated that "[t]he term victim also includes, where appropriate, the immediate family or dependants of the direct victim".[68]

As explained by ***Adam Weiss,*** a staff lawyer at the AIRE Centre, the European Convention on Human Rights also provides legal protection to the families of victims.

Article 3 of the European Convention on Human Rights creates positive obligations for states: to criminalise, investigate and prosecute acts of torture, as well as to prevent such acts. While it places emphasis on holding accountable those responsible for these acts, it does not make reference to the support and rehabilitation of torture survivors. This may be due to the assumption that there is generally in European countries a health care system in place that would assist these victims.

Under Article 8 of the Convention, there is not only a negative obligation to not interfere with the family, but according to the case law of the European Court the state has some positive obligations, inherent in the right to respect for family life, to make sure that families are united and that they are functioning properly. In the *Kutzner v. Germany*[69] case, the European Court of Human Rights spoke of these negative and positive obligations, holding that before the state takes radical measures in separating families, it has the obligation to make some positive effort to make sure the family unit can survive as it is. This article of the Convention may thus be of particular relevance for the detainees who have or will receive refugee status in a European country.

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[67] *UN Basic Principles and Guidelines on the Right to Reparation*, *supra* note 39, at VI (8). Similarly, see Article 2 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted in 1985 and Article 24 of the *UN Convention for the Protection of All Persons from Enforced Disappearances.* For an overview on communities of harm, see, Ruth Rubio-Marín, Clara Sandoval and Catalina Díaz, "Repairing Family Members: Gross Human Rights Violations and Communities of Harm", in R. Rubio (ed) *The Gender of Reparations* (Cambridge, Cambridge University Press, 2009).

[68] Recommendation Rec(2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims.

[69] European Court of Human Rights, *Kutzner v. Germany*, Judgment 26 February 2002.

According to ***Adam Weiss***, the best way of using the provisions of the European Convention is not necessarily through litigation but by using them to approach the authorities and working together with them (following a human rights-centered approach). This could be done in cases where a child is taken away from the family due to the trauma the family members have suffered, or in cases of control orders that interfere with family life. These control orders raise issues under Article 8; not only under Articles 5 and 3.

Under the European Convention, in order to bring a claim before the European Court, you need to be a victim of a violation. The definition of 'victim' is thus important to the question of whether family members' rights can be recognised under the Convention. The AIRE centre has been pushing for this recognition. Reframing the question of who is the victim can be a very powerful tool in helping those who were detained but also their families.

Certain gross human rights violations are held to have a particularly acute impact on family members. That is the case of enforced disappearances as typically the family members are left without any information on the fate and whereabouts of their loved ones often for prolonged periods of time, and on the verge of despair given the lack of response from authorities. Another example is torture given that often the direct victim continues to suffer from trauma after the event, which may severely disrupt his or her ability to maintain healthy and balanced relationships with others.

In its case law, the European Court has recognised that under certain circumstances, a family member of a disappeared person may be considered to have suffered inhuman or degrading treatment if the state authorities failed to provide information on the fate of the disappeared person.[70]

The illegal abductions and detentions conducted in the context of the war on terror have had a severe impact on the families of the detainees. The strain caused by their sudden and inexplicable absence, the inability to communicate with them or obtain information about how and where they

[70] In *Cyprus v. Turkey* (Judgement of 10 May 2001), at para. 156, the Court stated that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include (…) the way in which the authorities responded to those enquiries." And it added, "For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3."

were, the fear of speaking publicly about what was happening, the refusal of help or information from the authorities, the feeling of guilt for 'not doing enough' to secure their release, and the uncertainty of the legal situation of their loved ones have all affected wives, parents, brothers, sisters and children.

Zachary Katznelson, legal director at Reprieve, described his first-hand experience with Guantánamo Bay detainees (he represents 34 detainees) and the difficulties of communication between them and their families. He highlighted the level of isolation these detainees experience, and also the trauma they suffer from that isolation and the separation from their families – from his direct experience with Guantánamo Bay detainees, the two predominant words that shape the prisoners' and their families' experiences are: trauma and isolation.

Zachary is often the main link between the detainees and their families. However, strict restrictions are also imposed on the communication between the detainees and their lawyers and what the lawyer can tell the families. Zachary can tell the family what he sees, but everything that a prisoner says is regarded by the U.S. government as something that could endanger national security because these individuals are seen as enemies of the U.S. Also, the notes taken by lawyers during their conversations are carefully reviewed after the meetings, for a period of about 4 weeks. Furthermore, because of the censorship process, there is no confidentiality between lawyer and client, everything must be shared with the government.

At Guantánamo Bay, no family visits are allowed; only David Hicks' father was able to go to Guantánamo Bay, and the authorization for this visit was connected to political reasons. Communication by mail is allowed via the International Committee of the Red Cross (ICRC) but is heavily censored (especially drawings and numbers as they could function as codes). Letters from the outside may mean everything for the detainees, so being unable to receive them or receiving heavily censored letters has a very negative impact on prisoners. The lack of human contact, particularly of the prisoners with their families, is incredibly difficult psychologically. In 2008 the ICRC was permitted for the first time in 6 years to set up phone calls between the detainees and their families, but only for one hour per year. This makes it difficult for detainees to even know what to say during that short time. Again, this is in stark contrast with the rights that convicted prisoners – not mere suspects – have in the U.S., including those on death row who can, *inter alia*, receive visitors. Guantánamo Bay is also in contrast with, for example, the detention facility of Bagram in Afghanistan where videoconferences between the detainees and their families are permitted.

The trauma of prisoners and their families starts even before the detention. For example, for persons who were living in Afghanistan, they and their families suffer the trauma of war and from experiencing violence.

Often people say that the families of the Guantánamo Bay detainees are actually lucky because unlike those who are in secret detention, they know where their loved ones are. But this was not always like that as it was only in May 2006 that the U.S. government finally released the names of the prisoners in Guantánamo. For those who are being held in secret prisons worldwide, this is still the case.

The level of isolation and stigmatisation that these families suffer is only broken by organizations like HHUGS who reach out to them and offer support without judgments on what the detainees might or not have done.

During the detention, there is a switch in the family dynamics which needs to be dealt with once the detainee comes back. Wives and children take on very different roles than they would if the husband/father would be there. Often they put a lot of effort in campaigning for the release of their loved one.

Upon release of the detainees, many families have had to learn how to live with the physical limitations and the psychological trauma their loved ones experienced. Equally, they have had to become accustomed to a difficult economic situation and stigma. Several children born after their fathers were detained have met their fathers for the first time when they were released.

In spite of the recognition of family members as victims and of their rights as such, in practice they have struggled to receive the assistance they need and deserve.

Uzma Qureshi, from the nongovernmental organisation HHUGS (Helping Households Under Great Stress),[71] explained the work they undertake in providing support and advice to households affected by anti-terror legislation. She described how control orders imposed upon former detainees upon their return also apply to their families who live in the same household and place an immense burden on their lives. Examples of these restraints include: not being allowed to have mobile phones; no internet access; any visitors to the home must be previously approved by the Home Office; phone calls are only permitted to certain numbers; often not allowed to meet with certain individuals; sometimes only allowed to leave the house for a few

[71] www.hhugs.org.uk.

hours. These types of restrictions severely hamper the lives of all the family members, including the children.

As is explained by Victoria Brittain in her seminal report *Beseiged in Britain*,

> Under control orders or deportation bail, whole families began to live a life of strict rules designed to punish them – and to impel them towards leaving Britain – as some of them did, voluntarily. ... Everyone in these families, including children, has lost the ability to trust. All feel betrayed by the authorities, and many know they have also been betrayed by former friends and colleagues.[72]
>
> Bail and control order conditions which prohibit virtually all social interaction reinforce the fear of breaking the rules inadvertently by speaking to people met on the street or in the mosque, and intensify feelings of isolation.[73]

Brittain describes that a majority of the men subjected to control orders have been "driven into mental illness and four into florid psychosis. More than half were assessed as already suffering mental health problems associated with their torture and/or prison experience at home,"[74] particularly difficult to cope with "when they come from backgrounds where such mental illness is a real stigma and therefore almost impossible to acknowledge."[75] She further explains that:

> Children are also frequently re-traumatised by the constant reminder of their father's vulnerability, through repeated court appearances or unannounced police visits to the home, often while they are sleeping. Such visits are a routine condition of control orders and deportation bail, which also mean unannounced visits from the private company responsible for their subjects' electronic tags and the special telephone that the men have to use up to five times a day, including during the night, to confirm their presence and whenever they leave the house or return. Acute anxiety never lets up as the tags malfunction repeatedly and fail to register at the company's central control. So, a man sleeping quietly or playing with his children can be arrested, taken to court and accused of having broken his bail conditions. A breach of the conditions can mean a five-year jail sentence.[76]

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[72] Victoria Brittain, *Beseiged in Britain*, *Race & Class* 2009; 50; 1, p. 4.
[73] *Ibid*.
[74] *Ibid*., p. 5.
[75] *Ibid*.
[76] *Ibid*.

Brittain also describes the challenges facing many women, including anxiety, depression, overwhelming logistical difficulties and language barriers.[77]

HHUGS was created in 2004 as a result of the realisation that families affected by counter-terrorism measures had a great need for support, particularly after the adoption of new UK anti-terrorism legislation. Most of these families started to feel ostracised by the wider community. Some had language problems, and often women were left alone to deal with issues that their husbands used to deal with. In general, families were in need of great emotional support, especially the children. HHUGS gives practical support and advice to these families, and it aims at improving their work in addressing stigmatisation of these families within society.

E. Access to Justice in the U.S.

Victims of rendition and unlawful detention have brought a number of legal actions in U.S. courts. These courts would appear to be the most appropriate forum for such claims given that the policies of rendition and illegal detention have been devised by the U.S. government and implemented by U.S. state officials, at times with the connivance of authorities from other states. In implementing such policies, the U.S. government has also relied on the logistical support of private U.S.-based aviation corporations.

These legal actions have faced a series of obstacles which fall into two main categories: the state secrets privilege and the immunity of state officials. As a result, victims have been left without access to an effective and adequate remedy.

Steven Watt, a staff attorney at the American Civil Liberties Union (ACLU), described the operation of the state secrets privilege in U.S. courts, which has proved to be a particularly robust legal obstacle for victims of rendition and unlawful detention who are seeking civil redress in U.S. courts.

Whilst the U.S. Supreme Court has made a number of important rulings striking down the Bush administration detention policies, to date, lower courts have declined to recognise that victims of U.S. rendition, detention and torture policies have a right to civil redress for their injuries. They have done so by either dismissing claims without consideration of the merits on the basis of the state secrets privilege or upholding government claims to official

[77] *Ibid*.

immunity. What lower courts, to date, have effectively said is that even if the U.S. government does operate an 'extraordinary rendition' programme[78] and that individuals have been tortured as a consequence, victims have no right of recourse before U.S. courts to seek civil redress.

This presentation focused on the operation of the state secrets privilege as a bar to civil redress for victims of egregious human rights violations and illustrated its operation by reference to two cases: *Khaled El-Masri v. Tenet*,[79] and *Binyam Mohamed and Others v. Jeppesen*.[80]

In December 2005 the ACLU filed a case on behalf of a German citizen, *Khaled El-Masri* against the CIA director at the time of the events, George Tenet as well as three U.S.-based aviation corporations, which public records showed were actively involved in the rendition programme, including Khaled's rendition – these corporations either owned or operated the aircrafts. In the law suit the ACLU alleged that Tenet ordered the rendition and that the aviation corporations, by providing planes and staff, facilitated the rendition knowing the end result of the rendition: secret detention and torture. The claims in *Khaled El-Masri v. Tenet* were filed under the U.S. Constitution which prohibits torture and provides a remedy for victims of torture, and also under the Alien Tort Claims Act (ATCA), which was enacted by Congress in 1789 and provides foreign nationals with the right of recourse before federal courts for violations of certain international law norms, including the prohibition of torture.

Shortly after the suit was filed, the U.S. government sought to intervene to assert the state secrets privilege, and have the case immediately dismissed without consideration of any publicly available evidence that corroborated El-Masri's claims. The state secrets privilege – a common law evidentiary privilege – is a prerogative of the government to invoke to exclude discrete pieces of evidence from consideration when such consideration in the course of litigation would be harmful to the U.S. national security interests, including means and methods of intelligence gathering and U.S. relations with foreign powers.

In determining whether to dismiss the case, no evidence was formally considered by the district court. The court upheld the claim of the government and dismissed the case without deciding on the merits, stating

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[78] Since September 2006 the Bush administration has confirmed that it operates a rendition and detention programme and justified its use in a number of public statements.

[79] *Khaled El Masri v. Tenet*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667).

[80] *Mohamed v. Jeppesen Dataplan, Inc.* 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008).

that the very subject matter of this case is a state secret and that there are no procedures that the court could have employed to hear the case without revealing secrets of state. The decision to dismiss the case from the very outset was made by the court based on two affidavits presented by the government; one publicly available and the other for the judge's eyes only. The court dismissed the case despite volumes of publicly available information that the ACLU presented to the court that corroborated Khaled's version of events and that could eventually be led as evidence. This information included statements by U.S. officials publicly confirming the existence of a rendition and detention programme. The court also failed to consider alternatives to dismissal that could have been employed by the court to protect state secrets while at the same time affording Khaled his day in court.

In *El-Masri v. Tenet*, the Court of Appeals for the Fourth Circuit upheld the lower court's decision dismissing the case on broadly similar grounds. And, in December 2007, the Supreme Court, without comment, declined to review the Court of Appeals' decision. Having exhausted all adequate and available domestic remedies, in April 2008, the ACLU submitted a petition to the Inter-American Commission on Human Rights on behalf of Khaled. The case is still pending a determination as to admissibility.

In October 2007, the ACLU filed a second case challenging the "extraordinary rendition" programme, *Binyam Mohamed and Others v. Jeppesen.* The sole defendant in this case is Jeppesen Dataplan, a wholly-owned subsidiary of the Boeing Aerospace Company. The case was filed under the ATCA. The claim against Jeppesen is that it aided and abetted or conspired in the forced disappearance and torture of Binyam Mohamed and the other four plaintiffs by knowingly providing critical flight planning and logistical support services to aircraft and crews used by the CIA in their rendition.

The U.S. government again sought to intervene to assert the state secrets privilege and to have the case dismissed from the very outset, without consideration of publicly available evidence which could corroborate the plaintiffs' claims that Jeppesen was indeed knowingly involved in their forced disappearance and torture. On broadly similar grounds to those advanced in the El-Masri case, the lower court dismissed the case on 13 February 2008. In June 2008, the ACLU requested that the Court of Appeals in California reinstate the lawsuit on the grounds that the government had improperly invoked the states secrets privilege. Oral argument was held in February 2009 during which U.S. Justice Department lawyers repeated the Bush administration's position on the application of the privilege to argue for the affirmation of the lower court's decision dismissing the case. At the time of writing, the decision on the appeal is pending before the Court of Appeal.

In ***Steven***'s view, the government is not using the state secrets privilege claim as it was initially crafted - as a shield to protect U.S. national security interests; but rather as a sword to cover up mistakes, embarrassment and egregious violations of human rights. The U.S. court system, by blindly accepting the assertion of privilege is ignoring facts widely known in the public domain and, in effect, facilitating a government cover-up. The court is saying 'your facts may be true but because of the harm to national security we can't allow the case to proceed'.

Steven Watt highlighted that although these cases have not proven successful in the U.S. courts, it is important to view these cases, not in isolation, but rather as part of a broader advocacy strategy aimed at four things: exposing the rendition programme; ending the programme; holding U.S. officials accountable in venues other than U.S. courts (e.g. before the U.S. Congress) and providing some form of redress for the clients by providing them with a venue to tell their stories and to seek an official acknowledgment of what happened to them; an explanation as to why they were targeted; and an apology. In these two cases, this is all that the six men are seeking.

Lorna McGregor, the International Legal Advisor at REDRESS, described the application by U.S. courts of another procedural barrier to justice in rendition and illegal detention cases: immunities.

The case of *Rasul v. Rumsfeld and others*[81] was filed by four British nationals who were held in Guantánamo Bay and later released. The plaintiffs argued that they had been subjected to interrogation techniques that were approved by Donald Rumsfeld and other U.S. senior state officials and which amounted to torture and other prohibited forms of ill-treatment. The applicants alleged that they were subjected to beatings, sleep deprivation, extreme temperatures, forced nudity, death and psychological threats and religious abuse during the period when these techniques were in force. They claimed civil damages against U.S. officials in a case lodged in U.S. courts on the basis of international law and constitutional claims. In January 2008 the Court of Appeals for the DC Circuit dismissed the case on the basis of the immunity of state officials under U.S. law.[82]

Immunity, as a procedural bar, means that the applicants would not be able to even argue their case in court. This, in a very real and practical sense,

[81] *Rasul v. Rumsfeld*, 414 F.Supp.2d 26 (D.D.C. Feb. 6. 2006).
[82] Decision of 18 January 2008, available at:
http://ccrjustice.org/files/Rasul_AppealsCourtDecision_01_08.pdf.

prevents the individuals who were subjected to rendition, unlawful detention and torture from moving on with their lives.

In the United Kingdom there have been several cases brought by British citizens or residents where immunity was raised as a procedural barrier in civil claims for damages. But in these cases what is at stake is the immunity granted to foreign state officials or foreign states for acts of torture that occurred abroad, for example in the cases of *Al-Adsani v. Kuwait* and *Jones and others v. Saudi Arabia*. According to the jurisprudence of UK courts so far, state and individual immunity prevents these cases from being heard. These immunities have their basis in international law and international relations rationales such as: non-interference in the affairs of another state. An application has been submitted to the European Court of Human Rights in the case of *Jones v. UK*, so the application of this type of immunity may change in the future.

In the *Rasul v. Rumsfeld and others* case, the immunities in question are of a domestic nature, thus no such international relations rationales were advanced. Essentially, the Court held that the defendants were entitled to two levels of immunity:

> a) the first, a judicially-created qualified immunity, which applies when the act in question was not clearly established as a violation at the time it was committed;
> b) the second ground for immunity was found under the Federal Liability and Tort Compensation Reform Act, commonly referred to as the Westfall exception, according to which if an official was acting within the scope of their employment at the time when he or she implemented these interrogation techniques he or she enjoys immunity, and also that the appropriate body to challenge and to bring a claim against is actually the U.S. as a government.

As to the first ground of immunity, the court held that the test to be used is if a reasonable person would have not known either that the act was illegal or that the individual was protected by the particular law (the U.S. Constitution and the Geneva Conventions in this case) then the defendants can escape liability. The court also stated that Guantánamo Bay detainees lack constitutional rights because they are aliens without property and presence in the U.S. The later argument may be considered to have been put in question by the more recent decision of *Boumediene.*[83] This ground of immunity seems

[83] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

easier to contest given the widely-known absolute nature of the prohibition of torture.

In what concerns the second ground of immunity, the idea behind it is to protect federal employees from personal liability from common law torts committed within the scope of their employment. When an official is seeking to be protected by this immunity, the Attorney General needs to confirm they were acting within the scope of their employment and then it is upon the applicants, or the victims, to challenge that presumption.

As ***Lorna McGregor*** pointed out, although it might seem intuitively obvious that one should not be protected by the scope of employment immunity when one commits torture, it may not be so evident in practice.

In the UK, for example, it has been very difficult to argue that torture in not an 'official act' and that one does not carry it out within one's official capacity. This is so because the egregiousness of torture as defined in Article 1 of the UN Convention against Torture, which the House of Lords relied upon, is precisely that it is conducted under the mantle and with the construct of a state. In fact, in order to argue that an act falls within the Convention against Torture it must be demonstrated that the act was carried out by someone acting in an official capacity. In the UK it is therefore difficult to argue that torture does not constitute an official act.

In the U.S. the court looked at what was the meaning of 'in the scope of employment' and it concluded that one needs to look at four factors:

> a) whether the act was the kind of act that the employee was employed to perform;
> b) whether the act occurred substantially within the authorised time and space limits of the employment;
> c) whether it had at least the purpose of serving the master;
> d) and in case force was intentionally used by servant against another, whether the use of force is not unexpected by the master.

In this particular case, the U.S. court found that the acts in question (detention and interrogation of suspected enemy combatants) were the type of conduct that the defendants were employed to engage in. In other words, the alleged torturers' conduct was incidental to the defendants' legitimate employment duties.

The background of the jurisprudence on the 'scope of employment' in the U.S. is related to attempts by U.S. lawyers to target the employer (the State)

instead of the individual employee, partly because the employer has more money.

However, it results in this case in the fact that it is very difficult to argue that detention and interrogation techniques that amount to torture were not carried out within the scope of employment and are therefore not covered by immunities.

On the other hand, the U.S. has been one of the few countries in the world that has accepted that individuals (U.S. nationals and non-nationals) can bring a case for civil damages against foreign officials for torture that occurred outside the U.S. In these cases, the courts have held that torture is not an official act. The UK courts, on the other hand, have explicitly distanced themselves from the U.S. line of jurisprudence when it comes to the liability of foreign individuals (including foreign state officials) in tort claims.

There is a difficult tension here given that you can sue a foreign official for acts of torture but you cannot sue a U.S. official for the same acts because it is considered to fall within the scope of employment.

There seem to be, however, entry points to argue against this understanding of the U.S. court in *Rasul v. Rumsfeld and others*. In December 2008 the U.S. Supreme Court granted the Rasul plaintiffs' petition for certiorari and remanded the case to the U.S. Court of Appeals for the DC Circuit for further consideration in light of *Boumediene v. Bush.*

F. Investigations into Allegations of EU Involvement in Renditions and Unlawful Detentions

As international concern at the U.S. government's policies on the 'war on terror' was growing, allegations of the involvement of European states in rendition and illegal and secret detention started making the news. By 2004, there had been reports of secret prisons in central and Eastern Europe operated by the CIA as well as of CIA-chartered flights using European airspace and airports while transferring illegally abducted prisoners to detention sites all over the world under the U.S.'s control.[84]

Not long after, investigations conducted by the Council of Europe on the alleged existence of secret detention sites in Europe and on the transport of

[84] See Dana Priest and Joe Stephens, "Secret World of U.S. Interrogation", *Washington Post* (11 May 2004).

detainees suspected of terrorist acts in European territory documented how counter-terrorism policies and practices operated as a "global spider's web".[85] Attention was set no longer only on the U.S. but also on Europe's connivance and collusion in the U.S.-led programme of 'extraordinary rendition' and unlawful detention.

The investigations of the Council of Europe in 2006 and 2007 concluded that "the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture" and that "[i]n most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies" of European countries.[86]

Gavin Simpson, a senior investigator at One World Research who worked closely with Dick Marty, the Rapporteur in charge of the Council of Europe's investigations, reminded that the abuses transcend national boundaries and national borders, and cover several different jurisdictions all at the same time. The U.S. government has exported its detentions and detainee transfers to other continents, including Europe, precisely in order to avoid the jurisdiction of the U.S. courts. Part of the reason why it is so difficult to seek justice for these abuses in U.S. courts, is because they have occurred extraterritorially.

The fringes of the 'global spider's web' are on the U.S. side, but the very heart of it sits in Europe. The Council of Europe's Marty inquiry ran for two years. It was led by a Swiss senator and head of the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights. It began with the first of many limited disclosures, which came in November 2005 in the form of an article by the investigative journalist Dana Priest in the Washington Post, which stated that several Eastern European democracies had hosted some of the highest-valued terrorist suspects in secret prisons, or secret detention facilities. The countries at that point were not named, although, as Miss Priest herself confesses, the names were known to her and

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[85] Swiss Senator Dick Marty, Rapporteur of the Council of Europe's inquiry into the alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states has written, in relation to his report that: "I have chosen to adopt the metaphor of a global "spider's web" as the *leitmotif* for my report. It is a web that has been spun out incrementally over several years, using tactics and techniques that have had to be developed in response to new theatres of war, new terms of engagement and an unpredictable threat". See, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States", Draft report – Part II (Explanatory memorandum) Rapporteur: Mr Dick Marty, Switzerland, ALDE AS/Jur (2006) 16 Part II, 7 June 2006, at para. 25.

[86] Council of Europe (2007), *supra* note 1, at paras. 9 and 10.

to the Washington Post. The reason that they were not named was because of the influence of the White House, and both the managing editor of the Washington Post and Miss Priest herself were called to meetings with the presidential administration and asked expressly not to disclose the names of the countries in question. The Washington Post justifies its decision on the basis that there were severe safety and co-operation issues – that these countries were of course ongoing allies of the U.S. in the war on terror. So the political stakes were very high.

The investigation was opened in late 2005 and early 2006, in the knowledge that it could be construed as a great political risk. It was felt that the principles at stake outweighed the political considerations – here after all were some of the practices which would have been among the most egregious contraventions of the European Convention on Human Rights taking place at the authorisation of, and on the territory of, Council of Europe member states. The abuses included enforced disappearances, allegations of torture and inhuman and degrading treatment inflicted upon the detainees, and all of this took place in secret so it was completely immune from any democratic legitimacy, or indeed scrutiny, of parliamentary or other oversight bodies.

Gavin Simpson explained that these investigations revealed that Europe was implicated in the U.S.-led programme essentially in four ways:

> a) European airports were used as stop-over points when the CIA was carrying out illegal transfers of detainees;

European and other sites around the world had been used as stop-over points in rendition operations carried out by the U.S. These were points at which aircraft stopped off – to refuel, generally – on the way out to conducting, or on the way home from conducting, detainee transfer operations. Notably, two fell within the British Isles, or Great Britain and Ireland, the first of those is in Prestwick, near Glasgow, and the second at Shannon. Those airports were described by the CIA themselves as very suitable stop-off points because they were no-questions-asked kinds of places. That meant that the pilots could often land there with very little notice, the authorisation procedures were not rigorous or cumbersome, and in fact numerous planes stopping off on route to destinations like Pakistan, Romania, Poland, and other sites were refuelled at those two points as they entered European airspace.

> b) European airports were used as staging points, i.e. where aircrafts would congregate before carrying out multiple renditions and where the crew would 'refresh';

Some airports had acted as more than stopovers, and had become staging points. These were the hinges at which aircraft congregated in advance of carrying out multiple rendition or transfer operations. They were the locations at which aircraft stopped for a couple of days while the crew rehabilitated, or refreshed and recuperated themselves, including by for example in Palma de Mallorca checking into four and five-star hotels, having luxury spa treatments, and ordering casements of the finest wines. In places such as Cyprus, the Council of Europe documented meetings of the high-ranking intelligence agents not only from the U.S. but from other countries who were aware of these operations (including in some instances the countries of origin of the detainees being transferred), right in the heart of Europe, at both Frankfurt and Ramstein airports. There were numerous instances, including in one very well-known instance a detainee being transferred across the tarmac of Ramstein from one aircraft onto another on his way to secret detention in Egypt.

> c) certain locations in Europe functioned as pick-up points, i.e. where individuals were snatched, as was the case with Abu Omar in Milan, Agiza and Alzery in Stockholm and El-Masri in Skopje;

The third category the Council of Europe found within Europe were pick-up points, and from a number of locations, one or more detainees were picked up by a snatch team – a CIA team in collaboration with the national intelligence agencies of that country – and carried to secret detention. In Aviano in Italy, the detainee Abu Omar, who is a Muslim cleric who practiced in Milan, was bundled onto a military aircraft having been snatched from the streets of Milan. In Stockholm-Bromma airport, Ahmed Agiza and Mohammed Alzery, the two Egyptian detainees, were taken from the city centre of Stockholm and bundled into an aircraft which was on route to Cairo. In Skopje, the German-Lebanese citizen Khaled El-Masri, who spent 5 months in secret detention in Afghanistan, was handed over by Macedonians to the CIA. And in Tuzla, Boumediene and five others of Bosnian-Algerian nationality or residency (whose case was then heard by the U.S. Supreme Court) were passed to the U.S. military by the then-controlling SFOR administration in collaboration with the Bosnian authorities. Again and again, there were instances of European national intelligence services co-operating with the CIA in the apprehension and transfer of the suspects.

> d) CIA aircraft landed at certain airports that functioned as 'drop-off points' for detainees who were subsequently transported to nearby secret detention sites, such as those in Poland and Romania.

The fourth category, and probably the most controversial of all, was the points at which these detainees were then dropped off, or at which they were held in secret detention facilities.

Examples of renditions 'circuits' were given to illustrate how within a short period of two weeks, there could be 3 operations involving the illegal abduction and transfer of at least 5 detainees, and these operations could involve several countries – from Europe, to the Middle-East, North-Africa, and of course, Cuba.

As ***Gavin Simpson*** noted, this system operated in a rather meticulous and methodical manner, and was "efficiently marshalled and choreographed". It had an impressive wide territorial scope and a true transnational character. The systematic character of this programme of illegal transfer and detention was not only revealed in the way it operated but also on how it was covered-up.

In fact, the systematic plan to conceal these operations has been, in his opinion, the first and foremost obstacle to the investigations. And this, in his view, is not coincidental, it is in fact "highly coordinated"; it is a matter of policy on the part of the U.S. and its allies to suppress as much information as possible.

It appears that although there was surely awareness of and authorisation given by European authorities, the CIA largely operated the system and, in fact, it is very likely that only a small group of individuals within the European governments or intelligence agencies were fully aware of these operations, of "who was coming in when, or by what means they were being transferred". The reason why this was possible is because European states essentially gave a *carte-blanche* to the U.S. and the CIA. A perverse use of Article 5 of the NATO Treaty – on collective self-defence, sometimes referred to as the 'Three Musketeers clause' – after the 9/11 attacks allowed the U.S. to secure numerous concessions from its European allies (including the use of ports, airbases, territory and airspace) as well as important agreements on intelligence cooperation and information sharing.

According to ***Gavin Simpson,*** the highest level of NATO security policy, which also pertains to the secrecy of information, was implemented across the board – which is known in the terms of NATO agreements as 'cosmic top secret' classification. The level of secrecy with which the system operated is thus a major obstacle to investigations.

A further barrier to investigations was the fact that the system was very tightly operated on what military and especially intelligence agencies describe as a need-to-know basis – there are only few individuals who possess real, material, first-hand knowledge of how the system was operated and therefore it is not possible to simply obtain testimonies from bystanders or witnesses. As ***Gavin Simpson*** pointed out, there was no "democratic legitimacy and no effective oversight" of these processes.

Contributing to this was the fact that the CIA did not use its counterpart civilian intelligence agencies because they were considered as unreliable partners but instead resorted to military intelligence agencies which were seen as more tightly operated.

Other significant obstacles to investigations that the Council of Europe faced include the lack of legal or political protection given to whistleblowers particularly in some of the countries involved (like Poland and Romania). In fact, the Council of Europe reported on special mechanisms employed by intelligence services which are carried over as chain reactions of blackmail, lies, deceit and bribery between different agencies and institutions in individual states and between states but because of the genuine fear of putting lives at risk, investigations into this could not go further.

Another obstacle is the discrepancy of resources between the U.S. and its legal team on the one hand, and the Council of Europe on the other. In fact, whenever the invocation of state secrecy and immunity has not been sufficient, the U.S. has employed highly skilled teams of lawyers to put forward legal justifications for its activities or to redefine the law – for example, the many definitions constructed in the law by the state department during the period of the war on terror.

Moreover, the fact that some American airlines have created false records of flights with the purpose of deceiving their real operations – which is highly illegal within the European air safety and aviation regulations - added considerable difficulty to the investigations.

The Council of Europe faced many difficulties in its investigations due to the lack of cooperation of its member states. Most member states were reluctant to cooperate with the investigations. Out of the 47 member states, only 21 responded to the information requests by the Rapporteur, Mr. Marty, and most of them simply denied any involvement in the issue, or apologised for not having information available. According to ***Gavin Simpson***, some countries – such as Poland and Macedonia – went further by attempting to mislead the inquiry. Even Romania had its own inquiry into this matter –

which ***Gavin Simpson*** considered a "token gesture of an inquiry" whose findings exonerated all Romanian authorities of involvement in the secret detention system.

This was, in his view, a frustrating exercise that the Council of Europe was "powerless to overturn". The Council was limited in its investigative powers, it did not have the right to subpoena or to conduct searches, and no binding guarantees of the anonymity or confidentiality of some of their witnesses.

The cover-up persists. There is a new paradigm of 'managed disclosure', where information is allowed to drip out of official sources. Possibly the best example is that relating to the island of Diego Garcia, which is part of UK territory. First, the UK government said it relied on the assurances of the U.S. government that there were no renditions through UK territory, then it had to apologise – rather embarrassingly – and say that there had in fact been renditions, but they were limited in their nature and had all taken place many years ago. Now it appears that there may be credible evidence, convergent evidence coming out about the use of Diego Garcia, or territorial waters around it, for actually having held high-value detainees. It's the worst possible form of complicity – the granting of blanket use of territory or airspace, giving over a carte-blanche, and then being completely powerless to control the way in which the information does come out and far less the political implications. That is why it is clear that the U.S. led this system. It didn't resort to its allies, including the UK, to ask for strategic or policy advice, it didn't even consider international law as an appropriate framework within which to work. It did all of these things in the interest primarily of the national security of the U.S., and the doctrines and indeed the many, many individuals who have suffered in the process are seen in many cases as collateral damage that the U.S. is prepared to incur.

It is therefore ironic that the most damaging and probably the most revealing disclosures about this system, both hitherto and in the future, very often come from the U.S. itself. The first public official to talk about this system was President Bush, on the 6th of September 2006, when he talked about the transfer of 14 high-value detainees to Guantánamo Bay and revealed that they had previously been held in a system operated covertly by the CIA overseas. Any European partner who has participated in this system must know that they stake their entire credibility on their denials in the mistaken belief that the U.S. will back them to the hilt. But one should not be surprised if, through formal or informal channels, it is the U.S. that comes out and describes the system in Poland, or describes the system in Romania, or describes the scope and the nature of European co-operation, which we have tried earnestly to

uncover, but which we cannot do without co-operation of the authorities involved.

Following the Council of Europe's first report, the European Parliament conducted its own investigations into the topic.[87] As a result, both institutions called upon their member states to conduct full investigations into the involvement of their officials in such practices.[88]

As explained by ***Roísín Pillay***, the Legal Officer for Europe of the International Commission of Jurists, the duty of states to investigate rendition violations is central to the discussions on reparation and remedies for survivors of the renditions system. Whilst there can be remedies for survivors of renditions without a full and thorough investigation, these would fall short of the international duty to investigate and also of the needs of victims of rendition and of society. Even if the U.S. would compensate the survivors of rendition without disclosing all the sensitive information, as was suggested by the Virginia District court in the El-Masri case, much would be lost.

According to ***Roísín Pillay***, there are three important aspects of the duty to investigate:

> a) It is a fundamental need for victims; victims have a need and a right to know the truth, they need public acknowledgement by the institutions responsible for what has happened to them, that what happened was wrong;
> b) Investigations are a practical necessity in order to have justice through civil and criminal law systems;
> c) Investigations are also necessary at a wider political level in order to understand how the events took place and in order to prevent them from happening again.

The duty to investigate is recognised in international law as a part of the right to a remedy and reparation. According to the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, the obligation of states to respect, ensure respect for and implement international human rights law and international humanitarian law implies that states have a duty to "investigate

[87] European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detentions of prisoners, "Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detentions of prisoners" (2006/2200(INI)), (30 January 2007).
[88] European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)).

violations effectively, promptly, thoroughly and impartially" and to prosecute and punish those responsible as appropriate.[89]

Furthermore, the UN Principles explain that victims' right to "adequate, prompt and effective reparation" entails, inter alia, satisfaction, which includes the "verification of the facts and full and public disclosure of the truth".[90] Moreover, victims have also a right to obtain information related to these violations and a right to know the truth.[91]

The duty to investigate is also established in Article 13 of the UN Convention against Torture, Article 3 of the UN Convention on Enforced Disappearance, and it has also been recognised by the UN Human Rights Committee to form part of the right to life and the right to freedom from torture, cruel, inhuman or degrading treatment or punishment under the International Covenant on Civil and Political Rights.

Roísín Pillay noted that the jurisprudence of the European Court of Human Rights is very relevant for the experience of renditions in Europe. She noted that the duty to investigate has been developed in the case law of the European Court in the context of cases of torture, disappearances and arbitrary killings in conflict and non-conflict situations. The case law of the Court has changed the way systems of investigation in some European countries function.

The European Court has affirmed the duty to investigate in relation to some of the most fundamental rights: right to life (Article 2),[92] the prohibition of torture and other prohibited ill-treatment (Article 3), the right to liberty (Article 5) and the right to respect for family and private life (Article 8). The duty to investigate has also been recognised by the European Court as part of the right to a remedy (Article 13).[93] Importantly, the Court has established that the duty to investigate exists both in relation to acts by both state and non-

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[89] *U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation*, *supra* note 39, at para. 3, b).

90 *Ibid.* at para. 22, b).

91 *Ibid.*, at para. 11, c).

[92] European Court of Human Rights, *McCann and others v United Kingdom*, Application No. 18984/91, Judgment of 27 September 1995.

[93] In *Aksoy v. Turkey*, the Court established that the notion of effective remedy in the context of a breach of Article 3 includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure. European Court of Human Rights, *Aksoy v. Turkey*, Judgment of 18 December 1996, at para. 98.

state actors.[94] This means that in cases where there are credible allegations of renditions or secret detentions on the territory of member states of the Council of Europe, either where there is active involvement of that State's authorities, or where authorities simply turn a blind eye or there is some form of passive tolerance or collusion with the practice, then there is clearly a duty to investigate.

The European Convention is not prescriptive about what form an investigation must take – it may be an especially established independent commission, or a criminal investigation, or an inquest. In its case law, the European Court of Human Rights has, however, established the basic requirements of what constitutes an 'effective investigation': the authorities must act of their own motion once the matter has come to their attention; the persons responsible for and carrying out the investigation must be independent from those implicated in the events; it must be effective, i.e. it must be thorough and rigorous and capable of leading to the identification and punishment of those responsible, and of identifying systemic failures that have led to the violation of human rights; the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident; it needs to be prompt and reasonably expeditious; there must be a sufficient element of public scrutiny of the investigation or its results; and the victim and the next-of-kin of the victim must be involved in the investigation and be kept informed of how it proceeds at all stages.[95]

There have been investigations into rendition practices and secret detentions in several European countries. These have taken different forms: criminal investigations, parliamentary inquiries (for example, in Sweden, Poland, Romania). However, according to ***Roísín Pillay***, many of these investigations have been far from satisfactory and do not fulfill international law obligations: for example, in Poland there has been a parliamentary inquiry which was very cursory, conducted in secret and which came up with very little information beyond blanket denials. This was similarly the case in Romania. However, there have also been some very thorough criminal investigations, for example in Italy.

Roísín Pillay noted the significant barriers that impede the effectiveness of these investigations. These are primarily of a political nature, but they are also facilitated by certain legal barriers such as state secrecy and national security

[94] European Court of Human Rights, S*alman v. Turkey,* Application. No. 21986/93, Judgment of 27 June 2000.

[95] See European Court of Human Rights, *Hugh Jordan v UK,* Application no. 24746/94, Judgment of 4 May 2001, at paras. 105-109.

considerations. For example in the context of the ongoing criminal investigation in Italy,[96] there have been four constitutional challenges to the prosecution, the most serious of which has been on grounds of state secrecy. Also in parliamentary commissions of inquiry, there have been issues of state secrecy and non-disclosure on national security grounds – for example, in Romania, the report which was published was very short and stated that that there was no evidence that renditions or secret detentions had taken place. However, there were apparently very detailed annexes to this report which stated the bases for these findings, but the annexes have not been disclosed on national security grounds. In such a context, it is difficult to assess the credibility of the inquiry. Another issue that came up in the Romanian inquiry has been the lack of power of some of these commissions, as alleged by the chair of the commission herself.

Political considerations seem to have also influenced the lack of criminal investigations. For example, in Sweden, there was a decision following a private criminal complaint not to initiate a criminal investigation into whether offences had been committed by Swedish officials. Some of the reasons that appear to be behind that decision are that the officials that were directly involved were relatively junior; that they were acting on a political decision, and the importance of national security considerations in their work. The UN Human Rights Committee, which considered the involvement of Swedish authorities in the rendition of Alzery found that Sweden had failed to investigate these allegations and thus failed to meet its obligations under the International Covenant on Civil and Political Rights.

Anne FitzGerald, the Director of the Research Unit of the International Secretariat of Amnesty International (AI), spoke about the investigations conducted by AI and explained that AI has been emphasising that most of the people who have been rendered and all of the people who have been held in the CIA's high-value detainee programme have been victims of enforced disappearance. Enforced disappearance is a crime well established under international law. However, it poses in practice serious obstacles for AI in documenting these cases because the researchers cannot locate and speak to the victims and although it is known that hundreds of people have been

[96] An investigation into the case of Abu Omar has been ongoing in Italy. Abu Omar is an Egyptian national who was residing in Italy when he was abducted in Milan by the CIA on 17 June 2003. He was taken via Ramstein in Germany to Egypt where he was allegedly subjected to torture. In February 2007 indictments were issued against 26 US citizens (CIA agents) and 7 Italians (5 member of the Italian Military Secret Service). The trial began on 8 June 2007 but was suspended on 3 December 2008 until 18 March 2009 because the Italian government brought an action before the Constitutional Court arguing against the use by the prosecution of classified documents.

rendered to countries in the Middle East, Afghanistan, Pakistan, Africa, or from these countries, there is no firm information as to how many there are and where they are or even who they are. Also, in many cases, the families are too frightened to disclose that their loved ones have gone missing in a country like Afghanistan or Iraq or Pakistan, as this might bring suspicion on the family. The number of those who have been released and may be afraid to speak to NGOs or journalists is also unknown.

As ***Anne FitzGerald*** put it, the secrecy surrounding the rendition and secret detention programmes calls to mind the theory of "known unknowns" – the things "we now know we don't know" – espoused by former U.S. Secretary of Defence Donald Rumsfeld. We know that the U.S. has been carrying out or facilitating rendition and secret detention, we don't know the scope or scale of the programmes, nor do we know exactly how much other states have colluded with the U.S. in carrying out these human rights violations. In her view, this is exactly what rendition is designed to do – to evade public scrutiny and keep the victims completely outside any kind of rule-of-law protection.

Nevertheless, since mid-2005 AI has located and interviewed more than half a dozen men who were held in the CIA secret detention programme, and a number of others who had been victims of rendition. Two of them were arrested in Jordan; three in Pakistan; one in Iraq; and one in Tanzania. Most of them (certainly four, possibly all seven) were kept in the CIA black sites in Eastern Europe, probably in Romania.

Anne FitzGerald highlighted the harsh conditions and the isolation in which these individuals were held. She noted furthermore that this kind of detention and isolation induces a sort of dependence on the interrogator. As she explained, secret detention is not only by its nature an enforced disappearance but the conditions in which these men were confined constitute torture. She quoted the findings of FBI agents who observed in November 2002 detainee no. 63 after he had been subjected to intense isolation for only three months:

> during that time period no.63 was totally isolated, with the exception of occasional interrogations, in a cell that was always flooded with light. By later November the detainee was evidencing behaviour consistent with extreme psychological trauma – talking to non-existent people, reporting hearing voices, and crouching in the cell covered with a sheet for hours on end.

As explained by ***Anne FitzGerald***, this trauma also extends to the families who, in most of these cases, did not know where their loved ones had been taken, had no idea whether they were dead or alive; and where to start looking for them, even if they had the courage and resources to do so. Also, for the former detainees, the most difficult thing to deal with was often the concern they had for their families' wellbeing, as they had no idea where their families were or what was happening to them, or even whether they had also been arrested and were being held somewhere. All those interviewed by AI said that it wasn't the aftermath of the physical abuse that has affected them so much but the psychological abuse, the psychological torture that they suffered.

In most cases, these individuals never knew why they were rendered and detained, and charges have not been brought against them. In several cases, the governments of the countries to which they were returned made it very clear to AI that there had not been any suspicion that they were involved in terrorism and that they were not going to try them on any charges to do with terrorism. Three of them were eventually tried on charges to do with falsifying travel documents.

Even though these individuals were free from secret detention, they were still suffering the consequences. In the countries where they are living now they are harassed by political security, their neighbours are suspicious of them, they are unable to get work, employers are not willing to take them on and they are not able to travel. And in most cases they live in countries where there isn't any kind of a social security network, so they don't have access to public funds because there aren't any; they rely on the goodwill of their families who are not always in a position to take care of them. Most of them were small merchant traders of one kind or another, so have lost these businesses because they disappeared when they were taken away from them for two or three years. And they don't have the capital to start them up again.

As late as 2007 prisoners were transferred from CIA custody to Guantánamo Bay, indicating that the programme of renditions and secret detention still operated. That same year, a group of NGOs and academics – AI, Reprieve, Cage Prisoners, Human Rights Watch and the Center for Human Rights and Global Justice at New York University - issued a joint list of about three dozen people who are known to have been held in secret U.S. custody and whose whereabouts remain unknown.

The difficulties in finding these people and in finding evidence on which to initiate investigations into theses cases are immense. Human rights researchers do not use the same standard of proof as criminal investigators;

they seek to establish whether there has been a violation and that there is a need for investigation; they look at wider governmental responsibility; they try to prove that there is a pattern of abuses rather than assessing individual criminal responsibility. In doing so, they tend to rely on testimonial evidence from victims and from witnesses, and the information they get is not always of trial evidence standard, but the sheer quantity of it is often decisive.

Medical and humanitarian groups often have vital information but limited ability to share it. Documentary evidence can also be very significant, particularly details of military and police operations, and of course flight records, which were key to establishing the workings of the rendition programme. Many of the flight records were obtained from the U.S. Federal Aviation Administration itself. Although the information on flight records was not always consistent, AI (as well as other organizations and investigative journalists) was able to link particular flights with information that was given to them by the detainees about when they had been transferred and where they thought that they had been transferred from or to.

Political blockages of investigations at the national level are, according to ***Anne FitzGerald***, very common. The ongoing criminal investigation and prosecution in Italy, which is normally given as a positive example, was only possible thanks to the following factors:

a) there was a crime committed on Italian soil that was reported to the police, and the prosecutor who subsequently took the case on – Armando Spataro – took his duty to investigate and prosecute all crimes very seriously;
b) the victim – Hassan Mustafa Osama Nasr, usually known as Abu Omar – was sent to Egypt, where he was held and released after 14 months, and during his initial release he was able to phone his wife and tell her that he had been kidnapped and rendered to Egypt. (Police had initially speculated that he had not been abducted, but had left the country voluntarily to join the insurgency in Iraq). The prosecutor was able to take the information that Abu Omar gave his wife before he was rearrested in Egypt, and combine this with some of the details gathered from other witnesses to keep the investigation under way. This included crucial details about where the abduction had taken place and the fact that somebody had been seen using a mobile telephone. With this information, and an extensive analysis of mobile telephone records originating from around the area of the abduction, it was eventually possible to identify a number of CIA agents, including the CIA bureau chief in Milan, and further investigations of him led to other information about the abduction of Abu Omar, including aviation records confirming the details of his removal, and eventually leading to Italian military intelligence.

This investigation and subsequent prosecutions have has received no support at all from the Italian government – which has indeed attempted to stall the case at every opportunity – but the case has continued largely thanks to the work of one very dedicated prosecutor. The prosecutor has showed his frustration with the lack of response from the U.S. and Egyptian judicial authorities to his requests for judicial assistance. Armando Spataro's work to get the case investigated and brought before the courts has been carried out in spite of his government, rather than with its support, and the lack of political will shown by successive Italian governments to investigate and prosecute offences related to rendition and secret detention has unfortunately been very much the norm, rather than the exception.

G. Access to Courts in the EU: Civil Claims for Compensation and Diplomatic Protection

As the extent of violations being committed in the context of the war on terror came out into the open and access to detainees became possible, important legal battles began to be fought in domestic as well as regional courts. Thanks to the untiring work of lawyers in different parts of the world, the plight of these 'ghost prisoners' was kept alive.

Access to justice for these individuals in the U.S. encountered significant delays[97] and insurmountable challenges, as was previously noted. These difficulties, coupled with the return of the nationals or residents of European countries have triggered a series of legal actions brought before European courts.

Courts have been the battlefield for a range of issues: from urging governments to provide diplomatic protection to non-nationals and to request their release, to obtaining access to vital information deemed classified, and to reparation claims.

Cori Crider, a staff attorney at Reprieve, spoke about how, in spite of all the obstacles, lawyers have managed to go around the back end in a lot of different ways over the past four years by going to different jurisdictions and doing legal or political work to seek release or compensation for a prisoner.

One of the most emblematic cases of hard-fought legal battles for the release of prisoners in which ***Cori Crider*** has been working is that of *Binyam*

[97] It was only in 2004 that a US court ruled that Guantánamo detainees had a right to file *habeas corpus* writs in US courts. Till today, no *habeas corpus* has been concluded.

Mohamed.[98] While at Guantánamo Bay, Binyam Mohamed was never formally charged; the charges were sworn but not proffered. These charges were, according to ***Cori***, based on what he had been telling his interrogators while being tortured. Based on conversations that ***Cori*** and other lawyers had with Binyam, it was clear to them that UK interrogators had visited him, first in Pakistan before he was rendered to Morocco (and there were indications that they knew that he was going to go to Morocco) and then also in Bagram in Afghanistan and in Guantánamo Bay. Apparently, the British intelligence also passed information to U.S. intelligence agents that then made its way into the hands of the Moroccan interrogators.

Based on these facts, and on the knowledge about the participation of the British intelligence, Reprieve brought a case before the UK courts. The court acknowledged that the UK possessed information that could be essential to proving Binyam's innocence; that he was about to face a procedure that the UK had recognised is unfair and illegal; and therefore the UK had a duty to provide that information, not for publication, but to his security-cleared attorneys so that they could use it to make representations on that exculpatory information and convince the U.S. authorities to drop the charges.

Cori noted that in another case – of Guantánamo detainee Mohamed Al-Kahtani – when charges against him were about to be proffered, evidence came out about the torture he had suffered in Guantánamo Bay and, probably by no coincidence, the charges were dropped in May 2008. In the meantime, however, new charges were announced on 18 November 2008.

In the case brought in the UK, the court decided that the UK Foreign Secretary had a duty to disclose to Binyam's security-cleared lawyers information that it held and that was "not only necessary but essential" for his defence.[99] The court decided that it would give some time to the foreign secretary to 'think whether he would want to make a public interest immunity certificate'. In other words, because of the sensitivity of this case, the court did not immediately decide that the UK government must give the 44 exculpatory documents that had been identified by the lawyers to them, but it tried, in ***Cori***'s view, to find a way of creating an opportunity for the

[98] Binyam Mohamed is an Ethiopian national who arrived to the UK at the age of 15 and sought asylum. He was granted indefinite leave to remain. In 2001 he was detained in Pakistan, from where he was rendered by the CIA to Morocco where he was detained for 18 months. He was then transferred to a detention site outside Kabul, and then to Guantánamo Bay. He was released back to the UK on 23 February 2009.

[99] UK High Court of Justice, Queen's Bench Division, Divisional Court, Judgment 21 August 2008. [2008] EWHC 2048 (Admin), at para 105.

lawyers to have access to this information at a very crucial time (i.e. before the charges would be proffered). However, the Foreign Secretary submitted a public interest immunity certificate after a week, stating that the national security of the UK outweighs Binyam's interest in proving his torture and his innocence, and the information cannot be given because that would be incredibly damaging to the intelligence-sharing relationship with the U.S. The court ordered the foreign secretary to reconsider its position once more and take into account the abhorrence of English law for torturers. Another public interest immunity certificate was submitted saying that although the UK absolutely condemns torture, the appropriate way to raise these issues is in private discussions with the governments in question, rather than by public disclosure.

In the meantime, the UK and U.S. governments agreed to give the information requested, not to Binyam's security-cleared lawyers, but to the persons presiding over the military commissions – who are the same people who would decide whether the charges would be dropped and also the same people who had said previously that Binyam's allegations of being innocent and having been tortured were not true.

On 28 October 2008 charges against Binyam Mohamed before the Guantánamo Military Commission were dropped.

On 2 February 2009, the UK High Court decided that it would not force the disclosure of the information held by the UK Foreign Office given the real 'threat' made by the U.S. government that it would "re-evaluate its intelligence sharing relationship with the United Kingdom with the real risk that it would reduce the intelligence provided" in case such information would be disclosed.[100]

Wolfgang Kaleck, a German lawyer and general secretary of the Center for Constitutional and Human Rights (ECCHR), observes an opportunity in the transnational character of rendition flights as it presents the possibility of litigation in various jurisdictions. According to him, although the 'global spider's web' seems to be a very powerful and nearly untouchable apparatus, it also gives the transnational human rights movement a chance to litigate in several jurisdictions.[101]

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[100] High Court of Justice, Queen's Bench Division, Judgment of 4 February 2009, para 62. [2009] EWHC 152 (Admin).

[101] For a good overview of the different investigations and court cases in Europe, see European Center for Constitutional and Human Rights, "CIA – "Extraordinary Rendition" Flights, Torture and Accountability – A European Approach", 2nd edition (January 2009).

The case of Khaled El-Masri illustrates well how litigation may be pursued in different jurisdictions, thus increasing the chances for success in achieving accountability and reparation.

As is typically the case, the rendition and illegal detention that El-Masri alleges to be victim of involves a number of countries. El-Masri, a German citizen of Lebanese descent, was allegedly abducted in Macedonia on 30 December 2003; he was then transferred to Afghanistan in a CIA-chartered plane that had just flown from Palma de Mallorca. He was detained in the infamous 'salt pit' prison outside Kabul, and then he was released in Albania four months after. And finally, at least part of the perpetrators were from the U.S., so there were several jurisdictions involved.

Since his release, different legal actions were taken almost in all of the implicated countries. In Europe, there is an ongoing criminal investigation at the *Audiencia Nacional* in Spain into allegations of the use of the airport in Palma de Mallorca for his rendition flight. This investigation has revealed very important information which has been used by the Italian prosecutor in the Abu Omar case and which has also been used in the ongoing investigation in Germany.

In Germany there is an ongoing criminal investigation at the Prosecutor's Office in Munich and arrest warrants have been issued by a Munich court for 13 American citizens (CIA agents). In Germany trials cannot be conducted *in absentia* so this case is now halted because the defendants are not in German territory and so far the government has refused to issue extradition requests. In fact, the court and the Bavarian Minister of Justice sent the case to the Federal Minister of Justice for the extradition to be requested. The Federal Minister of Justice reportedly wrote a letter to its U.S. counterpart asking whether, in case Germany would demand extradition, the U.S. you respond in a positive way, and the answer was negative. As a result, Germany did not ask for the extradition of the CIA agents and in the meantime an action has been filled by ECCHR in the Administrative Court in Berlin on 9 June 2008 to force the government to issue these extradition requests.[102]

Besides these legal actions, information has been sought in Albania and Macedonia through the Open Society Institute's Justice Initiative program of freedom of information in Eastern Europe. This, in ***Wolfgang Kaleck***'s view, is a very big step.

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[102] Open Society Justice Initiative, "Rights Groups Demand Investigation of CIA's Extraordinary Rendition Program" (9 June 2008), available at http://www.justiceinitiative.org/db/resource2?res_id=104096

In the meantime, in October 2008 El-Masri's lawyers filed a criminal complaint in Macedonia. The statute of limitations for the criminal case would expire soon after. In January 2009, El-Masri filed a lawsuit against the Macedonian government for damages for its role in his unlawful abduction and detention.[103]

According to ***Wolfgang Kaleck,*** civil claims in this and other cases in Germany (perhaps with the exception of Murat Kurnaz's case) do not have very good prospects because it seems that the role of Germans is hard to investigate in detail and was not big enough to demand any reparation.

The positive development in relation to all these cases in Germany is that the German parliament has launched an inquiry commission into the collaboration between the German secret services and the U.S. and into these cases. However, the work of the inquiry has been delayed due to internal disagreements on the question of access to information that can be classified as 'core field of executive privilege' and to information which must be kept secret in the higher interests of the state. So, lawyers have also not been able to have access to all the information they would need, to hard facts that they could use in a criminal procedure and for a reparation case. In the meantime, a case has been brought before the Federal Constitutional Court to oblige the government to disclose more information to the inquiry.[104] Also, the problems of accessing information are very real in Murat Kurnaz's case.

One other element in Murat Kurnaz's case was the reluctance of Germany to request his return from Guantánamo Bay at an earlier stage based on the fact that he was not a German national.[105] The issue of how much diplomatic protection can be demanded from the government in the cases of non-nationals and how to use the nationality rule is very complex. These are the legal and factual problems faced in Kurnaz's case. One positive thing in this case is that the mayor of his hometown has come to his home and apologised, and many interesting and long articles had been published in important German papers, besides the articles also published which gave a very bad image of him.

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[103] Open Society Justice Initiative, "Victim of CIA Abduction Files Lawsuit against Macedonian Government" (26 January 2009), available at http://www.justiceinitiative.org/db/resource2?res_id=104197

[104] European Centre for Constitutional and Human Rights (January 2009), *supra* note 102, p. 137.

[105] European Centre for Constitutional and Human Rights, "CIA – "Extraordinary Rendition" Flights, Torture and Accountability – A European Approach" (March 2008), p. 71-2.

According to ***Wolfgang Kaleck*** it is also important to discuss the application of universal jurisdiction principles in these cases. There have been two criminal complaints in Germany on the basis of its universal jurisdiction law. These were filed in 2004 and 2006 against Rumsfeld and also against George Tenet as the former director of the CIA for conducting the extraordinary rendition programme.[106] In 2007 a similar complaint was filed in France.[107] There has been no legal success in these cases so far, and several legal and political obstacles are faced (such as immunity in France and the large discretion of prosecutors in Germany, and the pressure from the U.S.). However, nearly every European jurisdiction includes the principles of active and passive personality which can be used to bring these cases to court, not just in situations of 'pure universal jurisdiction' when there is no connection at all with the country at stake. These principles create several opportunities for litigation.

Wolfgang Kaleck warned that when considering this type of litigation, one must have the 'broader picture in mind'. In other words, one must evaluate in each case what are the prospects of legal success but also if any broader success can be achieved, such as defending the rule of law and the absolute prohibition of torture. The tension between human rights and *realpolitik* is very evident in these cases and one must be aware of that. If these cases are accompanied by professional public outreach they can in the long term contribute to changing the *realpolitik*. Already, the cases have succeeded in revealing, in a very short time, much new information about the rendition programme.

Timothy Otty QC, a barrister at 20 Essex Street Barristers, spoke of his own experience with cases of rendition even before the 9/11 attacks.

The first time he came across rendition was in the case of Abdullah Ocalan, the leader of the PKK who is seen by some as a freedom fighter and by others as a terrorist. In 1999 he was abducted from Kenya, taken into custody by men he described as 'fair-haired with English voices', then handed over to Turkish security forces on a private plane waiting at Nairobi airport. He was taken to Turkey to face the death penalty. Nairobi at the time had the largest concentration of CIA operatives outside Langley, because it was shortly after the East African bombings of 1998, and as that case would unfold, the evidence increasingly pointed to significant political pressure being placed on

[106] For more information see http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al.
[107] See, http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld.

a series of governments around Europe by the Clinton administration to deprive Ocalan of sanctuary and to force him out of the Council of Europe to a location from which he could be snatched. This case was brought before the European Court of Human Rights. Several human rights arguments were raised on behalf of the Applicant, and the case was won on the issues of the death penalty and the unfairness of the domestic trial process, but it was lost on whether the Applicant's initial detention was itself unlawful. As ***Timothy Otty*** notes, one of the points made in argument was that if the European Court sanctioned this detention as lawful it would risk giving licence to any police force or security force that chose to go into any other country and act as it saw fit. In hindsight, this observation appears quite prophetic.

Timothy Otty has also acted with others as amicus curiae in three Supreme Court cases relating to the Guantanamo detentions in the United States. In this jurisdiction he has also acted on behalf of the families of three Guantánamo Bay detainees who were long-term UK residents but not UK nationals – Bisher al Rawi, Jamil el-Banna and Omar Deghayes.

Bisher al Rawi and Jamil el-Banna were detained in the Gambia in November 2002 while on a business trip. Within weeks they were in the "Dark prison" in Kabul, where they would spend some time under interrogation before transfer to Bagram airbase and then on to Guantánamo Bay. Omar Deghayes was detained in Pakistan, and he also went to Afghanistan en route to Guantánamo Bay. When the men first disappeared, immediate representations were made to the UK Foreign Office for their intervention – all of them had families who were British nationals, were UK residents themselves, and were refugees with nowhere else to go and no effective tie to their country of nationality.

The solicitors acting on behalf of al Rawi and el-Banna, expressed concern at the role that might or not have been played by the security services in their original detention. The Foreign Office response was carefully phrased. To the question 'please could you tell us if any British agency had any involvement in the apprehension and detention of el-Banna and al Rawi', the Foreign Office replied that 'the Foreign and Commonwealth Office can confirm that the Foreign and Commonwealth Office played no role in the detention and arrest of al Rawi and el-Banna'.

Omar Deghayes' solicitors also met with even more unsatisfactory correspondence. They approached the Foreign Office asking it to intervene on behalf of Mr Deghayes, and got a letter saying , in effect, that 'he's a Libyan national, we suggest you take this up with the Libyan authorities', overlooking the fact that Mr Deghayes and his family were refugees from

Libya, having fled the country after the death in custody of his father about 20 years ago.

In November 2005 ***Timothy Otty*** was instructed in judicial review proceedings on behalf of all three men and their families, seeking to compel the United Kingdom to intervene on their behalf. One of the first issues that was raised in the litigation was the rationale for the careful wording of the el-Banna / al Rawi correspondence with the FCO. Within 3 months of the start of the proceedings, on the opening day of the Divisional Court hearing, the Government agreed to request Bisher al Rawi's release and return. The Government had disclosed telegrams sent to the CIA by MI5 immediately prior to Jamil el-Banna and Bisher al-Rawi's departure for Gambia, which said that a number of Islamic extremists with links to Abu Qatada and to Al Qaeda were heading to the Gambia.

A year after the request for Bisher al Rawi's release he was returned to the UK, not on a military transport plane but on a private jet in the company of MI5. He was not subjected to questioning on his return. He was released into the community without any further restrictions.

As far as Jamil el-Banna and Omar Deghayes were concerned, the Foreign Secretary and the Home Secretary insisted that because these men were foreign nationals they had no standing to intervene on their behalf with the American authorities. The challenge to this position failed in the Divisional Court and the Court of Appeal. The Divisional Court's judgment contained strong wording indicating the sympathy the court had for the applicants and how they could see the public importance of the issues raised. Permission to appeal to the House of Lords would subsequently be granted. The case was due to be argued in October 2007, but in August 2007 after Prime Minister Blair left office there was a change of policy and the Government agreed to request the release and return of *all* UK residents held in Guantánamo Bay, with the result that Jamil el-Banna and Omar Deghayes were home with their families within 3 or 4 months.

Their ordeal was not, however, entirely over. When they were flown back to the UK on 19 December 2007 they faced an extradition request from Spain. They were released on bail the following day. Several questions were raised in the extradition challenge as to the complicity of Spanish authorities in rendition flights, including the rendition flights which these men had been involved with, and the questionable legality of the attendance by Spanish authorities at interrogation centres. Medical evidence was also produced indicating the very severe damage that both of these men had suffered in custody, and the Spanish authorities withdrew their extradition request.

The case of Boumediene is also going to be heard by the European Court which will tackle head-on the question of legality of refusal of diplomatic protection to non-nationals.

Timothy Otty was also one of the Counsels involved in the case before the House of Lords on the use of torture evidence case. The Court of Appeal had ruled by a majority of 2:1 that evidence obtained under torture could be admitted in English courts, provided the English authorities had not themselves perpetrated the torture or connived in it. A seven judge panel of the House of Lords rejected that argument unanimously.

The lesson that ***Timothy Otty*** draws from these cases is that fundamental legal principle can win out at the end of the day, albeit that the road which has to be travelled can be a long and frustrating one.

III. Conclusions

Carla Ferstman, director of REDRESS, concluded the conference by highlighting two important issues that came out of these discussions:

The first is the importance of multidisciplinary work. As ***Carla Ferstman*** noted, here we are not dealing with legal issues in a vacuum, but with social and psychological issues as well. In fact, there is a range of disciplines relevant to how we assist and confront the different challenges facing individuals as they return to their home countries or third countries.

The second issue is the importance of a multi-jurisdictional approach. This results from the fact that we are dealing with transfers from one jurisdiction to another. By making reference to the notion of the 'spider's web', she noted that the fact that there are so many jurisdictions involved in one way or another and the complicated situation with a variety of different abuses, requires one to think strategically about how to best approach the different jurisdictions and how civil society and lawyers can best interact in different regions, and how to ensure effectiveness when often in different jurisdictions we are faced with gaps or gaps between jurisdictions which makes access to justice so difficult.

The conference canvassed a variety of different themes:

1. Issues relating to social reintegration - the variety of challenges individuals face when coming back and trying to re-establish themselves (financially,

emotionally, with their families), either when returning to where they were living previously or some other location; and the variety of work that is being done to assist that process. It was possible to conclude that more collaboration and coordination between communities is needed to assist in that process. The lack of support was indeed something referred to throughout the conference.

2. The difficulties in accessing justice both in the U.S. and in other jurisdictions. As was made clear throughout the conference, it is not enough to seek justice for those who assisted in the rendition while not being able to get at the heart of the issue, i.e. to achieve accountability in the U.S. There are also the continuing legal challenges that individuals face – on the one hand, they have a need for a remedy and reparation, but they continue to face challenges relating to their current situation such as control orders, *refoulement*, etc.

3. The political aspect of these issues – the lack of will and obfuscation by governments, and the difficulty to get at the heart of what actually has been happening. As was noted, there are many organizations who have been trying to chip away some of these barriers, and maybe they don't give themselves enough credit for how much success they have already had.

The question, in terms of moving forward, is what further can be done with respect to the continuing problem of countries not being willing to accept individuals to come back to their territory and the continuing risk of those individuals to be sent to third locations is as much as a political as a legal problem.

IV. Annexes

A. Conference Agenda

FRESHFIELDS BRUCKHAUS DERINGER

REDRESS

Seeking Reparation for Torture Survivors

DAY 1: EXPERIENCES IN REINTEGRATING INTO SOCIETY

9 – 9.30 **REGISTRATION AND COFFEE**

9.30 – 10 **WELCOME AND OVERVIEW OF THEMES OF CONFERENCE**

- **Paul Lomas, Partner, Freshfields Bruckhaus Deringer LLP**
- **Lorna McGregor, International Legal Advisor, REDRESS**

10 – 11.30 **PANEL 1: RECEPTION IN EU MEMBER STATES: DETENTION, DEPORTATIONS AND INVESTIGATIONS OF RETURNEES**

Chair: Eric Metcalfe, Human Rights Policy Director, JUSTICE

1) **Christophe Marchand, Hamaide-Krywin, Avocat Brussels**

2) **Edward Fitzgerald QC, Doughty Street Chambers**

11.30 – 11.45 **COFFEE BREAK**

11.45 – 1.15 **PANEL 2: ACCESS TO HEALTH AND PSYCHOLOGICAL CARE**

Chair: Dr. Michael Korzinski, Co-Founding Director of the Helen Bamber Foundation

1) **Dr. Önder Özkalipci MD, Forensic Physician, International Rehabilitation Council for Torture Victims**

2) **Steven Watt, Staff Attorney, American Civil Liberties Union**

3) Professor Renos K. Papadopoulos, Centre for Psychoanalytic Studies, University of Essex

1.15 – 2.30 **LUNCH**

2.30 – 3.30 **PANEL 3: ACCESS TO EMPLOYMENT, HOUSING AND DISABILITY BENEFITS, SUPPORTIVE COMMUNITIES AND DEALING WITH STIGMA**

<u>Chair:</u> Kevin Laue, Legal Advisor, REDRESS

1) **Moazzam Begg, Spokesman for Cageprisoners**

2) **Murat Kurnaz, former Guantánamo Bay detainee, author, human rights activist**

3.30 – 3.45 **COFFEE**

3.45 – 5.15 **PANEL 3 CONTINUED**

<u>Chair:</u> Julia Hall, Senior Counsel, Human Rights Watch

1) **Clara Gutteridge, Investigator, Reprieve**

2) **Saadiya Chaudary, Solicitor, Bindmans**

5.15 – 7 **RECEPTION**

DAY 2: ACCESS TO JUSTICE AND THE RIGHT TO REPARATION

9.30 – 10.45 PANEL 4: SUPPORT FOR FAMILY MEMBERS

Chair: Asim Qureshi, Senior Researcher, Cageprisoners

1) **Adam Weiss, Staff Lawyer, AIRE Centre**
2) **Zachary Katznelson, Legal Director, Reprieve**
3) **Uzma Qureshi, HHUGS**

10.45 – 11 COFFEE BREAK

11.15 – 12.25 PANEL 5: ACCESS TO JUSTICE IN THE U.S.

Chair: Paul Lomas, Partner, Freshfields Bruckhaus Deringer LLP

1) **Steven Watt, Staff Attorney, American Civil Liberties Union**
2) **Lorna McGregor, International Legal Advisor, REDRESS**

12.25 – 2 LUNCH

2 – 3.30 PANEL 6: INVESTIGATIONS INTO ALLEGATIONS OF EU INVOLVEMENT IN RENDITIONS AND UNLAWFUL DETENTIONS

Chair: Carla Ferstman, Director, REDRESS

1) **Gavin Simpson, Senior Investigator, One World Research (New York)**
2) **Róisín Pillay, Legal Officer for Europe, International Commission of Jurists**
3) **Anne FitzGerald, Amnesty International, Director, Research Unit**

3.30 – 3.45 COFFEE

3.45 – 5.15 PANEL 7: ACCESS TO COURTS IN THE EU: CIVIL CLAIMS FOR COMPENSATION AND DIPLOMATIC PROTECTION

Chair: Lorna McGregor, International Legal Advisor, REDRESS

1) **Cori Crider, Staff Attorney, Reprieve**

2) **Wolfgang Kaleck, General Secretary, European Centre for Constitutional and Human Rights**

3) **Timothy Otty QC, 20 Essex Street Barristers**

5.15 – 5.45 CLOSING SESSION

Carla Ferstman, Director, REDRESS

B. Biographies of the Speakers

Moazzam Begg, Spokesman for Cageprisoners

Moved by the plight of the Afghani people, in 2001 Moazzam travelled to Kabul with his family to start a school for basic education and provide water pumps. When the allied attack on Afghanistan began in October 2001, Moazzam and his family moved to Islamabad in Pakistan for safety. It was there that he was seized in January 2002 by Pakistani police and CIA officers, bundled into the back of a car and taken back to Kabul, where he was held in a windowless cellar at Bagram airbase for nearly a year.

Hooded, shackled and cuffed, he was taken first to the U.S. detention facility at Kandahar, then on to Bagram, and finally to Guantánamo Bay. During his internment, he was kicked and beaten, suffocated with a bag over his head, stripped naked, chained by his hands to the top of a door and left hanging, and led to believe he was about to be executed. One psychiatrist encouraged him to kill himself. In all, he spent three years in prison, much of it in solitary confinement, and was subjected to over three hundred interrogations, as well as death threats and torture, witnessing the killings of two detainees.

Moazzam is one of nine British citizens who were held at Camp X-Ray, Guantánamo Bay by the government of the United States of America. He was labelled an 'enemy combatant' by the U.S. government, imprisoned for a crime he didn't commit and whose precise nature has never been determined. He was released on January 25, 2005 without charge though he received no compensation or an apology.

As spokesman for the prisoner human rights organisation, Cageprisoners, Moazzam appears extensively both in the media and around the country, lecturing on issues surrounding torture, anti-terror legislation and community relations. He has authored several pieces that have appeared in major broadsheets around the world, and a book detailing life as a Muslim living in the UK and his further experiences in Guantánamo. "Enemy Combatant" is the first book to be published by a former Guantánamo Bay prisoner.

Saadiya Chaudary, Solicitor, Bindmans

Saadiya Chaudary is an assistant solicitor in the Public Law and Human Rights department at Bindmans LLP where she undertakes immigration and asylum cases. Since January 2005, she has also been a volunteer at Reprieve where she has worked specifically on the cases of the Russian nationals detained in Guantánamo Bay. Prior to joining Bindmans, Saadiya interned at The AIRE Centre where she advised on aspects of European Union Law and the European Convention on Human Rights.
She is currently completing an LL.M in International Law.

Cori Crider, Staff Attorney, Reprieve

Cori Crider joined Reprieve in 2006, supported by a human rights fellowship from Harvard Law School. She is now a staff attorney licensed in New York and helps represent over forty current and former Guantánamo prisoners. She coordinates Reprieve's efforts to resettle Guantánamo's asylum seekers—prisoners who face torture or execution if repatriated to their home countries.

Cori graduated from Harvard with a J.D. in June 2006. During law school, she monitored U.N. human rights bodies in Geneva; investigated and reported on dams that harmed indigenous groups in Cambodia; and helped sue corporations for exploitative and abusive practices in Nigeria and South Africa. She holds a B.A. from the University of Texas – Austin in History and Plan II.

Carla Ferstman, Director, REDRESS

Carla Ferstman is the Director of REDRESS. She joined REDRESS in May 2001 as the Legal Director and became the organisation's Director in September 2005. She was called to the Bar in British Columbia, Canada in 1994, and worked as a criminal defence lawyer in Vancouver, Canada. She left Canada at the end of 1995 and since then has worked in a variety of countries and international law contexts, for the United Nations, judicial institutions and civil society organisations and in academia. She has written and lectured extensively on international criminal law and human rights. She has an LL.B. from the University of British Columbia and an LL.M. from New York University.

Anne FitzGerald, Amnesty International, Director, Research Unit

Anne FitzGerald, Director of the Research Unit of Amnesty International, has been investigating the U.S. program of rendition and secret detention since 2005. She has carried out research into the structure and operation of the rendition system, and has travelled to Yemen and other countries in the Middle East, as well as to Europe and the U.S., to interview detainees who have been rendered or forcibly disappeared, judicial officials, lawyers, government officials, and former and serving military, intelligence and police officers. Anne has testified on rendition and secret detention before parliamentary intelligence committees and the European Parliament.

Edward Fitzgerald QC, Doughty Street Chambers

Edward Fitzgerald, the winner of the Silk of the Year award in 2005 and Times Justice Human Rights Award in 1998, specialises in criminal law, public law and international human rights law.

As a criminal practitioner he has featured in many of the leading cases involving extradition, appeals against miscarriages of justice, and international law. He also frequently appears in the Privy Council in cases involving the constitutions of the Commonwealth, Caribbean, death penalty appeals and extradition.

Clara Gutteridge, Investigator, Reprieve

Clara Gutteridge is an investigator at Reprieve, working on renditions and secret detentions in the War on Terror. Clara studied philosophy and law at Sussex University, and holds a masters degree in philosophy, where she focused on contemporary continental political philosophy and ethics. Clara has been a renditions investigator at Reprieve for the past three years. Recently Clara's work has been mainly in the areas of European complicity in the global renditions system, and renditions and detentions in East Africa and the Horn of Africa.

Julia Hall, Senior Counsel, Human Rights Watch

Julia Hall is senior counsel in the Terrorism and Counterterrorism Program at Human Rights Watch. She conducts research and advocacy on counter-terrorism measures globally with respect to their impact on human rights and civil liberties, in particular the erosion of the prohibition against torture, states' *nonrefoulement* obligation, and the growing use of diplomatic assurances against torture. Ms. Hall is the author of several reports documenting the phenomenon of transfers of alleged terrorism and national security suspects to countries where they are at risk of torture and ill-treatment and has served as an expert on this topic in cases before U.N. treaty-bodies, the European Court of Human Rights, the U.K. Special Immigration Appeals Commission, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, and in U.S. federal court, including with regard to Guantánamo Bay detainees slated for repatriation. Ms. Hall has been involved actively in the campaign to resettle Guantánamo Bay detainees who have been cleared for release but cannot be repatriated due to fears of risk of torture on return. In July 2008, she monitored the military commission of Salim Hamdan, Osama bin Laden's former driver, at Guantánamo Bay.

Wolfgang Kaleck, General Secretary, European Centre for Constitutional and Human Rights

Wolfgang Kaleck is an Attorney at Law in Germany; General Secretary of the European Center for Constitutional and Human Rights (see www.ecchr.eu) and a part-time lecturer at the University of Bremen. Since 2000, he has been a Speaker of the Coalition Against Impunity (Koalition gegen die Straflosigkeit. Wahrheit und Gerechtigkeit für die deutschen Verschwundenen in Argentinien, see http://www.menschenrechte.org/koalition).

Zachary Katznelson, Legal Director, Reprieve

Zachary Katznelson is the Legal Director of Reprieve. He represents 34 prisoners in Guantánamo Bay and has been to the base ten times. Zachary joined the staff at Reprieve in February 2006, having first worked with the organization as a volunteer. He received a Bachelor of Arts from Brown University in 1995, and received his law degree from New York University School of Law in 2000. Before joining Reprieve,

Zachary worked on the cases of women convicted of killing their batterers, but who had not been allowed to introduce evidence of the abuse at trial. He has litigated to improve prison conditions, represented prisoners in habeas actions to enforce parole-related due process rights, and investigated death penalty cases in Louisiana, Mississippi and Alabama. After graduation from law school, Zachary clerked for Chief Judge Marilyn Hall Patel of the Northern District of California. Zachary has also served on the staff of U.S. Congressman Jerrold Nadler, writing legislation and speeches and advising the Congressman on various matters.

Dr. Michael Korzinski, Co-Founding Director of the Helen Bamber Foundation

Dr. Korzinski was a visiting fellow at the Refugee Studies Programme University of Oxford England from 1991 to 1996. During his tenure at Oxford he completed a PhD in Psychology and received concurrent in-service psychotherapy training during his clinical internship at the Medical Foundation for the Care of Victims of Torture, London. Upon completing his PhD he was employed by the Medical Foundation as senior member of the clinical team and a therapist working with some of the most vulnerable and damaged Medical Foundation clients. His roles and responsibilities included clinical assessment, providing specialist therapeutic care, evaluating the long and short term therapeutic needs of refugee survivors of torture and organised violence. He provided supervision and training to clinicians at the Medical Foundation and other institutions. He regularly made presentations together with Medical Foundation Legal Officer to the caseworkers at the Home Office in order to help them better understand problems faced by survivors of torture. He remained on the clinical staff of the Medical Foundation until 2005, when together with Helen Bamber (OBE), founder and former director of the Medical Foundation, they established The Helen Bamber Foundation. The Helen Bamber Foundation is addressing the social and psychological needs of survivors of gross human right violations.

Dr. Korzinski has acted as a consultant to trauma programmes throughout the world, is a recognised expert in the trauma and recovery field and a published author on the subject. Dr. Korzinski has been involved care and rehabilitation of hundreds of survivors of gross human right violations. He has recently presented at an international expert seminar on Best Practices in Psychological Support to Victims of Trafficking.

Kevin Laue, Legal Advisor, REDRESS

Kevin Laue is a Zimbabwean human rights lawyer who has worked for REDRESS since 2002, initially on torture in Zimbabwe and subsequently on matters pertaining to the United Kingdom, including casework. He also works on anti-terrorism and torture issues, such as the role of British troops in Iraq, and recently gave evidence to the Joint Committee on Human Rights in this regard.

Paul Lomas, Partner, Freshfields Bruckhaus Deringer LLP

Paul Lomas is a partner in Freshfields Bruckhaus Deringer LLP. Based in London, he leads the world wide commercial disputes group and specialises in commercial litigation, cases with a strong economic or regulatory aspect and EU law and competition law. He is also the partner responsible for the firms pro bono strategy and activities. He has acted for a variety of well known companies and financial institutions on litigation and internal investigations into corporate conduct. He has appeared in cases at all levels of the English courts, the European Court of Justice, the Court of First Instance, the Florida Supreme Court and in arbitrations. Paul, who speaks English and French, was educated at Emmanuel College, Cambridge and Insead. He has been a partner since 1990.

Lorna McGregor, International Legal Advisor, REDRESS

Lorna McGregor is the International Legal Advisor at REDRESS where she represents individual torture survivors, prepares *amicus curiae* briefs and conducts research on key issues relating to torture and works on strategic litigation in countries such as Nepal, Peru and Uganda. Lorna leads REDRESS' international casework, research and advocacy on the impact of counterterrorism strategies on the prohibition of torture and the right to a remedy and reparation for torture survivors. Lorna has previously worked as a Programme Lawyer at the International Bar Association (focusing on outreach and the development of advocacy and litigation strategies to combat impunity for ICC crimes in Uganda and Sudan); the State Immunity Project Coordinator at REDRESS and in Sri Lanka as the Coordinator of the Transitional Justice Working Group. Lorna holds an LL.B.(Hons) from Edinburgh Law School and an LL.M. from Harvard Law School.

Christophe Marchand, Hamaide-Krywin, Avocat Brussels

Christophe Marchand is a specialised criminal law attorney based in Brussels. He deals with complex and international cases including money-laundering, murder, human traffic, drug traffic, terrorism, IHL and extradition. He has experience in expertise in Human Rights and terrorism issues, especially in North-Africa. Christophe qualified as an attorney in 1996 and has been a partner in the law firm Hamaide-Krywin since 2001. He completed his legal training with a Masters in International Law at the University of Brussels (2006). He has written several articles on issues related to Criminal law, International Criminal Law, Human Rights and Terrorism.

Eric Metcalfe, Human Rights Policy Director, JUSTICE

Eric Metcalfe is the Director of human rights policy at JUSTICE, the UK section of the International Commission of Jurists. He completed his doctorate in law at the University of Oxford and was called to the Bar in 1999. Following pupillage at 39 Essex Street, he was a lawyer in the immigration and judicial review team of the Treasury Solicitors Department before joining JUSTICE in 2003. He also manages

JUSTICE's third party interventions, most recently *Serious Fraud Office v Corner House and CAAT* (House of Lords, 2008).

Timothy Otty QC, 20 Essex Street Barristers

Tim Otty is cited by the major legal directories as a leading human rights QC and was the youngest member of the Bar to me made silk in 2006. He acted as Counsel for Abdullah Ocalan in one of the earliest examples of rendition by the United States in 1999 and, since then, has appeared before domestic courts and United States Courts in a series of leading cases relating to the War on Terror. He has acted on behalf of all but one of the British nationals or British residents held at Guantánamo Bay in proceedings before both the English Courts and before the United States Supreme Court. Tim is one of the experts regularly used by the Council of Europe and the International Bar Association in international judicial training programmes. He teaches Human Rights and Internal Armed Conflict on the highly acclaimed LSE course, Law, War and Human Rights. He is currently Vice Chair of the Bar's Human Rights Committee and Member of the Executive Committee of the Commonwealth Lawyers Association. He read law at Trinity College Cambridge where he was an Exhibitioner. He was called to the Bar by Lincoln's Inn where he was awarded a Tancred Scholarship and European Bursary Award. He was a stagiare attached to the Secretariat of the European Commission of Human Rights in 1992. He was the youngest member of the Bar to be appointed silk in 2006.

Dr. Önder Özkalipci MD, Forensic Physician, International Rehabilitation Council for Torture Victims

Önder Özkalipci MD is a Forensic Physician and Medical Expert for International Rehabilitation Council for Torture Victims in Copenhagen, Denmark. He has worked on the issue of torture since 1990 professionally. He previously worked at Human Rights Foundation of Turkey between 1990 and 2003 and Impact Positif in Geneva from 2004 to 2006. Önder has been working for IRCT since May 2007 as a consultant on the Istanbul Protocol Implementation Projects and as a forensic medicine consultant for advancing the forensic documentation capacity of IRCT rehabilitation centres. He is one of three coordinators and one of six editors of the "UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment Or Punishment: "The Istanbul Protocol"". He has published several articles and book chapters on torture and among the two editors of a Medical Atlas on Torture. He has worked as a co-coordinator and trainer on Istanbul Protocol Implementation Projects in Mexico, Georgia, Serbia, Turkey, Uzbekistan and Sudan for the training of forensic doctors, prison doctors, judges and prosecutors. He worked as a forensic expert at exhumations in the Former Yugoslavia in 1996 and 1997. He has attended several trainings on documentation of torture allegations as a trainer all over the world.

Professor Renos K. Papadopoulos, Centre for Psychoanalytical Studies, University of Essex

Renos K. Papadopoulos, Ph.D., is Professor in the Centre for Psychoanalytic Studies, Director of the Centre for Trauma, Asylum and Refugees, and a member of the Human Rights Centre, all at the University of Essex, Consultant Clinical Psychologist at the Tavistock Clinic (London), training and supervising systemic family psychotherapist and Jungian psychoanalyst in private practice. As consultant to the United Nations and other organizations, he has worked with refugees and other survivors of political violence in many countries. He is the founder and director of the Masters and PhD programmes in Refugee Care that are offered jointly by the University of Essex and the Tavistock Clinic. He is the editor of the 'The International Series of Psychosocial Perspectives on Trauma, Displaced People and Political Violence' (published by Karnac Books, London).

Róisín Pillay, Legal Officer for Europe, International Commission of Jurists

Róisín Pillay is Legal Officer for Europe at the International Commission of Jurists (ICJ) where her work focuses on counter-terrorism and human rights. She studied law at Trinity College Dublin and at Cambridge University, and qualified as a barrister in Ireland. After graduation, Róisín worked for the Irish Law Reform Commission and for a number of human rights NGOs. She was Senior Legal Officer at JUSTICE, the British section of the ICJ, where she worked on implementation of the Human Rights Act from 2000 – 2002. Between 2002 and 2006 she was committee specialist at the UK Parliamentary Joint Committee on Human Rights, managing inquiries into compliance with international human rights standards, and advising on the human rights compatibility of Bills. She has also been a managing editor and book review editor of the European Human Rights Law Review.

Asim Qureshi, Senior Researcher, Cageprisoners

Asim Qureshi has a legal background specialising during his Masters in International Law. He is currently employed as the Senior Researcher at Cageprisoners where he has led investigations into to Pakistan, Bosnia, Kenya, Sudan, Sweden, USA and around the UK. With his team of researchers, he has written and published many reports exposing the use of unlawful detention, rendition, and torture in the 'war on terror'.

Uzma Qureshi, Helping Households under Great Stress (HHUGS)

Uzma Qureshi studied at King's College London in Biomedical Sciences and went on to complete a P.G.C.E in secondary science at the Institute of Education in London, to become a qualified teacher. For the past four years Uzma has been involved in campaigning on Human Rights issues, in particular extradition to the U.S. under the controversial Extradition Treaty 2003. Currently she works for Hhugs as one of the administration workers.

Gavin Simpson, Senior Investigator, One World Research (New York)

Gavin Simpson is the Senior Investigator with One World Research (www.oneworldresearch.com), a New York-based research and investigation firm that specialises in human rights and public interest issues. In this role he carries out fact-finding and reporting tasks for a wide array of international clients on matters ranging from unlawful detention and asylum claims, to corruption, corporate crimes and abuses by law enforcement or intelligence agencies. Previously Mr. Simpson was the Lead Investigator on the Council of Europe's "Marty Inquiry", investigating and writing on behalf of Swiss Senator Dick Marty for the 2006 and 2007 reports on alleged secret detentions and renditions involving CoE member States. Mr. Simpson lived for over four years in West Africa, where he led investigations for the Truth and Reconciliation Commissions (TRCs) of Sierra Leone and Liberia, and one year in Bosnia and Herzegovina, where he documented the legacies of inter-ethnic conflict in the Former Yugoslavia.

Steven Watt, Staff Attorney, American Civil Liberties Union

Steven M. Watt is a senior staff attorney with the Human Rights Program of the American Civil Liberties Union (ACLU) and specialises in litigation before federal courts and international tribunals. Steven is counsel in *El Masri v. Tenet*, and *Mohamed v. Jeppesen*, challenges to the CIA's "extraordinary rendition" program, *Ali v. Rumsfeld*, a suit challenging U.S. interrogation and detention practices in Afghanistan and Iraq, *Sabbithi v. Kuwait*, a case on behalf of three Indian women, trafficked into the U.S. by their diplomat employers and enslaved, and six cases before the Inter-American Commission of Human Rights. Prior to joining the ACLU, Steven was a human rights fellow at the Center for Constitutional Rights, where he focused on post 9/11 litigation, including *Rasul v. Bush, Arar v. Ashcroft* and *Turkmen v. Ashcroft*. Originally from Scotland, Steven holds a law degree from the University of Aberdeen, a Diploma in Legal Practice from the University of Edinburgh, and an LL.M. in international human rights law from the University of Notre Dame, Indiana.

Adam Weiss, Staff Lawyer, AIRE Centre

Adam Weiss is a Staff Lawyer at the AIRE Centre (Advice on Individual Rights in Europe). The AIRE Centre is a London-based charity providing free legal advice and services under European law, including advice on EU free movement law and the European Convention on Human Rights. The AIRE Centre has been involved in over 100 cases before the European Court of Human Rights, including many cases alleging violations of Article 3 (freedom from torture and inhuman and degrading treatment) and Article 8 (right to respect for family and private life). Adam holds law degrees from the University of London (King's College) and Columbia University and has published articles in the areas of human rights law and EU free movement law.